

+BEFORE THE PUBLIC SERVICE COMMISSION

In re: 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  
ORDER NO. PSC-05-0259-PCO-TP  
ISSUED: March 8, 2005

ORDER GRANTING IN PART AND DENYING  
IN PART SPRINT'S MOTION TO COMPEL

Case Background

On September 24, 2004, Sprint-Florida, Incorporated (Sprint) filed its complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively KMC) 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.

On October 15, 2004, KMC filed a motion to dismiss for failure to state a claim upon which relief may be granted, improper joinder of KMC Data and KMC Telecom V, failure to join an indispensable party, failure to request an audit, and for use of an unauthorized methodology to recalculate traffic. On October 21, 2004, Sprint filed its response to KMC's motion to dismiss. On December 3, 2004, Order No. PSC-04-1204-FOF-TP was issued denying KMC's motion to dismiss.

On November 15, 2004, Sprint served its First Set of Interrogatories (Nos. 1-22) and First Requests for Production of Documents (Nos. 1-11) on KMC. On December 14, 2004, the parties mutually agreed to extend the date for KMC's response to January 4, 2005. On January 5, 2005, KMC filed its response to Sprint's First Set of Interrogatories and First Requests for Production of Documents, and on January 28, 2005, KMC filed its Supplemental Responses.

On February 15, 2005, Sprint filed its Motion to Compel, alleging that KMC's responses to Sprint's First Set of Interrogatories and First Request for Production of Documents were untimely, evasive, and unresponsive. On February 22, 2005, KMC filed its response to Sprint's Motion to Compel. This Order addresses Sprint's Motion to Compel.

Sprint's position

Sprint argued KMC is in violation of Rule 1.340(e), Florida Rules of Civil Procedure (FRCP), by not providing attestation with its answers to questions submitted by Sprint in Sprint's First Set of Interrogatories served on KMC November 15, 2004. Sprint stated that, as of the date Sprint filed its Motion to Compel, KMC had not provided attestation to certain Interrogatories

DOCUMENT NUMBER-DATE

02321 MAR-8 05

FPSC-COMMISSION CI FRK

Sprint has identified in its motion. Therefore, Sprint maintains, it has no proof that KMC's answers were provided under oath as required by Florida discovery rules. As such, the answers KMC did provide are incomplete to the extent attestation is lacking. Sprint is requesting the Commission order KMC to either provide the required affidavits to attest that answers KMC submitted to Sprint were answered under oath, or in the alternative, order that KMC provide a full and truthful sworn answer to each of the Interrogatories Sprint has identified in its Motion to Compel.

Additionally, Sprint addressed the following standard objections made by KMC to some of Sprint's discovery requests: 1) the requests lack relevancy; 2) the requests are "burdensome" or "overly broad"; 3) the requests seek proprietary or privileged information; and 4) the requests were for information outside the jurisdiction of the Commission, such as VoIP traffic, information relating to intrastate traffic originating and terminating in other states, and interstate traffic.

Sprint argues that the concept of relevancy in a discovery context is broader than in the trial context under Rule 1.280(b)(1), FRCP. Also, Sprint cites First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Ass'n, Inc., 545 So. 2d 502, 503 (Fla. 4<sup>th</sup> DCA 1989), wherein the court ruled that a party objecting on the basis that the discovery requested is "burdensome" or "overly broad" must explain or quantify the manner in which such a discovery request is "burdensome" or "overly broad." Sprint states KMC has not shown specifically how any of Sprint's discovery requests constitute a "burdensome" or "overly broad" request.

Sprint argues that KMC's objection that certain portions of the subject information are proprietary is not valid because the parties have executed a protective agreement governing the handling of proprietary and confidential information in this case.

Sprint further argues that KMC's objection to Sprint's discovery requests based on privilege is not valid because KMC has not provided any information to "describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection" as Rule 1.280(b)(5), FRCP, mandates.

Sprint urges that KMC's objection to Sprint's discovery requests based on the Commission's lack of jurisdiction over certain traffic is also not valid. Sprint cites Rule 1.280, FRCP as giving a party the right to discover any matter relevant to the subject matter at issue, even if that information would not be admissible at trial.

In addition to its argument contesting KMC's standard objections, Sprint asserts that KMC's response to Sprint's Interrogatory No. 2 is unclear in that KMC should specifically say whether it believes that any of the traffic it delivers to Sprint over local interconnection trunks or PRIs is VoIP traffic or not.

Sprint asserts that KMC objects to Sprint's Interrogatories No. 3 and No. 4 (also POD No.1) because the question does not limit the request for specific information. Sprint states it is not required to limit or narrow its request in such a manner. Sprint maintains its requests in Interrogatory No. 3 are relevant to Sprint's determination of how much, if any, interexchange traffic was delivered by KMC to Sprint in violation of the parties' interconnection agreements and Florida law. Sprint also argues that its request in Interrogatory No. 4 relevant. That inquiry requests that KMC identify and describe all contractual agreements KMC has with other carriers and entities that terminate or exchange traffic with KMC. Such information, Sprint maintains, will likely lead to the discovery of admissible evidence relating to how KMC receives traffic from these providers and then delivers it to Sprint.

Sprint notes that KMC objects to Sprint's Interrogatory No. 8 because the question is "ambiguous and makes unproven factual assumptions," and to Interrogatory No. 9 due to the vagueness of the term "pseudo charge party number." Sprint argues, however, that its request in Interrogatory No. 8 is not ambiguous, citing Rule 1.30(b), FRCP, which provides:

An interrogatory that is otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or calls for a conclusion or asks for information not within the personal knowledge of a party.

Sprint states that the term "pseudo charge party number" in Interrogatory No. 9 is not vague because it defined that term in a footnote in its original Complaint. Sprint states that KMC's ultimate responses to Interrogatories No. 8 and No. 9 were not responsive to the question asked.

In response to KMC's objection to Sprint's Interrogatory No. 11 and POD No. 4 because the requested information is privileged is not valid, Sprint argues that because KMC has failed to identify any documents that it considers privileged, as required by Rule 1.280(b)(5), FRCP, KMC cannot legally claim documents requested are privileged.

Finally, in response to KMC's responses to Interrogatories No. 17 and No. 20, Sprint, citing Rule 1.380 FRCP, argues that the responses were incomplete and unresponsive to the questions asked. Thus, those non-responsive answers should be considered as evasive or incomplete and KMC should be required to provide more complete answers.

### KMC's Response

In response, KMC provided as an attachment to its Response to Sprint's Motion to Compel, affidavits attesting that KMC's answers to Sprint's First Set of Interrogatories (Nos. 1-22) and First Requests for Production of Documents (Nos. 1-11) were made under oath.

Regarding Interrogatory No. 2, KMC asserts that it has not terminated to Sprint any VoIP traffic that originates on the KMC network over local interconnection trunks in Tallahassee and Fort Myers. KMC also states that, except for Company X (the confidential customer KMC

identified in its motion to dismiss), it has “no reason or basis to know, and does not know” if traffic that it does not originate, and receives from other carriers, is VoIP traffic.

KMC argues that it did respond and address Sprint’s question in Interrogatory No. 3, advising Sprint that the only traffic KMC terminated or sent to Sprint over local interconnection trunks was traffic KMC received over PRIs from Company X. KMC asserts that it does not send any traffic to Sprint over PRIs.

KMC urges that information concerning its contractual agreements with other carriers outside the Sprint-KMC service area is not discoverable. According to KMC, that information relating to markets outside the Sprint service area in Florida, or outside the market areas in which Sprint and KMC do business is not relevant, nor will such information lead to the discovery of admissible evidence with respect to the subject of Sprint’s complaint. KMC states that once a non-disclosure agreement is executed between Sprint and KMC and the pertinent companies have been notified, it will provide Sprint copies of agreements it has with several IXCs that service the entire State of Florida. KMC also states it has mutual traffic exchange (MTE) agreements with some CLECs that operate in Florida but will not provide copies of those agreements because KMC has not exchanged terminating traffic with any of those CLECs in the Tallahassee or Fort Myers service areas.

In response to Sprint’s Interrogatory No. 8, KMC maintains that at no time did it change any Calling Party Number information or Charge Party Number information present in any Signaling System 7 (SS7) record for any call. Also, KMC asserts any information it passed on to Sprint was sent in an unaltered form. KMC states that it stands by its previous objections and responses provided in its response to Interrogatory No. 9.

KMC states that it stands by its previous objections and responses provided in its response to Interrogatory No. 11 and POD. No. 4 concerning privileged information. However, KMC does admit it should have provided Sprint with the privilege log. KMC states it is in the process of compiling the privilege log and will provide same to Sprint once it is properly compiled.

KMC asserts that although it stands by its previous responses provided to Interrogatories No. 17 and No. 20 and requests for PODs No. 7 and No. 10, it will respond additionally. KMC responded “No” to Sprint’s Interrogatory No. 17, which asks if KMC knew that the enhanced service provider identified by KMC in its Motion to Dismiss was transporting interexchange traffic to KMC. KMC also responded “No” to Sprint’s Interrogatory No. 20, which asked, “To KMC’s knowledge, do any ILECs, CLECs, IXCs, or other telecommunications service providers, information services providers or enhanced services providers (other than the enhanced service provider identified in KMC’s Motion to Dismiss) transport interexchange traffic to KMC for termination to Sprint?”

Findings and Conclusion

The scope of discovery under the Florida Rules of Civil Procedure is liberal. Rule 1.280(b)(1), FRCP, states that:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of the other party. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

While the scope of discovery is not limitless, upon review of the pleadings and consideration of the arguments, Interrogatory No. 4, as propounded by Sprint, appears reasonably calculated to lead to the discovery of admissible evidence. Also, KMC should be more definitive in its answer to Sprint's Interrogatory No. 8 by indicating whether KMC does or does not know how another provider would "obtain a nonworking KMC number and insert it into the Charge Party Number parameter in the SS7 signaling." In addition, the term "pseudo charge party number" in Sprint's Interrogatory No. 9 is not vague since the term is defined in Sprint's original complaint. For those reasons, KMC shall respond to Interrogatory No. 4, shall provide a more complete response to Interrogatory No. 8, and shall respond to Interrogatory No. 9.

Finally, KMC has given more definitive and complete answers in its response to Sprint's Motion to Compel regarding Interrogatories No. 3, 11, 17, and 20, and those answers are now deemed adequate. No further response to those requests shall be required.

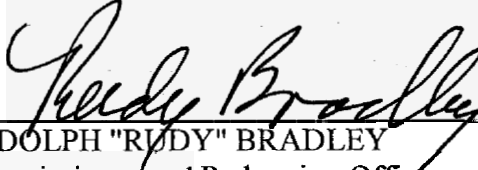
Accordingly, Sprint's Motion to Compel is hereby granted, in part, and denied, in part, as set forth in the body of this Order.

Based on the foregoing, it is

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that Sprint-Florida, Incorporated's Motion to Compel is hereby granted in part and denied in part, as set forth in the body of this Order. It is further

ORDERED that KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC shall have fifteen days (15) from the date of this Order to provide Sprint, as well as Commission staff, with the required responses as indicated in the body of this Order.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this  
8th day of March, 2005

  
RUDOLPH "RUDY" BRADLEY  
Commissioner and Prehearing Officer

(SEAL)

DRG

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.