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Matilda Sanders

From: Whitt, Chrystal [CC] [Chrystal.Whitt@mail.sprint.com]
Sent: Monday, December 20, 2004 3:08 PM
To: Filings@psc.state.fl.us
Subject: 031047 Sprint's Response to KMC's Motion

Filed on behalf of:

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Docket No. 031047

Title of filing: Sprint's Response in Opposition to KMC Motion

Filed on behalf of: Sprint

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Description: Sprint's Response in Opposition to KMC Motion

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December 20, 2004

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 031047-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated are the original of Sprint's Response in Opposition to KMC's Motion to Hold Proceedings in Abeyance (and two attachments).

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions, please do not hesitate to call me at 850/599-1560.

Sincerely,

Susan S. Masterton

Susan S. Masterton

Enclosure

CERTIFICATE OF SERVICE
DOCKET NO. 031047-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Electronic and U.S. mail on this 20th day of December, 2004 to the following:

Carris (Lee) Fordham
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

KMC Data LLC/KMC Telecom III LLC/KMC Telecom V, Inc.
Marva B. Johnson
1755 North Brown Road
Lawrenceville, GA 30043-8119

Kelley Drye & Warren LLP
Yorkgitis/Mutschelknaus/Soriano/Klein
1200 19th Street, N.W.,
Fifth Floor
Washington, DC 20036

Messer Law Firm
Floyd R. Self, Esq.
P.O. Box 1876
Tallahassee, FL 32302-1876

Susan S. Masterton

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of Petition of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC For Arbitration of an Interconnection Agreement with Sprint- Florida, Incorporated	)	Docket No. 031047-TP
	)	Filed: December 20, 2004

SPRINT-FLORIDA, INCORPORATED'S RESPONSE IN OPPOSITION TO KMC'S MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Pursuant to Rule 28-106.204, Florida Administrative Code, Sprint-Florida, Incorporated (hereinafter "Sprint") hereby responds in opposition to KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC's (hereinafter, "KMC's") Motion to Hold Proceedings in Abeyance (hereinafter "Motion"), which was filed and served on Sprint by e-mail on December 13, 2004. Sprint objects to KMC's Motion for the reasons set forth below. This is the second such Motion filed by KMC in an attempt to delay the resolution of this arbitration. On August 11, 2004, KMC filed, but later withdrew, a Motion to Hold the Proceeding in Abeyance, which, if granted, would have suspended action on the arbitration until approximately November 10, 2004. Sprint also filed a Response in opposition to that Motion.

1. In its Motion KMC requests that the Commission hold this arbitration in abeyance until February 21, 2005, to allow the parties to negotiate language to be incorporated into the final agreement to reflect the D.C. Circuit Court of Appeals decision in USTA II[1], which invalidated portions of the FCC's Triennial Review Order (TRO).[2] (Motion at ¶ 1). That decision took effect on June 15, 2004, well after Sprint and KMC began negotiations for

[1] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).
[2] *In the Matter of Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, Docket No. CC 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 and *Deployment of Wireline Services Offering Advanced Telecommunications Services*, CC Docket No. 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, released August 21, 2003.

a new agreement and this arbitration was initiated on November 12, 2003. On December 15, 2004 the FCC voted on final rules to address the USTA II UNEs.[3]

2. Sprint disagrees that a suspension of the arbitration is necessary in order to address the USTA II issues and the implementation of the FCC's December 15, 2004, ruling. The parties have settled all but one issue from the initial arbitration filing. The remaining issue involves the appropriate intercarrier compensation for Voice over Internet Protocol (VoIP) traffic. At the prehearing in this docket on August 31, 2004, Commissioner Davidson, as the prehearing officer, suggested revisions to the phrasing of that issue in order to ensure that the issue was properly framed for a decision by the Commission. Commission staff and the parties engaged in several oral and written discussions in an attempt to reach an agreement on the rephrasing of the issue to address Commission Davidson's concerns. Ultimately, the parties failed to reach and agreement and the matter was brought to Commission Davidson for resolution.

3. Commissioner Davidson approved revised language for the issue on November 4, 2004. Subsequently, the parties were requested to advise the Commissioner as to whether additional discovery or testimony would be necessary to build a complete record on the revised issue. Sprint responded to that request via an e-mail to staff on November 9, 2004 suggesting a procedure for allowing additional testimony and discovery (See Attachment 1). To Sprint's knowledge, KMC has yet to respond to this request. Rather on December 13, 2004, KMC filed this Motion requesting that the arbitration be held in abeyance.

4. It should be noted that KMC's substantive position on the VoIP intercarrier compensation issue is and has been that the Commission should delay acting on this issue pending certain FCC actions. The filing of the Motion, as well as KMC's continued

[3] A written order is anticipated by the end of December.

delays in responding to requests regarding the revised issue, have the practical effect of giving KMC the relief it seeks.

5. In its Motion for Abeyance, KMC has requested that all procedural deadlines in the arbitration be suspended. Since KMC has failed to respond to Sprint's proposal for additional proceedings, there are, at this time, no procedural dates to be suspended. Rather, what remains to be done is to establish a procedural schedule for filing additional testimony and conducting additional discovery on the revised VoIP issue. Sprint presumes that KMC is asking that no activity occur in setting a new schedule until after February 21, 2005.[4]

6. Since USTA II took effect on June 15, 2004, the parties have been aware that the FCC would need to revisit the UNEs addressed by that decision. In fact, the parties have engaged in ongoing negotiations concerning how to incorporate USTA II and any subsequent revisions to the FCC rules as a result of USTA II into the agreement. Sprint previously has proposed to KMC placeholder language that would allow the parties to address USTA II and the subsequent FCC orders through the change in law provisions of the new agreement. (See Attachment 2) KMC rejected Sprint's proposal.

7 KMC has noted that it has adopted another interconnection agreement, lessening the need for a speedy resolution to this arbitration (Motion at ¶ 4). Sprint notes that it has disputed KMC's ability to adopt certain portions of the agreement and that that dispute is the subject of an open docket with the Commission (Docket No. 040557-TP). While the parties have agreed in concept to a resolution of that dispute, the settlement is not yet

[4] KMC notes that Sprint and KMC have filed joint motions for abeyance in other states. (Motion at ¶ 3) Sprint notes that these arbitrations are in earlier procedural stages, i.e., no testimony has yet been filed. In addition, in these arbitrations the request for abeyance is until January 21, 2005, in North Carolina and January 24, 2005, in

final. In any event, by its terms the MCI agreement adopted by KMC expires on February 28, 2005.[5] If KMC's request to delay all action in this arbitration until the end of February is granted, thereby delaying the discovery process and the filing of supplemental testimony until after that date, a new agreement based on the Commission's decision in this arbitration will not be final by the time the adopted agreement has expired. Given that the arbitration was filed over a year ago, it seems the wiser and more expedient course of action would be to establish dates for extending the discovery cutoff and filing additional testimony, thereby allowing the parties to proceed expeditiously to resolve the remaining disputed issue.

WHEREFORE, Sprint respectfully requests the Commission to deny KMC's Motion, to proceed expeditiously to extend the discovery cut off to allow for additional discovery and to establish dates for supplemental testimony and a hearing, as set forth above.

Respectfully submitted this 20th day of December 2004.

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ATTORNEY FOR SPRINT

Tennessee, not February 21, 2005. However, in the unilateral motion KMC has filed in Florida, KMC has, inexplicably, asked for an additional month's delay.

[5] By its terms, the agreement took effect on March 1, 2002 and is valid for 3 years from that date.

Attachment 1

Masterton, Susan S [CC]

From: Masterton, Susan S [CC]
Sent: Tuesday, November 09, 2004 12:02 PM
To: 'Lee Fordham'; fself@lawfla.com
Cc: David Dowds; Anne Marsh; Katrina Tew; Luehring, Janette W [CC]; Burt, Jim R [CC]; Bennett, Linda K [CC]; Khazraee, Sandra A [CC]
Subject: RE: Docket No. 031047

Sprint has no suggested changes to the wording of the revised issue.

Sprint believes that additional discovery is necessary in order to flesh out the record so that it provides an adequate basis for the Commission to resolve Issue 2 as set forth in the revised draft of the issue (particularly sub issues (a), (b) and (f), which Sprint believes are not adequately addressed in the existing testimony or discovery responses). In addition, Sprint believes that supplemental testimony would also be helpful in ensuring a full and complete record. Until the additional discovery and testimony is complete, Sprint cannot be sure whether a hearing would ultimately be necessary, or whether the record, including the additional discovery and testimony, could be stipulated by the parties.

As far as a time frame, Sprint believes that some time to conduct additional discovery is necessary before supplemental testimony should be due. Sprint would suggest that the time frame for responding to discovery be shortened to 15 calendar days, with 5 days to file objections, instead of the 20/10 calendar days that are currently provided in the procedural order. Then, Sprint would suggest that supplemental direct testimony be due approximately 1 month from now (around mid-December) and that supplemental rebuttal testimony be due approximately 2 weeks after supplemental direct testimony. Once the testimony is complete, the parties could revisit the need for a hearing, and, if a hearing is determined to be necessary, the hearing could be scheduled at that time.

It may be that an informal conference call with staff and the parties would be helpful in working out procedural issues related to the additional discovery and testimony time frames.

If you have any questions, please let me know.

Susan S. Masterton
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-----Original Message-----
From: Lee Fordham [mailto:CFordham@PSC.STATE.FL.US]
Sent: Thursday, November 04, 2004 12:53 PM
To: fself@lawfla.com; Masterton, Susan S [CC]
Cc: David Dowds; Anne Marsh; Katrina Tew
Subject: Docket No. 031047

Hello, counselors.

The attachment is the Commission-preferred wording for the revised Issue 2 in the above referenced

docket. We are asking for your input/approval prior to the issuance of an order modifying the remainder of the procedural schedule for this docket. In addition to your review of the wording, please indicate whether you will require any additional testimony or discovery to supplement the record and, if so, how much time will you need. Also, please reaffirm whether you still wish to proceed by briefing the issue, as opposed to going back to a hearing mode.

Thanks for your attention to this matter.
Lee

KMC – FL – USTA II placeholder language:

On March 2, 2004 the United States Court of Appeals for the District of Columbia Circuit, in *United States Telecom Ass'n v.* FCC, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), affirmed in part, vacated in part, and remanded in part certain rules of the Federal Communications Commission ("FCC") concerning incumbent LECs' obligations to make elements of their networks available on an unbundled basis. In the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Docket No. CC 01-338. *USTA II* was stayed twice by the D.C. Circuit Court and was not in effect until the mandate was issued on June 15, 2004. The Parties have not incorporated into this agreement any changes that may be necessary as a result of USTA II. The Parties agree that this issuance of *USTA II* constitutes a revision or modification of the Applicable Rules under which this Agreement was negotiated and arbitrated. The Parties agree to enter into good faith negotiations to amend this Agreement to reflect such Amended Rules. If within sixty (60) days of the effective date of this Agreement the Parties are unable to reach agreement with respect to the applicability of such order or the resulting appropriate modifications to this Agreement required because of USTA II, either party may file the dispute with Commission, it being the intent of the parties that this Agreement shall be brought into conformity with the then current obligations under the Act as determined by the Amended Rules.

Comment: Do we need to add WHEN the parties will enter into these negotiations? Or is that covered by the next sentence?