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October 19, 2004

BY HAND DELIVERY

The Honorable Charles M. Davidson
Commissioner
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Docket No. 031047-TP, KMC Proposed Issue 2 Language

Dear Commissioner Davidson,

By agreement of the parties and Commission Staff, Sprint and KMC are submitting to you proposed language and justification for their proposed version of Issue 2.

As you will recall, at the prehearing conference you suggested that if the only remaining issue for this arbitration involves Voice over Internet Protocol ("VoIP") traffic, you suggested that it would be more helpful to the Commission if the issue language could be rewritten to address certain specific subjects relating to VoIP traffic. On the basis of that direction, the Commission Staff prepared a revised and expanded Issue 2 draft that addressed many of the points you raised at the prehearing conference. However, as KMC closely examined the Staff draft, it became clear to us that certain essential elements were omitted from the proposed language. On the basis of this review, we have attempted to work with Sprint in developing agreeable language. However, we have not been able to do so because Sprint fundamentally disagrees with what KMC believes is the necessary prefatory question to this subject as well as some necessary clarification to the Staff's enumeration of the issue.

CMP _____
COM _____
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____

RCA _____
SCR _____
SEC _____
OTH _____

While we appreciate the Staff's efforts to resolve this situation, KMC believes so strongly in the importance of including this additional language as the only rational means of comprehensively addressing this issue that we have asked for the opportunity to address this directly with you. If after your review of this letter and its accompanying draft issue language you have any additional questions or wish to further discuss the basis for inclusion of these matters, then we would be happy to address them with you in an appropriately noticed meeting where both parties could appear.

Regarding the specific language differences, KMC hereby provides the following explanation and elaboration in support of its proposed revisions to the issues list.

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As an initial matter, KMC submits that the attached draft issue language is an improvement over the Staff's version (including Sprint's modification to the Staff's draft) in that it recognizes as a threshold matter whether the parties should defer compensation issues regarding the exchange of VoIP traffic until the FCC completes its pending, comprehensive proceeding regarding IP-enabled services, including VoIP. *See In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (released Mar. 10, 2004). Without addressing the merits of its position, KMC submits that the Commission should wait until the FCC completes its rulemaking, and that until then, the parties should exchange IP-enabled services traffic, including VoIP, on a bill-and-keep basis. Consequently, in the attached draft KMC proposes Issue 2(a) as the threshold matter to be determined. If the Commission elects to defer, as KMC advocates, then there is no need for the Commission to address the remaining issue subparts as these questions all go to the heart of the matters that the FCC is considering in its rulemaking.

Traditionally, the FCC has treated IP-enabled service, including VoIP services, as exempt from access charges. Indeed, at the commencement of its *Intercarrier Compensation* rulemaking, the FCC stated clearly that "IP telephony [is] generally exempt from access charges."¹ In the interim, since the FCC made that statement, the FCC has issued only one narrowly-stated holding resulting in the imposition of access charges on any form of IP telephony. On April 21, 2004, the FCC concluded that certain forms of 1+ IP telephony specifically identified in a petition for declaratory ruling filed by AT&T were telecommunications services and subject to access charges.² The FCC specifically stated that its holding was limited to the services AT&T described, sometimes called "IP-in-the-middle" because of the absence of any net protocol conversion and the lack of any enhanced capability provided to end-users as a result of the use of Internet protocol. The FCC also stated that the conclusions in the *AT&T Declaratory Ruling* case were temporary, and subject to change, pending the outcome of the *IP-Enabled Services* and *Intercarrier Compensation* proceedings. On the basis of this FCC decision, KMC has told Sprint that it expects that the parties will abide by the *AT&T Declaratory Ruling* decision to the extent the parties exchange the types of traffic subject to that decision *and* where one of the parties would be the party responsible for access charges for such traffic.³ Thus, except for those VoIP services addressed in the *AT&T Declaratory Ruling*, KMC submits that the remaining VoIP traffic, to the extent the parties can identify it, should be exchanged on a bill-and-keep basis pending the FCC's decisions. Accordingly, assuming that this Commission opts for deferral under Issue 2(a), Issue 2(b) is the logical extension and asks whether KMC's proposal for interim bill-and-keep should be adopted.

¹ *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

² *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, Order (Apr. 21, 2004).

³ In addition, KMC has also stated to Sprint its intent to adhere to the FCC's decision in *pulver.com*, WC Docket No. 03-45, FCC 04-27, Order (Feb. 19, 2004), in which the FCC found that a certain class of computer-to-computer IP-based offering to be information services.

Proposed Issue 2(c) and its subparts are based on the assumption that the Commission, in addressing Issue 2(a), decides that deferral to the FCC is not appropriate. In that case, the Issue 2(b) becomes moot and the Commission then proceeds to Issue 2(c) and subparts (1) through (8).⁴ Issue 2(c) inquires how, assuming that bill and keep is not adopted during the pendency of the FCC's rulemaking, the parties should identify, exchange and compensate each other for VoIP traffic. This issue is essentially the starting point of the Staff's draft, which foregoes the threshold questions of Issues 2(a) and (b) entirely. KMC by and large accepted the Staff's proposal with some modifications proposed by Sprint on September 9, 2004, although KMC has further refined these subpoints by adding some further clarifying language. Each subpart is addressed below (using KMC's numbering) in turn:

(1) Sprint's edits refocused the Staff's sub-issue 2(a) from traffic *originating* on each party's network to any traffic at all that traverses one party's network and is delivered to the other party for termination regardless of the networks (including third party provider networks) the traffic originated on or otherwise traversed *before hitting the network of KMC or Sprint*. Accordingly, KMC rephrased Sprint's language to discuss the types and volumes of traffic in terms of *delivery* to the other party for termination, since the delivering carrier, where it is not the originating carrier, cannot truly be said to be "terminating" its traffic on the other party's network. If the original Staff wording is used, which focused only on party-originated traffic, KMC would not object to the phrasing of the second question of Issue 2(c)(1). KMC further notes that, even as phrased by KMC, it is likely that neither party can provide comprehensive answers because if the traffic originates on and traverses the networks of other providers before being delivered to the Sprint or KMC network, the party initially receiving the traffic may have no way of knowing the types of traffic using IP being delivered to it for exchange to the terminating carrier, or whether and how the IP is used in a fashion that is categorically significant.

(2) Sprint inserted an appropriate question about the jurisdiction of the types of traffic exchanged. KMC amplified the question to clarify that the parties should address, and that the Commission must decide, how jurisdiction is determined, and the extent to which third-party providers play a role in the determination of the jurisdiction of such traffic. For example, if third-party providers originate or transport the traffic before it hits the network of either Sprint or KMC, it may be that originating line information has been removed from the message records (for whatever reason), affecting the determination of the jurisdiction of the traffic, or at least the ability Sprint or KMC to determine that jurisdiction. KMC and Sprint are dependent, in a very real manner, on the role played by these third-party providers in correctly identifying the jurisdiction of the traffic or providing the information to correctly identify the jurisdiction. Accordingly, the jurisdiction of the traffic is, in the global sense, expressly tied to the role played by third-party providers that are earlier in the process involved in originating or transporting the call. KMC's language reflects this situation.

⁴ Some or all of these issues, arguably, would also be pertinent if the Commission finds for deferral under Issue 2(a) but does not adopt bill-and-keep on an interim basis under Issue 2(b), although KMC submits that such an approach to address a provisional intercarrier compensation scheme is not a wise use of the Commission's, or the parties' resources, in light of the pending FCC rulemaking decision.

(3) KMC believes that the Staff's sub-issues (c) and (d) were addressing similar questions, and so KMC has melded them into one sub-issue which predominantly reflects Staff sub-issue (d). By asking how the traffic might be routed using Internet protocol, again, third party providers are implicated if the inquiry is not limited to traffic initiated by KMC or Sprint. Any IP utilization related to the traffic may occur *before* the traffic hits the network of either KMC or Sprint, and KMC wished to clarify that by adding the second sentence. Hence, the identity of third-party providers "up the chain" is important to any inquiry regarding the manner in which IP is used to initiate or route such traffic, as neither of the parties may use IP when exchanging, transporting, or terminating such traffic.

(4) This is a new sub-issue added by KMC. Given the manner in which Sprint modified sub-issue (a) on the Staff list to remove the focus on traffic originated by KMC or Sprint, KMC sought to include this inquiry because it gets to the heart of whether KMC and Sprint are themselves originating IP-enabled, or VoIP traffic that is to be terminated by the other party (or other carriers). Anticipating KMC's sub-issue 2(c)(5) and Staff sub-issue 2(e), KMC asks what compensation to other carriers (not limited to the terminating carrier), if any, is paid by each party for IP or VoIP traffic originated on its network, if any.

(5) This sub-issue builds on Staff sub-issue 2(e). KMC added to the language as it did because differentiated levels of compensation might be charged, based upon the extent to which the parties are applying different standards to different types of VoIP services, for example distinguishing between those services that fall under the scope of the FCC's *AT&T Declaratory Ruling* and those services which do not. How each party has chosen historically to be compensated for terminating these different types of IP-enabled traffic is germane to the credibility of the positions that might be taken by each party on that same issue in this case. The details of any arrangements in place today may guide the Commission in making its decision how the two parties should handle this matter in Florida.

(6) KMC's sub-issue (6) asks the central question, in the event the Commission does not defer what should the compensation be for each type of IP-enabled service traffic and who has the jurisdiction to decide the rate? The Commission cannot assume that it has the jurisdiction to determine the rate at which IP-enabled traffic that does not fall within its jurisdiction should be compensated, because under the Telecommunications Act of 1996- some of the IP-enabled traffic may not fall within any of the terms of Sections 251 or 252 of the Act. Thus, the Commission, as the arbitrator under Section 252 of the Act, does not have the authority to arbitrate any dispute the parties may have. In other words, this sub-issue highlights the fact that the Commission cannot determine the rate for a function or service not within its jurisdiction to decide.

(7) Similarly, sub-issue 2(c)(7) builds on Staff sub-issue 2(g) to ask, in detail, not only whether there are helpful FCC or Commission precedents to address compensation for each type of IP-enabled services traffic exchanged between the parties, but whether the traffic types at issue, if not addressed by FCC or Commission precedent, are information services or telecommunications services. As such, these amplifications are directly relevant to and perhaps are precluded by the question in sub-issue 2(c)(6), namely what compensation should be required


for the different types of IP-enabled traffic. Much of the traffic in question, by the time it reaches the network of either party, may have already been handled by other carriers or providers, and such providers or carriers may have, in fact, used IP in a way that affects whether the traffic is information or telecommunications services and, thus, whether and what form of compensation applies. KMC, therefore, submits that the Commission must ascertain to what extent third-party providers must be involved to determine the nature of the traffic.

(8) Sprint's rewrite of Staff's sub-issue 2(h) made certain assumptions regarding the ability of the party directly connected to the terminating carrier to provide the information necessary for the terminating carrier to identify the type of traffic being exchanged. KMC's edits to this sub-issue acknowledge, as both the parties and the Commission must, that for the party delivering traffic to the terminating carrier to provide the information requested by the terminating carrier and identified in response to Staff's sub-issue 2(h), third party providers involved earlier in the routing of the traffic may have to provide certain information to the party delivering the traffic to the terminating carrier. To ignore this issue would be to remain oblivious to the virtually non-existent role that the non-originating party delivering the traffic to the terminating plays in generating and transmitting, in the first instance, the information needed by the terminating party to understand the nature of the traffic. KMC's language on this sub-issue explicitly acknowledges the critical role that third-party providers will play in a satisfactory resolution of the issues regarding the identification of, exchange of, and compensation for the IP-enabled traffic in question.

Commissioner Davidson, we appreciate your interest in sharpening the focus of this issue so that it adequately and properly addresses the matters inherent in the original short version of this issue. KMC believes that the best means of addressing the many questions buried inside the VoIP question is by the draft KMC language attached to this letter. Accordingly, we respectfully request that KMC's draft of this issue language be adopted for use in this arbitration proceeding.

If you have any questions regarding this draft, or its relationship to the Sprint or Staff drafts, then we would welcome the opportunity for an appropriate meeting of the parties to respond to your questions.

Sincerely,



Floyd R. Self

cc: Ms. Blanca Bayó
Parties of Record

KMC Revised Issue 2 Language

2. (a) Should the Commission consider, or defer to the FCC's ongoing, comprehensive *IP-Enabled Services* rulemaking, the jurisdiction over and treatment of traffic that is exchanged between the Parties and transported in whole or in part using Internet protocol?

(b) Assuming the Commission decides in issue 2.(a) to defer the treatment of traffic transported in whole or in part using Internet protocol to the FCC, should such traffic (that does not fall within the scope of either the FCC's *pulver.com* decision or *AT&T Declaratory Ruling*)¹ be exchanged by the Parties on a bill-and-keep basis until the FCC *IP-Enabled Services* rulemaking has concluded?

(c) If the Commission decides in response to issue 2.(a) that traffic transported in whole or in part using Internet protocol that falls outside the scope of both the FCC's *pulver.com* decision and *AT&T Declaratory Ruling* should be addressed right now and possibly subject to some type of compensation in advance of the FCC's decision in the *IP-Enabled Services* rulemaking, how should the parties identify, exchange and compensate each other for such traffic? The following aspects should be addressed, as pertinent:

- (1) What types of traffic transported in whole or in part using Internet protocol that do not fall within the scope of either the FCC's *pulver.com* decision or *AT&T Declaratory Ruling*, if any, does each party deliver to the other party for termination on the other party's network? Identify the approximate quantity, in terms of minutes of use or other appropriate measure, of each traffic type that each party delivers to the other party for termination on the other party's network?
- (2) What is the jurisdiction of each type of traffic identified in (2)(c)(1)? How is such jurisdiction determined? How will the Commission include third-party carriers in the determination of the jurisdiction of such traffic?
- (3) How are each of the traffic types identified in (2)(c)(1) physically routed and terminated to the other party's network, and specifically how is Internet protocol used or involved in the routing of the traffic? From which carriers does this traffic originate?

¹ The Parties agree that traffic transported in whole or in part using Internet protocol that falls within the scope of either the FCC's *pulver.com* or *AT&T Declaratory Ruling* decisions from 2004 is currently governed by and subject to those Orders, with the necessary recognition that the FCC has stated that those Orders do not pre-judge the outcome of the ongoing *IP-Enabled Services* rulemaking.

- (4) To what extent is each party or its affiliates originating each type of traffic identified in (2)(c)(1) in Florida? What compensation is each party or its affiliates paying to other carriers for the traffic that it originates?
- (5) For each of the traffic types identified in (2)(c)(1), what form of intercarrier compensation, if any, is currently paid to the terminating carrier? Is the terminating carrier receiving a different level of compensation from any other carrier(s) for terminating each such traffic type? If so, explain in detail and provide the terms of such arrangements.
- (6) For each of the traffic types identified in (2)(c)(1), what form of intercarrier compensation should be paid on a going-forward basis, if any, and why, and who has jurisdiction to decide?
- (7) For each of the traffic types identified in (2)(c)(1), what existing FCC or FPSC precedent supports your classification of this traffic and the payment (or nonpayment) of intercarrier compensation? Is such traffic information services or telecommunications services? How is this issue determined? To what extent must third-party carriers be involved to determine whether such traffic is information services or telecommunications services?
- (8) For each of the traffic types identified in (2)(c)(1), can the terminating carrier identify the specific traffic type? If so, how? If not, what information does the party sending the traffic need to provide to the party terminating the traffic to allow the party terminating the traffic to identify the specific traffic type? What information do third parties sending the traffic to the party directly sending the traffic to the terminating party need to provide to the party directly sending the traffic to the terminating party and the party terminating the traffic to allow the party terminating the traffic to identify the specific traffic type? What reporting and auditing requirements, if any, are needed?

CERTIFICATE OF SERVICE

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

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