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Sent: Thursday, October 21, 2004 4:21 PM
To: Filings@psc.state.fl.us
Subject: 041144-TP Sprint's Response to KMC's MOTion to Dismiss Sprint's Complaint

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October 21, 2004

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

Re: Docket No. 041144-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated is Sprint's Response to KMC'S Motion to Dismiss Sprint's Complaint.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions, please do not hesitate to call me at 850/599-1560.

Sincerely,

A handwritten signature in black ink that reads "Susan S. Masterton".

Susan S. Masterton

Enclosure

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE
DOCKET NO. 041144**


I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail this 21st day of October, 2004 to the following:

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Susan S. Masterton

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint-Florida, Incorporated) Docket No. 041144-TP
Against KMC Telecom III LLC,)
KMC Telecom V, Inc. and KMC Data LLC,)
for failure to pay intrastate)
Access charges pursuant to its interconnection)
Agreement and Sprint's tariffs and for violation of)
Section 364.16(3)(a), Florida Statutes.) Filed: October 21, 2004
)

**SPRINT-FLORIDA INCORPORATED'S RESPONSE TO
KMC'S MOTION TO DISMISS SPRINT'S COMPLAINT**

Sprint-Florida, Incorporated ("Sprint") hereby files its response to the Motion to Dismiss Sprint's Complaint filed by KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLL ("KMC") on October 14, 2004 ("KMC's Motion").

INTRODUCTION

In its Motion, KMC raises no issues that meet the legal standard for dismissal of an action by this Commission. Instead, in its Motion KMC attempts to obfuscate the facts and misdirect the Commission's attention to irrelevant or unproven allegations to avoid accountability and responsibility for its actions.

As KMC has recognized at ¶ 34 of its Motion, a Motion to Dismiss raises, as a question of law, the sufficiency of the ultimate facts alleged in the original petition or complaint to state a cause of action. See, *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); *Pizzi v. Central Bank and Trust Co.*, 200 So. 2d 895, 897 (Fla. 1971). The standard to be applied in ruling on a Motion to Dismiss is whether, assuming all the allegations in the complaint are true, the complaint states a cause of action upon which relief may be granted. *Id.* In making this determination the Commission may not look beyond the four corners of the Complaint. *Id.* See also, *In re: Emergency Petition of*

AT&T Communications of the Southern States, et.al. for cease and desist order and other sanctions against Supra Telecommunications and Information Systems, Inc., Docket No. 030200-TP, Order No. PSC-03-0578-FOF-TP, issued on May 6, 2003. Although KMC introduces in its Motion several new allegations of fact and disputes the facts Sprint has presented in its Complaint, these new allegations and disputes of material facts may not properly serve as the basis for dismissal of Sprint's Complaint. KMC has failed to raise any issue that, as a matter of law, provides support for its Motion. Therefore, the Commission should deny KMC's Motion to Dismiss.

RESPONSE

KMC Attempts to Shift its Responsibility to Others

KMC consistently misinterprets and misrepresents the facts relating to Sprint's Complaint in an attempt to justify its Motion to Dismiss. For instance, as a basis for its Motion, KMC attempts to shift to others the burden for determining the jurisdiction of the traffic it is terminating to Sprint through its interconnection arrangements. First, KMC twists the allegations in ¶ 13 of Sprint's Complaint to infer that Sprint is alleging that ALL of the traffic at issue was originated from Sprint end users and, therefore, that Sprint is in a better position to determine the jurisdiction of the traffic. KMC completely misconstrues the allegations contained in ¶ 13 of Sprint's Complaint. Because some of the traffic that is at issue was originated from Sprint end users, Sprint was able to follow the traffic from its originating point, at least until it was handed off to the Sprint end user's presubscribed interexchange carrier. In addition, Sprint was able to ascertain that this interexchange traffic was transported over KMC's local interconnection trunks for final termination by Sprint to Sprint's end users. This Sprint end-user-originated traffic

information served to validate the traffic studies described in ¶¶ 13 and 14 of Sprint's Complaint, which, based on the true calling party number, showed that KMC was terminating interexchange traffic disguised as local traffic to Sprint over KMC's local interconnection trunks. For the remainder of the traffic, originated by customers of other local exchange carriers, Sprint relied on an identification of the true calling party numbers and charge party numbers to ascertain the jurisdiction of the traffic and to determine that KMC was wrongfully delivering interexchange traffic over its local interconnection trunks for termination.

However, Sprint is not able to determine exactly what transpired between the origination of the call and the final routing of the call by KMC. KMC on the other hand, as the carrier responsible for receiving the traffic from its customers and transporting the traffic for final termination, is the entity that has knowledge of and controls its arrangements with the customers on whose behalf it is routing the traffic to Sprint for termination by Sprint to Sprint's end user customers. Therefore, KMC has the ultimate responsibility to ensure that the traffic it delivers to Sprint is routed over the appropriate interconnection facility and that the appropriate compensation is paid, in accordance with its interconnection agreements and the law.

In addition, KMC attempts to shift its responsibility for complying with the interconnection agreements and the law to unnamed "mystery carriers" and to a named alleged enhanced services provider who only KMC has knowledge of, since this party is apparently a customer of KMC's.¹ Sprint agrees with KMC's statement that "determining how this situation has occurred can only successfully occur through the

¹ Even while alleging that this enhanced service provider is an indispensable party to this Complaint, KMC also claims that the identity of the provider is confidential.

cooperative efforts of Sprint and KMC.” (KMC’s Motion at ¶ 15) However, KMC has refused to cooperate with Sprint to resolve this matter, as described in ¶¶ 19 and 20 of Sprint’s Complaint. KMC’s refusal to cooperate or to respond to Sprint’s attempts to recover the appropriate compensation for interexchange traffic that KMC has wrongfully and knowingly delivered as local traffic to Sprint for termination has necessitated that Sprint file this Complaint.

The Enhanced Service Provider identified by KMC is not an indispensable party

KMC alleges that an enhanced service provider on whose behalf KMC routes traffic to Sprint for termination is an indispensable party to this Complaint proceeding because, KMC implies, “on information and belief” that this provider is the entity who “purposefully masked, or otherwise mischaracterized or misreported” the traffic (KMC’s Motion at ¶¶ 18 & 20). In ¶ 20, KMC erroneously appears to allege that this enhanced service provider terminated traffic directly to Sprint; however, Sprint has no relationship with this provider and was not aware of its relationship with KMC until receiving KMC’s Motion to Dismiss. In addition, the traffic at issue in Sprint’s Complaint was traffic delivered to Sprint by KMC over KMC’s interconnection trunks with Sprint.

Under Florida law, an “indispensable party” is “a party who has an interest in the controversy of such a nature that a judgment cannot be made without affecting that interest” See, *Glancy v. First Western Bank*, 802 So. 2d 498, 500 (Fla. 4th DCA 2001); *Phillips v. Choate*, 456 So. 2d 556, 559 (Fla. 4th DCA 1984).² The alleged enhanced

² The Commission also has addressed this issue. See, e.g., *In re: Petition by Verizon Florida, Inc. to reform intrastate network access and basic local telecommunications rates in accordance with Section 364.164, Florida Statutes*; *In re: Petition by Sprint-Florida, Incorporated to reduce intrastate switched network access rates to interstate parity in revenue-neutral manner pursuant to Section 364.164(1), Florida Statutes*; *In re: Petition for implementation of Section 364.164, Florida Statutes, by rebalancing rates in a revenue-neutral manner through decreases in intrastate switched access charges with offsetting rate adjustments for basic services, by BellSouth Telecommunications, Inc.*, Docket Nos. 030867-TL, 030868-

service provider identified by KMC is not a party to the interconnection agreement between Sprint and KMC and has no arrangements with Sprint for termination of its traffic. Allegedly, this enhanced service provider is not a telecommunications carrier, but instead is a customer purchasing telecommunications services from KMC. A customer of a carrier cannot logically or reasonably be deemed to be an “indispensable party” in an action between two carriers regarding their wholesale and contractual relationships. Therefore, this provider cannot be an “indispensable party” to Sprint’s action against KMC for violation of the interconnection agreements governing the two parties or for violation of s. 364.16.(3)(a), F.S., which addresses the exchange and termination of traffic between local exchange carriers.³

Sprint is alleging that KMC violated its interconnection agreements with Sprint by transporting interexchange traffic over local interconnection trunks and also violated s. 364.16(3)(a), F.S., by knowingly delivering interexchange traffic over local

TL and 030869-TL, Order No. PSC-03-1331-FOF-TL, issued Nov. 21, 2003 (“While the IXC’s participation could be useful in our consideration of the Petitions before us in these Dockets, their participation as parties is not necessary such that the Commission cannot proceed without them); *In re: Emergency Petition by D.R. Horton Custom Homes, Inc. to eliminate authority of Southlake Utilities, Inc. to collect service availability charges and AFPI charges in Lake County*, Docket No. 981609-WS, Order No. PSC-99-0648-PCO-WS, issued April 6, 1999 (recognizing that Rule 28-106.109, Florida Administrative Code establishes that substantially affected parties be provided notice and an opportunity to join in an action); *In re: Petition by Florida Power & Light Company for enforcement of Order 4285, which approved a territorial agreement and established boundaries between the Company and the City of Homestead*, Docket No. 970022-EU, Order No. PSC-97-0487-PCO-EU, issued April 28, 1997 (“The purpose of this proceeding is to resolve a territorial dispute between two utilities, both parties to this proceeding. Utility customers are not indispensable parties to this proceeding”); *In re: EAS Between Williston and Gainesville*; *In re: EAS Between McIntosh and Gainesville*; *In re: EAS Between Panama City and the Beaches*; *In re: EAS Between Fernandina Beach and Jacksonville*, Docket Nos. 820467-TP, 830064-TP, 830365-TP, 8501153-TP, Order No. 17045, issued January 2, 1987 (“Chapter 120 is designed to give those who may be adversely affected an opportunity to participate. None of the companies the Petitioners claim are indispensable have sought to intervene or participate in these proceedings.”)

³ As the Commission has recognized in decisions cited in footnote 2, to the extent the enhanced service provider believes its interests may be substantially affected by the Commission’s decision in this proceeding, the provider may file a Petition to Intervene pursuant to Rules 28-106.109 and 28-106.205, Florida Administrative Code. To the extent this provider may be in possession of factual information necessary to resolve this Complaint, the discovery rules applicable to actions before the Commission provide mechanisms for serving discovery on third parties. See, Rules 1.310 and 1.351, Florida Rules of Civil Procedure.

interconnection arrangements to avoid the payment of access charges. KMC's relationship with the identified alleged enhanced service provider, its apparent familiarity with the nature of the traffic this company transported to KMC, and KMC's apparent familiarity with the manner of the routing and delivery of this traffic to Sprint serve to support Sprint's allegations, if anything, rather than providing grounds for dismissing Sprint's Complaint.

Whether the provider identified by KMC is, in fact, the responsible entity for the interexchange traffic terminated by KMC to Sprint that is the subject of this Complaint is a factual issue outside the four corners of Sprint's Complaint. (In fact, KMC is merely alleging that this provider may be the responsible entity on "information and belief.") The validity of KMC's allegations concerning this enhanced service provider's role in the wrongful actions by KMC set forth in Sprint's Complaint are properly addressed by the Commission in accordance with the appropriate administrative procedures to resolve disputed issues of fact and cannot serve as the basis for dismissing Sprint's complaint.

KMC Telecom V, Inc. and KMC Data LLC are proper parties to this Complaint

KMC asserts that KMC Telecom V, Inc. and KMC Data LLC are not proper parties to this Complaint because they did not transmit the traffic to Sprint that is at issue in Sprint's Complaint. (KMC's Motion at ¶¶ 15 & 16) However, KMC Telecom V is a party to at least one of the historical interconnection agreements that Sprint is alleging KMC violated (See, Sprint's Complaint at ¶ 4 and related footnotes). In addition, both KMC Telecom V, Inc. and KMC Data LLC are parties to the current Sprint/KMC interconnection agreement and will be parties to the interconnection agreement that is the

subject of Sprint's arbitration with KMC in Docket No. 031047-TP.⁴ Since the Complaint also seeks forward-looking relief regarding KMC's continuing obligations to comply with its interconnection agreements, and since KMC Telecom V was a party to the historical agreements that Sprint is alleging were violated by KMC, they are both proper parties to this Complaint and should not be dismissed from the proceeding. The issue of the extent of either party's culpability in violating the interconnection agreements and the law, as Sprint alleges, is, again, a disputed factual issue to be resolved through the complaint process.

An audit is not required

KMC alleges that the interconnection agreements between the parties REQUIRE that a party conduct an audit as a "condition precedent" to bringing a Complaint for violation of the interconnection agreement to the Commission for resolution. Patently, the interconnection agreements do not contain any such requirement. KMC admits as much in its Motion. (KMC's Motion at ¶ 29) All of the audit provisions cited by KMC in its Motion state that a party MAY request an audit if the party believes it is necessary to ascertain compliance with the terms of the interconnection agreement. In the case of the facts giving rise to this Complaint, Sprint did not need to request an audit, because it was able to discover the facts without an audit, i.e., through its own investigations and through the use of the Agilent system. Contrary to KMC's statements (KMC's Motion at ¶ 3) Sprint did provide KMC with information to validate Sprint's billings (See Sprint's Complaint at ¶¶ 19 & 20) At no point during the discussions between the parties did

⁴ *In re: Notice of adoption of existing interconnection agreement between Sprint-Florida, Incorporated and MCIMetro Access Transmission Services, LLC by KMC Telecom III LLC, Telecom V, Inc. and KMC Data, LLC*, Docket No. 040557-TP; *In re Petition of KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC for arbitration of interconnection agreement with Sprint-Florida, Incorporated*, Docket No. 031047-TP.

KMC request an audit or indicate that it felt an audit would be beneficial in resolving the parties' dispute, a right that KMC clearly had under the provisions of the interconnection agreement, which apply to both parties. Rather, in an effort to delay Sprint's pursuit of a resolution of this dispute, KMC has waited until the eleventh hour to falsely assert that an audit must be performed before billing disputes are brought before the Commission. KMC's position is clearly without foundation and cannot serve as a basis for dismissal of Sprint's Complaint.

In addition, KMC wholly fails to address the provisions of s. 364.16(3)(a), F.S., which are the basis of Sprint's allegations that KMC has violated the statute through its unlawful delivery of access traffic over local interconnection arrangements. The statute clearly does not require an audit as a prerequisite to an action, but rather authorizes the Commission to conduct an investigation of a violation of the statute if requested by a substantially affected party. Sprint is a substantially affected party and has requested an investigation in its Complaint.

Sprint's Methodology for Recalculating Traffic and its ability to backbill are disputed issues of fact

KMC's Motion also contains allegations that Sprint has used an improper methodology to calculate the access charges due Sprint as a result of KMC's improper termination of interexchange traffic as local traffic in violation of its interconnection agreements with Sprint and the law. Sprint asserts that its methodology is correct and that the amount of access charges that KMC should have paid Sprint as set forth in the Complaint is correct. But, in any event, the accuracy of the amount that Sprint is claiming is due and the appropriate methodology to calculate this amount are factual issues to be determined by the Commission in resolving this Complaint. In no way do they serve as a

basis for claiming that Sprint has failed to state a cause of action and, therefore, that Sprint's Complaint should be dismissed.

Similarly, KMC alleges that Sprint, as a matter of law, is prohibited from backbilling KMC and, therefore, the Complaint fails to state a cause of action. However, KMC has presented no affirmative citation to the interconnection agreements or to the statutes that support this prohibition. Meanwhile, Sprint has cited to specific provisions of the interconnection agreements governing the parties (Sprint's Complaint at ¶¶ 24-29) and specific statutory provisions (Sprint's Complaint at ¶¶ 39 & 40) that entitle Sprint to the relief requested.

The interconnection agreements provide no limitations on a party's right to backbill when it discovers that a violation of the interconnection agreement by the other party resulted in incorrect billing. Section 364.16(3)(a), F.S., not only does not prohibit backbilling but such backbilling is inherent in the authority the statute accords to the Commission to investigate company records and accounts in response to a complaint that a violation of the statute has occurred. If any limitation is applicable to Sprint's backbilling of KMC as a result of its violation of its interconnection agreements and the statute, it would be the statutory limitations for applicable causes of action.⁵ In addition, as KMC itself notes in its Motion (at ¶ 26), the access tariff provisions it cites limit backbilling in PIU disputes and are inapplicable to the grounds on which Sprint's

⁵ Section 95.11(2) (b), Florida Statutes, prescribes a 5-year statute of limitations for actions founded on contracts. Section 95.11 (3) (f), Florida Statutes, prescribes a 4-year statute of limitations for actions founded on a statutory liability and section 95.11 (3) (j), Florida Statutes, provides a 4-year statute of limitations for actions founded on fraud. See, also, *In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida, Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company*, Docket No. 020960-TP, Order No. PSC-03-1139-FOF-TP, in which the Commission stated regarding backbilling between Verizon and Covad that "We believe that the current state of the law should be sufficient. Accordingly, we find that the five-year statute of limitations in Florida Statutes § 95.11 (2)(b) shall apply to the parties' rights to assess previously unbilled charges for services rendered."

Complaint is based. Sprint is alleging that KMC violated its interconnection agreements and Florida law by wrongfully and deliberately delivering to Sprint access traffic masked as local traffic and violated Sprint's access tariff by failing to pay the tariffed access rate. In contrast, the access tariff provisions cited to by KMC apply to interexchange carriers who are terminating access traffic to Sprint over access arrangements, not CLECs who are wrongfully terminating access traffic over their local interconnection facilities.

KMC appears to be taking the position that, because the interconnection agreements do not specifically limit backbilling when one party's billings are incorrect due to violations of the interconnection agreements and misrepresentation of the nature of the traffic by the other party, the party that perpetrated the violation is absolved of its obligation to pay moneys that are rightfully due the billing party. Should KMC's position prevail, the Commission would be validating and rewarding KMC's willful and wrongful behavior in violation of its interconnection agreements with Sprint and with Florida law. Contrary to KMC's assertions, while the extent to which and the amount Sprint may bill KMC for access charges due Sprint as a result of KMC's violations may constitute disputed issues of fact between the parties, these disputed issues in no way provide a valid basis for dismissing Sprint's Complaint.

Sprint's Complaint states a cause of action upon which this Commission may grant relief

Pursuant to Florida law (and as KMC recognizes in its Motion at ¶ 34) the factual allegations contained in Sprint's Complaint must be taken as true for the purpose of ruling on KMC's Motion. If the Complaint presents ultimate facts which, if true, are sufficient to state a cause of action, then the Motion to Dismiss must be denied. Sprint has alleged that KMC willfully and knowingly delivered to Sprint interexchange traffic

over local interconnection trunks in violation of its interconnection agreements and s. 364.16(3)(a), F.S., and that as a result of these violations KMC failed to pay Sprint access charges that were due and also caused Sprint to overpay reciprocal compensation. These facts are sufficient to state a cause of action against KMC. That KMC disputes these facts and presents additional disputed facts to the contrary does not provide a legitimate basis for dismissing Sprint's Complaint.

CONCLUSION

Wherefore, the Commission should deny KMC's Motion, set this matter for hearing to resolve disputed issues of fact between the parties, and expeditiously set a procedural schedule for resolution of this Complaint.

Respectfully submitted this 21st day of October 2004.



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