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COMMISSION
CLERK

July 19, 2004

BY HAND DELIVERY

Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: ~~Docket No.~~ 040557-TP

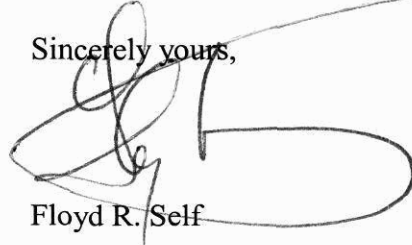
Dear Ms. Bayó:

Enclosed for filing on behalf of KMC Telecom III, LLC, KMC Telecom V, Inc., and KMC Data, LLC (collectively "KMC") are an original and fifteen copies of KMC's Response to Sprint's Request for Relief 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,



Floyd R. Self

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DOCUMENT NUMBER-DATE

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of)
)
Notice of KMC Telecom III LLC,)
KMC Telecom V, Inc., and KMC Data LLC) **Docket No. 040557-TL**
To Adopt an Interconnection Agreement) **Filed: July 19, 2004**
Under Sections 252(e) and 252(i))
of the Telecommunications Act of 1996)

KMC's RESPONSE TO SPRINT's REQUEST FOR RELIEF

KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively, "KMC"), pursuant to Rules 28-106.103 and 28-106.204, Florida Administrative Code, respectfully submit to the Commission this response to the Request for Relief that Sprint-Florida, Inc. ("Sprint") filed and served as a part of its Response in Partial Opposition to KMC's Notice to Adopt and Request for Relief ("Request for Relief"). KMC requests that the Commission reject Sprint's proposed relief and proceed to issue its acknowledgement of KMC's adoption. In support of this response, KMC states as follows:

1. This docket was initiated by KMC's notice of adoption filed on June 15, 2004. In that adoption, KMC provided written notice to Sprint and the Commission, pursuant to section 252(i) of the Telecommunications Act of 1996 (47 U.S.C section 252(i) (hereinafter, the "Act")), of its adoption of the Sprint and MCI Interconnection Agreement dated March 1, 2002 ("Sprint-MCI Agreement). KMC's adoption of this Sprint-MCI Agreement was an adoption of the agreement exactly as is and in its entirety.

2. On July 6, 2004, Sprint filed via U.S. Mail its partial response and request for relief. In its response, Sprint did not *per se* object to the adoption of the Sprint-MCI Agreement, but Sprint did raise a partial objection by stating that three modifications must be made to the Sprint-MCI Agreement before KMC may adopt it. The relief requested by Sprint, to require modifications to the provisions pertaining to ISP-bound traffic, UNE rates, and other sections affected by the adoption of the TRO and the subsequent *USTA II*¹ decision, are based upon factually incorrect statements and conclusions and a total misunderstanding of the operation of an adoption pursuant to section 252(i) of the Act. Accordingly, Sprint's attempt to unilaterally amend a lawful adoption under section 252(i) must fail.

3. Section 252(i) provides, in its entirety, as follows:

Availability to Other Telecommunications 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 law is simple: competitive carriers have the right to obtain the same terms, conditions and rights that other carriers have. This statute does not give incumbent LECs, like Sprint, the opportunity to limit or require additional terms beyond those present in the underlying, legally effective interconnection agreement.

4. The KMC adoption was full and complete – and if there is any doubt as to what KMC is adopting, then KMC now states, without exception, that its adoption of the Sprint-MCI agreement is full and complete, without exceptions, and subject to any and all amendments that have been lawfully adopted and approved as between Sprint and MCI. In view of such an

¹ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) No. 00-1012 (and consolidated cases) (decided March 2, 2004).

adoption as KMC has undertaken in this case, Sprint is simply without any unilateral ability to impose on KMC amendments that have not been adopted by MCI. If Sprint has amendments to the Sprint-MCI Agreement that it wants KMC to adopt, then it can request voluntary negotiations to that effect with KMC and the negotiation process can proceed as set forth in the Act. Alternatively, if Sprint is able to negotiate amendments with MCI, then Sprint may present such amendments to KMC. But under no circumstance may Sprint impose an amendment on KMC if MCI has not adopted it.

5. Sprint's characterization of KMC's interconnection agreement status and the negotiations process is riddled with factual inconsistencies and inaccuracies. The following is presented in effort to clarify some factual misstatements and to provide additional background information so as to put the present adoption in context.

a. Without addressing Sprint's assertion as to the rules of law that apply with regard to the expiration date for an adopted agreement when a carrier adopts an existing agreement pursuant to section 252(i), KMC notes that in addition to the facts set forth regarding KMC's adoption of the original 1997 Sprint/MCI agreement (the "1997 MCI Agreement") (Request for Relief, at paragraph 7, page 3) KMC exercised the rights set forth under Part A, Section 3 of the 1997 MCI Agreement to extend the agreement for an additional year. The revised expiration date pursuant to the extension was April 16, 2002.

b. Sprint asserts that KMC "initially refused to comply with Sprint's request that KMC choose a new agreement." (Request for Relief, at paragraph 8, page 3.) Sprint's assertion is factually incorrect. As a factual matter, KMC and Sprint agreed, pursuant to the terms of a Confidential Settlement Agreement (the "Settlement Agreement"), to negotiate replacement interconnection agreements in effort to ameliorate a number of operational issues

and to implement the agreed upon intercarrier compensation provisions as specified in the Settlement Agreement dated May 8, 2002. Resolution of these issues in the context of the Settlement Agreement resulted in KMC's withdrawal of the complaint filed as Docket No. 011615-TP and KMC's agreement not to file a pending operational complaint in Florida against Sprint. At the time that Sprint initiated a request for KMC to "either negotiate a new agreement or opt into another existing agreement" KMC and Sprint were *already engaged* in negotiations of a replacement interconnection agreement pursuant to terms specified in the Settlement Agreement. As such, Sprint's request to "opt into or negotiate a new agreement" was already satisfied.

c. In addition, Sprint asserts that "after negotiations, KMC agreed to opt into the 2002 MCI Agreement." (Request for Relief, at paragraph 8, page 3.) This assertion is also factually inaccurate. As noted, shortly after the 1997 MCI Agreement expired, KMC and Sprint were engaged in on-going negotiations of a replacement interconnection agreement pursuant to the agreed upon terms in the Settlement Agreement. KMC and Sprint continued these negotiations with the expectation of reaching mutually agreeable replacement provisions. As the negotiations wore on, Sprint became increasingly concerned that KMC's continued operations under the 1997 MCI Agreement, pending resolution of the on-going negotiations, were "problematic." Though Sprint did request that KMC opt-in to a new interconnection agreement pending the completion of the pending negotiations, KMC consistently expressed concern regarding the inefficiencies of implementing temporary interconnection terms on an interim-only basis in light of the fact that they parties were already actively engaged in negotiating replacement agreements. KMC also expressed concerns regarding the potential for negotiated processes to be disrupted when implementing a new agreement. Despite the objections, in effort

to bring closure to the issues and to continue the negotiations on the replacement agreement, on June 30, 2003, KMC and Sprint agreed to utilize the terms of the Florida Digital Network, Inc. and Sprint-Florida Interconnection and Resale Agreement dated December 27, 2001 (the “FDN Agreement”) as an interim agreement pending completion of the negotiations. The FDN agreement expired on December 26, 2003. (Docket No. 030680.)

d. In paragraph 9 of Sprint’s Request for Relief, Sprint asserts that Sprint sent KMC a document to “effectuate KMC’s election of its opt into the 2002 MCI Agreement.” This statement is partially accurate. In order to avoid confusion, KMC notes that such document was in response to the mutual discussions of the parties as to potential interim agreements that could be applied during the pending resolution of the negotiations. KMC further adds that the document provided by Sprint was provided pursuant to discussions from June of 2003, and not relevant or related to KMC’s June 15, 2004, adoption of the 2002 MCI Agreement. As such, these facts bear no relevance to the current adoption approval pending before the Commission.

e. In paragraph 9 of Sprint’s Request for Relief, Sprint further asserts that it provided to KMC an amendment to “govern reciprocal compensation” and makes an assertion as to KMC’s interpretation of the ISP Remand Order.² Sprint’s assertions are factually incomplete; nonetheless, these assertions are irrelevant in the instant matter. Notwithstanding the foregoing, it appears from Sprint’s assertions in paragraphs 9 and 10 of Sprint’s Request for Relief that Sprint believes that the terms of the ISP Order on Remand apply randomly, or even worse, when Sprint makes a unilateral assertion that such terms apply. Notwithstanding the foregoing, Sprint’s assertions are irrelevant because the amendment to “govern reciprocal compensation” is required as a result of the above referenced Settlement Agreement between the KMC and Sprint

² *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99068, Order on Remand and Report and Order, released April 27, 2001 FCC 01-131.

as indicated to Sprint in correspondence from KMC to Sprint dated August 4, 2004, requesting application of the same amendment to the FDN Agreement as provided for in the parties Settlement Agreement. Sprint's interpretation of the ISP Remand Order is at best inconsistent with the actual text of the Order, but most importantly, it is discriminatory as it would allow Sprint to unilaterally determine when applicable law that is embodied in the provisions of the ISP Remand Order is to be applied to an adoption.

f. In paragraph 11 of Sprint's Request for Relief, with regard to the FDN Agreement, Sprint asserts that "Sprint and KMC have continued to operate under its terms while the parties have negotiated a replacement agreement." Again KMC believes that this issue bears no relevance to the Commissions decision to approve or deny the adoption of the 2002 MCI Agreement in this docket. Though Sprint seems resolute with regard to this assertion, it should be noted that this is a unilateral assertion. As a factual matter, there are on-going disputes regarding the implementation of the FDN Agreement. It should be further noted that no implementation meetings have been held between Sprint and KMC in effort to provide for the full implementation of the interconnection terms.

g. With regard to the assertions set forth in paragraph 12 of Sprint's Request for Relief, KMC again notes that such response bears no relevance to the adoption of the 2002 MCI Agreement. KMC acknowledges that the provisions that Sprint references are contained in the FDN Agreement. However, KMC also notes that as discussed herein, such provisions are irrelevant in light of the terms agreed to in the Settlement Agreement. Further, even if Sprint's prevailed with regard to its position on the provisions of the reciprocal compensation terms for the adoption of the FDN Agreement (which again, are unrelated to the matter at hand), as Sprint notes and as KMC indicated to Sprint in correspondence dated August 11, 2003, even under the

terms of paragraph 37.1.5 of the FDN Agreement, when traffic is not in balance the parties will negotiate compensation provisions that would apply. As such, both the Settlement Agreement and the terms of the FDN Agreement provide for compensation for local and ISP-bound traffic. Sprint's assertions are not only irrelevant, but are factually inaccurate.

h. In paragraph 13, Sprint asserts that a substantial portion of the traffic exchanged between KMC and Sprint "is ISP-bound traffic that originates with Sprint's end users and is terminated to KMC." Again, Sprint's assertion lacks any relevance to KMC's adoption of the 2002 MCI Agreement. Nonetheless, as indicated in KMC's August 11, 2003, correspondence to Sprint, no such traffic studies have been produced with regard to the nature of the traffic. Despite what Sprint has tried to characterize these assertions as, what they evidence more than anything is Sprint's *unilateral* attempts to interpret, apply, and implement interconnection terms between the parties and Sprint's clear refusal to address issues that were clearly raised by KMC related by KMC and disposed of in agreements between the parties.

i. KMC agrees with Sprint's assertions in paragraph 14 of Sprint's Request for Relief which state that KMC intends for the adoption of the 2002 MCI Agreement to be an interim agreement which will remain in effect pending completion of the arbitration proceedings in Docket No. 031047-TP and the execution of a new agreement pursuant to the Commission's ruling in that proceeding. All other assertions made by Sprint in paragraph 14 are again, at best, irrelevant and factually inaccurate. KMC vehemently disagrees with Sprint's characterization of KMC's adoption of the 2002 MCI Agreement as an effort to obtain more favorable reciprocal compensation provisions for ISP-bound traffic. Sprint has consistently ignored, or conveniently forgotten, that there is already a Settlement Agreement between the parties governing the application of Sprint's election of the ISP Remand Order and resolution of several reciprocal

compensation complaints brought by KMC against Sprint on that very matter. Sprint appears to raise issues where clearly there should not be any. Even if the terms of the Settlement Agreement did not already provide for the reciprocal compensation terms that are to govern the parties relationship post-March 2002, the terms of the FDN Agreement *already provide for compensation* when traffic is not in balance.

j. As the Commission is aware, on November 12, 2003, KMC filed a petition for arbitration for a replacement interconnection agreement between KMC and Sprint for the state of Florida. (*See*, Docket No. 031047-TP.) Given Sprint's earlier insistence that KMC seek a new operating arrangement under the 1997 MCI Agreement upon expiration, and KMC's concern regarding future attempts that Sprint might make to limit KMC's rights under the terms of the FDN Agreement, on June 15, 2004, KMC adopted the terms of the 2002 MCI Agreement as a second interim agreement in effort to provide for continuous and uninterrupted service pending the Commission's hearing and ruling on Docket No. 031047-TP.

k. Once the Commission wades through all of the irrelevant clutter that Sprint has tried to interject into the 252(i) adoption process, what *will* become apparent is that Sprint is seeking to discriminate against certain carriers in its application of the 252(i) requirements of the Act. Sprint is unilaterally applying simple logic, not real law. Sprint's logic is simply that when it benefits Sprint, 252(i) applies, when it does not benefit Sprint, 252(i) does not apply. What is apparent and *is relevant* is that Sprint is seeking to apply UNE rate provisions to KMC that do not apply to MCI, while at the same time, refusing KMC access to the reciprocal compensation provisions that apply to MCI under the exact same agreement. What is also apparent and relevant is that Sprint is seeking to avoid its obligations for the payment of intercarrier compensation pursuant to the Settlement Agreement and applicable law. The bottom

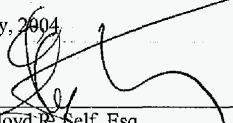
line is that the Commission should disregard Sprint's attempt to clutter this matter up with irrelevant and other factual misstatements and, instead, proceed on the basis of the law and acknowledge the 252(i) adoption.

6. As a final legal matter, KMC notes that the effect of the *Triennial Review Order* and *USTA II* decision on Sprint's obligations under all applicable law and regulation, and thus, what amendments may be appropriate to the Sprint-MCI Agreement, is obviously a matter much in flux at this point in time. To require KMC to complete negotiations on such complex matters before KMC is allowed to adopt an existing and approved interconnection agreement pursuant to section 252(i) of the Act would have the practical effect of prohibiting all "as is" adoptions and deny to KMC the benefits of this key statutory provision. Again, if such amendment have been successfully negotiated, filed, and approved by this Commission, then as a matter of law there is no question that such amendments would be effective as against KMC. However, the fact that such amendments between Sprint and MCI do not exist cannot be a legal bar to KMC's adoption at this time.

WHEREFORE, KMC requests that the Commission reject Sprint's proposed relief and proceed to issue its acknowledgement of KMC's adoption of the Sprint-MCI Agreement.

Respectfully submitted, this the 19th day of July, 2004.

By:


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by Hand Delivery (*) and/or U.S. Mail this 19th day of July, 2004.

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