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July 23, 2005

**BY HAND DELIVERY**

Ms. Blanca Bayó, Director  
Commission Clerk and Administrative Services  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 041144-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC ("KMC") are an original and fifteen copies of the non-confidential Marva Brown Johnson Direct Testimony Exhibits 1, 2, and 5 in the above referenced docket. KMC is withdrawing the confidential claim for these exhibits filed on February 28, 2005.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

  
Floyd R. Self

FRS/amb  
Enclosures  
cc: Parties of Record



305 Church Street, South West  
7th Floor, Suite 715  
Huntsville, Alabama 35801  
Tel 256.705.1030  
Fax 256.705.1099  
www.kmctelecom.com

April 21, 2004

**VIA FACSIMILE AND OVERNIGHT MAIL**

Mr. Michael Holloway, President  
Mr. David Flanary, Executive Vice President  
Mr. Clay Johnson, CFO  
UniPoint Holdings  
6500 River Place Blvd, Bldg 2 Suite 200  
Austin, Texas 78730  
Facsimile: (512) 735-1242

UniPoint Services, Inc.  
Attn: Contract Administration  
6500 River Place Blvd, Bldg 2 Suite 200  
Austin, Texas 78730  
Facsimile: (512) 735-1220

**NOTICE OF POTENTIAL SWITCHED ACCESS LIABILITY**

Dear Mr. Holloway, Flanary and Johnson:

As you know, KMC is currently providing service to UniPoint Holdings, Inc. ("UniPoint") pursuant to multiple Service Agreements, KMC's Interstate and International Service Terms and Conditions ("Federal Tariffs") and applicable state tariffs ("Intrastate Tariffs").

This letter is to provide notice to Unipoint concerning a claim by Sprint Communications for switched access charges on UniPoint's traffic in the state of Florida. While KMC intends to oppose vigorously this claim, in the event KMC is unsuccessful in its opposition, KMC hereby advises you that Unipoint is responsible for any and all such charges and financial security is hereby requested to be posted by Unipoint to pay any such charges. Secondly, as outlined more fully below, KMC requires additional information from Unipoint in order to properly oppose the imposition of switched access charges. Finally, the Service Agreements contemplated a definitive Master Service Agreement to be signed by Unipoint and KMC. The terms and conditions for the MSA have been negotiated for some time and KMC now must insist that an MSA be executed and delivered prior to the close of business on April 26, 2004.

As you may be aware, there are several state Public Service Commission ("State PSC") and Federal Communications Commissions ("FCC") proceedings pending in effort to determine the appropriate regulatory treatment for voice related internet protocol traffic. Among the issues to be addressed in these proceedings is a fundamental issue with regard to the specific network and service applications that will be classified as voice over internet protocol ("VoIP") traffic and the appropriate treatment for both VoIP applications and non-VoIP internet protocol based

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applications. Many incumbent local exchange carriers ("ILECs") have already made claims with regard to intrastate and interstate switched access charges that ILECs assert are owed for the origination and termination of VoIP and non-VoIP internet protocol based applications. More significantly, today the FCC has ruled that the service provided by AT&T, which may be very similar to that provided by Unipoint, is subject to switched access charges. Our counsel is studying the impact of this most recent ruling but at a minimum this is a troubling decision.

Following receipt of an invoice by KMC from Sprint for switched access charges in the amount of \$3,066,595 for the period beginning July 2002 through February 2004 KMC reviewed the corresponding call detail and billing records supporting the claimed Sprint charges to determine the originating jurisdiction of the minutes of use ("MOUs") and their originating Calling Party Number ("CPN"). KMC has performed traffic studies using sample information from the SS7 networks, trunks terminating KMC local traffic, billing records, and KMC's PRI arrangements and determined that a large percentage of the MOUs for VoIP and non-VoIP internet protocol traffic that KMC has been billed for to date by Sprint is traffic originating from and terminating to numbers assigned to UniPoint.

While KMC is vigorously disputing these charges and intends to continue to do so, consistent with the obligations set forth in KMC's tariffs, UniPoint is obligated to pay these charges associated with UniPoint's use of the Services. For example, and without limitation, we refer you to Section 5(i) of the Federal Tariff which provides in relevant part as follows:

As between KMC Telecom and Customer, Customer is responsible for all charges attributable to Customer's use of the services, including charges resulting from fraudulent or unauthorized use of services, including but not limited to KMC Calling Card Services, by any third party, local access charges, all use or requirements for utilization of a service after its delivery to Customer, and all billing, billing adjustments/credits, customer service, creditworthiness and other service-related requirements of Customer's uses.

In addition, given the amount involved, KMC requires assurances that if the Sprint charges applicable to the Services are ultimately found to be due and owing Unipoint will in fact pay such charges. Section 6(d) of the Federal Tariff provides that Unipoint is obligated, at KMC's request and in KMC's sole opinion, to "pay in advance of the furnishing or continuation of any service, and/or make such payments in cash or the equivalent of cash." Accordingly, KMC requests that, prior to the close of business on Monday, April 26, 2004, either a cash escrow account be established under the control of KMC equal to the amount Sprint has claimed for these charges ("Escrow Amount") or an irrevocable letter of credit in the Escrow Amount be posted by Unipoint in favor of KMC by an acceptable bank to be drawn upon to pay these charges.

Second, KMC requires additional information from UniPoint in order to effectively dispute and respond to an ILEC's switched access charge billing. Therefore, in effort to further

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evaluate the merits of Sprint's claims, KMC requests, that UniPoint provide KMC with certain information to allow KMC to confirm the nature of the UniPoint traffic exchanged on KMC's network pursuant to the Agreements for the period from July 2002 through the current date. Specifically, KMC requests that UniPoint provide the following information no later than Monday, April 26, 2004:

If UniPoint characterizes any of the traffic as Voice over Internet Protocol ("VoIP") please identify the percentage of traffic UniPoint calculates represents VoIP traffic based on the following definition:

"Voice over Internet Protocol" or "VOIP" Internet Voice, also known as Voice over Internet Protocol (VoIP) is technology that allows subscribers to make telephone calls, within the United States, using a broadband Internet connection instead of a regular (or analog) phone line. VoIP is an enhanced service and utilizes TCP/IP as a means to provide two way real time voice communications over public internet backbone packet networks. VOIP as defined herein is exclusively limited to traffic which utilizes TCP/IP as a transmission protocol from the customer's originating broadband service or equipment to the terminating equipment or gateway."

2. To the extent that UniPoint does not characterize one-hundred percent of such traffic as VoIP, please provide additional information regarding the nature, percentage, and characterization of the jurisdictional nature of the remaining traffic.

Third, to the extent that UniPoint may be using the Services to originate and/or terminate VoIP traffic, KMC insists that the parties enter into a Master Service Agreement that provides for KMC's PRI services that may be utilized to provide VoIP services. KMC understands that the UniPoint has been negotiating such an arrangement with KMC for some time but that must now come to an end. Specifically, KMC requests that UniPoint work jointly with KMC in effort to ensure that a Master Service Agreement substantially in the form KMC forwarded to Unipoint on early this year is executed by both KMC and UniPoint no later than the close of business on Monday, April 26, 2004. In the event there are any Services being provided by KMC to Unipoint that are not VoIP traffic a definitive MSA needs to be executed prior to the close of business on Monday, April 26, 2004. Mikhael Vitenson, Associate General Counsel, will be furnishing another copy of acceptable MSA drafts to you either today or tomorrow.

In the interim, and effective immediately, all traffic sent by Unipoint to KMC for all Services (to originate and/or terminate VoIP internet protocol related services or non-VoIP services) be sent by Unipoint accompanied by originating line information including but not limited to a CPN.

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While KMC greatly values its relationship with Unipoint the foregoing requests must be complied with in order to protect KMC's interests which we trust you understand. The failure of Unipoint to respond satisfactorily to this letter will leave KMC no choice than to immediately suspend all Services.

Please contact me directly to discuss any of the matters set forth above and in order to hopefully resolve these issues to KMC's satisfaction. I can be reached directly at (256) 705 - 1022 or by email at [wendell.register@kmc telecom.com](mailto:wendell.register@kmc telecom.com).

Sincerely,

  
Wendell E. Register  
Vice President - Network Operations

cc: Roscoe C. Young II, CEO  
William H. Stewart, CFO  
Kevin Bittner, Senior Vice President - Sales  
Marva Brown Johnson, Esq., Senior Counsel - Regulatory Affairs  
Mikhael Vitenson, Esq. Associate General Counsel  
Alan M. Epstein, Esq.



May 3, 2004

Via Facsimile  
Mr. Wendell E. Register, Vice President – Network Operations  
305 Church Street, SW  
7<sup>th</sup> Floor, Suite 715  
Huntsville, Alabama 35801  
Facsimile: 256-705-1099

Dear Wendell:

Reference is made to your letters labeled "Notice of Potential Switched Access Liability" dated April 21, 2004, and received by UniPoint Holdings, Inc. on April 23, 2004 by overnight delivery (the letters also indicated facsimile delivery, which UniPoint has no record of receiving). As you can appreciate, your letter and our subsequent telephone conversations raised issues for the first time and we have been attempting to respond to your requests as expeditiously as possible.

First and foremost, you stated that UniPoint's services "may be very similar" to the services AT&T was providing which the FCC ruled are subject to switched access. It is our position, as we have communicated to you and as we have presented several times to the FCC Commissioners and staff, UniPoint is an Enhanced Service Provider providing unregulated information and/or enhanced services to its customers. This is vastly different than AT&T's self-proclaimed regulated telecommunications service and/or the services described by AT&T's filings related to its petition.

Per your requests, UniPoint has presented KMC a plan for migrating particular types of traffic away from KMC's network. Such plan has already begun to significantly reduce the amount of traffic that KMC is receiving from UniPoint. It is UniPoint's expectation that it will be able to complete this extremely time intensive exercise, on or before May 3<sup>rd</sup>. It is our understanding that no term obligations and/or early termination charges would be applicable as a result of responding to your requests, and no existing terminating services will be billed on a going forward basis past May 3<sup>rd</sup> or discontinued use of the services, whichever date comes first.

KMC has stated that certain types of traffic from UniPoint would be acceptable to KMC, and both parties are working to create a definition that is mutually acceptable. It is expected that said definition will be part of a mutually agreed upon Master Services Agreement ("MSA"), that both parties have agreed to diligently work towards completion. Despite the efforts expended by UniPoint to finalize the previous MSA, your team indicated that we should turn our attention to the new form provided by Mr. Vitenson on April 30, 2004, which we are doing. At a minimum the MSA will include the ability for UniPoint to originate traffic (which is currently today used by end-users) via KMC's network and terminate traffic that originated from an IP broadband connection, with pricing based on local reciprocal compensation charges and not switched access charges. I reiterate such limitation on traffic

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KMC is willing to accept does not reflect UniPoint's interpretation of the FCC's definition of an information and/or enhanced service, or of the types of traffic, or situations in which, access charges do not apply. Continued use of origination and termination services for IP broadband access to the PSTN, will be permitted and local rates will apply while the parties complete said MSA.

You stated in your letter that KMC has received a bill from Sprint for switched access charges, due to traffic that KMC has terminated to Sprint. KMC has claimed that some portion of the traffic that Sprint is claiming access charges are due to traffic originated from UniPoint's network. As KMC is aware UniPoint is an Enhanced Service Provider, offering information and/or enhanced services to a wide variety of customers, and such traffic is to be treated as local traffic and is therefore exempt from paying access charges as defined by the FCC.

UniPoint has offered to help KMC in disputing any switched access charges due to traffic originating from UniPoint's network. But UniPoint currently has no information to validate that the traffic in question even originated from UniPoint's network. Assuming that KMC can provide the supporting information that the traffic Sprint is charging KMC switched access originated from UniPoint's network, UniPoint will assist in providing KMC with the necessary information required to dispute said switched access charges, assuming acceptable resolution to the foregoing items.

You indicated in your letter that KMC is vigorously disputing these charges and intends to continue to do so. To the extent that you desire your letters to constitute demands for \$3,066,595, UniPoint disputes these claims.

While I appreciate the language in your letters regarding valuing the relationship with UniPoint, I am surprised by the course KMC has chosen to follow. I believe we could have worked through some of these issues prior to being forced to react on a compressed timeline. Pursuant to your request, this letter is being provided in an effort to outline a basis for going forward between the two companies. It does not purport to be a complete response to all of the issues in your letter and UniPoint reserves all rights and remedies available to it.

Sincerely,



Kihm Schroeder  
Vice President, Operations

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305 Church Street, South West  
7th Floor, Suite 715  
Huntsville, Alabama 35801  
Tel 256.705.1030  
Fax 256.705.1099  
www.kmctelecom.com

June 11, 2004

**VIA FACSIMILE AND OVERNIGHT MAIL**

Mr. Michael Holloway, President  
Mr. David Flanary, Executive Vice President  
Mr. Clay Johnson, CFO  
UniPoint Holdings  
6500 River Place Blvd, Bldg 2 Suite 200  
Austin, Texas 78730  
Facsimile: (512) 735-1242

UniPoint Services, Inc.  
Attn: Contract Administration  
6500 River Place Blvd, Bldg 2 Suite 200  
Austin, Texas 78730  
Facsimile: (512) 735-1220

Dear Mr. Holloway, Flanary and Johnson:

We are writing in response to your letter of May 3, 2004, referencing our letter to you dated as of April 21, 2004, regarding potential switched access liability in connection with certain services provided by KMC to UniPoint Holdings, Inc. ("UniPoint").

We acknowledge that all of UniPoint's terminating traffic has been migrated from KMC's network as of May 3, 2004. Such migration resulted in rendering idle 197 PRI circuits previously ordered by UniPoint from KMC on various dates (the "PRI Circuits"). As you know, such PRI Circuits were ordered for a minimum term and are subject to termination charges per the provisions of the Service Orders and KMC's applicable Tariff. Without waiving any rights that may be available to KMC at law or in equity or under the Tariff and the Service Orders, KMC will, at this time, not bill UniPoint for termination charges associated with the terminated PRI Circuits, provided, that:

1. UniPoint complies in all respects, not later than June 18, 2004, with the requests for information made by KMC in its letter dated April 21, 2004, and from time to time thereafter;
2. UniPoint pays any and all third party switched access liability that have been, or may be, assessed in connection with UniPoint's provisioning of services to other third parties utilizing the PRI Circuits and indemnifies KMC and its affiliates from and against any and all liabilities, claims, suits, damages and losses (including attorneys'

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fees and costs) associated with such switched access liability or the defense and/or dispute by KMC thereof.

In addition to the termination by UniPoint of the PRI Circuit, UniPoint requested, in conversations between UniPoint and KMC taking place subsequent to UniPoint's letter of May 3, that KMC terminate and/or not bill UniPoint for unutilized capacity on certain DS-3 circuits connecting UniPoint's and KMC's facilities ordered by UniPoint from KMC at various times (the "DS-3 Circuits"). Such DS-3 Circuits are, as are the PRI Circuits, subject to minimum term commitments per the Service Orders for such DS-3 Circuits. However, and subject expressly to the conditions of subparagraphs (1) and (2) above, KMC will not bill UniPoint at this time for unutilized capacity on the DS-3 Circuits and will work together with UniPoint to minimize the termination liability associated with the DS-3 Circuits and to foster exchange of acceptable traffic between our companies that would utilize such DS-3 Circuits.

Further, it has come to KMC's attention that there are instances where UniPoint, or customers of UniPoint, pass the billing telephone number ("BTN") assigned to the PRI Circuit, in lieu of the originating line information ("OLI") or calling party number ("CPN"), to carriers that are downstream of KMC's network. In discussions with UniPoint on this matter, UniPoint has been unable to provide KMC adequate assurance with regard to whether other call detail information (such as carrier identification codes ("CIC")) necessary for third party carriers to properly jurisdictionalize this traffic and to determine the appropriate party to bill and rates to apply is also being passed on traffic originated on the remaining PRI Circuits. In order to ensure that there is no appearance of impropriety regarding the routing of this traffic beyond KMC's network, please *cease this practice immediately*. Please be reminded failure to pass adequate calling party information is a violation of industry guidelines, and in some instances may also be subject to other regulatory or legal scrutiny. For avoidance of doubt, UniPoint bears responsibility for any and all third party claims associated with UniPoint's: (1) failure to deliver or delivery of inaccurate OLI and CPN information; and (2) any alteration of call detail information associated with traffic traversing the PRI Circuits once this traffic has left KMC's network. As specified in the Tariffs, to the extent that switched access liability, or other liability, may be assessed by third parties in connection with UniPoint's use of the PRI Circuits, UniPoint bears any and all such liability.

Lastly we provided to your attention on April 30, 2004, an MSA and certain attachments thereto which reflects types of traffic acceptable to KMC that may utilize some of the PRI Circuits and the DS-3 Circuits. UniPoint indicated that it intends to work diligently at arriving to a mutually acceptable agreement with KMC. However, we did not receive comments on the MSA to date. As we stated, unless UniPoint complies with the requirements set forth above, we are unable to continue providing originating PRI circuits to UniPoint and will have no choice but to terminate such circuits as of midnight, June 17, 2004, unless a fully executed agreement is in place between our companies reflecting such requirements. We are looking forward to your comments and to continued discussions.

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Please indicate your receipt and acceptance of the terms and conditions set forth in this letter by signing below and returning a signed counterpart of this letter to my attention.

Sincerely,



Wendell E. Register  
Senior Vice President Network Operations

AGREED AND ACCEPTED:

UniPoint Holdings, Inc.

By: \_\_\_\_\_  
Name:  
Title:  
Date:

- cc: Roscoe C. Young II, CEO
- William H. Stewart, CFO
- Kevin Bittner, Senior Vice President – Sales
- Marva Brown Johnson, Esq., Senior Counsel – Regulatory Affairs
- Mikhael Vitenson, Esq. Associate General Counsel
- Alan M. Epstein, Esq.

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