

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-05-1234-FOF-TP
ISSUED: December 19, 2005

The following Commissioners participated in the disposition of this matter:

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ORDER ON SPRINT COMPLAINT AGAINST KMC FOR ALLEGED
FAILURE TO PAY INTRASTATE ACCESS CHARGES

BY THE COMMISSION:

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Abbreviations and Acronyms

Act	Telecommunications Act of 1996
AMA	Automatic Message Accounting
BR	Brief
CDR	Call Detail Record
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CN	Charge Number
CP	Called Party
CPE	Customer Premises Equipment
CPN	Calling Party Number
DSL	Digital Subscriber Line
ESP	Enhanced Services Provider
EXH	Exhibit
FCC	Federal Communications Commission
FDN	Florida Digital Network, Inc. d/b/a FDN Communications
FPSC	Florida Public Service Commission
ICA	Interconnection Agreement
IP	Internet Protocol
ISP	Internet Service Provider
IXC	Interexchange Company
JIP	Jurisdiction Information Parameter
KMC	KMC Telecom V, Inc., KMC Telecom III, LLC, KMC Data LLC
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
LNP	Local Number Portability
MCI	MCIMetro Access Transmission Services, LLC
MOU	Minute of Use
MSA	Metropolitan Statistical Area
NPA	Numbering Plan Area
NXX	Central office code or prefix
OCN	Operating Company Number
PBX	Private Branch Exchange
PIU	Percentage of Interstate Usage
PLU	Percentage of Local Usage

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POTS	Plain Old Telephone Service
PRI	Primary Rate Interface
PSTN	Public Switched Telephone Network
Sprint	Sprint Florida, Incorporated
SS7	Signaling System 7
TR	Transcript
VoIP	Voice over Internet Protocol

CASE BACKGROUND

On September 24, 2004, 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), to avoid paying Sprint access charges. Sprint also asserts that this misrouting of access traffic has resulted in an overpayment of reciprocal compensation 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, and on December 3, 2004, we issued Order No. PSC-04-1204-FOF-TP, denying KMC's Motion to Dismiss. On January 30, 2005, the Order Establishing Procedure, Order No. PSC-05-0125-PCO-TP, was issued.

On February 28, 2005, KMC filed its Answer, Affirmative Defenses and Counterclaims, and on March 4, 2005, KMC filed its Motion for Audit. On March 18, 2005, Sprint filed its response to KMC's Motion for Audit and simultaneously filed a Motion to Strike the Answer, Affirmative Defenses and Counterclaim, and Motion to Dismiss the Counterclaim or, in the Alternative, Motion to Bifurcate the Counterclaim of KMC. On March 25, 2005, KMC filed its response. On May 20, 2005, we issued Order No. PSC-05-0558-PCO-TP, striking KMC's Counterclaim with leave to refile as a separate complaint which rendered KMC's Motion for Audit moot.

The hearing in this matter was conducted on July 12, 2005. Thereafter, the parties met for one last effort at resolving their dispute between themselves. KMC then filed a Motion to Dismiss on September 16, 2005. Our staff was informed on September 19, 2005, that the parties' negotiations were not successful. On September 23, 2005, Sprint filed its Response in Opposition to KMC's Motion to Dismiss. On October 4, 2005, KMC filed an Amended Motion to Dismiss, to which Sprint responded on October 11, 2005. On November 1, 2005, we issued Order No. PSC-05-1065-FOF-TP, denying KMC's Motion to Dismiss and its alternative request for a stay of the proceedings pending the outcome of matters before the FCC.

ISSUE 1: THE FLORIDA PUBLIC SERVICE COMMISSION'S JURISDICTION TO ADDRESS THIS COMPLAINT

Arguments

Sprint

Sprint argues that KMC has violated Florida law, Sprint's tariffs, and the parties' interconnection agreements by knowingly delivering interexchange traffic to Sprint over local trunks to avoid access charges. Sprint argues not only that this is a specific violation of Section

364.16(3)(a), Florida Statutes, but also that this Commission clearly has jurisdiction to address the complaint as set forth in Section 364.16(3)(b), Florida Statutes, which states:

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

In addition, Sprint contends that we have jurisdiction to resolve complaints arising out of the parties' interconnection agreements pursuant to Sections 251 and 252 of the federal Telecommunications Act and Sections 364.16, 364.161, and 364.162, Florida Statutes. Furthermore, Sprint argues that the parties' interconnection agreements themselves, specifically Section 23 in each of them, provide that we have jurisdiction to resolve disputes over the terms and conditions of the agreements.

Finally, Sprint also alleges that KMC has violated Sprint's access tariffs by failing to pay the tariffed access rate. Sprint explains that 47 U.S.C. §201 and Section 364.163, Florida Statutes, delineate both the FCC's and the Commission's jurisdiction with regard to interstate and intrastate access charges, while case law holds that tariffs have the force and effect of law, and are enforceable by the Commission. *Citing Maddalena v. Southern Bell*, 382 So. 2d 1246 (Fla. 4th DCA 1980); and *In re: Complaint by Mr. Paul Leon and Mr. Joseph Olazabal against Florida Power and Light Company regarding tariffs for moving electric light poles*, Order No. PSC-98-1385-FOF-EI, in Docket No. 981216-EI.

In response to KMC's allegations that this Commission does not have jurisdiction, because the traffic at issue is enhanced services traffic, and specifically, VoIP traffic, Sprint contends that whether the traffic is VoIP traffic or ESP traffic is yet to be determined. Even if it is VoIP traffic, Sprint argues that the FCC has not determined that all VoIP traffic is enhanced services traffic, but has, instead, stated that certain VoIP traffic is telecommunications traffic, subject to intercarrier compensation. Sprint further asserts that under evidentiary rules, KMC bears the burden of demonstrating that the traffic at issue was, in fact, enhanced services traffic. Sprint notes that this Commission has also considered a related question of proof in Docket No. 950985-TP, wherein we found, based upon Section 364.16(3), Florida Statutes, that "[w]e find that the company terminating the call should receive terminating switched access from the originating company unless the originating company can prove the call is local." Order No. PSC-96-1231-FOF-TP, at p. 23.

Finally, Sprint contends that the FCC has indicated that VoIP traffic that uses the public switched network in the same manner as circuit switched traffic should be subject to the same intercarrier compensation.¹ Sprint notes that we have also stated that access charges are due when VoIP traffic is terminated over the public switched network in the same manner as circuit

¹ *Citing In the Matter of Federal-State Joint Board, Report to Congress*, CC Docket No. 96-45, released April 10, 1998 at ¶¶ 88 and 89; and *In the Matter of IP-Enabled Services*, FCC 04-28, released March 10, 2004, at ¶ 33.

switched traffic.² Furthermore, Sprint contends that the FCC has not preempted state commission jurisdiction over all aspects of VoIP traffic, as KMC contends. Rather, Sprint argues, the FCC only preempted states as to the application of so-called “legacy regulations” on Vonage-type services. Sprint emphasizes that the FCC specifically declined to determine: (1) whether a Vonage-type VoIP service is a telecommunications service or information service; and (2) what type of intercarrier compensation is appropriate. Sprint adds that regardless of these arguments, KMC has failed to submit any evidence that the traffic at issue is VoIP in the first place.

KMC

KMC addresses this issue as a question of whether this Commission has authority to grant the relief requested by Sprint in this docket. KMC contends that it does not. KMC contends that the traffic at issue is enhanced services traffic, more specifically IP telephony traffic, from one particular end use customer – PointOne. KMC argues that the FCC has determined that enhanced services traffic, such as IP telephony traffic, is interstate in nature; thus, the FCC is the final arbiter on any disputes regarding the appropriate treatment of such traffic, including intercarrier compensation. KMC emphasizes that, although we approved the parties’ interconnection agreement, the parties exchanged the traffic pursuant to federal policies applicable to this traffic, which call for the traffic to be treated as if it were local in nature and not subject to access charges.

KMC contends that the FCC has recognized the limited role of state commissions with regard to this traffic, citing the FCC’s decision in *Petition for Declaratory Ruling That pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Serv.*, 19 FCC Rcd 3307, ¶¶ 17- 18 (2004), and Footnotes 47–68 of the FCC’s decision regarding Vonage’s request for a declaratory statement, 19 FCC Rcd 22404 (2004). KMC further maintains that the courts have also recognized the limited role of state commissions over IP-enabled telephony services.³ KMC adds that the FCC currently has an open rulemaking proceeding to address the regulatory treatment of IP-enabled service offerings, which would include the PointOne services at issue here. KMC argues that until the FCC proceeding has concluded, the state commissions have no role in deciding the appropriate intercarrier compensation for this traffic.

In addition, KMC argues that the FCC has stated on numerous occasions that access charges do not apply to enhanced services.⁴ KMC acknowledges that the FCC has upon one

² Citing *Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc.*, Order No. PSC-00-1519-FOF-TP, issued August 22, 2000 at page 57.

³ Citing *Vonage Holdings Corp. v. Minn. Publ. Utils. Comm’n*, 290 F.Supp. 2d 993, 997, 1001-1002 (D. Minn. 2003), aff’d. (8th Cir. Dec. 22, 2004); and *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm’n.*, No. 04 Civ. 4306 (S.D.N.Y. July 16, 2004).

⁴ Citing *MTS and WATS Market Structure*, 97 FCC RCD 2d 682, 715; *Amendment of Part 69 of the Commission’s Rules Relating to Enhanced Serv. Providers*, 3 FCC Rcd 2631 (1988); *Access Charge Reform*, 12 FCC RCD 15982, 16133 (1997); *Developing a Unified Intercarrier Compensation Regime*, 16 FCC RCD 9610, 9613 (2001); and *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998).

occasion decided that access charges are applicable to enhanced services - its decision regarding AT&T's Petition for Declaratory Ruling regarding AT&T's IP-enabled services. AT&T's Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges, 19 FCC Rcd 7457, 7466-68 at ¶¶ 14-15, 17 (2004). KMC asserts, however, that the FCC's decision in that case was very limited. Specifically, KMC explains that the FCC found that access charges are due when Internet Protocol is used only for "transmission purposes for 1+ dialed interexchange calls, where there was no net protocol conversion, and where there were no enhanced features or functionalities enabled by the use of IP." KMC argues that subsequent rulings by the FCC on similar questions indicate that the FCC intended its ruling on AT&T's IP Telephony services to be strictly limited to services that are identical to AT&T's service at issue in that case.⁵

KMC argues that the FCC has clearly and consistently determined that IP-enabled enhanced services traffic is inherently interstate, and specifically stated that the FCC, rather than the state commissions, has the authority to determine the regulatory treatment of IP-enabled services. Thus, KMC contends that if this Commission fails to recognize the FCC's primary jurisdiction to determine the proper regulatory treatment of PointOne's traffic, we run a significant risk of our decision ultimately coming into conflict with FCC decisions. Thus, KMC suggests that we should dismiss the complaint for lack of jurisdiction.

Finally, KMC contends that the FCC's authority in this area has recently been confirmed by the courts. KMC explains that in August of this year, the U.S. District Court for the Eastern District of Missouri dismissed a complaint by Southwestern Bell against PointOne to collect access charges. In the case, Southwestern Bell sought to collect access charges from VarTec, Unipoint d/b/a PointOne, and Transcom. The court determined that these carriers were least cost routers providing the "IP transmission" of the calls. The court, however, dismissed UniPoint from the case, rejecting the plaintiff's assertions that the complaint pertained to tariff enforcement outside the FCC's authority. KMC emphasizes that the court reached the following conclusion:

. . . in order to determine whether the UniPoint defendants are obligated to pay the tariffs in the first instance, the Court would have to determine either that the UniPoint defendants are IXCs or that access charges may be assessed against entities other than IXCs. The first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC. The Court's entrance into these determinations would create a risk of inconsistent results among courts and with the Commission. The FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance.

Southwestern Bell Telephone, L.P. v. VarTec Telephone, Inc., 2005 WL 2033416, at 4 (E.D. Mo., Aug. 23, 2005). With regard to the case before this Commission, KMC contends that the issue is the same as that addressed by the VarTec court.

⁵ Citing AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs., 20 FCC Rcd. 4826, ¶¶ 1 - 2 (2005).

KMC also references a case out of the U.S. District Court for the Western District of New York, wherein Frontier Telephone attempted to collect access charges from USA Datanet, a VoIP provider. KMC contends that in that case, the court discussed at length the federal proceedings involving IP-enabled services and concluded that since Frontier was disputing whether Datanet's services provide enhanced functionality, there was a potential for conflict with the FCC's ongoing proceedings. Thus, the court stayed its proceedings pending the outcome of FCC proceedings. KMC acknowledges that there are some factual distinctions between the referenced cases and this proceeding, but argues that the legal principles at issue are the same. Furthermore, KMC notes that the traffic at issue was originated by one former KMC customer, PointOne. Thus, KMC argues that the complaint should be dismissed, because we lack sufficient jurisdiction to resolve the issues.

Analysis

A. History

By way of background, enhanced service providers or ESPs are a class of service providers that the FCC has in the past acknowledged as being among a variety of users of LEC interstate access services. The FCC defines "enhanced services" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a). The 1996 Act describes these services as "information services." *See* 47 U.S.C. § 153(20) ("information service" refers to the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."). *See also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11516 (1998) (*Universal Service Report to Congress*) (the "1996 Act's definitions of telecommunications service and information service essentially correspond to the pre-existing categories of basic and enhanced services"). *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, CC Docket No. 01-92.

Since 1983, the FCC has exempted ESPs, now known as information service providers (ISPs), including those that provide service related to the Internet, from the payment of certain interstate access charges. ISPs are, instead, treated as end users for the purpose of applying access charges and are entitled to pay local business rates for their connections to LEC central offices. This policy, known as the "ESP exemption," has been reviewed by the FCC on a number of occasions and retained each time. *See First Reconsideration of 1983 Access Charge Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access and would experience rate shock that could affect their viability if full access charges were instead applied); *see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*) ("the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired"); *Access Charge Reform Order*, 12 FCC Rcd at 16133-35, paras. 344-48 ("maintaining the existing pricing structure ... avoids disrupting the still-evolving information

services industry"); and *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. See also *Access Charge Reform Order*, 12 FCC Rcd at 16133-35, paras. 344-48. In the Matter of *Developing a Unified Inter-carrier Compensation Regime*, 20 FCC Rcd 4685, CC Docket No. 01-92.

B. Jurisdictional Analysis

At the outset, we believe this Commission has jurisdiction to resolve this matter, as clearly set forth in Order No. PSC-05-1065-FOF-TP. In that Order, we denied KMC's Motion to Dismiss concluding that we do have jurisdiction over this matter, contrary to KMC's contention that jurisdiction rests solely with the FCC.

As set forth in that Order, the strongest argument for our authority with regard to this issue is based upon the clear provisions of Section 364.16(3)(b), Florida Statutes, which provide that anyone with a "substantial interest may petition the commission for an investigation of any suspected violation of paragraph (a)." (emphasis added). The statute further provides that we shall then arbitrate complaints that arise from a violation of subsection (a). As we found,

This language not only authorizes us to investigate the allegations before us, but requires us to take action to determine the veracity of, and to resolve, those allegations. This provision does not preclude us from ultimately reaching a decision that no violation has occurred, but does require action by this Commission to investigate the alleged violation. When read in conjunction with Section 364.02(13), Florida Statutes, and Section 364.162, Florida Statutes, additional support for our authority in this matter can be gleaned from the Legislature's clear expression that we may continue to resolve interconnection disputes for the types of services that KMC alleges are at issue, and should do so pursuant to our authority to resolve interconnection disputes.

Order No. PSC-05-1065-FOF-TP at p. 11.

With regard to the cases referenced by KMC for the proposition that this Commission is preempted in this area, we also addressed those cases in our Order on the Motion to Dismiss, and concluded that the cases may be distinguished with the biggest distinguishing factor being that, unlike this case, none of the cases at issue presented a state law question to the court or the FCC.

Decision

Based on the foregoing, we affirm that we have jurisdiction to investigate and address the allegations presented in Sprint's complaint pursuant to Section 364.16 (3)(b), Florida Statutes, consistent with Order No. PSC-05-1065-FOF-TP.

ISSUE 2: PROPERLY INCLUDED PARTIES TO THIS COMPLAINT

Arguments

Sprint

Sprint notes that KMC has argued that KMC Data LLC and KMC Telecom V are not proper parties to Sprint's Complaint, based on its representations that neither entity was involved in the traffic that is the subject of Sprint's Complaint. Therefore, neither entity can be held liable for the access charges due Sprint for this traffic. Sprint advises that it included KMC III, KMC V, and KMC Data LLC as parties to the Complaint because all three are certificated as CLECs in Florida and all three are parties to one or more of KMC's interconnection agreements with Sprint. When it initially filed its Complaint, Sprint states it had insufficient knowledge of the relationships among the various KMC entities to which Sprint provided service under the interconnection agreements, since KMC had been unresponsive to Sprint's attempts to gather information from KMC regarding the traffic that is the subject of Sprint's Complaint. According to Sprint, KMC subsequently has alleged that KMC Data LLC does not provide service in Florida and has no customers. Sprint claims it still includes KMC Data as a party because it has entered into a Florida interconnection agreement with Sprint.

Regarding KMC V, Sprint urges that its internal records and industry records available to Sprint show that KMC V was closely involved in the traffic that is the subject of Sprint's complaint. Because of this, KMC V should be held responsible, along with KMC III, for knowingly delivering interexchange traffic over local interconnection trunks to Sprint for the purpose of avoiding access charges. According to Sprint, the evidence of KMC V's involvement in this traffic includes the following: First, the evidence shows that KMC V owned the charge-party numbers assigned to the customer (Unipoint) that KMC says is responsible for the access bypass traffic identified by Sprint. Second, in response to discovery, KMC identified the OCN 8982 as belonging to KMC V. The Local Exchange Routing Guide ("LERG") shows that the charge party numbers assigned to Unipoint by KMC belong to the OCN 8982 that is assigned to KMC V. Third, the evidence also shows that the interconnection facilities (i.e., local trunks) used to deliver the traffic to Sprint that is the subject of Sprint's Complaint, were ordered under KMC V's OCN 8982.

Sprint claims that KMC has changed its story several times on the involvement of KMC V in this case. First, KMC stated under oath in a discovery response that KMC III owned the charge party numbers assigned to the customer that KMC says is responsible for the offending traffic identified by Sprint. After Sprint filed its direct testimony and discovery responses demonstrating that KMC V was the owner of the relevant numbers in the LERG, KMC changed its story. Later, when questioned about the inconsistencies in its testimony and discovery responses, KMC attempted to say that the numbers really belonged to KMC III and they just hadn't made the relevant "record changes" to reflect the correct ownership. Finally, in response to further inquiry from Sprint, KMC admitted that KMC V owned the OCN under which the numbers were assigned and under which the facilities were ordered during the entire time period that is the subject of this Complaint.

Sprint argues there is no support or justification in the law for the position apparently espoused by KMC's counsel in his opening statement that two entities, which are jointly parties to the applicable interconnection agreements and jointly engaged in the activities that Sprint alleges to be unlawful under its Complaint, cannot be found jointly responsible to Sprint for the access charges that should have been paid under the law and the interconnection agreements. KMC Data LLC is a certificated CLEC in Florida and was a party to at least one of the interconnection agreements that KMC had with Sprint. On this basis alone KMC Data LLC is a proper party to this Complaint, argues Sprint. KMC V and KMC III were joint parties to applicable interconnection agreements and jointly engaged in the activities that give rise to this Complaint. According to Sprint, nothing in the interconnection agreements indicates that liability under the agreements should be divided or allocated among the various KMC entities. Therefore, urges Sprint, both KMC V and KMC III are proper parties to Sprint's Complaint and they should be held jointly responsible for their actions and for the payment to Sprint of the wrongfully avoided access charges.

KMC

KMC argues that KMC Data and KMC V are not properly parties to this case because they never had any customers in the Tallahassee and Ft. Myers markets and never exchanged any traffic with Sprint in those markets. According to KMC, the trunks were ordered and paid for by KMC III and KMC III alone. KMC claims Sprint has offered no evidence linking KMC Data to any of the calls. And the mere fact that KMC Data has an interconnection agreement with Sprint is not enough to make it a defendant in this case if KMC Data never exchanged traffic with Sprint. Moreover, argues KMC, that agreement postdates Sprint's complaint in this proceeding.

KMC urges that, as for KMC V, Sprint has offered only a single flawed rationale linking that carrier to the traffic at issue: the OCNs for the telephone numbers associated with the calls in question were assigned to KMC V. However, claims KMC, the fact that KMC III used the KMC V numbers does not change the fundamental fact that the traffic at issue was KMC III traffic, and not exchanged between KMC V and Sprint.

Assuming Sprint's theories on liability are correct, KMC argues, there is no liability by association or by virtue of common ownership. If there was, KMC notes, then it was improper to dismiss KMC's counterclaims against Sprint's IXC affiliate. According to KMC, whatever theoretical justification Sprint may have once had for bringing the complaint against all three KMC companies before discovery, testimony, and depositions, if any, KMC Data and KMC V should now be dropped as defendants based upon the competent substantial evidence of record.

Analysis

We are persuaded by KMC's argument that there is absolutely no nexus between KMC Data LLC and the transactions which are the subject of this docket. Though KMC Data LLC has entered into an interconnection agreement with Sprint, it has never exchanged any traffic with Sprint in Florida, and was in no way involved in facilitating the present transactions. Sprint did not even allege anything other than the existence of the interconnection agreement, and a

common ownership umbrella. We do not believe that establishes a nexus sufficient to justify naming KMC Data LLC as a defendant in this Complaint.

However, we are more persuaded by Sprint's argument regarding the involvement of KMC V in the circumstances giving rise to this docket. Sprint argues that KMC V is a party to the applicable interconnection agreements, it owned the charge party numbers at issue in the case, and the local interconnection trunks over which the traffic was delivered to Sprint were apparently ordered in KMC V's name. It is well documented that the Local Exchange Routing Guide ("LERG") shows that the charge party numbers assigned to Unipoint by KMC belong to the OCN 8982 that is assigned to KMC V. Also, the evidence indicates that the interconnection facilities (i.e., local trunks) used to deliver the traffic to Sprint that is the subject of Sprint's Complaint, were ordered under KMC V's OCN 8982. That nexus is sufficient to justify the inclusion of KMC V as a defendant in this Complaint.

Decision

Based on the foregoing, KMC Data LLC shall be dismissed as a defendant in this Complaint, and KMC V shall be retained as a joint defendant with KMC III.

ISSUE 3: REQUIREMENT TO CONDUCT AN AUDIT AS A CONDITION PRECEDENT TO BRINGING CLAIMS

This issues addresses two questions:

- 1) Is an audit required prior to filing a complaint with this Commission, and
- 2) Is an audit required to establish liability?

Arguments

Sprint

Sprint witness Burt states that there is no language in the applicable Interconnection Agreements between Sprint and KMC (the 1997 MCI Agreement, the FDN Agreement and the 2000 MCI Agreement) that requires an audit prior to a complaint being filed. The witness also states there is no language in Sprint's Access Services Tariff that requires an audit.

The witness notes that Part A, Section 22.1 and Attachment IV, Section 8.2 of the 1997 MCI interconnection agreement allow audits and detail their rights and limitations, but do not require audits before pursuing a complaint, and points to a portion of Part A, Section 22.1 which states, "The auditing Party may perform up to two (2) Audits per twelve (12) month period" The witness also quotes a portion of Attachment IV, Section 8.2, "Either Party may request an audit of such usage reports on no fewer than ten (10) [business] day's (sic)"

Witness Burt also points to the FDN agreement as providing for an audit as an option, not as a requirement. The witness refers to Section 7.1 of the FDN agreement which states in part, “. . . either Party, at its own expense, may audit the other Party’s books . . .”

In addressing Sprint’s Access Service Tariff, Section E2.3.11.D.1, witness Burt testifies that this section is permissive and does not require an audit. He specifically notes the language which states, “. . . when a billing dispute arises or when a regulatory commission questions the reported PIU, the Company may, upon written request, require the customer to provide call detail records which will be audited to” The witness does not believe the tariff section is applicable to this complaint, because “it addresses the misreporting of PIUs for traffic that is properly routed over access trunks, while this complaint involves the wrongful termination of access traffic over local interconnection trunks.”

Sprint also notes that KMC appears to no longer believe that the agreements or Sprint’s tariffs require an audit prior to filing a complaint and refers to KMC witness Johnson’s deposition.

KMC

In its brief KMC concedes that “an audit is not a condition precedent to the bringing of a complaint,” and refers to our decision on KMC’s first Motion to Dismiss in Order No. PSC-04-1204-FOF-TP, issued December 3, 2004. KMC witness Johnson explains that there is no need to provide testimony on an issue that has already been decided by the Commission.

Witness Johnson believes that some “accounting” is necessary “if the Commission determines that switched access charges are due to Sprint” but that payment would be due from an IXC or from PointOne, not KMC. The witness also states that “some accounting or reconciliation of the local traffic compensation would be appropriate to reconcile what KMC and Sprint paid each other”

KMC questions the accuracy of the amount of access charges Sprint has billed and believes that “this would amount to the establishment of a PIU for the local interconnection trunks” which can only be set after an audit according to Section E2.3.11.D.1 of Sprint’s Access Services Tariff.

Analysis

On October 14, 2004, KMC filed a Motion to Dismiss Sprint’s Complaint. Among KMC’s allegations was that the Complaint was premature because of Sprint’s failure to conduct an audit. In Order No. PSC-04-1204-FOF-TP we found “[t]he alleged failure to have performed an audit is not a proper basis to dismiss the complaint.” Both Parties agree that this portion of the issue has been settled.

The second part of this issue is whether conducting an audit is a contractual condition precedent to KMC being found liable for alleged underpayments or overcharges. The Parties do

not agree on whether or not Section E2.3.11.D.1 of Sprint's Access Services Tariff applies to this issue. Sprint believes the audit provision is permissive and applies to calculating the PIU for traffic routed over access trunks. KMC believes that a PIU must be determined for the local interconnection trunks to accurately compute any access charges, which can only be established after an audit.

The audit provision in Sprint's Access Services Tariff is not on point with this issue, does not require an audit prior to filing a complaint, nor does it establish liability. As such, an audit is not necessary to determine liability for access charges or reciprocal compensation but may be necessary to determine actual amounts owed.

Decision

There is no provision in the Interconnection Agreements with KMC or Sprint's tariff that requires an audit prior to filing a complaint with this Commission or that requires an audit to establish liability.

ISSUE 4: APPROPRIATE METHOD TO DETERMINE THE JURISDICTIONAL NATURE AND COMPENSATION OF TRAFFIC

Arguments

Sprint

Sprint witness Burt argues that "It is common industry practice to determine jurisdiction based on the originating and terminating end points of the calling parties." He states that the FCC recently confirmed, in its Prepaid Calling Services docket, that the end points of a call, not the actual path, are appropriate to classify long distance calls as jurisdictionally interstate or intrastate.⁶ Witness Burt notes that the FCC affirmed, in its AT&T Declaratory Ruling,⁷ that the use of Internet Protocol for a portion of the transmission of traffic that originates and terminates on the public switched network does not change the character of the call as a telecommunications service. He advises that the FCC rejected AT&T's position, finding that AT&T's routing of traffic through its Internet backbone does not change the nature of the traffic from a telecommunications service to an information service.

Witness Burt notes that we addressed the jurisdiction of traffic in Investigation Into Appropriate Methods To Compensate Carriers For Exchange Of Traffic Subject To Section 251 Of The Telecommunications Act Of 1996, Docket No. 000075-TP, Order No. PSC-02-1248-

⁶ WC Docket No. 03-133, In the Matter of AT&T Petition for Declaratory Ruling Regarding Prepaid Calling Card Services, CC Docket No. 03-133, FCC 05-41, ¶ 5.

⁷ 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.

FOF-TP, issued September 10, 2002 (Reciprocal Compensation Order), stating “we believe that the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call.” He continues that we also found that “. . . traffic that originates in one local calling area and terminates in another local calling area would be considered intrastate exchange access under the FCC’s revised Rule 51.701(b)(1).”

Sprint argues in its brief that although the traffic in question is not virtual NXX traffic, it is similar in that KMC assigned local NPA/NXX charge numbers to the traffic, even though it was originated in a distant local calling area. Sprint quotes our conclusion in the Reciprocal Compensation Order that:

We find that carriers shall be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is assigned. In addition, we find that the intercarrier compensation for these numbers shall be based upon the end points of the particular calls.⁸

Sprint witness Burt asserts that each of the three Interconnection Agreements that apply to this complaint, the 1997 MCI Agreement, the FDN Agreement, and the 2002 MCI Agreement, define local traffic as originating and terminating in a given local calling area. Sprint points out in its brief that all three of the agreements rely on the end points of the call to determine jurisdiction.

KMC

KMC witness Johnson argues that the FCC has not treated VoIP and other IP-based offerings as telecommunications services. Witness Johnson asserts that the treatment of enhanced services traffic, including VoIP, stems from an access charge exemption established in 1983, when the FCC instituted the access charge regime. She advises that the FCC reached no definitive conclusions regarding any type of VoIP in its 1998 Report to Congress⁹:

. . . [b]ecause of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, *before making definitive pronouncements*, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony. . . . [emphasis by witness]

Witness Johnson argues that since the Report to Congress was issued, the FCC has considered several situations involving certain VoIP services. She notes, in particular, the FCC’s AT&T Declaratory Ruling¹⁰ where it found that access charges may be appropriate for certain

⁸ Ibid., pp. 34-35.

⁹ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998).

¹⁰ 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, issued April 21, 2004..

types of services that use Internet Protocol (IP). She points out that the decision is very narrow, in that it applied only to calls “where the Internet protocol is used solely for transmission purposes for 1+-dialed interexchange calls, there is no net protocol conversion, and there are no enhanced features or functionalities enabled by the use of the IP.” She advises that a comprehensive review of this and other issues is taking place in the FCC’s *IP-enabled Services* Docket.

Witness Johnson contends that KMC must treat enhanced services traffic as local, regardless of the putative physical endpoints of the communications. She adds that the FCC generally considers IP telephony to be exempt from access charges.¹¹ She notes that PointOne, the company that handed off the traffic to KMC, has consistently maintained that its traffic is enhanced services traffic, specifically VoIP.

Analysis

It is well established that the jurisdiction of traffic should be based upon the end-points of a call.¹² However, KMC raises a valid exception to the payment of access charges in the form of the FCC’s access charge exemption. The decisions made by the FCC thus far indicate the application of access charges to VoIP calls is appropriate in only very narrow circumstances. The question to be answered, then, is whether the exemption applies to the traffic in this case, as discussed in later issues.

In the Reciprocal Compensation Order, we declined to rule on IP telephony, stating that it was a nascent technology and we did not want to make decisions that could constrain its emergence. However, we also stated that “a call is determined to be local or long distance based upon the end points of the particular call. As such, the technology used to deliver the call, whether circuit-switching or IP telephony, should have no bearing on whether reciprocal compensation or access charges should apply.”¹³ Although we reserved any generic judgment on the issue until the market for IP telephony developed further, we also stated that carriers could petition for decisions regarding specific IP telephony services through arbitration or complaint proceedings.¹⁴

Decision

¹¹ See *Developing a Unified Inter-carrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

¹² See Order No. PSC-02-1248-FOF-TP. Investigation Into Appropriate Methods To Compensate Carriers For Exchange Of Traffic Subject To Section 251 Of The Telecommunications Act Of 1996, Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002.

¹³ *Ibid.*, p. 36.

¹⁴ *Ibid.*, p. 38.

The jurisdiction and compensation of a call shall be based on its end points, unless otherwise specified in the applicable interconnection agreement. Notwithstanding this decision, enhanced services traffic may be exempt from access charges.

ISSUE 5: DELIVERY OF INTEREXCHANGE TRAFFIC TO SPRINT OVER LOCAL INTERCONNECTION TRUNKS IN VIOLATION OF SECTION 364.16(3)(a)

Section 364.16(3)(a), Florida Statutes, states:

(a) 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.

At issue is whether KMC knowingly delivered access traffic to Sprint over local interconnection trunks, in violation of the statute.

Arguments

Sprint's contention that KMC knowingly participated in access charge avoidance is based upon three major points: 1) KMC sold non-local PRIs to PointOne¹⁵ and inserted a local PRI number into the charge party number parameter of the SS7 records, which masked the jurisdiction of the traffic; 2) an email from KMC witness Menier to PointOne indicated knowing participation; and 3) the actions of KMC upon receipt of the bills from Sprint and upon the issuance of the AT&T Declaratory Ruling by the FCC showed that KMC knew the traffic in question was subject to access charges.

Insertion of Charge Numbers for PRIs

Sprint

Sprint witness Burt states that KMC changed the called party number [sic] in the SS7 records to a local PRI number, thus making the call appear local. He contends that "KMC proactively programmed the PRI's [sic] to default to the local PRI number rather than retaining the originating calling party number in the call detail record." Sprint witness Wiley contends that the use of PointOne's numbers homed to Tallahassee and Ft. Myers rate centers makes the traffic appear local.

Witness Wiley states that "a large percentage of calls coming from KMC's switches did not meet the standardized criteria for CN [Charge Number], CPN [Calling Party Number] and

¹⁵ UniPoint and PointOne are the same company.

JIP [Jurisdiction Information Parameter].” He advises that the calls appeared to originate within KMC’s network, but an examination of the calling party number showed that the calls actually originated in areas outside of KMC’s network, and contained a large percentage of intrastate interLATA calls. He argues that this shows that KMC violated its agreement with Sprint regarding proper use of interconnection trunk arrangements.

Witness Wiley explains that there are a number of signaling messages that control the establishment, duration and disconnection of calls. He states that the fields in the records that are used to determine routing and origination of calls are calling party number (CPN), Charge Number (CN), and Jurisdiction Information Parameter (JIP), as well as the Called Party (CP) field. He adds that the charge number may be omitted under certain circumstances. He also advises that the JIP, which is used primarily for local number portability (LNP), may be included or not “as a LEC option based on the outgoing trunk group.”

Witness Wiley advises that in normal operation, the CPN number and CN could both be used if they were different. He contends, however, that unlike the records of the calls from KMC, the CPN and CN should have a relationship between the two. He advises that the charge number denotes the billing number of the trunk group it supports and is assigned by the carrier at the originating switch. Witness Wiley asserts that in a number of cases, where traffic on a trunk group had an originating charge number and JIP assigned to the KMC switches, the trunk groups “were found to carry traffic that originated outside the serving area.”

Witness Wiley explains that Sprint does not use the CPN to determine the jurisdiction of a call on a day-to-day basis. He states that Sprint must use a special study to determine the jurisdiction of a call where the calling party number and charge party number are from different calling areas.

Witness Wiley argues that the “configuration of providing a customer premises in Orlando with local number connections in Tallahassee and Fort Myers violates the North American Numbering Plan Assignment Guidelines.” He asserts that a call for a customer located in Ft. Myers or Tallahassee, which is in a different serving area, numbering plan area (NPA), and Local Access and Transport Area (LATA) from Orlando, should have had a charge party number with an Orlando NPA. He states that “[s]ince KMC willfully provided its Orlando customer with numbers for Ft. Myers and Tallahassee, KMC must have knowingly violated the rules for numbering to [mask] the Orlando presence of the traffic in order to escape access charges for the traffic from this customer.”

Witness Burt argues that “[t]he PRI circuits KMC sold to PointOne may be end user services, but they are not local services.” He explains that those PRIs do not originate and terminate within the same local calling area, but instead originate in Orlando, Florida, and terminate in either Tallahassee or Fort Myers, Florida, making the calls interexchange by jurisdiction. Witness Burt opines that the fact that the PRI circuits are interexchange supports Sprint’s claims that KMC was knowingly attempting to avoid access charges. He asserts that “the fact that KMC knowingly populated the records by assigning [PointOne’s] number homed

to the Tallahassee and Ft. Myers rate centers to make the traffic appear to be local supports Sprint's claims that access charges are due for this traffic."

Witness Burt contends that "[i]t is suspect that a carrier could hand-off substantial amounts of traffic, especially preponderantly intrastate toll traffic, which is bound for Sprint end users, through KMC without KMC knowing it would be more efficient for the carrier to directly interconnect with Sprint." He argues that there must be some financial incentive to route large volumes of traffic through KMC for delivery to Sprint end-users. He states that KMC used a programming option so that the PRIs over which the calls were transported default to a local PRI number "rather than retaining the originating calling party number in the call detail record." Witness Burt avers that the inclusion by KMC of certain language in contracts with its customers appears to shift liability for payment of access charges to KMC's customers, which he argues is an indication of a "knowing" violation.

Witness Burt asserts that "[t]he tests that Sprint did in an attempt to identify the intermediate IXC for the traffic that originated on its network indicated that the customers originating the subject traffic were presubscribed to IXCs, not Enhanced Service Providers." He argues that "[t]his further proves the point that KMC and [PointOne] knowingly entered into a clandestine arrangement to terminate interexchange long distance traffic over local interconnection trunks to avoid the payment of access charges contrary to KMC's interconnection agreements with Sprint."

KMC

KMC witness Johnson acknowledges that Section 364.16(3)(a), Florida Statutes, sets up a prohibition against a LEC knowingly delivering access traffic over local interconnection trunks. Nevertheless, she argues that the statute does not require a LEC that hands off traffic to another LEC be liable for access charges. She argues that the provision in Section 364.16(3)(b) to have access to all relevant customer records and accounts gives the Commission authority to "look behind the last connecting carrier to its customer. . . ." She opines that the intent of the law is to have the responsible party pay.

KMC witness Johnson states that PointOne, who purchased PRI service from July 2002 through May 2004, generated the traffic in question. She avers that KMC provides a number of services, including PRI circuits, to various entities in Florida. She explains that PRIs are high capacity circuits that are commonly used by enhanced service providers, as well as other entities. Witness Johnson asserts that a number of KMC customers have substantial amounts of traffic, not just PointOne, so the presence of large volumes of traffic is not an indication of any wrongdoing on the part of KMC. She contends that there was no special arrangement between KMC and PointOne. She notes that KMC treated PointOne in the same way as it did any other customer.

Witness Johnson notes that traffic from PointOne's PRIs was delivered by KMC to Sprint over local interconnection trunks for termination in the Tallahassee and Ft. Myers markets. Witness Johnson argues that the fact that the calling party numbers are from exchanges outside

of Ft. Myers and Tallahassee is not proof that the traffic was interexchange *telecommunications* traffic. [emphasis by witness] She contends that PointOne consistently maintained that the traffic was enhanced services traffic, specifically Voice Over Internet Protocol (VoIP).

Witness Johnson argues that Sprint assumes since KMC handed off the traffic that it knew what was going on. She states that “Sprint’s theory is that it can avoid a proper investigation and take the easiest target, the party with the least information about what happened, and make that party pay the access charges bill.” She claims that it places an unfair burden on KMC to be put into a position to have to sue PointOne for recovery of the charges. She contends that this is “contrary to the statutory directive to find the root cause of the problem and have the party responsible for the traffic pay for it”

KMC witness Twine states that he evaluated the SS7 data provided by Sprint for four hours of summary detail records when it was provided by Sprint in early April 2004. He explains that the SS7 records contain originating and terminating line information, from which KMC could determine whether the calls did come from outside the local calling area. He notes that KMC was particularly interested in the charge party number, which is transmitted separately from the calling party number. He advises that in some instances “. . . the entity associated with the charge party number may not bear any relation to the entity originating, or responsible for paying for the origination of, the communication.” As a result of his analysis, witness Twine concludes that, except for a de minimus amount of traffic that was call forwarded by KMC customers, the traffic contained the charge party number associated with the PRI circuits purchased from KMC by PointOne.

Witness Twine contends that “[i]ndustry SS7 standards and the Lucent Technical Reference Document for KMC’s 5ESS switches (235-080-100) in Tallahassee and Ft. Myers require that the Billing Telephone Number for PRIs be used to populate the charge party number field in SS7 signaling information.” He explains that there is a separate number associated with each PRI circuit, but there is also a single billing telephone number associated with the entire PRI group. Witness Twine notes the reason the charge party number was needed is that there was a minutes-of-use threshold above which additional charges applied for PointOne’s PRIs; thus, KMC needed to track the overall minutes of use. He avers that this limited use did not require the use of calling party numbers, so KMC did not track them.

Witness Twine clarifies that KMC did not change any preexisting information in the SS7 records; rather, the charge party number field was populated with the billing number associated with the PRI group for billing purposes. He argues that the presence of the CPN information confirms that Sprint could have determined the originating line numbers at any time. He asserts that the origination of the call was never masked or hidden. He adds that the calling party number was not manipulated by KMC. He avers that the calling party number was passed intact to Sprint on every call. He remarks that if it had not been, Sprint would not have been able to conduct its investigation using the Agilent system. He concludes that there is no requirement that the charge party number and the calling party number be the same.

Witness Twine contends that “[t]he charge party number has no bearing on whether the traffic was unregulated enhanced services traffic or regulated telecommunications traffic, which is a threshold question that must be answered.” He states that “[i]f the traffic were telecommunications traffic, then the calling party number, not the charge number would be used to determine jurisdiction. . . .”

Witness Twine explains that “. . . the way in which KMC handled the SS7 information on [PointOne’s] PRI circuits serving Tallahassee and Ft. Myers, by inserting the Billing Telephone Number into the SS7 charge party number field and using that parameter, *rather than the Calling Party Number*, for KMC’s billing purposes, is common to all KMC’s PRI subscribers.” [emphasis by witness] KMC witness Calabro advises that the PRIs that KMC provisioned to PointOne were User-Network trunk groups that connected PointOne’s customer premises equipment to KMC’s local network. Witness Calabro contends that KMC programmed its switch to use PointOne’s billing telephone number as the charge party number because PointOne is an end user. He states that this is normal industry practice. He asserts that neither Lucent’s 235-080-100 Translation Guide for the 5ESS switch, nor the Lucent 235-190-104 ISDN Feature Description, constitutes a hard and fast requirement that cannot be deviated from.

Witness Calabro argues that it would have been wrong for KMC to populate the SS7 records in such a way as to make the calls appear to be interexchange in nature, since PointOne is an end user. He advises that KMC used Automatic Message Accounting (AMA) records, not SS7 records, for billing, in accordance with the industry norm. He contends that there was no reason for KMC to look at the SS7 data, as Sprint has done, to determine if there was a relationship between the calling party number and the charge party number.

Witness Johnson argues that it would have been “more economically attractive” to KMC to charge PointOne access charges, but it did not do so because PointOne was an enhanced services provider. She contends that Sprint witness Burt’s assumption that KMC had a financial incentive to charge for the flat-rated PRIs is wrong.

Witness Calabro argues that ESPs are not required at the state or federal level to prove that they are providing enhanced services before purchasing local services but, rather, may self-certify their status. He asserts that “it has never been the role of common carriers to investigate individual customers.” He opines that KMC’s treatment of PointOne reflected the industry norm. Witness Calabro contends that this Commission knows PointOne is not a carrier, because PointOne has never sought certification as an IXC. He argues that Sprint’s claim that it would have been more efficient for PointOne to purchase services directly from Sprint is a red herring. He states that KMC’s services compare favorably to any and all of Sprint’s services. He adds that KMC is under no obligation to suggest to its customers that it might be more efficient for them to interconnect directly with Sprint.

Menier Email

Sprint

Sprint witness Burt states that emails between KMC and PointOne address bypass of access charges that would save PointOne thousands of dollars a month on termination charges. He notes in particular that the emails state “[t]he LECs will not be too anxious to provide ‘access bypass’ services so a CLEC is the obvious choice.” Witness Burt argues that PointOne could have terminated traffic directly to Sprint more efficiently, so that “[t]here has to be a financial incentive, which does not exist if the traffic clearly is exempt from access charges as KMC asserts.”

Witness Burt contends that KMC’s responses to Sprint discovery show “that KMC was aware of the value of avoiding access charges and communicated this to [PointOne].” He opines that KMC’s emails show that KMC recognized that delivering the traffic in question to Sprint would be problematic. Witness Burt also points to a contract KMC was negotiating that contained language explaining that PRIs were to be used exclusively for enhanced, information or VoIP services, and that VoIP traffic could be lawfully terminated to the PSTN as local traffic, exempt from access charges. He argues that KMC did not ask the FPSC for a decision on the exempt nature of this traffic, or share the information contained in the PointOne correspondence with Sprint.

KMC

KMC witness Menier asserts that KMC was not knowingly aiding PointOne in the avoidance of access charges, as represented by Sprint. He explains that he knows KMC did not do so, because he was the primary person involved in the negotiation of the agreements with PointOne for PRIs. He notes that when PointOne contacted KMC in the spring of 2002 about purchasing services, he was the person who responded to that inquiry. He states that the sale was similar to the sale of PRIs to other wholesale customers by KMC. He opines that customers like PointOne come to CLECs for services because they offer “more flexible service arrangements, better prices and better customer service than the ILECs did.”

Witness Menier adds that PointOne told him that it was an enhanced services provider that supported other entities that provide VoIP services, and that it was not a telecommunications provider. He avers that he believed PointOne’s assertions that it was an enhanced services provider, based on his experience as a former ISP owner and purchaser of PRI services. Nevertheless, witness Menier states he was not surprised by Sprint’s request for access charge payments, because he understands that incumbent LECs disagree with the applicability of the access charge exemption for certain traffic.

KMC states that “Sprint seizes upon one phrase within a series of e-mails between Mr. Menier and PointOne at the time the PRIs were being established as supposed evidence that PointOne sought to evade access charges that Sprint believes otherwise would be due for the traffic PointOne generated over the PRIs.” KMC contends that the email was an indication that

KMC was aware that Sprint would likely not afford PointOne the ESP treatment that KMC agreed it was entitled to. KMC points out that the testimony of its witness Menier was unchallenged, as Sprint did not depose him.

Behavior of KMC

Sprint

Witness Burt states that KMC, upon receiving a bill from Sprint, immediately challenged PointOne to prove that the traffic in question was enhanced services traffic. He notes that KMC accepted PointOne's self-certification that it was an enhanced services provider without any substantiation. He remarks that KMC also advised PointOne that KMC expected it to be responsible for any access charges that were due.

Witness Burt states that the FCC had already addressed the type of traffic at issue in 1998, so that KMC by its actions "must have known" that the traffic it was passing to Sprint was subject to access charges. He contends that KMC attempted to "cover its tracks" after the FCC issued the AT&T Declaratory Ruling. Witness Burt notes that KMC contacted PointOne on the day the AT&T Declaratory Ruling was released to express concerns that the traffic being questioned by Sprint was the same type as that addressed in the FCC's ruling. He adds that KMC terminated its relationship with PointOne not long after sending the letter.

KMC

KMC witness Johnson advises that a November 6, 2003, letter from Sprint was the first indication that Sprint believed certain traffic delivered over local interconnection trunks was subject to access charges. She notes that subsequently, on November 12, 2003, Sprint did invoice KMC for the traffic. She states that KMC filed a timely dispute of these and subsequent charges. She argues that Sprint did not provide adequate supporting detail for KMC to verify the charges at that time. She asserts that all KMC received initially was a summary of the amounts due for each month. She explains that through data provided by Sprint on April 6, 2004, KMC was able to determine that the traffic in question was sent by PointOne over PRIs to KMC in Ft. Myers and Tallahassee.

Witness Johnson asserts that once the involvement of PointOne had been verified, KMC notified PointOne of the disputed traffic on April 21, 2004, asking that it provide information regarding the nature of the traffic by April 26, 2004. She adds that KMC also advised PointOne that if it was providing traffic other than enhanced services traffic over the PRIs, that KMC would terminate service to PointOne. Witness Johnson notes that KMC received a response on May 3, 2004, in which PointOne stated:

. . . as we have communicated to you and an [sic] as we have presented several times to the FCC Commissioners and staff, [PointOne] 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.

Witness Johnson argues that there is no significance to the fact that PointOne migrated its traffic off of KMC's network other than that PointOne "made a business decision to not execute the MSA and the VoIP Addendum." She contends that witness Burt's reliance on this event as proof that PointOne was not an enhanced services provider is unfounded.

Analysis

Insertion of Charge Numbers for PRIs

Initially, Sprint believed that in certain SS7 data the charge party number was changed so that the traffic appeared to be local when it was toll traffic. It appears to be permissible for users of ISDN PRI services to use the billing number as the charge party number, but it is not required. Ultimately, Sprint agreed that the signaling information provided by KMC was not altered, but rather a number was inserted into the charge party parameter of the SS7 records.

As explained by Sprint witness Wiley, a call detail record gives a record of calls going through the network to determine whether it is a chargeable call for billing purposes. He advised that the logic in a PRI or an SS7 message will place the charge party number into the originating number field in a CDR. He explained that if the calling party number is present, it is used for billing purposes, but if a charge party number is present, it is used instead. He noted that the Sprint switch eliminates the calling party number when the charge number is present, based on Bellcore documentation for the AMA bill format. Witness Wiley also explains that for calls that come over local trunks, some would not have individual CDRs because the provision of the detail records can be turned on or off on a trunk-group basis. Witness Wiley agreed that the manner in which information is used for billing is dependent upon which AMA records it uses, and that companies are bound by their own tariffs and auditing guidelines as to how that is done. Witness Wiley was not aware of any notification to KMC that Sprint would use charge party number to determine the jurisdiction of a call.

The simple fact is that KMC inserted certain numbers associated with PointOne's PRIs into the charge party parameter of the SS7 records. KMC states it did so for billing purposes, due to the cap on minutes that was part of the service it provided to PointOne. It appears that KMC believed this was appropriate. There is disagreement between the parties as to what the proper switch programming is. Thus, it seems there may be some aspects of the programming guides that leave matters to interpretation. Further, Sprint agrees that companies are bound by their own tariffs and auditing guidelines as to how to use data for billing. Again, there appears to be some leeway. There is no evidence in the record that shows KMC was aware of the manner in which Sprint performed billing functions. It appears that KMC applies access charges on calling party and called party numbers, based on its own access tariff. Thus, it appears the insertion of a charge party number would not alter KMC's own billing, and there is no evidence KMC knew Sprint used a different approach. We can understand why Sprint believes the actions of KMC appear suspect. However, we do not believe the record shows by a preponderance of

the evidence that KMC deliberately made the traffic appear local to avoid payment of access charges to Sprint.

Menier Email

Sprint puts notable weight on one email of KMC witness Menier to PointOne, where he uses the term "access bypass." [quotes in email] The emails leading up to that referenced by Sprint witness Burt discuss VoIP and indemnification to KMC if the local exchange company will not accept the VoIP traffic. KMC contends in its brief that the reference to access bypass was an indication of witness Menier's knowledge that Sprint believes VoIP traffic is subject to access charges, as stated in his rebuttal testimony. Sprint is on record in this docket as saying just that.

The email by itself is not proof that KMC was knowingly involved in an access avoidance scheme. KMC witness Menier was the person who wrote the email, and he denies that there was any such intent on the part of KMC. Given Sprint's position that VoIP is not enhanced services traffic, along with Sprint's belief that the traffic in this case is phone-to-phone VoIP, it is not hard to believe that Sprint considers VoIP traffic to be access bypass. The use of that phrase in an email, particularly given the denial of any wrongdoing by witness Menier, is not proof that KMC knowingly did anything wrong.

Behavior of KMC

We note that KMC confirmed the involvement of PointOne in the traffic at issue in April 2004, the same month that the FCC released the AT&T Declaratory Ruling. The record shows that KMC repeatedly asked for documentation of the traffic. While Sprint's claim was made in November 2003, according to KMC witness Johnson, a small amount of call detail records were provided on April 6, 2004, that permitted KMC to analyze the traffic. Given the coincidence of the April 21, 2004, release date of the AT&T Declaratory Ruling, Sprint's reliance on the April 21 date of KMC's letter to PointOne is unfounded. There is no convincing evidence that the issuance of the ruling triggered a reaction by KMC. KMC's determination that PointOne's traffic was the cause of a multi-million dollar claim by Sprint for access charges is a far more plausible explanation for the actions of KMC.

While KMC's concerns are evident in its letter to PointOne, if KMC was a knowing participant in the improper routing of traffic, its concerns would have arisen much sooner. In the April 21, 2004 letter to PointOne, KMC indicated a willingness to vigorously oppose the claim, but advised PointOne that if unsuccessful, KMC would expect PointOne to pay any charges. KMC also requested additional information to be provided as to the nature of the traffic to aid KMC in its opposition to the access charge claim.

PointOne made plain in its response on May 3, 2004, that it considers itself to be an "Enhanced Service Provider providing unregulated information and/or enhanced services to its customers." PointOne argued in its letter that the services it provides are vastly different from those that were the subject of AT&T's FCC petition. This assertion on the part of PointOne is

consistent with KMC's insistence that it understood PointOne to be an enhanced services provider, and that the traffic that was handed off by PointOne was enhanced services traffic. It is clear from the record that KMC relied on this assertion in providing PRIs to PointOne as an end user. The actions of KMC subsequent to the release of the FCC's AT&T Declaratory Ruling show concern with the traffic. However, such actions do not indicate that KMC knowingly engaged in improper behavior.

It appears that the key to this question is the portion of the statute that states "for which terminating access service charges would otherwise apply."¹⁶ There is no question that KMC knew the traffic came from outside the local calling area. However, the record does not show that KMC was involved in access avoidance with the intention of terminating traffic in violation of the statute. While we cannot be certain that KMC made correct interpretations of the facts in making its decision to sell PRI services to PointOne, it appears that KMC had a reasonable basis to believe it was handling the traffic correctly.

Decision

It cannot be proved that KMC knowingly violated Section 364.16(3)(a), Florida Statutes.

ISSUE 6: IDENTIFICATION OF ENHANCED SERVICES TRAFFIC AND TREATMENT THEREOF

The FCC has defined enhanced services as "any offering over the telecommunications network which is more than a basic transmission service."¹⁷ The FCC advised that such services include

[s]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.¹⁸

Considerable discussion has taken place in this case regarding whether the traffic involved was Voice over Internet Protocol (VoIP) traffic. Therefore, an FCC explanation of VoIP services may prove useful:

VoIP technologies, including those used to facilitate IP telephony, enable real-time delivery of voice and voice-based applications. When VoIP is used, a voice communication traverses at least a portion of its communications path in an IP

¹⁶ Section 364.16(3)(a), Florida Statutes.

¹⁷ FCC 98-67, ¶ 25, citing Computer II Final Decision, 77 FCC 2d at 419, para. 93.

¹⁸ Ibid., citing para 94.

packet format using IP technology and IP networks. VoIP can be provided over the public Internet or over private IP networks. VoIP can be transmitted over a variety of media (e.g., copper, cable, fiber, wireless). Unlike traditional circuit-switched telephony, which establishes a dedicated circuit between the parties to a voice transmission, VoIP relies on packet-switching, which divides the voice transmission into packets and sends them over the fastest available route. Thus, VoIP uses available bandwidth more efficiently than circuit-switched telephony and allows providers to maintain a single IP network for both voice and data.¹⁹

Arguments

Is The Traffic Enhanced Services

Sprint

Sprint witness Burt states that “KMC made two bad assumptions that led to this dispute. First, KMC assumed the traffic [PointOne] was delivering to KMC was enhanced services traffic and, second, KMC assumed that enhanced services traffic could automatically be terminated to Sprint over local interconnection trunks.” He argues that in order to demonstrate that the traffic in question is enhanced services traffic, KMC would have to show that the traffic met the requirements of the FCC’s rule defining enhanced services. He contends that KMC would also have to demonstrate that IP is used in the transmission of the traffic, and that such use is not the same as that described in the AT&T Declaratory Ruling.

Witness Burt asserts that Sprint has no evidence that the traffic in question is truly enhanced services traffic. He states that call records for calls originated by Sprint end users as well as end users of other local exchange companies indicate the calls originated on standard access lines and were routed to IXCs before being terminated on Sprint’s network as local traffic. He contends that “[b]ased on this SS7 information and associated call records these calls appear to be interexchange voice calls.”

Witness Burt states that Sprint has sample calls that show that the traffic is plain voice traffic. He explains that the subscriber invoices provided in his exhibit show that the calls are from POTS subscribers. He adds that a sample call was traced to the KMC local interconnection trunks with Sprint. He notes that the terminating numbers in the SS7 records provided correspond to the telephone numbers on the Sprint Florida subscriber invoices.

Witness Burt argues that “[t]he Direct Testimony of Ms. Johnson removes any doubt that the traffic that is subject to this dispute is VoIP traffic.” He asserts that witness Johnson agrees that VoIP traffic is not necessarily enhanced traffic. He also points to KMC witness Johnson’s testimony, where she advises that KMC requires customers to represent and warrant that the VoIP services they are providing through use of KMC services meet a certain definition of VoIP,

¹⁹ Petition for Declaratory Ruling that AT&T’s IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, FCC 04-97, Order (April 21, 2004), ¶3.

which states, among other things, that VoIP calls do not originate or terminate on the PSTN as circuit switched long-distance traffic. He contends that if KMC had validated the nature of the traffic as suggested by KMC witness Johnson, KMC would not have had to attempt to obtain information from PointOne on the nature of the traffic. Witness Burt states that based on three letters between KMC and PointOne, Sprint does not believe PointOne is an enhanced services provider. He notes that in the letters, KMC asks for documentation that the traffic is enhanced services traffic. He adds that PointOne “restates its claim that it is an enhanced services provider, but doesn’t provide any information to prove this claim. . . .” Witness Burt contends that PointOne is an interexchange carrier because it is transporting interexchange calls. Witness Burt opines that a company’s actions determine whether it meets the definition of a carrier, regardless of whether it had a certificate.

Witness Burt advises that the traffic in question was significantly reduced upon the issuance of the AT&T Declaratory Ruling. Citing letters between KMC and PointOne, he points out that KMC contacted PointOne on the day that the AT&T Declaratory Ruling was released to express concerns that the traffic was the same phone-to-phone VoIP-type traffic identified in the AT&T case. He notes that KMC states that it terminated its relationship with PointOne shortly after the AT&T order was issued. He opines that “if the provider or KMC had been able to demonstrate that the traffic was truly enhanced services traffic, there would have been no reason for the traffic to have stopped.” He contends that KMC must have believed it was at risk and decided to discontinue its relationship with PointOne as a result. He argues that a claim that a company is an enhanced services provider does not make it one; rather, it is the nature of the traffic that determines whether it is enhanced or not.

KMC

KMC witness Johnson states that PointOne consistently maintained that the traffic it delivered was enhanced services traffic, specifically VoIP. Witness Johnson advises that although she did not negotiate the initial sale to PointOne, she did work with the KMC sales and provisioning staff on the matter. She asserts that she never received any indication that PointOne was anything other than an enhanced services provider, or that it was attempting to improperly avoid access charges. Witness Johnson contends that “[t]here’s no standard by which I could have measured [PointOne’s] status as an ESP. The FCC didn’t set out any precertification requirements or guidelines for ESPs.”

Witness Johnson states that KMC does not know whether or how Internet Protocol was used for the traffic in question. She explains that PointOne never provided the information about its services that KMC requested, in spite of additional follow-up by KMC. She asserts that PointOne did advise KMC that its traffic was different from the AT&T traffic at issue in the FCC proceeding. She notes that PointOne “migrated its traffic off of KMC’s network on or around May 3, 2004.” She adds that Sprint’s exhibits detailing traffic reflect this fact, because the traffic dropped dramatically after that date.

Witness Johnson argues that Sprint was predisposed to believe the traffic in question was fraudulent, so it did not consider the possibility that it was enhanced services traffic. She

maintains, however, that the presence or absence of CPN does not define a telecommunications call. She contends that an analysis of originating and terminating call records considers parameters of telecommunications services and does not test whether traffic is enhanced services. She complains that Sprint designed tests to identify telecommunications traffic by default, not to determine whether there were enhanced services involved.

KMC witness Calabro argues that Mr. Miller of Agilent²⁰, like Sprint, was also predisposed to believe that the relationship of calling party number to called party number indicated jurisdiction. He notes, however, that Mr. Miller was unaware of the enhanced service provider exemption from access charges, could not say where the calls came from, and could not recognize that the calls came from KMC's enhanced service provider customer. Witness Calabro contends that if Mr. Miller understood these things, he would have come to a different conclusion about the nature of the traffic. He asserts that it is important to discern what happened in the middle of the calls before coming to the conclusion that access charges apply.

Witness Calabro testifies that he was unable to determine what enhanced services PointOne provides, but he believes that they could have provided "[a]ny activity that operated on protocol conversion, storage, content manipulation, [or] used computer processing." He avers that enhanced services are any services that meet the [47 C.F.R. 64.702] definition. He cites FCC Rule Sec. 64.702(a), which states:

For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restricted information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

He notes that the definition is "very similar to the term Information Service which was defined in the Communications Act of 1934 as amended in 1996 as the offering of 'a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.' 47 U.S.C. § 153(20)" He states that the FCC includes Internet Service Providers and VoIP offerings in this classification; however, he provided no cites in support of this position.

In reviewing a bill provided by Sprint, KMC witness Calabro states that the manner in which a call shown on the bill was enhanced is not discernible from the bill or from the portion of the information that Sprint provided. He posits that the persons on the bill may have been customers of PointOne. He notes that the FCC has declined to require billing by ILECs for enhanced services, so if there was an additional bill from PointOne, he was not surprised that it was not included on the Sprint bill.

²⁰ Mr. Miller is employed by Agilent Technologies as a solution architect. Agilent provides data services for SS7 information, which were used in the preparation of this case.

Witness Calabro agrees that certain traffic of PointOne came from different LATAs and different states. However, he argues that the call detail records provided by Sprint were comprised of managed data including material that did not come from the SS7 data, although he does not contend that there was mismanagement of the data.

KMC witness Johnson contends that Sprint has not demonstrated that the FCC's AT&T Declaratory Ruling applies to the PointOne traffic. She asserts that the ruling does not support Sprint's claim. She argues that Sprint witness Burt's reliance on the FCC *Pre-Paid Calling Card Services Order* is also misplaced. She notes that the ruling applies only to determine the jurisdiction of calling cards. She states that Sprint has not shown any similarity between the traffic in this ruling and the PointOne traffic.

How should Enhanced Services Traffic be compensated?

Sprint

Witness Burt insists that, regardless of whether PointOne is an enhanced services provider, the interconnection agreements between Sprint and KMC govern the appropriate form of intercarrier compensation. Witness Burt notes that enhanced services are not identified in the interconnection agreements as a separate type of traffic for compensation purposes. He explains that the only categories included are local, ISP-bound and toll traffic. He asserts that if KMC wanted to terminate enhanced services traffic to Sprint, it should have discussed the matter with Sprint beforehand.

Witness Burt states that the use of Internet protocol at some point between an IXC's network and KMC's network would not change Sprint's position on the type of compensation that is due. He avers that the FCC confirmed in its AT&T Declaratory Ruling that access charges apply to certain phone-to-phone VoIP traffic. He claims that "Sprint's evidence shows that the traffic being terminated to Sprint over local interconnection trunks appears to be 'phone-to-phone' VoIP that meets the criteria spelled out by the FCC in the AT&T order." Witness Burt notes that the FCC has declined to rule on whether access charges apply to VoIP that has a net change in protocol but originates or terminates on the public switched network.²¹

KMC

KMC witness Calabro explains that when the FCC implemented its initial access charge regime²² IXCs were required to pay access charges for use of the local exchange networks of LECs. He adds that the FCC exempted Enhanced Services Providers (ESPs) from such charges, allowing them instead to be classified as end users. He opines that ESPs "can purchase local

²¹ FCC WC Docket No. 03-211, FCC 0-4-267, ¶44.

²² FCC CC Dockets No. 78-72 MTS and WATS Market Structure and No. 80-286 Jurisdictional Separations proceeding.

services, PRIs, from the local exchange carriers of their choosing, just as all non-carrier, business customers can do.” KMC witness Johnson also states that the treatment of enhanced services traffic, including VoIP, stems from an access charge exemption established in 1983, when the FCC instituted the access charge regime.

KMC witness Johnson argues that the FCC has not treated VoIP and other IP-based offerings as telecommunications services. She contends that KMC must treat enhanced services traffic as local, regardless of the putative physical endpoints of the communications. She adds that the FCC generally considered IP telephony to be exempt from access charges. [See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001)]

Witness Johnson explains that the FCC has considered compensation for VoIP telephony several times. She notes the most recent occasion was in the AT&T Declaratory Ruling issued April 2004.²³ She states that the FCC determined that access charges are due for traffic where Internet Protocol is used solely for transmission purposes for 1+ dialed interexchange calls, there is no net protocol conversion, and there are no enhanced features or functionalities enabled by the use of the IP. She argues that KMC has no information to suggest that the traffic delivered to Sprint met these conditions.

Analysis

Is The Traffic Enhanced Services?

While Sprint witness Burt claimed the traffic being terminated appears to be phone-to-phone VoIP, he stated that Sprint cannot distinguish enhanced services traffic from any other voice traffic. Sprint witness Schaffer also admitted that Sprint cannot distinguish calls made using VoIP. He stated that Sprint does not know where some of the calls came from, only that they were delivered to Sprint by KMC. KMC does not claim to know with certainty whether the calls involved are enhanced services traffic. Rather, KMC relied upon the assertions of its customer, PointOne, and accepted that the traffic was enhanced services that would be exempt from access charges.

For ease of discussion, we have segmented the analysis into several broad topics, including Sprint’s sample calls, KMC’s reliance on PointOne’s self-certification, possible types of traffic as indicated by SS7 records, and finally, compensation for enhanced services traffic.

Test Calls

As discussed above, witness Burt stated that Sprint provided sample calls that show that the traffic is plain voice traffic. He also noted that a sample call was traced to the KMC local interconnection trunks with Sprint. He explained that the terminating numbers in the SS7

²³ Petition for Declaratory Ruling that AT&T’s IP Telephone Services are Exempt from Access Charges, WC Docket No. 02-361, FCC 04-97, Order April 21, 2004

records provided correspond to the telephone numbers on the Sprint Florida subscriber invoices. Sprint asserted the test calls prove the traffic is the same type of phone-to-phone telecommunications traffic described in the AT&T Declaratory Ruling.

Our staff examined exhibit 41, JRB-2, which is a confidential CD comprised of customer bills and a corresponding summary that appears to have been compiled by Sprint, titled "SS7 Call Records with Charge Party Number [of PointOne]." In the summary portion, Sprint detailed information about seven sample calls. Of those, our staff was able to match six of the summarized calls to the bills. The seventh call has no corresponding bill. Out of the six calls, two do not match the time of day between the bill and the summary; one has a discrepancy of one hour, the other, one minute. We suspect the one-minute difference could be due to rounding of seconds into minutes, but do not understand the one-hour difference. Two of the six bills show a different long-distance carrier than Sprint listed in the summary.

Most of the information shown in the summary cannot be verified at all by our staff, including all of the information that Sprint claims shows KMC handed off the traffic as local with an inserted charge party number. Our staff attempted to find the corresponding files in the call detail records provided by Sprint. However, upon finding a file labeled with the same date, April 19, 2004, which is the date of the six sample calls, it was ascertained that the calls in the file were actually from April 20, 2004. A search for the telephone numbers of the sample calls turned up nothing. The same exercise was performed in a number of other CD files with no results. Thus, the sample calls on the customer bills could not be tied to the call detail records. Nothing in the record could be found that ties the Sprint customer bills to KMC, other than the typed table that Sprint holds out as SS7 records.

In a discussion of attempted test calls, Sprint witness Schaffer states that the test calls made by Sprint did not originate on any of the trunks used to originate the calls terminated by KMC to Sprint as local calls, because Sprint did not know how to make the test calls work. He states that none of the test calls were made from any of the original calling party numbers that appear in the calls in this case. He also concedes that none of the test calls were made using VoIP telephony services.

It appears that Sprint's exhibit 41 JRB-2 proves nothing other than the fact that some Sprint customers made toll calls to Sprint customers in other areas. We are concerned with the errors found in the purported SS7 summary. Also, nothing in Sprint's exhibit definitively ties the calls to KMC. As an additional note, there is nothing in the bills to indicate any participation or benefit from an "access avoidance" scheme by the customers. A simple calculation reveals that the per-minute rates paid for the calls vary greatly. If there were an access avoidance scheme, it would appear that the end users were unwitting participants.

Self-Certification

Sprint, like KMC, does not require customers to demonstrate that they are enhanced service providers prior to providing local services to those customers. Witness Burt agreed that

Sprint does not have a certification process for enhanced service providers; rather, Sprint relies on its tariff to ensure appropriate use of services.

Sprint witness Burt stated that Sprint has tariff provisions that address the appropriate use of services so that Sprint can comply with Section 364.16(3)(a) of Florida Statutes. He states that there is a self-certification process. However, he noted Sprint also might evaluate on a case-by-case basis situations where large volumes of traffic are being terminated or unusually large numbers of circuits or services are being purchased.

KMC pointed out that “Sprint’s practice regarding ESP self-certification is not materially any different from KMC’s (and what happened in this case) and certainly includes no additional restrictions or certifications.” KMC argued that “KMC, like Sprint and the rest of the industry, must rely upon the certification of its customers. “

It appears that Sprint would hold KMC to a different standard than it holds itself. Nevertheless, what a company claims to be and what it is may be two different things. The self-certification alone is not proof of the nature of the traffic. Thus, other factors must be considered in making the determination.

Possible Types of Traffic

While the record is inconclusive as to whether the traffic in question is or is not enhanced services traffic, there is evidence as to some of the possibilities. It is instructive to understand some of the difficulties that arise in trying to determine jurisdiction of traffic based upon SS7 records. In trying to ascertain what categories the traffic might fall into, we explored with the parties what the SS7 records would reflect for various traffic types.

Dial-Up Internet VoIP

Witness Burt claimed that Sprint has evidence that shows the calls “[appear] to be ‘phone-to-phone’ VoIP that meets the criteria spelled out by the FCC in the AT&T order.” In examining this assertion, record evidence shows that the SS7 records for a Dial-Up Internet VoIP call are indistinguishable from other voice calls, as discussed below.

Sprint noted that VoIP Internet telephony can be provided using dial-up Internet service, in which a customer first makes a dial-up connection to the Internet to connect to an Internet Service Provider (ISP) and then initiates a call using software provided by the ISP. Sprint explained that if the call to the ISP is a local call, no call record is generated at the originating end, because the call is not billable. However, if the call to the ISP were made by dialing a long-distance number, a call record is created which contains the originating number of the calling party. At the terminating end, Sprint stated that it cannot determine if a call was made using dial-up VoIP, because there is nothing in the AMA standards to indicate that the call was made through a dial-up IP network.

Sprint witness Shaffer admitted that nothing in the call record standards indicates that a call was made through a dial-up ISP network. Witness Schaffer conceded that, “[s]ince there are no technical standards or fields defined in the AMA to identify a VoIP originated call, Sprint cannot accurately state what fields or the values that would or would not be populated in the AMA record.”

KMC agreed that IP telephony can be provided using dial-up Internet Service. KMC stated that it does not expect to see a difference in the call records between VoIP or POTS calls. KMC argued that “[t]he fact that a call record has originating [sic] calling party number information associated within exchange [sic] in a different LATA from that in which the communication terminates to an end user does not indicate that a call is not a VoIP call.” Citing several sources, KMC asserted that many providers of VoIP services, whether dial-up or broadband, populate the SS7 calling party number field for purposes of Caller ID. Thus, it appears that the appearance of a calling party number in a terminating call record is not necessarily an indication that a call was originated on the PSTN. Sprint is unable to determine where much of the subject traffic comes from.

Broadband Internet VoIP

As noted above, an originating call record might be produced for dial-up Internet VoIP under certain circumstances. However, Sprint witness Schaffer stated that a call using VoIP over DSL would not have an originating AMA record, because it would not go through the PSTN. He acknowledged that a VoIP call made over DSL would not have a correlated call detail record.

If the call terminated to the PSTN, Sprint stated that it does not know if a calling party number would be signaled for population in the AMA record. As previously noted by KMC, providers may populate the SS7 calling party number field for purposes of Caller ID. As with dial-up Internet telephony, Sprint advised there is no indication in the SS7 terminating records that the call originated as VoIP on DSL. Sprint also admitted it cannot determine whether or not the traffic sent to Sprint on KMC’s local interconnection trunk groups are VoIP originated.

Wireless

Sprint witness Wiley advised by way of example, that if a Miami wireless subscriber makes a call while in the Tallahassee area to a Tallahassee end user, it would come across Sprint’s wireless trunks. However, if that same wireless provider had an arrangement with KMC, Sprint did not know how the call would appear in the SS7 records. Witness Wiley opined that such calls would not have a charge party number. He admitted that the Agilent study was performed based on calling party numbers, not charge party numbers, so the universe of calls could possibly include wireless calls.

Call-Forwarded Traffic

Sprint witness Wiley stated that if a call is forwarded from outside its territory, Sprint would not have a record of the originating leg of the call. Thus, call-forwarded traffic could comprise a portion of the traffic that had no correlated call detail records.

Only 8% of the traffic had correlated call detail records (CDRs). In the Agilent study, only 2.5% had correlated CDRs. Correlated CDRs are made when there are both an originating and a terminating call detail record. The remaining traffic could be access traffic as insisted by Sprint. It also could be broadband or dial-up Internet VoIP traffic. It could potentially be wireless traffic, if routed through a CLEC. In summary, the SS7 characteristics of the traffic in this case could apply to various types of traffic other than access traffic.

How should Enhanced Services Traffic be compensated

Sprint agreed that the FCC's enhanced services exemption permits ESPs to be treated as end users, which allows the ESP to purchase local service or access service as an end user from a LEC. Nevertheless, Sprint insisted that an ESP's end-user status has nothing to do with the intercarrier compensation that applies between the local exchange carrier providing service to the ESP and any other carrier that the local service provider exchanges traffic with; rather, such intercarrier compensation is governed by their interconnection agreements. Sprint's position is that access charges should apply to VoIP calls. As noted by Sprint witness Burt, there are no contract provisions between KMC and Sprint for enhanced services traffic.

Sprint argued in its brief that the access charge exemption was intended to address the bypass of access charges by customers with PBX service and interstate private line service, also known as "leaky" PBX.²⁴ Sprint stated that a surcharge of \$25 applied to each line. Sprint argued that, since PointOne paid no such surcharge, it was not entitled to an access charge exemption.

KMC responded that the passage cited by Sprint applies only to interstate private lines and has no bearing on the access charge exemption. KMC explains that, although the FCC established both the surcharge and the access charge exemption in the same order,²⁵ it draws clear distinctions between them. KMC cites the order:

[T]he policy problems underlying the ESP exemption and the rules for the leaky PBX traffic are different. The former is based on concerns about rate shock on ESPs from the application of access charges; the latter is based on the inability to distinguish leaked interstate traffic from ordinary local calling over certain end user lines. *Thus, the ESP exemption represents an affirmative decision to provide ESPs with special treatment; the leaky PBX rules are not really an "exemption"*

²⁴ FCC Order 83-356, ¶88.

²⁵ IMTS and WATS Market Structure, 97 FCC 2d 682, ¶¶ 80-83

at all (in the sense of an affirmative policy determination that leaked traffic should receive special treatment) but a pragmatic accommodation to measurement difficulties. [Emphasis by KMC] (ONA NPRM, 4 FCC Rcd 3983, ¶ 41)

The ESP exemption could apply to certain categories of traffic. Contrary to the position of KMC witness Calabro, the FCC has not definitively included VoIP traffic in the enhanced services category; rather, the FCC has found in certain cases that access charges may apply to VoIP traffic. Based on the discussion above, it can not be determined from the record in this case whether the traffic involved is enhanced services traffic.

Decision

The evidence in the record is inconclusive as to whether the subject traffic is enhanced services traffic or voice traffic. Since the nature of the traffic cannot be determined, treatment of enhanced services under the interconnection agreements, tariffs and law need not be decided.

ISSUE 7: REQUIREMENT FOR PAYMENT TO SPRINT FOR TARIFFED ACCESS CHARGES

Arguments

Sprint

Sprint witness Burt argues that “the basis for whether KMC is required to pay access charges for the toll traffic that it delivered to Sprint over local interconnection trunks is the language in the Interconnection Agreements between Sprint and KMC, the language in Sprint’s Access Tariff and Florida Statutes.” He states that all of these require KMC to pay access charges on traffic that is not local.

Witness Burt states that Sprint’s Access Services Tariff addresses the jurisdictional nature of the traffic, in that intrastate usage is comprised of calls that enter a customer network from a calling location within the same state, regardless of the routing of the calls.

Sprint points out in its reply brief that this Commission addressed the payment of access charges in Order No. PSC-96-1231-FOF-TP, stating:

When it cannot be determined whether a call is local or toll, the local exchange provider originating the call shall be assessed terminating switched access charges for that call unless the local exchange provider originating the call can provide evidence that the call is actually a local call.

Sprint advises that the order is specifically incorporated by reference into both MCI agreements adopted by KMC, and generally incorporated into the FDN agreement.

Sprint contends that KMC's reliance on the FCC's AT&T Declaratory Ruling is misplaced, because the FCC indicates in footnote 92 that a CLEC can be held liable, based on the interconnection agreement.

KMC

KMC witness Johnson states that KMC is not liable for access charges under the statute, interconnection agreement terms, or tariff provisions cited by Sprint. She contends that Sprint must provide additional information about the traffic in question, so that KMC can properly evaluate Sprint's claims and identify any IXCs associated with the traffic. She opines that "[i]f the traffic is not enhanced services traffic and otherwise switched access traffic, the IXCs are the parties that should pay any access charges that may be due and not KMC."

KMC witness Calabro agrees that Sprint's tariffed access charges would be due if the traffic in question were interexchange traffic. However, like witness Johnson, he asserts that the IXC would owe the charges, not KMC. He contends that ". . . Sprint has failed to undertake a wider investigation into the nature of the traffic, choosing to rely upon speculation and assumption." He notes that Sprint witness Burt "admits that Sprint lacks the ability to discern the nature of the traffic at issue in this proceeding and is not able to distinguish enhanced service traffic from other traffic."

Witness Johnson states Sprint is asserting without substantiation that PointOne is an IXC. She complains that Sprint does not consider whether KMC was entitled to treat PointOne as an end user. She opines that the fact that PointOne never sought certification from the FPSC makes it clear that PointOne does not consider itself to be a telecommunications carrier. She avers that "[t]elecommunications law and practice has always put the onus on customers to self-certify and not to use common carrier services for any unlawful purpose."²⁶ She adds that "[t]here was neither a duty nor a basis for KMC to conduct any type of unilateral investigation as to whether [PointOne] was an interexchange carrier and to assess if the traffic it was generating over the PRI trunks was interexchange traffic."

Witness Johnson argues the FCC determined in its AT&T Declaratory Ruling that where access charges applied, they were due from the IXC that carried the traffic. She notes that the FCC did not address the situation where access charges were imposed on a local exchange carrier, rather than the IXC. She complains that although Sprint has identified a number of IXCs in this case, it did not seek to collect the access charges from them. She adds that KMC had no relationship with the IXCs.

²⁶ Witness Johnson did not cite any specific orders or rules.

Analysis

As discussed above by Sprint, this Commission has addressed the payment of access charges previously in Order No. PSC-96-1231-FOF-TP. That order makes no exception for enhanced services traffic. The order is specifically referenced in the 1997 MCI agreement. It is also referenced in the 2002 MCIMetro/Sprint agreement. We located the corresponding paragraph in the FDN agreement, but were unable to find a reference, specific or general, to our Order. Toll traffic, as set forth in Hearing Exhibit 12, Part C, Section 37.2, which is the FDN agreement adopted by KMC, is to be given the meaning commonly used in the industry and “. . . includes communications between two points in different rate centers.” The effective dates of each agreement are noted by Sprint witness Burt:

1997 MCI Agreement – September 13, 2000 through June 19, 2003

FDN Agreement – June 20, 2003 through June 13, 2004

2002 MCI Agreement – June 14, 2004 to present. (Burt TR 55)

The 1997 MCI agreement, for example, states:

Compensation for the termination of toll traffic and the origination of 800 traffic between the interconnecting parties shall be based on the applicable access charges in accordance with FCC and Commission Rules and Regulations including but not limited to Order PSC-96-1231-FOF-PP [sic], Docket Number 95-0985-PP [sic].

Sprint argues in its brief that the interconnection agreements with KMC provide that access charges apply for non-local traffic. Each of the three agreements defines local traffic in a similar manner, as discussed above.

Sprint also advises that Section E1.1A of its Access Service Tariff specifically states it applies to Interexchange Carriers, Alternative Local Exchange Companies and end users. Sprint did not provide a cite, and we were unable to locate this tariff provision in the record.

Based on the parties' agreements, the initial burden to go forward with the complaint is met by Sprint if it demonstrates by a preponderance of the evidence that the traffic at issue is not local.²⁷ While KMC argues that it is also Sprint's burden to demonstrate that the traffic is not exempt enhanced services traffic, the provisions of the interconnection agreements, when read in conjunction with the statutory provisions and prevailing case law applicable to affirmative defenses, require that KMC prove that the traffic is enhanced services traffic. Thus, it then falls

²⁷ Section 364.16(3)(a), Florida Statutes, provides, in pertinent part, that “No local exchange telecommunications company or competitive local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply. . . .”

to KMC to demonstrate by a preponderance of the evidence that the traffic is not subject to access charges because the traffic is exempt. As discussed in Issue 6, the evidence in the record is inconclusive on this point; thus, KMC has not met its burden.

In responses to discovery, Sprint stated that KMC should pay access charges because the charge party numbers inserted into the SS7 records were assigned to KMC, and KMC also provided the PRIs that were used to transport traffic across LATA lines. Additionally, Sprint argued that there is a contractual relationship between Sprint and KMC, not Sprint and some other party. Sprint added that except for some instances where Sprint is both the originating and terminating carrier, Sprint is unable to identify the IXCs involved in the traffic.

Sprint also explained that it did not contact the IXCs involved in the traffic because it could identify only a small percentage of the IXCs since a large volume of the traffic was not originated from Sprint customers. Sprint pointed out that correlated call records that enabled it to identify an IXC were available for only 8 percent of the traffic.

KMC argues in its brief that Section 3.1.4 of Sprint's Access Services Tariff applies only to IXCs and end users that avail themselves of Sprint's access services. KMC also argues that the access tariff Section E6.1 states that switched access service "is available to *customers for their use in furnishing their services to end users.*" [emphasis by KMC] KMC contends that, if we were to find that access charges are due, they would be due from the IXC or PointOne.

KMC witness Johnson contends that Sprint could have sued PointOne and the IXCs as SBC did in proceedings elsewhere. Witness Johnson notes that Sprint had a direct relationship with the IXCs that it handed traffic to, and could have just as easily asked the IXCs about the traffic as it did KMC.

KMC should pay any access charges that are owed for non-local traffic that it terminated to Sprint over local interconnection trunks. As noted by Sprint, the FCC stated in the AT&T Declaratory Ruling that although access charges are typically due from IXCs, it does not preclude charging them to CLECs where agreements provide for it. The full footnote also states:

. . . To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.²⁸

As previously discussed, the interconnection agreements adopted by KMC require the payment of access charges. Payment of the charges by KMC is compliant with the FCC's statement.

KMC had a contractual relationship with PointOne. Even where Sprint has a contractual relationship with IXCs, Sprint should not have to track down carriers of traffic that has been

²⁸ Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, FCC 04-97, Order (April 21, 2004, ¶ 23, fn 92

handed off several times before ultimately reaching Sprint's network. Both the agreement and the tariffs are applicable to the traffic. Therefore, without clear evidence that the traffic is otherwise exempt, access charges are due pursuant to the parties' agreements and the tariff.

Decision

KMC shall be required to pay Sprint its tariffed access charges for the traffic that is the subject of this complaint. The amount is discussed in Issue 8.

ISSUE 8: DELIVERY OF INTEREXCHANGE TRAFFIC TO SPRINT OVER LOCAL INTERCONNECTION TRUNKS, IN VIOLATION OF INTERCONNECTION AGREEMENTS AND APPROPRIATE COMPENSATION, IF ANY

Arguments

Sprint

Sprint witness Burt notes that three interconnection agreements apply to this complaint: the 1997 MCI Agreement, the 2002 MCI Agreement, and the FDN Agreement, which each define local traffic as traffic that originates and terminates in a given local calling area. He argues that KMC has violated its contract based on the contract language that defines the manner in which traffic is to be terminated. Witness Burt asserts that the agreements place the responsibility on each party to route traffic on the appropriate trunks. He contends that "KMC cannot escape its responsibility to comply with the terms of the interconnection agreement by deflecting responsibility to its customers, in this case a self-described enhanced services provider."

Witness Burt argues that KMC's characterization of the circuits sold to PointOne as "local PRI circuits" does not take precedence over the interconnection agreements. He states that KMC certainly knew that calls from Orlando to Tallahassee or Fort Myers were not local under the interconnection agreements, regardless of KMC's assertions that it did not know where the traffic was before it reached KMC's network.

KMC

KMC witness Johnson does not agree with the calculations provided by Sprint because she does not think Sprint has demonstrated why KMC would be the party obligated to pay. She contends that if the traffic were telecommunications traffic, and therefore PointOne is an IXC, it would be PointOne that is liable for the charges. She notes that in such a case PointOne would be operating without proper authorization from this Commission. She adds that it may be appropriate for the IXCs identified by Sprint in its Agilent study to pay the charges.

Traffic Involved and Amounts

Sprint

Sprint witness Wiley states that Sprint developed a percentage of interstate, intrastate interLATA and local traffic for KMC based on the Agilent study. He adds that these percentages were applied to KMC's MOUs from June 2002 through November 2004 to develop the access charge billing amounts KMC should have been compensating Sprint.

Witness Wiley advises that Sprint only maintains six months of the call detail records online although portions of other months may also be available. He notes that all other data is archived on tapes with a third party vendor. He contends that it takes approximately two days to process a calendar day of archival records. He asserts that the amount of work involved to obtain and analyze the records led Sprint to develop a statistically valid random sample of the call detail records.

Sprint witness Aggarwal explains that Sprint uses SS7 CDR Summary Reports to calculate PLU and PIU factors which are then applied to billed minutes to determine whether the usage should be classified as interstate, intrastate or local. She continues that the calculated PLU and PIU factors are applied to the billed minutes. She adds that appropriate rates from Sprint's interstate and intrastate access tariffs and local rates from the parties' interconnection agreement were applied to determine the amount of additional charges that are due. She notes that a true-up is done to determine the amounts still owed based on the additional access charges.

According to witness Aggarwal, Sprint used the Agilent system, which is a "data warehouse for SS7 traffic" to perform its traffic study. The study performed by Agilent also used the Agilent system, but was done in addition to the Sprint study. Agilent captures the SS7 signals and makes them "more user-friendly." Information is captured throughout the day at "fairly regular intervals." Witness Aggarwal states that the Agilent system captures the majority, but not all, of the minutes billed by Sprint.

Witness Aggarwal notes that the interstate rates used were averages based on interstate access revenue for all carriers in Florida divided by the corresponding interstate access minutes for that month. She explains that intrastate rates used were based on previously billed rates, and that local rates were composite rates based on end office switching, tandem switching and common line elements per the interconnection agreement. She contends that while the amount of improperly terminated traffic is much less than it was prior to May 2004, there is still improper termination of traffic. She notes that Sprint is continuing to monitor and adjust KMC's traffic for access traffic.

KMC

KMC witness Twine contends that Sprint has consistently refused to provide the detail behind the calculation of damages. He complains that Sprint provided only 3% of the call detail

for a period of twenty-seven months, which is comprised of one day of data for each month. He argues that this is not the sample upon which Sprint is basing its claim. He states that KMC has not been able to verify the PIUs and PLUs associated with the traffic. He adds that neither KMC nor this Commission can verify the MOUs that Sprint is claiming without the full data.

KMC argues in its brief that a significant amount of traffic was not accounted for in the studies performed by Sprint. KMC asserts that “[w]ithout knowing why these significant percentages of traffic were not included in the records on which Sprint relies, or the characteristics of the CDRs that were unavailable, it is not possible to come to any kind of conclusions as to whether the jurisdictional percentages Sprint used are reliably descriptive of the traffic for each month as a whole.” KMC explains that an examination of Sprint witness Aggarwal’s deposition exhibits shows that, for the months November 2002, December 2002, May 2003, and June 2003, Sprint considered only 37%, 48%, 48% and 53%, respectively, of the volume of MOUs to which the jurisdictional factors were applied.

KMC lists a number of other flaws:

- Aberrational differences in the applied tariff rates in Sprint’s calculations, which ranged from \$0.056 to \$0.0669
- Jurisdictional factors based on a different time period than the MOUs to which they were applied, thus failing to consider variations in monthly traffic.
- Improper conclusion that all traffic delivered without a CPN was subject to intrastate access charges.

As a result of these problems, KMC argues that the amount of access charges cannot be determined from the record in this case. KMC states that because Sprint’s methods in calculating the amount of access charges are flawed, a post-decision audit or accounting will be necessary to determine an amount. Due to the concerns outlined by KMC, it insists that “. . . only an audit reviewing the available CDRs, as opposed [to] the CDR Summary Reports relied upon by Sprint in its Complaint . . . can determine the reliability of Sprint’s calculations and identify the areas in which modifications are required.” KMC also asserts that the small amount of traffic that Sprint continues to see appears to be call forwarded traffic.

Analysis

According to Sprint, the interconnection agreements adopted by KMC each specify that equal access InterLATA or IntraLATA interexchange traffic is to be exchanged over separate trunks from non-equal access intraLATA toll and local traffic. At the same time, it is evident that the agreements adopted by KMC allow the parties to combine access traffic with local traffic on the same trunks. However, such an approach requires that the parties *agree* to do so. As noted by Sprint witness Burt, “the fact that the interconnection agreements don’t separately address enhanced services traffic should have resulted in KMC discussing and gaining agreement from Sprint as to the proper intercarrier compensation for this traffic.” We have verified that the

agreements also state that compensation for termination of toll traffic between the interconnecting parties will be based upon applicable access charges in accordance with FCC and Commission rules.

The FCC has not determined that enhanced services traffic is local traffic. For policy reasons, the FCC granted an exemption from payment of access charges for certain types of services. Thus, even if the traffic is enhanced services traffic, under the parties' agreements, it is still non-local traffic that was improperly terminated over local interconnection trunks, based on the language in the parties' interconnection agreements. As such, unless KMC can show that the exemption applies, access charges are due. As discussed in Issue 6, KMC has not provided convincing evidence to support its affirmative defense that the traffic in question is enhanced services traffic or that it is subject to the exemption.

Traffic Involved and Amounts

In understanding Sprint's calculations, it is important to sort out the different studies and calculations that have taken place. The actual amount claimed by Sprint comes from summary call detail records. Sprint provided exhibits with tables and spreadsheets that are clearly not the SS7 records themselves, as noted elsewhere by KMC witness Calabro. We have determined that there is a summary page for each month through February 2005. It appears that the minutes of use are adjusted in each summary page to reclassify them from local to intrastate and interstate minutes. We note that transit traffic is shown, but is not included in the totals.

An important distinction is that there is an Agilent *system*, and an Agilent *study*. While the Agilent study relies on data produced by the Agilent system, it is based on different days than are chosen for the sample described in the affidavit of Sprint employee Dr. Brian Staihr, as described below.

Based on the affidavit of Dr. Staihr, Sprint collected a sample comprised of call detail records for one day per month for the applicable period to calculate the factors that are applied to adjust minutes from the summary call records. For ease of discussion, we will call this the Sprint study. An examination of Sprint witness Aggarwal's exhibits shows that a blended access charge rate is applied to the adjusted minutes to derive a dollar amount.

A review of the Agilent study reveals that it is based on one week of data beginning September 15, 2003, and ending September 21, 2003. Agilent performs a similar calculation to Sprint's. It appears that for purposes of this docket, Sprint uses the Agilent study as a crosscheck. The purpose stated in the Agilent study is to perform future studies of the same kind, for a share of the revenues it enables Sprint to obtain. Thus, Agilent is not independent and its calculations must be considered accordingly. We note that Sprint did not file actual SS7 records. As pointed out by KMC witness Calabro, the files contain "managed data," with information that would not have come from the SS7 records.

The affidavit of Dr. Staihr that is attached to witness Wiley's testimony explains the methodology used to derive the sample used by Sprint to calculate billing factors. Dr. Staihr states:

. . . [t]hat he chose the days for the sample through random number generation, using the months beginning November 1, 2002 and ending January 31, 2005. That this time period involved 823 days at 24 hours a day, which equaled 19,752 population hours. That one day per month (or 27 days) at 24 hours per month [sic] equates to 648 sample hours. That a sample size of 648 with a population of 19,752 (the equivalent of a statistically infinite population) produces results at a 95% confidence level and a .04 confidence interval.

We see an apparent incongruity in the statement of Dr. Staihr, who was not a witness in this case. He indicates that a sample of 27 days was chosen through random number generation from a period of 27 months. Through an examination of the material filed by Sprint, it is clear that the CDRs provided by Sprint represent one day per month. Dr. Staihr's statement confirms this fact. If the days were randomly chosen, there could be more than one day for some months, and no days for other months in the sample. We also note an inconsistency in the time period chosen. The minutes of use and adjustments presented by witness Aggarwal are for the period July 2002 through February 2005, while the factors applied to the minutes are from a sample of days from November 2002 through January 2005. Although KMC expresses concerns about the sample as noted in its brief, neither side presented an expert witness on statistical sampling. Nevertheless, there is enough inconsistency in this and other factors discussed elsewhere to cause concern about the validity of the sample used by Sprint.

We also are concerned with a number of other discrepancies in the record as to how the billing factors were calculated and applied. As already noted, Sprint witness Wiley stated that the Agilent study was used to determine the factors. This is in conflict with the affidavit of Dr. Staihr, which is attached to witness Wiley's testimony as an exhibit. Sprint witness Aggarwal stated that Sprint used the monthly SS7 CDR Summary Reports to calculate the factors. It appears that the CDR Summary Reports are used to apply factors to the minutes of use in these reports, not to develop the factors themselves.

Further cause for concern is that witness Aggarwal advised that there is not a one-to-one relationship between actual billed minutes and the calculated PLU factor. We note that the Sprint witness stated that she has no knowledge of the amount of variability in the amount of billed traffic across the days of a month. According to witness Aggarwal, Sprint tried to capture a full 24-hour period for each day used in the billing sample, but did not compare it to the billed traffic for the day; rather, Sprint used all of the SS7 traffic it had available for the day. She agreed that the amount of billed traffic differed from the amount of traffic captured in the SS7 records. Witness Aggarwal explained that the Agilent system captures a large percentage of the minutes that Sprint bills, but not all of them. She stated that she does not know why it does not capture all of the minutes of use. She conceded that in November 2002, the study only considered 37 percent of the traffic, but she did not know why this or other months varied in the amount of traffic captured. She also agreed that certain days, or certain hours of certain days,

might not be collected. Witness Aggarwal admitted that minutes that are unbilled for whatever reason are used in the determination of jurisdictional factors. These statements are another indication of incongruities in the Sprint calculations, as already noted by KMC.

Sprint witness Aggarwal explained that all traffic that does not have a CPN is considered to be intrastate. She states that this treatment is consistent with Sprint's access tariff. She explains that Sprint develops a factor for such traffic and applies it to all of KMC's MOUs to determine the amount of traffic without a CPN. KMC argues in its brief that "Sprint's tariff provides, to the contrary, that access is to be [billed] based upon the [discrete] access charge rate elements applicable to a call. . . ." We note that KMC refers generally to the Sprint Access Service Tariff, but does not cite a specific provision.

Sprint argues in its brief that it calculated the amount owed using several different methods. Initially, Sprint used billing factors, followed by additional methods to check the accuracy of the calculations, using the amounts from the SS7 summary reports. Sprint states the application of a PLU and PIU based on the summary reports produced a figure of \$3,493,454, while the use of PLU and PIU factors based on 27 days of call detail records totaled \$3,261,832, through November 2004. Sprint states that the charges actually calculated to bill KMC were \$3,460,731 for the same period. We totaled the figures in Sprint's KMC Billing Summary for that period, and arrived at a figure of \$3,462,733.

By totaling the dollar amounts on Sprint Exhibit 51, RA-2, we determined that the total included in Sprint's brief is a few hundred dollars more than the totals in Exhibit RA-2. It appears that this is due to the fact that the brief includes amounts through March 2005, while the exhibits end with February 2005. The total in the brief is also higher than the amount shown in testimony, although the amount in testimony appears tied to a document produced by Sprint titled "KMC Correlated Call Record," which includes traffic through August 2003. We note that, based on Sprint's representations, the method based on total volume, which appears to be used for the figure in the brief, produces results approximately seven percent higher than the method using factors based on 27 days of CDRs.

KMC complains that "[i]gnoring that the record has been closed, Sprint's brief offered two alternate calculations in the space of four sentences as supposed independent verification of its calculation. . . ." KMC argues that, even if the methods are accepted, the difference of several hundred thousand dollars is not trivial. KMC argues that "[u]nlike Sprint's earlier calculations, where KMC could at least confirm some of the arithmetic, these alternatives leave many questions as to even the simple math since Sprint, guilty of many an elementary school math teacher's refrain, did not show its work." KMC contends that the lack of rigor in the calculations confirms the need for an accounting. Sprint responds that it "used the evidence in the record to employ two additional methodologies as a check on the accuracy of its calculations. Using both an average of all the monthly summary reports and also using the data from the 27 days of sample CDRs confirmed that Sprint's initial calculations were reasonable." Sprint states that it "welcomes a Commission audit or accounting of Sprint's records. . . ."

Many details of the methodologies employed by Sprint are not apparent from the record. We attempted to replicate Sprint's numbers, using the data in the record, but were unable to do so. We note several areas where we believe Sprint's figures warrant adjustment.

Sprint's requested amount includes charges for call-forwarded traffic. According to Sprint, call-forwarded traffic was not excluded from the calculation used for Sprint's claim. Sprint witness Aggarwal explains that Sprint would have to do a manual calculation to exclude the call-forwarded traffic from the calculation of damages, and since it represented only a small portion of the traffic, Sprint did not exclude it. Sprint witness Wiley advised that call forwarding accounted for about six tenths of one percent of the calls. Witness Wiley agreed that he could determine what percentage of the calls studied were call forwarded, but he could not correlate those to the bills sent to KMC. We believe identifiable call-forwarded traffic should be excluded.

We determined that the amount computed by Sprint includes charges for interstate traffic, and interstate traffic is not within the jurisdiction of this Commission. Therefore, interstate traffic should be removed. As noted above, Sprint witness Aggarwal states that all traffic that does not have a calling party number is classified as access traffic.²⁹ Although she asserts that such practice is consistent with Sprint's access tariff, she does not cite the tariff provision. KMC argues in its brief that witness Aggarwal's assertion is not in accordance with Sprint's access tariff. However, as noted above, KMC provides no specific cites. Witness Aggarwal's position is unrebutted in the record. Accordingly, traffic without a CPN may be included in the minutes to be billed.

We also have concerns about the rate that is applied, as pointed out by KMC. It is clear from the difference in the rate, which ranged from \$0.056 to \$0.0669 per minute of use, that it is not a tariffed rate. Sprint witness Aggarwal asserted that the rate used was essentially the tariff rate. Later she stated that "the rate was based on billed dollars divided by billed minutes for intrastate only." She did not know why an analysis was performed to determine a rate to use, rather than using the rate in the tariff. Witness Aggarwal agreed that the best way to determine the exact amount would be to determine the correct jurisdiction of the traffic then apply the correct rate. We believe the appropriate access rates, in accordance with the applicable tariff, should be used.

Regarding the claimed amount Sprint is requesting for the period since May 2004, we determined that the figure for each month is very small. Sprint identified six-tenths of one percent of the total traffic for all months as call forwarded traffic. We determined that traffic coming from outside the local calling area after May 2004 is a few percent of the traffic. As a result, the amount is not significantly higher than the previously identified call-forwarded traffic. We were unable to find any call details for this traffic, and believe that KMC's explanation that it is call-forwarded traffic is plausible, given the small amount. Therefore, the small amounts of

²⁹ We have confirmed the statement of Sprint witness Aggarwal.

traffic, which occurred after PointOne migrated its traffic away from KMC in May 2004, should be eliminated from the calculation.

The use of a sample is appropriate in the circumstances, since Sprint is trying to reconstruct figures after the fact. However, there is considerable record evidence that the traffic used to develop factors may not be complete and may not correspond with the time period over which the factors were applied. Therefore, a determination must be made as to the reliability of the factors.

In summary, there are a number of problems with Sprint's methodology as discussed by KMC, with the additional problems noted by us. Accordingly, an audit is warranted.

Audit

The parties' agreements contain certain provisions for audits. The 1997 MCIMetro agreement provides that each party is to bear its own expenses for an audit. It also states that "[t]he reasonable cost of special data extractions required by the auditing Party to conduct the Audit or Examination will be paid for by the auditing Party." A "Special Data Extraction" is defined as "the creation of an output record or informational report (from existing data files) that is not created in the normal course of business." The 2002 MCIMetro agreement contains the same language. The FDN agreement also provides that a party will bear its own expenses in connection with an audit. However, it does not address the expenses further. However, this proceeding is fundamentally a billing dispute which, in accordance with the provisions of the agreements, has been brought to us for resolution. Accordingly, since there, strictly speaking, is not an "auditing party," we believe we have latitude as to how and from whom the costs of the audit can be recovered. While we have concluded elsewhere that KMC improperly delivered traffic to Sprint, we also concluded that KMC did not knowingly violate Section 364.16(3)(a), Florida Statutes. On balance, we believe it would be reasonable for the parties to share equally the costs of the audit. The time period to be covered in the audit should be July 2002 through May 2004. This is the time period used in Sprint witness Aggarwal's exhibit, excluding the period after PointOne migrated its traffic away from KMC's network.

The following adjustments should be made:

- Call-Forwarded Traffic should be removed.
- Interstate Traffic should be removed.
- Appropriate intrastate access charges should be applied in accordance with the appropriate tariff.
- Traffic with no CPN should be included.

Finally, an independent third party auditor should be engaged by the parties to determine the amount owed, which may be based on a statistically valid random sample or other

methodology, as the entity deems appropriate. 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. The parties shall exercise best efforts so that the audit is completed expeditiously. Upon completion, the audit report shall be submitted for review by us, for a determination of further steps required (including the timeline for any refunds).

Decision

The record is uncontroverted that the traffic exchanged between KMC and Sprint meets the definition of "toll" traffic in the parties' interconnection agreements. Nevertheless, Sprint's sampling methodology appears to contain flaws that render it unreliable. Further, the amount requested by Sprint contains figures for traffic that we believe inappropriate for this claim.

Therefore, we find that KMC delivered interexchange traffic to Sprint over local interconnection trunks in violation of the terms of its Interconnection Agreements with Sprint. However, the amount cannot be determined based on this record. The parties shall obtain an audit or accounting to determine the amount, subject to the adjustments noted.

ISSUE 9: BACKBILLING LIMITATIONS UNDER INTERCONNECTION AGREEMENTS, TARIFFS, OR OTHER APPLICABLE LAW

Arguments

Sprint

Sprint's witness Burt states that there are no backbilling limitations in the interconnection agreements, Sprint's tariffs, or in Section 364.16(3)(a), Florida Statutes, for misrouted traffic. The witness explains that Section 95.11(2), Florida Statutes, provides for a five-year limitation period for actions based on contract violations. The witness asserts that in Docket No. 020960-TP, Order No. PSC-03-1139-FOF-TP, we ". . . recognized the applicability of the five-year statutory limitations period to billing disputes under interconnection agreements"

The witness also notes that Sections 95.11(3)(f) and (j), Florida Statutes, provide for a four-year limitation period for actions based on statutory liability or action based on fraud, respectively. Witness Burt states that Sprint's backbilling from July 2002 is within even this shorter time period. Sprint states that the backbilling provision tied to a permissive audit in its Access Tariff only applies to erroneous PIUs and not to this Complaint.

KMC

KMC chose to address this issue only in its post-hearing brief. KMC believes that "Sprint is limited by its tariff such that it can only back bill access charges for the quarter in

which an audit is completed and the quarter prior to the audit.” KMC concedes that “Section 95.11, Florida Statutes, would otherwise generally apply.”

Analysis

We have previously addressed the PIU audit section, E.3.11.D.1, in Sprint’s Access Services Tariff, in Issue 3. The audit section provides for a permissive audit of access traffic over access trunks, not misrouted access traffic over local interconnection trunks, which is the basis of this Complaint. Thus, Section E.3.11.D.1 does not apply.³⁰

In Issue 5, KMC did not knowingly violate Section 364.16(3)(a), Florida Statutes. Therefore, Section 95.11(3), Florida Statutes, does not apply to the backbilling limitation. Since there are no limitations to backbilling in Sprint’s Access Services Tariff or Interconnection Agreement with KMC that warrant a departure from Florida’s five-year statute of limitation, Section 95.11(2), Florida Statutes, applies. The backbilling time period at issue in this Complaint, from 2002, is well within the five-year statute of limitation.

Decision

Sprint’s backbilling is limited, if at all, only by Section 95.11 (2) , Florida Statutes.

ISSUE 10: OVERPAYMENT OF RECIPROCAL COMPENSATION, AND APPROPRIATE REFUND, IF ANY

Arguments

Sprint

Sprint witness Dansforth states that from July 2002 to June 2003 Sprint overpaid reciprocal compensation to KMC because access traffic was sent over Sprint’s local interconnection trunks. The witness avers that Sprint is interconnected with KMC for the exchange of local and ISP-bound traffic. The witness explains that in 2001 the FCC’s ISP Remand Order³¹ established an interim compensation plan which addressed intercarrier compensation of traffic delivered to ISPs and the treatment and compensation of local traffic.

³⁰ The backbilling period cited by KMC for Section E.3.11.D.1 of Sprint’s Access Services Tariff was erroneous. The period includes the quarter the audit was completed, the quarter prior to the completion of the audit, and two quarters following the completion of the audit.

³¹ Order FCC 01-131 was released April 27, 2001, in Dockets No. 96-98 and 99-68 entitled In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic.

The witness states that a crucial component in the FCC's order, which Sprint adopted in Florida on February 1, 2002, was the assumption that "if one carrier's traffic exceeded the other carrier's traffic by a factor of three (3), all traffic above the 3:1 ratio was presumed to be ISP-bound traffic and compensated at the ISP-bound traffic rate as set forth in the FCC's order," and all traffic below the 3:1 ratio was presumed to be local (voice) minutes to be compensated at the reciprocal compensation rate in the interconnection agreement. Witness Dansforth notes that Sprint derived the number of local (voice) minutes to be compensated at the reciprocal compensation rate by multiplying the number of CLEC originated minutes that terminated to Sprint by three, and this calculation also determined the number of Sprint originated minutes that were above the 3:1 ratio and assumed to be ISP-bound. The witness also states that "[i]n this case, three times the number of KMC-originated minutes terminated by Sprint is presumed to be the number of Sprint originated voice or [l]ocal traffic terminated by KMC."

Witness Dansforth explains that because KMC routed access traffic over local interconnection trunks, KMC inflated its local traffic minutes of use which resulted in Sprint over paying reciprocal compensation threefold due to the misrouted traffic. The witness notes that the local (voice) rate is higher than the ISP rate and argues that "Sprint overpaid by that rate differential multiplied by the number of minutes that were sent incorrectly as if they were [l]ocal or voice traffic."

KMC

KMC witness Johnson states that we should find that Sprint is not entitled to a refund of reciprocal compensation "since the traffic in question was properly sent over the local interconnection trunks." The witness also notes that if access charges are owed to Sprint that they should be paid by entities other than KMC. In this situation, there would need to be an accounting of the reciprocal compensation paid by both Sprint and KMC that is separate from the access charge issue. KMC believes the accounting should be conducted by an independent third party or this Commission.

Analysis

On June 26, 2002, Sprint and KMC adopted Amendment No. 1 to their 1997 MCI Interconnection Agreement to implement Order FCC 01-131, on the exchange of local and ISP-bound traffic. The amendment was effective until the adoption of the FDN agreement on June 20, 2003.

While routing access traffic over local interconnection trunks would skew the 3:1 ratio in determining the number of Sprint-originated minutes that were above or below the ratio, we do not agree with Sprint's calculations. Sprint overpaid reciprocal compensation by three times the rate differential multiplied by the number of misrouted access minutes. However, in Confidential Exhibit 53 it appears the minutes are multiplied by the local rate in section 3.1.1 of Amendment 1 to the 1997 MCI agreement. We are also concerned that in reviewing the calculations provided by Sprint it cannot be determined whether or not any KMC originated local traffic was rightfully included in applying the 3:1 ratio, which could also skew the results.

KMC argues that if Sprint is owed access charges, an accounting of the reciprocal compensation paid by both KMC and Sprint should be conducted. Any audit conducted as recommended in Issue 8 to determine the appropriate access charges owed by KMC to Sprint inherently should take into account any reciprocal compensation payments made by KMC for such traffic.

An audit is appropriate to address concerns with Sprint's calculations as outlined above. The audit should be for the period July 2002 through June 19, 2003. Responsibility for payment of the cost of the audit should be handled in the same manner as recommended in Issue 8.

Decision

An audit of the traffic in question shall be completed by an independent third party to determine the appropriate refund. Responsibility for payment of the cost of the audit shall be handled in the same manner as recommended in Issue 8.

ISSUE 11: APPROPRIATE PAYMENT ARRANGEMENTS WITH SPRINT FOR COMPENSATION FOR ANY TRAFFIC DELIVERED BY KMC TO SPRINT THAT IS THE SUBJECT OF THIS COMPLAINT OR REFUNDS FOR OVERPAYMENT OF RECIPROCAL COMPENSATION

Arguments

Sprint

Sprint believes this Commission should order KMC to pay within ten days of our final order over \$3 million in access charges, more than \$700,000 in reciprocal compensation, and 1.5% interest per month for late payment charges. Sprint witness Dansforth states that the payment should be made by wire transfer.³² Sprint cites to Attachment VIII, Section 3.1.17 of the 1997 MCI Agreement, Section 6.5 of the FDN Agreement, and Attachment 8, Section 3.1.17 of the 2002 MCI Agreement as the applicable agreement provisions that require KMC to pay interest in the amount of 1.5% per month on backbilled charges.

Specifically, the agreements state:

1997 MCI Agreement, Att VIII, 3.1.17:

Sprint will assess late payment charges to MCI in accordance with the applicable tariff, if any. If there is no applicable tariffed late payment charges then Sprint will assess late payment charges equal to the lesser

³² Sprint witness Dansforth provides the appropriate bank account number and transit routing number in his direct testimony.

of 1.5% per month of the balance due or the maximum allowed by law, until the amount due including late payment charges is paid in full.

2001 FDN Agreement, Section 6.5:

The billing party will assess late payment charges to the billed party equal to the lesser of one and one-half percent (1.5%) per month or the maximum rate allowed by law for commercial transactions, of the balance due, until the amount due is paid in full.

MCI 2002 Agreement, Att 8, Section 3.1.17:

The Parties will assess late payment charges equal to the lesser of 1.5% per month of the balance due or the maximum allowed by law, until the amount due including late payment charges is paid in full.

KMC

KMC states that if it is determined that access charges are owed, PointOne or various interexchange carriers, not KMC, would owe the charges to Sprint. KMC believes that an accounting will be necessary to resolve the reciprocal compensation payments between Sprint and KMC, and that any amounts that might be due from KMC should be suspended until KMC's complaint against Sprint with offsetting claims has been resolved.

KMC argues that the applicable interest rate should be "the statutorily determined rate of 0.0058% per month (or 0.0001918 per day)" instead of 1.5% per month. KMC notes that all three agreements contain the requirement that the lesser of the 1.5% or the maximum rate set by law is the applicable interest rate. KMC references Section 55.03, Florida Statutes, and the statutorily set rate of 0.0058% per month made by the Chief Financial Officer of the State of Florida as the applicable rate because it is less than 1.5% per month.

Analysis

Interest Rate

The testimony on this issue was sparse. In fact, KMC chose to address the issue of payment arrangements only in its post-hearing briefs. Even though Sprint and KMC agree on the same late payment sections of the applicable agreements, each party has its own interpretation for the calculation of the late payment charge. Each late payment section states that the charge will be "the lesser of 1.5% per month . . . or the maximum allowed by law. . . ." Sprint believes 1.5% per month is the lesser while KMC believes that the rate established under Section 55.03, Florida Statutes, 0.0058 per month, is the lesser.

Section 55.03, Florida Statutes, requires the Chief Financial Officer of the State of Florida to establish the interest rate payable on judgments beginning January 1st of each year.

On December 1, 2004, the interest rate on judgments was set at 7% a year (.0001918 per day) for the year 2005. Section 55.03, Florida Statutes, applies to judgments, decisions of a court, and sets the interest on the amount awarded at the end of the proceeding until the award is fully paid. It is not used to calculate the amount of the judgment itself. Because Section 55.03, Florida Statutes, only applies to court ordered judgments, it does not apply in this situation. The Parties chose to limit the late payment interest rate in their agreements to the lesser of 1.5% per month or the maximum rate allowed by law. Therefore, a late payment charge of 1.5% per month is appropriate.

Timing of Payment

KMC argues that other entities should be responsible if access charges are owed and that an “accounting” is necessary to resolve reciprocal compensation payments. These concerns have been addressed in previous issues. KMC also believes that any payments due to Sprint should be held in abeyance until Docket No. 050581-TP, *Complaint of KMC Telecom III LLC and KMC Telecom V, Inc. against Sprint Florida, Incorporated and Sprint Communications Company Limited Partnership for alleged failure to pay access charges pursuant to interconnection agreement and Sprint’s tariffs, and for alleged violation of Section 364.16(3)(a), Florida Statutes*, is resolved. Sprint has requested that payment be received within 10 days of our final order.

Since audits are to be conducted pursuant to Issues 8 and 10, it appears premature to discuss timing of payments at this time. The audit reports should be submitted to us when complete for a determination of further steps required, including the timeline for payment.

Decision

The appropriate payment arrangements will be determined after we have reviewed the audit conducted pursuant to Issues 8 and 10. A late payment charge of 1.5% per month shall also be paid by KMC.

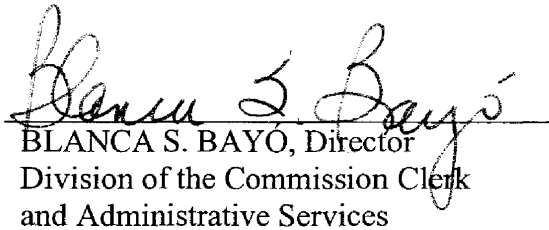
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that the issues identified in this docket are resolved as set forth within the body of this Order. It is further

ORDERED that this docket will remain open pending our review of the audits for Issues 8 and 10. We shall then establish a timeline for the payment of the appropriate refund amount as determined by the auditor.

By ORDER of the Florida Public Service Commission this 19th day of December, 2005.


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

(S E A L)

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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.