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June 6, 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 Prehearing Statement in the above referenced docket. Also enclosed is a 3 ½" diskette with the document on it in MS Word 2003 format.

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

DOCUMENT NUMBER-DATE

05450 JUN-6 05

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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 )

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Docket No. 041144-TP  
Filed: June 6, 2005

**KMC PREHEARING STATEMENT**

KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively “KMC”), pursuant to Order Nos. PSC-05-0125-PCO-TP, issued January 31, 2005 and PSC-05-00402-PCO-TP, issued April 18, 2005, hereby submit their prehearing statement in the above captioned matter.

**A. APPEARANCES**

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Counsel to KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC

**B. WITNESSES**

<u>Witness</u>	<u>Main Witness Issues</u>
Paul J. Calabro (Rebuttal)	4 – 8, 10, and 11
Marva Brown Johnson (Direct and Rebuttal)	All Issues
Christopher S. Menier (Rebuttal)	6

Ronald Twine (adopting, and to be substituted for Timothy E. Pasonski) (Direct and Rebuttal) 4 – 8, 10 and 11

### C. EXHIBITS

<b><u>Witness</u></b>	<b><u>I.D. No.</u></b>	<b><u>Description</u></b>
Paul J. Calabro	PJC-1	Lucent Technologies Publication 235-080-100 section 7.9 CPN Billing
Marva Brown Johnson	MBJ-1	KMC's April 21, 2004 Notice to Customer X of Switched Access Liability (Confidential)
Marva Brown Johnson	MBJ-2	Customer X's May 3, 2004 Reply to KMC's April 21, 2004 Notice (Confidential)
Marva Brown Johnson	MBJ-3	Samples of Bills Submitted to Customer X for the PRIs in Question (Confidential)
Marva Brown Johnson	MBJ-4	KMC Tariff Sheet on PRI Circuits
Marva Brown Johnson	MBJ-5	KMC's June 3, 2004 Reply to Customer X's Letter of May 3, 2004 (Confidential)
Marva Brown Johnson	MBJ-6	KMC's Notice to Sprint of Default on the Confidential Settlement Agreement (Confidential)
Marva Brown Johnson	MBJ-7	KMC's Claim Against Sprint for Reciprocal Compensation Payments (Confidential)
Marva Brown Johnson	MBJ-8	Excerpts from Customer X's website (Confidential)
Marva Brown Johnson	MBJ-9	FCC Filings made by Customer X

Marva Brown Johnson	MBJ-10	April 28, 2005 Decision of U.S. Bankruptcy Court of Northern District of Texas in <i>Transcom Enhanced Services, LLC</i> , Case No. 05-31929-HDH-11
Ron Twine adopting		
Timothy E. Pasonski	TEP – 1	KMC’s Calculation of Access Charges Owed by Sprint to KMC (Confidential)
Ron Twine adopting		
Timothy E. Pasonski	TEP-2	KMC’s Calculation of Amounts due for Reciprocal Compensation by Sprint to KMC (Confidential)

#### D. POSITION

The traffic at issue in this proceeding is not toll traffic subject to access charges, as Sprint claims, but rather it is enhanced services traffic associated with KMC's provisioning of local PRIs to an enhanced services provider customer. The FCC has determined that enhanced services traffic in the form of IP telephony traffic, such as the VoIP traffic at issue here, is interstate in nature and not subject to access charges. The customer in this case represented itself to KMC and has consistently represented itself to all as an enhanced services provider. KMC was entitled to rely upon such representations and, under the FCC’s policies, rules, and decisions, KMC was required to treat the enhanced service provider as an end user customer that can purchase local PRIs. Since the FCC has determined that enhanced services providers are entitled to treatment as local end user customers, and that enhanced services are not subject to access charges, the local calls they generate over local PRIs are appropriately classified as local in nature and are not subject to access charges. Contrary to Sprint’s focus on the originating and terminating points of each call, under the FCC’s policies, rules, and decisions, IP telephony calls

are not subject to access charges, except for traffic that falls squarely within the scope of the FCC's two *AT&T Declaratory Ruling* decisions, neither of which is applicable here. If it is determined that this customer was not an enhanced services provider or that this was not enhanced services traffic for which KMC was required to provide local PRIs or IP telephony traffic exempt from access charges, then any access charges that may be due would be due from the customer and/or the interexchange carriers associated with this traffic and not from KMC. In addition to failing its burden of proof as to KMC's liability in this case, Sprint has also failed to meet its burden of proof with respect to its calculations of access charges and other reciprocal compensation adjustments. In the final analysis, because this traffic was properly treated as enhanced services traffic which was entitled to local PRIs, all of Sprint's claims in this case must fail.

#### **E. ISSUES OF FACT, LAW, AND POLICY AND JOINT PETITIONERS' POSITIONS**

**ISSUE 1:** What is the Florida Public Service Commission's jurisdiction to address all or part of this complaint?

**KMC'S POSITION:** The traffic at issue in this proceeding is associated with the local PRIs that KMC provided to an enhanced services provider customer under KMC's intrastate CLEC authority because under applicable federal rules and regulations, KMC was required to treat the customer as an end user customer. The FCC has determined that enhanced services traffic in the form of IP telephony traffic, such as the VoIP traffic at issue here, is interstate in nature, and that the FCC is the final arbiter of the appropriate treatment of such traffic, including for purposes of intercarrier compensation. Although the Florida PSC approved the interconnection agreements under which KMC and Sprint exchange traffic, the parties exchanged the traffic in question pursuant to federal policies and long-standing treatment of IP-Telephony traffic as local in nature and not subject to access charges.

**ISSUE 2:** Are KMC Data LLC and KMC Telecom V, Inc. properly included as parties to this complaint?

**KMC'S POSITION:** No, KMC Data and KMC V are not properly parties to this case. KMC Data and KMC V never had any customers and never exchanged any traffic with Sprint. The traffic in question was solely associated with KMC III – the trunks were ordered and paid for by

KMC III and KMC III alone. Sprint has offered no evidence linking KMC Data to any of the calls. The mere fact that KMC Data has an interconnection agreement with Sprint-Florida is not enough to make it a defendant in this case if KMC Data never exchanged traffic with Sprint-Florida. Sprint has offered only marginally more evidence linking KMC V to any of the traffic at issue: the OCNs for the telephone numbers associated with the calls in question were assigned to KMC V. However, the fact that KMC III used the KMC V numbers does not change the fundamental fact that the traffic at issue was KMC III traffic, and not exchanged between KMC V and Sprint-Florida.

**ISSUE 3:** Under the Interconnection Agreements with KMC or Sprint's tariffs, is Sprint required to conduct an audit as a condition precedent to bringing its claims against KMC or for KMC to be found liable?

**KMC'S POSITION:** The Commission has determined in denying KMC's motion to dismiss or motion for an audit that an audit is not a condition precedent to the bringing of a complaint. Order No. PSC-04-1204-FOF-TP, issued December 3, 2004. In the event the Commission determines that access charges can be assessed on the traffic in question, then any access charges that may be due to Sprint should be collected, as with interexchange traffic as a general matter, from the calling party customer and/or the interexchange carrier(s) associated selected by the calling party, but *not* from KMC. Significantly, Sprint-Florida's testimony and responses in discovery reveal that Sprint is able to identify IXCs involved in carrying the traffic in question. Assuming that Sprint is correct that the traffic in question was interexchange traffic subject to access charges, Sprint failed to mitigate its damages by identifying and billing the IXCs involved which, under its tariffs, are the parties responsible for the payment of access charges. If the Commission were to determine that KMC was responsible for any portion of this traffic, this would amount to the establishment of a PIU for the local interconnection trunks, and Sprint's tariff *requires that such a PIU be established only after an audit.*

**ISSUE 4:** What is the appropriate method to determine the jurisdictional nature and compensation of traffic?

**KMC'S POSITION:** The FCC has determined that enhanced services providers are not to be regulated as common carriers, and that enhanced services are not subject to access charges. Rather, the FCC has determined that enhanced service providers are to be treated like end users and are able to purchase local services from local exchange carriers, such as KMC. KMC was required to provide enhanced services providers with end user services, such as the local PRIs, that KMC did in this situation. Since enhanced services providers are end users, the local calls they generate are appropriately classified as local in nature and are not subject to access charges. The FCC has further determined that, notwithstanding the originating and terminating points of an IP telephony call, IP telephony calls are not subject to access charges, except for traffic that falls squarely within the scope of the FCC's two *AT&T Declaratory Ruling* decisions. Sprint bears the burden of demonstrating that the calls in question fall within the scope of those two decisions or are otherwise subject to access charges if it seeks to assess access charges for such calls. Sprint has failed to do so. Sprint has already charged and KMC has paid reciprocal

compensation for such traffic, which is consistent with the treatment, under the FCC's policies, rules, and decisions, with the treatment of KMC's customer as an end user entitled to purchase local PRI services, which it did.

**ISSUE 5:** Did KMC knowingly deliver interexchange traffic to Sprint over local interconnection trunks in violation of Section 364.16(3)(a), Florida Statutes? If yes, what is the appropriate compensation and amount, if any, due to Sprint for such traffic?

**KMC'S POSITION:** No, KMC did not knowingly deliver interexchange traffic to Sprint over local interconnection trunks. KMC provided its enhanced services provider customer with local PRIs, consistent with, and as required by, the policies, rules, and decisions of the FCC. The traffic was appropriately treated and handled as if it were local exchange traffic. KMC has already paid reciprocal compensation for the traffic in question. No additional or different compensation is due from KMC to Sprint for this traffic.

**ISSUE 6:** Was any of the traffic that is the subject of Sprint's complaint enhanced services traffic? If yes, how is enhanced services traffic delivered to Sprint from KMC to be treated under the Interconnection Agreements, Sprint's tariffs, and applicable law?

**KMC'S POSITION:** Yes, except for a small amount of call forward traffic, all of the remaining traffic at issue was enhanced services traffic from one KMC customer, and such enhanced services traffic was limited to the time period of approximately June 2002 to June 2004. KMC was and is required to provide enhanced services provider customers that request them local PRIs. The customer in question presented itself to KMC as an enhanced services provider. The type of enhanced services, IP telephony, provided by that customer do not fall within a category of traffic for which the FCC has determined access charges are appropriate. The traffic KMC received over those local PRIs was then delivered to Sprint over local interconnection trunks between KMC and Sprint in the Tallahassee and Ft. Myers markets. Sprint's position that access charges apply for each call where the calling party number and called party number information are not within in the same local calling area completely ignore KMC's obligations to provide enhanced services provider customers with local PRIs, in which case the calling and called party number information becomes irrelevant. There is nothing in the interconnection agreements or Sprint tariffs that abrogate KMC's legal obligation to provide local PRIs to enhanced services provider customers. Sprint's position also ignores the policies, rules, and decisions of the FCC which hold that, except in limited and specific circumstances which are not present here, access charges are not applicable to IP telephony. As the party seeking to collect access charges on the traffic in question, Sprint has the burden of proof; it cannot shift that burden of proof to KMC simply by billing KMC access charges.

**ISSUE 7:** Was KMC required to pay Sprint its tariffed access charges for the traffic that is the subject of this complaint? If yes, what is the appropriate amount, if any, due to Sprint for such traffic?

**KMC'S POSITION:** No, KMC is not liable for access charges on any of this traffic because the traffic in question is IP telephony traffic. The FCC has made clear that, as a general matter, access charges are not due for IP telephony. Only in limited circumstances, which Sprint has not demonstrated are present here, can Sprint assess access charges on IP telephony. KMC was entitled to accept its customer's self certification as an enhanced services provider offering IP telephony services. KMC was required to provide the customer, upon request, with local PRIs, which is what KMC did. The FCC could, in the future, determine that the traffic in question was not enhanced services provider or IP telephony traffic for which KMC was required to provide local PRIs. In that case, any access charges that may be due would be due from the customer and/or the interexchange carriers associated with this traffic and not from KMC. KMC does not agree with the access charge calculations submitted by Sprint. Sprint has repeatedly failed to provide KMC with the underlying data necessary to verify the alleged charges under Sprint's assumptions regarding the nature of the traffic and KMC's liability for compensation.

**ISSUE 8:** Did KMC deliver interexchange traffic to Sprint over local interconnection trunks in violation of the terms of the Interconnection Agreements with Sprint? If yes, what is the appropriate amount, if any, due to Sprint for such traffic?

**KMC'S POSITION:** No. KMC did not knowingly deliver interexchange traffic to Sprint over local interconnection trunks in violation of the terms of the Interconnection Agreement. No additional amount beyond that which KMC has already paid is due to Sprint from KMC in connection with the traffic at issue in this proceeding. If, in fact, it is determined that access charges are due for this traffic (see discussion under Issue 7), Sprint must refund the compensation KMC has paid for this traffic.

**ISSUE 9:** To what extent, if any, is Sprint's backbilling limited by its Interconnection Agreements with KMC, Sprint's tariffs, or other applicable law?

**KMC'S POSITION:** To the extent that Sprint is seeking access charges from KMC, Sprint is limited by its tariff such that it can only back bill access charges for the quarter in which an audit is completed and the quarter prior to the audit. Section 95.11, Florida Statutes, would otherwise generally apply.

**ISSUE 10:** Did Sprint overpay reciprocal compensation to KMC? If yes, what is the appropriate refund, if any, due to Sprint?

**KMC'S POSITION:** No, Sprint did not overpay reciprocal compensation to KMC. Consistent with applicable law, KMC properly paid Sprint reciprocal compensation on the traffic in question. Sprint's payment of reciprocal compensation to KMC was, in part, based upon the



amount of traffic for which KMC paid Sprint reciprocal compensation. No refund is appropriate. In the event it is determined that the traffic in question was not enhanced services provider or IP telephony traffic for which KMC was required to provide local PRIs and for which reciprocal compensation was due, then any access charges that may be due would be due from the customer and/or the interexchange carriers associated with this traffic and not from KMC. In this situation there may need to be an accounting for the reciprocal compensation paid, which should be done by an independent third party or the Commission.

**ISSUE 11:** If the Commission determines that KMC owes Sprint compensation for any traffic delivered by KMC to Sprint that is the subject of this complaint or refunds for overpayment of reciprocal compensation, what are the appropriate payment arrangements?

**KMC'S POSITION:** In the event it is determined that this was not enhanced services provider or IP telephony traffic for which access charges were inappropriate, then any access charges that may be due would be due from the customer and/or the interexchange carriers associated with this traffic and not from KMC. An accounting may be necessary to reconcile reciprocal compensation payments already made between KMC and Sprint (and those which Sprint has not yet paid and which are past due). Any amounts that may be due from KMC to Sprint should be held in abeyance pending the resolution of KMC's reciprocal and offsetting claims which the Commission has directed be filed in a separate docket.

#### **STIPULATED ISSUES**

There are no stipulated issues.

#### **PENDING MOTIONS**

KMC has filed two motions to compel discovery responses, one filed on May 19, 2005, and the other filed on June 6, 2005.

#### **PENDING REQUESTS OR CLAIMS FOR CONFIDENTIALITY**

KMC has a Request for Confidential Classification pending, and will be filing additional requests for its prefiled testimony and exhibits.

#### **REQUIREMENTS THAT CANNOT BE COMPLIED WITH**

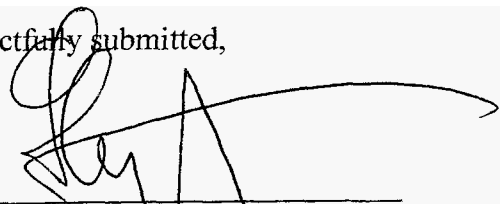
None.

## DECISIONS PREEMPTING THE COMMISSION'S ABILITY TO RESOLVE THIS MATTER

The FCC has recognized that access charges do not apply to enhanced services, in general, and IP Telephony, in particular. *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983) (adopting the enhanced services exemption and stating that enhanced service providers were entitled to purchase local services as end users); *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2631 (1988) (affirming access charge exemption); *Access Charge Reform*, 12 FCC Rcd 15982, 16133 (1997) (affirming access charge exemption); *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001) ("IP telephony [is] generally exempt from access charges ...."); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1988) ("Report to Congress") (declining to classify, or apply access charges to IP Telephony). The two narrow *AT&T Declaratory Ruling* cases, neither of which applies here, are the only two exceptions to the general rule that access charges do not apply to IP Telephony. The FCC has previously recognized affirmed the limited role of state jurisdictions regarding information or enhanced services. *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, Memorandum Opinion and Order (Feb. 19, 2004) ¶¶ 17-18, and cases cited therein; *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Order and Opinion, FCC 04-267, Released Nov. 12, 2004 ("*Vonage Declaratory Ruling*"). See also *Vonage Holdings Co. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 997, 1001-02 (D. Minn. 2003), aff'd by Eighth Circuit. Section 230 of the Telecommunications Act of 1996 (the "1996 Act") also makes clear the national policy to "preserve the vibrant and competitive free market" that exists for information services, "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). To the extent that there is any future departure from the FCC's policies toward the Internet and IP-enabled applications, it should be initiated and implemented by the FCC through a rulemaking process such as its current *IP-Enables Services* rulemaking (WC Docket No. 04-36), not by *ad hoc* state proceedings, especially adjudications involving two LECs.

**OBJECTIONS TO WITNESSES QUALIFICATIONS AS AN EXPERT**

Sprint has not identified any expert witnesses, so KMC has no such objections at this time.

Respectfully submitted,  


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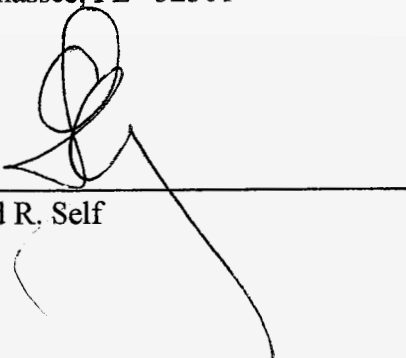
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by hand delivery (\*) and/or U.S. Mail this 6<sup>th</sup> day of May, 2005.

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