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January 3, 2006

**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 in the above referenced docket on behalf of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC ("KMC") is an original and fifteen copies of the following documents:

1. KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC's Motion for Reconsideration; and
2. KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC's Request for Oral Argument.

CMP \_\_\_\_\_ Please acknowledge receipt of these documents by stamping the extra copy of this letter  
COM 3 "filed" and returning the same to me.

CTR \_\_\_\_\_ Thank you for your assistance with this filing.

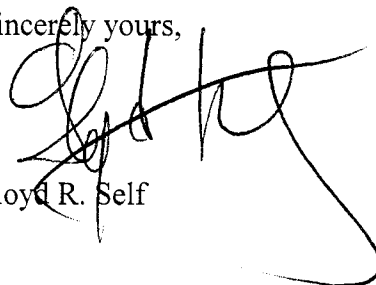
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Sincerely yours,

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FPSC-BUREAU OF RECORDS

Floyd R. Self



SGA \_\_\_\_\_ FRS/amb  
SEC 1 Enclosures  
cc: Parties of Record

OTH Kim P. Wang

Request  
DOCUMENT NUMBER-DATE  
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Motion  
DOCUMENT NUMBER-DATE

00042 JAN-3 06

FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Complaint of Sprint-Florida, Incorporated )  
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. )  
\_\_\_\_\_ )

Docket No. 041144-TP  
Filed: January 3, 2006

**KMC TELECOM III LLC, KMC TELECOM V, INC., AND KMC DATA LLC'S  
MOTION FOR RECONSIDERATION**

**INTRODUCTION**

KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively "KMC"), pursuant to Rule 25-22.060, Florida Administrative Code, hereby requests that the Public Service Commission ("Commission") reconsider certain aspects of Issues 4 and 6 in its Order No. PSC-05-1234-FOF-TP, issued on December 19, 2005 ("Order"), and state:

KMC requests that the Commission reconsider its decision on Issues 4 and 6 in which Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership (collectively "Sprint") was found to have met its burden of demonstrating that access charges were due for the disputed traffic, Issue 4 regarding the method of establishing the jurisdictional nature of enhanced services traffic, and Issues 8 and 10 which establish the parameters for conducting an audit of the disputed traffic.

Reconsideration of Issue 4 is justified because the Commission's decision overlooked and failed to consider issues of fact and law affecting the proper placement of the burden of proof in a case before an administrative tribunal, and overlooked its concurrent decision in Issue 6 that Sprint failed to present an adequate evidentiary basis for determining that access charges are appropriate for the calls at issue in this proceeding. In addition, even if the issue of enhanced services traffic was in the nature of an affirmative defense, the Commission overlooked or failed

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to consider that KMC submitted competent substantial evidence of the nature of the disputed traffic, evidence that Sprint accepted as the standard in the industry for making that determination, and evidence that the Commission failed to consider in its analysis and decision in Issue 6.

Reconsideration of the "end point" method of determining the jurisdictional nature of traffic as discussed in Issue 4 is appropriate because the Commission overlooked or failed to consider the effect of such a determination on the assessment of access charges to enhanced services traffic.

Fourth, reconsideration of the parameters of an audit as discussed in issues 8 and 10 is necessary because the Commission overlooked or failed to consider that, regardless of the good faith efforts of the parties, a private third party auditor acceptable to both parties may not be available. Therefore, an audit conducted by the Commission, but paid for by the parties, may be necessary.

Finally, the Commission should not require the parties to engage and begin the directed audit pending the resolution of this Motion, and the Commission should otherwise refrain from enforcing its Order as to the audit. Given the sum total of issues raised by this Motion for Reconsideration, it would be inefficient and wasteful for the parties to begin this process as this issues raised above substantiate and justify reconsideration and reversal of the findings that KMC owes Sprint access charges for the subject traffic and, even if access charges are owed, there are substantial potential problems with the outlined audit process that need to be addressed before any meaningful audit can begin.

## ARGUMENT

### I. THE COMMISSION IMPROPERLY SHIFTED THE BURDEN OF PROOF TO KMC TO DEMONSTRATE THAT ACCESS CHARGES WERE NOT DUE TO SPRINT (ISSUES 4 AND 6).

This proceeding was initiated by Sprint as a result of its filing of a Complaint in which Sprint alleged that KMC wrongfully terminated interexchange traffic over local interconnection trunks and thereby failed to pay intrastate access charges that were due to Sprint for the termination of intrastate interexchange traffic. Sprint Complaint at p.18. The Commission's decision to consider all of the traffic at issue in this case as intrastate interexchange traffic for which terminating access charges apply was the direct result of an improper shifting of the burden of proof from the entity asserting that such charges apply, Sprint, to the entity against which the complaint was made, KMC.

It is well established in Florida that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." *Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778, 788 (Fla. 1st DCA 1981). Thus, Sprint is required to prove all of the material allegations of its Complaint, which allegations include that KMC wrongfully terminated interexchange traffic over local interconnection trunks. The traffic was identified and accounted for as enhanced services traffic. Thus, if Sprint disputed that fact, it was its duty to present a *prima facie* case that the relevant facts that formed the basis for the identification of the traffic were incorrect. As applied to this case, that evidence would have to include evidence that the traffic was not enhanced services traffic.

The evidence presented by Sprint in support of its Complaint was, as found by the Commission, unreliable and insufficient to support **any** conclusion, much less a conclusion that the traffic was not enhanced services traffic. Order at pp. 32-33, 37. Despite Sprint's failure to present any competent, substantial evidence to support the allegations in its Complaint, the Commission entered its Order granting the relief requested by Sprint because KMC allegedly

failed to prove the incorrectness of Sprint's allegations. By so doing, the Commission overlooked or failed to consider the appropriate burden of proof in this case as established by *J.W.C.* and its progeny.

**II. THE COMMISSION IMPROPERLY REJECTED COMPETENT SUBSTANTIAL EVIDENCE THAT THE TRAFFIC AT ISSUE WAS ENHANCED SERVICES TRAFFIC AND FAILED TO SHIFT THE BURDEN OF PROOF TO SPRINT TO REBUT THAT EVIDENCE (ISSUE 6).**

The Commission's Order analogized the issue of enhanced services traffic to that of an affirmative defense, for which the burden of proof rests with the party advancing the defense. KMC disagrees that an issue disputed in a Complaint can properly be shifted to the respondent to the Complaint. However, even if the burden of proving the invalidity of Sprint's allegations properly rests with KMC, the Commission overlooked or failed to consider that evidence of the same nature as the "industry standard" evidence that formed the basis of identifying traffic by the originating and terminating end points (Order at pp. 15-17) was presented as competent, substantial evidence of the enhanced services nature of the PointOne traffic.

The Commission's Order acknowledged that self-certification by enhanced services providers is the method of demonstrating the nature of such traffic accepted by both Sprint and KMC, and generally constitutes the standard in the industry. Order at pp. 33-34. KMC presented un rebutted evidence, in the form of the certification by PointOne, that the traffic was enhanced service traffic. Sprint agreed that self-certification is an appropriate standard for determining whether traffic is enhanced service traffic, and is the standard used by Sprint for making that determination. Evidence of the standard of practice in an industry is competent substantial evidence upon which a finding may be based. *See, Lockwood v. Baptist Regional Health Services, Inc.*, 541 So.2d 731, 732 (Fla. 1st DCA 1988). KMC complied with the accepted industry practice for certification of the nature of service provided to PointOne, and

thus presented *prima facia* evidence that the PointOne traffic consisted of enhanced service traffic.

Sprint presented no competent substantial evidence to rebut KMC's *prima facia* case that the traffic at issue was enhanced services traffic but, as recognized by the Commission, attempted in its Complaint to "hold KMC to a different standard than it holds itself." Order at 34. The Commission cannot summarily and without explanation reject competent substantial evidence that, in effect, stipulates the industry standard, and in so doing decide the issue on the basis that "[t]he evidence in the record is inconclusive." In this case, KMC submitted evidence of the nature of the traffic, and Sprint submitted none. In failing to accord weight to the evidence of the industry standard for identifying enhanced services traffic, the Commission overlooked or failed to consider the body of caselaw that establishes that the industry standard is evidence of a type and nature sufficient to support a finding of fact.

Even if the issue of enhanced services traffic is in the nature of an affirmative defense, once KMC submitted evidence that the service was enhanced services traffic in the form of the industry standard customer certification for identifying enhanced services traffic, the burden shifted to Sprint to demonstrate that the traffic was other than enhanced services traffic. The shifting of the burden of proof in light of the introduction of competent substantial evidence by KMC was recently summarized by the Fifth DCA, which held that:

The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a *prima facie* case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and **unless he meets this obligation upon the whole case he fails.** (e.s.)

*Westerheide v. State*, 888 So.2d 702, 705 (Fla. 5th DCA 2004), citing *In re Ziy's Estate*, 223 So.2d 42, 43 (Fla.1969).

As found by the Commission, even after having the most direct access to the call traffic data, and even after having studied that data, Sprint utterly failed to submit any competent substantial evidence whatsoever regarding the issue of enhanced services in response to KMC's evidence of the industry standard. Thus, Sprint failed to make an evidentiary case to support its Complaint, and failed to meet its burden of proof. Under Florida law, the relief requested must, therefore, be denied. In failing to require Sprint to meet the ultimate burden of proof, the Commission overlooked or failed to consider Florida law requiring that such failure result in a denial of the requested relief.

**III. THE COMMISSION OVERLOOKED OR FAILED TO CONSIDER THAT A DETERMINATION OF THE JURISDICTIONAL NATURE OF ENHANCED SERVICES TRAFFIC IS NOT BASED ON THE END POINTS OF SUCH TRAFFIC (ISSUE 4).**

The Commission's Order states that "it is well established that the jurisdiction of traffic should be based on the end points of a call." Order at 17. In making that analysis, the Commission overlooked or failed to consider the restrictions on identifying the end points of enhanced services traffic, and the effect of such a decision on the exemption of enhanced services traffic from assessment of access charges.

The Commission has earlier ruled in the *Reciprocal Compensation Order*<sup>1</sup> that intercarrier compensation for non-enhanced vNXX traffic is based on the end points of a call rather on the originating and terminating NPA/NXXs. However, the Commission did not rule on that issue with respect to enhanced services traffic.

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<sup>1</sup> *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Order on Reciprocal Compensation, Docket No. 000075-TP (Phases II and IIA), Order No. PSC-02-1248-FOF-TP (2002).

Through its reliance on the *AT&T Declaratory Ruling*<sup>2</sup> as the basis for its decision that the jurisdiction for determination of access charge applicability is to be based solely on the end points of such traffic (see, Order at 15), the Commission overlooked or failed to consider that the AT&T Declaratory Ruling was decided as to IXCs and not CLECs, and was limited solely to a consideration of transport, and not to termination fees.

Enhanced service traffic includes a number of services, including dial-up VoIP, broadband VoIP, wireless, and call forwarded traffic. Order at 34-36. As has been demonstrated by Sprint's complete inability to distinguish the types of traffic, the parties' billing systems are not capable of distinguishing toll from enhanced services traffic. However, if the exemption of enhanced services traffic from access charges is to have any practical effect, it is necessary to provide service to enhanced service providers that is local to their customers.

By deciding that the jurisdictional nature of enhanced services traffic be based on the geographic location of the calling and called parties, the Commission overlooked or failed to consider the FCC's classification of this traffic as information services traffic, and the FCC determination, as expressed in the *Vonage* decision, that an end-point analysis is not appropriate when analyzing enhanced services traffic.<sup>3</sup> The basis for the FCC's decision is that when enhanced services are used, there is no feasible way to determine where the person on, for example, the VoIP end of the call is located.

Based on the foregoing, the Commission overlooked or failed to consider that its decision that the determination of the jurisdiction of enhanced services traffic is to be based on the

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<sup>2</sup> *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, adopted April 14, 2004, released April 21, 2004.

<sup>3</sup> *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Order, FCC 04-267 (released November 12, 2004).



physical location of the end user customers has the direct effect of inappropriately permitting the assessment of access charges on enhanced services.

**IV. THE COMMISSION OVERLOOKED OR FAILED TO CONSIDER THAT THE PARTIES MAY BE UNABLE TO AGREE UPON AN OBJECTIVE AND INDEPENDENT THIRD-PARTY AUDITOR, AND SHOULD THUS HOLD OPEN THE POSSIBILITY OF A COMMISSION CONDUCTED AUDIT (ISSUES 8 AND 10).**

The Commission's Order requires that "an independent third party auditor should be engaged by the parties . . . . The parties should jointly select the third-party auditor and should submit a report to this Commission indicating the target date for the issuance of the auditor's report within 60 days of the issuance of the order in this proceeding." Order at 48-49. Through its Order, the Commission made no contingency for the possibility that the parties may be unable to agree upon an objective and independent third-party auditor.

KMC believes that the test for independence and impartiality is whether the auditor would be equally willing to audit KMC or Sprint's records. In that regard, KMC has opened discussions with several audit companies. Although several indicated a willingness to audit KMC, none expressed a corresponding willingness to audit Sprint. Therefore, KMC has no confidence as to the objectivity and independence of those companies. KMC is continuing to search for an independent auditor, but has yet to find a qualified independent party.

KMC commits to engage in a selection process in good faith. However, the Commission has overlooked or failed to consider that, regardless of the good faith efforts of the parties, a private, independent third party auditor acceptable to both parties may not be available. Therefore, KMC requests that if the parties, within 15 days of the effective date of the Commission's Order, are unable to agree on an auditor, that the Commission perform the audit, with all costs of the audit to be shared equally between the parties as required by the Order. Order at 48.

## V. TEMPORARY RELIEF FROM ENFORCEMENT OF ORDER

A motion for reconsideration generally may not stay the effect of the order being reconsidered. Rule 25-22.060(c), Florida Administrative Code. Therefore, until this matter is resolved,<sup>4</sup> KMC requests that the Commission temporarily not require the parties to engage the independent auditor and to otherwise temporarily refrain from enforcing its Order with respect to the engagement of the auditor. KMC agrees that the parties should certainly utilize the time during the pendency of this Motion to continue to identify and evaluate potential auditors, however, given the issues raised by this Motion it would be inefficient, expensive, and wasteful for the parties to secure and proceed with the audit as the Order directs since the issues raised in this Motion go to both the finding that KMC pay access charges and the audit process itself. A temporary stay of the audit during the pendency of this Motion will not harm Sprint, as the relief Sprint seeks is purely monetary, and in the event KMC does not prevail on its Motion, Sprint is protected and would be made whole by the payment of additional interest.

### CONCLUSION

For the foregoing reasons, the Commission should reconsider and clarify Issues 4, 6, 8 and 10, and find:

- a. that the Commission overlooked or failed to consider the issues of fact and law identified herein;
- b. that Sprint failed to meet its burden of proof regarding whether KMC wrongfully terminated interexchange traffic over local interconnection trunks as alleged in its Complaint;
- c. that KMC established a prima facie case that the disputed traffic was enhanced services traffic through the introduction of competent substantial evidence of the nature of the traffic;

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<sup>4</sup> KMC contemplates this temporary relief would extend until an order on reconsideration is issued.

d. that Sprint failed to meet the burden of proof of responding to KMC's evidence that the disputed traffic was enhanced services traffic;

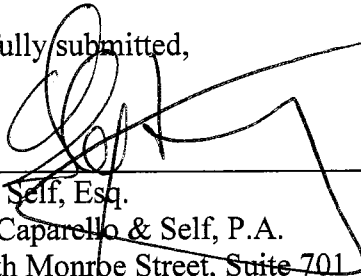
e. that the legal and practical effect of determining whether access fees are to be assessed based solely on the end points of the traffic rather than the nature of the traffic will be to allow for the improper assessment of access fees on enhanced services traffic;

f. that if, after reconsideration of the above issues, the Commission still believes an audit to be necessary, the Order provide for a Commission conducted audit, paid for equally by the parties, in the event the parties cannot agree on a private auditor; and

g. that the requirements of the Order for the parties to engage and begin the audit process are temporarily stayed pending the resolution of the Motion for Reconsideration.

As a result of the foregoing reconsideration, the Commission should reconsider its Order and deny the relief requested by Sprint in its Complaint.

Respectfully submitted,



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Telecom V, Inc. and KMC Data LLC

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by electronic mail and/or U.S. Mail this 3<sup>rd</sup> day of January, 2006.

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