

LAW OFFICES  
**Messer, Caparello & Self**  
A Professional Association

Post Office Box 1876  
Tallahassee, Florida 32302-1876  
Internet: [www.lawfla.com](http://www.lawfla.com)

March 11, 2005

**BY ELECTRONIC FILING**

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:

Enclosed for filing on behalf of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC is an electronic version of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC's Motion for Continuance of Final Hearing in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

  
Floyd R. Self

FRS/amb  
Enclosures  
cc: Parties of Record

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Complaint of Sprint-Florida, Incorporated )  
Against KMC Telecom III LLC, )  
KMC Telecom V, Inc. and KMC Data LLC, ) Docket No. 041144-TP  
for failure to pay intrastate access charges ) Filed: March 11, 2005  
pursuant to its interconnection agreement and )  
Sprint's tariffs and for violation of )  
Section 364.16(3)(a), Florida Statutes. )  
\_\_\_\_\_)

**KMC TELECOM III LLC, KMC TELECOM V, INC. AND  
KMC DATA LLC'S MOTION FOR CONTINUANCE OF FINAL HEARING**

KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively "KMC") pursuant to Rule 28-106.210, F.A.C., hereby file this Motion to continue the final hearing in this case, and as grounds therefore state:

**Introduction**

1. This action was commenced on September 24, 2004, upon the filing of a Complaint by Sprint-Florida, Inc. alleging that KMC intentionally and knowingly changed interexchange calling party identifying numbers as part of a scheme to misroute interexchange telephone traffic to Sprint as local traffic, thus avoiding and underpaying access charges due to Sprint.

2. On October 14, 2004, KMC moved to dismiss the Sprint Complaint. That motion was denied by Order No. PSC-04-1204-FOF-TI, dated December 3, 2004.

3. On November 16, 2004, Sprint commenced discovery in this proceeding through the filing of interrogatories and requests for production of documents. The parties have engaged in good faith discovery since that time.

4. On January 19, 2005, the Commission staff conducted an issue identification meeting to discuss issues for the hearing and a schedule for the proceeding. At the issue

identification meeting, a hearing date of May 18, 2005 was discussed. KMC advised the staff at that time of a potential conflict regarding the primary, critical witness for KMC, Marva Johnson, who was previously scheduled to testify in an out-of-state proceeding during the week of May 16, 2005. At that time, Ms. Johnson advised the staff and Sprint that she believed another KMC employee would be able to testify in the competing hearing meaning she would be available for the hearing on the proposed May 18<sup>th</sup> date.

5. On January 31, 2005, the Prehearing Officer issued his procedural order with a tentative list of issues along with the prehearing and post-hearing schedule of date and procedures. The procedural order set May 18, 2005 as the date for the final hearing.

6. During the discovery period, KMC investigated the basis for the Sprint claims to determine whether the claims had merit. Through its investigation, KMC discovered patterns in interexchange traffic from Sprint that led KMC to believe that Sprint along with Sprint's IXC affiliate were engaged in a pattern of misrouting interexchange telephone traffic to KMC as local traffic, thus avoiding and underpaying access charges due to KMC. In order to determine the cause of the aberrant call patterns, KMC more closely analyzed traffic delivered from Sprint over local interconnection trunks at various KMC switch locations in Florida as well as interexchange carrier traffic from Sprint's IXC affiliate. On the basis of this investigation, as soon as KMC had sufficient information to determine that Sprint was misrouting interexchange telephone traffic as local traffic, KMC prepared and filed its Counterclaim against Sprint-Florida, Incorporated and Sprint's IXC affiliate, Sprint Communications Company, Limited Partnership d/b/a Sprint. That Counterclaim was filed with the Commission on February 28, 2005. Sprint has not, as yet, either answered the Counterclaim or filed a motion to dismiss the Counterclaim. On March 1, 2005, KMC propounded discovery to Sprint and Sprint's IXC affiliate in furtherance of the claims

made by KMC against the Sprint companies. This discovery was revised and re-filed on March 7, 2005 to correct several internal cross-reference inconsistencies.

7. On March 4, 2005, KMC filed a Motion for Audit of the Sprint records related to the routing of interexchange traffic to KMC. Sprint has requested an extension of time to March 18, 2005 for the filing of a response. KMC did not oppose that motion.

### **Motion for Continuance**

#### **A. A continuance is necessary to fully investigate the issues**

8. The claims raised by KMC in its Counterclaim (other than the claim regarding reciprocal compensation under parties' May 8, 2002, confidential Memorandum of Understanding) concern the same issues raised by Sprint -- i.e., misrouting of interexchange calls as local traffic. These claims are integrally related to the claims asserted by Sprint in its Complaint against KMC. In essence, KMC has uncovered evidence whereby Sprint and Sprint's IXC affiliate are essentially engaging in exactly the same thing that Sprint accuses KMC of doing. While the evidence adduced to date indicates that to the extent there was a misrouting of traffic it was limited to one enhanced services customer, the same cannot be said of Sprint's actions as alleged by the counterclaims which are continuing and ongoing. Given the interrelatedness of the parties' claims, a complete understanding and resolution of the issues regarding the routing of IXC and local traffic under the parties' interconnection agreements compels that these claims be heard and considered together in a single proceeding.

9. The methods by which calls are identified and routed, combined with the volume of calls that comprise the basis of the Sprint Complaint and the KMC Counterclaim make the determination of issues in this case complex, and time-consuming to unravel. In order to

compile the information necessary for the Commission to understand the issues, KMC has requested an audit of the records of Sprint and its IXC affiliate. As set forth in its Motion for Audit, KMC asserts that the Commission has an obligation, as the trier of fact in this proceeding, to allow for a full and fair consideration of all relevant facts bearing on the issues raised in this docket. If the final hearing in this matter is held on May 18, 2005, as is presently scheduled, KMC will be unable to adequately develop the record necessary to either defend itself against the Sprint Complaint, or to advance the issues raised in the Counterclaim. As such, the interests of KMC to a fair resolution of this proceeding would be severely prejudiced if the hearing proceeds on May 18, 2005.

10. According to the allegations in the Sprint Complaint, the matters that form the basis for the Complaint have been ongoing since July 2002, and have been the subject of discussions between Sprint and KMC since at least November 6, 2003 (see Sprint Complaint at §§18-20). In addition, all of the relief sought by Sprint can be satisfied through quantifiable monetary damages. Therefore, there is no need for a rush to judgment on the issues, since the result of any delay in the final hearing date can be subject to an accounting.

11. The Sprint Complaint also alleges conscious and willful malfeasance on the part of KMC. The nature of those allegations goes directly to KMC's good name and reputation. In order to allow KMC to clear its name of Sprint's serious, but wholly unfounded allegations, the Commission must allow KMC the opportunity to fully investigate the issues, and present the complete results of its investigation to the Commission. By requiring KMC to rush through its investigation in order to meet a May 18, 2005 hearing date, the Commission will, in effect, deny KMC the opportunity to defend itself, and in so doing will severely prejudice KMC's right to a full and fair consideration of the issues.

12. It would, furthermore, be inequitable for the Commission to take up Sprint's allegations of malfeasance in the routing of traffic, while denying KMC an equal opportunity to demonstrate that Sprint was engaged in a similar pattern of conduct. If KMC allowed the opportunity to demonstrate that Sprint engaged in similar, if not more egregious practices, such a demonstration would constitute either a defense or a set-off to Sprint's claims. If the continuance of the May 18, 2005 is disallowed, the Commission will, in effect, deny KMC the opportunity to prove up its defenses, including that of set-off, and in so doing will severely prejudice KMC's right to defend itself from Sprint's claims.

13. The issues involved in the Sprint Complaint and the KMC Counterclaim both deal with allegations of rerouting, misdirecting and misidentifying interexchange telecommunications traffic as local traffic, resulting in underpayment of access charges. It will advance the interests of administrative efficiency and economy to have all of the related issues heard and resolved in a single proceeding.

14. KMC has been diligently conducting discovery in this proceeding and has otherwise complied with the procedural requirements of the Commission. In addition, there have been no previous continuances or extensions regarding any aspect of this proceeding to date. This request for a continuance is made in good faith to allow for a complete exploration of the issues, and is not interposed for purposes of delay. *Sprint took nearly a year to investigate and prepare its complaint before filing it with this Commission.* Given the resolution of KMC's motion to dismiss only in December, KMC had a good faith basis for waiting until the resolution of that motion before beginning the kinds of expenditures necessary to a full and complete defense of itself or a determination of potential counterclaims. Due process requires that KMC be given an adequate opportunity to explore these interrelated claims in the same proceeding and

at the same time as Sprint's claims. KMC is seeking an extension of as little as 90 days. Fairness and justice require no less.

**B. KMC has a previously disclosed conflict on May 18, 2005**

15. As set forth in paragraph 4 above, at the time of the January 19, 2005, issue identification meeting, KMC advised the staff that its critical witness, Marva Johnson, was previously scheduled to testify in an out-of-state proceeding during the week of May 16, 2005. At the time of the meeting, KMC advised of the possibility that KMC witness responsibility for that case might be handled by another KMC employee. Unfortunately, the other employee KMC was relying upon is no longer with the company.

16. Ms. Johnson is the key witness for KMC. Given the current restructuring of KMC's Florida operations, and the concurrent loss of employees, there is no person at KMC that has the knowledge required to provide testimony and assist in the presentation of the evidence at the hearing. Moreover, the nature of the testimony in both this docket and the other state is such that retention of an outside expert witness is neither practical nor cost effective. Thus, Ms. Johnson's participation is critical to KMC's ability to develop and present its defense to Sprint's unfounded allegations of malfeasance. By requiring KMC to proceed with the hearing as scheduled for May 18, 2005, the Commission will, in effect, deny KMC the opportunity to defend itself, and in so doing will severely prejudice KMC's right to a full and fair consideration of the issues.

17. KMC disclosed Ms. Johnson's previously scheduled conflict well ahead of time, and prior to the entry of the procedural order in this proceeding. Through circumstances beyond KMC's control, the conflict was not resolved. This request for a continuance is made in good faith to allow for the attendance of KMC's key witness, and is not interposed for purposes of

delay. Due process requires that KMC be permitted to utilize the witnesses that it needs in order to present its case.

**C. Consultation with opposing counsel**

18. KMC has consulted with opposing counsel for Sprint regarding this matter. Sprint counsel has indicated a willingness to work with KMC and the Commission to reschedule the hearing to a convenient time to address Ms. Johnson's time conflicts subject to the availability of Sprint's own witnesses and without any extensive delay of the hearing date. With respect to the continuance for purposes of permitting the parties the opportunity to investigate the claims associated with KMC's counterclaims, Sprint is opposed to any such extension of time.

**Request for Relief**

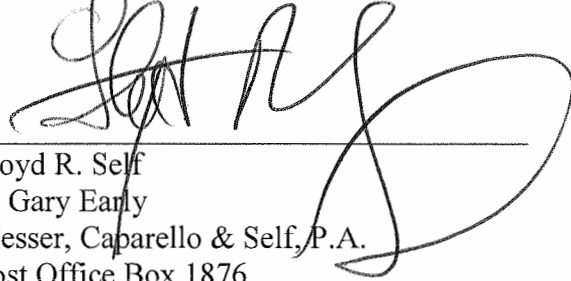
WHEREFORE, for the reasons set forth herein, KMC respectfully requests that the Commission enter an amended procedural order that: (1) continues the hearing currently scheduled for May 18, 2005, for at least 90 days; (2) allows the parties to supplement the direct testimony previously filed in this proceeding to fully incorporate the issues raised in the Counterclaim.; and (3) extends the deadlines for discovery, prehearing statements, the prehearing conference, and post-hearing briefs accordingly.

If the Commission grants the Motion for Audit, the supplemental direct testimony should be due no sooner than thirty (30) days after the report of the audit is released to the parties. In these circumstances, if rebuttal has not yet been filed, then the time to file rebuttal should be postponed to 30 days after the filing of the supplemental direct testimony; if rebuttal has already been filed, then supplemental rebuttal should be allowed 21 days after the supplemental direct. On the basis of these actions, the deadlines for discovery, prehearing statements, the prehearing conference, the hearing, and post-hearing briefs should be adjusted accordingly.



Finally, in the event the Commission denies KMC its right to a hearing in this case to its counterclaims, at a minimum KMC respectfully requests that the May 18, 2005 hearing be rescheduled so as to all Ms. Johnson and all of the parties' witnesses with the ability to appear at the hearing in this matter.

Respectfully submitted,



Floyd R. Self  
E. Gary Early  
Messer, Caparello & Self, P.A.  
Post Office Box 1876  
Tallahassee, FL 32302-1876  
Telephone: (850) 222-0720  
Facsimile: (850) 224-4359  
e-mail: fself@lawfla.com  
e-mail: gearly@lawfla.com

Edward A. Yorkgitis, Jr.  
Barbara A. Miller  
Kelley Drye & Warren LLP  
1200 19th Street, N.W., Fifth Floor  
Washington, D.C. 20036  
Telephone: (202) 955-9600  
Facsimile: (202) 955-9792  
e-mail: cyorkgitis@kelleydrye.com  
e-mail: bmiller@kelleydrye.com

Marva Brown Johnson  
KMC Telecom Holdings, Inc.  
1755 North Brown Road  
Lawrenceville, GA 30043  
Telephone: (678) 985-6220  
Facsimile: (678) 985-6213  
e-mail: marva.johnson@kmctelecom.com

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

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by electronic mail and/or U.S. Mail this 11<sup>th</sup> day of March, 2005.

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

Dovie L. Rockette-Gray  
General Counsel's Office, Room 370  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Ms. Nancy Pruitt  
Division of Competitive Markets and Enforcement  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Susan Masterton, Esq.  
Sprint-Florida, Incorporated  
P.O. Box 2214  
Tallahassee, FL 32316-2214

Sprint Communications Company,  
Limited Partnership d/b/a Sprint  
c/o Sprint-Florida, Incorporated  
P.O. Box 2214 (MC FLTLHO0107)  
Tallahassee, FL 32316-2214

  
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Floyd R. Self