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**Matilda Sanders**

**From:** Whitt, Chrystal [CC] [Chrystal.Whitt@mail.sprint.com]  
**Sent:** Monday, March 21, 2005 2:43 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** 041144-TP Sprint's Corrections to Motion to Strike and Response to KMC's Motion for Audit  
**Attachments:** 041144 Sprint's Corrections to Motion to Strike and Response to Audit.pdf

**Filed on behalf of:**

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**Docket No. 041144-TP**

**Title of filing:** 041144-TP Sprint's Corrections to Motion to Strike and Response to KMC's Motion for Audit

**Filed on behalf of: Sprint**

**No. of pages:** 10

**Description:** 041144-TP Sprint's Corrections to Motion to Strike and Response to KMC's Motion for Audit, originally filed on Friday March 18<sup>th</sup>, 2005.

- CMP \_\_\_\_\_
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March 21, 2005

Ms. Blanca Bayó  
Director, Division of the Commission  
Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0863

RE: Docket No. 041144-TP, Corrections

Dear Ms. Bayó:

Enclosed please find 1) revised pages 2, 4, 5, 7 and 17 of Sprint-Florida, Incorporated's Motion to Strike the Answer, Affirmative Defenses and Counterclaim and Motion to Dismiss the Counterclaim or, in the Alternative, Motion to Bifurcate the Counterclaim of KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC, filed on March 18, 2005 and 2) revised pages 1 and 2 of Sprint-Florida, Incorporated's Response in Opposition to KMC's Motion for Audit, filed March 18, 2005. The corrected pages should replace the previously filed original pages.

The revised pages make the following typographical corrections:

**Motion to Strike:**

- page 2, line 5, October 19, 2005 is corrected to October 19, 2004
- page 4, line 5, December 18, 2005 is corrected to December 18, 2004
- page 4, line 17, "KMC's" is corrected to "KMC"
- page 5, line 5, PSC-05-0608-PCO-TP is corrected to PSC-04-0608-PCO-TP
- page 7, line 17, the word "not" is inserted between "answer is" and "required"
- Page 17, line 5, the word "its" is inserted between "filing" and "egregiously"
- Page 17, line 6 & 7, the word "be" is inserted after the words "pleadings to"

**Response to Motion for Audit:**

- page 1, line 3, the word "Motion" is corrected to read "Response"
- page 1, line 10, October 14, 2005 is corrected to read October 14, 2004
- page 2, footnote 2 is corrected to follow the last sentence of the paragraph and renumbered
- page 2, line 11, the word "and" is deleted is replaced with a comma
- page 2, line 20, the word "be" is deleted

DOCUMENT NUMBER-DATE

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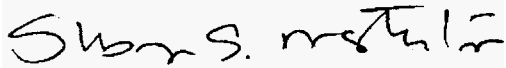
FPSC-COMMISSION CLERK

Ms. Blanca Bayó  
March 21, 2005  
Page 2

Parties have been served with a copy of this filing pursuant to the attached Certificate of Service.

If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan S. Masterton". The signature is written in a cursive style with some capitalization and is positioned above a light gray rectangular background.

Susan S. Masterton

**CERTIFICATE OF SERVICE  
DOCKET NO. 041144-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail this 21<sup>st</sup> day of March, 2005 to the following:

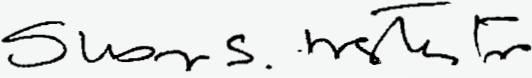
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interconnection arrangements with Sprint-Florida, in violation of Florida statutes, KMC's interconnection agreements with Sprint-Florida, and Sprint-Florida's tariffs. Sprint-Florida served KMC with its Complaint on September 24, 2004 electronically and via U.S. Mail. In addition, the Commission Clerk served KMC with a copy of the Complaint on September 28, 2004. The Case Activity Scheduling Record (CASR) for the docket established October 19, 2004 as the due date for KMC's response to Sprint-Florida's Complaint (25 days from the date of Sprint-Florida's filing). However, in accordance with Rule 28-106.204, Florida Administrative Code, KMC instead filed a Motion to Dismiss the Complaint on October 14, 2004. Sprint-Florida filed its Response to KMC's Motion on October 21, 2004 and, after oral argument from the parties, the Commission denied KMC's Motion at its Agenda Conference on November 30, 2004. Subsequently, an issue identification conference was held on January 19, 2005. At that meeting, consensus was reached by Commission staff and the parties concerning the issues to be addressed by the parties in their testimony and at the hearing. The Order on Procedure, setting forth various procedural dates and attaching the agreed to list of issues to be addressed in the proceeding, was issued on January 31, 2005. Direct testimony was due on February 28, 2005. On that date both parties filed their direct testimony as required by the procedural order. On that same date, KMC belatedly filed its Answer, Affirmative Defenses and Counterclaims to Sprint-Florida's original complaint, setting forth various allegations against Sprint-Florida in the counterclaims and also including allegations against Sprint Communications Company Limited Partnership (hereinafter, "Sprint LP"), which is not a party to Sprint-Florida's Complaint.

## ARGUMENT

**KMC's Answer, Affirmative Defenses and Counterclaims are Untimely and should be barred**

and if it is denied, the Florida Rules of Civil Procedure provide that an answer shall be provided within 10 days of the ruling or a different time fixed by the court.<sup>1</sup> In applying the “tolling” principle to this case there are several interpretations as to when KMC’s answer should have been filed. The most conservative interpretation would hold that KMC’s answer was due five days after the Order Denying the Motion to Dismiss, or December 18, 2004 (since five days remained from the prior time period when KMC filed its Motion to Dismiss). However, even under the most liberal construction of the effect of the tolling, KMC’s Answer should have been filed no later than 25 days (the full original response period) after the Order denying the Motion to Dismiss was issued, or by December 28, 2004. Yet, KMC did not file its answer (which included its statement of Affirmative Defenses and its Counterclaims) until 85 days after the Order was issued, that is, on February 28, 2005.

At the point when KMC filed its pleading, the issue identification had been held, the procedural order issued and the timeframes for filing testimony on the issues identified in the procedural order had been established (and in the case of the direct testimony had arrived). While the established time frames for filing pleadings can be waived upon good cause shown, KMC has offered no explanation for its delay in providing its responsive pleadings. Sprint-Florida believes that KMC failed to provide an explanation or justification because it has no legitimate basis for its actions. KMC knew that it intended to file an answer and counterclaims as early as the November 30, 2004, Agenda Conference during which KMC’s counsel noted KMC’s intent to do so. See 11-30-04 Agenda Conference Transcript at page 10

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<sup>1</sup> Prior to the adoption of the Model Rules, the Commission rules provided for the same time frames embodied in the Rules of Civil Procedure. Former Rule 25-22.0037, F.A.C.

As apparent authority for its filing, KMC cites a Commission Order granting a motion by BellSouth for permission to file a Counterclaim subsequent to filing of its answer in a complaint proceeding involving a billing dispute with IDS. *In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC*, Order No. PSC-04-0608-PCO-TP, issued June 18, 2004 in Docket No. 031125-TP (hereinafter, “BST/IDS Complaint Proceeding” and “BST/IDS Counterclaim Order,” respectively). In its Motion BellSouth had provided justification for its request to deviate from normal procedure to file its counterclaims at a relatively late point in the proceeding, including an allegation that it did not receive information necessary to its decision to file a counterclaim until shortly before its filing. (BST/IDS Counterclaim Order at pages 2 & 3) KMC made no such representation in its egregiously late-filed Answer and Counterclaim. To the contrary, from the face of KMC’s pleadings it is clear that KMC does not rely on any information provided by Sprint-Florida subsequent to the filing of Sprint-Florida’s Complaint.

In the BellSouth/IDS Counterclaim Order, the Commission specifically found that the acceptance of BellSouth’s counterclaims would not delay the case or otherwise prejudice IDS.<sup>2</sup> (BST/IDS Counterclaim Order at page 9) In contrast, KMC’s inordinately late filing of its Answer and Counterclaims severely prejudices Sprint-Florida in the prosecution of its Complaint. Since KMC’s pleading was not filed until the same day as the Direct Testimony and there were no issues in the procedural order upon which Sprint-Florida could rely, Sprint-Florida was not able to address any of the factual issues or affirmative defenses raised in the pleading in

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<sup>2</sup> In the BST/IDS Complaint proceeding, unlike the instant case, BellSouth’s counterclaims were filed 5 weeks before the due date for direct testimony and 5 months before the hearing.

advantage in doing so, the result would be procedural chaos. Therefore, Sprint-Florida urges the Commission to strike the Answer, Affirmative Defenses and Counterclaims as improper and procedurally barred.

**Granting Sprint-Florida's Motion to Strike will not preclude KMC from pursuing its claims in an appropriate proceeding**

Counterclaims are not recognized specifically in the Uniform Rules of Administrative Procedure, as this Commission has acknowledged. Rather, since the adoption of the Uniform Rules, in considering counterclaims raised in Commission proceedings, the Commission has relied on Rule 28-106.108, F.A.C., which allows consolidation of separate matters in the interest of the just, speedy and inexpensive resolution of issues, if no party is unduly prejudiced by the consolidation. See, BST/IDS Counterclaim Order at page 7 While the Rules of Civil Procedure relating to counterclaims are not strictly applicable, the case law interpreting those rules is instructive to the Commission's consideration of Sprint-Florida's request to strike KMC's pleadings. KMC's Counterclaims would be considered "permissive" rather than "compulsory" counterclaims, under the relevant rules of civil procedure and the applicable case law. In fact, in an administrative proceeding, arguably, there is no such thing as a compulsory counterclaim, since an answer is not required. *Lawhorn v. Atlantic Refining*, 299 F 2d 353 (5<sup>th</sup> Cir. 1962) An analysis under the relevant case law distinguishing permissive and compulsory counterclaims also confirms that KMC's counterclaims are permissive. See, *Londono v. Turkey Creek*, 609 So. 2d 14 (Fla. 1992) (in which the Florida Supreme Court adopts the "logical relationship" test to determine if a counterclaim is compulsory). KMC's claims do not arise from the same transaction or factual circumstances upon which Sprint-Florida's complaint is based and they are

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availability and KMC has subsequently withdrawn its Motion, though reserving its right to



the same proceedings as Sprint-Florida's. Rather, as described above, Sprint-Florida will be prejudiced by the delays and inefficiencies that would accompany the inclusion of KMC's counterclaims at this stage of the proceeding.

### **CONCLUSION**

KMC has abused the Commission's process by filing its egregiously untimely and procedurally and substantively improper Answer and Counterclaim. Allowing these pleadings to be included in this docket at this late date would unduly prejudice Sprint-Florida's pursuit of the relief requested in its Complaint.

Wherefore Sprint-Florida requests that the Commission:

Strike KMC's Answer, Affirmative Defenses and Counterclaims; or

Dismiss KMC's claims for failure to state a cause of action; or

Dismiss KMC's claims against Sprint LP since it is not a party to Sprint-Florida's Complaint and, therefore, is improperly included; or

Dismiss Count III of KMC's Counterclaim for lack of subject matter jurisdiction to enforce the terms of the Confidential Settlement and Release Agreement; or

In the alternative, bifurcate the Counterclaims pursuant to the Commission's authority in Rule 28-106.211, F.A.C.

To the extent the Commission denies Sprint-Florida's Motions in whole or in part, Sprint-Florida and Sprint LP reserve their rights to file any responsive motions or other appropriate pleadings allowed by law.

**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
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**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.<sup>1</sup> In support of this Response, 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, 2004, 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

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<sup>1</sup> 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.

bring its Complaint. 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.<sup>2</sup> The Commission agreed with Sprint-Florida that an audit was not required as a condition precedent to Sprint-Florida's bringing its Complaint.<sup>3</sup>

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, 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 a "fishing expedition" to attempt to

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<sup>2</sup> 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.

<sup>3</sup> 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.