

ORIGINAL

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From: Whitt, Chrystal [CC] [Chrystal.Whitt@mail.sprint.com]
Sent: Friday, March 18, 2005 4:42 PM
To: Filings@psc.state.fl.us
Subject: 041144-TP Sprint's Motion to Strike and Sprint's Response to KMC's Motion for Audit
Attachments: Sprint's Response to KMC's Motion for Audit.pdf; Sprint's Motion to Strike.pdf; BB COS.pdf

Filed on behalf of:

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Docket No. 041144-TP

Title of filing: 041144-TP Sprint's Motion to Strike and Sprint's Motion for Audit

Filed on behalf of: Sprint

No. of pages: 28

Description: Sprint-Florida, Incorporated's Motion to Strike the Answer, Affirmative Defenses and Counterclaim and Motion to Dismiss the Counterclaims or, in the Alternative, Motion to Bifurcate the Counterclaim, of KMC, and Sprint's Response to KMC's Motion for Audit.

- CMP _____
- COM 3
- CTR _____
- ECR _____
- GCL _____
- OPC _____
- MMS _____
- RCA _____
- SCR _____
- SEC 1
- OTH _____

3/21/2005

MOTION to STRIKE
DOCUMENT NUMBER-DATE
02697 MAR 18 '05

Response to
MOTION for AUDIT
DOCUMENT NUMBER-DATE
02698 MAR 18 '05
FPSC-COMMISSION CL FRK



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March 18, 2005

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. 041144-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated are:

1. Sprint-Florida, Incorporated's Motion to Strike the Answer, Affirmative Defenses and Counterclaim and Motion to Dismiss the Counterclaims or, in the Alternative, Motion to Bifurcate the Counterclaim, of KMC.
2. Sprint's Response to KMC's Motion for Audit.

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

If you have any questions regarding this electronic filing, please do not hesitate to call me at 850-599-1560.

Sincerely,

A handwritten signature in black ink that reads "Susan S. Masterton".

Susan S. Masterton

Enclosure

**CERTIFICATE OF SERVICE
DOCKET NO. 041144-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail this 18th day of March, 2005 to the following:

Division of Legal Services
Lee Fordham/ Dovie Rockette-Gray
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Nancy Pruitt/Ann Marsh
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Susan S. Masterton

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint-Florida, Incorporated)	Docket No. 041144-TP
Against KMC Telecom III LLC,)	
KMC Telecom V, Inc. and KMC Data LLC,)	
for failure to pay intrastate access charges)	
pursuant to its interconnection agreement and)	
Sprint's tariffs and for violation of)	
Section 364.16(3)(a), Florida Statutes.)	Filed: March 18, 2005

SPRINT-FLORIDA INCORPORATED'S MOTION TO STRIKE THE ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM AND MOTION TO DISMISS THE COUNTERCLAIM OR, IN THE ALTERNATIVE, MOTION TO BIFURCATE THE COUNTERCLAIM, OF KMC TELECOM III LLC, KMC TELECOM V, INC. AND KMC DATA LLC

Pursuant to Rule 28-106.204, Florida Administrative Code, Sprint-Florida, Incorporated (hereinafter, "Sprint-Florida") hereby files this Motion and requests that the Commission strike the Answer, Affirmative Defenses and Counterclaims filed by KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC filed on February 28, 2005 (hereinafter, "KMC Answer and Counterclaims.") KMC's pleadings are improper, untimely and are not authorized by the Order on Procedure, Order No. PSC-0125-PCO-TP, issued on January 30, 2005. In addition, and in the alternative, Sprint-Florida moves that the Counterclaims filed by KMC be dismissed in their entirety or in part as more fully set forth herein. Finally, should Sprint-Florida's Motions to Strike or Dismiss be denied, Sprint-Florida moves that the Commission bifurcate the Counterclaims from this proceeding, in whole or in part, and require that KMC pursue them in separate action to avoid undue prejudice to Sprint-Florida.

PROCEDURAL HISTORY

Sprint-Florida filed the Complaint that is the subject of this docket on September 24, 2004, alleging that KMC knowingly terminated interexchange traffic over its local

DOCUMENT NUMBER-DATE

02697 MAR 18 05

FILED - COMMUNICATIONS SECTION

interconnection arrangements with Sprint-Florida, in violation of Florida statutes, KMC's interconnection agreements with Sprint-Florida, and Sprint-Florida's tariffs. Sprint-Florida served KMC with its Complaint on September 24, 2004 electronically and via U.S. Mail. In addition, the Commission Clerk served KMC with a copy of the Complaint on September 28, 2004. The Case Activity Scheduling Record (CASR) for the docket established October 19, 2005 as the due date for KMC's response to Sprint-Florida's Complaint (25 days from the date of Sprint-Florida's filing). However, in accordance with Rule 28-106.204, Florida Administrative Code, KMC instead filed a Motion to Dismiss the Complaint on October 14, 2004. Sprint-Florida filed its Response to KMC's Motion on October 21, 2004 and, after oral argument from the parties, the Commission denied KMC's Motion at its Agenda Conference on November 30, 2004. Subsequently, an issue identification conference was held on January 19, 2005. At that meeting, consensus was reached by Commission staff and the parties concerning the issues to be addressed by the parties in their testimony and at the hearing. The Order on Procedure, setting forth various procedural dates and attaching the agreed to list of issues to be addressed in the proceeding, was issued on January 31, 2005. Direct testimony was due on February 28, 2005. On that date both parties filed their direct testimony as required by the procedural order. On that same date, KMC belatedly filed its Answer, Affirmative Defenses and Counterclaims to Sprint-Florida's original complaint, setting forth various allegations against Sprint-Florida in the counterclaims and also including allegations against Sprint Communications Company Limited Partnership (hereinafter, "Sprint LP"), which is not a party to Sprint-Florida's Complaint.

ARGUMENT

KMC's Answer, Affirmative Defenses and Counterclaims are Untimely and should be barred

Rule 28-106.203 of the Uniform Rules of Administrative Procedure, applicable to all administrative proceedings involving disputed issues of material fact, provides that a respondent to a petition "may file an answer." This provision of the administrative rules differs from the rules applicable in civil proceedings, in that in civil proceedings an answer is generally required, or certain facts are admitted and certain defenses are barred. See, Rule 1.140, Florida Rules of Civil Procedure In an administrative proceeding, the answer, if filed, provides, along with the Complaint, the framework for establishing the scope of the issues to addressed in discovery, testimony, and cross-examination. At the Commission, where pre-filed testimony is generally required, the tentative issues are developed at any early point in a proceeding. An answer that is filed after the issues have been identified and initial testimony has been prepared serves little, if any, purpose within this procedural framework.

While no specific time frame for an answer is provided in the uniform rule, it is the prerogative of the administrative body applying the rules to proceedings within its jurisdiction to establish the time frames within which the various pleadings must be completed. In establishing the initial due date for a response to a petition, the Commission generally recognizes the 20 day time frame set forth Rule 1.140, including any applicable extension of the time frame based on the method of service. In this docket, the original CASR established a due date of October 19, 2004 for KMC's response to Sprint-Florida's Complaint. In lieu of providing a response on October 19, KMC exercised its rights under Rule 28-106.204, F.AC, and filed a Motion to Dismiss Sprint-Florida's Complaint. KMC's Motion was ultimately denied by the Commission. The Commission Order reflecting this decision was issued on December 3, 2004.

In general, pursuant to the Florida rules of civil practice, a Motion to Dismiss "tolls" the time frame for providing an answer. (Rule 1.140(a)(2)) After the Motion to Dismiss is decided,

and if it is denied, the Florida Rules of Civil Procedure provide that an answer shall be provided within 10 days of the ruling or a different time fixed by the court.¹ In applying the “tolling” principle to this case there are several interpretations as to when KMC’s answer should have been filed. The most conservative interpretation would hold that KMC’s answer was due five days after the Order Denying the Motion to Dismiss, or December 18, 2005 (since five days remained from the prior time period when KMC filed its Motion to Dismiss). However, even under the most liberal construction of the effect of the tolling, KMC’s Answer should have been filed no later than 25 days (the full original response period) after the Order denying the Motion to Dismiss was issued, or by December 28, 2004. Yet, KMC did not file its answer (which included its statement of Affirmative Defenses and its Counterclaims) until 85 days after the Order was issued, that is, on February 28, 2005.

At the point when KMC filed its pleading, the issue identification had been held, the procedural order issued and the timeframes for filing testimony on the issues identified in the procedural order had been established (and in the case of the direct testimony had arrived). While the established time frames for filing pleadings can be waived upon good cause shown, KMC has offered no explanation for its delay in providing its responsive pleadings. Sprint-Florida believes that KMC’s failed to provide an explanation or justification because it has no legitimate basis for its actions. KMC knew that it intended to file an answer and counterclaims as early as the November 30, 2004, Agenda Conference during which KMC’s counsel noted KMC’s intent to do so. See 11-30-04 Agenda Conference Transcript at page 10

¹ Prior to the adoption of the Model Rules, the Commission rules provided for the same time frames embodied in the Rules of Civil Procedure. Former Rule 25-22.0037, F.A.C.

As apparent authority for its filing, KMC cites a Commission Order granting a motion by BellSouth for permission to file a Counterclaim subsequent to filing of its answer in a complaint proceeding involving a billing dispute with IDS. *In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC*, Order No. PSC-05-0608-PCO-TP, issued June 18, 2004 in Docket No. 031125-TP (hereinafter, "BST/IDS Complaint Proceeding" and "BST/IDS Counterclaim Order," respectively). In its Motion BellSouth had provided justification for its request to deviate from normal procedure to file its counterclaims at a relatively late point in the proceeding, including an allegation that it did not receive information necessary to its decision to file a counterclaim until shortly before its filing. (BST/IDS Counterclaim Order at pages 2 & 3) KMC made no such representation in its egregiously late-filed Answer and Counterclaim. To the contrary, from the face of KMC's pleadings it is clear that KMC does not rely on any information provided by Sprint-Florida subsequent to the filing of Sprint-Florida's Complaint.

In the BellSouth/IDS Counterclaim Order, the Commission specifically found that the acceptance of BellSouth's counterclaims would not delay the case or otherwise prejudice IDS.² (BST/IDS Counterclaim Order at page 9) In contrast, KMC's inordinately late filing of its Answer and Counterclaims severely prejudices Sprint-Florida in the prosecution of its Complaint. Since KMC's pleading was not filed until the same day as the Direct Testimony and there were no issues in the procedural order upon which Sprint-Florida could rely, Sprint-Florida was not able to address any of the factual issues or affirmative defenses raised in the pleading in

² In the BST/IDS Complaint proceeding, unlike the instant case, BellSouth's counterclaims were filed 5 weeks before the due date for direct testimony and 5 months before the hearing.

its direct testimony. In addition, Sprint-Florida was unable to serve any discovery on KMC to explore these issues prior to the due date for the testimony. As far as the Counterclaims, again Sprint-Florida had no opportunity to address or explore the issues raised in discovery or testimony, while KMC shamelessly included the procedurally improper Counterclaim issues in its direct testimony. In addition to the harm Sprint-Florida has already suffered from KMC's untimely filing, Sprint-Florida is prejudiced because if the Counterclaims are allowed to remain as part of this proceeding the inevitable result will be significant delay in the already established procedural schedule. In fact, Sprint-Florida believes that KMC's motivation for waiting so long to file its pleading is solely KMC's desire to delay the proceeding. This conjecture is supported by KMC's subsequent filing of a Motion for Continuance that was based in a large part on KMC's arguments that delay was necessary for KMC to pursue its Counterclaims and further supported by KMC's subsequent filing of a Motion for Audit requesting that the Commission conduct an audit of Sprint LP. Sprint-Florida is certain that a Motion to Stay the proceedings will not be far behind if KMC's Motion for Audit is granted.³

KMC's egregious delay in filing its Answer and Counterclaims is inexplicable and inexcusable and KMC makes no attempt in its pleading to explain or justify this unconscionable delay. As discussed above, Sprint-Florida can only surmise that KMC perceived these tactics would delay Sprint-Florida's efforts to prosecute its Complaint, to KMC's advantage. Were the Commission to condone KMC's egregious disregard for the Commission's standard practices and procedures, leading other parties to take a similar approach should they perceive a strategic

³ Another basis for KMC's Motion was its representation that a key witness would be unavailable on the original hearing date due to conflicts with hearings in other states. The parties have reached an agreement on a revised hearing date to accommodate the witness's lack of

advantage in doing so, the result would be procedural chaos. Therefore, Sprint-Florida urges the Commission to strike the Answer, Affirmative Defenses and Counterclaims as improper and procedurally barred.

Granting Sprint-Florida's Motion to Strike will not preclude KMC from pursuing its claims in an appropriate proceeding

Counterclaims are not recognized specifically in the Uniform Rules of Administrative Procedure, as this Commission has acknowledged. Rather, since the adoption of the Uniform Rules, in considering counterclaims raised in Commission proceedings, the Commission has relied on Rule 28-106.108, F.A.C., which allows consolidation of separate matters in the interest of the just, speedy and inexpensive resolution of issues, if no party is unduly prejudiced by the consolidation. See, BST/IDS Counterclaim Order at page 7 While the Rules of Civil Procedure relating to counterclaims are not strictly applicable, the case law interpreting those rules is instructive to the Commission's consideration of Sprint-Florida's request to strike KMC's pleadings. KMC's Counterclaims would be considered "permissive" rather than "compulsory" counterclaims, under the relevant rules of civil procedure and the applicable case law. In fact, in an administrative proceeding, arguably, there is no such thing as a compulsory counterclaim, since an answer is required. *Lawhorn v. Atlantic Refining*, 299 F 2d 353 (5th Cir. 1962) An analysis under the relevant case law distinguishing permissive and compulsory counterclaims also confirms that KMC's counterclaims are permissive. See, *Londono v. Turkey Creek*, 609 So. 2d 14 (Fla. 1992) (in which the Florida Supreme Court adopts the "logical relationship" test to determine if a counterclaim is compulsory). KMC's claims do not arise from the same transaction or factual circumstances upon which Sprint-Florida's complaint is based and they are

availability and KMC has subsequently withdrawn its Motion, though reserving its right to

not logically related to the facts or legal issues raised in Sprint-Florida's Complaint. KMC attempts to establish some nexus to Sprint-Florida's Complaint by alleging that at least some of the traffic for which it is claiming that access charges are due was terminated over Sprint-Florida's local interconnection trunks. However, it is clear that KMC's Counterclaim primarily is directed against Sprint LP, Sprint Corporation's Florida-registered long distance subsidiary, especially since a substantial amount of the traffic KMC bases its claims on apparently was terminated in areas outside Sprint-Florida's service territory. The significance of the distinction between compulsory and permissive counterclaims in the instant case is that a permissive counterclaim is not abandoned if it is not filed in response to an action so that there is no procedural bar to pursuing it in a separate proceeding. Since KMC's counterclaims are permissive, rather than compulsory, KMC is not prejudiced by a Commission order striking the Answer and Counterclaim, as Sprint-Florida has requested.

KMC's Pleading is an Improper Pleading filed only for the purposes of harassment and delay and should be stricken

As previously noted, KMC knew that it intended to file an answer and counterclaims as early as the Agenda Conference at which its Motion to Dismiss was considered and denied. In addition, at the January 19, 2005 Issue ID conference, KMC indicated that it was contemplating filing a counterclaim. When Sprint-Florida's counsel attempted to ascertain when KMC intended to file this counterclaim and expressed concerns about any delay in the schedule for Sprint-Florida's Complaint, KMC declined to say when its counterclaim might be filed. Though cognizant of Sprint-Florida's legitimate concerns about the timeliness of the filing, KMC waited more than a month from the date of the Issue ID to file its Answer and Counterclaims. Upon

pursue additional delays relating to the prosecution of its Counterclaims.

review, these Counterclaims raise issues unrelated to Sprint-Florida's Complaint, attempt to involve another Sprint Corporation subsidiary that is not a party to the Complaint, and raise allegations regarding unpaid access charges that have never been specifically communicated to Sprint-Florida or to Sprint LP.⁴ From the face of the Counterclaims it appears that KMC had or could have had all of the information it provides as support for its allegations to timely file the Counterclaims, rather than deliberately waiting until the issues and procedure were well established.

In addition to KMC's blatant disregard for Commission procedure evidenced by its inordinate and unjustified delay in filing its pleadings, KMC's counterclaims against Sprint-Florida and Sprint LP for unpaid access charges are so ambiguous and ill-founded that Sprint-Florida and Sprint LP cannot adequately ascertain the factual or legal basis for the allegations. KMC has cobbled together unrelated and unreliable purported "facts" and conclusions to assert ambiguous allegations against Sprint LP, while including Sprint-Florida in what appears to be a spurious attempt to create an illusion of a logical nexus with Sprint-Florida's Complaint. In fact, in apparent recognition of the complete deficiency of the factual basis for its allegations, KMC has filed a separate Motion for Audit (Sprint-Florida's response to which is being separately filed on this same date) in an attempt to inveigle the Commission into a "fishing expedition" that it hopes will provide some support for the wholly invented and unsubstantiated allegations in its counterclaim. Because of the unprecedented untimeliness of KMC's filing and the

⁴ The only "notice" Sprint-Florida or Sprint LP had regarding the access charge claims in KMC's counterclaim was general allusions by KMC that most of the traffic at issue in Sprint's Complaint against KMC was Sprint LP traffic. KMC has never billed either Sprint-Florida or Sprint LP for the traffic or provided Sprint with an identification of the timing, interconnection trunks or other details of the access traffic that was allegedly terminated over Sprint-Florida or some other LECs local interconnection trunks.

unconscionable insufficiency of the allegations in its pleading, Sprint-Florida is forced to conclude that KMC filed the allegations and the Motion for Audit solely for the purpose of harassing Sprint-Florida and delaying the Commission's consideration of Sprint-Florida's well-founded Complaint against KMC.

It is clear from KMC's behavior that it is determined to do anything, other than defend itself in a straightforward manner, to prevent Sprint-Florida from pursuing a fair resolution of its Complaint. KMC's pleading clearly meets the standard of a pleading filed for an improper purpose, as set forth in s. 120.595, F.S.⁵ While the intent of that statute is to afford the party who is on the receiving end of an improper filing the ability to recover the attorney fees it incurs to respond to ill-motivated pleadings, Sprint-Florida is not seeking such relief at this time. Rather, Sprint-Florida offers the improper nature of the pleadings as further support for Sprint-Florida's Motion to Strike KMC's Answer and Counterclaims. Sprint-Florida urges the Commission to thwart KMC's attempts to stonewall and impede the Commission's established procedures for handling disputes, causing Sprint-Florida and the Commission to unnecessarily waste and expend resources to respond. To the extent KMC has any valid grounds for a Complaint against Sprint-Florida or Sprint LP, striking these untimely, procedurally improper and substantively deficient pleadings will not jeopardize KMC's right to pursue these claims in another proceeding. At that time Sprint-Florida and Sprint LP stand ready to defend against KMC's unfounded and unsubstantiated allegations that either company avoided access charges as KMC has charged.

⁵ Section 120.595, F.S., defines an "improper purpose" to mean "participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

If the Commission grants Sprint-Florida's Motion to Strike KMC's Answer and Counterclaims as set forth above, further pleadings regarding the legal sufficiency of these pleadings are not required. However, in the event the Commission does not grant Sprint-Florida's Motion to Strike, in the alternative Sprint-Florida offers the following additional grounds for dismissal or, in the alternative bifurcation, of KMC's Complaint.

KMC's Counterclaim against Sprint LP should be dismissed as Sprint LP is not a party to the original action

As far as the allegations in Count IV of KMC's Counterclaim can be reasonably deciphered, they appear to represent claims against Sprint LP, which is not a party to Sprint-Florida's underlying Complaint against KMC. (KMC's Answer and Counterclaims at paragraph 30)⁶ Sprint LP is a Delaware corporation that is a subsidiary of Sprint Corporation, which is also Sprint-Florida's corporate parent. Sprint LP is a registered (formerly certificated) long distance company in Florida, while Sprint-Florida is a certificated incumbent local exchange company. While they share a corporate parent, they are entirely separate entities that operate independently, including offering separate and distinct services in Florida, under different certificates, and pursuant to different regulatory structures. Rule 1.170 of the Florida Rules of Civil Procedure allows a party to file a permissive counterclaim only against an opposing party. The corollary rule of Administrative Procedure, Rule 28-106.109, F.A.C., allows consolidation of proceedings that involve similar issues of law or fact or identical parties (but then only if consolidation would not unduly prejudice the rights of a party).

As previously discussed, KMC's Counterclaims against Sprint LP are not based on facts or law similar to the facts and law raised by Sprint-Florida's Complaint against KMC. Sprint-

⁶ In addition, Counts I and II also appear to substantially involve Sprint LP.

Florida's Complaint alleges that KMC violated s. 364.16(3)(a), F.S., which prohibits local exchange companies from terminating access traffic over local trunks without paying the applicable access charges and also that KMC violated its interconnection agreements with Sprint-Florida by terminating interexchange traffic over local trunks and, therefore, not paying Sprint-Florida's tariffed access charges. KMC's claims against Sprint LP are necessarily grounded in different facts and law, since Sprint LP is not a local exchange company, could not have violated s. 364.16(3)(a), F.S. and does not have an interconnection agreement with KMC. In fact, KMC emphasizes that its claim differs from Sprint-Florida's claim against KMC in paragraph 11 of the Counterclaim, where KMC states "there is no evidence that the access traffic being redirected [by Sprint to KMC] is enhanced services traffic, unlike the traffic at issue in Sprint's Complaint." In addition, KMC's allegations against Sprint LP involve termination of traffic in areas outside of Sprint-Florida's service territory and, by implication, involve the activities of other ILECs or CLECs who are not named and who are not parties to Sprint-Florida's Complaint. KMC's Answer and Counterclaims at paragraph 10 Therefore, it is clear that KMC's allegations against Sprint LP are not grounded on similar facts or law to Sprint-Florida's underlying Complaint, and, therefore, do not meet the first criterion set forth in Rule 28.106.108, F.A.C.

While the Rules of Civil Procedure are not strictly applicable to administrative proceedings they and the related cases are instructive. Rule 1.170 clearly does not allow a permissive counterclaim to include allegations against a nonparty to the underlying Complaint. See, *Smith v. Whispering Pine Village*, 656 So. 2d 623 (Fla. 5th DCA 1995) Similarly, Rule 28-108, F.A.C., refers to "identical parties" when describing circumstances when consolidation might be allowed. Because KMC's counterclaim against Sprint LP is permissive counterclaim

that does not involve similar facts or law and because Sprint LP is not a party to Sprint-Florida's Complaint, the Commission should dismiss KMC's counterclaims against Sprint LP from this proceeding.

The Commission does not have subject matter jurisdiction over KMC's claim that Sprint-Florida violated its Settlement Agreement with KMC

In Count III of its Counterclaim, KMC alleges that Sprint-Florida has violated a Confidential Settlement and Release Agreement executed by the parties to resolve various reciprocal compensation disputes in various states. (KMC's Answer and Counterclaim at paragraph 27) The Confidential Settlement and Release Agreement was never filed with or approved by this Commission (nor was it required to be).

The Commission has recognized that it has no general authority to enforce contracts. The Commission also has recognized that it has specific authority to enforce the terms of interconnection agreements and amendments to those agreements, based on its statutory authority to approve those agreements. See, BST/IDS Complaint Proceeding, Order No. PSC-04-0425-FOF-TP, issued April 26, 2004 in Docket No. 031125-TP (hereinafter "BST/IDS Dismissal Order")⁷ In Count III KMC makes no allegations that Sprint-Florida has violated the provision of any interconnection agreement or amendment to an interconnection agreement filed and approved by the Commission. Rather, KMC alleges solely a violation of the contractual Confidential Settlement and Release Agreement executed by the parties (KMC Answer and Counterclaim at paragraph 27). In the BST/IDS Dismissal Order, the Commission dismissed a claim filed by IDS against BellSouth based on its lack of subject matter jurisdiction to resolve contractual disputes. (at page 9) Similarly, the Commission lacks subject matter jurisdiction over

KMC's claims against Sprint-Florida, and, therefore, should dismiss Count III of KMC's counterclaim.

KMC's Counterclaims concerning Sprint-Florida's and Sprint LP Failure to Pay Access Charges Should be Dismissed for Failure to State a Cause of Action and failure to comply with Rule 28-206.201, F.A.C.

In order for a Petition to survive a Motion to Dismiss, the Commission must find that a Complaint (or counterclaim), taking all of the factual allegations contained in the four corners of the pleading as true, states a cause of action upon which the Commission may grant relief. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993) In addition, Rule 28-106.201, F.A.C., requires that a petition for a formal proceeding must contain ultimate facts that demonstrate that the petitioner is entitled to relief. Therefore, in order to "state a cause of action" KMC's counterclaim must contain allegations of ultimate fact relating to all of the elements of the causes of action upon which its claims are based. KMC's Counterclaim fails to meet these standards because it fails to allege facts, even in the barest form, that demonstrate that Sprint-Florida or Sprint LP avoided paying access charges rightfully due to KMC. For instance, KMC alleges that Sprint-Florida violated its interconnection agreements by terminating interexchange traffic over local trunks, although KMC neglects to cite the particular interconnection agreements or provisions of those agreements that it is alleging Sprint-Florida violated. (Answer and Counterclaim at ¶¶ 2, 17) In addition, KMC alleges that Sprint-Florida and Sprint LP violated KMC's tariffs by failing to pay access charges, although the applicable provisions of the tariff are not cited. Answer and Counterclaim at ¶¶ 2, 31)

² See, also, s. 364.162, F.S., and *BST v. MCIMetro Access Transmission Serv.*, 317 F. 3d 1270 (11th Cir. 2003)

The essential factual allegation upon which KMC appears to base its claims is that the access minutes of traffic that Sprint LP terminated to KMC have decreased or varied from March 2002 through January 2005. (Answer and Counterclaims at ¶¶ 4, 9, 10, and 14) Sprint-Florida is aware of no law, rule, tariff or agreement that mandates that an IXC maintain a certain level of traffic. Yet, it is on this basis that KMC alleges that access traffic was terminated to KMC over local interconnection trunks, either by Sprint-Florida or other unidentified local exchange companies. In making these allegations, KMC fails to identify or enumerate the amount of traffic that it alleges was improperly terminated and entirely fails to provide any information to support its claim that any of the reduction in access traffic it observed was ultimately delivered to KMC over any ILEC local interconnection trunks. Rather, KMC engages in rank speculation as to the cause of this decrease that violates the basic principles of logic by assuming without foundation that if one thing is true, then the other must necessarily follow. (Answer and Counterclaims at ¶ 11) KMC's pleadings are so deficient in identifying the time frame, specific location, specific traffic or specific entity that is responsible for any of the traffic that KMC alleges Sprint-Florida and Sprint LP owe access charges that Sprint-Florida and Sprint LP are unable to respond in any coherent or meaningful fashion to the allegations in KMC's Counterclaims.

For these reasons, KMC's Counterclaims fail to state a cause of action upon which the Commission may grant relief and fail to comply with the requirements of Rule 28-106.201, F.A.C., and, therefore, should be dismissed. This dismissal should be without prejudice to KMC's right to re-file its claims in a separate proceeding. In that event, Sprint-Florida and Sprint LP would expect that KMC would cure the defects in its pleading described in this Motion and file a properly pled Complaint that would enable Sprint-Florida or Sprint LP to meaningfully respond.

Even if KMC's Counterclaims are not dismissed they should be bifurcated to a separate proceeding

Rule 1.270 of the Florida Rules of Civil Procedure allow the court to separate claims if doing so would be in furtherance of convenience or would avoid prejudice. Similarly, Rule 28-106.211, F.A.C., allows a proceeding to be bifurcated if it will prevent delay and promote the just, speedy and inexpensive determination of a case. As delineated above, the inclusion of KMC's procedurally improper, untimely, poorly pled, and unrelated counterclaims against Sprint-Florida and Sprint LP in this proceeding will prejudice and delay Sprint-Florida's pursuit of its Complaint. To the extent that the Commission does not grant Sprint-Florida's Motions to Strike or Dismiss set forth above, Sprint-Florida requests that to prevent delay and to promote the just and speedy determination of Sprint-Florida's claims, the Commission bifurcate KMC's claims into a separate proceeding.

Bifurcation will further the interests of justice in that it will not reward KMC for its dilatory behavior in waiting more than five months to file its counterclaims, without any explanation or justification. Also, it will avoid prejudice to Sprint-Florida that would result from a delay in the resolution of Sprint-Florida's complaint, which Sprint-Florida properly filed and has pursued in good faith and in accordance with the Commission's established procedures. KMC will not be prejudiced by bifurcation, because there is no logical relationship between KMC's counterclaims and Sprint-Florida's Complaint, so there is no disadvantage to KMC to pursue its claims separately. In addition, adding KMC's counterclaims to this proceeding will necessitate a completely revised schedule to establish new issues, new testimony filing dates and likely a new hearing date, the same as would be required if KMC pursues its counterclaims separately. Therefore, no efficiencies or economies will be gained by hearing KMC's claims in

the same proceedings as Sprint-Florida's. Rather, as described above, Sprint-Florida will be prejudiced by the delays and inefficiencies that would accompany the inclusion of KMC's counterclaims at this stage of the proceeding.

CONCLUSION

KMC has abused the Commission's process by filing egregiously untimely and procedurally and substantively improper Answer and Counterclaim. Allowing these pleadings to be included in this docket at this late date would unduly prejudice Sprint-Florida's pursuit of the relief requested in its Complaint.

Wherefore Sprint-Florida requests that the Commission:

Strike KMC's Answer, Affirmative Defenses and Counterclaims; or

Dismiss KMC's claims for failure to state a cause of action; or

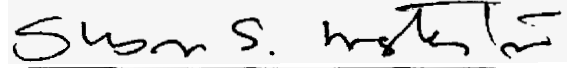
Dismiss KMC's claims against Sprint LP since it is not a party to Sprint-Florida's Complaint and, therefore, is improperly included; or

Dismiss Count III of KMC's Counterclaim for lack of subject matter jurisdiction to enforce the terms of the Confidential Settlement and Release Agreement; or

In the alternative, bifurcate the Counterclaims pursuant to the Commission's authority in Rule 28-106.211, F.A.C.

To the extent the Commission denies Sprint-Florida's Motions in whole or in part, Sprint-Florida and Sprint LP reserve their rights to file any responsive motions or other appropriate pleadings allowed by law.

Respectfully submitted this 18th day of March 2005.



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