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Timolyn Henry

From: Ann Bassett [abassett@lawfla.com]  
Sent: Monday, September 26, 2005 4:30 PM  
To: Filings@psc.state.fl.us  
Subject: Docket No. 050581-TP - KMC Complaint Against Sprint  
Attachments: 2005-09-26, KMC's Response to Sprint's Motion to Dismiss Count IV.pdf

The person responsible for this electronic filing is:

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The Docket No. is 050581-TP - Complaint of KMC Telecom III LLC and KMC Telecom V, Inc. Against Sprint-Florida and Sprint Corp. 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

This is being filed on behalf of KMC Telecom III LLC and KMC Telecom V, Inc.

Total Number of Pages is 6

KMC Telecom III LLC and KMC Telecom V, Inc.'s Response to Sprint-Florida's Motions to Dismiss Count IV

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September 26, 2005

**BY ELECTRONIC FILING**

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. 050581-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of KMC Telecom III LLC and KMC Telecom V, Inc. ("KMC") is an electronic version of KMC Telecom III LLC and KMC Telecom V, Inc.'s Response to Sprint-florida's Motion to Dismiss Count IV in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,



Floyd R. Self

FRS/amb  
Enclosures  
cc: Parties of Record

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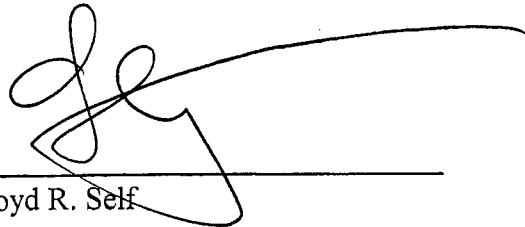
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by electronic mail this 26<sup>th</sup> day of September, 2005

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Floyd R. Self

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of KMC Telecom III LLC and )  
KMC Telecom V, Inc. Against Sprint-Florida )  
and Sprint Corp. 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. )  
\_\_\_\_\_ )

Docket No. 050581-TP  
Filed: September 26, 2005

**KMC TELECOM III LLC AND KMC TELECOM V, INC.  
RESPONSE TO SPRINT-FLORIDA'S  
MOTION TO DISMISS COUNT IV**

KMC Telecom III LLC and KMC Telecom V, Inc. (collectively "KMC"), pursuant to Rule 28-106.204(1), Florida Administrative Code, hereby file this response to the September 19, 2005, Sprint-Florida, Incorporated ("Sprint-FL") Motion to Dismiss Count IV of the KMC Complaint. Sprint-FL has failed to demonstrate as a matter of law why its Motion should be granted, and in support of the denial of Sprint-FL's Motion, KMC states as follows:

- 1. As this Commission has said in connection with a motion to dismiss:

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

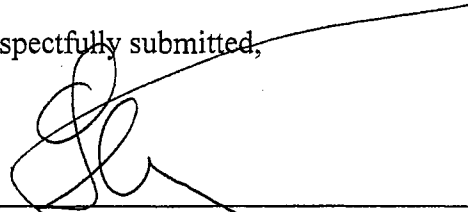
Order No. PSC-04-1204-FOF-TP, issued December 3, 2004. In the arguments presented, Sprint-FL's Motion fails to demonstrate that as a matter of law Count IV should be dismissed. Accordingly, the Motion should be denied.

2. First, Sprint-FL's argument that this Commission does not possess general authority to enforce contracts is not the issue raised by Count IV. Rather, the issue raised by Count IV goes to rates, terms, and conditions associated with the application and implementation of the parties' obligations for reciprocal compensation under an approved interconnection agreement. While this obligation was implemented by the Amendment No. 1 attached to the Sprint-FL Motion, the issue raised by Count IV is whether that obligation continued, and was otherwise included within, KMC's subsequent adoption of the FDN Agreement. Thus, whether, and to what extent, the MOU continued to remain effective is a question of mixed law and fact which does not merit dismissal as a matter of law.
3. Second, Sprint-FL takes issue with the fact that the MOU was not filed with the Commission. As a matter of law, the Commission has not adopted a rule requiring that all contracts and agreements between carriers be filed with the Commission. While Section 364.07(1), Florida Statutes, authorizes the Commission to require the filing of contracts between carriers, there is no Commission rule requiring such filing. The reciprocal compensation terms of the MOU were a continuing legal obligation, or at least whether such an obligation continued is a question of fact and law that does not constitute a basis for dismissal.

4. Third, the IDS-BellSouth order relied upon by Sprint-FL does not stand for the proposition that as a matter of law the Commission is without jurisdiction to hear all such contract-based claims that have not been filed and approved by the Commission. As this Commission said in the IDS-BellSouth order cited by Sprint-FL: “We find BellSouth’s argument is without merit to the extent that it argues that IDS’s complaint fails to state a cause of action merely because the Complaint requires us to refer to a privately negotiated settlement agreement and federal law to settle the dispute.” Order No. PSC-04-0423-FOF-TP, at 8 (April 26, 2004). Thus, as a matter of law, there is no basis for immediate dismissal of a claim based solely on the fact that the underlying agreement was “a private agreement” or otherwise not filed with the Commission.
5. Finally, the IDS-BellSouth order is factually distinguishable from the instant case. The settlement agreement at issue in the IDS-BellSouth case, Docket No. 031125-TP, goes to a financial agreement to settle a dispute between the parties. The MOU at issue in Count IV of the KMC Complaint goes to the heart of the interconnection relationship between KMC and Sprint-FL – the rates, terms, and conditions of reciprocal compensation for the exchange of local traffic. In this context, Sprint-FL’s attempt to dismiss KMC’s Count IV goes to the relevancy of the agreement and the facts and circumstances regarding whether, and to what extent, the agreement applies or continue to apply. Sprint-FL’s allegations regarding whether the MOU was effective simply do not constitute a basis, *as a matter of law*, for dismissing the complaint.

ACCORDINGLY, based upon the foregoing, KMC respectfully requests that the Commission deny Sprint-FL's Motion to Dismiss Count IV of the KMC Complaint, and proceed to conduct an issues identification conference and otherwise proceed with the resolution of this matter as set forth in the Complaint.

Respectfully submitted,



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