

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated.

DOCKET NO. 041144-TP
ORDER NO. PSC-05-0558-PCO-TP
ISSUED: May 20, 2005

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER RESOLVING PROCEDURAL MOTIONS

BY THE COMMISSION:

Case Background

On September 24, 2004, Sprint-Florida, Incorporated (Sprint) filed its complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively KMC) for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs, and for alleged violation of Section 364.16(3)(a), F.S.

On October 15, 2004, KMC filed a motion to dismiss, and on October 21, 2004, Sprint filed its response to KMC's motion to dismiss. On December 3, 2004, Order No. PSC-04-1204-FOF-TP was issued denying KMC's motion to dismiss. On January 19, 2005, the parties met to identify issues to be resolved in this proceeding. On January 30, 2005, the Order Establishing Procedure, Order No. PSC-05-0125-PCO-TP, was issued.

On February 28, 2005, KMC filed its Answer, Affirmative Defenses and Counterclaims, and on March 4, 2005, KMC filed its Motion for Audit. On March 18, 2005, Sprint filed its response to KMC's Motion for Audit and simultaneously, filed a 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. On March 25, 2005, KMC filed its response. This Order addresses the various pending motions. At our May 17, 2005, Agenda Conference, we granted KMC's request and received oral argument on the Motions herein addressed.

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PSC COMMUNICATIONS

This Commission has jurisdiction over this matter pursuant to Sections 364.16(3)(b) and 364.162(1), Florida Statutes.

Sprint's Motion to Strike KMC's Answer, Affirmative Defenses, and Counterclaim and Motion to Dismiss the Counterclaims or, in the alternative, Motion to Bifurcate the Counterclaim

Sprint has asked for various alternative, and ostensibly distinct, forms of relief through the umbrella of this motion. KMC responded in kind. The arguments are, however, somewhat intertwined. Thus, while the arguments of the parties are presented separately according to the relief requested, our Order sets forth a single, unified analysis and determination addressing Sprint's Motion in its entirety.

I. Arguments

A. Motion to Strike

1. Sprint

Sprint argues that KMC's Answer, Affirmative Defenses and Counterclaim should be stricken, because those pleadings are improper, untimely, and are not authorized by the Order Establishing Procedure issued January 30, 2005, Order No. PSC-05-0125-PCO-TP. Citing Rule 28-106.203, Florida Administrative Code, Sprint acknowledges that it is not mandatory for a Respondent or party to file an "answer" to a complaint or petition filed with this Commission.¹ However, Sprint argues that if a response is filed, we have generally recognized the 20-day time-frame followed in civil practice and set forth in Rule 1.140, Florida Rules of Civil Procedure. In this case, Sprint notes that KMC exercised its rights under Rule 28-106.204, Florida Administrative Code, to respond first with a Motion to Dismiss 20 days after the Complaint was filed, a motion that was ultimately denied by this Commission. Sprint contends that while the filing of that Motion to Dismiss tolled the time for filing KMC's answer, once the Motion was resolved, KMC should have had only 10 days to file its Answer to Sprint's Complaint, at least under civil rules of practice. Sprint notes that, arguably, KMC's answer was due in as little as 5 days from the Order Denying the Motion to Dismiss, because that would be the remaining time left on the original response period (20 days, plus 5 days service by mail), and that under the broadest interpretation of the applicable rules, KMC would have had only 25 days to file its answer. Sprint emphasizes, however, that KMC did not file its Answer until a full 85 days after the Order Denying the Motion to Dismiss was issued², subsequent to the Issue Identification meeting, the procedural order, and the filing of direct testimony.

Sprint contends that KMC's late filing of its Answer, Affirmative Defenses, and Counterclaim severely prejudices Sprint at this point in the proceeding, because direct testimony has already been filed in the case. As such, Sprint did not have an opportunity to address any of the factual issues or affirmative defenses KMC raised in its pleadings. Specifically, Sprint argues that while it is still exploring through discovery issues raised in KMC's Counterclaim,

¹ Rule 28-106.203, F.A.C. states a "respondent may file an answer to the petition."

² See Docket 041144-TP, Order No. PSC-04-1204-FOF-TP, issued December 3, 2004.

KMC actually addressed those issues in its pre-filed direct testimony, which was filed on the same date as KMC's Answer.

Sprint further asserts that if KMC is allowed to go forward with its untimely filed Counterclaim, a significant delay will result in the procedural schedule set forth in the Order Establishing Procedure. Sprint believes that, "KMC's motivation for waiting so long to file its pleading is solely KMC's desire to delay the proceeding."

Sprint notes that KMC relies upon a situation that arose in Docket No. 031125-TP, in which BellSouth was allowed to file a Counterclaim late in the proceeding as support for KMC's filing in this case. Sprint emphasizes that in that case, BellSouth had alleged that it had been unable to file the Counterclaim earlier because it had been unable to obtain the information necessary to support its claims. Sprint notes that KMC has made no such allegation to support its filing in this matter, and in that case, we specifically found that allowing the late-filed Counterclaim would not unnecessarily delay the case or prejudice the opposing party. Sprint contends that the situation in this case is significantly different and merits a different conclusion.

Sprint claims that granting its Motion to Strike KMC's Counterclaim would not prevent KMC from bringing forth those allegations at a later date in a separate proceeding. Sprint notes that while not directly applicable, the Rules of Civil Procedure applicable to counterclaims may be helpful to us in addressing this question. Sprint contends that under the Rules of Civil Procedure, KMC's Counterclaim would be considered "permissive" and not "compulsory," meaning the claims may be considered together, but are not required to be considered together. Generally, Sprint notes, this Commission has relied on Rule 28-106.108, Florida Administrative Code, in considering whether to consolidate separate matters. That rule provides that separate matters may be consolidated if no party will be unduly prejudiced by such consolidation.³ Sprint contends, in this instance, case law should be persuasive in deciding if KMC's Counterclaim should be retained for consideration in this case. In particular, Sprint cites *Londono v. Turkey Creek*, 609 So. 2d 14 (Fla. 1992), wherein the Court adopted the "logical relationship" test to determine if a counterclaim is compulsory or not. Sprint asserts that the "logical relationship" test consists of a court or administrative body making a finding of fact determining whether a counterclaim arose from the same transaction or factual circumstances upon which the initial complaint is based. Sprint alleges that KMC's Counterclaim and the issues it raises pertain to, for the most part, Sprint Communications Company Limited Partnership (Sprint LP), which is a separate subsidiary owned by Sprint's corporate parent, Sprint Corporation, and the traffic at issue in the Counterclaim was largely terminated outside of Sprint-Florida's local service territory. Thus, Sprint argues the issues in the Counterclaim do not need to be addressed in this proceeding, and can (and should) proceed separately.

Finally, Sprint argues that KMC's pleadings should be stricken because KMC filed its Answer and Counterclaim solely for the purposes of harassment and delay because KMC's claims are not reasonably related to Sprint's Complaint. Sprint claims KMC had knowledge

³ Rule 28-106.108, F.A.C. "if there are separate matters which involve similar issues of law or fact, or identical parties, the matter may be consolidated if it appears that consolidation would promote the just, speedy...and would not unduly prejudice the rights of a party."

long before the actual filing of its pleading that it intended to file an answer and counterclaim in this case. Sprint references page 10 of the November 30, 2004, Agenda Conference Transcript, wherein counsel for KMC indicated an intent to file an answer and counterclaim in the case. Sprint also made note of the fact that at the January 19, 2005, issues identification meeting, KMC indicated again the possibility of filing a counterclaim. Aside from the fact KMC's Counterclaim was filed more than a month after the Issue ID meeting, Sprint argues that it cannot adequately ascertain any factual or legal basis for the allegations raised in the Counterclaim. Sprint maintains that KMC's Counterclaim consists mainly of allegations against Sprint LP. Sprint indicates KMC has drawn conclusions based on facts that KMC knows to be unreliable and unrelated to Sprint's Complaint. In order to connect Sprint-Florida to its claims, Sprint argues KMC is falsely alleging that a direct relationship exists between Sprint-Florida, Incorporated and Sprint LP, which is an entity wholly separate from Sprint-Florida, and is attempting to invoke a logical nexus for its Counterclaim based on unreliable and unrelated facts and conclusions.

2. KMC

Citing Rule 28-106.203, Florida Administrative Code, KMC argues that there is no defined limitation on the time in which an Answer and Counterclaim can be filed. KMC further asserts that there is no other applicable rule restricting KMC's ability to file an Answer, and emphasizes that we have, in cases such as Docket No. 031125-TP, allowed other companies to file counterclaims well after the 20 days that Sprint argues is applicable.

KMC also argues that it does, in fact, have a reason for its delay. KMC contends that, similar to BellSouth's situation in Docket No. 031125-TP, it only discovered the Sprint L.P.'s evasion of access charges through its own investigation of the allegations raised in Sprint-Florida's complaint. KMC adds that there was no other motivation for it to investigate Sprint call routing and billing records other than to defend against Sprint-Florida's complaint.

KMC contends that Sprint's Motion discounts the complexity of this issue and the inter-relation of the questions presented. Furthermore, KMC argues that Sprint is simply attempting to avoid scrutiny of its own behavior in seeking to have KMC's Counterclaim removed from consideration in this proceeding.

In conclusion, KMC argues that it filed its Counterclaim in as timely a manner as possible given the circumstances, that the issues raised therein are directly and integrally related to the issues in Sprint's complaint against KMC, and that retaining the Counterclaim issues in this case will not unduly prejudice Sprint.

B. Motion to Dismiss Counterclaim

1. Sprint

Sprint argues first that the Counterclaim should be dismissed, because the allegations therein are against Sprint LP, a long distance subsidiary of Sprint Corporation, Sprint-Florida's parent company. Sprint-Florida emphasizes that Sprint LP and Sprint-Florida are entirely

separate entities that operate independently, offer different services in Florida, under different regulatory structures. Thus, Sprint argues that under Rule 1.170 of the Florida Rules of Civil Procedure and Smith v. Whispering Pine Village, 656 So.2d 623 (Fla. 5th DCA 1995), the Counterclaim should be dismissed, because it is directed to a nonparty, rather than the *opposing* party.

Furthermore, Sprint argues that the allegations in the counterclaim do not arise out of the same transactions or even the same legal requirements that gave rise to Sprint's complaint against KMC. Sprint emphasizes that it is seeking relief against KMC for violation of the provisions of Section 364.16(3), Florida Statutes, which is inapplicable to IXCs, such as Sprint LP. Sprint also notes that KMC does not have an interconnection agreement with Sprint LP as it does with Sprint-Florida, Incorporated. Thus, Sprint argues that the bases for the allegations in the Complaint and the Counterclaim are entirely different. Sprint adds that KMC's allegations against Sprint LP involve termination of traffic outside Sprint-Florida's service area which, by implication, could involve other CLECs or ILECs, who are not currently parties in this case.

In addition, Sprint argues that KMC's Counterclaims or a portion of the Counterclaims, should be dismissed for lack of subject matter jurisdiction as it relates to the allegation in Count III of the Counterclaims. Count III alleges Sprint violated a Confidential Settlement and Release Agreement executed by the parties in resolution of various reciprocal compensation disputes in various states. Sprint asserts this Commission has recognized it has no general authority to enforce contracts aside from interconnection agreements and amendments to those agreements.⁴ Since KMC does not argue in its Counterclaim that Sprint violated any provision of any interconnection agreement or amendment thereto, which was filed and approved by the Commission, Sprint argues we lack subject matter jurisdiction to resolve any violation KMC alleges under the contractual Confidential Settlement and Release Agreement executed between the parties.

Finally, Sprint argues that KMC's Counterclaim should be dismissed because it fails to state a cause of action and fails to comply with Rule 28-206.201, F.A.C.⁵ Sprint argues that KMC has failed to identify any provision in any interconnection agreement that has been violated by Sprint-Florida or Sprint LP, or to identify any statute or rule that has been violated. Sprint also contends that KMC's allegations are based entirely on speculation. Sprint argues KMC has not only failed to identify a specific entity that may be responsible for the alleged unlawful traffic termination, KMC does not provide any information on such traffic relating to timeframe, specific location, or specific traffic to support its claim.

2. KMC

KMC maintains that Sprint's Motion to Dismiss KMC's Counterclaim should be denied, contending that its Counterclaim is not defective for its joinder of Sprint's IXC affiliate, Sprint LP. KMC claims that Sprint LP is subject to Section 364.16(3)(a) by virtue of the fact that Sprint-Florida and Sprint LP share the same corporate parent, Sprint Corporation. Also, KMC

⁴ Sprint references Docket 031125-TP, Order No. PSC-04-0423-FOF-TP, issued April 6, 2004.

⁵ Rule 28-206.201, F.A.C. set forth requirements for "Initiation of Proceeding" before an Agency.

argues that the fact that Sprint and Sprint LP both hold certificates of public convenience and necessity with the Commission, bearing identical addresses and websites, should be considered compelling for purposes of maintaining KMC's Counterclaims. KMC further asserts that both Sprint-Florida and Sprint LP were involved in routing converted toll traffic over local interconnection trunks in Tallahassee and Fort Myers without paying KMC appropriate access charges. Finally, KMC alleges it is appropriate to join Sprint LP under Rule 28-106.109, F.A.C., because a determination of KMC's rights in this proceeding is intertwined with determining what role Sprint LP played with Sprint in routing toll traffic.⁶

KMC claims that its Counterclaim asserts factual and legal issues similar to those raised in Sprint's Complaint. KMC states 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 similar and possibly indistinguishable between Sprint's Complaint and KMC's Counterclaims. Additionally, KMC argues that its claims arise from the same transaction or factual circumstances upon which Sprint's Complaint is based.

KMC emphasizes that this Commission does have jurisdiction to consider whether a breach occurred under the Confidential Settlement and Release Agreement executed between KMC and Sprint. KMC claims the Agreement is "integral to a complete review and interpretation of the reciprocal compensation provisions of the interconnection agreements" because it forms the basis of one of the interconnection agreements KMC adopted.

KMC also argues that its Counterclaims do state a cause of action and comply with Rule 28-206.201, F.A.C. KMC contends the Counterclaims clearly allege that Sprint-Florida knowingly misrouted intrastate interexchange traffic over local interconnection trunks in violation of Florida law as well as the parties' interconnection and settlement agreements. KMC claims Rule 28-206.201, F.A.C., only applies to documents filed to initiate a proceeding. KMC states an Answer, Affirmative Defenses and Counterclaims, by definition, do not "initiate a proceeding."

Finally, KMC adds that "inclusion of its Counterclaim issues may necessitate a delay, but any such delay does not rise to the level of "prejudice" to Sprint."

C. Motion to Bifurcate

1. Sprint

In the alternative, Sprint requests that KMC's Counterclaims be bifurcated if this Commission does not grant Sprint's Motion to Dismiss. Sprint cites Rule 1.270 of the Florida Rules of Civil Procedures and Rule 28-106.211, F.A.C., as authority for bifurcation in an administrative proceeding if doing so would promote fairness, and avoid prejudice and delay. Sprint argues that to allow KMC's Counterclaims, which are untimely, poorly pled, and unrelated to Sprint's Complaint, would prejudice Sprint and delay resolution to its Complaint.

⁶ Rule 28-106.109, F.A.C. provides for "notice to interest parties."

2. KMC

KMC reiterates its argument that similarity of law, fact and identical parties exist between the parties' claims. Therefore, KMC contends that "simultaneous consideration and resolution" should be undertaken by the Commission based on both KMC's Counterclaim and Sprint's Complaint.

II. Analysis and Decision

At the outset, we acknowledge that there is no definitive provision establishing the time for filing an Answer to a Petition in our proceedings, and that the time for filing an Answer was not otherwise established for this proceeding in an Order. As such, KMC's filing, while notably late in the proceeding, is not in direct violation of any rule or Order of this Commission. While Sprint states that we have acknowledged the 20-day response period applicable in civil proceedings, that time period is simply not an enforceable rule of this Commission.⁷ Thus, the Motion to Strike shall not be granted based solely on the fact that the Answer was filed more than 20 days after the Complaint, or more than 10 days after the Order on the Motion to Dismiss.

It is, however, fully within our authority to strike a pleading that is unduly prejudicial, has been filed simply for purposes of harassment and delay, or is otherwise a sham pleading. See Section 120.569(2)(e) and (g), Florida Statutes; Rules 28-106.211 and 28-106.108, Florida Administrative Code; and Rules 1.140(f) and 1.150(a), Florida Rules of Civil Procedure. At the outset, we find KMC's Answer, Affirmative Defenses, and Counterclaim does not constitute a "sham" pleading, nor does it appear to have been filed solely for purposes of harassment or delay. Again, while filed notably late in the proceeding, KMC's assertions that it was unable to file earlier, because it only recently discovered the situation, are plausible and not dissimilar from the situation in which BellSouth was allowed to file a late counterclaim in Docket No. 031125-TP.

We then consider: (1) the impacts on the case schedule; (2) the alleged undue prejudice imposed upon Sprint and its ability to prepare its case; (3) whether the issues are, in fact, integrally related; and (3) the administrative efficiencies associated with either striking the Answer, Affirmative Defenses, and Counterclaim or consolidating the issues in this proceeding. It is within our discretion to strike any portion of KMC's pleading or all of the pleading. Thus, for instance, we could strike the Counterclaims, but allow the Answer and Affirmative Defenses to be retained, which is the course of action we take in this instance.

There would certainly be administrative efficiencies associated with retaining KMC's Counterclaims in this proceeding. However, this case is significantly advanced in the schedule. The complaint in this matter was filed September 24, 2004. The hearing in this matter is currently scheduled for July 12, 2005.⁸ The Direct Testimony date was February 28, 2005, and the Rebuttal Testimony due date was set for May 10, 2005. Although supplemental testimony

⁷ To the contrary, in 1998, we sought a waiver from the Uniform Rules to retain Rule 25-22.037(1), F.A.C., which provided a time frame for filing Answers, and that request was denied.

⁸ Originally, this matter was set for hearing on May 18, 2005, but due to initial concerns raised and subsequent motions filed regarding KMC's Answer, Affirmative Defenses, and Counterclaim, the hearing was postponed.

could possibly be included to remedy some of the concerns raised, we are nevertheless concerned that the timing could preclude any meaningful discovery on that supplemental testimony.

Of even greater concern is the fact that the allegations raised by KMC in its Complaint, while pertinent to a sister company of Sprint-Florida, are not directly related to Sprint-Florida. Thus, KMC's allegations do not constitute a true counterclaim. Since the allegations do not appear to arise out of the same transactions and allegations as those presented in the Complaint, albeit similar alleged facts and arguments, it is also not a proper cross-claim. It appears, instead, that KMC has a separate, but similar, complaint. As noted by both KMC and Sprint, even if the "Counterclaim" is considered separate, it is certainly within our authority under Rule 28-106.109, Florida Administrative Code, to consolidate the complaints for hearing for purposes of administrative efficiency. In this instance, however, we do not believe that it will promote administrative efficiency to consolidate the matter. Instead, the Counterclaim shall be stricken with KMC being allowed to refile its allegations as a separate complaint, subject to any jurisdictional and legal sufficiency arguments that might be made. While bifurcation would be another option, the issues raised in KMC's Counterclaim do appear to constitute a separate matter that can, and should be addressed separately.

Having concluded that the Counterclaim shall be stricken, we need not reach the jurisdictional and sufficiency questions raised in the context of Sprint's request for dismissal of the Counterclaim.⁹ Looking solely at Sprint's arguments that the "Counterclaim" is not truly a counterclaim as contemplated by the Florida Rules of Civil Procedure, striking the Counterclaim is the more procedurally proper action to take, as opposed to dismissal.¹⁰

For all the reasons cited above, Sprint's Motion to Strike KMC's Answer, Affirmative Defenses, and Counterclaim, and Motion to Dismiss the Counterclaims or, in the alternative, Motion to Bifurcate the Counterclaim, is hereby granted, in part, to the extent that the Counterclaim is stricken.

KMC's Motion for Audit

KMC argues that we should conduct an audit to investigate and determine if Sprint and Sprint LP have engaged in unlawful conduct to avoid payment of access charges due KMC. KMC contends it has experienced a reduction in the number of minutes in its terminating toll traffic in the Clearwater, Daytona Beach, Ft. Myers, Melbourne, Pensacola, Sarasota, and Tallahassee markets. KMC states it has reason to believe, based on its analysis, that Sprint LP deliberately converted the termination of toll traffic in these areas to avoid the payment of access charges to KMC as the terminating carrier. However, having determined that KMC's Counterclaim shall be stricken, we find that this request is rendered moot.

⁹ We note, however, that the Florida Supreme Court has recognized that the PSC is without authority to resolve private contract issues involving a telecommunications company. Teleco Communications Company v. Clark, 695 So. 2d 304 (Fla. 1997).

¹⁰ Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Sprint-Florida, Incorporated's Motion to Strike KMC's Answer, Affirmative Defenses, and Counterclaim and Motion to Dismiss the Counterclaims or, in the alternative, Motion to Bifurcate the Counterclaim is hereby granted, in part, and denied, in part, to the extent that KMC's Counterclaim shall be stricken with leave to refile as a separate complaint. It is further

ORDERED that KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC's Motion for Audit has been rendered moot by our decision regarding KMC's Counterclaim. It is further

ORDERED that this docket shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 20th day of May, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: 
Kay Flynn, Chief
Bureau of Records

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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

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