

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-05-0723-PCO-TP  
ISSUED: July 6, 2005

**ORDER GRANTING, IN PART, AND DENYING, IN PART,  
MOTION TO COMPEL**

I. 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.

On April 26, 2005, KMC served its Third Set of Interrogatories (Nos. 43-82) and Fourth Request for Production of Documents (Nos. 29-73) on Sprint. On May 16, 2005, Sprint served its Responses. Thereafter, on May 17, 2005, Sprint served its first set of Supplemental Responses to KMC's discovery requests. KMC then filed a Motion to Compel on June 7, 2005. Sprint filed its Response to the Motion to Compel on June 17, 2005. That same day, Sprint served its second set of Supplemental Responses to these discovery requests.

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.

II. Motion to Compel

A. KMC

KMC asks that the Commission compel additional, more complete responses to Interrogatories Nos. 49, 54, 55, 56, 59, 70, 70A, 73, 74, 78, and 79, as well as Requests for Production of Documents (PODs) 45 and 46. KMC argues that Sprint has not meaningfully responded to these requests and any responses provided thus far have been evasive and deficient.

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Sprint argues, however, that it has responded adequately, and that to the extent any of its responses need additional supplementation or explanation, it has done so in its Supplemental Responses.

The parties' specific arguments as to each request are set forth as follows.

1. Interrogatory 49

KMC explains that this request asks for the characteristics of the traffic referenced in witness Burt's Direct Testimony at page 20. KMC argues that Sprint's response does not answer the question. Instead, KMC contends, Sprint fails to identify the traffic characteristics and instead, argues simply that Mr. Burt did not intend to describe characteristics of traffic. KMC maintains that this is contrary to statements in the witness's testimony, wherein he states that enhanced services traffic can be identified by characteristics of that traffic. KMC asserts that the purpose of the testimony is irrelevant to the discovery request.

Sprint, however, argues that KMC simply misunderstands Mr. Burt's testimony. Sprint explains that the characteristics referenced by Mr. Burt are those set forth in FCC Rule 64.702, which defines enhanced services.

2. Interrogatory 54 and POD 45

KMC asserts that it asked Sprint to identify all documents or policies pertaining to how Sprint is able to identify whether a customer is an enhanced services provider (ESP). POD 45 asks for all documents that Sprint relied upon in its response. KMC argues that Sprint has merely indicated that documents would be provided on May 17, 2005, and that they were not. KMC further argues that Sprint also referenced KMC to Sprint's response to Interrogatory 53, which Sprint indicates responds to both interrogatories.

KMC contends that in Sprint's response to Interrogatory 53, Sprint contends that it has enhanced service provider customers, but that it would be unduly burdensome to identify who those customers are. KMC adds that Sprint has indicated it does not need to identify those customers separately from its other customers, and that it has not identified any enhanced service providers that have asked Sprint to deliver traffic across LATA boundaries for termination to another local exchange carrier. KMC contends that Sprint has failed to identify any policies pertaining to the identification of ESPs or to state that no such policies exist. Thus, KMC asks that a response to this interrogatory be compelled.

Sprint argues that these requests are duplicative of KMC's Interrogatory 53. Sprint states that while it does provide services to ESPs, it would be unduly burdensome to identify all of its ESP customers. Sprint further argues that it identified and provided all documents that pertain to its provision of services to ESPs. Sprint notes that ESP customers may order services out of its non-ESP tariffs. Sprint argues that it has provided all other information responsive to this request.

3. Interrogatory 55 and POD 46

KMC argues that Sprint has failed to identify and describe the local services that ESPs purchase from Sprint. KMC argues that while Sprint indicated it would provide responsive documents on May 17, 2005, it failed to do so. Furthermore, KMC argues, Sprint merely referred KMC to Sprint's response to Interrogatory 53, which is unresponsive to the inquiry set forth in Interrogatory 55. Thus, KMC argues that Sprint should be compelled to more fully respond.

Sprint acknowledges that it has referenced Interrogatory 53, but explains that it set forth in that response all the local services it provides that are specifically designed for ESPs. Furthermore, Sprint emphasizes that ESPs may purchase other local services. Sprint emphasizes that due to the number of local services it offers, it would be unduly burdensome for it to detail every non-ESP local service that ESP customers may order. Sprint also emphasizes that it cannot separately identify its ESP customers. Thus, Sprint argues that it has fully responded to the request to the extent possible.

4. Interrogatory 56

KMC argues that Sprint has failed to respond to KMC's request for details as to how Sprint, when it is the terminating LEC, is able to differentiate a call that employs only circuit switching, as opposed to one that uses the Internet protocol at any point along its path. KMC contends that Sprint's response does not identify the protocols, nor does it answer the question of whether and how Sprint can identify different calls. Instead, KMC contends Sprint avoids the question.

Sprint responds that it does not make such a differentiation, and that there is no other information responsive.

5. Interrogatory 59

KMC argues that Sprint should be required to respond to this request which asks Sprint to explain whether Sprint asks each of its ESP customers to make some sort of demonstration to confirm that it is, in fact, an ESP. If Sprint does require such a demonstration, KMC asks that Sprint describe the required demonstration. KMC contends that Sprint has, again, ignored this portion of Interrogatory 59, and provided no response at all.

With regard to the portion of this interrogatory that is contested, Sprint explains that it simply overlooked this question. Therefore, Sprint filed a Supplemental Answer to this question, which indicates that Sprint does not ask its ESP customers to make any sort of demonstration prior to providing services to that customer.

6. Interrogatory 70

This request asks Sprint, for those call detail records that it has provided to KMC, to identify which of the CDRs were for any calls originated on the Sprint local network. KMC notes that Sprint has stated that KMC can identify the information for itself, but KMC contends that it cannot. KMC explains that Sprint has the complete data necessary to enable it to extract this information. KMC does not have the necessary additional information; thus, it argues that Sprint should be required to respond more completely to this request.

Sprint acknowledges that it originally objected on the grounds that KMC could extract the data as easily as could Sprint. Sprint emphasizes that KMC does, in fact, have all of the data necessary to identify the calls originating on Sprint's local network. Sprint adds, however, that it is filing a Supplement to its original responses, which describes the steps necessary to identify the ILEC that originated a call. The Supplemental response explains that the originating ILEC can be determined by looking at the information in the columns identified as "Calling NPA," "Calling NXX," and "Calling Line" then referring to the Local Exchange Routing Guide (LERG) to determine what carrier has the NPA/NXX and to the Number Portability Administrative Center (NPAC) to determine if the telephone number in question has been ported to another carrier. Thus, Sprint believes that it has responded to the extent required. Sprint still contends that KMC is as capable as Sprint is of determining the originating ILEC.

7. Interrogatory 70A

KMC explains that this interrogatory seeks information from the same CDRs referenced in Interrogatory 70, but asks that Sprint identify all calls that were carried at any point by the Sprint IXC affiliate. KMC contends that Sprint is much more able to identify the pertinent calls, and should be required to do so.

Sprint explains that KMC is correct in that it does not have some of the data necessary to make this determination from the CDRs. Sprint explains that correlated call records (CCRs) are necessary to show what happened on the originating side of the call. Therefore, Sprint filed a Supplemental response, which explains that in reviewing the CCRs, Sprint determined that Sprint IXC did not hand off traffic to Customer X.

8. Interrogatory 73

This interrogatory asks whether Sprint has ESP customers in Florida and which trunks are used by Sprint to route calls from Sprint ESP customers to KMC customers with Tallahassee and Fort Myers phone numbers. KMC argues that Sprint has merely referenced its response to Interrogatory 53, which does not answer the question. KMC argues that while Sprint has acknowledged it has ESP customers in Florida, it would be unduly burdensome for Sprint to identify them, Sprint does not regularly identify them or differentiate them for purposes of those customers ordering local services, and Sprint has not identified any ESP customers that have asked Sprint to transport traffic across LATA boundaries for deliver to another local carrier. KMC emphasizes, however, that Sprint does not respond at all to the question regarding which

trunks carry the ESP traffic. Thus, KMC contends that answer is evasive and utterly unresponsive.

Sprint again explains that it does have ESP customers, but that it does not, and cannot, identify those customers separately from its other customers. Thus, Sprint contends there is no way to tell over which trunks the ESP traffic is routed. Sprint supplemented its answer by re-emphasizing that it does not know which trunks are used.

#### 9. Interrogatory 74

KMC asks that Sprint explain what signaling information Sprint has delivered and currently delivers to KMC in connection with calls that originate on Sprint-provided Primary Rate ISDN service provided to a Sprint enhanced/information services provider end user. KMC then asks Sprint to explain how this signaling is any different from that associated with the PRIs that KMC provided to Customer X.

KMC argues that Sprint's answer is incomplete, because Sprint states it is only identifying some of the pertinent information. Sprint also seems to qualify its answer, according to KMC, by its use of phrases such as "in the context of these proceedings: and "for this discussion." KMC is concerned that this indicates Sprint has selectively excluded some information that may be relevant to KMC's request. KMC adds that Sprint did not respond at all to the second part of the question, which asks for a comparison to the KMC PRI associated signaling.

Sprint responds that it believes it has fully responded. Sprint acknowledges, however, that the qualifying phrases used may have been misconstrued. Thus, Sprint provided a Supplemental response, which explains that Sprint limited its answer to the SS7 Calling Number, Called Number, and Charge number parameters. Sprint further provides the American National Standard information relative to the parameters for this type of call.

#### 10. Interrogatory 78

In this request, KMC seeks a description of how the CDR reports are generated, including the extent to which they rely upon minutes of use, comprehensive use, or sampling of CDRs, and the trunk utilization reports generated by switch sampling techniques.

KMC argues that Sprint's answer is too general, in that it simply indicates that the information is "extracted" and placed in a monthly report. KMC argues that Sprint has provided these reports as the basis of its complaint against KMC; thus, KMC must have enough information about how the reports are prepared in order to defend itself against Sprint's claims. KMC urges that neither it, nor the Commission, should accept "on faith" Sprint's assertions about how it made its calculations that serve as the basis for its claims against KMC.

Sprint argues that, while it believes it has already fully responded to the extent required, it is providing a Supplemental response that may assist KMC in understanding how the reports

are prepared. Sprint supplements by providing an EXCEL spreadsheet with a step-by-step explanation of the process by which Sprint determined when traffic was improperly routed over local interconnection trunks.

#### 11. Interrogatory 79

KMC asks that Sprint explain how the PIUs and PLUs on the documents characterized as "KMC CLEC PLU Backbilling" that Sprint provided in response to Interrogatory 1(a) were calculated. If they were not calculated in the same manner, KMC asks that Sprint identify which ones were calculated differently and explain the differences.

KMC argues that Sprint's response is, again, vague and unresponsive. KMC contends that it needs more specificity if it is to be able to respond to and defend against Sprint's claims.

Sprint notes that it has already fully responded to KMC's requests for information regarding how it calculated the amount of avoided access charges in responding to earlier interrogatories. Sprint further emphasizes that it provided a description of how it made its calculations in response to this interrogatory. However, as with Interrogatory 78, Sprint has now submitted a Supplemental response to Interrogatory 79, which consists of an EXCEL spreadsheet with a step-by-step explanation of the process and a sample page of a monthly report to correlate the process.

### III. DECISION

The scope of discovery under the Florida Rules of Civil Procedure is liberal. Rule 1.280(b)(1), FRCP, states that:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of the other party. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. What is relevant for purposes of discovery is a broader matter than what is relevant and admissible at hearing. Discovery may be permitted on information that would be inadmissible at trial, if it would likely lead to the discovery of relevant, admissible evidence. See Allstate Insurance Co. v. Langston, 655 So.2d 91 (Fla. 1995). Furthermore, objections to discovery that is "burdensome" or "overly broad" must be quantified. First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Ass'n, Inc., 545 So.2d 502, 503 (Fla. 4th DCA 1989). Finally, assertions that information sought is subject to privilege as a "trade secret" must be set forth in such a way that parties can assess the applicability of the alleged privilege. TIG Ins. Corp. of America v. Johnson, 799 So.2d 339 (Fla. 4th DCA 2001).

This standard is not, however, without limit, as this Commission has recognized time and again. See Orders Nos. PSC-03-0857-PCO-TP; PSC-03-1304-PCO-TL; and PSC-05-0096-PCO-TP. In accordance with Rules 1.280 and 1.350, Florida Rules of Civil Procedure, the scope of discovery does not include the discovery of irrelevant information. See Travelers Indemnity Company v. Salido, 354 So. 2d 963(Fla. 3rd DCA 1978). Furthermore, Rule 1.350, Florida Rules of Civil Procedure, requires that the party from whom production is sought must have possession, custody or control of the documents. See also Henry P. Trawick, Florida Practice and Procedure, § 16-10, (1991). It is not proper to seek production of documents that do not exist and would, therefore, require preparation. See Bissell Bros. v. Fares, 611 So. 2d 620(Fla. 2nd DCA 1993)(discovery of nonexistent records cannot be had); Balzebre v. Anderson, 294 So. 2d 701(Fla. 3rd DCA 1974)(“ . . . a party may not be required to produce documents which it does not have. . .”); and Henry P. Trawick, Florida Practice and Procedure, § 16-10, (1991).

A. Interrogatory 49

Upon consideration, it appears that Sprint has responded to this interrogatory in a meaningful, complete manner. Sprint has indicated that the characteristics contemplated in witness Burt’s response are those set forth in the FCC’s rule. This is responsive to the request. Thus, the Motion as to Interrogatory 49 is denied.

B. Interrogatory 54 and POD 45

As for these requests, the responses provided by Sprint also appear to be adequate. KMC asks that Sprint identify all policies applicable to the identification of all Sprint customers that are ESPs. Sprint has stated not only that it does not separately identify these customers, but that it cannot identify these customers. Thus, there are no policies to identify. As such, the Motion as it pertains to these requests is denied.

C. Interrogatory 55 and POD 46

As for these requests, it also appears that Sprint’s answers provided here are generally responsive. Sprint has indicated that it does not separately identify its ESP customers, but provides the tariff setting forth all the services, terms, and conditions for local services designed specifically for ESPs. There is, however, some lack of clarity as to the applicability of the tariff provisions regarding the local service offerings designed specifically for ESPs. Thus, Sprint shall be required to clarify whether a customer has to identify itself as an ESP or make any demonstration that it is an ESP in order to purchase services out of the tariff that are designed specifically for ESPs.

D. Interrogatory 56

Here, the issue of whether Sprint’s answer is responsive to the request is close. It appears to be generally responsive. However, while Sprint has explained that it does not differentiate a call that uses Internet protocol at any point, it is unclear whether Sprint has explained whether it can differentiate such calls. Therefore, Sprint shall be required to provide a clarification

explaining whether or not, when it is the terminating LEC, it can differentiate calls that utilize Internet protocol in their transmission from those calls that only employ circuit switching.

E. Interrogatory 59

Upon consideration, the Motion is denied as to this request. While Sprint acknowledges it did not respond to this request initially, it has since provided a responsive answer in its Supplemental response to this interrogatory. Sprint is, however, cautioned to carefully consider all portions and subparts of discovery served.

F. Interrogatory 70

Sprint has provided an explanation of how KMC may proceed to identify these calls in the CDRs already provided to KMC. KMC has not explained what information it is lacking that prevents it from determining the answer to this interrogatory using the information it now has in hand. As such, KMC has failed to adequately explain why Sprint should be required to do so. Thus, the Motion as to this interrogatory is denied.

G. Interrogatory 70A

Again, Sprint has provided more information, as well as further explanation, that would allow KMC to identify the calls at issue in the CDRs. KMC should now have the information that will allow it to extract the information from the CDRs. Furthermore, Sprint explains in its Supplemental response to this interrogatory that it has determined that Sprint's IXC did not hand traffic off to KMC's Customer X. Thus, the Motion as to this request is denied.

H. Interrogatory 73

Sprint appears to have fully responded to this interrogatory to the extent possible. It has explained that it does not, and cannot, identify the trunks over which ESP traffic is routed. Thus, KMC's Motion as it pertains to this interrogatory is denied.

I. Interrogatory 74

Upon consideration, Sprint has provided information responsive to this request. Sprint has clarified its use of the qualifying phrases referenced, and has provided information in its Supplemental response that satisfies this request. Thus, as it pertains to Interrogatory 74, the Motion is denied.

J. Interrogatory 78

While it appears that Sprint's initial response to this interrogatory was insufficient, the additional information provided in the Supplemental response provides KMC with the information necessary to determine how the CDR reports are generated. As such, the Motion as it pertains to this request is denied.



K. Interrogatory 79

Finally, with regard to Interrogatory 79, KMC contends that the initial response provided by Sprint was insufficient. Sprint has, however, supplemented that initial response, and the supplemental information appears to satisfy this request. As noted previously herein, Sprint should endeavor to provide complete, fully explanatory responses that will negate the need for numerous supplemental responses. While the Supplemental responses have largely provided information fully responsive to the discovery requests at issue here, I recognize that the need for Sprint to provide supplemental information has delayed KMC's ability to analyze the information.

L. Conclusion


Based on the foregoing, KMC's Motion to Compel Responses to its Third Set of Interrogatories and Fourth Request for Production of Documents is hereby granted, in part, and denied, in part. The Motion is granted only to the extent that: (1) Sprint shall be required to clarify whether a customer has to identify itself as an ESP or make any demonstration that it is an ESP in order to purchase services out of the tariff that are designed specifically for ESPs; and (2) Sprint shall be required to provide a clarification explaining whether or not, when it is the terminating LEC, it can differentiate calls that utilize Internet protocol in their transmission from those calls that only employ circuit switching.

Based on the foregoing, it is therefore

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that KMC's Motion to Compel Responses to its Third set of Interrogatories and Fourth Request for Production of Documents to Sprint is hereby granted, in part, and denied, in part, as set forth in the body of this Order. It is further

ORDERED that Sprint shall provide the additional information and clarifications required by this Order by the close of business within three (3) days of issuance of this Order.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this  
6th day of July, 2005.

  
RUDOLPH "RUDY" BRADLEY  
Commissioner and Prehearing Officer

( S E A L )

BK

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.