

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: March 18, 2005

**SPRINT-FLORIDA INCORPORATED'S RESPONSE TO
KMC'S MOTION FOR AUDIT**

In accordance with Rule 28-106.204, F.A.C., Sprint-Florida, Incorporated (hereinafter, "Sprint-Florida") files its Response in Opposition to KMC's Motion for Audit, filed with the Commission on March 4, 2005.¹ In support of this Motion, Sprint-Florida states as follows:

1. On September 24, 2004, Sprint-Florida filed its Complaint against KMC, alleging that KMC improperly and knowingly delivered interexchange traffic over its local interconnection trunks with Sprint-Florida to avoid the payment of access charges, in violation of s. 364.16 (3)(a), Florida Statutes, KMC's interconnection agreements with Sprint-Florida and Sprint-Florida's tariffs. KMC filed its Motion to Dismiss Sprint-Florida's Complaint on October 14, 2005, which was denied by the Commission in Order PSC-04-1204-FOF-TP issued December 3, 2004. One of the grounds for dismissal asserted by KMC was Sprint-Florida's failure to conduct an audit prior to filing its Complaint. KMC argued that the interconnection agreements between the parties and Sprint-Florida's tariffs required that an audit be performed before Sprint-Florida could

¹ Sprint-Florida's Response was originally due on March 11, 2005. On March 10, 2005 Sprint-Florida filed its Motion for Extension of Time to respond the KMC's Motion so that Sprint-Florida's Response could be filed simultaneously with its responsive Motions to KMC's Counterclaims. KMC did not object to Sprint's Motion for Extension of Time.

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bring its Complaint.² Sprint-Florida argued in its response to KMC's Motion that an audit was discretionary but not required and that through its own records and investigations Sprint had sufficient evidence to prove its allegations against KMC and, therefore, did not exercise its discretionary right.³ The Commission agreed with Sprint-Florida that an audit was not required as a condition precedent to Sprint-Florida's bringing its Complaint.

2. After the Motion to Dismiss was denied, consistent with standard Commission procedure, an issue identification conference was held to establish the preliminary list of issues that would form a framework for discovery and the parties' pre-filed testimony. Subsequently, the Order on Procedure was issued reflecting the preliminary issues and establishing a procedural frame work for the proceeding, including dates for filing testimony and the hearing. In total disregard of the Order on Procedure and KMC filed an Answer, Affirmative Defenses and Counterclaims raising completely new and largely unrelated issues and attempting to include additional parties on the same day direct testimony was due. The impropriety of KMC's pleadings is addressed in Sprint-Florida's Motion to Strike, which was filed separately on this same day.

3. As fully discussed in Sprint-Florida's Motion to Strike, KMC's Counterclaims are based on cobbled together, unrelated and unreliable purported "facts" and illogical conclusions. In recognition of the deficiencies in the factual basis of its pleading, a few days after KMC filed its Counterclaims, it filed this unprecedented Motion asking the Commission to conduct an audit that is essentially be a "fishing expedition" to attempt to

² See, *In the Matter of Thrifty Call, Inc. Petition for Declaratory Ruling Concerning BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1*, CCB/CPD File 01-17, in which the FCC reached the same conclusion regarding similar language in BellSouth's federal access tariff.

³ Under the terms of the interconnection agreements, either party has a right to request an audit. However, as noted in Sprint-Florida's Response to KMC's Motion to Dismiss, KMC chose not to exercise that right.

uncover some evidence that might support the outlandish claims made in KMC's counterclaims.

4. In contrast to KMC's Counterclaims, Sprint-Florida's claims against KMC are based on switch records created, maintained, preserved and collected in accordance with standard industry practice that show that certain traffic delivered by KMC to Sprint-Florida as local traffic originated outside the local calling area in which the traffic was terminated and, therefore, was interexchange traffic that KMC should have terminated over access trunks for which paid access charges should have been paid. Sprint-Florida has produced records and information that identify the specific trunks, the originating and terminating points of the calls, the calling party and called party numbers, and the charge party numbers that were used to disguise the access traffic as local traffic. The data provided by Sprint-Florida to KMC is so specific that KMC was able to determine from it exactly which KMC customer was responsible for the traffic. Sprint-Florida's evidence is so solid that KMC does not appear to be disputing that the traffic is technically interexchange traffic, but instead is offering as defenses that it didn't know it was interexchange traffic or that it thinks or thought it was enhanced service traffic not subject to access charges.

5. The same cannot be said of the amalgam of information upon which KMC bases its spurious allegations against Sprint-Florida and Sprint LP. In fact, while KMC has alleged in its complaint that it collected some form of switch records for an unspecified time period, neither KMC's Counterclaim, nor the direct testimony that KMC presumptively filed to support its claim include any documentation identifying the trunk groups, amount of traffic, time frame, calling or called party number or any other specific

information that supports KMC's claim or even provides Sprint-Florida or Sprint LP a basis upon which to meaningfully respond. In fact the primary factual evidence that KMC presents in support of its counterclaims is a general allegation that the amount of traffic Sprint LP terminated to KMC over access trunks has decreased over a three year period. (Motion at ¶ 2) Even then, KMC provides no specific information, such as minutes of use, to support this alleged decline. Instead KMC presents its data in the form of percentages of access traffic compared to the percentage decrease or increase in KMC access lines, again providing no numbers to support even this questionable claim.

6. Recognizing the patent deficiencies of its Counterclaims, in its Motion for Audit KMC asks the Commission to use its limited resources to conduct a broad-based and ill-defined audit of Sprint LP (also involving Sprint-Florida) related to Sprint LP's termination of interexchange traffic to KMC in several local calling areas within the state, the majority of which are not in Sprint-Florida territory and which would also entail examining the records of unidentified tandem service providers in those service areas. In its Motion to Strike, Sprint-Florida has suggested that the KMC's primary purpose in raising the flimsy allegations in its Counterclaims and Motion for Audit is to delay the orderly prosecution of Sprint-Florida's Complaint against KMC. The Commission should not allow its resources to be abused in this manner.

7. KMC refers to its tariffs and interconnection agreements with Sprint-Florida as support for its request. (Motion at ¶ 6) KMC has entirely misrepresented the provisions of the interconnection agreements. The agreements do contain provisions that allow parties to request an audit. Pursuant to the agreements, audits are to be conducted by the requesting party and expenses are to be born either by each party (under 1997 MCI

Agreement) or by the requesting party (under the FDN Agreement). The agreements do not contemplate or provide that the parties could avoid their obligations and responsibilities by asking the Commission to assume the burden and expense of an audit, as KMC suggests.⁴

8. KMC neglected to cite specifically any provision of its "tariffs" that authorizes or requires audits. (Motion at ¶ 6) However, Sprint-Florida researched KMC's price lists on file with the Commission and found only a reference to the "Company's" ability to request an audit. See, KMC Price List No. 2, Switched Access Services, Section 3.1.3(A)(3)(a) Sprint-Florida found nothing in KMC's tariffs that authorized the Commission to conduct an audit. In any event, KMC has no authority to bind the Commission to use its resources to further KMC' private interests via its price lists or otherwise.

9. KMC also states that the Commission's enabling statutes give it the authority to conduct the far reaching audit of Sprint LP and Sprint-Florida requested in KMC's Motion. (Motion at ¶ 6) Again, KMC fails to cite to a specific statutory provision to support its position. Section 364.18, Florida Statutes, authorizes the Commission to inspect the books and records of a telecommunications company and section 364.183, Florida Statutes, provides the Commission access to records of a telecommunications company that are necessary for the Commission to dispose of matters within its jurisdiction. Sprint-Florida's research shows that the Commission has used this authority in a few instances to audit records in relation to a billing dispute between two

⁴ See *In re: Request for Arbitration concerning complaint against Sprint-Florida, Incorporated for alleged overbilling and failure to comply with interconnection agreement by Tallahassee Telephone Exchange, Inc.*, Order No. PSC-02-1529-FOF-TP, issued November 6, 2002 in Docket No. 020837-TP, in which the Commission recognizes that similar audit provisions in Sprint-Florida's agreement with TTE provide for audits to be conducted by the parties to an agreement.

telecommunications companies.⁵ However, it is apparent from the records of these proceedings that these audits were initiated by the Commission to reconcile the disputed positions of the parties, not to ascertain the proof necessary to support one party's complaint against the other. Nowhere could Sprint-Florida find precedent for a complaining party to request that the Commission conduct an audit to develop the evidence necessary to prove that party's case.

10. It is questionable whether the Commission has any authority to audit Sprint LP's records, since the amendment of the definition of "telecommunications company" in section 364.02(13), Florida Statutes, by the Legislation in 2003 to exempt intrastate interexchange telecommunications companies. A plain reading of ss. 364.18 and 364.183 supports a conclusion that the Commission no longer has access to the records of intrastate interexchange telecommunications companies in the manner set forth in those provisions. In exempting intrastate interexchange telecommunications companies from the definition of "telecommunications company," the Legislature carved out certain provisions of chapter 364, Florida Statutes, that would continue to apply to these companies. Sections 364.18 and 364.183 are not included in this enumerated list. In looking at the specific statutory sections to which an intrastate interexchange telecommunications company continues to be subject, it appears that the only "auditing" authority over these companies retained by the Commission is the authority to audit access charge reduction flowthroughs pursuant to s. 364.164, Florida Statutes.

⁵ See, e.g., *In re: Complaint of IDS Telecom LLC against BellSouth Telecommunications, Inc. for overbilling and discontinuance of service, and petition for emergency order restoring service*, Docket No. 031125-TP; *In re: Complaint by BellSouth Telecommunications, Inc. against Thrifty Call, Inc. regarding practice in the reporting of percent interstate usage for compensation for jurisdictional access services*, Docket No. 000475-TP; and *In Re: Complaint by BellSouth Telecommunications, Inc. against Intermedia Communications, Inc., Phone One, Inc., NTC, Inc. and National Telephone of Florida regarding the reporting of percent usage for compensation for jurisdictional access service*, Docket No. 000690-TP

11. While the Commission may no longer has the authority to audit intrastate interexchange telecommunications company records, it arguably still has jurisdiction to resolve complaints that such companies are violating the statute by not paying lawfully due access charges. In furtherance of this duty, the Commission can obtain the information necessary to exercise its jurisdiction through the discovery process, which in any event, has been the primary mechanism for the Commission to obtain information it needs to resolve disputes brought before it.

12. As Sprint-Florida has thoroughly argued in its Motion to Strike, KMC's Counterclaims that are the basis for this Motion for Audit should be stricken or dismissed, or at a minimum bifurcated from this proceeding, making KMC's Motion moot. To the extent that the Commission denies Sprint-Florida's Motion to Strike, Dismiss or, in the alternative, Bifurcate the Commission should deny KMC's unorthodox and unprecedented Motion for Audit which attempts to co-opt the Commission's resources to gather evidence that KMC was not willing to expend its own resources to obtain. Rather, to the extent the Commission believes it needs to obtain independent evidence to ascertain the merit of KMC's claims, it may conduct the necessary discovery to obtain that information, without incurring undue expense.

13. While the Commission may no longer have the authority to audit the records of intrastate interexchange telecommunications companies, the Commission retains the authority to audit local exchange company records to dispose of matters within its jurisdiction. Section 364.16(3)(a), Florida Statutes, specifically authorizes the Commission to investigate allegations that a local exchange company has terminated access traffic over local interconnection arrangements without paying the applicable

access charges. While Sprint-Florida does not believe that it is required that the Commission conduct an audit to investigate its claims against KMC, or that KMC has provided sufficient grounds for the Commission to conduct an audit to investigate KMC's claims against Sprint-Florida, to the extent the Commission decides to grant KMC's request for an audit, Sprint-Florida request that the Commission also audit KMC's records related to Sprint-Florida's claims, to ensure that a complete record is fairly developed to address the parties claims in this proceeding.

Wherefore, Sprint-Florida requests that the Commission deny KMC's Motion for Audit for the reasons set forth herein, or, if the Commission grants KMC's Motion in whole or in part that the Commission expand its audit to include KMC's records.

Respectfully submitted this 18th day of March 2005.



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