

BEFORE THE PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 041144-TP  
ORDER NO. PSC-05-0695-PHO-TP  
ISSUED: June 24, 2005

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on June 20, 2005, in Tallahassee, Florida, before Commissioner Rudolph "Rudy" Bradley as Prehearing Officer.

APPEARANCES:

SUSAN S. MASTERTON, Esquire, Sprint-Florida, Inc., 1313 Blair Stone Road, Tallahassee, Florida  
On behalf of Sprint-Florida, Incorporated ("SPRINT").

FLOYD R. SELF, Esquire, Messer, Caparello & Self, P.A., 215 South Monroe Street, Suite 701, Tallahassee, Florida 32301; and EDWARD A. YORKGITIS, JR., Esquire, Kelley Drye & Warren LLP, 1200 19<sup>th</sup> Street, N.W., Fifth Floor, Washington, D.C. 20036  
On behalf of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC. ("KMC").

BETH KEATING, Esquire, and LEE FORDHAM, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Commission ("STAFF").

**PREHEARING ORDER**

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

DOCUMENT NUMBER-DATE

06021 JUN 24 05

FPSC-COMMISSION CLERK

## II. CASE BACKGROUND

On September 24, 2004, Sprint-Florida, Incorporated (Sprint) filed its complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively KMC) 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. On January 31, 2005, Order No. PSC-05-0125-PCO-TP was issued, establishing the procedures to govern the conduct of the parties in the resolution of this Docket. Thereafter, the schedule for this matter was modified by Order No. PSC-05-0402-PCO-TP, issued April 18, 2005. This matter is set for hearing July 12, 2005.

## III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Service's confidential files.

#### IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 50 pages, and shall be filed at the same time.

#### V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the

opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

| <u>WITNESS</u>   | <u>PROFFERED BY</u> | <u>ISSUES</u>              |
|--|---------------------|----------------------------|
| <b><u>DIRECT &amp; REBUTTAL</u></b>  |                     |                            |
| William L. Wiley   | SPRINT              | 4, 5, and 8                |
| James A. Burt  | SPRINT              | 1, 3, 4, 5, 6, 7, 8, and 9 |
| Christopher M. Schaffer  | SPRINT              | 2 and 5                    |
| Ritu Aggarwal (Adopting the Direct Testimony of Kenneth A. Farnan and filing Rebuttal Testimony) | SPRINT              | 5, 7, and 8                |
| Mitchell S. Danforth (Direct only)   | SPRINT              | 10 and 11                  |
| Marva Brown Johnson  | KMC                 | All Issues                 |
| Christopher S. Meiner  | KMC                 | 6                          |
| Ronald Twine (adopting, and to be substituted for Timothy E. Pasonski) <sup>1</sup>              | KMC                 | 4 – 8, 10 and 11           |
| Paul J. Calabro (Rebuttal only)  | KMC                 | 4 – 8, 10 and 11           |

<sup>1</sup> On June 7, 2005, KMC filed substitute pages 1 and 2 for Mr. Twine to replace pages 1 and 2 through 9 of the Direct Testimony of Witness Pasonski. Also, KMC filed a substitute page 1 to replace page 1 of Witness Pasonski's Rebuttal Testimony.

VII. BASIC POSITIONS

**SPRINT:** KMC has engaged in systematic, continuous and intentional actions to avoid paying Sprint access charges rightfully due Sprint for interexchange traffic delivered to Sprint by KMC for termination by Sprint to Sprint end users. KMC has knowingly terminated interexchange traffic over its local interconnection arrangements to Sprint. KMC's actions violate the terms of its interconnection agreements with Sprint, Sprint's tariffs and section 364.16(3)(a), Florida Statutes.

**KMC:** The traffic at issue in this proceeding is not toll traffic subject to access charges, as Sprint claims, but rather it is enhanced services traffic associated with KMC's provisioning of local PRIs to an enhanced services provider customer. The FCC has determined that enhanced services traffic in the form of IP telephony traffic, such as the VoIP traffic at issue here, is interstate in nature and not subject to access charges. The customer in this case represented itself to KMC and has consistently represented itself to all as an enhanced services provider. KMC was entitled to rely upon such representations and, under the FCC's policies, rules, and decisions, KMC was required to treat the enhanced service provider as an end user customer that can purchase local PRIs. Since the FCC has determined that enhanced services providers are entitled to treatment as local end user customers, and that enhanced services are not subject to access charges, the local calls they generate over local PRIs are appropriately classified as local in nature and are not subject to access charges. Contrary to Sprint's focus on the originating and terminating points of each call, under the FCC's policies, rules, and decisions, IP telephony calls are not subject to access charges, except for traffic that falls squarely within the scope of the FCC's two *AT&T Declaratory Ruling* decisions, neither of which is applicable here. If it is determined that this customer was not an enhanced services provider or that this was not enhanced services traffic for which KMC was required to provide local PRIs or IP telephony traffic exempt from access charges, then any access charges that may be due would be due from the customer and/or the interexchange carriers associated with this traffic and not from KMC. In addition to failing its burden of proof as to KMC's liability in this case, Sprint has also failed to meet its burden of proof with respect to its calculations of access charges and other reciprocal compensation adjustments. In the final analysis, because this traffic was properly treated as enhanced services traffic which was entitled to local PRIs, all of Sprint's claims in this case must fail.

**STAFF:** Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

**VIII. ISSUES AND POSITIONS**

**ISSUE 1: WHAT IS THE FLORIDA PUBLIC SERVICE COMMISSION'S JURISDICTION TO ADDRESS ALL OR PART OF THIS COMPLAINT?**

**SPRINT:** The Commission has jurisdiction to address Sprint's Complaint pursuant to 47 U.S.C. §§ 152, 251 and 252 and pursuant to sections 364.01, 364.16, 364.162 and 364.163, Florida Statutes.

**KMC:** The traffic at issue in this proceeding is associated with the local PRIs that KMC provided to an enhanced services provider customer under KMC's intrastate CLEC authority because under applicable federal rules and regulations, KMC was required to treat the customer as an end user customer. The FCC has determined that enhanced services traffic in the form of IP telephony traffic, such as the VoIP traffic at issue here, is interstate in nature, and that the FCC is the final arbiter of the appropriate treatment of such traffic, including for purposes of intercarrier compensation. Although the Florida PSC approved the interconnection agreements under which KMC and Sprint exchange traffic, the parties exchanged the traffic in question pursuant to federal policies and long-standing treatment of IP-Telephony traffic as local in nature and not subject to access charges.

**STAFF:** Staff has no position at this time.

**ISSUE 2: ARE KMC DATA LLC AND KMC TELECOM V, INC. PROPERLY INCLUDED AS PARTIES TO THIS COMPLAINT?**

**SPRINT:** Yes. All three entities are parties to applicable interconnection agreements with Sprint. In addition, KMC III and KMC V have engaged in specific actions related to the improper and unlawful delivery by KMC of access traffic for termination to Sprint end users over KMC's local interconnection trunks with Sprint.

**KMC:** No, KMC Data and KMC V are not properly parties to this case. KMC Data and KMC V never had any customers and never exchanged any traffic with Sprint. The traffic in question was solely associated with KMC III – the trunks were ordered and paid for by KMC III and KMC III alone. Sprint has offered no evidence linking KMC Data to any of the calls. The mere fact that KMC Data has an interconnection agreement with Sprint-Florida is not enough to make it a defendant in this case if KMC Data never exchanged traffic with Sprint-Florida. Sprint has offered only marginally more evidence linking KMC V to any of the traffic at issue: the OCNs for the telephone numbers associated with the calls in question were assigned to KMC V. However, the fact that KMC III used the KMC V numbers does not change the fundamental fact that the traffic at issue was KMC III traffic, and not exchanged between KMC V and Sprint-Florida.



**STAFF:** Staff has no position at this time.

**ISSUE 3:** **UNDER THE INTERCONNECTION AGREEMENTS WITH KMC OR SPRINT'S TARIFFS, IS SPRINT REQUIRED TO CONDUCT AN AUDIT AS A CONDITION PRECEDENT TO BRINGING ITS CLAIMS AGAINST KMC OR FOR KMC TO BE FOUND LIABLE?**

**SPRINT:** No. Neither Sprint's interconnection agreements nor Sprint's tariffs require Sprint to conduct an audit as a condition precedent to pursuing its claims against KMC.

**KMC:** The Commission has determined in denying KMC's motion to dismiss or motion for an audit that an audit is not a condition precedent to the bringing of a complaint. Order No. PSC-04-1204-FOF-TP, issued December 3, 2004. In the event the Commission determines that access charges can be assessed on the traffic in question, then any access charges that may be due to Sprint should be collected, as with interexchange traffic as a general matter, from the calling party customer and/or the interexchange carrier(s) associated selected by the calling party, but *not* from KMC. Significantly, Sprint-Florida's testimony and responses in discovery reveal that Sprint is able to identify IXCs involved in carrying the traffic in question. Assuming that Sprint is correct that the traffic in question was interexchange traffic subject to access charges, Sprint failed to mitigate its damages by identifying and billing the IXCs involved which, under its tariffs, are the parties responsible for the payment of access charges. If the Commission were to determine that KMC was responsible for any portion of this traffic, this would amount to the establishment of a PIU for the local interconnection trunks, and Sprint's tariff *requires that such a PIU be established only after an audit.*

**STAFF:** Staff has no position at this time.

**ISSUE 4:** **WHAT IS THE APPROPRIATE METHOD TO DETERMINE THE JURISDICTIONAL NATURE AND COMPENSATION OF TRAFFIC?**

**SPRINT:** The jurisdictional nature and applicable compensation for the traffic delivered by KMC to Sprint for termination to Sprint end users should be based on the end points of the calling and called parties. As demonstrated by the evidence presented by Sprint in its testimony and exhibits, the calls that are the subject of Sprint's Complaint originate from end user customers outside the local calling area of the Sprint end users to whom the calls are terminated. And, even if KMC's Customer X is considered *arguendo* to be the KMC end user from which the calls originate, the calls are jurisdictionally interexchange calls for which access charges are due.

**KMC:** The FCC has determined that enhanced services providers are not to be regulated as common carriers, and that enhanced services are not subject to access charges. Rather, the FCC has determined that enhanced service providers are to be treated like end users and are able to purchase local services from local exchange carriers, such as KMC. KMC was required to provide enhanced services providers with end user services, such as the local PRIs, that KMC did in this situation. Since enhanced services providers are end users, the local calls they generate are appropriately classified as local in nature and are not subject to access charges. The FCC has further determined that, notwithstanding the originating and terminating points of an IP telephony call, IP telephony calls are not subject to access charges, except for traffic that falls squarely within the scope of the FCC's two *AT&T Declaratory Ruling* decisions. Sprint bears the burden of demonstrating that the calls in question fall within the scope of those two decisions or are otherwise subject to access charges if it seeks to assess access charges for such calls. Sprint has failed to do so. Sprint has already charged and KMC has paid reciprocal compensation for such traffic, which is consistent with the treatment, under the FCC's policies, rules, and decisions, with the treatment of KMC's customer as an end user entitled to purchase local PRI services, which it did.

**STAFF:** Staff has no position at this time.

**ISSUE 5:** **DID KMC KNOWINGLY DELIVER INTEREXCHANGE TRAFFIC TO SPRINT OVER LOCAL INTERCONNECTION TRUNKS IN VIOLATION OF SECTION 364.16(3)(A), FLORIDA STATUTES? IF YES, WHAT IS THE APPROPRIATE COMPENSATION AND AMOUNT, IF ANY, DUE TO SPRINT FOR SUCH TRAFFIC?**

**SPRINT:** Yes. As demonstrated by the evidence presented by Sprint in its testimony and exhibits and in discovery responses from KMC, KMC knowingly received access traffic from its Customer X, inserted a charge party number local to the local calling area where the calls were terminated to Sprint's end users (even though neither the calling parties nor Customer X were physically located in these local calling areas) and sent this access traffic over its local interconnection trunks with Sprint to avoid access charges in violation of Section 364.16(3)(a), Florida Statutes. The appropriate compensation due Sprint for this traffic is the access charges that should have been paid, minus any reciprocal compensation payments. Sprint has determined that \$3,466,521 is due through March 2005.

**KMC:** No, KMC did not knowingly deliver interexchange traffic to Sprint over local interconnection trunks. KMC provided its enhanced services provider customer with local PRIs, consistent with, and as required by, the policies, rules, and decisions of the FCC. The traffic was appropriately treated and handled as if it were local exchange traffic. KMC has already paid reciprocal compensation for



the traffic in question. No additional or different compensation is due from KMC to Sprint for this traffic.

**STAFF:** Staff has no position at this time.

**ISSUE 6:** **WAS ANY OF THE TRAFFIC THAT IS THE SUBJECT OF SPRINT'S COMPLAINT ENHANCED SERVICES TRAFFIC? IF YES, HOW IS ENHANCED SERVICES TRAFFIC DELIVERED TO SPRINT FROM KMC TO BE TREATED UNDER THE INTERCONNECTION AGREEMENTS, SPRINT'S TARIFFS, AND APPLICABLE LAW?**

**SPRINT:** Sprint has no way of distinguishing enhanced services traffic from any other voice traffic it receives over local interconnection trunks. Billing records that Sprint has examined for certain calls originated and terminated to Sprint end users show that the traffic that is the subject of Sprint's Complaint is not enhanced services traffic, but is plain old voice telecommunications traffic. While KMC has alleged that the traffic is enhanced services or VoIP traffic, KMC has presented no evidence to show that the traffic is truly enhanced services traffic. And, even if the internet protocol is used at some point in the routing of the call, pursuant to the *AT&T Declaratory Ruling*, the traffic is telecommunications traffic for which applicable access charges are due.

**KMC:** Yes, except for a small amount of call forward traffic, all of the remaining traffic at issue was enhanced services traffic from one KMC customer, and such enhanced services traffic was limited to the time period of approximately June 2002 to June 2004. KMC was and is required to provide enhanced services provider customers that request them local PRIs. The customer in question presented itself to KMC as an enhanced services provider. The type of enhanced services, IP telephony, provided by that customer do not fall within a category of traffic for which the FCC has determined access charges are appropriate. The traffic KMC received over those local PRIs was then delivered to Sprint over local interconnection trunks between KMC and Sprint in the Tallahassee and Ft. Myers markets. Sprint's position that access charges apply for each call where the calling party number and called party number information are not within in the same local calling area completely ignore KMC's obligations to provide enhanced services provider customers with local PRIs, in which case the calling and called party number information becomes irrelevant. There is nothing in the interconnection agreements or Sprint tariffs that abrogate KMC's legal obligation to provide local PRIs to enhanced services provider customers. Sprint's position also ignores the policies, rules, and decisions of the FCC which hold that, except in limited and specific circumstances which are not present here, access charges are not applicable to IP telephony. As the party seeking to collect access charges on the traffic in question, Sprint has the burden of proof; it cannot shift that burden of proof to KMC simply by billing KMC access charges.

**STAFF:** Staff has no position at this time.

**ISSUE 7:** **WAS KMC REQUIRED TO PAY SPRINT ITS TARIFFED ACCESS CHARGES FOR THE TRAFFIC THAT IS THE SUBJECT OF THIS COMPLAINT? IF YES, WHAT IS THE APPROPRIATE AMOUNT, IF ANY, DUE TO SPRINT FOR SUCH TRAFFIC?**

**SPRINT:** Yes. Since the traffic KMC terminated to Sprint is interexchange traffic, KMC is required to pay access charges to Sprint for this traffic. Sprint has determined that \$3,466,521 is due through March 2005.

**KMC:** No, KMC is not liable for access charges on any of this traffic because the traffic in question is IP telephony traffic. The FCC has made clear that, as a general matter, access charges are not due for IP telephony. Only in limited circumstances, which Sprint has not demonstrated are present here, can Sprint assess access charges on IP telephony. KMC was entitled to accept its customer's self certification as an enhanced services provider offering IP telephony services. KMC was required to provide the customer, upon request, with local PRIs, which is what KMC did. The FCC could, in the future, determine that the traffic in question was not enhanced services provider or IP telephony traffic for which KMC was required to provide local PRIs. In that case, any access charges that may be due would be due from the customer and/or the interexchange carriers associated with this traffic and not from KMC. KMC does not agree with the access charge calculations submitted by Sprint. Sprint has repeatedly failed to provide KMC with the underlying data necessary to verify the alleged charges under Sprint's assumptions regarding the nature of the traffic and KMC's liability for compensation.

**STAFF:** Staff has no position at this time.

**ISSUE 8:** **DID KMC DELIVER INTEREXCHANGE TRAFFIC TO SPRINT OVER LOCAL INTERCONNECTION TRUNKS IN VIOLATION OF THE TERMS OF THE INTERCONNECTION AGREEMENTS WITH SPRINT? IF YES, WHAT IS THE APPROPRIATE AMOUNT, IF ANY, DUE TO SPRINT FOR SUCH TRAFFIC?**

**SPRINT:** Yes. The parties' interconnection agreements require local and interexchange traffic to be terminated over separate trunks. Each party is responsible for ensuring that it complies with terms of the interconnection agreements. The traffic that is the subject of Sprint's Complaint is interexchange traffic, that KMC wrongfully terminated over its local interconnection trunks with Sprint, in violation of the applicable interconnection agreements. Sprint has determined that \$3,466,521 is due through March 2005.

**KMC:** No. KMC did not knowingly deliver interexchange traffic to Sprint over local interconnection trunks in violation of the terms of the Interconnection Agreement. No additional amount beyond that which KMC has already paid is due to Sprint from KMC in connection with the traffic at issue in this proceeding. If, in fact, it is determined that access charges are due for this traffic (see discussion under Issue 7), Sprint must refund the compensation KMC has paid for this traffic.

**STAFF:** Staff has no position at this time.

**ISSUE 9:** **TO WHAT EXTENT, IF ANY, IS SPRINT'S BACKBILLING LIMITED BY ITS INTERCONNECTION AGREEMENTS WITH KMC, SPRINT'S TARIFFS, OR OTHER APPLICABLE LAW?**

**SPRINT:** Sprint's backbilling is limited, if at all, by the applicable statutes of limitations.

**KMC:** To the extent that Sprint is seeking access charges from KMC, Sprint is limited by its tariff such that it can only back bill access charges for the quarter in which an audit is completed and the quarter prior to the audit. Section 95.11, Florida Statutes, would otherwise generally apply.

**STAFF:** Staff has no position at this time.

**ISSUE 10:** **DID SPRINT OVERPAY RECIPROCAL COMPENSATION TO KMC? IF YES, WHAT IS THE APPROPRIATE REFUND, IF ANY, DUE TO SPRINT?**

**SPRINT:** Yes. By sending non-local access minutes to Sprint over local facilities, KMC inflated the amount of local or "voice" traffic, and, as a result, Sprint overpaid reciprocal compensation by three times for the minutes of use that KMC incorrectly routed in this fashion. Because the contractual local or "voice" rates are substantially higher than the ISP-bound traffic rates, Sprint overpaid by that rate differential multiplied by the number of minutes that were sent incorrectly as if they were local or "voice" traffic. Sprint has overpaid KMC at least \$741,396 in reciprocal compensation as a result of sending access traffic to Sprint over local facilities.

**KMC:** No, Sprint did not overpay reciprocal compensation to KMC. Consistent with applicable law, KMC properly paid Sprint reciprocal compensation on the traffic in question. Sprint's payment of reciprocal compensation to KMC was, in part, based upon the amount of traffic for which KMC paid Sprint reciprocal compensation. No refund is appropriate. In the event it is determined that the traffic in question was not enhanced services provider or IP telephony traffic for which KMC was required to provide local PRIs and for which reciprocal compensation was due, then any access charges that may be due would be due

from the customer and/or the interexchange carriers associated with this traffic and not from KMC. In this situation there may need to be an accounting for the reciprocal compensation paid, which should be done by an independent third party or the Commission.

**STAFF:** Staff has no position at this time.

**ISSUE 11:** IF THE COMMISSION DETERMINES THAT KMC OWES SPRINT COMPENSATION FOR ANY TRAFFIC DELIVERED BY KMC TO SPRINT THAT IS THE SUBJECT OF THIS COMPLAINT OR REFUNDS FOR OVERPAYMENT OF RECIPROCAL COMPENSATION, WHAT ARE THE APPROPRIATE PAYMENT ARRANGEMENTS?

**SPRINT:** KMC should be required to pay Sprint within ten days of the Commission's final order all monies determined to be due to Sprint.

**KMC:** In the event it is determined that this was not enhanced services provider or IP telephony traffic for which access charges were inappropriate, then any access charges that may be due would be due from the customer and/or the interexchange carriers associated with this traffic and not from KMC. An accounting shall be necessary to reconcile reciprocal compensation payments already made between KMC and Sprint (and those which Sprint has not yet paid and which are past due). Any amounts that may be due from KMC to Sprint should be held in abeyance pending the resolution of KMC's reciprocal and offsetting claims which the Commission has directed be filed in a separate docket.

**STAFF:** Staff has no position at this time.

IX. EXHIBIT LIST

| <u>WITNESS</u>               | <u>PROFERRED BY</u> | <u>I.D. NO.</u>                          | <u>DESCRIPTION</u>                              |
|------------------------------|---------------------|--|---|
| <u>DIRECT &amp; REBUTTAL</u> |                     |  |   |
| Wiley                        | SPRINT              | <u>                    </u><br>(WLW - 1) | Agilent BI Overview and Rev. Assurance Overview |
| Wiley                        | SPRINT              | <u>                    </u><br>(WLW - 2) | Access Bypass Study Results (CONFIDENTIAL)      |
| Wiley                        | SPRINT              | <u>                    </u><br>(WLW - 3) | Agilent CDRs (CONFIDENTIAL CD only)             |

| <u>WITNESS</u>                         | <u>PROFERRED BY</u> | <u>I.D. NO.</u>   | <u>DESCRIPTION</u>  |
|--|---------------------|-------------------|---|
| Wiley                                  | SPRINT              | (REVISED WLW - 4) | Brian K. Staihr Affidavit   |
| Wiley                                  | SPRINT              | (REVISED WLW - 5) | KMC-Random Sample CDRs (CONFIDENTIAL CD only)   |
| Wiley                                  | SPRINT              | (WLW - 6)         | KMC Interconnection and Transport to Customer X                                       |
| Wiley                                  | SPRINT              | (WLW - 7)         | Company X switch (Gateway) Location   |
| Burt                                   | SPRINT              | (JRB - 1)         | Parts of KMC's Supp Res to Sprint's ROG 15, POD 5 (CONFIDENTIAL)                      |
| Burt                                   | SPRINT              | (JRB - 2)         | Sprint customer Call Examples (CONFIDENTIAL)  |
| Schaffer                               | SPRINT              | (CMS - 1)         | KMC's Corporate Structure from Docket No. 020143-TP                                   |
| Schaffer                               | SPRINT              | (CMS - 2)         | LERG Screen Prints  |
| Schaffer                               | SPRINT              | (CMS - 3)         | ARMS Order (CONFIDENTIAL)   |
| Schaffer                               | SPRINT              | (CMS - 4)         | Analysis of KMC provided SS7 Records  |
| Aggarwal (Adopting Exhibits of Farnan) | SPRINT              | (KJF - 1)         | KMC Complaint Summary (CONFIDENTIAL)  |
| Aggarwal (Adopting Exhibits of Farnan) | SPRINT              | (KJF - 3)         | Access Compensation Due (CONFIDENTIAL)  |
| Aggarwal                               | SPRINT              | (RA - 1)          | Reallocated MOU (CONFIDENTIAL) <sup>2</sup>   |
| Aggarwal                               | SPRINT              | (RA - 2)          | KMC Billing Summary (CONFIDENTIAL)  |
| Danforth                               | SPRINT              | (MSD - 1)         | Reciprocal Compensation Expense Overpayment Calculation (CONFIDENTIAL)                |
| Johnson                                | KMC                 | (MBJ - 1)         | KMC's April 21, 2004 Notice to Customer X of Switched Access Liability (CONFIDENTIAL) |

<sup>2</sup> Note that Sprint is substituting RA-1, in its entirety, for witness Farnan's KJF-2.

| <u>WITNESS</u>                           | <u>PROFERRED<br/>BY</u> | <u>I.D. NO.</u> | <u>DESCRIPTION</u>  |
|--|-------------------------|-----------------|---|
| Johnson                                  | KMC                     | (MBJ - 2)       | Customer X's May 3, 2004 Reply to KMC's April 21, 2004 Notice (CONFIDENTIAL)  |
| Johnson                                  | KMC                     | (MBJ - 3)       | Samples of bills Submitted to Customer X for the PRIs in Question (CONFIDENTIAL)  |
| Johnson                                  | KMC                     | (MBJ - 4)       | KMC Tariff Sheet on PRI Circuits  |
| Johnson                                  | KMC                     | (MBJ - 5)       | KMC's June 3, 2004 Reply to Customer X's Letter of May 3, 2004 (CONFIDENTIAL)   |
| Johnson                                  | KMC                     | (MBJ - 6)       | KMC's Notice to Sprint of Default on the Confidential Settlement Agreement (CONFIDENTIAL)   |
| Johnson                                  | KMC                     | (MBJ - 7)       | KMC's Claim Against Sprint for Reciprocal Compensation Payments (CONFIDENTIAL)  |
| Johnson                                  | KMC                     | (MBJ - 8)       | Excerpts from Customer X's website (CONFIDENTIAL)   |
| Johnson                                  | KMC                     | (MBJ - 9)       | FCC Filings made by Customer X  |
| Johnson                                  | KMC                     | (MBJ - 10)      | April 28, 2005 Decision of U.S. Bankruptcy Court of Northern District of Texas in <i>Transcom Enhanced Services, LLC</i> , Case No. 05-31929-HDD-11 |
| Calabro                                  | KMC                     | (PJC - 1)       | Lucent Technologies Publication 235-080-100 section 7.9 CPN Billing   |
| Twine<br>(Adopting Exhibits of Pasonski) | KMC                     | (TEP - 1)       | KMC's Calculation of Access Charged Owed by Sprint to KMC (CONFIDENTIAL)  |
| Twine<br>(Adopting Exhibits of Pasonski) | KMC                     | (TEP - 2)       | KMC's Calculation of Amounts due for Reciprocal Compensation by Sprint to KMC (CONFIDENTIAL)  |

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.



X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

On June 6, 2005, KMC filed a Motion to Compel. Sprint filed its Response on June 17, 2005. An Order addressing KMC's Motion will be issued in a timely manner following full consideration of the pleadings.

XII. PENDING CONFIDENTIALITY MATTERS

KMC has indicated it will be filing additional requests for its prefiled testimony and exhibits. In addition, Sprint filed a Request for Confidentiality on the day of the Prehearing Conference, June 20, 2005. That Request will be addressed prior to the hearing in this matter.

XIII. DECISIONS THAT MAY IMPACT COMMISSION'S RESOLUTION OF ISSUES

Parties have stated in their prehearing statements that the following decisions have a potential impact on our decision in this proceeding:

**KMC:** The FCC has recognized that access charges do not apply to enhanced services, in general, and IP Telephony, in particular. *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983) (adopting the enhanced services exemption and stating that enhanced service providers were entitled to purchase local services as end users); *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2631 (1988) (affirming access charge exemption); *Access Charge Reform*, 12 FCC Rcd 15982, 16133 (1997) (affirming access charge exemption); *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001) ("IP telephony [is] generally exempt from access charges ...."); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1988) ("Report to Congress") (declining to classify, or apply access charges to IP Telephony). The two narrow *AT&T Declaratory Ruling* cases, neither of which applies here, are the only two exceptions to the general rule that access charges do not apply to IP Telephony. The FCC has previously recognized affirmed the limited role of state jurisdictions regarding information or enhanced services. *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, Memorandum Opinion and Order (Feb. 19, 2004) ¶¶ 17-18, and cases cited therein; *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket

No. 03-211, Memorandum Order and Opinion, FCC 04-267, Released Nov. 12, 2004 ("*Vonage Declaratory Ruling*"). See also *Vonage Holdings Corp. v. Minnesota Public Utilities Com'n*, 394 F.3d 568 (8th Cir. 2004). Section 230 of the Telecommunications Act of 1996 (the "1996 Act") also makes clear the national policy to "preserve the vibrant and competitive free market" that exists for information services, "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). To the extent that there is any future departure from the FCC's policies toward the Internet and IP-enabled applications, it should be initiated and implemented by the FCC through a rulemaking process such as its current *IP-Enables Services* rulemaking (WC Docket No. 04-36), not by *ad hoc* state proceedings, especially adjudications involving two LECs.

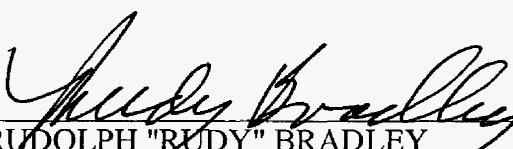
XIV. RULINGS

Opening statements, if any, shall not exceed ten minutes per party.

It is therefore,

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this 24th day of June, 2005

  
RUDOLPH "RUDY" BRADLEY  
Commissioner and Prehearing Officer

(SEAL)

BK/LF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.