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December 24, 2001

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 011615-TP Complaint of KMC Telecom III, Inc., for Enforcement of Interconnection Agreement with Sprint-Florida, Inc.

Dear Ms. Bayó:

Enclosed for filing is the original and fifteen (15) copies of Sprint's Motion to Dismiss KMC's Complaint. Parties have been served with copies pursuant to the attached Certificate of Service.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Sincerely,

Susan S. Masterton

Susan S. Masterton

Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of KMC Telecom III, Inc.	)	Docket No. 011615-TP
For enforcement of interconnection agreement	)	
With Sprint-Florida, Incorporated	)	Filed: December 24, 2001

SPRINT'S MOTION TO DISMISS KMC'S COMPLAINT

On November 29, 2001, KMC Telecom III, Inc. (hereinafter "KMC") filed a complaint for enforcement of its interconnection agreement with Sprint-Florida, Incorporated (hereinafter "Sprint"). Without waiving any rights to file additional motions or other responsive pleadings, Sprint hereby files its Motion to Dismiss the Complaint of KMC pursuant to Rule 28-106.204, F.A.C., because the facts alleged by KMC are insufficient to state a cause of action against Sprint based on the clear language of the Commission's arbitration order underlying the provisions of the parties' interconnection agreement relating to payment of reciprocal compensation.

A. KMC'S COMPLAINT IGNORES THE COMMISSION'S ARBITRATION ORDER AND THE PLAIN MEANING OF THE INTERCONNECTION AGREEMENT

As acknowledged by KMC in paragraph 12 of its Complaint, KMC voluntarily elected to adopt the interconnection agreement between Sprint-Florida, Incorporated and MCImetro Transmission Services, Inc. (hereinafter "Sprint/MCI Agreement").[1] The

[1] In footnote 1 of the Complaint, KMC states that it adopted the Sprint/MCI Agreement on December 28, 1998 and renewed the adoption on October 16, 2000 (approved by the Commission in Order No. PSC-01-0494-FOF-TP). Sprint's records show that KMC Telecom II did adopt and readopt the Sprint/MCI agreement on those dates. Sprint's records show that KMC Telecom III (the Petitioner in this Complaint)

Sprint/MCI Agreement was executed by Sprint and MCI on April 16, 1997 in accordance with the Commission's Final Order on Arbitration, *In re: Petition by MCI Telecommunications Corporation for arbitration with United Telephone Company of Florida and Central Telephone Company of Florida concerning interconnection rates, terms and conditions, pursuant to the Federal Telecommunications Act of 1996*, Docket No. 961230-TP, Order No. PSC-97-0294-FOF-TP (hereinafter "Sprint/MCI Arbitration Order"). As KMC admits in its June 15, 2001 letter to Sprint (attached as Exhibit E of the Complaint), KMC did not attempt to negotiate changes to the Sprint/MCI agreement at the time of its adoption of that agreement regarding any provisions of the agreement.[2]

KMC alleges in its Complaint that it is owed reciprocal compensation by Sprint at the tandem interconnection rate because its switches located in Tallahassee and Ft. Myers serve comparable geographic areas to the areas served by Sprint's tandem switches. The issue of when MCI was due reciprocal compensation at the tandem switching interconnection rate was specifically addressed and decided by the Commission in the Sprint/MCI Arbitration Order. The Commission ruled that:

> We find that the Act does not intend for carriers such as MCI to be compensated for a function they do not perform. Even though MCI argues that its network performs "equivalent functionalities" as Sprint in terminating a call, MCI has not proven that it actually deploys both tandem and end office switches in its network. If these functions are not actually performed, then there cannot be a cost and a charge associated with them. Upon consideration, we therefore conclude that MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function. (Sprint/MCI Arbitration Order at page 17)

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opted into the Sprint/MCI Agreement effective April 22, 1999 (approved by the Commission in Order No. PSC-99-1413-FOF-TP).

[2] However, Sprint and KMC II have negotiated two amendments subsequent to KMC II's adoption of the original Sprint/MCI agreement, one on November 28, 2000, involving line sharing, and one on January 8, 2001, involving EELs.

MCI specifically raised the argument that geographic comparability was sufficient to establish equivalent functionality. The Commission rejected this argument. (Sprint/MCI Arbitration Order at page 16.)[3]

The relevant provisions in the parties' interconnection agreement related to the payment of the tandem switching interconnection rate directly implement the Commission's decision in the Sprint/MCI Arbitration Order. Attachment IV, section 2.4.2, of the Agreement (attached hereto as Attachment 1) provides:

> When Sprint terminates calls to MCIm's subscribers using MCIm's Switch, Sprint shall pay to MCIm transport charges from the IP to the MCIm switching center for dedicated or common transport. Sprint shall also pay to MCIm a charge symmetrical to its own charges for the functionality actually provided by MCIm. [emphasis added]

B. TO EFFECT ANY CHANGE IN LAW THE AGREEMENT MUST BE SPECIFICALLY AMENDED

At the time the Sprint/MCIm Agreement was executed, the language in Section 2.4.2 reflected the state of law in Florida regarding the applicability of the tandem interconnection rate. This Commission has consistently refused to specifically affirm arguments that geographic comparability alone is sufficient to establishment entitlement to the tandem interconnection rate. [4]

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[3] In its complaint, KMC references FCC Rule 51.711 (a)(3), which sets forth a comparable geographic area criterion for entitlement to the tandem interconnection rate. At the time of the Sprint/MCI Arbitration Order, the 8th Circuit Court of Appeals had vacated FCC Rule 51.711 in Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997). The rule was reinstated on June 10, 1999 by the 8th Circuit in Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir. June 10, 1999) in response to the U.S. Supreme Court decision in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999).

[4] See, e.g., ATT/BellSouth Arbitration, Docket No. 000731-TP, Order No. PSC-01-1402-FOF-TP; MCI/BellSouth Complaint, Docket No. 991755-TP, Order No. PSC-00-2471-FOF-TP; Intermedia/BellSouth Arbitration, Docket No. 991854-TP, Order No. PSC-00-1519-FOF-TP. These decisions were generally based on the FPSC's analysis of the provisions of FCC Rule 51.711 (a)(3) and ¶1090 of the Local Competition Order.

In Docket No. 991755-TP, *In re: request for arbitration concerning complaint of MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of approved interconnection agreement*, Order No. PSC-00-2471-FOF-TP, issued December 21, 2000 (hereinafter "MCI Tandem Rate Order"), the Commission rejected an attempt by MCI to alter the parties' interconnection agreement to reflect a single prong "comparable geographic area" test. In its decision in that docket the Commission recognized that the plain language of the BellSouth agreement required MCI to demonstrate that its switch performed the same functions as BellSouth's tandem switch in order for MCI to be entitled to the tandem interconnection rate (MCI Tandem Rate Order at page 11).[5] MCI argued that a demonstration that it served a comparable geographic area was sufficient to justify its entitlement to the tandem interconnection rate under FCC Rul3 51.711 (a) (3). Based on an analysis of the rule and the provisions of ¶1090 of the Local Competition Order, the Commission upheld the requirement that MCI must provide tandem functionality for it to receive the tandem interconnection rate. (MCI Tandem Rate Order at page 13)

As KMC notes in paragraph 35 of its Complaint, on April 27, 2001, the FCC issued a Notice of Proposed Rulemaking in Docket No. 01-92, *Developing a Unified Intercarrier Compensation Regime* (hereinafter Intercarrier Compensation NPRM). In ¶105 of the NPRM the FCC clarified that Rule 51.711(a)(3) contemplates only geographic

[5] Significantly, the posture of that case was a request by MCI to force BellSouth to amend their interconnection agreement to recognize the comparable geographic area criterion and to require BellSouth to pay MCI the tandem interconnection rate retroactively to the date that MCI first requested that BellSouth amend the agreement to reflect the reinstatement of the FCC's Rule 51.711. There appeared to be no dispute concerning the plain meaning of the language in the original agreement or that the agreement would need to be amended for the comparable geographic area standard to apply.

comparability for an ALEC to be entitled to reciprocal compensation at the tandem interconnection rate. The FCC also indicated its intent to revisit ¶1090 of the Local Competition Order and the relevance of similar functionality in the context of tandem switching compensation in ¶107 of the NPRM.

The tandem interconnection rate issue has been considered again recently by this Commission in Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996* (hereinafter "Generic Reciprocal Compensation Docket, Phase II"). On December 5, 2001, the Commission voted on the issue of the applicability of the tandem interconnection rate and determined that demonstration of serving a comparable geographic area by an ALEC was sufficient under the FCC rules, as clarified in the Intercarrier Compensation NPRM, to entitle an ALEC to the tandem rate. The Commission also approved specific criteria for demonstrating geographic comparability.[6] The Commission decided that its rulings in the Generic Reciprocal Compensation Docket are prospective in nature and are to be implemented through negotiation of new agreements or through applicable change of law provisions.[7]

The parties' interconnection agreement sets forth the procedure to be used when a change of law affects the applicability of the terms of the agreement. The relevant provision in Part A, Section 2.2 (attached hereto as Attachment 2) is as follows:

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[6] In its complaint KMC offers nothing but unsupported conclusions that its switch serves a comparable geographic area, nor has KMC suggested any criteria for determining whether it has, in fact, met this standard.

[7] While the Commission voted on these issues on December 5th, it deferred issuing a final order until other issues under consideration in the docket are decided. Therefore the Commission's order has not been rendered and will not be effective until such time as a final order is issued. However, Sprint does not dispute that the Commission's vote on the tandem switching issue provides guidance to the interconnection negotiations on a going forward basis.

> In the event the FCC or the Commission promulgates rules or regulations or issues orders, or a court with appropriate jurisdiction issues orders which conflict with or make unlawful any provision of this Agreement, the Parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which are consistent with such rules, regulations or orders. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations, or orders become effective, then the Parties shall resolve their dispute under the applicable procedures set forth in Section 23 (Dispute Resolution Procedures) hereof.

To date Sprint has no record that KMC has requested negotiation of an amendment to the agreement to reflect the change in law arguably effectuated by the FCC's clarification of Rule 51.711 in the Intercarrier Compensation NPRM.[8] The Commission has consistently affirmed that the terms of voluntarily negotiated interconnection agreements are binding on the parties to the agreement.[9] KMC voluntarily adopted the Sprint/MCI agreement, including the provisions relating to compensation at the tandem interconnection rate included in the agreement pursuant to the Sprint/MCI Arbitration Order issued by this Commission. Therefore, KMC is bound by the terms of the Agreement until it is properly amended in accordance with the change of law provisions.[10]

[8] Had KMC requested renegotiation of the tandem interconnection rate provisions to address the change of law related to the comparable geographic area standard, the appropriate criteria to determine whether KMC that standard would have a necessary part of these negotiations.

[9] See, e.g., In re: Request for arbitration concerning complaint of XO Florida, Inc. against Verizon Florida Inc. (f/k/a GTE Florida Incorporated) regarding breach of interconnection agreement and request for expedited relief) Staff Recommendation approved by the Commission on December 17, 2001; In re: Request for approval of interconnection agreement between Metropolitan Fiber Systems of Florida, Inc. and United Telephone Company of Florida, pursuant to the Federal Telecommunications Act of 1996, Order No. PSC-97-0240-FOF-TP.

[10] As stated in Sprint's April 30, 2001, letter to KMC, attached to the Complaint as Exhibit D, KMC has not provided any evidence to Sprint that its switch actually provides tandem functionality as required by the agreement.

CONCLUSION

Under the clear terms of the Sprint/MCI Arbitration Order and the Interconnection Agreement, geographic comparability is not a factor in determining KMC's entitlement to the tandem reciprocal compensation rate. The Agreement has not been amended to reflect the "change in law" KMC argues was effectuated by the FCC's clarification of its rules in the Intercarrier Compensation NPRM. KMC has not provided evidence that its switches provide tandem switching functionality as required by the Sprint/MCI Arbitration Order and the plain language of the agreement. Therefore, based on the clear terms of the Final Arbitration Order, the Agreement, and Commission precedent, KMC's complaint should be dismissed.

Respectfully submitted this 24th day of December 2001.

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ATTORNEY FOR SPRINT

2.2.2.1 "Transport", which includes the two (2) rate elements of transmission and any necessary tandem switching of Local Traffic from the interconnection point between the two (2) carriers to the terminating carrier's end office Switch that directly serves the called end user.

2.2.2.2 "Termination", which includes the switching of Local Traffic at the terminating carrier's end office Switch.

2.3 When an MCIm subscriber places a call to Sprint subscribers, MCIm will hand off that call to Sprint at the IP. Conversely, when Sprint hands over Local Traffic to MCIm for MCIm to transport and terminate, Sprint must use an established IP within the LATA for a minimum of twelve (12) months from the time that interconnection is established. After the twelve (12) month period Sprint may, with MCIm's agreement, establish an alternate IP of its choosing that the parties will use for Sprint's Local Traffic to MCIm. Should Sprint and MCIm be unable to agree to the establishment of Sprint's alternate IP, then Sprint may invoke the Dispute Resolution Procedure as set forth in Section 23 of Part A of this Agreement.

2.4 MCIm may designate an IP at any Technically Feasible point including, but not limited to, any electronic or manual cross-connect points, Collocations, entrance facilities, and mid-span meets. The transport and termination charges for Local Traffic flowing through an IP shall be as follows:

2.4.1 When calls from MCIm are terminating on Sprint's network through the Sprint tandem, MCIm will pay to Sprint transport charges from the IP to the tandem for dedicated or common transport. MCIm shall also pay a charge for tandem switching, dedicated or common transport to the end office, and end office termination.

2.4.2 When Sprint terminates calls to MCIm's subscribers using MCIm's Switch, Sprint shall pay to MCIm transport charges from the IP to the MCIm switching center for dedicated or common transport. Sprint shall also pay to MCIm a charge symmetrical to its own charges for the functionality actually provided by MCIm.

2.4.3 MCIm may choose to establish direct trunking to any given end office. If MCIm leases trunks from Sprint, it shall pay charges for dedicated or common transport. For calls terminating from MCIm to subscribers served by these directly-trunked end offices, MCIm shall also pay for end office termination. For Sprint traffic

and to implement such alternative prior to discontinuance of such Network Element or Combination; and (iii) with respect to a network change, cooperates with MCIm to find a reasonable alternative, if one exists, to the changed network to allow MCIm to provide Telecommunications Services as if the change was not made. Sprint agrees that all obligations undertaken pursuant to this Agreement, including without limitation, performance standards, intervals, and technical requirements are material obligations.

Section 2. Regulatory Approvals

2.1 This Agreement, and any amendment or modification hereof, will be submitted to the Commission for approval in accordance with Section 252 of the Act. Sprint and MCIm shall use their best efforts to obtain approval of this Agreement by any regulatory body having jurisdiction over this Agreement and to make any required tariff modifications. MCIm shall not order services under this Agreement until such Commission approval has been obtained or as may otherwise be agreed in writing between the Parties. In the event any governmental authority or agency rejects any provision hereof, the Parties shall negotiate promptly and in good faith such revisions as may reasonably be required to achieve approval.

2.2 In the event the FCC or the Commission promulgates rules or regulations or issues orders, or a court with appropriate jurisdiction issues orders which conflict with or make unlawful any provision of this Agreement, the Parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which are consistent with such rules, regulations or orders. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute under the applicable procedures set forth in Section 23 (Dispute Resolution Procedures) hereof.

2.3 In the event Sprint is required by any governmental authority or agency to file a tariff or make another similar filing in connection with the performance of any action that would otherwise be governed by this Agreement, Sprint shall: (i) use best efforts to consult with MCIm reasonably in advance of such filing about the form and substance of such filing; (ii) provide to MCIm its proposed tariff prior to such filing; and (iii) take all steps reasonably necessary that do not conflict with such governmental authority or agency requirement to ensure that such tariff or other filing imposes obligations upon Sprint that are as close as possible to those provided in this Agreement and preserve for MCIm the full benefit of the rights otherwise provided in this Agreement. Except as otherwise permitted under this Section 2.3, in no event shall Sprint file any tariff that

CERTIFICATE OF SERVICE
DOCKET NO. 011615-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand delivery or facsimile * or overnight ** mail this 24th day of December, 2001 to the following:

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