

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-04-1204-FOF-TP  
ISSUED: December 3, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman  
J. TERRY DEASON  
RUDOLPH "RUDY" BRADLEY  
CHARLES M. DAVIDSON

ORDER DENYING MOTIONS TO DISMISS

BY THE COMMISSION:

On September 24, 2004, pursuant to Rules 28-106.201 and 25-22.036, Florida Administrative Code, Sprint-Florida, Incorporated (Sprint) filed a complaint against KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC (collectively "KMC"). Sprint alleges that KMC knowingly terminated intrastate interexchange traffic over local interconnection arrangements, in violation of Section 364.16(3)(a), Florida Statutes, to avoid paying Sprint access service charges. Sprint also asserts that this misrouting of access traffic has resulted in an overpayment of reciprocal compensation paid to KMC for local minutes terminated to KMC by Sprint. On October 14, 2004, KMC filed a Motion to Dismiss Sprint's complaint for failure to state a claim upon which relief may be granted, improper joinder of KMC Data LLC and KMC Telecom V, failure to request an audit, and use of an unauthorized methodology to recalculate traffic. On October 21, 2004, Sprint filed its response to KMC's Motion to Dismiss.

I. Standard of Review

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

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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.

## II. Analysis

In determining if Sprint's complaint states a cause of action upon which relief can be granted, an analysis of Section 364.16(3)(a), Florida Statutes, is necessary since Sprint bases its primary argument on that statutory provision. Section 364.16(3)(a) states:

No local exchange telecommunications company or competitive local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

Sprint alleges that Section 364.16(3)(a) was violated by KMC because KMC intentionally altered some originating numbers that determine the jurisdiction of the traffic.

We believe Section 364.16(3)(a) is clear in its directive concerning what conduct is prohibited. The statute clearly prohibits a telecommunications company from knowingly delivering interexchange traffic over local interconnection arrangements if that interexchange traffic is subject to terminating access charges. Since Sprint specifically alleges in its complaint that KMC has engaged in such prohibited conduct under the statute, we find that Sprint has stated a cause of action upon which relief could be granted.

### Prematurity

KMC contends that the dispute resolution provisions of the 1997 MCI-Sprint Agreement and the 2001 FDN-Sprint Agreement provide for a mandatory audit before Sprint or KMC can file a complaint with the Commission alleging a billing discrepancy related to payment of access charges and reciprocal compensation. KMC argues that since no audit has been conducted, the complaint is premature and should be dismissed.

The question of whether the conduct of an audit is a contractual condition precedent to KMC's liability for alleged underpayments or overcharges is an issue to be decided by us either at hearing or on a motion for summary final order. We believe that the existence of this issue does not affect our jurisdiction to hear Sprint's complaint and is not a legal prerequisite to the accrual of a cause of action. See San Marco Contracting Company v. Department of Transportation, 386 So.2d 615 (Fla. 1<sup>st</sup> DCA 1980). Thus, the alleged failure to have performed an audit is not a proper basis to dismiss the complaint.

Improper Joinder

KMC states that its Motion to Dismiss should be granted because Sprint improperly joined KMC Data LLC and KMC Telecom V in its complaint. KMC claims that both KMC Data LLC and KMC Telecom V were not involved in any interexchange or local traffic activity during the timeframe Sprint alleges the unlawful delivery and termination of interexchange traffic occurred. Although we are not bound by the Florida Rules of Civil Procedure governing joinder of parties, we believe that Fla. R. Civ. P. 1.250 dealing with misjoinder of parties offers guidance for the disposition of the issue KMC raises. Fla. R. Civ. P. 1.250 (a) states “Misjoinder of parties is not a ground for dismissal of an action. Any claim against a party may be severed and proceeded with separately.” Using the rule as a guide, we find the question of whether KMC Data LLC and KMC Telecom V are improperly joined should not weigh in our decision on whether or not to grant KMC’s Motion to Dismiss.

Failure to Join Indispensable Party

KMC asserts also that Sprint failed to join a certain enhanced service provider (name redacted) which KMC has contracted with to deliver traffic. KMC contends that some or all the traffic at issue in Sprint’s complaint is traffic that is transported by this enhanced service provider.

The concept of indispensable party is not specifically provided for in the Florida Administrative Code. The courts define an “indispensable party” as one who has such an interest in the subject matter of the action that a final adjudication cannot be made without affecting the party’s interest or without leaving the controversy in such a situation that its final resolution may be inequitable. W.R. Cooper, Inc. v. City of Miami Beach, 512 So. 2d 324, 326 (Fla. 3d DCA 1987). In Order No. PSC-99-0648-PCO-WS, issued April 6, 1999 (Docket No. 981609-WS),<sup>1</sup> we construed this judicial definition as having similar meaning to Rule 28-106.109, Florida Administrative Code, which governs the effect of agency proceedings on non-parties. That rule states:

[I]f it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that the absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

Based on the rule cited above, KMC’s enhanced service provider (over whom the PSC does not have regulatory jurisdiction) may very well have an indirect interest in the resolution of Sprint’s Complaint. However, we find that the enhanced service provider is not an indispensable party, since the issue of whether KMC knowingly delivered traffic to Sprint without paying the appropriate compensation does not appear to require the presence of this third-party. Therefore,

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<sup>1</sup> See also Order No. PSC-03-1331-FOF-TL, issued November 21, 2003.

we find that failure to join an indispensable party is not a basis to grant KMC's Motion to Dismiss.

Jurisdiction to Grant Requested Relief

Finally, KMC argues that this Commission has no legal authority to authorize backbilling in this instance, because that remedy is barred by the application of the parties' contract or by Sprint's tariff, and is not otherwise authorized in the statutes. We disagree. Section 364.16(3)(b) specifically provides that:

Any party with a substantial interest [i.e. Sprint] may petition the commission for an investigation of any suspected violation of paragraph (a). In the event any certificated local exchange service provider [i.e. KMC] knowingly violates paragraph (a), the commission shall have jurisdiction to arbitrate bona fide complaints arising from the requirements of this subsection and shall, upon such complaint, have access to all relevant customer records and accounts of any telecommunications company.

We find that this provision grants us the implied authority to authorize a company to be backbilled if it is proved the company knowingly delivered interexchange traffic through a local interconnection arrangement without paying the appropriate access charges. While the proper interpretation of Section 364.16(3) is ultimately a question for us to determine later in these proceedings, Sprint's complaint is sufficient to withstand KMC's motion to dismiss.

Decision

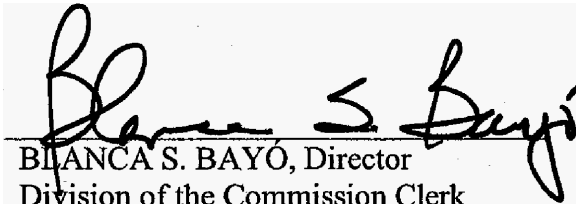
Based on the foregoing, we find Sprint has stated a cause of action upon which relief may be granted under Section 364.16(3)(a), Florida Statutes. Therefore, we deny KMC's Motion to Dismiss.

Based on the foregoing, it is

ORDERED that the Motion to Dismiss filed by KMC Telecom III, LLC, KMC Telecom V, Inc. and KMC Data LLC (collectively "KMC") is denied. It is further

ORDERED that this docket shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 3rd day of December, 2004.



BLANCA S. BAYO, Director  
Division of the Commission Clerk  
and Administrative Services

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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.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.