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July 6, 2004

Ms. Blanca Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

COMMISSION
CLERK

JUL - 6 PM 4:44

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RE: Docket No. 040557-TL, Notice of adoption of existing interconnection agreement between Sprint-Florida, Incorporated and MCImetro Access Transmission Services, LLC by KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC.

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated is the original and fifteen copies of Sprint's Response in Partial Opposition to KMC's Notice to Adopt and Request for Relief. Service has been made this same day via U.S. Mail and hand delivery to the parties listed on the attached service list.

Please acknowledge receipt of this filing by stamping and initialing a copy of this letter and returning same to the courier. If you have any questions, please do not hesitate to call me at 850/599-1560.

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- OTH Ken P

Sincerely,

Susan S. Masterton

Susan S. Masterton

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DOCUMENT NUMBER - DATE

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FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
DOCKET NO. 040577-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail and hand delivery* this 6th day of July, 2004 to the following:

KMC Data LLC
John McLaughlin, Jr./ Marva B. Johnson
1755 North Brown Road
Lawrenceville, GA 30043-8119

Kelley Drye & Warren LLP
Andrew M. Klein/ Brad Mutschelknaus
1200 19th St. NW, #500
Washington, DC 20036

Messer Law Firm
Floyd R. Self, Esq.
P.O. Box 1876
Tallahassee, FL 32302

Jeff Bates *
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Victor McKay *
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850



Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Notice of adoption of existing) Docket 040557-TP
Interconnection agreement between)
Sprint-Florida, Incorporated and)
MCImetro Access Transmission)
Services, LLC by KMC Telecom III)
LLC, KMC Telecom V, Inc. and KMC) Filed: July 16, 2004
Data LLC.)
_____)

SPRINT-FLORIDA INCORPORATED'S
RESPONSE IN PARTIAL OPPOSITION TO KMC'S
NOTICE TO ADOPT AND REQUEST FOR RELIEF

Pursuant to Sections 28-106.201 and 28-106.203, Florida Administrative Code, Sprint-Florida, Incorporated ("Sprint") files this Response in Partial Opposition to the Notice to Adopt an Interconnection Agreement Under Section 252(e) and 252(i) of the Telecommunications Act of 1996 of KMC Telecom III, LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively, "KMC") filed on June 15, 2004.¹ In support thereof, Sprint states as follows:

Parties and Jurisdiction

1. Sprint is an incumbent local exchange company certificated and doing business in Florida and subject to the jurisdiction of the Florida Public Service Commission (hereinafter, "FPSC" or "Commission"). Sprint's address is 6450 Sprint Parkway, Overland Park, Kansas 66251.

¹ While KMC denotes its pleading as a "Notice" KMC appears to be requesting relief from the Commission in the manner of a "Petition" pursuant to s. 28-106.201, F.A.C. To the extent KMC is requesting affirmative relief from the Commission and its pleading is intended as a Petition, Sprint files this pleading as an answer pursuant to Rule 28-106.203, F.A.C. To the extent KMC intends its pleading as a notice filing only, then Sprint's pleading is intended as a request for relief pursuant to s. 28-106.201, F.A.C.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

2. Pleadings, orders, notices and other papers filed or served in this matter should be served upon:

Susan S. Masterton, Esquire
1313 Blair Stone Road
P.O. Box 2214
Tallahassee, FL 32316-2214
(850) 599-1560 (phone)
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3. KMC is a certificated competitive local exchange company providing competitive local exchange services in Sprint's ILEC operating territory in Florida.

4. The Commission has jurisdiction over disputes concerning the interconnection agreement between Sprint and KMC pursuant to sections 251 and 252 of the Telecommunications Act of 1996 and ss. 364.01, 364.16 and 364.161, Florida Statutes.

RESPONSE IN OPPOSITION

Background

5. On June 15, 2004, KMC filed its Notice to Adopt and served the same on Sprint via e-mail on that same day.

6. In the Notice to Adopt KMC states its intent to adopt (pursuant to section 252(i) of the Telecommunications Act of 1996) the interconnection agreement between Sprint and MCImetro Access Transmission Services, LLC (MCI), dated March 1, 2002 and allowed to take effect by operation of law in FPSC Docket No. 020389-TP. KMC requests that the Commission "acknowledge" this adoption. (Notice to Adopt at page 1)

7. On December 12, 1998, KMC adopted the original 1997 Sprint/MCI agreement (“1997 MCI Agreement”).² The FCC and this Commission have held that when a carrier adopts an existing agreement pursuant to section 252(i), the expiration date for the adopted agreement is the same as the expiration date for the original agreement.³ Sprint and MCI executed a new agreement, terminating and superseding the original agreement, on March 2002 (“2002 MCI Agreement”).⁴

8. Subsequent to the filing of the 2002 MCI agreement, Sprint sent notices to CLECs (including KMC) that had opted into the 1997 MCI Agreement informing them of the expiration of the agreement and giving them the choice to either negotiate a new agreement or to opt into another existing agreement. KMC initially refused to comply with Sprint’s request to choose a new agreement. However, after negotiations, KMC agreed to opt into the 2002 MCI agreement.

9. Sprint sent KMC a document to effectuate KMC’s election to opt into the 2002 MCI Agreement, which included, at KMC’s request, a separate amendment to govern reciprocal compensation.⁵ KMC never executed the opt-in document or the amendment.

²See *In re: Petition by MCI Telecommunications Corporation for arbitration with United Telephone Company and Central Telephone Company of Florida concerning interconnection rates, terms and conditions, pursuant to the Federal Telecommunications Act of 1996*, Order No. PSC-97-0294-FOF-TP, issued 3-14-97 and Order No. PSC-98-0829-FOF-TP, issued 6-24-98, in Docket No. 961230-TP and *In re: Notice by Sprint –Florida Incorporated of adoption of an approved interconnection and resale agreement between Sprint-Florida, Incorporated and MICmetro Transmission Services, Inc. by KMC Telecom III, Inc.*, Order No. PSC-99-1413-FOF-TP, issued 7-23-99, in Docket No. 990734-TP.

³ *In Re: Petition by Global NAPS, Inc. for arbitration of interconnection rates, terms and conditions and related relief of proposed agreement with BellSouth Telecommunications, Inc.*, Order No. PSC-00-0568-FOF-TP issued March 20, 2000 in Docket No. 991220-TP; *In the Matter of Global NAPs South, Inc. Petition for Preemption of Jurisdiction of Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic of Virginia, Inc.*, CC Docket No. 99-198.

⁴ *In re: Request by Sprint-Florida, Incorporated for approval of interconnection, unbundling, resale and collocation agreement with MICmetro Access Transmission Services, LLC*, Docket No. 020389-TP, memo to docket file indicating that the adoption took effect by operation of law dated August 16, 2002.

⁵ At that time, KMC requested this amendment because KMC interpreted the ISP Remand Order as prohibiting a carrier from opting into a prior reciprocal compensation arrangement, even if it did not result in higher rates that the carrier would be entitled to under its agreement in effect in first quarter 2001. As

10. Instead, KMC informed Sprint that it preferred to adopt the existing Sprint/Florida Digital Network Agreement (FDN Agreement). Sprint provided KMC with a document to effectuate KMC's adoption of the FDN Agreement, without modification. KMC voluntarily executed the agreement, and Sprint countersigned. Sprint filed the Notice of Adoption of the FDN Agreement by KMC with the Commission on July 24, 2003 in Docket No. 030680-TP.

11. The FDN Agreement and KMC's adoption of that agreement expired on December 26, 2003. However, pursuant to the expiration provisions of the FDN Agreement, Sprint and KMC have continued to operate under its terms while the parties have negotiated a replacement agreement. KMC and Sprint are currently involved in an arbitration of disputed terms of the replacement agreement before this Commission in Docket No. 031047-TP.

12. Subsequent to adopting the FDN Agreement, KMC disputed the applicability of the reciprocal compensation provisions of the agreement to KMC. The reciprocal compensation provisions of the FDN Agreement adopted by KMC provide:

1. INTERCONNECTION AND RECIPROCAL COMPENSATION

1.1. The Parties agree to "Bill and Keep" for mutual reciprocal compensation for the termination of Local Traffic on the network of one Party which originates on the network of the other Party. Under Bill and Keep, each Party retains the revenues it receives from end user customers, and neither Party pays the other Party for terminating the Local Traffic which is subject to the Bill and Keep compensation mechanism. The Bill and Keep arrangement is subject to the following conditions:

37.1.1 Bill and Keep is only applicable if terminating traffic between the Parties is balanced within 10 percent.

37.1.2 Bill and Keep is limited to Local Traffic only.

discussed below, Sprint has interpreted the ISP Remand Order as prohibiting carriers from opting into more favorable compensation arrangements

- 37.1.3 Bill and Keep applies to traffic between a CLEC end office and a Sprint tandem and is limited to 24 DSO trunks (one-way from CLEC to Sprint).
- 37.1.4 Traffic Studies may be conducted semi-annually to measure the amount of traffic on the interconnection trunks to detect an out of balance condition. Parties agree to share the results of such studies.
- 37.1.5 Either Party can cancel the Bill and Keep compensation arrangement when traffic volumes require the installation of more than 24 one-way trunks or when the usage is out of balance by more than 10%. Formal notification of the cancellation must be provided in writing 90 days prior to the Effective Date. Notwithstanding anything in this Agreement to the contrary, the Parties may continue the Bill and Keep compensation arrangement by mutual agreement.
- 37.1.6 If either Party does deliver such written notice, the Parties will negotiate an amendment to this Agreement under applicable law reflecting charges to be assessed by each Part for terminating Local Traffic. If the Parties are unable to negotiate such an amendment, the Parties agree to resolve the issue under the dispute resolution section of this Agreement.
- 37.1.7 Bill and Keep does not apply to local traffic originated by the CLEC, transiting Sprint's network, and terminated by a third party in which case applicable transit charges will apply. Sprint will not assume transport and termination liabilities on behalf of the calls originated by the CLEC.
- 37.1.8 Information Access Traffic will be exchanged on a "Bill and Keep" basis. Under Bill and Keep, each Party retains the revenues it receives from end user customer, and neither Party pays the other Party for terminating the Information Access Traffic.
- 37.1.9 On April 27, 2001, the FCC released its Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic (the "ISP Compensation Order"). The Parties agree that by executing this Agreement and carrying out the intercarrier compensation rates, terms and conditions herein, neither Party waives any of its rights, and expressly reserves all of its rights, under the ISP Compensation Order, including but not limited to the ILEC's option to invoke on a date specified by ILEC the FCC's ISP terminating compensation plan.

13. A substantial portion of the traffic exchanged between KMC and Sprint is ISP-bound traffic that originates with Sprint's end users and is terminated to KMC. Pursuant to the

terms of the FDN Agreement adopted by KMC, this traffic is subject to a bill and keep arrangement.

14. Apparently, KMC unilaterally filed the Notice to Adopt that is the subject of this docket in an attempt to obtain a more favorable reciprocal compensation scheme for its ISP-bound traffic. It is Sprint's understanding that KMC intends this adoption as an "interim agreement" to remain in effect pending completion of the arbitration proceeding in Docket No. 031047-TP and execution of a new agreement pursuant to the Commission's ruling in that proceeding.

15. In paragraph 4 of its Notice to Adopt, KMC alleges that Sprint has unreasonably failed to accept KMC's adoption of the MCI agreement. Sprint denies this allegation. Sprint does not object to KMC's adoption of the majority of the provisions in the 2002 MCI Agreement. However, certain provisions of the agreement have been altered by changes in law so that KMC has failed to adopt the provisions of the 2002 MCI agreement in a reasonable time as required by FCC Rule 51.809, and Sprint is not required to recognize the adoption of these provisions.⁶

⁶The instant case can be distinguished from the Commission's previous decision *In re: Petition by KMC Telecom, Inc. for relief in accordance with Section 252(i) of the Telecommunications Act of 1996, with respect to refusal by Sprint-Florida, Incorporated to make available one term in a previously approved interconnection agreement*, Order No. PSC-97-1036-FOF_TP, issued August 29, 1997 in Docket No. 970496-TP, because in this case clear, effective changes in law have occurred and Sprint has diligently attempted to negotiate amendments to interconnection agreements to implement them.

ISP-bound Traffic

6. First, the MCI agreement contains provisions relating to compensation for ISP-bound traffic that KMC is prohibited from adopting pursuant to the FCC's ISP Remand Order.⁷

17. In order to reduce the "arbitrage opportunities presented by the existing recovery mechanism for ISP-bound" traffic, the FCC established rate caps for compensation for ISP-Bound Traffic. See ISP Remand Order, paragraphs 7, 8 and 83-87. The FCC acknowledged that bill and keep appears appropriate for compensation for ISP-bound traffic and expressed the preference for implementing bill and keep in the future. ISP Remand Order at paragraph 6.

18. In paragraph 82 of the ISP Remand Order the FCC determined that because compensation for ISP-bound traffic is governed by section 201 of the Federal Telecommunications Act 252(i) no longer applied to rates paid for ISP-Bound traffic and, therefore, carriers could no longer invoke 252(i) to opt into the rates paid for ISP-Bound traffic. Consistent with the overall intent of the ISP Remand Order to reduce arbitrage opportunities for compensation for ISP-bound traffic, in footnote 154, the FCC specifically prohibits carries from opting into reciprocal compensation schemes from existing agreements that allow a carrier to receive greater compensation for ISP-bound traffic than allowed under the ISP Remand Order. In addition, in footnote 155 of the Order the FCC explicitly states that such provisions are no longer timely under FCC Rule 51.809 and, therefore, may not be adopted. Thus, although Sprint allowed KMC to adopt a rate less than the FCC rates (bill and keep reciprocal compensation provisions) that reduced compensation for ISP-Bound Traffic as part of the FDN agreement, Sprint is

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 and *In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, released April 27, 2001 FCC 01-131.

unwilling to allow KMC to now adopt the MCI agreement that would increase the rates for ISP-Bound Traffic.

19. Since KMC has been subject to a bill and keep compensation mechanism for ISP-bound traffic under its adoption of the FDN agreement since July 2003, it is not now eligible to adopt the more favorable ISP-bound traffic compensation scheme provided by the 2002 MCI agreement.

UNE Rates

20. Second, the MCI agreement contains provisions relating to the rates for unbundled network elements that have been superseded by the FPSC's order in Docket No. 990649B-TP, *In re: Investigation into pricing of unbundled network elements (Sprint/Verizon track)*, Order No. PSC-03-0058-FOF-TP, issued January 8, 2003 ("Sprint UNE Order") As required by the Sprint UNE Order, Sprint had initiated negotiations with KMC via the change in law provisions of the parties' interconnection agreement to incorporate the UNE rates approved in the Sprint UNE (See Attachment A).⁸ However, KMC has refused to negotiate with Sprint to implement this change in law in good faith as required by applicable "change in law" provisions.

21. Sprint sent similar notices to all affected CLECs to incorporate the new UNE rates, including MCI and FDN. While numerous CLECs have agreed to the amendments incorporating the new rates, several CLECs, including MCI, FDN and KMC, have refused to do so. FDN has appealed the Sprint UNE Order to the U.S. District Court for the Northern District of Florida and KMC has appealed the Sprint UNE Order to the Florida Supreme Court. The federal court has not yet issued a ruling in the appeal (oral

⁸ For the purposes of the new interconnection agreement that is the subject of the arbitration between KMC and Sprint in Docket No. 031047-TP, KMC is not disputing Sprint's incorporation of the UNE rates approved by the Commission in Sprint's UNE Order.

arguments were held on April 14, 2004) and the Florida Supreme Court proceeding is stayed pending the outcome of the federal appeal. However, the Sprint UNE Order has not been stayed, either by the courts or by this Commission.

22. It appears that, since the expiration of the 1997 MCI Agreement, KMC has attempted to improperly retain the superseded UNE rates by consecutively adopting unexpired interconnection agreements of other CLECs (first, FDN and then, MCI) who have also refused to negotiate in good faith to incorporate this change in law.

23. Pursuant to FCC Rule 51.809, Sprint is required to accept adoption of only those provisions that are opted into within a reasonable period of time. Like KMC's attempt to adopt the ISP-bound traffic compensation provisions, KMC's attempt to adopt the UNE rate provisions of the 2002 MCI Agreement are no longer timely due to the change in law effectuated by the Sprint UNE Order. Therefore, Sprint rejects KMC's adoption of the MCI agreement in this respect.

TRO and USTA II

24. Third, the 2002 MCI Agreement does not reflect the change in law effectuated by the decision of the FCC's TRO decision or the decision of the D.C. Circuit Court of Appeals in USTA II. Sprint is in the process of negotiating or notifying all CLECs to negotiate amendments, including MCI and KMC, to incorporate the TRO and USTA II changes. It would be unfair to allow KMC to adopt the MCI agreement without incorporating the TRO and USTA II changes.

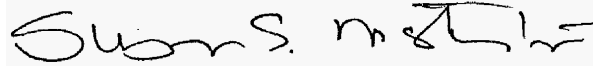
REQUEST FOR RELIEF

WHEREFORE, Sprint requests that the Commission:

1. reject, in part, KMC's adoption of the MCI agreement as set forth above;

2. affirm Sprint's position regarding the application of the ISP Remand Order to KMC's ISP-bound traffic;
3. order KMC to negotiate with Sprint to include provisions in the adopted agreement that reflect the current state of the law regarding Sprint's UNE rates and the USTA II; and
4. order such other relief as it deems just and proper.

RESPECTFULLY SUBMITTED this 6th day of July 2004.



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