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ORIGINAL

October 15, 2004

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COMMISSION
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BY HAND DELIVERY

Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

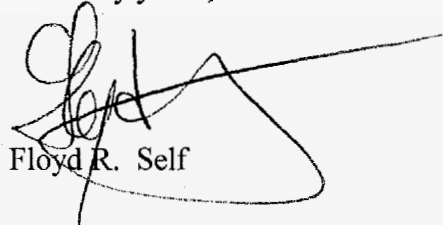
Re: Docket No. 041144-TP

Dear Ms. Bayó:

On October 14, 2004, KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC filed their Motion to Dismiss Sprint's Complaint in the above referenced docket. The Motion was filed with confidential information that should have been redacted. We would request that the Commission return the confidential version to us and replaced it with the enclosed redacted version and confidential claim.

Thank you for your assistance with this filing.

Sincerely yours,



Floyd R. Self

CMP _____
COM 5 _____
CTR _____
ECR _____ FRS/amb
Enclosures
GCL _____ cc: Parties of Record
OPC _____
MMS _____
RCA _____
SCR _____
SEC 1 _____
OTH Kim P. _____

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

REDACTED

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
Filed: October 14, 2004

**KMC'S MOTION TO DISMISS
SPRINT'S COMPLAINT**

Respondents, KMC TELECOM III LLC, KMC TELECOM V, INC. and KMC DATA LLC (collectively "KMC"), by and through their undersigned counsel and pursuant to Rules 25-22.036 and 28-106.204, Florida Administrative Code, hereby move the Florida Public Service Commission ("the Commission") to dismiss the Complaint of SPRINT-FLORIDA, INC. ("Sprint") filed on September 24, 2004, for improper joinder of KMC Data and KMC Telecom V, failure to join an indispensable party, failure to request an audit, use of an unauthorized methodology to recalculate traffic, and failure to state a claim upon which relief may be granted. In support of this Motion, KMC states as follows:

I. INTRODUCTION AND SUMMARY

1. Sprint's Complaint against KMC fails to comply with the basic procedural requirements set forth in the applicable interconnection agreements and tariffs. By engaging in a unilateral traffic analysis readjustment and otherwise ignoring the dispute resolution procedures governing the parties, Sprint has failed to state a claim upon which relief can be granted. Moreover, Sprint has improperly identified KMC Data LLC as a party when KMC Data did not

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operate in the state of Florida during the time frame specified in Sprint's complaint. In fact, the minutes of use that Sprint alleges were misrouted were all routed via interconnection facilities between KMC Telecom III, LLC and Sprint. For this reason, Sprint has also improperly identified KMC Telecom V, Inc. as a party. Finally, Sprint has failed to join an indispensable party, which renders its Complaint wholly incomplete and inadequate. Due to the numerous legal, technical, and factual deficiencies of Sprint's approach, its Complaint in this proceeding must be dismissed.

2. In evaluating Sprint's claims, it is important at the outset to recognize a fundamental point made by Sprint about KMC: the traffic at issue in this proceeding was not originated by a KMC subscriber on KMC's network. Rather, the alleged intrastate traffic "was originated from a Sprint local customer and handed to an IXC for delivery to a Sprint local customer in another local calling area." Complaint, at para. 13. In fact, it is likely that some portion of Sprint's local customers have preselected Sprint as their IXC. This admission that multiple *other* service providers handled the calls *before* KMC ever handled the call back to Sprint is a clear indication that KMC is only providing a portion of a completed service. Thus, KMC's sole responsibility for any transformation in the jurisdictional representation of each call is highly unlikely. In fact, given Sprint's acknowledgement that the calls originated from a Sprint local customer, Sprint is, in fact, more likely to have the necessary information regarding the service provider end traffic characteristics.

3. As a threshold matter, disputes such as the present controversy must be resolved pursuant to the procedures specified in the applicable interconnection agreements and Sprint tariffs. While Sprint has been in some communication with KMC about Sprint's alleged

misreporting claims, Sprint has not provided KMC with copies of any of its findings or other data, nor, critically, has Sprint requested an independent audit as set forth in the interconnection agreements. Further, Sprint has not at any time rendered a bill reflecting the type of detailed call-by-call information and the related charges for the switched access functions that Sprint believes that it provided and is due compensation. This type of information is inherent in a billing adjustment situation, and KMC must have this information in order for KMC to conduct the necessary internal reviews to determine the specific facts surrounding Sprint's claims. Since Sprint has failed to adhere to the procedures for the calculation and verification of local and/or alleged access minutes that are detailed in the applicable interconnections agreements and tariffs, KMC is without the ability to fully respond to the charges. Given the fundamental failure to follow Sprint's own processes and procedures, Sprint is no yet at the point where it can seek to invoke this Commission's jurisdiction. Accordingly, this Complaint should be dismissed.

A. The Interconnection Agreements and Tariff Requirements

4. As Sprint has detailed in its Complaint, the local interconnection relationship between the parties for the pertinent periods of the Complaint has been governed by several different interconnection agreements over the last several years. In chronological order, these agreements are summarized as follows:

The MCI-Sprint Agreement

5. As is reflected in paragraph 4 of the Complaint, for the period June 2002 through June 2003, the local interconnection and traffic exchange between Sprint and KMC was governed by the 1997 MCI-Sprint Agreement and the June 2002 amendment, which are Attachment 1 and Attachment 2 to the Complaint ("MCI Agreement").

6. Part A, Section 22.1 of the MCI Agreement provides that an “Audit” may be conducted for the purpose of conducting “a comprehensive review of services performed under this Agreement.” This section further provides that an “Examination” may be undertaken for the purpose of “an inquiry into a specific element of or process related to services performed under this Agreement.”

7. The importance of an Audit or Examination is set forth in Part A, Section 22.4, where the MCI Agreement states:

Adjustments, credits or payments shall be made and any corrective action shall commence within thirty (30) days from the auditing Party’s receipt of the final audit report to compensate for any errors or omissions which are disclosed by such Audit or Examination and are agreed to by the Parties.

8. There are other applicable audit provisions in the MCI Agreement. Attachment IV specifically addresses interconnection arrangements. In Attachment IV, Section 8.2, the Agreement provides that the parties are to exchange such reports and data to facilitate the “proper billing of traffic.” This section continues that either party “may request an audit of such usage reports” by an independent auditor. Again, as in Part A, Section 22.4, the audit language in Attachment IV, Section 8.2, provides that audit results are to be used for “any adjustments, credits, or payments, and any corrective action.”

9. Finally, the dispute resolution provisions in Part A, Section 23, of the MCI Agreement specifically recognize that disputes which the parties cannot themselves resolve may be handled by the Commission. However, inherent in this recognition of Commission jurisdiction is the fact that the parties are to first attempt in good faith to resolve their differences.

Given the clear audit provisions of the MCI Agreement, Sprint has not fulfilled its duty before attempting to invoke this Commission's jurisdiction.

The FDN Agreement

10. On June 15, 2004, KMC adopted the FDN-Sprint Agreement dated December 27, 2001, and which Sprint has included with its Complaint as Attachment 3 ("FDN Agreement"). The FDN Agreement is not as detailed as the MCI Agreement, but it does include audit requirements.

11. In Section 7.1 of the FDN Agreement, the parties state that an audit is the proper means of assessing the accuracy of the other party's bills. Like the MCI Agreement, these FDN Agreement audit provisions relate back to the dispute resolution provisions of Section 23. Again, the parties are obligated to seek to resolve their differences before seeking relief from the Commission. Given the ability of an independent audit to address the claims raised by Sprint, such an approach is clearly mandated by the FDN Agreement.

The Sprint Access Tariff

12. The Sprint access tariff has a specific requirement for the conduct of an audit "when a billing dispute arises" Section E2.3.11.D.1., Sprint Access Service Tariff.

13. The audit is the lynchpin to establishing the jurisdictional nature of traffic so as to ensure the payment of the applicable access charges. Once the independent audit has been completed, then the results of the audit are applied to determine the jurisdictional nature of the traffic. See, Section E2.3.11.D.9-10, Sprint Access Service Tariff. Since according to Sprint's Complaint the traffic in question has traversed an IXC network, and is otherwise believed to be

intrastate interexchange traffic, Sprint was required to undertake an audit. Because Sprint has not requested an audit, a complaint is not appropriate at this time.

B. The Present Controversy

14. As is clear from a review of the provisions of the applicable interconnection agreements and tariffs, the proper avenue for determining whether a party has correctly routed traffic is by an audit. Only through an audit can the facts be independently established —facts which then become the basis for any appropriate correcting adjustment. There is nothing in any of the agreements or tariffs cited or referenced by Sprint that permit a party to conduct its own traffic review and immediately, without providing the necessary data and seeking a resolution with the other party, to use such work product as a basis for unilaterally bringing a complaint requiring that traffic be reclassified and compensation payments be readjusted.

15. Sprint's chosen approach is particularly disturbing because assuming Sprint's ultimate allegations are true, determining how this situation occurred can only successfully occur through the cooperative efforts of Sprint and KMC, as well as the other mystery carriers alluded to by Sprint which include Sprint as the originating carrier and, potentially, as the IXC. This reality underscores the wisdom in the audit approaches mandated in the agreement and tariff. Pursuing a *complaint* at this stage based solely upon a unilateral study of selected traffic records as reinterpreted and extrapolated over a two or three-year period is not the best means of ascertaining the truth, and is certainly not the means *required* by the applicable interconnection agreements and tariffs.

II. ARGUMENT

A. KMC Data LLC and KMC Telecom V, Inc. Are Not Proper Parties

16. In Paragraph 5 of its Complaint, Sprint names KMC Data LLC and KMC Telecom V, Inc. as respondents to its Complaint. KMC Data LLC and KMC Telecom V, Inc. are voice and data telecommunications company certificated by this Commission. Sprint did not make any specific allegations in its Complaint regarding traffic being delivered to Sprint by KMC Data or KMC Telecom V, Inc. Specifically, as is reflected in the attached affidavit, for the period in question KMC Data did not have *any* customers, and both companies did not deliver *any* traffic to Sprint.

17. On the basis of the foregoing, KMC Data and KMC Telecom V are not a proper party to these proceedings. Accordingly, the Commission should dismiss KMC Data LLC and KMC Telecom V, Inc. as a party to these proceedings.

B. Sprint Has Failed to Join an Indispensable Party

18. Sprint's Complaint expressly alleges improper "arrangements" between KMC and "various carriers." (See Comp. para. 17). Upon information and belief, the termination "arrangements" that are the subject of the Complaint involve exclusive traffic exchanges between KMC and [REDACTED]

19. [REDACTED] is a privately held company based in [REDACTED] [REDACTED] is an enhanced services provider and does not provide telecommunications services. As such, [REDACTED] does not possess a certificate of public convenience and necessity from the Florida Public Service Commission.

20. ██████████ was responsible for transporting traffic ultimately to KMC via PRIs that ██████████ purchased from KMC. Sprint alleges such traffic was “purposefully masked, or otherwise mischaracteriz[ed] or misreport[ed] as local traffic” upon delivery to Sprint from ██████████ is thus an indispensable party to the action. (See Comp. para. 11). Indeed, as conceded in the Complaint, Sprint relied on analyses provided by Agilent Technologies, which only evaluated “call detail usage records for traffic terminated to Sprint over the local interconnection trunks **between Sprint and KMC.**” (See Comp. para 13) (emphasis added). Such analysis would completely overlook masking that took place at earlier exchanges in the chain of transportation. Thus, if such traffic was indeed masked upon termination, it was masked prior to delivery to KMC by a third party not presently named by Sprint in its Complaint.

21. Florida courts have unequivocally held that a motion to dismiss is one of the “four instances in which a party may raise the failure to join an indispensable party.” Engel Mortgage Co., Inc. v. Dowd, 355 So. 2d 1210, 1212 (Fla. 1st DCA 1977); see also Rule 1.140(b)(7), Fla. R. Civ. P. (2003). Further, “[a]n indispensable party is one whose interest in the subject matter of the action is such that if [it] is not joined, a complete and efficient determination of the equities and rights and liabilities of the other parties is not possible.” Kephart v. Pickens, 271 So. 2d 163, 164 (Fla. 4th DCA 1972) (citing Grammer v. Roman, 174 So. 2d 443 (Fla. 2d DCA 1965)).

22. Florida law has further defined an indispensable party as an entity which has “not only an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.” Glaney v. First

W. Bank, 802 So. 2d 498 (Fla. 4th DCA 2001) (quoting Phillips v. Choate, 456 So. 2d 556, 557 (Fla. 4th DCA 1984)).

23. [REDACTED] meets both definitional standards for indispensability, as its inclusion is mandatory to ensure a comprehensive determination of each party's rights, equities, and liability, and to comport with general principles of equity and good conscience. **Therefore, Sprint's** Complaint against KMC should be dismissed for failure to join [REDACTED] as an indispensable party.

C. Sprint's Failure to Request an Audit Bars Its Claim

24. Sprint has failed to comply with either its Interconnection Agreements with KMC or with its own access charges tariff by failing to request an audit and seeking to resolve this matter with KMC based upon the audit findings before filing a complaint. Whether Sprint's Complaint is viewed as an under-reporting of access charges complaint or as an over-reporting of local minutes, either situation requires the institution of an audit before a complaint may be filed.

25. As Sprint correctly points out, at different moments within the period of time alleged by Sprint, the local interconnection relationship between Sprint and KMC has been controlled by several different local interconnection arrangements. However, irrespective of which arrangement controlled at which point in time, each and every one of them require an audit. See paragraphs 4 to 15 above.

26. With respect to Sprint's access charge tariff, KMC recognizes that local interconnection traffic terminated to Sprint over local interconnection trunks should only include local traffic. However, to the extent Sprint believes there has been a violation of its access

services tariff, that tariff certainly makes clear that an audit is the proper remedy “when a billing dispute arises.” Section E2.3.11.D.1, Sprint Access Services Tariff, First Rev. Page 24 (eff. Dec. 31, 2000). While the language for the audit appears in the Section of the access tariff dealing with jurisdictional reporting requirements, a detailed read of the audit language reveals that the duty to conduct an audit is not limited to PIU disputes. However, even if the audit is linked to a PIU dispute, then certainly in this situation the PIU would be zero. Alternatively, the issue may well reside with any IXC that may have been involved in the call process (which Sprint certainly believes is the case — see paragraph 15 of Sprint’s Complaint). In such case, an audit is the appropriate means of addressing the disputed jurisdictional traffic of the IXC, which is *not* KMC in this case.

27. Reading the entire tariff in context requires the initiation of an audit before a jurisdictional adjustment in traffic can be made leading to the imposition of access charges. The tariff is clear that Sprint is without authority to do anything with respect to access charge disputes until such audit is completed. When the audit determines a different result than that which has been reported, *then and only then* may Sprint take *the audited results* and seek a billing adjustment as set forth in the tariff. All of the foregoing must be undertaken *before* a complaint may be filed. This system makes sense and comports with the other provisions of the tariff.

28. It is well established that the rights and remedies provided for in these interconnection agreements and tariffs are exclusive. *See, e.g., Bella Boutique Corp. v. Venezolana Internacional de Aviacion, S.A.*, 459 So.2d 440, 441 (Fla. 3d DCA 1984) (“[a] validly filed tariff constitutes the contract of carriage between the parties and conclusively and

exclusively governs the rights and liabilities between the parties”); Wackenhut Corp. v. Lippert, 609 So.2d 1304, 1307 (Fla. 1993); Landrum v. Florida Power & Light Co., 505 So.2d 552, 554 (Fla. 3d DCA 1987); *see also, e.g.*, American Tel. & Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214, 1963 (1998); Cahnmann v. Sprint Corp., 133 F.3d 484, 488-89 (7th Cir. 1998); American Tel. & Tel. Co. v. Florida-Texas Freight, Inc., 357 F. Supp. 977, 979 (S.D. Fla. 1973).

The interconnection agreements and tariff provide an audit process for resolving disputes over billing and traffic routing. Those provisions are plain and straightforward, but in all events, any ambiguity in these provisions must be reasonably construed against Sprint. Rule 25-24.485(1)(d)-(e), Florida Administrative Code; *see also*, Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983); Louisville & Nashville Railroad v. Speed-Parker, Inc. 137 So. 724 (Fla. 1931); Bella Boutique, 459 So.2d at 442. Sprint, as the party claiming a violation, is bound by the terms of its contracts and tariffs, and is precluded from pursuing any relief that varies from these provisions. *See* Wackenhut, 609 So.2d at 1307; Landrum, 505 So.2d at 554.

29. A dispute regarding allegations of traffic misreporting require an audit, and an audit is a condition precedent to any change in the jurisdictional classification of traffic. In its Complaint, Sprint has not identified to this Commission any authority to the contrary. Asserting that an audit is optional or not mandatory does not justify Sprint’s independent and unilateral recalculation and rewriting of several years worth of traffic data history.

30. In the final analysis, Sprint cannot be permitted to ignore the terms of the applicable interconnection agreements or its own filed tariff and the required audit provisions

included in each simply because it chooses to do so. There is no legal basis for sustaining this premature Complaint. Accordingly, it should be dismissed.

D. Sprint's "Methodology" for Recalculating Traffic is Not Authorized

31. The basis for Sprint's Complaint is generally unstated in its Complaint aside from the bare assertion that its Agilent system has determined the correct jurisdictional classification for the calls handed off to Sprint after traversing multiple different carriers' networks, including Sprint local and Sprint interexchange networks. However, based upon the limited information provided by Sprint to KMC, it appears that the basis for the recomputed traffic is the extrapolation of data applied to the entire period. In other words, limited data is being used as a surrogate for the entire multi-year period. This is a tremendous abuse of process. A limited sampling of data cannot reasonably account for seasonality, or other daily, weekly, monthly, and yearly fluctuations in traffic caused by any number of different reasons.

32. First, there is absolutely no authority in the agreements or tariffs or in the rules or statutes of this Commission for unilaterally employing this approach and applying the result retroactively to several years of traffic. Since there is no legal basis for such unprincipled calculation, there is no legal authority for filing a Complaint with this Commission claiming that KMC has "intentionally misled" Sprint and that KMC is, therefore, obligated to pay additional charges and interest to accommodate any difference.

33. Second, the Complaint fails to legally demonstrate that sampling used by Sprint is a valid surrogate for *any* period of time, let alone the entire multi-year period. The Complaint contains no documentation of the processes, procedures, or data used as inputs or the detailed results or documentation flowing from the Agilent analysis. Given the tremendous market

fluctuations over the last several years, only a comprehensive audit, undertaken according to mutually agreeable standards and accounting for the historical fluctuations and variations in the KMC customer base as well as the overall market, may lead to any meaningful evaluation of Sprint's claims. As the Commission is well aware, the local and long distance markets in Florida have been subject to extensive marketing campaigns and rate offerings over the last few years that have impacted company market shares and calling patterns. Another critical dynamic unaccounted for is the impact of various mergers and acquisitions in the industry and the effects of new markets and technologies, such as wireless and voice over internet. Simply stated, any number of events may have significantly caused traffic patterns and calling characteristics to have changed over the period of time in question, *arguendo*, time, assuming there is any validity to Sprint's claims. There is no factual or legal basis for accepting Sprint's unilateral test and subsequently applying it to a multi-year period as the basis for compensation between the companies. Accordingly, the Complaint should be dismissed.

E. Sprint Has Not Stated A Claim Upon Which Relief May be Granted

34. KMC recognizes that a motion to dismiss raises, as a question of law, the sufficiency of the facts alleged in the original petition or complaint to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, assuming all allegations in the petition are true, Sprint's Complaint states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

35. In the present Complaint, the facts raised by Sprint are insufficient as a matter of law to sustain a complaint before this Commission because Sprint has failed to comply with its own contracts and tariff. Thus, the instant action is, as a matter of law, barred by the contracts, tariff, or other operation of law. At its core, Sprint seeks the Commission's authorization to readjust historic traffic volumes and backbill KMC for several years of intrastate access charges, also seeking refunds on reciprocal compensation payments. There is simply no basis under the Commission's governing statutes, the Commission's own rules or orders, or the applicable interconnection agreements and tariff that permit the backbilling now requested. Indeed, Sprint's Complaint offers no legal authority for multiple years of backbilling. The Complaint does not cite to a single specific statute, rule, order, or any contractual or tariff provision that authorizes the backbilling and interest it seeks.¹ Accordingly, this Commission is without authority to grant the relief requested, and this Motion to Dismiss should be granted.

¹Indeed, the only backbilling authority indirectly cited by Sprint is in Section E2.3.11.D.9, of Sprint's Access Services Tariff, which permits the results of an *audit* to be backbilled for the current quarter and the immediate prior quarter. However, such backbilling cannot occur unless there has been an audit.

IV. CONCLUSION

Based on the foregoing, KMC's Motion to Dismiss should be granted, and Sprint's Complaint should be dismissed.

Respectfully submitted,



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Attorneys for KMC Telecom III LLC,
KMC Telecom V, Inc., and KMC Data LLC

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint against KMC Telecom III LLC,)
KMC Telecom V, Inc., and KMC Data LLC)
for alleged failure to pay intrastate access charges) Docket No. 041144
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)

AFFIDAVIT

STATE OF GEORGIA

COUNTY OF GWINNETT

BEFORE ME, the undersigned authority, personally appeared Marva Brown Johnson, who under oath was deposed and stated:

1. I am, Marva Brown Johnson, the Vice President and Senior Regulatory Counsel for KMC Telecom V, Inc. and KMC Data LLC. I have direct knowledge of KMC Data LLC and KMC Telecom V, Inc.'s operations in the state of Florida and of the Florida regulatory requirements applicable to each of these entities.

2. KMC Data LLC holds from the Florida Public Service Commission certificate number TJ556 as a reseller of long distance telecommunications service, and KMC Data LLC also holds certificate number TX590 as a competitive local exchange carrier.

3. KMC Telecom V, Inc. holds from the Florida Public Service Commission certificate number 7530 as an alternative local exchange carrier.

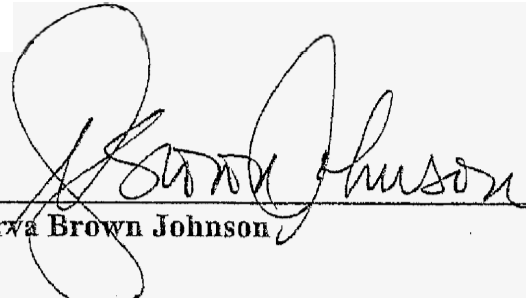
4. With respect to the claims and allegations contained within the Sprint-Florida, Incorporated Complaint of September 24, 2004, filed with the Florida Public Service Commission in Docket No. 041144, at no time within the period claimed by Sprint-Florida, Incorporated did KMC Data LLC have any Florida customers or otherwise transmit or terminate

to Sprint-Florida, Incorporated any telecommunications services calls.

5. At no time within the period claimed by Sprint-Florida, Incorporated did KMC Telecom V, Inc. receive an invoice from Sprint for any of the charges that Sprint alleges are owed with respect to the claims and allegations contained within the Sprint-Florida, Incorporated Complaint of September 24, 2004, filed with the Florida Public Service Commission in Docket No. 041144.

AFFIANT FURTHER SAYETH NAUGHT.

DATED this 14th day of October, 2004.




Marva Brown Johnson

STATE OF GEORGIA

COUNTY OF GWINNETT

The foregoing instrument was acknowledged before me this 14th day of October, 2004 by MARVA JOHNSON, who is personally known to me or has produced _____ as identification.

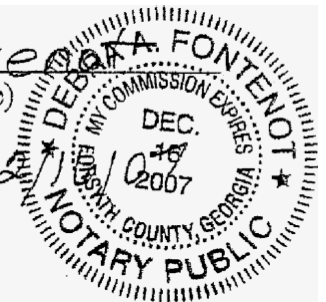


Notary Public (signature)

Debra A. Fontenet

Notary Public (printed name)

My commission expires: 10/1/2007

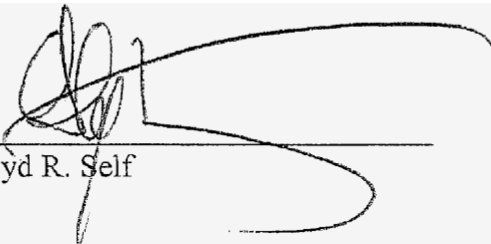


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by hand delivery (*), electronic mail (***) and/or U.S. Mail this 14th day of October, 2004.

Lee Fordham, Esq.*
General Counsel's Office, Room 370
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Susan Masterton, Esq.**
Sprint-Florida, Incorporated
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Floyd R. Self