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Sent: Monday, June 27, 2005 4:36 PM
To: Filings@psc.state.fl.us
Subject: Docket 041144-TP

Attachments: 2005-06-27, 041144, Motion to Reconsider the Commission's Order on Motion to Compel.pdf

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1144, Motion to

** PRIVATE **

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The Docket No. is 041144-TP - Sprint Complaint Against KMC

This is being filed on behalf of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Telecom Data LLC

Total Number of Pages is 14

KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Telecom Data LLC's Motion to Reconsider the Commission's Order Granting, Inc Part, and Denying In Part, KMC's Motion to Compel

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June 27, 2005

BY ELECTRONIC FILING
Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
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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") is an electronic version of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC's Motion to Reconsider the Commission's Order Granting, In Part, and Denying In Part, KMC's Motion to Compel in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosures
cc: Parties of Record

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint-Florida, Incorporated 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.	Docket No. 041144-TP

KMC TELECOM III LLC, KMC TELECOM V, INC. AND KMC DATA LLC'S MOTION TO RECONSIDER THE COMMISSION'S ORDER GRANTING, IN PART, AND DENYING IN PART, KMC'S MOTION TO COMPEL

Pursuant to Section 25-22.0376 of the Florida Administrative Code, KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively, "KMC"), by and through their undersigned counsel, hereby file this motion seeking reconsideration and alteration of the Florida Public Service Commission's ("Commission") June 16, 2005, Order Granting, in Part, and Denying, in Part, KMC's Motion to Compel (the "Order"). Reconsideration is warranted because the Commission overlooked the fact that the failure to compel production of the call detail data requested prejudges the issues regarding the calculations of Sprint-Florida Incorporated ("Sprint-FL") regarding its claim for recovery of intrastate access charges. Reconsideration is also warranted because new facts have come to light as of June 23, 2005, at a deposition of a Sprint witness regarding the calculation of the claim for access charges that underscore the need for the production of the requested data. Because Sprint had not heretofore made that information available, the Commission had heretofore no opportunity to consider those facts in deciding the motion to compel.

Since its response to KMC's very first Interrogatory and Production of Documents Request, Sprint-FL has insisted that KMC does not need the actual Call Detail Records ("CDRs") in order to understand or verify *either* (a) the scope and extent of Sprint-FL's claims of violations *or* (b) Sprint-FL's calculations of the access charge recovery it seeks. Sprint-FL states documents derived from Sprint's analysis of the CDRs, such as the so-called "SS7 CDR Summary Reports" ("CDR Summary Reports") and the KMC Complaint Summary, are sufficient for KMC to verify and for the Commission to validate Sprint-FL's claims and calculation of access charges which it seeks. KMC has from the very first Interrogatory and Production of Documents request been requesting call detail information because, based on the information that Sprint-FL has provided, one cannot verify the extent to which the types of traffic Sprint is complaining about were exchanged between the parties, nor can one verify Sprint-FL's calculations without that information.

Last week, KMC deposed Sprint's witness overseeing the alleged compensation calculation in this case, Ritu Aggarwal. Ms. Aggarwal's testimony made clear that Sprint-FL relied principally upon its analysis of the CDRs in arriving at its claim for recovery, and that the CDR Summary Reports and other documentation produced by Sprint-FL to date represented intermediate steps in that damage calculation. Ms. Aggarwal's testimony also made clear that, although the samples of CDRs Sprint-FL deigned to provide KMC (one day from each month of the relevant time period through the present) may illustrate certain signaling characteristics of the types of traffic exchanged by the parties, these samples would not allow one to verify *any* of the information on the CDR Summary Reports used by Sprint as the intermediate stage of its access charge recovery calculations. In short, the testimony of Sprint-FL's witness made plain that Sprint-FL has failed to provide the data upon which KMC could verify or challenge Sprint-FL's calculations and claims for recovery in any meaningful way.

Accordingly, the Commission should reconsider its Order and require Sprint-FL to provide the data and information that KMC has been seeking and to which it is entitled, specifically responses to KMC's Interrogatories 1, 7, 10, and 11 and Production of Documents Requests 1, 7, and 10 in the form of the CDRs which Sprint-FL itself purportedly examined to substantiate its claims in this case. As explained below, at an absolute minimum, the Commission should compel the production of the CDRs upon which the claimed access charges were based for *three complete months* (one from 2002, 2003, and 2004 (prior to June)) in which the overwhelming majority of the claimed violations occurred.

Background

1. This action was commenced on September 24, 2004, upon the filing of a Complaint by Sprint-Florida, Inc. ("Sprint-FL") alleging that KMC intentionally and knowingly changed interexchange charge party numbers as part of a scheme to misroute interexchange telephone traffic to Sprint-FL as local traffic, in order to avoid and underpay access charges due to Sprint-FL. Sprint-Fl has also claimed that KMC violated its interconnection agreements with Sprint-FL and Sprint-FL's state tariffs. According to the allegations in the Sprint Complaint, the matters that form the basis for the Complaint have been ongoing since July 2002, and have been the subject of discussions between Sprint-FL and KMC since at least November 6, 2003. *See* Sprint Complaint at ¶¶ 18-20.

2. On January 20, 2005, KMC served its First Set of Interrogatories and First Request for Production of Documents on Sprint-FL ("KMC's Discovery Request"). *See* Exhibit 1 to KMC Motion to Compel.[1]

3. On February 21, 2005, Sprint-FL served its Response and Objections to KMC's First Set of Interrogatories and First Request for Production of Documents ("Response to KMC's Discovery Request")(attached to KMC's Motion to Compel as Exhibit 3).

[1] Because of the number of documents involved, KMC will reference any exhibits attached to its Motion to Compel, rather than provide them a second time. KMC will be happy to provide these exhibits again upon request if that is the Commission's preference.

4. Because Sprint-FL's responses were incomplete and insufficient, on March 14, 2005, KMC contacted Sprint-FL in an attempt to resolve the discovery issues raised in this Motion to Compel and provided Sprint-FL with a list of KMC's objections to their responses. Sprint-FL has since provided KMC with four sets of supplementary responses, most recently on May 27, 2005, the last of which was in response to KMC's Motion to Compel. As part of its supplementary responses, Sprint-FL prepared and produced a rudimentary, but wholly inadequate, privilege log. *See* Sprint Supp. Responses (attached to KMC's Motion to Compel as Exhibits 4, 5, 6, 7).

5. Sprint's supplemental responses did not cure many of the principal defects in its initial response. Therefore, on May 18, 2005, KMC filed a Motion to Compel responsive, complete, and meaningful discovery responses to KMC's Discovery Request ("Motion to Compel"). In its Motion to Compel, KMC requested (1) the Call Detail Records ("CDRs") for the period in question in response to numerous discovery requests, including Interrogatories 1, 7, 10, and 11 and Production of Documents Requests 1, 7, and 10 because the sample of CDRs provided was insufficient for KMC to verify or challenge any of Sprint-FL's claims regarding the scope and extent of KMC's alleged violations and, most significantly, Sprint-FL's calculations of the access charge recovery it seeks, (2) a more complete response to Interrogatory 15, including CDR Summary Reports, and (3) more complete responses to Interrogatories 6(b), 7, 11, 16, and 36 and Production of Documents Requests 6, 7, 10, 12, 16, 17, 18, and 25. The focus of KMC's motion was information requested and relating to the call data on which Sprint-FL's claims and calculation of alleged access charges are predicated. Because these fundamental areas of information provide the only possible way to analyze, assess, and

challenge Sprint-FL's claims, KMC was forced to move to compel provision of the requested data.

6. Sprint-FL, with the exception of supplemental responses to Interrogatories 11 and 15, opposed the motion to compel, arguing that provision of the requested CDRs was unduly burdensome, and that it had already provided sufficient responses on which to verify the access charges recovery claims. Sprint conjectured that KMC was simply unable to understand the data, and stated that, if KMC wished for additional detail, it should propound additional and more specific discovery requests. Sprint-FL's response grossly misrepresents the facts, the nature of KMC's discovery requests, and the sufficiency of Sprint-FL's responses, as has now been confirmed in the deposition of Sprint's witness Ritu Aggarwal.

7. On June 16, 2005, this Commission issued an order granting KMC's motion in part and denying it in part. In relevant part, the Commission denied KMC's requests for the requested CDRs and provision of specific information relating to Sprint-FL's calculation of its claimed access charges to be recovered on the grounds that Sprint-FL had supplied sufficient information for KMC to evaluate Sprint-FL's claims. Specifically, the Commission held, with respect to KMC's request for CDRs, that providing all of the CDRs for the relevant time period would be unduly burdensome and the limited sample of one day's worth of data per month and the CDR Summary Reports provided was sufficient. The Commission also found on the record then available to it that Sprint-FL's explanation of its methodology for calculating access charge recovery was also sufficient. The result of the Commission's Order was that, by denying KMC the opportunity to review CDRs underlying Sprint-FL's calculation of claimed access charge recovery, the

Commission essentially forced itself and KMC to accept Sprint's calculation of the recovery of access charges to which Sprint claims it is entitled without the ability to verify the numbers on which that calculation is based. KMC submits that the Commission overlooked this fact in reaching its Order, justifying this request for reconsideration.

8. As noted earlier, on June 23, 2005, KMC deposed Sprint-FL's witness Ritu Aggarwal, whose testimony was offered to substantiate Sprint's calculation of access charge recovery it seeks in this proceeding. During the course of this deposition, it became clear that, although KMC could verify some of Sprint-FL's methodology and arithmetic from the documentation Sprint-FL has provided thus far in response to KMC's discovery requests about the extent and scope of the alleged violations and damage calculations, Sprint-FL has not provided the same data to KMC upon which Sprint itself relied in making its claims making it possible for KMC to verify the validity of the numbers used in that arithmetic. The new facts resulting from Ms. Aggarwal's testimony, which were heretofore not available to the Commission or KMC, warrant reconsideration of the Order.

ARGUMENT

9. The CDRs lie at the heart of this litigation: both Sprint-FL's claims and KMC's defense. As the Commission knows, Sprint-FL is alleging that calls sent over local interconnection trunks to Sprint-FL customers that Sprint-FL originally treated as local calls subject to reciprocal compensation were intrastate and interstate calls subject to unpaid access charges. KMC has repeatedly requested the CDRs underlying Sprint-FL's claims and Sprint-FL has refused, claiming that the one-day-a-month sample of CDRs that it has provided is sufficient for KMC to verify and challenge, if appropriate, Sprint-FL's claims of both liability and access charge recovery.[2] Sprint-FL also looks to the monthly CDR Summary Reports as the principal foundation upon which Sprint-FL determined the scope and extent of the violations by KMC in this case and upon which Sprint-FL calculated the access charges it seeks to recover.

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2 At most, these single days of data may illustrate signaling information on a sample of calls exchanged over the trunk groups in question, allowing KMC to better understand the types of calls that were exchanged and the signaling information associated with the calls, but as to the central issues such as monthly magnitude and nature of traffic and assessing Sprint-FL's claims of damages, they essentially provide no information at all. Ms. Aggarwal did not even claim that the days for which SS7 CDRs were provided each month were determined to be representative of the month as a whole. Exh. 1 at ______ (Aggarwal Dep.).

10. The deposition of Ritu Aggarwal on June 23, 2005, in Tallahassee made clear that Sprint's representations upon which the Commission relied were baseless. At the deposition, Mr. Aggarwal, who oversees the Sprint-FL group which calculated the calculation of access charge recovery Sprint-FL seeks, and is the only witness Sprint offers for the calculation of the claimed access charges, made clear that Sprint-FL reviewed, through the Agilent system, *all of the SS7 CDRs* that Sprint allegedly had available to it as the first and foundational step in its calculation of the extent and scope of KMC's alleged violations. Exh. 1 at __ (Aggarwal Dep.).[3] Sprint did not merely look at one day a month, which is the only glimpse they have proffered KMC. Ms. Aggarwal admitted that one could never look just at the one day that had been provided for any given month and arrive at the numbers on the CDR Summary Reports. Exh. 1 at __ (Aggarwal Dep.). Rather, one would have to examine all of the call detail records that Sprint-FL examined. Yet Sprint-FL has repeatedly tried to convince this Commission that giving KMC one day out of thirty – presumably containing only about three or four percent of the monthly CDRs, on average – is a sufficient proffer of data to supports its claims for recovery in this case. In light of this aspect of the Aggarwal testimony alone, the Commission should reconsider its Order and compel Sprint to provide responses to KMC's Interrogatories 1, 7, 10, and 11 and Production of Documents Requests 1, 7, and 10 in the form of the CDRs that Sprint-FL itself analyzed in order to substantiate its claims and calculations of access charge recovery.

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[3] KMC took the deposition on Ritu Aggarwal on June 23, 2005, but has not received the deposition transcript at this point in time. KMC expects to receive the transcript on June 28, 2005, and as soon as KMC receives the transcript, it will file the transcript with the Commission and provide the necessary citations. Because of the time limits under Rule 22.0376 of the Florida Administrative Code, KMC was unable to wait until it received the transcript to file the instant motion.

11. But Ms. Aggarwal's deposition brings to light other critical reasons why the CDRs requested should be provided. She explained that the principal purpose of the analysis of the CDRs by Sprint was to calculate jurisdictional factors by which the local and intrastate MOUs originally billed by Sprint would be reallocated to the interstate, intrastate, and local categories. Exh. 1 at __ (Aggarwal Dep.). In doing so, her testimony made clear, Sprint-FL did not have available to it all of the CDRs for the MOUs that were originally billed, and so Sprint-FL's analysis using the SS7 system often used a significantly smaller number of minutes for analysis than were originally billed. As shown in Aggarwal Deposition Exhibit No. 3, for example, over the period July 2002 through November 2003, Sprint only examined a volume of traffic that represented 71% of the traffic billed. Exh. 1 at __ (Aggarwal Dep. Exh. 3). Ms. Aggarwal could not explain why such shortfalls occurred, nor could she testify that the calls that were examined satisfied any sort of objective criteria as being representative of all of the traffic billed. Sprint-FL never made any attempt to determine why call data or what data was missing from the CDR Summary Reports at page 1 of Aggarwal Deposition Exhibit No. 3. There is no way to know whether these reports are adequate without an opportunity to examine the underlying CDRs that Sprint examined as the first step in its analysis.[4]

[4] Underscoring yet further the need for KMC to look at the CDRs for itself is the fact that Sprint-FL never made any attempt to assess the reliability of the Agilent computer system at all for the purposes used in generating Sprint-FL's backbills to KMC for access charges or the damages calculations for which it is offered. Exh. 1 at __ (Aggarwal Dep.). Sprint-Fl never conducted any form of audit or reliability assessment of the Agilent computer program and the numbers it was reporting. *Id.* Without any kind of assessment of that kind, there is absolutely no way to conclude, without receiving and analyzing the underlying CDRs, whether the numbers found in the CDR Summary Reports are accurate and reliable.

12. In fact, Ms. Aggarwal could not even offer any assurances that Sprint-FL had not billed for too many minutes in the first instance. Exh. 1 at __ (Aggarwal Dep.).

13. In these circumstances, KMC is entitled to look at all of the CDRs Sprint-FL used in its calculations to give it the opportunity to determine whether certain types or volumes or hours or days of traffic were included or excluded – whether inadvertently or intentionally makes no difference – from the Sprint calculations so as to skew the jurisdictional numbers that are central to Sprint-FL's calculations.

14. Further underscoring the inadequacy of the sample provided to KMC as satisfying Sprint-FL's discovery obligations, Ms. Aggarwal made clear that there would be problems if Sprint-FL only looked at as few of 50% of the CDRs in any month. Exh. 1 at __ (Aggarwal Dep.). Yet looking at Aggarwal Deposition Exhibit No. 3, it is clear that for the months November 2002, December 2002, May 2003, and June 2003, Sprint looked at CDRs that represented only 37, 48, 48, and 53% of the volume of MOUs to which the jurisdictional factors were applied. Exh. 1 at __ (Aggarwal Dep. Exhibit No. 3 at 1). Significantly, these months represent more than $620,000 of Sprint's alleged access charges which it is seeking, not even taking into account the impact on the reciprocal compensations amounts paid. KMC is entitled, with respect to these and other months, to review the CDRs to see what was included or excluded from the pool of MOUs which Sprint-FL used in its calculation of the jurisdictional factors, as well as to determine the accuracy of the calculation itself. None of this can be done with the data that Sprint-FL has provided to date.

15. If KMC does not receive the requested data from Sprint-FL, it will be denied the opportunity to fully respond to Sprint's claims, and the Commission will have forced

KMC (not to mention the Commission) simply and blindly to accept the numbers that appear in the *later stages* of Sprint's calculations of access charges, *i.e.*, in the CDR Summary Reports. In short, the fact is that KMC will have been denied its opportunity to engage in meaningful discovery in this case and forced to accept the numbers in the CDR Summary Reports.

16. Given the revelations at Ms. Aggarwal's deposition, it is now more clear than ever that KMC is entitled to review all of the CDRs upon which Sprint based its claims for liability and access charge recovery. At an absolute minimum, given the complete inadequacy of the one-day-a-month samples to confirm or check any of the numbers in the CDR Summary Reports as confirmed by Ms. Aggarwal, the Commission should require Sprint-FL to provide *all* of the CDRs for at least *three complete months* (one from 2002 (after June), 2003, and 2004 (prior to June)) in which the overwhelming majority of the claimed violations occurred. Months after May 2004 contain much smaller amounts of traffic at issue in this case than those prior to June 2004. Sprint-FL needs to provide enough data that KMC can actually verify and, if appropriate challenge, Sprint-FL's conclusions and analysis of the traffic.

17. While Sprint-FL may argue that the production of the additional CDRs beyond its earlier sampling is unduly burdensome, such an argument is unconvincing. Sprint-FL unilaterally decided not only that it would provide a sample, but how that sample would be structured – one day from each month – without any attempt to determine if that was acceptable to KMC, if there were another sample that KMC would accept in response to its discovery requests, if the sample bore any relation to its calculation of access charge recovery. Therefore, Sprint-FL created its own burden here. Moreover, KMC is entitled

to the data upon which Sprint-FL relied and without which it cannot verify or challenge the claims Sprint-FL decided to pursue before this Commission.

Conclusion

18. For the foregoing reasons and those stated in KMC's Motion to Compel, the Commission should reconsider its June 16, 2005, Order and require Sprint-FL to more fully and meaningfully respond to KMC's Interrogatories and Requests for Production of Documents. Specifically, the Commission should compel complete responses to KMC's Interrogatories 1, 7, 10, and 11 and Production of Documents Requests 1, 7, and 10 in the form of the CDRs which Sprint-FL itself purportedly examined to substantiate its claims in this case.

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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 electronic mail this 27th day of June, 2005.

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