

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 041144-TP

In the Matter of:

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.



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PROCEEDINGS:                   AGENDA CONFERENCE  
                                  ITEM NO. 5

BEFORE:                         CHAIRMAN BRAULIO L. BAEZ  
                                  COMMISSIONER J. TERRY DEASON  
                                  COMMISSIONER RUDOLPH "RUDY" BRADLEY  
                                  COMMISSIONER CHARLES M. DAVIDSON

DATE:                            Tuesday, November 30, 2004

TIME:                            Commenced at 9:30 a.m.  
                                  Concluded at 11:35 a.m.

PLACE:                          Betty Easley Conference Center  
                                  Room 148  
                                  4075 Esplanade Way  
                                  Tallahassee, Florida

REPORTED BY:                   LINDA BOLES, RPR  
                                  Official FPSC Reporter  
                                  (850) 413-6734

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FLORIDA PUBLIC SERVICE COMMISSION

FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 FLOYD R. SELF, ESQUIRE, representing KMC Data LLC,  
3 KMC Telecom III LLC and KMC Telecom V, Inc.

4 SUSAN MASTERTON, ESQUIRE, representing  
5 Sprint-Florida, Incorporated.

6 LEE FORDHAM, ESQUIRE, representing the Florida Public  
7 Service Commission Staff.

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## P R O C E E D I N G S

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CHAIRMAN BAEZ: Item 5.

COMMISSIONER DAVIDSON: Move it.

CHAIRMAN BAEZ: Mr. Self, I see you rising.

MR. SELF: Yes, Commissioner. I just need a couple of minutes.

CHAIRMAN BAEZ: Please have a seat and talk to us.

MR. SELF: Are you ready to do it now?

CHAIRMAN BAEZ: Yeah. Let's, let's see if we can.

Mr. Self, before you get all set up, I mean, if you're saying it's a couple of minutes, maybe we can spare them now. If not, would you rather I hold it off?

Why don't we hold it off. I'm sorry, guys. I didn't mean to get you all up. So Item 5 is off.

\* \* \* \* \*

CHAIRMAN BAEZ: We are back on Item 5, Mr. Self. Again, I apologize for the false start earlier.

Mr. Fordham, you want to tee this up for us?

MR. FORDHAM: Yes. Commissioners, Item 5 is staff's recommendation on a motion to dismiss in Docket Number 041144-TP. And, as noted, the parties are here to address the Commission and staff is available for questions.

CHAIRMAN BAEZ: Very well. Mr. Self.

MR. SELF: Thank you, Mr. Chairman, Commissioners; I appreciate your indulgence to give me a few minutes. I will be

1 brief, but it is important that I speak on this item for a few  
2 moments at least as the issue that's before you -- I suspect  
3 you may see more of these types of issues in the future because  
4 of what's, what's going on.

5           We're here on KMC's motion to dismiss, and basically  
6 there's just two points that I want to make.

7           First, as we've set forth in the motion, KMC is  
8 really in the middle in this situation. While Sprint may  
9 factually dispute this fact, the fact of the matter is, is KMC  
10 didn't change or transform any of the traffic that's at issue  
11 here. We passed it as it was. And, and so there may be other  
12 parties that need to be here, which goes to our issue of the  
13 indispensable party.

14           And so first off it's important to understand that  
15 there's multiple carriers involved in the process that  
16 ultimately is at issue here as to what's happened to the  
17 character of this traffic.

18           Our second and more fundamental problem, and really  
19 goes to the heart of the motion to dismiss, is that we don't  
20 have the data from Sprint to evaluate what's happened. Sprint  
21 has indicated in its complaint that it's conducted certain  
22 studies and used Alliant or Allegiant, whatever the name of the  
23 company is, to also conduct a study.

24           But the reality of the situation is, is we don't have  
25 the benefit of all of the data that Sprint has examined. And

1 it doesn't really matter whether you characterize this  
2 complaint as an access complaint, as a local interconnection  
3 complaint or, or something else, but the reality is, as we've  
4 indicated in the motion, there's a number of different  
5 processes and procedures under the access tariff, under the  
6 interconnection agreements that requires the parties to work  
7 together or at least to attempt to work together in good faith  
8 to exchange the data that's necessary to see if they can't  
9 resolve these problems without resorting to the Commission.  
10 And that process has not yet occurred under any of the  
11 standards that we've indicated in the motion to dismiss.

12           And, therefore, we think that the complaint is, is  
13 premature and the process should be given a chance to work  
14 before the Commission's jurisdiction is engaged. And so I  
15 would say that, that the motion to dismiss is well-founded and  
16 should be granted.

17           If, however, you believe that it's not appropriate to  
18 actually dismiss the complaint at this time, I would request,  
19 however, that you do direct the parties to engage in the  
20 process that's set forth, whether it's the access tariff or the  
21 interconnection agreement, so that, that an audit can be  
22 conducted or the parties exchange information or whatever --  
23 the Commission perhaps mediate in this, but by some process the  
24 parties work together to exchange the data so we can really  
25 find out what's at the root of what's going on here before we

1 get into a formal litigation mode. Thank you.

2 CHAIRMAN BAEZ: Ms. Masterton.

3 MS. MASTERTON: Thank you, Commissioners. I think, I  
4 think Mr. Self has conceded that KMC's motion does not meet the  
5 legal standard for a motion to dismiss, which is that the  
6 complaint must fail to state a cause of action, taking all of  
7 the facts that are stated in the complaint as true. And KMC  
8 has some factual disagreements with us, and that's the intent  
9 of the process that we're requesting to go forward with the  
10 Commission.

11 I did want to note that we have shared information  
12 with KMC on at least two occasions. We sent them records and  
13 we resent them at KMC's request, including some fields that  
14 they said they needed. So we have shared records that were  
15 requested by KMC. We would have shared more, if more were  
16 requested. However, KMC refused to cooperate with us in trying  
17 to resolve this dispute. We initiated this in November of 2003  
18 and we've had multiple attempts to get together with them and  
19 reconcile our data and get their response to what we found, and  
20 they have not been cooperative and that's why we filed this  
21 complaint.

22 As far as the indispensable party, our  
23 interconnection agreement is with KMC. KMC is the entity  
24 that's terminating the traffic to us over their local  
25 interconnection trunks. And under both the statute, which

1 we're alleging has been violated, and the interconnection  
2 agreement, KMC is the appropriate party for us to have filed  
3 the complaint against. And so we ask the Commission to deny  
4 the motion to dismiss and to set a procedural schedule for us  
5 to go forward with this complaint.

6 CHAIRMAN BAEZ: Commissioners, questions?

7 Mr. Self, the, the comments you made concerning what,  
8 what to me sounds like discovery issues, I mean, whether,  
9 whether Ms. Masterton's client provided your client with  
10 information so that you can ascertain exactly what the  
11 situation is or understand what the issue is, I guess she has  
12 represented that there, there will be further cooperation  
13 forthcoming. Is that -- I mean, are we going to be able to  
14 settle that particular issue if and when this moves forward?

15 Because I don't want to get into the he said/she said  
16 about who gave who what and how nicely and all that at this  
17 point. But, I mean, if --

18 MS. MASTERTON: I think I can represent on Sprint's  
19 behalf that we will provide all, you know, the necessary  
20 documentation, records that are requested that we have to  
21 justify our complaint. Yes.

22 CHAIRMAN BAEZ: And, and that is essentially all that  
23 you could do, I guess.

24 MR. SELF: Yes, Commissioner, I agree with that. And  
25 KMC certainly will provide whatever it has with respect to

1 these issues.

2 Our issue today with respect to the motion to dismiss  
3 is the fact that, that there's a process specified, whether  
4 it's the tariffs or the interconnection agreement, where the  
5 parties are to work together to try and resolve their  
6 differences, if, if they can. And they may not, in which case  
7 a complaint is certainly appropriate.

8 And what I'm saying is while there has been some  
9 information exchange, since it's Sprint that says we believe  
10 you have violated XYZ, it's Sprint's duty to give to us all of  
11 the data that they have, and they haven't done that yet.

12 Some of this -- if you're in a litigation mode, then,  
13 yes, this is certainly a discovery type issue. All I'm saying  
14 today and advocating for today is before you get to a  
15 litigation mode where you're engaging in that kind of  
16 discovery, there's obligations under the interconnection  
17 agreement, under the tariff for a process by which data is  
18 provided and exchanged so that the parties can evaluate where  
19 they are.

20 CHAIRMAN BAEZ: Well, and I, and I -- you know, my,  
21 my dad used to have a saying or still does, he says, "It falls  
22 from the tree." I mean, it is, it is obvious to me, and maybe  
23 we should have -- I don't know that we should have to say it.  
24 It is obvious to me that if, if you two, if KMC and Sprint  
25 specifically are in some kind of contractual agreement that



1 obviously binds you to cooperate with each other to resolve  
2 disputes, then you should follow the spirit of the, of the  
3 language. I think that, that goes without saying. But there,  
4 I said it.

5 Now what, what kind of, you know, more than, more  
6 than expressing our wishes that that isn't the case, that it  
7 certainly be the case, what more can we do?

8 MR. SELF: Well, I guess the fundamental legal  
9 question which is really before you today is must that all  
10 occur before a complaint can be filed?

11 CHAIRMAN BAEZ: I see, and I see your question.

12 MR. SELF: And we're saying no and Sprint is  
13 obviously saying yes. Or Sprint is saying we have provided  
14 and, therefore, it's appropriate for us to proceed.

15 CHAIRMAN BAEZ: Well, and, again, assuming for a  
16 moment that staff's recommendation on, on your motion is, is  
17 accepted, aren't we really -- you know, we're making a  
18 distinction now without a practical difference anyway, wouldn't  
19 you say?

20 MR. SELF: Well --

21 CHAIRMAN BAEZ: For this, for this -- I mean in this  
22 case or in this particular instance.

23 MR. SELF: Well, when you get into a litigation mode,  
24 obviously there are certain things that start happening. I  
25 mean, Sprint's already served discovery on us, for example.

1 We're obviously going to have to answer the complaint. There  
2 may be counterclaims, there may be the possibility that we  
3 might file a joinder to bring in an indispensable party, those  
4 sorts of issues, and we're spending our time litigating instead  
5 of problem solving.

6 CHAIRMAN BAEZ: I agree. I agree with that notion.

7 Ms. Masterton, what --

8 MS. MASTERTON: I mean, I can only say that we've  
9 been working for a year, over a year to try to resolve it with  
10 them outside of the litigation process, and the cooperation has  
11 not been forthcoming from KMC. And I see KMC's request as just  
12 an attempt to delay this even further. So, I mean, we  
13 certainly have tried to work with them. We'll continue to try  
14 to work with them even -- you know, as always when you're in  
15 litigation, the parties continue to discuss possible  
16 resolution, and we will, you know, are more than willing to do  
17 that. But I don't see any benefit -- I don't see anything  
18 happening between now and whenever that would just postpone the  
19 litigation process.

20 CHAIRMAN BAEZ: Thank you. Commissioners, any other  
21 questions?

22 COMMISSIONER DEASON: I have a question for Mr. Self.

23 CHAIRMAN BAEZ: Go ahead, Commissioner Deason.

24 COMMISSIONER DEASON: You made some reference to the  
25 fact -- to -- that there should be an audit conducted. Is that

1 provided in an interconnection agreement or what's the  
2 authority for the audit?

3 MR. SELF: Well, I guess on an intellectual level  
4 it's kind of interesting whether the complaint here is an  
5 underpayment of access charges, yeah, an underpayment of access  
6 charges or, or -- whether it's an access complaint or whether  
7 it's a local interconnection complaint. The access tariff has  
8 provisions that require an audit. The interconnection  
9 agreements have provisions that certainly provide for an audit.  
10 It seems to me that when you get into a dispute where one party  
11 is saying we did the right thing, the other party said you've  
12 underpaid access charges, you know, an audit is, which  
13 certainly is provided for in the tariff and the interconnection  
14 agreement, brings in an independent person to evaluate that  
15 situation and, and really help the parties determine what the  
16 facts are.

17 COMMISSIONER DEASON: But an audit has not been  
18 conducted; is that correct?

19 MR. SELF: That's correct.

20 COMMISSIONER DEASON: Okay. Ms. Masterton?

21 MS. MASTERTON: The interconnection agreement allows  
22 a party to request an audit but it doesn't require it. And we  
23 did our investigation via the use of the Agilent system and  
24 that's where our data comes from; therefore, we didn't believe  
25 that an audit was necessary. It's not, it's not a required

1 prerequisite. The same is also true for the tariff, although  
2 that's not really the basis of our claim.

3 We're also alleging a violation of a provision of  
4 Chapter 364 that allows a party to request the Commission to  
5 investigate alleged violations. It doesn't require an audit;  
6 it requires a Commission investigation. And so we -- our  
7 Agilent evaluation is the basis for our complaint and,  
8 therefore, we didn't request an audit which is not required,  
9 and it shouldn't be a reason to, you know, postpone the  
10 prosecution of the complaint.

11 COMMISSIONER DEASON: Staff, is an audit required?  
12 And if it's not required at this stage, will one be required  
13 before the litigation is concluded?

14 MR. FORDHAM: Commissioner, staff found no mandates  
15 for an audit. Staff found permissive audits but no mandates  
16 for audits.

17 COMMISSIONER DEASON: And so if this goes to  
18 litigation, will there be an audit done or is -- the burden is  
19 on whatever party to prove their case. And if they choose to  
20 employ an audit, fine, and if they don't, that's their choice.

21 MR. FORDHAM: Commissioner, as Sprint indicated, it  
22 may be unnecessary, depending on what's determined in  
23 discovery. Certainly if an audit appears to be indicated,  
24 staff would at whatever point come back to the Commission and  
25 recommend it if the parties are unable to agree to an audit.

1 But at this point staff is not convinced that an audit is  
2 required.

3 CHAIRMAN BAEZ: Thank you, Commissioners. Any other  
4 questions or a motion?

5 COMMISSIONER DAVIDSON: Move staff.

6 COMMISSIONER BRADLEY: Second.

7 CHAIRMAN BAEZ: There's a motion and a second to  
8 approve staff. All those in favor, say aye.

9 (Unanimous affirmative vote.)

10 (Discussion on Agenda Item 5 concluded.)

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1 STATE OF FLORIDA )  
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CERTIFICATE OF REPORTER

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I, LINDA BOLES, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 1st DAY OF DECEMBER, 2004.

Linda Boles  
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