

State of Florida



Public Service Commission

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COMMISSION CLERK

DATE: November 18, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayo)

FROM: Office of the General Counsel (Rockette-Gray, Fordham) *ARG 2.57*
Division of Competitive Markets & Enforcement (Pruitt) *y* *FEB for BIC*

RE: Docket No. 041144-TP -- Complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated.

AGENDA: 11/30/04 -- Regular Agenda--Motion to Dismiss-Decision Prior to Hearing - Parties May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Attachments 1, 2, and 3 are not included in the Word version of this document.

FILE NAME AND LOCATION: S:\PSC\GCL\WP\041144.RCM.DOC

Case Background

On September 24, 2004, pursuant to Rules 28-106.201 and 25-22.036, Florida Administrative Code, Sprint-Florida, Incorporated (Sprint) filed a complaint against KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC (collectively "KMC"). Sprint alleges that KMC knowingly terminated intrastate interexchange traffic over local interconnection arrangements, in violation of Section 364.16(3)(a), to avoid paying Sprint access service charges. Sprint also asserts that this misrouting of access traffic has resulted in an overpayment of reciprocal compensation paid to KMC for local minutes terminated to KMC by Sprint. On October 14, 2004, KMC filed a Motion to Dismiss Sprint's complaint for failure to state a claim upon which relief may be granted, improper joinder of KMC Data LLC and KMC Telecom V, failure to request an audit, and use of an unauthorized methodology to recalculate traffic. On October 21, 2004, Sprint filed its response to KMC's Motion to Dismiss.

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The Commission has jurisdiction over this matter pursuant to Section 364.16(3)(a), Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant KMC's Motion to Dismiss?

Recommendation: No. Staff recommends that KMC's Motion to Dismiss be denied. **(Rockette-Gray, Fordham)**

Staff Analysis:

I. Standard of Review

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

II. Argument

KMC argues that Sprint has failed to state a claim upon which relief can be granted because Sprint has not abided by the dispute resolution provisions governing the parties. According to KMC, Sprint's complaint contravenes the dispute resolution provisions set forth in the 1997 MCI-Sprint Agreement and the 2001 FDN-Sprint Agreement, both of which KMC adopted, as well as Sprint's Access Tariff. ("1997 MCI Agreement," see Attachment 1, "FDN Agreement," see Attachment 2, and "Sprint's Access Tariff," see Attachment 3). KMC asserts that the Agreements and Tariff govern the local interconnection and traffic exchange between itself and Sprint, including audit requirements within the dispute resolution provisions. It contends that Sprint's unilateral study of selected traffic records does not meet the audit requirements of the interconnection agreements and Sprint's tariff. Essentially, KMC argues that Sprint has not acted in good faith in trying to resolve their differences and has prematurely filed a complaint with this Commission.

Additionally, KMC maintains that Sprint improperly joined KMC Data LLC and KMC Telecom V in its complaint. KMC maintains that during the period that Sprint alleges to be in question concerning interexchange traffic, KMC Data LLC did not have any customers, and

KMC Data LLC and KMC Telecom V did not deliver any interexchange or local traffic to Sprint.

KMC asserts also that Sprint failed to join an enhanced service provider (name redacted) which KMC contracted with to transport certain traffic at issue as an indispensable party to the complaint. KMC contends this enhanced service provider was the party ultimately responsible for transporting traffic to KMC.

Finally, KMC puts forth the argument that Sprint's ultimate issue is one of backbilling. Essentially, KMC claims that even if Sprint makes a valid case for monies it is due based on backbilling, no legal basis exists for the Commission to authorize backbilling against KMC on the unpaid access charges and reciprocal compensation payments. KMC points out the only possible basis is under Sprint's Access Tariff which allows backbilling only if supported by an audit. Since an audit was not performed, KMC alleges the Commission has no basis to allow Sprint to backbill KMC.

In response, Sprint argues that a claim upon which relief can be granted has been stated because KMC is in violation of Section 364.16(3) F.S. due to KMC's unlawful delivery of access traffic over local interconnection arrangements. Sprint maintains that the statute does not require an audit be performed before a "substantially affected party" can bring a complaint before the Commission. Sprint alleges it meets the requirement of a "substantially affected party" under the statute and therefore has stated a valid claim with its request for an investigation. Sprint further alleges that an audit under the Interconnection Agreements is not required nor is it a "condition precedent" to filing a complaint for violation of such agreements. Rather, Sprint maintains the provisions which deal with an audit under the agreements are permissive, rather than mandatory. Sprint adds that the agreements did not limit the parties on recalculation methods which could be used for an appropriate determination of traffic access charges. Therefore, Sprint alleges that the recalculation method it used to distinguish interexchange traffic from local was proper under the applicable interconnection agreements.

Secondly, Sprint argues that KMC Data LLC and KMC Telecom V, Inc. are properly joined parties. Sprint asserts that both are proper parties because they are parties to the current Interconnection Agreement between Sprint and KMC and will be parties to the agreement that is currently in arbitration in Docket No. 031047-TP. Additionally, Sprint states that KMC Telecom V, Inc. is properly joined because it is a party to the 2002 Agreement between Sprint and MCI.

Sprint further argues that the party that KMC refers to as an enhanced service provider is in actuality a customer of KMC and is unknown to Sprint. Sprint asserts KMC admitted it routes traffic to Sprint on behalf of this enhanced service provider. Sprint further alleges this provider is not part of any agreement that Sprint has with KMC. Therefore, Sprint contends such an enhanced service provider should not be considered an indispensable party.

Finally, Sprint asserts that no limitations were placed on the parties' right to backbill under any of the Agreements if a violation concerning incorrect billing were discovered. Further, Sprint states that the Commission has the inherent authority to order a company be backbilled pursuant to Section 364.16(3), Florida Statutes, which authorizes the Commission to

investigate a regulated company's records and accounts in response to a complaint filed against it.

III. Analysis

In determining if Sprint's complaint states a cause of action upon which relief can be granted, an analysis of Section 364.16(3)(a), Florida Statutes, is necessary since Sprint bases its primary argument on that statutory provision. Section 364.16(3)(a) states:

No local exchange telecommunications company or competitive local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

Sprint alleges that Section 364.16(3)(a) was violated by KMC because KMC intentionally altered some originating numbers that determine the jurisdiction of the traffic. Traffic jurisdiction is characterized as local or interexchange traffic. Sprint states in its complaint that the jurisdiction of telecommunications traffic has historically been determined by the originating and terminating end points of a call, which KMC does not dispute.

Staff believes Section 364.16(3)(a) is clear in its directive concerning what conduct is prohibited. The statute clearly prohibits a telecommunications company from knowingly delivering interexchange traffic over local interconnection arrangements if that interexchange traffic is subject to terminating access charges. Staff believes Sprint's complaint raises as a question of fact whether KMC knowingly delivered or terminated access traffic over a local interconnection arrangement without paying the appropriate charges. Since Sprint specifically alleges in its complaint that KMC has engaged in such prohibited conduct under the statute, staff believes that Sprint has stated a cause of action upon which relief could be granted.

Prematurity

KMC contends that the dispute resolution provisions of the 1997 MCI-Sprint Agreement and the 2001 FDN-Sprint Agreement provide for a mandatory audit before Sprint or KMC can file a complaint with the Commission alleging a billing discrepancy related to payment of access charges and reciprocal compensation. KMC argues that since no audit has been conducted, the complaint is premature and should be dismissed.

The question of whether the conduct of an audit is a contractual condition precedent to KMC's liability for alleged underpayments or overcharges is an issue to be decided by the Commission either at hearing or on a motion for summary final order. Staff believes that the existence of this issue does not affect the Commission's jurisdiction to hear Sprint's complaint and is not a legal prerequisite to the accrual of a cause of action. See San Marco Contracting Company v. Department of Transportation, 386 So.2d 615 (Fla. 1st DCA 1980). Thus, the alleged failure to have performed an audit is not a proper basis to dismiss the complaint.

Improper Joinder

Additionally, KMC states that its Motion to Dismiss should be granted because Sprint improperly joined KMC Data LLC and KMC Telecom V in its complaint. KMC claims that both KMC Data LLC and KMC Telecom V were not involved in any interexchange or local traffic activity during the timeframe Sprint alleges the unlawful delivery and termination of interexchange traffic occurred. Although the Commission is not bound by the Florida Rules of Civil Procedure governing joinder of parties, staff believes that Fla. R. Civ. P. 1.250 dealing with misjoinder of parties offers guidance for the disposition of the issue KMC raises. Fla. R. Civ. P. 1.250 (a) states "Misjoinder of parties is not a ground for dismissal of an action. Any claim against a party may be severed and proceeded with separately." Using the rule as a guide, staff believes the issue of whether KMC Data LLC and KMC Telecom V are improperly joined should not weigh in this Commission's decision on whether or not to grant KMC's Motion to Dismiss.

Failure to Join Indispensable Party

KMC asserts also that Sprint failed to join a certain enhanced service provider (name redacted) which KMC has contracted with to deliver traffic. KMC contends that some or all the traffic at issue in Sprint's complaint is traffic that is transported by this enhanced service provider.

The concept of indispensable party is not specifically provided for in the Florida Administrative Code. The courts define an "indispensable party" as one who has such an interest in the subject matter of the action that a final adjudication cannot be made without affecting the party's interest or without leaving the controversy in such a situation that its final resolution may be inequitable. W.R. Cooper, Inc. v. City of Miami Beach, 512 So. 2d 324, 326 (Fla. 3d DCA 1987). In Order No. PSC-99-0648-PCO-WS, issued April 6, 1999 (Docket No. 981609-WS),¹ the Commission construed this judicial definition as having similar meaning to Rule 28-106.109, Florida Administrative Code, which governs the effect of agency proceedings on non-parties. That rule states:

[I]f it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that the absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

Based on the rule cited above, KMC's enhanced service provider (over whom the PSC does not have regulatory jurisdiction) may very well have an indirect interest in the resolution of Sprint's Complaint. However, staff believes that the enhanced service provider is not an indispensable party, since the issue of whether KMC knowingly delivered traffic to Sprint without paying the appropriate compensation does not appear to require the presence of this third-party. Therefore, staff believes that KMC's Motion to Dismiss should be denied as it

¹ See also Order No. PSC-03-1331-FOF-TL, issued November 21, 2003.

relates to failure to join an indispensable party. KMC certainly has the opportunity to request an order, in accordance with Rule 28-106.109, Florida Administrative Code, that the enhanced service provider be notified of the proceeding and offered an opportunity to join. KMC also can make use of any available non-party discovery methods to obtain information that it requires for the presentation of its case.

Jurisdiction to Grant Requested Relief

Finally, KMC argues that the Commission has no legal authority to authorize backbilling in this instance, because that remedy is barred by the application of the parties' contract or by Sprint's tariff, and is not otherwise authorized in the statutes. KMC emphasizes that what Sprint is seeking is: (1) an adjustment to the historical traffic volumes exchanged between the companies; (2) permission to backbill KMC for any underpayments on intrastate access charges; and (3) a refund of any overpayments of reciprocal compensation made by Sprint to KMC because the ratio of traffic between the companies had been improperly skewed. KMC argues that there is simply no legal basis for this type of backbilling over multiple years, and further emphasizes that Sprint has not referenced any such legal authority in its Complaint.

Sprint disagrees, and in turn notes that KMC itself has not presented any legal authority for its contention that the Commission is prohibited from allowing Sprint to backbill. Furthermore, Sprint argues that it did, in fact, reference specific portions of its interconnection agreement with KMC that provide for backbilling, as well as specific statutory authority, Section 364.16, Florida Statutes, pursuant to which Sprint is authorized to seek relief. Sprint adds that this same provision includes the inherent authority for the Commission to provide the appropriate remedy, including backbilling, when violations are found.

Section 364.16(3)(b) specifically provides that:

(b) Any party with a substantial interest [i.e. Sprint] may petition the commission for an investigation of any suspected violation of paragraph (a). In the event any certificated local exchange service provider [i.e. KMC] knowingly violates paragraph (a), the commission shall have jurisdiction to arbitrate bona fide complaints arising from the requirements of this subsection and shall, upon such complaint, have access to all relevant customer records and accounts of any telecommunications company.

Staff believes that this provision grants the Commission the implied authority to "make the pot right" when violations of this provision are found, which would include the authority to allow a company to be backbilled if it is proved the company knowingly delivered interexchange traffic through a local interconnection arrangement without paying the appropriate access charges. While the proper interpretation of Section 364.16(3) is ultimately a question for the Commission to determine later in these proceedings, Sprint's complaint is sufficient to withstand KMC's Motion to Dismiss.

Docket No. 041144-TP
Date: November 18, 2004

IV. Conclusion

Staff believes Sprint has filed a claim upon which relief can be granted based on Section 364.16(3). Therefore, staff believes that it is appropriate for the Commission to proceed with this docket. Based on the foregoing, staff recommends that KMC's Motion to Dismiss be denied.

Docket No. 041144-TP
Date: November 18, 2004

Issue 2: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending resolution of Sprint's complaint. **(Rockette-Gray, Fordham)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending resolution of Sprint's complaint.

Agreement, without the prior written approval of the other Party. Each Party shall obtain the other Party's prior approval before discussing this Agreement in any press or media interviews. In no event shall either Party mischaracterize the contents of this Agreement in any public statement or in any representation to a governmental entity or member thereof.

21.5 Except as otherwise expressly provided in this Section 21, nothing herein shall be construed as limiting the rights of either Party with respect to its customer information under any applicable law including, without limitation, Section 222 of the Act.

Section 22. Audits and Examinations

22.1 As used herein "Audit" shall mean a comprehensive review of services performed under this Agreement. "Examination" shall mean an inquiry into a specific element of or process related to services performed under this Agreement. The auditing Party may perform up to two (2) Audits per twelve (12) month period commencing with the Effective Date. The auditing Party may perform Examinations as the auditing Party deems necessary. Audits must be separated by no less than five (5) months.

22.2 Upon thirty (30) days written notice by the auditing Party to the audited Party, the auditing Party shall have the right through its authorized representative to make an Audit or Examination, during normal business hours, of any records, accounts and processes which contain information bearing upon the provision of the services provided and performance standards agreed to under this Agreement. Within the above-described thirty (30) day period, the Parties shall reasonably agree upon the scope of the Audit or Examination, the documents and processes to be reviewed, and the time, place and manner in which the Audit or Examination shall be performed. The audited Party agrees to provide Audit or Examination support, including appropriate access to and use of audited Party's facilities (e.g., conference rooms, telephones, and copying machines).

22.3 Each Party shall bear its own expenses in connection with the conduct of the Audit or Examination. The reasonable cost of special data extractions required by the auditing Party to conduct the Audit or Examination will be paid for by the auditing Party. For purposes of this Section 22.3, a "Special Data Extraction" shall mean the creation of an output record or informational report (from existing data files) that is not created in the normal course of business. If any program is developed to the auditing Party's specifications and at the auditing Party's expense, the

auditing Party shall specify at the time of request whether the program is to be retained by the audited Party for reuse for any subsequent auditing Party Audit or Examination.

22.4 Adjustments, credits or payments shall be made and any corrective action shall commence within thirty (30) days from the auditing Party's receipt of the final audit report to compensate for any errors or omissions which are disclosed by such Audit or Examination and are agreed to by the Parties. The Party responsible for the error shall either forgo interest if they underbilled the other Party, or pay interest if they were responsible for the other Party's underbilling.

22.5 Neither such right to Examine and Audit nor the right to receive an adjustment shall be affected by any statement to the contrary appearing on checks or otherwise, unless such statement expressly waiving such right appears in writing, is signed by the authorized representative of the Party having such right and is delivered to the other Party in a manner sanctioned by this Agreement.

22.6 This Section 22 shall survive expiration or termination of this Agreement for a period of two (2) years after the expiration or termination of this Agreement.

22.7 The rights set forth in this Section 22 are in addition to the audit rights of either Party available under Attachment III, Sections 13.4.1 and 13.4.2.15; Attachment IV, Section 8.2; and Attachment VIII, Section 4.1.1.13.

Section 23. Dispute Resolution Procedures

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. The Parties agree to seek expedited resolution by the Commission, and shall request that resolution occur in no event later than sixty (60) days from the date of submission of such dispute. If the Commission appoints an expert(s) or other facilitator(s) to assist in its decision-making, each Party shall pay one-half of the fees and expenses so incurred. During the Commission proceeding, each Party shall continue to perform its obligations under this Agreement; provided, however that neither Party shall be required to act in any unlawful fashion. This provision shall not preclude the Parties from seeking relief available in any other forum.

Section 24. Bona Fide Request Process for Further Unbundling

intrastate carrier common line and interconnection charges as outlined on Part C hereto and any explicit intrastate universal service mechanism based on access charges.

- 6.3. Subject to the terms of this Agreement, the Parties shall pay invoices by the due date shown on the invoice. For invoices not paid when due, late payment charges will be assessed under § 6.5. If the payment due date is a Saturday, Sunday or a designated bank holiday, payment shall be made the next business day.
- 6.4. Billed amounts for which written, itemized disputes or claims have been filed are not due for payment until such disputes or claims have been resolved in accordance with the provisions governing dispute resolution of this Agreement. Itemized, written disputes must be filed with Sprint's National Exchange Access Center ("NEAC") no later than the due date of the related invoice. Itemized written disputes must be filed with CLEC no later than the due date of the related invoice. A copy of the dispute must be sent with the remittance of the remainder of the invoice.
- 6.5. The billing party will assess late payment charges to the billed party equal to the lesser of one and one-half percent (1.5%) per month or the maximum rate allowed by law for commercial transactions, of the balance due, until the amount due is paid in full.

7. AUDITS AND EXAMINATIONS

- 7.1. **Each Party to this Agreement** will be responsible for the accuracy and quality of its data as submitted to the other Party involved. Subject to each Party's reasonable security requirements and except as may be otherwise specifically provided in this Agreement, either Party, at its own expense, may audit the other Party's books, records and other documents directly related to billing and invoicing once in any twelve (12) month period for the purpose of evaluating the accuracy of the other Party's billing and invoicing. The audit period will include no more than the preceeding twelve (12) month period as of the date of the audit request. The Parties may employ other persons or firms for this purpose, provided that such persons or firms do not have a conflict of interest related to other matters before one of the Parties. On-site audits may be conducted at the other Party's locations or the Party's vendors' locations. The Parties will reasonably agree on the scope and manner in which the audit will be performed. Such audit will commence at a time and place agreed on by the Parties, but no later than thirty (30) days after notice thereof.
- 7.2. Each Party will cooperate fully in any such audit, providing reasonable access to any and all appropriate employees and books, records and other documents reasonably necessary to assess the accuracy of the Party's bills. Each Party shall maintain records that reasonably document the accuracy of such Party's bills for a minimum of thirty-six (36) months. Each Party's right to access information for audit purposes is limited to data less than thirty-six (36) months in age. The

Dispute Resolution provisions of this Agreement shall be used to resolve Disputes arising concerning requests for audits or examinations, or the results of the audits or examinations.

7.3. Each Party will promptly correct any billing error that is revealed in an audit. Adjustments, credits or payments will be made and any corrective action will commence within thirty (30) days from receipt of the final audit report. Each party will bear its own expenses in connection with the conduct of an audit or examination.

7.4.

8. INTELLECTUAL PROPERTY RIGHTS

8.1. Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel.

8.2. Neither Party shall have any obligation to defend, indemnify or hold harmless, or acquire any license or right for the benefit of, or owe any other obligation or any liability to, the other Party based on or arising from any claim, demand, or proceeding by any third party alleging or asserting that the use of any circuit, apparatus or system, or the use of any software, or the performance of any service or method, or the provision or use of any facilities by either party under this Agreement, constitutes direct or contributory infringement, or misuse or misappropriation of any patent, copyright, trademark, trade secret, or any other proprietary or intellectual property right of any third party.

8.3. Following notice of an infringement claim against Sprint based on the use by CLEC of a service or facility, CLEC shall at CLEC's expense, procure from the appropriate third parties the right to continue to use the alleged infringing intellectual property or if CLEC fails to do so, Sprint may charge CLEC for such costs as permitted under a Commission order.

9. LIMITATION OF LIABILITY

9.1. Except as otherwise set forth in this Agreement and except in cases of gross negligence and intentional misconduct, neither Party shall be responsible to the other for any indirect, special, consequential or punitive damages, including (without limitation) damages for loss of anticipated profits or revenue or other economic loss in connection with or arising from anything said, omitted, or done hereunder (collectively "Consequential Damages"), whether arising in contract or

ACCESS SERVICE TARIFF

SPRINT-FLORIDA, INCORPORATED
By: F. B. Poag, Director

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Effective: DEC 31 2000

E2. GENERAL REGULATIONS

E2.3 Obligations of the IC (Cont'd)

E2.3.11 Jurisdictional Report Requirements (Cont'd)

C. Maintenance of Customer Records (Cont'd) (T)

Audit Committee, or an auditor of a state regulatory commission. Such records shall consist of one of the following:

1. All of the records, workpapers and backup documentation (including magnetic tapes of call detail records of raw and billable traffic, a listing of all originating and terminating trunk groups, billing information from other companies and customer billing information); or
2. If the customer has a mechanized system in place that calculates its PIU, then a description of that system and the methodology used to calculate the PIU must be furnished and any other pertinent information (such as but not limited to flowcharts, source codes, etc.) relating to such system, or
3. Mutually agreed upon records which contain data sufficient to evidence the reported PIU, such as summary data compiled from the records in 1. preceding. If the customer and the Company cannot agree on mutually agreed upon records, the customer and the Company will jointly and informally solicit the assistance of the appropriate regulatory body or its staff to resolve any disagreement.

D. Audit and Reconciliation of Customer Records (T)

1. When the customer reports a projected PIU as set forth in E2.3.11.B preceding or when a billing dispute arises or when a regulatory commission questions the reported PIU, the Company may, upon written request, require the customer to provide call detail records which will be audited to substantiate the reported PIU provided to the Company. This written request shall be considered as the initiation of the audit. (T)

SPRINT-FLORIDA, INCORPORATED
By: F. B. Poag, Director

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Effective:

DEC 3 1, 2000

E2. GENERAL REGULATIONS

E2.3 Obligations of the IC (Cont'd)

E2.3.11 Jurisdictional Report Requirements (Cont'd)

D. Audit Reconciliation of Customer Records (Cont'd)

2. In the event of an audit, the customer shall provide the data specified in E2.3.11.C preceding to the agreed upon auditor within thirty days. The data will be provided at an agreed upon location during normal business hours. (T)
3. If the customer fails to provide the requested data within thirty days of the written request, or audit notice, the customer will be in violation of this tariff and subject to those actions specified in E2.1.8 preceding. Should the Company elect to take such measures, appropriate documentation will be provided to the Florida Public Service Commission prior to the refusal of any orders for additional service and/or disconnection of service.
4. Audits may be conducted by (a) an independent auditor under contract to the Company; (b) a mutually agreed upon independent auditor paid for by the customer; (c) an independent auditor selected and paid for by the customer; or (d) an independent auditor under contract to the Joint LEC Audit Committee. If the customer selects option (c), the selected auditor must certify that the audit was performed following FCC procedures for measuring interstate and intrastate traffic as established by Commission orders, and provide to the Company a report with supporting documentation to verify such procedures. If the customer selects option (b), (c) or (d), the auditor shall produce an attestation audit report upon completion of the audit.
5. When an auditor cannot be agreed upon within thirty days after receipt of the initial audit notice, the independent auditor under contract to the Joint LEC Audit Committee shall perform the audit.