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March 25, 2005

BY HAND DELIVERY

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 ("KMC") are an original and fifteen copies of KMC's Response to Sprint-Florida, Inc.'s Motion to Strike the Answer, Affirmative Defenses and Counterclaim, Response to Sprint-Florida, Inc.'s Motion to Dismiss the Counterclaim and Response to Sprint-Florida, Inc.'s Motion to Bifurcate the Counterclaim in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,


Floyd R. Self

FRS/amb
Enclosures
cc: Parties of Record

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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 25, 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

**RESPONSE TO SPRINT-FLORIDA INC.'S MOTION TO STRIKE
THE ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM,**

**RESPONSE TO SPRINT-FLORIDA INC.'S MOTION
TO DISMISS THE COUNTERCLAIM AND**

**RESPONSE TO SPRINT FLORIDA, INC.'S MOTION
TO BIFURCATE THE COUNTERCLAIM**

KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively "KMC"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby file this Response To Sprint-Florida Inc.'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 (collectively the "Sprint Motion"), and state:

The basic thrust of the Sprint Motion is predicated on the theory that if Sprint is able to string together enough inflammatory and pejorative adverbs and adjectives, then surely it must prevail. Despite Sprint's continuous bombast, KMC respectfully provides this point-by-point discussion of the issues raised by Sprint.

A. KMC's Answer, Affirmative Defenses and Counterclaims are not Untimely

Sprint begins its argument with the assertion that KMC's Answer, Affirmative Defenses and Counterclaims (the "KMC Counterclaims") were untimely. However, in the same breath,

Sprint concedes that neither the PSC rules nor the Uniform Rules impose a time limit for the filing of a permissible responsive pleading. Despite that affirmation, and without citing any authority whatsoever, Sprint claims that "the Commission generally recognizes the 20 day time frame set forth in Rule 1.140. . . ." See Sprint Motion at p.3. Sprint further argues that allowing for the filing of an answer and counterclaims after the issue identification conference and issuance of the procedural order "serves little, if any, purpose within this procedural framework." *Id.*¹

No rule applicable to this proceeding restricts KMC's right to file an answer (including affirmative defenses and counterclaims), as Sprint notes. In the absence of a rule establishing a time limitation for filing, there is no procedural bar to such a filing. Since Rule 28-106.203, F.A.C. specifically reserves the right to file an answer, without restricting the time in which an answer is to be filed, the dismissal or striking of the answer would violate both the rule and the due process rights of KMC.

Sprint's assertion that "the Commission generally recognizes the 20 day time frame set forth in Rule 1.140" is completely undermined by the most recent Commission action in a factually similar case, *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*, Docket No. 031125-TP (the "IDS Complaint Case"). In the *IDS Complaint Case*, the Commission allowed the filing of counterclaims well after the passage of 20 days from the filing of the Complaint. See *Order No. PSC-04-0608-PCO-TP*, p. 7, issued June 18, 2004. Sprint attempts to distinguish the *IDS Complaint Case* by arguing that BellSouth's Counterclaim

¹ It is noteworthy that at the January 19, 2005 issue conference, counsel for Sprint initially stated that there was no point in continuing with the conference, since it was understood that KMC was investigating facts that would likely lead to KMC filing counterclaims. After discussion, the Commission staff and the parties expressly agreed to conduct the issue conference with the understanding that the focus would be on the Sprint Complaint, and that the issues list may have to be augmented following KMC's completion of its investigation and filing of counterclaims.

was justified in that case because BellSouth alleged "that it did not receive information necessary to its decision to file a counterclaim until shortly before its filing." A review of the relevant timelines in the *IDS Complaint Case* and in this case reveals material similarities between the instant case and the earlier action. Those timelines are as follows:

IDS Complaint

Day 1 - Complaint filed (12/23/03)
Day 7 - Amended Complaint filed (12/30/03)
Day 24 - Partial Motion to Dismiss filed (1/16/04)
Day 120 - Issue ID conference (4/22/04)
Day 124 - Order Granting Part. Motion (4/26/04)
Day 134 - Procedural Order (5/6/04)
Day 135 - Counterclaim filed

Sprint Complaint

Day 1 - Complaint filed (9/24/04)
Day 20 - Motion to Dismiss filed (10/14/04)
Day 71 - Order denying Motion (12/3/04)
Day 118 - Issue ID conference (1/19/05)
Day 130 - Procedural Order (1/31/05)
Day 158 - Counterclaim filed

As set forth in the above table, the BellSouth counterclaims, like the KMC Counterclaims, were filed significantly more than 20 days after the filing of the complaint, after the issue identification conference and following entry of the Procedural Order. Furthermore, the Bellsouth counterclaims were not filed materially earlier in the process than the KMC Counterclaims so as to provide any significant or meaningful distinction.

Sprint also asserts that, unlike BellSouth, "KMC has offered no explanation for its delay in providing its responsive pleadings." That contention is yet another misstatement of the facts presented in the KMC Counterclaims. Beginning at page 17 of the KMC Counterclaims, KMC goes into detail to explain that the discovery of the scheme by Sprint and its IXC affiliate to evade payment of access charges was a direct result of its investigation of the allegations of the Sprint Complaint. Thus, there was no real motivation or opportunity for KMC to delve into the Sprint call routing and billing records until it was forced to defend against Sprint's Complaint. Thus, this case is entirely analogous to the circumstance faced by BellSouth, which had no reason to investigate and file its counterclaims against IDS until IDS raised issues for consideration by the Commission.

Tellingly, Sprint's Complaint reveals that it engaged in an even more detailed and lengthy period of investigation prior to filing the Complaint. *See* Sprint Complaint, ¶¶ 13-14. As a result of its lengthy investigation, Sprint asserts that KMC was responsible for misrouting IXC traffic over local lines to avoid payment of access charges for terminating IXC calls. Specifically, sometime before September 10, 2003, facts came to Sprint's attention that caused it to insert on that date a probe of traffic sent over Sprint-KMC local interconnection trunks. Within a few weeks thereafter, Sprint contracted with Agilent Technologies to conduct a similar investigation. However, Sprint did not file its own Complaint for over one year. Thus, Sprint's indignation that KMC waited 85 days after the Commission's action on the Motion to Dismiss disregards the complexity of the issue and the time necessary to properly investigate the facts revealing that Sprint and its IXC affiliate were involved in a far more pervasive scheme to avoid paying access charges to Sprint's local exchange competitors, such as KMC. Understandably, Sprint, through its Motion, would like to avoid any Commission scrutiny of its own widespread actions, if not permanently then at least until it plays out its attempt to establish some "moral high ground" relative to KMC. In light of the inextricable connection between Sprint's claims against KMC and KMC's more far-reaching allegations in the KMC Counterclaims, a piecemeal examination of the parties' respective actions is not in the public interest.

Sprint's argument that its ability to prosecute its Complaint is hindered if KMC is allowed to raise its Counterclaims is equally unavailing, and is a further demonstration of its desperation to stave off an examination of its own actions. While it is true that direct testimony has been filed, there is no restriction in the ability of the Commission to either allow for the filing of amended direct testimony, or to allow rebuttal and surrebuttal testimony to address the issues in the Counterclaims. KMC has no opposition to such an allowance, especially since it did not

have the same luxury of time as did Sprint in formulating its own claims. KMC recognizes that Sprint should have the opportunity to file testimony in response to the Counterclaims. The only conceivable "prejudice" to Sprint, and it is theoretical at best, would be an extension of the discovery and hearing dates. Given that the acts that form the basis for Sprint's Complaint allegedly occurred between July 2002 and June 2004, *and are not ongoing*, inclusion of the Counterclaim issues may necessitate a delay, but any such delay does not rise to the level of "prejudice" to Sprint. Given that Sprint's and its IXC affiliate's action are ongoing, if any party is adversely affected by delay, it is KMC, which continues to be denied access charges to which it is entitled. Given that the factual issues in the Sprint Complaint and the KMC Counterclaims are so closely related, it would be far more prejudicial for the Commission and the parties to have to engage in the duplication of effort required to try the issues separately.

In conclusion, KMC acted to investigate and bring its Counterclaims in a reasonably expeditious period of time. Had KMC raised its Counterclaims without investigating their validity as thoroughly as it did, Sprint might have reason to object. However, KMC should not be accused of "egregious," "unconscionable," and "shameless" delay because it elected to pursue a detailed investigation of the facts comparable to that which Sprint elected to pursue before filing its Complaint. Sprint's claims of "prejudice" prove to be, at most, simple annoyance by the incumbent carrier at its inconvenience in having to modify the time frames to deal with the serious issues set forth in the KMC Counterclaims. Any such inconvenience is far outweighed by the efficiency and economy of effort and expense that will be achieved by the Commission's consideration of the same fact patterns in a single docket, rather than in multiple dockets. Therefore, the Commission should deny the Sprint Motion, and proceed with a consideration of the proper means by which access charges for terminating IXC traffic are to be paid.

B. There is no valid reason for requiring KMC's Counterclaims to be addressed in a separate proceeding

Sprint next argues that KMC's Counterclaims could be resolved in a separate proceeding. Sprint is correct. In that regard, every issue of every claim could be brought as a separate proceeding. However, Sprint's argument begs the question of whether the Counterclaims *should* be allowed in this proceeding.

As set forth in the Counterclaims and in this response to Sprint's Motion, the issues regarding the manner in which access charges are to be assessed and paid for terminating IXC traffic form the basis for both the Sprint Complaint and the KMC counterclaims. The facts as to how calls are routed through various providers are likely to be substantially similar for both claims. Both claims are predicated on an analysis of the same interconnection agreements and other agreements between Sprint and KMC.

The Commission has recognized that the standard for consolidation under Rule 28-106.108, F.A.C. is also the appropriate standard for determining whether to allow consideration of a counterclaim. *Order No. PSC-04-0608-PCO-TP*, p. 7. Rule 28-106.108, F.A.C. provides that "[i]f there are separate matters which involve *similar* issues of law or fact, *or* identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party." (e.s.) In this case, the factual issues of how alleged IXC traffic is routed between various carriers and types of carriers, and legal issues of when access charges are triggered and to whom they are payable, are certainly similar, and perhaps indistinguishable, between the Sprint Complaint and the KMC Counterclaims. Sprint's assertion that "KMC's claims do not arise from the same transaction or factual circumstances upon which Sprint-Florida's complaint is based and they are not logically related to the facts or legal issues raised in Sprint-Florida's

Complaint" is unsupportable on its face. Both the Sprint Complaint and the KMC Counterclaims will require an understanding of the manner in which traffic is routed and terminated in both the Tallahassee and Ft. Myers markets, a review and interpretation of the same interconnection agreements and statutory provisions, and an analysis of the factual and legal relationship of the two entities. It is difficult to conceive of a factually and legally more similar set of claims than those presented to the Commission in this case. Therefore, the Commission should deny the Sprint Motion, and proceed with a consideration of the proper means by which access charges for terminating IXC traffic are to be paid.

Furthermore, both the Sprint Complaint and KMC Counterclaims involve the issues of the proper reciprocal compensation to be applied and paid between the parties. Again, the interpretation of the parties' interconnection agreements, specifically the reciprocal compensation provisions, is at issue and central to both the Complaint and Counterclaims regarding reciprocal compensation.

Finally, for the Commission to engage in fact-finding and determine KMC's rights as to the Sprint Complaint without also determining KMC's rights as raised in the Counterclaim would result in many relevant facts having been established, thus constituting law of the case or *res judicata*. Such a determination, without an opportunity to fully explore and present its allegations regarding Sprint's analogous conduct, would severely and irreparably prejudice KMC's rights to a full and fair determination of the issues.

For the reasons set forth herein, the Commission should deny the Sprint Motion, and proceed with a consideration of the proper means by which access charges for terminating IXC traffic are to be paid by all parties to this proceeding.

C. The KMC Counterclaims were not filed for purposes of harassment and delay

KMC is somewhat at a loss as to how to defend itself from Sprint's gross, personal attack as set forth in Section C of the Sprint Motion. KMC can only assume that Sprint's allegations of malice and wrongdoing are a desperate attempt to deflect the Commission's reasoned consideration of KMC's supported allegations of malfeasance on the part of Sprint and its IXC affiliate in its evasion of access charge payments to KMC. Even a cursory review of KMC's Counterclaims and simultaneously filed Direct Testimony make clear that KMC has alleged precipitous drops in traffic sent to KMC's end users that can only lead one to conclude that Sprint and its IXC affiliate are engaged in a scheme to divert access traffic from toll trunks.

Sprint's complaint as to the specificity of the Counterclaims is more directed to the concept of notice pleading, rather than the substance of the allegations. Under notice pleading principles, pleadings in the nature of a complaint or counterclaim need only contain allegations necessary to place the opposing party on notice of the nature of the claim. There can be no doubt that the KMC Counterclaim provides such notice to Sprint. KMC's Counterclaim placed Sprint on notice that KMC intended to prove that Sprint, its IXC affiliate, or both, were *and are* willfully misdirecting interexchange traffic over its local trunks in at least six specific Florida markets, thereby avoiding access charges called for in the interconnection agreements, under the statute, and in KMC's tariffs, and that Sprint has unlawfully withheld reciprocal compensation payments from KMC. Those allegations were made clearly and in good faith with supporting detail and only after reasonable investigation.

KMC's Counterclaims were made in an effort to resolve the access charge disputes between the parties in a single, efficient proceeding. As a further demonstration that Sprint has been adequately put on notice, many of Sprint's second set of interrogatories and requests for

production of documents go to defending itself against the Counterclaims, rather than further developing Sprint's own claims. See Sprint's Second Set of Interrogatories, Nos. 26, 30, 31 and 35, and Sprint's Second Request for Production of Documents, Nos. 13, 16, 19, 21 and 23. A copy of the discovery request is attached hereto as Exhibit A. Far from "attempts to stonewall and impede the Commission's established procedures for handling disputes," KMC wishes to advance the speedy and efficient resolution of all disputes related to the application of the same interconnection agreements and statutory provisions to the exchange of traffic over local interconnection trunks that the parties allege are subject to access charges. Sprint's vitriol directed at KMC for its efforts to bring Sprint's and, even more pervasively, its IXC affiliate's activities to light may be understandable, but is not warranted. Even more clearly, the Commission should deny the Sprint Motion, and proceed with a consideration of the proper means by which access charges, if any, for terminating the traffic in question are to be paid.

A review of the Sprint Complaint reveals that Sprint, not KMC, "cobbled together unrelated and unreliable purported 'facts' and conclusions to assert ambiguous allegations," (*see* Sprint Motion at p. 9). For example, Sprint asks the Commission to surmise the critical element of intent when it alleges that "[b]ased on the call detail records . . . it is logical to conclude that KMC has made arrangements with various carriers to inappropriately terminate interexchange traffic bound for Sprint end users over its local interexchange trunks with Sprint." Complaint at ¶17. While the Complaint offered no direct evidence of any such "arrangement," Sprint succeeded in placing KMC on notice of the facts it intends to discover and prove, and KMC has proceeded to investigate Sprint's claims and develop its defense (including the discovery that Sprint and its IXC affiliate were engaged in similar if not more egregious and widespread

activity that may adversely affect numerous local carriers, including other ILECs, albeit KMC's Counterclaims are properly limited to the damages caused to itself).

In addition to the foregoing, KMC has filed a Motion for Audit requesting that the Commission conduct an independent audit of Sprint and its IXC affiliate's call routing and access charge practices. An audit is the most accurate and effective means for determining whether IXC traffic was intentionally misrouted through local trunks in an effort to evade the payment of access charges. KMC would not have requested the kind of definitive analysis contemplated by an audit if the KMC Counterclaims were being brought for harassment purposes. In fact, KMC's request for an audit by the Commission would be the opposite action that one would expect if a party were pursuing a claim without a sound basis in fact. Sprint's strenuous and vociferous objection to having an accurate assessment made of its practices likely reveals more about the validity of the KMC Counterclaims than any other element of this case, and demonstrates that Sprint's arguments that KMC's claims are baseless are, themselves, baseless.

For the reasons set forth herein, the Commission should disregard Sprint's allegations that KMC brought its Counterclaims for harassment and delay, and proceed with a review of the claims of each party to this proceeding.

D. KMC's Counterclaim is not defective for its joinder of Sprint's IXC affiliate

Sprint argues that KMC's Counterclaim is defective and should be dismissed because it brings Sprint's sister company, Sprint LP, into the proceeding. As stated by Sprint, both Sprint-Florida and Sprint LP are under the same corporate parent, Sprint Corporation. Moreover, as alleged in the Counterclaims and further explained in KMC's simultaneously filed Direct Testimony, both Sprint-Florida and its Sprint IXC affiliate were involved in routing the traffic over local interconnection trunks in Tallahassee and Ft. Myers. Thus, this is not a situation in

which KMC is seeking have its rights as to a completely unrelated party determined through this proceeding. Rather, as has been exhaustively discussed herein, KMC seeks to have its rights under the same interconnection agreements and statutory provisions, and essentially the same factual scenario as alleged by Sprint in its Complaint. The joinder of Sprint's IXC affiliate is logical both from the standpoint of efficiency of effort for all parties and the Commission, but also from a more practical perspective of allowing any monetary relief awarded for any party's failure to pay access charges for similar acts to be awarded and possibly offset at the same time.

Even assuming *arguendo* the presiding officer was to determine that the relationship between Sprint and its IXC affiliate is that of completely separate entities, the Uniform Rules would allow for the inclusion of the Sprint IXC in this proceeding. Rule 28-106.109, F.A.C. (coincidentally miscited in the Sprint Motion, p. 9) provides that "[i]f it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that the absent person be notified of the proceeding and be given an opportunity to be joined as a party of record." The facts at issue in the KMC Counterclaims against Sprint's IXC affiliate are all but identical to those alleged against Sprint, and as explained earlier in this Response, are substantially similar if not inextricably related to the allegations made by Sprint in its Complaint, as to virtually compel the consideration of KMC's claims against Sprint's IXC affiliate at the same time as the Commission resolves the disputes between Sprint and KMC.

The remainder of Sprint's argument as set forth in its fourth argument is merely a rehash of its argument that the KMC Counterclaims "are not based on facts or law similar (sic.) to the facts and law raised by Sprint-Florida's Complaint against KMC." KMC has addressed the similarity, if not identity, of law and fact in the Sprint Complaint and KMC Counterclaim and,

rather than reiterate them yet again, adopts the argument as set forth previously herein. For the reasons stated herein, the Commission should deny the Sprint Motion, and proceed with a consideration of both parties claims that access charge traffic was diverted from toll trunks and improperly sent over local interconnection trunks.

E. The Commission has jurisdiction to consider the Confidential Settlement and Release Agreement

Sprint argues that the Commission has no jurisdiction to make any determination of the effect of the Confidential Settlement and Release Agreement because that agreement is a contract over which the Commission has no subject matter jurisdiction. However, as established in the KMC Counterclaims, the Agreement entails more than a mere contract dispute. Rather, the Agreement is integral to a complete review and interpretation of the reciprocal compensation provisions of the interconnection agreements. In this case, the Agreement formed the basis for the written amendment of the reciprocal compensation provisions of the applicable MCImetro Access Transmission Services, Inc. interconnection agreement effective April 1, 1999, as adopted by KMC. When KMC opted into the FDN interconnection agreement in July 2003, Sprint refused to recognize the still valid reciprocal compensation provisions of the Agreement.

In this case, Sprint has raised the issue of adjustments to reciprocal compensation amounts paid and not paid by KMC to Sprint. Thus, this Counterclaim provides a reasonable and effective means of resolving, in a single proceeding, any and all adjustments in reciprocal compensation payable to and from each party. Given the Commission's limited hearing schedule, a resolution of this Counterclaim in this instant proceeding will promote judicial efficiency, minimize the cost and expense in litigating the disputes, and ensure consistent treatment of the two complaints.

F. KMC's Counterclaims should not be dismissed for failure to state a cause of action or failure to comply with Rule 28-206.201, F.A.C.

Sprint contends in its Motion that the KMC Counterclaim "fails to allege facts, even in the barest form, that demonstrate that Sprint-Florida or Sprint LP avoided paying access charges rightfully due to KMC." Sprint Motion at p. 14. Even a cursory review of the Counterclaims reveals that KMC has alleged facts that state a cause of action which, if proved, would entitle KMC to relief. This issue is one for which extensive argument is not particularly necessary.

KMC has clearly alleged that Sprint-Florida knowingly misrouted intrastate interexchange traffic over local interconnection trunks in violation of Florida law. KMC Counterclaim ¶¶ 2-12, 20-24. KMC has also alleged that Sprint-Florida's routing of this traffic violated the parties' interconnection agreements, which prohibited interexchange traffic from being sent over local interconnection trunks. *Id.* ¶¶ 2-12, 17-18. KMC has alleged that Sprint's IXC affiliate routed intrastate interexchange traffic destined for KMC end users in a manner so as to avoid the payment of access charges to KMC under KMC's tariff. *Id.* ¶¶ 2-12, 29-30. Finally, KMC alleged that Sprint violated the settlement agreement between them by failing to pay reciprocal compensation for traffic exchanged over local interconnection trunk. *Id.* 13-15, 26-27. Any alleged failure to cite to specific paragraphs and clauses of the tariffs and interconnection agreements are hardly indicative of a failure to state a cause of action. In addition, the Counterclaims state the amount of damages KMC has suffered to date from Sprint's violations. That KMC has adequately stated a cause of action is bolstered by the fact that the factual basis for the KMC Counterclaims, i.e., the alleged misrouting of IXC traffic over local trunks, the relevant interconnection agreements, the violation of the complainant's tariffs, and the application of the law regarding access charges is virtually identical to the allegations in the Sprint Complaint. The principal exception is that the Sprint violations are ongoing, whereas the

KMC activities as alleged by Sprint ended one year ago. Therefore, the Commission should deny the Sprint Motion.

As to the issue of non-compliance with Rule 28-206.201, F.A.C., the simple response is to point out that the rule applies, on its face, to documents filed in order to initiate a proceeding. An Answer, Affirmative Defenses and Counterclaims, by definition, do not serve to initiate a proceeding. Rather, as here, they are filed in an existing proceeding to respond to and counter the allegations of the Petitioner. Therefore, the Motion should be denied on that basis alone.

If the rule is found to apply to the KMC Counterclaims, KMC would note that the procedural elements of the rule in Rule 28-206.201(1)(a)-(c), F.A.C., i.e. the identification of the agency involved, the identification of the parties and the manner in which notice of the action was received, were already on record. In addition, the KMC Counterclaims contain sufficient allegations as to Sprint's conduct in misdirecting interexchange traffic to constitute a statement of all disputed issues of material fact (28-206.201(1)(d), F.A.C.), contain a concise statement of the ultimate facts alleged (28-206.201(1)(e), F.A.C.), identify the applicable rules or statutes (28-206.201(1)(f), F.A.C.), and contains a statement of the relief sought by KMC (28-206.201(1)(g), F.A.C.). Therefore, the KMC Counterclaims were sufficient even when measured by Rule 28-206.201, F.A.C., and the Sprint Motion should therefore be denied.

G. The KMC Counterclaims should not be bifurcated

In its final argument, Sprint suggests that the Commission should bifurcate the Sprint Complaint from the KMC Counterclaims because failure to do so would "prejudice and delay Sprint-Florida's pursuit of its Complaint." Sprint Motion at p. 16. Sprint's argument should be rejected.

Sprint's argument again relies on its assertion that "there is no logical relationship between KMC's counterclaims and Sprint-Florida's Complaint." As set forth *ad nauseum* herein, that assertion is completely without merit. *See, e.g.*, Section B, *supra*. To recap, both party's claims both require an evidentiary analysis of how the traffic in question was routed over local and toll interconnection trunks between the parties, as well as how the traffic was routed before it was delivered to either of the parties, , both concern the same interconnection agreements, both relate to the termination of alleged interexchange traffic (including, in both cases, Sprint's IXC affiliate's traffic) through local interconnection trunks to end users, and both will require legal analysis of the same statutes, regulations and orders to determine when and by whom access charges, if any, must be paid. Therefore, the inextricable relationship between KMC's Counterclaims and Sprint-Florida's Complaint cries out for simultaneous consideration and resolution by the Commission. As argued earlier, the issues are so similar in nature that the Commission's fact-finding in this docket would, without doubt, result in specific findings as to many of the facts underlying the KMC Counterclaims. Such a determination by the Commission, without an opportunity to explore Sprint's analogous conduct, would severely and irreparably prejudice KMC's rights to a full and fair determination of the issues.

In addition to the foregoing, allowing the KMC Counterclaims to proceed in conjunction with the Complaint would allow the issues to be resolved in a single proceeding, rather than in multiple proceedings. Given the Commission's limited hearing schedule, it is necessary to resolve the disputes within the instant proceeding to promote judicial efficiency, minimize the cost and expense in litigating the disputes, and ensure consistent treatment of issues raised by the two claims.

Sprint cites to Rule 28-206.211, F.A.C. as support for its assertion that this case should be bifurcated. That rule provides that [t]he presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of **all** aspects of the case, including bifurcating the proceeding." (e.s.). The rule cited is not a bifurcation rule, rather it is a rule to allow the presiding officer to exercise discretion to ensure that cases are resolved in an efficient manner. The goals of efficiency, as well as those of greater speed, lower expense and overall justice, will be best served by allowing all aspects of this case to be resolved in a single proceeding.

Sprint's suggestion that there are "no efficiencies or economies . . . gained by hearing KMC's claims in the same proceedings" completely ignores reality and, once again, shows Sprint's hope that it can divert or at least delay scrutiny of its malfeasance. There is a complete lack of efficiency in holding two fact-finding hearings to determine the same facts, construe the same documents, and apply the same law when such fact-finding can be accomplished in a single proceeding. The relatively minor delays necessary to allow for additional discovery and for the refiling or amendment of direct testimony regarding the KMC Counterclaims pales in comparison with the effort that must be expended by all parties and the Commission in opening a new docket and proceeding anew on the KMC Counterclaims.


H. Conclusion

Sprint has failed to provide any reasonable basis for not allowing the KMC Counterclaims to proceed in this docket. The overriding theme of Sprint's Motion is that there is no factual or legal similarity between the Sprint Complaint and the KMC Counterclaim. That assertion is completely and absolutely false. As set forth in the KMC Counterclaims and this Response, those factual and legal issues could hardly be more related. Both claims require

Commission fact-finding as to how calls the parties allege are interexchange traffic subject to access charges are routed over local and toll interconnection trunks between the parties networks, both concern how traffic is routed prior to reaching either party's network, including traffic from the same carriers (such as Sprint's IXC affiliate), both concern the same interconnection agreements, both relate to the termination of alleged interexchange traffic through local interconnection trunks to end users, and both will require legal analysis of the same statutes, regulations and orders to determine when and by whom access charges, if any, must be paid. Given those similarities there is no reason why the issues cannot, and should not, be tried simultaneously. It would be a false economy indeed to require these cases to proceed along separate tracks, with separate discovery, separate testimony, separate expenditures of time and effort on the part of Sprint, KMC, and the Commission staff, and separate hearings to determine indistinguishable matters.

WHEREFORE for the reasons set forth herein, KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC respectfully request that the Commission's presiding officer enter an order denying Sprint'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, allow consideration of the Answer and Affirmative Defenses by the Commission, and allow the Counterclaim to be tried in this proceeding.

Respectfully submitted,



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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.)
_____)

**SPRINT FLORIDA, INCORPORATED'S SECOND SET OF
INTERROGATORIES AND SECOND REQUEST FOR PRODUCTION OF
DOCUMENTS TO KMC TELECOM III LLC, KMC TELECOM V, INC. AND
KMC DATA LLC**

Pursuant to Rules 1.280, 1.340, and 1.350 Florida Rules of Civil Procedure, Sprint-Florida, Incorporated ("Sprint-Florida"), by and through its undersigned counsel, hereby serves its Second Set of Interrogatories and Second Request for Production of Documents to KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC (collectively, "KMC"). The Interrogatories are to be answered under oath by officers or agents of KMC who are qualified to answer and who shall be fully identified. Sprint expects the required affidavits to be provided simultaneously with KMC's Responses to the Interrogatories. Pursuant to the Order on Procedure, PSC-05-0125-PCO-TP, responses to these Interrogatories and PODs must be provided to Sprint within 20 days of service, that is, on March 24, 2005.

DEFINITIONS

"Act" refers to the Communications Act of 1934, as amended (including, without limitation, as amended by the Telecommunications Act of 1996).

EXHIBIT "A"

"And" and "or" shall be construed both conjunctively and disjunctively, and each shall include the other whenever such construction will serve to bring within the scope of these interrogatories anything that would not otherwise be brought within their scope.

"CLEC" means a local exchange carrier that is not an ILEC.

"Communication" includes, without limitation of its generality, correspondence, statements, agreements, contracts, discussions, conversation, speeches, meetings, remarks, questions, answers, panel discussions and symposia, whether written or oral. The term includes, without limitation of its generality, both communications and statements which are face-to-face and those which are transmitted by documents or by media such as e-mail, intercoms, telephones, television or radio, data systems, and electronic reproductions and delivery systems.

"Concerning" shall mean comprising, describing, evidencing, referring to, responding to, quoting, or pertaining in any way to any part of a specified subject matter and/or to the contents or subject matter of any document including the specified subject matter.

"Document" or "documentation" means any medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memorandum (including any memorandum or report of a meeting or conversation), invoice, bill, order, form, receipt, financial statement, accounting entry, diary, calendar, telex, telegram, e-mail, facsimile ("fax"), cable, report, recording, contract, agreement, study, handwritten note, drawing, sketch, graph, index, list, tape, photograph, microfilm, data sheet or data processing tape, disk, file stored on computer, or any other written, recorded, transcribed, punched tape, filmed or graphic matter, however produced or

reproduced, which is in your possession, custody, control or otherwise accessible to you or which was, but is no longer, in your possession, custody or control.

Each of the words "each," "any" and "all" means each, any, and all.

"Employee(s)" means those persons in the direct employment of either Sprint or KMC, past and present.

"Enhanced Services" means services offered over common carrier transmission facilities used in interstate communications which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additions, different, or restructure information; or involve subscriber interactions with stored information. (47 C.F.R. 64.702(a)).

"FCC" refers to the Federal Communications Commission.

"FPSC" or "Commission" refers to the Florida Public Service Commission.

"Identification" or "identify" when used in reference to: (i) a document other than a contract or agreement, means to state: (1) its date; (2) its author; (3) the type of document; (4) its title; (5) its present location; (6) the name of each of its present custodians; (ii) a contract or agreement, means: (1) state the date of its making; (2) identify the parties thereto; (3) state whether the contract is oral or in writing; (4) state fully and precisely and separately all of the terms of said contract; (iii) a person other than an individual, means to state: (1) its full name; (2) its nature of organization, including the name of the state or country under the laws of which it was organized; (3) the address of its principal place of business; and (4) its principal line of business; (iv) a communication, requires you, if any part of the communications was written, to identify the document or

documents which refer to or evidence the communication, and to the extent that the communication was not written, to identify the persons participating in the communication and to state the date, manner, place, and substance of the communication.

“ILEC” means an incumbent local exchange carrier as defined in 47 U.S.C., Section 251 (h).

“Person” and “persons” include individuals, firms, partnerships, associations, joint ventures, corporations, government entities, or other groups, however organized.

“Possession, custody or control” includes actual and constructive possession. Any document which is not in your immediate physical possession, but to which you have or had a right to compel or secure production from a third person or which is otherwise subject to your control, shall be obtained and produced as directed.

“PRI circuit” or “primary rate interface circuit” means a circuit that provides a method of access to the telephone network and provides integration of multiple voice and data transmission channels on the same line.

“Relate to” means concern, consist of, refer to, pertain to, reflect, evidence, or to be in any way logically or factually connected with the matter discussed.

“Representative(s)” means those persons, past and present not in the direct employment of either Sprint or KMC, including outside counsel, who represent or represented the interests of Sprint or KMC in matters related to this proceeding.

“Sprint-Florida” refers to Sprint-Florida, Incorporated, which holds FPSC ILEC Certificate No. 22

“Sprint IXC” refers to Sprint Communications Company Limited Partnership, which holds FPSC IXC Certificate No. 83.

“Telecommunications service,” and “service” are used herein to have the same definitions contained in the federal and state statutes, rules and regulations.

“You,” “your” or “KMC” refers to KMC Telecom III LLC, KMC Telecom V, Inc. or KMC Data LLC and any parent or subsidiary corporations, DBAs, FKAs, and the employees, agents, representatives, or consultants of KMC Telecom III LLC, KMC Telecom V, Inc. or KMC Data LLC or any parent or subsidiary corporations.

“Voice Over Internet Protocol” or “VoIP” means real-time, multidirectional voice communication that uses internet protocol.

INSTRUCTIONS FOR INTERROGATORIES

These Interrogatories are to be answered with reference to all information in your possession, custody or control or reasonably available to you. When the information requested by an Interrogatory varies over time, state the response for each period of time as to which the response differs, and identify the time periods. If you cannot answer an Interrogatory in full after exercising due diligence to secure all the information requested, or do not have precise information with regard to any part of any Interrogatory, you should so state in your response, describing in full your effort to obtain the information requested, and then proceed to respond to the fullest extent possible. If you object to any part of any Interrogatory, answer all parts of the Interrogatory to which you do not object, and as to each part to which you do object, separately set forth the specific basis for the objection.

These Interrogatories are continuing in nature to the extent required or permitted by the Florida Rules of Civil Procedure and the Commission’s Rules and Regulations (collectively, “the Rules”). In the event you obtain additional information with respect to

any request after it has been answered and for which supplementation is called for by the Rules, you are required to supplement your response promptly following receipt of such additional information, giving the additional information to the same extent as originally requested. If you are unwilling to supplement your responses, please state the basis for your refusal to supplement.

If any response required by way of answer to these Interrogatories is considered to contain confidential or protected information, please furnish this information subject to an appropriate protective agreement.

In the event you assert that any information requested herein is privileged, you should identify any such information and any supporting documents in your written response, by date, and provide a general description of its content. You also should identify all persons who participated in the preparation of the document and all persons, inside or outside of KMC, who received a copy, read or examined any such document. In addition, you should describe, with particularity, the grounds upon which privilege is claimed.

In the event that you assert that any requested information is not available in the form requested, in your written response thereto, you should disclose the following:

- a. The form in which the requested information currently exists (identifying documents by title or description);
- b. The earliest dates, time period, and location that representatives of Sprint may inspect your files, records or documents in which the information currently exists.

For each Interrogatory answered, provide the name of the person or persons answering, the title of such person(s), and the name of the witness or witnesses who will be prepared to testify concerning the matters contained in each response. If you do not

intend to call or present a witness who is prepared to testify concerning the matters contained in any response, please so state.

INSTRUCTIONS FOR PODS

This Request for Production of Documents is to be answered with reference to all information in your possession, custody or control or reasonably available to you. When the information requested by a request varies over time, state the response for each period of time as to which the response differs, and identify the time periods. If you cannot answer a request in full after exercising due diligence to secure all the information requested, or do not have precise information with regard to any part of a request, you should so state in your response, describing in full your efforts to obtain the information requested, and then proceed to respond to the fullest extent possible. If you object to any part of a request, answer all parts of the request to which you do not object, and as to each part to which you do object, separately set forth the specific basis for the objection.

This Request for Production of Documents is continuing in nature to the extent required or permitted by the Florida Rules of Civil Procedure and the Commission's Rules and Regulations (collectively, "the Rules"). In the event you obtain additional information with respect to any request after it has been answered and for which supplementation is called for by the Rules, you are required to supplement your response promptly following receipt of such additional information, giving the additional information to the same extent as originally requested. If you are unwilling to supplement your responses, please state the basis for your refusal to supplement.

If any response required by way of answer to this Request for Production of Documents is considered to contain confidential or protected information, please furnish this information subject to the Protective Agreement entered into for this proceeding.

In the event you assert that any requested information is not available in the form requested, in your written response thereto, you should disclose the following:

- a. The form in which the requested information currently exists (identifying documents by title or description); and
- b. The earliest dates, time period, and location that representatives of Sprint may inspect your files, records or documents in which the information currently exists.

INTERROGATORIES

23. In his direct testimony on page 10, lines 8-23 and page 11, lines 1-9, Mr. Pasonski states that the service KMC provides to Company X is no different from the PRI service KMC provides to its other customers.

- (a) How many customers does KMC currently have who order PRI service in Sprint-Florida's Tallahassee service area? Please list all of the customers by name, the number of PRIs KMC provides to each, and the telephone number assigned to each of those PRIs by customer.
- (b) How many customers does KMC currently have who order PRI service in Sprint-Florida's Ft. Myers service area? Please list all of the customers by name, the number of PRIs KMC provides to each, and the telephone number assigned to each of those PRIs by customer.

- (c) Does KMC have any PRI customers located outside Sprint-Florida's Tallahassee service area that KMC serves from its facilities located in Sprint-Florida's Tallahassee service area? If so, please identify the customers by name and provide the number of PRIs KMC provides to each customer.
- (d) Does KMC have any PRI customer located outside Sprint-Florida's Ft. Myers service area that KMC services from its facilities located in Sprint-Florida's Ft. Myers service area? If so, please identify the customers by name and provide the number of PRIs KMC provides to each customer.

RESPONSE:

24. Did KMC terminate any traffic to Company X over the PRIs described in Mr. Pasonski's testimony on page 9, lines 11-23? If so, please quantify the number of minutes of use per month KMC terminated to Company X from July 2002 through May 2004.

RESPONSE:

25. In Exhibit TEP-1 to Mr. Pasonski's direct testimony on page 1, lines 1-13, there are numbers that are designated as the number of access lines in service for KMC in Tallahassee and Ft. Myers.

- (a) How many customers are associated with the access lines identified above for each of the years depicted on Exhibit TEP-1 page 1, lines 1-13 for both Tallahassee and Ft. Myers?
- (b) Of the customers identified in (a), how many are internet service providers?
- (c) How many of the access lines identified above terminate to internet service providers?
- (d) How many of the access lines described above terminate voice mail type answering services where the voice mail equipment is located and/or contained within KMC's systems or premises?

RESPONSE:

26. On page 14, line 2 of his direct testimony, Mr. Pasonski states that KMC "physically located SS7 monitoring equipment in the KMC Tallahassee Central Office and recorded one (1) month of SS7 activity on these and other trunks."

- a. Please identify the specific month and year in which KMC recorded the SS7 activity as referred to in Mr. Pasonski's testimony.
- b. Please identify the specific trunks for which this activity was recorded as referred to in Mr. Pasonski's testimony.

RESPONSE:

27. (a) Please state the full legal name, date of incorporation or organization and state of incorporation or organization for the following:

KMC Telecom III, LLC

KMC Telecom V, Inc.

KMC Data, LLC

(b) Please describe the organizational history for each of the entities identified in (a), including any changes in ownership, name, or affiliation.

RESPONSE:

28. Please describe the corporate structure for each of the entities identified in Interrogatory No. 27, including all direct or indirect parent and/or holding companies and all affiliated entities.

RESPONSE:

29. (a) Please identify any Access Customer Number Abbreviations (ACNAs) for each of the following entities:

- a. KMC Telecom III, LLC
 - b. KMC Telecom V, Inc.
 - c. KMC Data LLC
- (b) Please identify any Operating Customer Numbers (OCNs) for each of the entities identified in (a).

RESPONSE:

30. When did KMC first communicate to Sprint that KMC believed that Sprint-Florida was sending traffic to KMC in Florida that was subject to access charges, as alleged in the direct testimony of Ms. Johnson on page 24, lines 4-7 and the direct testimony of Mr. Pasonski on page 13, lines 3-6? Please describe in detail any such communications and identify any documents that KMC sent to Sprint-Florida or Sprint IXC relating to such communications, including, without limitation, notices, letters, or bills identifying the traffic that KMC believes was subject to access charges and the amount of compensation due.

RESPONSE:

31. (a) Please identify by name the other IXC Ms. Johnson states on page 13, lines 14-16 of her direct testimony was identified by KMC as being associated with Customer X's traffic.

(e) Please identify the traffic that KMC describes in Ms. Johnson's direct testimony on page 13, line 13 as "the traffic in question." Please describe in detail how KMC determined that Sprint IXC and the other IXC referred to in Ms. Johnson's testimony on page 13, lines 14-16 were "associated with some of portion of the traffic in question."

RESPONSE:

32. In her direct testimony beginning on page 13, line 23 through page 14, 9, Ms. Johnson describes the PRI services that KMC provides to its customers.

- (a) Do any of the customers to whom KMC provides PRI service use this service in conjunction with a PBX, as described by Ms. Brown on page 14, lines 2 and 3 of her direct testimony? If so, please identify those customers.
- (b) How many enhanced services providers does KMC provide PRIs to in Sprint-Florida's service territory? Please identify these "enhanced service providers" (other than Customer X), provide the number of PRIs purchased from KMC by each of these customers, and describe the network arrangements that KMC has implemented to provide this PRI service.

RESPONSE:

33. Please explain how an enhanced service provider would typically use the two-way PRIs it purchases from KMC.

RESPONSE:

34. In Ms. Johnson's direct testimony on page 21, lines 16-18, she states that KMC "provides services on a wholesale basis, to enable enhanced service providers the ability to originate and terminate their services, including VoIP."

- (a) Please describe in detail the wholesale services that KMC provides to any enhanced service providers.
- (b) Please identify any enhanced service providers to whom KMC provides wholesale services as referenced in Ms. Johnson's direct testimony in Sprint-Florida's service territory.
- (c) Please identify any documents in KMC's possession in which an enhanced service provider has represented or warranted that the enhanced VoIP service that they are utilizing KMC's services to provide meets the definition set forth in Ms. Johnson's testimony on beginning on page 21 line 22 through page 22, line 13.

RESPONSE:

35. Please identify the Sprint entity KMC Ms. Johnson is referring to in her direct testimony on page 23, line 9 when she states that KMC looked at all of the traffic Sprint was sending KMC in Florida.

RESPONSE:

36. (a) Please identify all of the local interconnection trunks which involve the Sprint tandem at one end referred to by Ms. Johnson in her direct testimony on page 23, lines 10 & 11.

(b) Please identify all of the access trunks KMC has with IXCs which involve the Sprint local tandem at one end referred to Ms. Johnson in her direct testimony on page 23, lines 12 & 13.

RESPONSE:

37. Please explain what "balance transfer/parent" means as it appears in Exhibit MBJ-3, attached to the direct testimony of Ms. Johnson.

RESPONSE:

38. (a) Please identify all of the carriers, e.g., IXC, CLEC, CMRS, or other, which directly connect with KMC other than Sprint and Customer X. How many if these

carriers connect using PRI circuits? Please identify the carriers that connect with KMC.

(b) Please describe the interconnection trunks used by the carriers who directly connect with KMC using other than PRI circuits.

RESPONSE:

REQUEST FOR PRODUCTION OF DOCUMENTS

12. Please produce the bills rendered to Customer X by KMC from July 2002 through May 2004 for the PRIs discussed by Mr. Pasonski in his direct testimony on page 9, lines 11-14.
13. Please produce the Local Trunk Traffic Study discussed by Mr. Pasonski in his direct testimony on page 14, lines 7.
14. Please produce the traffic studies discussed on page two of the letter to Customer X attached as Exhibit MJB-1.
15. Please produce the trend analysis referenced in Mr. Pasonski's testimony on page 16, lines 6 & 7.
16. Please produce the terminating access usage records identified in Mr. Pasonski's testimony on page 15, lines 8 & 9.
17. Please produce any documents reflecting the minutes of use cap on Customer X's PRIs as stated in Mr. Pasonski's testimony on page 8, lines 2-4.
18. Please produce the service agreements KMC has with each of the customers, identified by KMC in Interrogatory No. 1.
19. Please produce the SS7 records discussed in Mr. Pasonski's direct testimony on p. 14, lines 2 & 3.
20. Please produce a copy of the notices the KMC sent to Sprint on December 7, 2001, referred to in the direct testimony of Ms. Johnson on page 7, lines 3-7.
21. Produce all documents identified in Interrogatory 30, as well as any internal communications relating to KMC's belief that Sprint-Florida was sending traffic to KMC that was subject to access charges.
22. Please produce any Master Service Agreement KMC entered into with any customers in Tallahassee or Ft. Myers to whom KMC provided PRI service from July 2002 through May 2004.
23. Please produce any records relating to KMC's evaluation of all the traffic Sprint's IXC terminated to KMC in the Tallahassee and Ft. Myers markets, as discussed in Ms. Johnson's direct testimony on page 23 lines 20 & 21.

Respectfully submitted this 4th day of March 2005.



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ATTORNEY FOR SPRINT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by hand delivery (*), electronic mail and/or U.S. Mail this 25th day of March, 2005.

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