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August 16, 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

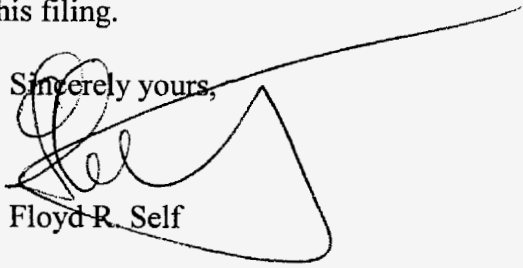
Dear Ms. Bayó:

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 Post Hearing Brief 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

- AMP \_\_\_\_\_
- COM 3 \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- 3CL \_\_\_\_\_ FRS/amb
- DPC \_\_\_\_\_ Enclosures
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07960 AUG 16 05

EPSC - COMMISSION OF PUBLIC UTILITIES

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

**POSTHEARING BRIEF OF  
KMC TELECOM III LLC, KMC TELECOM V, INC., AND KMC DATA LLC.**

KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC. (collectively "KMC") through undersigned counsel, submit this posthearing brief in the above styled docket involving KMC and Sprint-Florida Incorporated ("Sprint").

**BASIC POSITION**

The central issue of this case is whether Sprint can assess intrastate access charges against KMC, a fellow local exchange carrier ("LEC"), for traffic generated by a KMC end user customer who obtained and used a local service provided by KMC in the Tallahassee and Ft. Myers markets. Sprint's demand that KMC pay access charges for this traffic is based on a total denial of present and longstanding federal policy. Indeed, Sprint brought its claims before the incorrect forum, as the FCC has reserved for itself sole jurisdiction over the traffic at issue. The FCC long ago determined that enhanced services providers ("ESPs") are entitled to treatment as local end user customers, and that they are entitled to purchase local services with their enhanced services not subject to access charges. The FCC has further determined that enhanced services traffic in the form of IP telephony traffic, such as the VoIP traffic at issue here, is subject to the FCC's jurisdiction and not subject to access charges. The FCC has established only two very

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narrowly drawn and limited exceptions to the enhanced services exemption, one for specific “IP in the middle” services offered by long distance carriers and the other for certain calling card services offered by long distance carriers, neither of which is applicable here.

This case must be decided on the evidence presented to the Commission – and Sprint as the petitioner has the burden of proof. The record in this case demonstrates that under current law, Sprint’s tariffs, and the parties’ interconnection agreement, Sprint has totally and completely failed to fulfill its burden or to otherwise present competent substantial evidence of record as to its entitlement to access charges for this traffic.

Sprint has steadfastly shied away from any factual development that would be needed to make its case. It is Sprint’s burden to prove that access charges are due on this traffic. But Sprint has offered no evidence, except for an empty, ambiguous cloud picture or dotted line arrow in its Agilent study and exhibits, that this traffic is not enhanced services. More directly, Sprint’s own witnesses have offered sworn testimony that one cannot tell whether the traffic is enhanced just looking at what Sprint looked at, which was the total extent of what Sprint has offered as evidence in this proceeding to support its access charge claims. Sprint should remain accountable for its decision, as the petitioner, to proceed with its claims without bringing in other parties associated with the traffic in question or pursuing discovery which might have allowed it to meet its burden, assuming the facts even exist for Sprint to make a case.

Turning to the competent substantial evidence that is in the record, Sprint has tried to impose requirements on KMC over and above those established by the FCC, and which Sprint itself does not employ. More than 99% of the traffic in question is associated with one KMC end user customer, PointOne, and PointOne has consistently and always self-certified that it was providing enhanced services. These representations – supported by competent substantial

evidence from KMC and never rebutted by Sprint – were made not only to KMC, but have been made directly to the Federal Communications Commission (“FCC”) as well as in other public pronouncements by PointOne. Sprint’s own witnesses agree that it was reasonable to rely upon such self-certification, which is what Sprint itself, as well as the rest of the industry, does. In point of fact, KMC took steps beyond even what Sprint does, and when the FCC issued its first AT&T declaratory ruling, KMC went back to PointOne to inquire that it was not offering the same type of services as was the subject of the AT&T declaratory order. PointOne affirmed that it was not offering such services, and there is no evidence of record to the contrary. The fact that PointOne completely left KMC’s network shortly after KMC made this inquiry is simply a coincidence -- PointOne’s traffic had been in decline over the prior seven months, having dropped some 50% as PointOne apparently transitioned to another carrier.

Even assuming for the sake of argument that Sprint has properly brought its case before this forum, its claims must fail. Though the evidence in this case would not support such a determination, if the Commission were to conclude that KMC was not justified in its treatment of PointOne as an enhanced services provider or in its sale of local PRI services to PointOne, then Sprint’s own tariffs and the very FCC AT&T orders cited by Sprint as well as the FCC’s rules require that any access charges that may be due would be due from PointOne 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. The evidence of record, including depositions of Sprint’s witnesses, revealed numerous deficiencies in the calculations and assumptions made by Sprint. Assuming that KMC is liable to Sprint for access charges, the deficiencies in Sprint’s

submissions to this Commission cannot factually support any award of access charges against KMC. Clearly, before there can be any access charge award, an audit or accounting would have to be conducted before the amount of those access charges could be determined.

The FCC has asserted its exclusive jurisdiction supported by the federal courts, to be the arbiter of whether IP-enabled traffic is enhanced services or telecommunications services. Accordingly, this matter, and the questions raised by Sprint, should have been brought before the FCC. Sprint's Complaint should be dismissed on jurisdictional grounds. Likewise the substantive evidence offered by Sprint fails to support any factual determination. Accordingly, the requested relief must be denied.

**ISSUE 1: WHAT IS THE FLORIDA PUBLIC SERVICE COMMISSION'S JURISDICTION TO ADDRESS ALL OR PART OF THIS COMPLAINT?**

**SUMMARY:** \*\* The overwhelming majority of the traffic in question in this case falls under the jurisdiction of the FCC, which has asserted sole jurisdiction over the proper regulatory treatment – including the applicability of access charges – of IP telephony traffic. \*\*

**KMC POSITION:**

The preliminary jurisdictional question posed here is whether the Commission has the authority to grant the relief requested by Sprint, namely to issue an order that access charges apply to the traffic in question. For both legal and evidentiary reasons, there is no basis for this Commission to order the payment of access charges for the traffic at issue in this proceeding.

It was undisputed that the overwhelming majority of the traffic in question came from one KMC end user customer – PointOne. This customer, as the evidence unequivocally shows self-certified itself to KMC as an enhanced services provider of IP-telephony services, consistent with public representations it has consistently made on the Internet and before the FCC. Tr. 181-183 (Menier Rebuttal, at 3-4); Tr. 151-152 (Johnson Direct, at 20-21); Exh. 30 (Calabro Depo.,

at p. 12, lines 11-17; p. 13, line 11 through p. 14, line 3; Exhs. 8 and 60 (excerpts from [www.pointone.com](http://www.pointone.com)); Exh. 61 (PointOne FCC comments). The FCC has determined that enhanced services traffic in the form of IP telephony traffic, such as the PointOne traffic at issue here, is interstate in nature, and that the FCC is the final arbiter of the appropriate treatment of such traffic, including issues related to intercarrier compensation. Although the this Commission approved the interconnection agreements under which KMC and Sprint exchange this 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.

### **The Legal Basis For Denying Sprint's Requested Relief**

This Commission has jurisdiction over the local services that KMC provided PointOne, as the Commission would over the local services provided by any local exchange carrier. But the question of whether this traffic – which the evidence requires be treated as IP-enabled telephony traffic – should be treated as something other than local traffic for intercarrier compensation purposes is *within the sole oversight of the FCC*. The FCC has previously and repeatedly recognized the limited role of state jurisdictions regarding IP Telephony. *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Serv.*, Memorandum Opinion and Order 19 FCC Rcd 3307, ¶¶ 17-18 (2004) (*see, e.g.*, internal citations at fn 47-68; *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Order and Opinion, 19 FCC Rcd 22, 404 (2004) (“*Vonage Declaratory Ruling*”).

The extensive role of FCC jurisdiction and the very limited role of state Commissions over IP-enabled telephony services has been recognized by the courts as well. *See Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 997, 1001-02 (D. Minn.

2003), aff'd (8th Cir. Dec. 22, 2004); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n.*, No. 04 Civ. 4306 (S.D.N.Y. July 16, 2004).<sup>1</sup> Consistent with the FCC's jurisdiction over these issues, the FCC last year initiated a comprehensive rulemaking proceeding to address the regulatory treatment of all IP-enabled service offerings, which would include the PointOne services at issue here, in its WC Docket No. 04-36. *IP-Enabled Servs.*, First Report and Order and Notice of Proposed Rulemaking, 2005 WL 1323217 (F.C.C. June 3, 2005). Until that rulemaking is decided, and the FCC assigns a role for state Commissions regarding intercarrier compensation for such traffic, state commissions do not have the jurisdiction to depart from the *status quo* – access charges do not apply to IP telephony.

The FCC has long recognized that access charges do not apply to enhanced services, in general, and IP Telephony, in particular. See Tr. 218 (Calabro Rebuttal, at p. 4, line 19- p. 5, line 23); *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 Serv. Providers*, 3 FCC Rcd 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 (1998) ("Report to Congress") (declining to classify or apply access charges to IP Telephony).

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<sup>1</sup> Cf. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶¶ 52, 65 (2001) (*ISP Remand Order*) (the FCC has sole jurisdiction over terms and conditions for intercarrier compensation for ISP-bound traffic).

While the FCC, on one occasion, has found an IP-enabled service subject to access charges, it has done so in the narrowest of circumstances. This case and a subsequent ruling highlight the fact that the application of access charges to IP-telephony services by the FCC is the exception, rather than the rule, and serve to confirm the lack of jurisdiction of this Commission to decide this case. *See* Exh. 30 (Calabro Depo., at p. 15, lines 20-25, p. 16, lines 1-25, p. 17, lines 1-23, p. 18, lines 1-23). Specifically, in its *AT&T Declaratory Ruling* issued in April 2004, the FCC found that an IP-enabled service where Internet Protocol was used solely for transmission purposes for 1+ dialed interexchange calls, where there was no net protocol conversion, and where there were no enhanced features or functionalities enabled by the use of IP, such a service was a telecommunications service and subject to access charges from the IXC. *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457, 7466-68 at ¶¶ 14-15, 17 (2004). The FCC stated that its decision was narrowly limited to the facts before it, was provisional in nature, and subject to further review in its *IP-enabled Services* Rulemaking (WC Docket 04-36). *Id.* at 7466, ¶ 15; *see also IP-Enabled Servs.*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

In a subsequent declaratory ruling, involving AT&T and certain of its pre-paid calling card products, the FCC expressly declined to determine whether a calling card service using IP transmission technology was a telecommunications service or not, deferring to a rulemaking proceeding that the FCC was simultaneously commencing. *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, 20 FCC Rcd. 4826, ¶¶ 1-2 (2005). By putting off this question, the FCC indirectly underscored the narrow nature of its first *AT&T Declaratory Ruling*, finding for all practical purposes that the FCC's decision from April 2004 cannot be freely extended to services that are not on all fours with the services at



issue in that *Ruling*.<sup>2</sup> Rather, the agency concluded that other services, even if ostensibly closely related, require separate consideration *by the FCC*.<sup>3</sup> At a minimum, any decision to extend the applicability of access charges to IP telephony beyond its current very limited scope would require a comprehensive generic proceeding, which is the method by which the FCC is proceeding. Such a decision should not be made in the context of an adjudication between two local exchange carriers, especially when the party that presumably would become subject to access charges, the provider of IP telephony services, is not even a party to the proceeding.

### **The Evidentiary Basis For Denying Sprint's Requested Relief**

Point One has consistently represented both to the FCC and to the public at large that it is an ESP. When PointOne first requested service from KMC, it advised KMC that it was a business customer providing enhanced services. Tr. 183 (Menier Rebuttal, at p. 4). When Ms. Johnson was engaged attempting to negotiate a master service agreement and later also the VoIP attachment, PointOne always indicated that it was an ESP. Tr. 143, 145, 164 (Johnson Direct at p. 12, lines 14-17; p. 14, lines 13-19, and Johnson Rebuttal at p. 5, lines 15-22); Exh. 26 (Johnson Depo., at 10-11); *see also*. Exh. 30 (Calabro Depo., at p. 12, lines 11-17; p. 13, line 11 through p. 14, line 3). PointOne's comments to the FCC and the public pronouncements it made on its website always were unequivocal that it was an enhanced services provider. Exhs. 8 and 60 (excerpts from [www.pointone.com](http://www.pointone.com)); Exh. 61 (PointOne FCC comments). Consistent with such

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<sup>2</sup> Among other things, by moving very deliberately in the context of intercarrier compensation the FCC has been striving to act consistently with the Congress's declaration in Section 230 of the Telecommunications Act of 1996 (the "1996 Act") of 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). This Commission should act consistently by dismissing Sprint's Complaint. If this Commission is to regulate at all in this area, a far more comprehensive factual record would be required than that which Sprint has offered, which is characterized by innuendo, supposition, and speculation rather than hard evidence.

<sup>3</sup> 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-Enabled Services* rulemaking (WC Docket No. 04-36), not by *ad hoc* state proceedings, especially adjudications involving two CLECs.

status, PointOne did not hold itself out as a telecommunications carrier, had never sought or received certification from the Commission as a telecommunications carrier, had never registered with the Commission, had never filed a tariff in Florida, and did not offer telecommunications services to the public in Florida, including interexchange services. Exh. 30 (Calabro Depo. at p. 12, lines 11-17; p. 13, line 11 through p. 14, line 3).

Sprint has argued that KMC must have known that PointOne was not an enhanced services provider because when the *AT&T Declaratory Ruling* was issued KMC asked PointOne if it was providing services that met the definition within the AT&T order. Tr. 64-65 (Burt Direct at p. 15-16). This is a ridiculous assertion. As Ms. Johnson testified, KMC was already subject to Sprint's complaint in this docket and was already in the process of attempting to have PointOne execute a master services agreement. Under the circumstances, it was a reasonable business action to confirm PointOne's status in view of the new FCC pronouncement. On cross-examination, even the Sprint witnesses acknowledged that it was reasonable for KMC to make such an inquiry. Tr. 66 (Burt Direct, at 17). PointOne never stated that its services were analogous to those at issue in the *AT&T Declaratory Ruling*, and continued to maintain that it was a provider of enhanced services, namely IP telephony. Exh. 26 (Johnson Depo., at 71-72).

The nature of the traffic from PointOne also is without much dispute. When Sprint in early 2004 finally provided KMC with with additional data regarding its November 2003 initial invoices for the traffic in question, KMC was able to immediately identify the charge party numbers for the calls with the two billing telephone numbers for the two separate local PRIs for PointOne in Tallahassee and Ft. Myers. As the record in this case has been developed, it is clear that approximately 99% of the traffic put in issue by Sprint came from PointOne. Most significantly, this is reflected in Sprint's own calculations of minutes, which show a drastic

reduction after June 2004 when PointOne no longer was a customer of KMC and when KMC took down the PointOne circuits. Exh. 49 (Aggarwal Direct Testimony Exhibit, KJF-3) (column E shows a reduction of intrastate MOUs from 1.7 million minutes in April '04 to under 40,000 minutes from June '04 forward; this is a reduction of more than 99% from the traffic levels in the December 02' through August '03 time period). In fact, approximately six months before the *AT&T Declaratory Ruling* and KMC's inquiries discussed above, PointOne had already begun to migrate large amounts of its traffic from the KMC network for reasons of its own. *Id.* (monthly traffic was between November '02 and October '03 between 2.8 and 5.9 million minutes; traffic from December '03 through April '04 was between 1.3 and 1.8 million minutes).

Given all the evidence, KMC as local carrier had only one legal course – and that was to treat PointOne as an end user entitled to order and receive local telecommunications services, which, in fact, KMC provided in the form of local PRIs in the Tallahassee and Ft. Myers markets. Tr. 220-221 (Calabro Rebuttal, at 6-7). While Sprint may wish it were otherwise, there is no evidence in this case that PointOne was anything but an enhanced service provider who offered enhanced IP-Telephony services. Nor is there any evidence in this case that indicates that KMC had any such knowledge that would call into question that PointOne was an enhanced services provider offering IP Telephony services when KMC provided local PRIs to PointOne. Indeed, when the FCC issued its *AT&T Declaratory Ruling*, and shortly before PointOne completed a migration from KMC's network, KMC reasonably undertook to confirm with PointOne that its services did not meet the AT&T declaratory ruling facts.

The remaining traffic has not been identified by Sprint and appears to come from a variety of KMC end users. Exh. 2 (Sprint Resp. to KMC's Interog. 47); Tr. 99-100 (Schaeffer Rebuttal, at 4-5) Specifically, Sprint has admitted that while approximately 0.6% of the traffic it

reviewed would appear as intrastate access based on a simple comparison of calling party number and called party number, such traffic is in fact call forwarded traffic to which access would not apply. Exh. 15 (Wiley Depo., at 90); Exh. 21 (Aggarwal Depo., at 32-33). Notwithstanding this position, Sprint witness Aggarwal conceded that this traffic would still be considered as intrastate access for purposes of calculating a use factor to be applied to all traffic sent over the local trunks. Exh. 21 (Aggarwal Depo., at 32-34). Not only did Sprint thereby take back improperly what it initially gave, it is extremely likely that the small amount of residual traffic in question after PointOne severed its relationship with KMC is, in fact, call forwarded traffic. As was established in the various depositions and in Mr. Shaffer's rebuttal exhibit, such call forwarded traffic, even if it involves calling party and ultimate called party numbers not in the same local calling area, is not long distance traffic subject to access charges. Exh. 27 (Twine Depo., at 21); *see e.g.* Exh. 20 (Shaffer Depo. at 22-23, 69-70). As such, the most reasonable conclusion the Commission may draw is that the residual traffic that is not PointOne traffic, while it may be telecommunications traffic from non-ESP end user customers, it is not interexchange traffic subject to access charges.

As a final point, the Commission does not have the jurisdiction to grant the principal relief Sprint requests, the assessment of intrastate access charges against KMC. Sprint must assess such charges pursuant to its tariffs on file at the PSC, and the Commission's jurisdiction to rule that Sprint is entitled to such charges from KMC is limited by the terms and conditions of the tariff itself. Section 364.04, Florida Statutes; Rule 25-4.034, Florida Administrative Code; *Corporation De Gestion Ste-Foy, Inc. v. Florida Power & Light Co.*, 385 So.2d 124 (Fla. 3d DCA 1980). The parties' local interconnection agreements confirm that they pertain to local, and in some cases intraLATA, interconnection arrangements only, leaving the imposition of

access charges to be assessed only through and according to the terms and conditions of the parties' access tariffs. *See generally*, Exh. 10 (1997 MCI Agreement, Section 1.1; Exh. 12 (2001 FDN Agreement, Section 2). The Sprint Access Tariff allows access charges to be assessed only against end user customers, as appropriate or interexchange carriers. Sprint Access Tariff Section E2.1.4. There is no tariff provision for assessing access charges generally, and certainly not interLATA access charges, against another LEC, yet that is what Sprint seeks to do here retroactively. Absent terms and conditions within Sprint's tariff that confer the remedies which Sprint seeks, the Commission does not have the jurisdiction to consider the relief Sprint requests.

For the foregoing reasons, Sprint's Complaint should be dismissed for lack of jurisdiction within this Commission to grant the relief requested in that Complaint.

**ISSUE 2: ARE KMC DATA LLC AND KMC TELECOM V, INC. PROPERLY INCLUDED AS PARTIES TO THIS COMPLAINT?**

**SUMMARY:** \*\* KMC Data and KMC V had no customers and exchanged no traffic with Sprint in the relevant markets. KMC Data's interconnection agreement with Sprint, standing alone, is not enough to make it a defendant if KMC III's use of KMC V OCNs does not alter that the traffic was KMC III's. . \*\*

**KMC POSITION:**

KMC Data and KMC V are not properly parties to this case. KMC Data and KMC V never had any customers in the Tallahassee and Ft. Myers markets and never exchanged any traffic with Sprint in those markets – the trunks were ordered and paid for by KMC III and KMC III alone. Tr. 137-138 (Johnson Direct, at p. 6, lines 13-17; p. 7, lines 7-8). Sprint has offered no evidence linking KMC Data to any of the calls. Tr. 138 (Johnson Direct p. 7, lines 8-11). The mere fact that KMC Data has an interconnection agreement with Sprint is not enough to make it

a defendant in this case if KMC Data never exchanged traffic with Sprint. Moreover, that agreement postdates Sprint's complaint in this proceeding.

As for KMC V, Sprint has offered only a single flawed rationale linking that carrier to the traffic at issue: the OCNs for the telephone numbers associated with the calls in question were assigned to KMC V. Tr. 99-100 (Schaffer Direct, at 4-5). 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. Exh. 26 (Johnson Depo., at 21-22, 24-26, 28); Tr. 178-179 (Johnson Rebuttal, at 19-20).

Assuming that Sprint's theories on liability are correct, there is no liability by association or by virtue of common ownership. (If there was, then it was improper to dismiss KMC's counterclaims against Sprint's IXC affiliate.) Whatever theoretical justification Sprint may have once had for bringing the complaint against all three KMC companies before discovery, testimony, and depositions, if any, KMC Data and KMC V should now be dropped as defendants based upon the competent substantial evidence of record.

**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?**

**SUMMARY:** \*\* Access charges should be collected from the calling party and/or IXC(s) selected by the calling party. IXCs, under Sprint's tariffs, are responsible for access charges. Sprint's tariff requires that access charges be paid only after usage factors are established, which can occur only after an audit or accounting. \*\*

**KMC POSITION:**

This question was answered by the Commission in its decision on KMC's Motion to Dismiss -- an audit is not a condition precedent to the bringing of a complaint. Order No. PSC-

04-1204-FOF-TP, issued December 3, 2004. However, there remains the independent question of whether a proper accounting is required with respect to the amount of access charges if the Commission finds – *which it should not* – that access charges are owed, *and* that KMC owes Sprint access charges for some or all of the traffic in question. The answer to this question is an unequivocal “yes.” Sprint has made only a perfunctory attempt to meet its burden of proving the soundness and validity of the amount of access charges for which it has billed KMC, denying the Commission and KMC to the data needed to verify the claimed charges, except for summary reports that would only allow confirmation of the arithmetic of the final stages of Sprint’s proffered analysis. Sprint has also relied on are unsupported guesses and unwarranted assumptions that simply do not support their claims. (*See* end of Issue No. 5 for amore complete discussion.) As a result, no damages can be awarded until an accounting is conducted.

As explained further under Issues 5 and 7, if access charges are due for the traffic in question, which KMC does not concede, Sprint is required to collect such charges from PointOne and/or the IXCs whom Sprint has identified as being associated with the traffic. Exh. 2 (Sprint Resp. to Interog. 7(c) (identifying several IXCs involved with the traffic at issue); Exh. 33 (Agilent Study, at 8) (focusing on traffic from four IXCs identified in the week-long Agilent study). The FCC’s rules and orders are clear that IXCs pay access charges, not CLECs.

An accounting through an audit would further demonstrate the extent to which Sprint can identify the IXCs – it has already identified over one dozen – involved and therefore the appropriate targets for any action to collect access charges in the event the traffic in question was not properly treated as local traffic exchanged between KMC and Sprint. The fact that Sprint failed to pursue its claims for access charges against these IXCs undercuts Sprint’s claims in this matter, as Sprint had the opportunity but failed to mitigate its alleged damages by billing the

applicable IXCs. Finally, KMC notes that 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*. Sprint Access Services Tariff, Section E2..3.11.D.1.

**ISSUE 4: WHAT IS THE APPROPRIATE METHOD TO DETERMINE THE JURISDICTIONAL NATURE AND COMPENSATION OF TRAFFIC?**

SUMMARY: \*\* ESPs are treated as end users purchasing local services. KMC is required to provide ESPs with local end user services, including local PRIs. None of the calls at issue in this case are subject to access charges. KMC paid reciprocal compensation consistent with the local nature of the services provided. \*\*

**KMC POSITION:**

The jurisdictional treatment of the traffic in this case is not a simple matter of comparing the calling party to the called party on the call detail records generated by the Agilent system purchased and installed by Sprint, as Sprint would have this Commission believe. Exh. 30 (Calabro Depo., at p. 80, line 10 through p. 81, line 15). The calling party number was never intended to form the basis for determining the jurisdictional treatment of traffic. As KMC witness Calabro explained, "[c]alling party number was designed, developed, and deployed to support . . . customer services, not for billing purposes nor for jurisdictional purposes." Exh. 30 (Calabro Depo., at p. 73, line 19 through p. 74, line 3).

Yet a simple comparison of calling party number to called party number was the beginning and end of the inquiry made by Sprint in this case before it unilaterally assessed access charges against KMC without seeking any explanation from KMC pursuant to the interconnection agreement. Exh. 23 (Miller Depo., at p. 44, line 25 through p. 45, line 5, p. 45, lines 16-21, and p. 49, lines 12-17); Tr. 34 and 41 (Wiley Direct, at p. 6, lines 10-14, p. 13, lines



4-6); Exh. 22 (Aggarwal Depo., at p. 24, lines 7-14, p. 24, line 25 through p. 25, line 4, page 75, line 24 through p. 76, line 7, p. 91, lines 8-14); Tr. 116 (Aggarwal Rebuttal, at p. 4, lines 14-15); Exh. 2 (Sprint Resp. to KMC Interog. 15).

Sprint's reliance on the fatally flawed Agilent study is entirely misplaced. It is clear from a review of the study, and the information that was and was not analyzed, that Mr. Miller, the Agilent employee that performed the study, was predisposed – and even encouraged by Sprint personnel – to believe that access charges are dependant solely on the calling party number to called party number, and was also predisposed to believe that access charge applied in this case. Exh. 24 (Miller Depo., at p. 45, lines 16-20). Mr. Miller did not know the scope of the enhanced provider exception from access charges. Exh. 24 (Miller Depo. at p. 40, line 20 through p. 41, line 14, p. 55, lines 13-22). He could not identify where the calls that formed the basis for the study originated. From his diagrams, he acknowledged that he could not recognize whether the calls actually come from one or more IXCs he identified, or that they actually came from KMC's enhanced service provider customer. Exh. 24 (Miller Depo., at p. 40, line 20 through p. 41, line 14); *see also* Exh. 30 (Calabro Depo., at p. 80, lines 8-20).

The data used in the Agilent study, if reviewed without the unqualified bias caused by a predisposition that access charges apply, actually support the conclusion that the calls were local calls, properly routed over local trunks, and that KMC did not manipulate, mismanage, or misrepresent any of the signaling content. An objective review would have to be undertaken with an understanding of the enhanced service provider exception, and with the understanding that the overwhelming preponderance of the calls in question were generated by an enhanced service provider, who is entitled to treatment as an end user. The Agilent witness did not understand or apply the enhanced service exemption. Exh. 24 (Miller Depo., at p. 40, line 20

through p. 41, line 14, p. 55, lines 13-22). When end users make local calls, those calls are properly and only treated as local calls, afforded local jurisdiction and rated for and accounted for as local calls. Exh. 30 (Calabro Depo., at p. 80, line 21 through p. 81, line 14). It was complete error, and resulted in a study that lacks competent evidentiary support, for Agilent to base its conclusions on a subset of SS7 records that were extracted, stripped, and managed, as were the records used by Agilent, and without knowledge (or inquiry) that the charge party number was that of an enhanced service provider that was providing enhanced service calls. Exh. 30 (Calabro Depo., at p. 83, lines 1-19).

The circumstances in this case highlight the flaws in making such a simple and limited inquiry. IP Telephony services sent to KMC over local PRIs by an enhanced service provider, not surprisingly, had calling party numbers from LATAs outside Tallahassee and Ft. Myers even though the communications terminated in those markets.<sup>4</sup> Exh. 6 (KMC Resp. to Sprint Interogs. 8, 9, 10, and 13). KMC has never denied or argued that the call detail records are in error in this respect.<sup>5</sup>

But the inquiry cannot end there. If the traffic in question is generated by an enhanced service provider, even though the communication may have originated in a distant market, the enhanced services provider is entitled to access the public switched network in the market where the traffic will be terminated using local end user services. The source for this entitlement is the

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<sup>4</sup> Sprint has acknowledged that the way in which KMC's switch populated the SS7 fields for the traffic in question was *not* improper. Exh. 15 (Wiley Depo. at 65-66); Exh. 2 (Sprint's Responses to Interrogatory 79, 80) (with PRI configurations the billing telephone number may be transmitted as the charge party number); Exh. 2 (Sprint's Response to Staff Interrogatory 11(b)) (admitting that Sprint's preferred method of populating the charge party number field was simply an option available to the service provider). Rather, although KMC could have set the parameters differently (and in a manner that Sprint, apparently, would have preferred), KMC populated the charge party field in a legitimate manner given that it was providing PRIs to a customer with Tallahassee and Ft. Myers numbers.

<sup>5</sup> However, as KMC witness Twine explained, in providing its PRI services to PointOne, KMC had no reason to record the calling party number or even to examine its call detail records, which KMC did not retain because they were unneeded for billing PointOne. Exh. 27 (Twine Direct, at p. 8, lines 11-17); Tr. 226 (Calabro Rebuttal, at p. 12, lines 7-14).

FCC's access charge exemption, which was discussed earlier (*see* Issue No. 1, *supra*). When the enhanced services provider chooses this alternative, the traffic in question is local in nature, and not interexchange services from the standpoint of the local exchange carriers in the market where the traffic is terminated. Thus, while a simple comparison of calling party to called party numbers might suggest the traffic is intrastate interexchange traffic or even interstate traffic, in fact the access charge exemption allows that the traffic is jurisdictionally local in nature for all relevant purposes.<sup>6</sup>

This was the case in this matter, where jurisdiction of the traffic is governed by the FCC's access charge exemption for enhanced service providers and its treatment of almost all IP-enabled telephony services as exempt from access charges. As noted above, PointOne represented itself to KMC as an enhanced service provider, more specifically a provider of IP telephony services. Tr. 143, 145-146 (Johnson Direct p. 12, lines 2-17; p. 14, lines 17-19; p. 15, lines 9-13); Exh. 30 (Calabro Depo., p. 12, lines 11-18 and p. 13, line 11 through p. 14, line 3); Tr. 220 (Calabro Rebuttal, at p. 6, lines 21-23). As such, in order to access the Ft. Myers and Tallahassee local markets, under the FCC's well-established access charge exemption and treatment of IP-enabled services as subject to that exemption, PointOne was entitled to order and KMC was obligated to provide local PRI services, which is what happened. The PRI services and therefore the traffic that PointOne generated over these services were jurisdictionally local in

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<sup>6</sup> There are other instances in which traffic with calling party numbers and called party numbers from distant exchanges are not properly treated as interexchange traffic between LECs. For example, call forwarded traffic, where toll traffic is forwarded from the original called number to another number in the local exchange, will appear as interexchange traffic using Sprint's simplistic method of determining jurisdiction. Sprint itself acknowledged this and noted that at least 0.6% of the traffic was call forwarded traffic. Exh. 2 (Sprint Resp. to Staff Interog. 8(b)); Exh. 17 (Wiley Depo., at p. 88, line 21 through p. 90, line 12); Exh. 22 (Aggarwal Depo., at p. 33, lines 2-19). Of course, this number was based upon the "eye-ball" review of Sprint witness Wiley, who reviewed only traffic from three or four days out of the entire relevant period. Exh. 17 (Wiley Depo., at p. 102, line 3 through p. 103, line 17). If ascertaining the amount of call forwarded traffic among the traffic in question becomes necessary, an accounting would be needed to confirm the accuracy of this rough guesstimate. Moreover, certain types of wireless traffic that are originated and terminated in the Ft. Myers or Tallahassee markets may appear as though they were originated in distant markets – *e.g.*, roaming traffic. An accounting would be needed to ensure this traffic is excluded as well, should the issue even become necessary.

nature, despite what the simple comparison of calling party number to called party number might suggest. In this case, Sprint has failed to offer evidence to satisfy its burden of proving that KMC should not have treated PointOne as what it professed to be, an enhanced service provider, and offered and provided PointOne local PRI services accordingly.

In the face of the evidence that the PRI traffic in question was generated by a self-certified enhanced service provider, Sprint bears the burden of demonstrating that jurisdiction should be determined in a manner other than as envisioned by the FCC's enhanced services exemption. Sprint has failed to do so. Sprint has already billed and KMC has paid reciprocal compensation for such traffic. Under the FCC's policies, rules, and decisions, such payments were consistent with the treatment of KMC's customer PointOne as an end user entitled to purchase local PRI services, and with the treatment of the traffic as local in nature.

The Agilent study showed numerous charge party numbers that empirically were the charge party numbers of PointOne. Had Agilent chosen to conduct an unbiased review of the SS7 records, it would have concluded that every aspect of the signaling records demonstrated that the calls were local calls originated over a customer's local line, in this case a local primary rate ISDN ("PRI") line. And if they had actually looked at the content of the data and not had a predisposition to find access bypass, they would have – or should have -- drawn a different set of conclusions. That data included a local call, local call treatment, local routing, and a local telephone number as the charge party number, all of which, under Signaling System 7, were indicative of a local call. Exh. 30 (Calabro Depo., at p. 88, line 23 through p. 89, line 21).

The fact that one end of the PRIs were in Orlando does not change the conclusion that the PRI services were local in nature. There was extended discussion of this issue in the deposition of KMC expert witness, Paul Calabro. Exh. 30 (Calabro Depo., at p. 39, line 5 through p. 40,

line 10). As Mr. Calabro explained, the service was local in all respects, and the circuits connecting the customer, PointOne, to the Tallahassee and Ft. Myers markets were indistinguishable from long local loops, which a competitive LEC such as KMC is free to provide its customers, as it is not bound by the interLATA restrictions that apply to some ILECs. *Id.* In testimony reflecting the cause of the basic difference between an incumbent's versus a competitor's provision of local service, Mr. Calabro noted that "competitive local carriers use long loops as a regular concept. Incumbents had lots of central offices, lots of switches, and tended to use little, short loops. Competitive local exchange carriers typically had very few switches and served broader geographic areas in local calling areas." Exh. 30 (Calabro Depo., at p. 40, lines 5-10). The customer had Ft. Myers and Tallahassee telephone numbers. No switching or routing took place in Orlando, where KMC has no switch facilities (and provides no retail services). Exh. 30 (Calabro Depo., p. 39, lines 8-11; Twine Depo. at p. 28, lines 21-23). Rather, switching took place in Ft. Myers and Tallahassee, and KMC handed off the traffic to Sprint in those markets. Exh. 30 (Calabro Depo., at p. 98, lines 8-13); Exh. 27 (Twine Depo., p. 30, lines 22-24, p. 32, lines 5-13). An Orlando local customer calling PointOne, although physically it was in Orlando, would be making a toll call, while Tallahassee and Ft. Myers end users would have been able to call PointOne as a local call. Exh. 27 (Twine Depo., at p. 84, lines 6-18). In short, for the reasons stated here and also in Issue 5, the PRI services KMC provided PointOne were local to the Ft. Myers and Tallahassee markets.

If KMC were a terminating IXC, the signaling records would have looked different. As Mr. Calabro explained, a review of the records by one knowledgeable in SS7 should have caused the reviewer to conclude that KMC was not acting as an interexchange carrier handing the calls off, but that inquiry was never made. Exh. 30 (Calabro Depo. 92). Sprint provided a limited set

of anecdotal data that there were some calls for which there was a great deal of activity prior to the call reaching KMC over PointOne's PRIs . Even in the cases where such activity existed, it was not valid for Agilent or Sprint to conclude that access charges should apply to the disputed calls without knowing the nature of the traffic before it came to KMC over the PRIs. If the reviewer was knowledgeable of the application of access charges and the ESP exemption, that reviewer should have inquired whether the customer of the party to whom access charges would be applied was, by definition, exempt from access charges. Agilent and Sprint never performed that step. The failure to analyze whether KMC's customer, or another provider between the calling party's selected IXC and the delivery of the traffic to KMC was an exempt enhanced service provider, and Agilent's unsubstantiated predisposition that access charges should apply to the local calls in its study, has resulted in a study that is unsupported by relevant facts. Such evidence does not constitute competent substantial evidence to support any finding of fact in this case. Exh. 30 (Calabro Depo., at p. 93, line 6 through p. 94, line 24). Sprint, in its general application of similar principals to the traffic in question taken as a whole, committed similar errors.

For the foregoing reasons, the jurisdiction of the traffic in question should be determined with reference to the FCC's access charge exemption and the fact that PointOne was entitled to order, and did order, local PRI services. KMC provided PointOne local PRI services in Ft. Myers and Tallahassee. Because the traffic handed off to Sprint was local in nature, it was entitled to reciprocal compensation, which is what it originally billed and received from KMC. No further or additional compensation from KMC or any other party would be appropriate.

**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?**

SUMMARY: \*\* KMC did not knowingly deliver interexchange traffic to Sprint over local trunks. KMC provided an ESP customer with local PRIs as required by the FCC. The associated traffic properly was treated as local in nature. KMC has paid reciprocal compensation for the traffic in question. No further compensation is due. \*\*

**KMC POSITION:**

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. Tr. 146 (Johnson Direct p. 15, lines 9-13).

A review of the evidence in this proceeding gives no indication that PointOne's services were anything but enhanced services. PointOne's website and documents in the public domain indicate that the services offered were enhanced services. PointOne did not hold itself out as a telecommunications carrier, including in public proceedings in other states and at the FCC, and in that regard had never sought or received certification from the Commission as a telecommunications carrier, and had never filed a tariff. Exh. 30 (Calabro Depo., at p. 12, lines 11-17; p. 13, line 11 through p. 14, line 3).

There are no requirements in Florida or at the federal level that suggests any obligation on the part of telecommunications carriers to conduct an independent investigation of each of its customers to determine that they are being truthful when they aver that they are an enhanced

service provider before the carrier can provide them with local services under local tariffs. Under existing practice in the industry, the customer is required to self-certify as an enhanced service provider, and state that it will not use common carrier services for any unlawful purpose. It has never been the role of common carriers to investigate individual customers. As applied to this proceeding, once PointOne represented itself as an ESP, KMC behaved as is normal for local carriers and provided service without investigating or validating its customer's credentials as an ESP. Tr. 220-221 (Calabro Rebuttal, at p. 6, line 14 through p. 7, line 5).

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.

#### **The Services Provided and the Traffic in Question Were Local in Nature**

Virtually all of the traffic in question in this case was generated by an end user customer of KMC's local PRI services. The remaining fraction of traffic in this case (less than 1%) appears to have been traffic forwarded locally from KMC lines in the Ft. Myers and Tallahassee markets to Sprint lines in the same market, although the original calling party may have been in a distant market. See the discussion at Issue No. 1 above. In short, KMC did not deliver interexchange traffic over local interconnection trunks, and therefore it did not do so *knowingly*.

As noted above, under applicable FCC policies and decisions, enhanced services providers are entitled to access local public telephone networks by purchasing local services from local exchange carriers, regardless of the origin or termination of their traffic. (See Issue No. 1 *supra*). When enhanced service providers purchase local services, the traffic they generate using those services is, by definition, local service. Unless the FCC's access charge exemption is to be undermined, this treatment of the traffic as local applies not only to the carrier-customer



relationship but also as to local carrier-local carrier relationships in the markets where the local services are provided.

KMC provided local service – specifically Tallahassee local PRI service and Fort Myers local PRI service – to PointOne. KMC sold PointOne local primary rate ISDN service in and from the Tallahassee local calling area and the Ft. Myers local calling area consistent with Sprint’s local calling area definition. Exh. 30 (Calabro Depo. at 36-37). In doing so, KMC provided PointOne local Tallahassee telephone numbers or local Fort Myers telephone numbers, served the customer from a 5ESS switch that had primary rate ISDN capabilities located in Tallahassee and Fort Myers respectively, interconnected with Sprint locally in Tallahassee and Fort Myers respectively, interconnected through collocations where Sprint extended its local facilities, right into the Sprint central offices at its tandem locations in both of those cities and at selected end office central office locations in those cities. Sprint did not have to egress from the bounds of its central offices in Tallahassee or Ft. Myers and to receive that traffic. *Id.* at 36-40.

The fact that the circuit that KMC provided to the customer’s premises extended from the Ft. Myers and Tallahassee markets to Orlando does not change the conclusion that these services were local to Ft. Myers and Tallahassee. *Id.* Despite its geographic location in Orlando, the only calls that could be made over the Tallahassee PRIs or the Ft. Myers PRIs were calls to Tallahassee or Ft. Myers, respectively. *Id.* Notably, in providing the PRIs to PointOne, KMC did not perform any switching in Orlando (where KMC had no switching facilities and did not provide retail service). Exh. 30 (Calabro Depo., p. 39, lines 8-11; Twine Depo. at p. 28, lines 21-23). Instead, the first point of switching was in either Ft. Myers or Tallahassee, consistent with the fact that the services in question were assigned Ft. Myers or Tallahassee telephone numbers. Exh. 30 (Calabro Depo. at p. 98, lines 8-13); Exh. 27 (Twine Depo., p. 30, lines 22-24, p. 32,

lines 5-13). Accordingly, the simple fact that PointOne was in Orlando and KMC sent traffic from Point One in Orlando over its switches in Ft. Myers and Tallahassee does not, contrary to Sprint's assertions, suddenly and automatically render traffic non-local. *Id*

The arrangement of the PRIs in this case is materially different from other vaguely similar, but ultimately very different, virtual foreign exchange or "virtual NXX" arrangements. One of Sprint's witnesses intimated that the Commission should treat the traffic in question here in a manner similar to vNXX traffic, and not as local traffic. Tr. 54-57 (Burt Rebuttal, at p. 5, line 20 to p. 8, line 3). Specifically, in those cases, the only thing local about the traffic in question is the telephone numbers that have been assigned. Typically, one LEC has to transport the traffic it originates to a vNXX number outside the local calling order and hand it off the terminating carrier service the vNXX customer in a different local calling are or exchange. Switching by the vNXX service provider takes place in a calling area or exchange distant from that associated with the telephone number. It is these characteristics which form the basis of many ILECs', including Sprint's, complaints about treating vNXX traffic as local traffic. However, none of those characteristics are present in this case. From a network perspective, there is nothing which distinguishes the traffic in question from "traditional" local traffic, and comparisons with vNXX are a "red herring." *See* Exh. 30 (Calabro Depo., at p. 97, line 24 to p. 98, line 23).

**KMC Acted Reasonably and in Good Faith in Treating PointOne As An Enhanced Services Provider**

KMC offered PointOne local services because it understood PointOne, based on direct as well as public representations by the customer, to be an enhanced services provider covered by the FCC's enhanced services access charge exemption. In treating PointOne as an enhanced service provider, and the traffic as enhanced services, KMC was acting (1) reasonably, (2) in

good faith, and (3) consistently with industry practice. PointOne certified to KMC that it was an ESP seeking a PRI for enhanced services traffic. Tr. 181-183 (Menier Rebuttal, at 3-4). KMC had no reason to question this affirmative representation. *Id.* See also Tr. 163-167, 174 (Johnson Rebuttal, at 4-8, 15). This customer has consistently represented both to the FCC and to the public at large that it is an ESP. Tr. 181-183 (Menier Rebuttal, at 3-4); Tr. 151-152 (Johnson Direct, at 20-21); Exh. 30 (Calabro Depo., at p. 12, lines 11-17; p. 13, line 11 through p. 14, line 3; Exhs. 8 and 60 (excerpts from [www.pointone.com](http://www.pointone.com)); Exh. 61 (PointOne FCC comments); Exh. 6 (KMC's Resp. to Staff Interog. 31); Tr. 162-163 (Johnson Rebuttal, at 3-4). PointOne did not hold itself out as a telecommunications carrier, had never sought or received certification from the Commission as a telecommunications carrier, had never registered with the Commission, had never filed a tariff in Florida and does not offer telecommunications services to the public in Florida, including interexchange services. Exh. 30 (Calabro Depo., at p. 12, lines 11-17; p. 13, line 11 through p. 14, line 3). Moreover, there is no way to determine from looking at the traffic itself that it is or is not enhanced services traffic, which Sprint itself acknowledges. See Tr. 91 (Burt Rebuttal, at 17); Exh. 2 (Sprint Resp. to KMC Interog. 2). KMC properly, reasonably, and good faith in relied upon these representations to offer PointOne local services and to route the traffic to Sprint consistent with the information available to it. Tr. 236-237 (Calabro Rebuttal, at p. 6, line 14 through p. 7, line 5).

In addition to KMC's actions being a reasonable and good faith course of conduct, they were consistent with industry practice. Sprint's witness Jim Burt conceded that Sprint's practice regarding ESP self-certification is not materially any different from KMC's (and what happened in this case) and certainly includes no additional restrictions or certifications. Exh. 18 (Burt Depo., at 20-21, 23-24). As Mr. Burt stated, Sprint also relies on self-certification and relies on

the customer's signing of the agreement as the certification that the customer is complying with the requirements of that agreement and the applicable tariffs. *Id.* Here, PointOne signed service orders and agreements with KMC for the services at issue, thereby certifying to its qualifications to order such local end user services. Tr. 183-184 (Menier Rebuttal, at 4-5); Exh. 7 (KMC Resp. to Sprint Interog. 15 (copies of service orders)). In addition, Mr. Calabro testified that, based on his over three decades of experience working with Verizon, Verizon also uses self-certification without additional verification or investigation when providing local services as required by the ESP exemption. Exh. 30 (Calabro Depo., at 97). Mr. Calabro also confirmed that, again based on his three and a half decades in the telecom industry, providing services without conducting an independent investigation or validating customer credentials as an ESP was normal practice. Tr. 220 (Calabro Rebuttal, at 6-7).

Sprint's claim that KMC should have done more is disingenuous. Not only is an in depth investigation of PointOne or real time review of SS7 calling party and called party data not standard industry practice, but it would impose a crippling burden on KMC, since Sprint is suggesting that KMC should have done such a review for all traffic it sent to Sprint over local interconnection trunks. Tr. 224-225 (Calabro Rebuttal, at p. 10, line 21 through p. 11, line 1). Sprint offers no evidence that it performs a similar review. Further, as Sprint has conceded there is nothing about the SS7 information associated with the traffic that would demonstrate whether the traffic is or is not enhanced service traffic. Tr. 66 (Burt Direct, at 17); Exh. 2 (Sprint Resp. to KMC Interog. 2). The bottom line is that KMC, like Sprint and the rest of the industry, must rely upon the certification of its customers.

As explained in the preceding paragraphs, the traffic in question was local traffic provided over local PRI services. KMC acted reasonably, in good faith, and consistently with

industry practices, to treat PointOne as an enhanced services provider eligible for such local services. As such, the Commission need not reach the question of whether KMC “knowingly” exchanged interexchange traffic over local interconnection trunks because KMC, in this instance, did not exchange such traffic over the local interconnection trunks at all.

**There is No Evidence that KMC “Knowingly” Misrouted Traffic**

Assuming, for the moment that the traffic generated by PointOne over the local PRIs was, in whole or in part, interexchange traffic, Sprint has offered no persuasive evidence into the record that Sprint knowingly misrouted traffic over the trunks in question so as to be liable under Florida law. Sprint’s claim that KMC “knowingly” misrouted the Point One traffic is based on Sprint’s mischaracterization of how KMC handled the SS7 signaling information. Distilled to its essence, Sprint repeatedly alleges that KMC altered the Charge Party Number information as part of a conspiracy with PointOne to dupe Sprint to avoid payment of access charges.

Sprint’s allegations completely lack the support of any competent substantial evidence in the record. First, as explained above, KMC acted reasonably and in good faith in offering PointOne local PRIs and treating the PRIs in question, configured as they were, as local.

Second, KMC properly handled the SS7 information in light of the services it was providing. KMC acted in full accord with the Interconnection Agreement, Sprint’s tariffs, Florida State law and normal industry practices. Tr. 224 (Calabro Rebuttal p. 10, lines 11-18). The Sprint witnesses in their depositions acknowledged that while the charge party number field did not have the calling party number information as Sprint was expecting, nevertheless KMC did provide the calling party number information which forms the entire basis for Sprint’s case for access charges. In response to questions at their depositions, Sprint’s witnesses could not assert that Sprint actually used the charge party number to ascertain jurisdiction. *See e.g.* Exh.

22 (Aggarwal Depo., at 24, 76). Agilent's Sam Miller, in his deposition, confirmed this. Exh. 24 (Miller Depo., at 47-49 (charge party number field not used where CPN is present)). Moreover, Sprint in its discovery responses acknowledges that the billing telephone number of a PRI customer may legitimately be used to populate the charge party number field. See Exh. 2 (Sprint Resp. to KMC Interogs. 70 and 79). Even though Sprint may have preferred for KMC to have handled the SS7 information differently, Sprint offered no evidence that KMC was legally or contractually required to do so. In the final analysis, there is simply no evidentiary basis for claiming that KMC altered the SS7 signaling associated with its customer, PointOne's calls, which are the calls in question in this proceeding.

KMC properly used the Billing Telephone Number it assigned to PointOne to populate the Charge Party Number field in the SS7 messages it sent within its network and to Sprint and other carriers. As stated by Sprint witness William Wiley, "[t]he charge number is a provisionable field that denotes the billing number of the trunk group it supports. This field is assigned by the carrier at the originating switch. This type of provisioning is usually confined to User-Network trunk groups. That is, trunk groups that interconnect the carriers switch to a user's PBX or customer premise[s] equipment." Tr. 39 (Wiley Direct, at 11). In this case, the Primary Rate ISDN lines KMC provided to PointOne were User-Network trunk groups, and they connected the customer's Customer Premises Equipment to KMC's local network. Thus, KMC provisioned the Charge Party Number field with the Billing Telephone Number of PointOne. This is all to be expected and was proper in every respect. Tr. 226-227 (Calabro Rebuttal, at p. 12, line 8 through p. 13, line 3).

Third, as was more fully discussed at Issue 1, KMC cannot be found to have "knowingly" misrouted traffic subject to access charges over the local interconnection trunks in light of the

FCC precedent and statements that limits the applicability of access charges to only a single type of traffic, whose characteristics are not duplicated here. Indeed, the propriety and reasonableness of KMC's actions in the current legal and regulatory environment are accentuated by a recent federal bankruptcy court's decision that declined to find access charges applicable in a situation that seemed to differ only slightly from that present here. Exh. 62 (Transcom Enhanced Services, LLC, Case No. 05-31929-HDH-1, U.S. Bankruptcy Court for the Northern District of Texas (April 28, 2005)).

**No Recovery From KMC is Appropriate Even if the Traffic Were Interexchange Traffic and Knowingly Sent over Local Interconnection**

As an initial matter, if Sprint wants to collect access charges, it must do so pursuant to the rates terms and conditions of its Florida access charge tariff on file with the Commission. Section 364.04, Florida Statutes; Rule 25-4.034, Florida Administrative Code. Under the tariff, if access charges are due, they are owed by the customer or the IXC, and not by KMC, a fellow LEC. Sprint Access Tariff Section E2.1.4. Sprint's theory of damages is a game of telecommunications hot potato -- whoever is the last to handle the call is left with the liability. Unfortunately for Sprint, neither the law, nor (equally important) its tariff, supports this theory of liability based on convenience. Under Sprint's tariffs, the applicability of access charges is determined by the services provided. In the present circumstances, KMC was a LEC providing local switching and, at worse, a local transiting service, to an IXC -- such a position does not transform KMC into an IXC nor obligate KMC to pay access charges which can only be due from the IXC or the originating end user.

Further, as is discussed in greater detail at Issue No. 3, *supra*, Sprint's claims with respect to the amount of access charge liability are deeply flawed, and an accounting is necessary before

access charges can be assessed whether, as required by the tariff, against PointOne or the IXCs involved or, under Sprint's expansive theories of liability, against KMC or another LEC.

Assuming for the sake of argument that some or all of the traffic in question should be treated as interexchange traffic, and that KMC should pay any associated access charges, Sprint's tariff requires that in order to assess access charges a PIU usage must first be established for the local interconnection trunks *but only after and pursuant to an audit*. Sprint Access Services Tariff, Section E2.3.11.D.1. Sprint's documentation and the pre-filed and deposition testimony of its witnesses make clear that its claims concerning the amount of damages are a house of cards that collapse under any kind of scrutiny. Thus, the meager evidence in the record cannot displace the requirement for an accounting.

The starting point of Sprint's calculation of usage factors is that the jurisdiction of the traffic sent over the trunks at issue is to be made by looking at the data for each call as captured in the Call Detail Records ("CDRs") generated by the Agilent system.<sup>7</sup> Sprint's high level explanation of what it did was as follows: "The summary report provides the jurisdiction of the SS7 MOU which is based upon the calling party numbers to the called party numbers from the SS7 CDRs. In addition, Sprint extracts the monthly billed minutes from CASS (Carrier Access Billing System) for KMC." Exh. 2 (Sprint Second Supp. Resp. to KMC Interog. 15). The SS7 MOUs are used to determine the jurisdiction percentages for interstate, intrastate, and local which are then applied to the billed minutes to come up with the corrected/revised minutes in an excel spreadsheet." Upon examination of the witness Sprint offered to support its calculations, the many flaws of Sprint's methods became clear, such that a determination of any access charge recovery requires a post-decision audit or accounting. Exh. 22 (Aggarwal Depo., at p. 12, lines

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<sup>7</sup> As noted by KMC witness Paul Calabro, the Agilent CDRs should not be confused with SS7 records, as the latter have significantly more information and the Agilent CDRs represent a selective culling and arranging of information from the SS7 records correlated with external sources. Exh. 30 (Calabro Depo., at 22-23).



2-8. As an initial matter, despite its claims that it did not perform any sampling in its calculations, Sprint did in fact calculate its damages based on only a subset of CDRs for the traffic exchanged over the local interconnection trunks. Exh. 2 (Sprint Resp. to Staff Interrog. 21), Specifically, Sprint looked at the calling party number and the called party number in the CDRs it reviewed using a software program and put a summary of the results for each month into a chart purporting to show the percentages of traffic representing each jurisdictional factor, *i.e.* the CDR Summary Reports. Exh. 22 (Aggarwal Depo. at 19, 23-24, 39-42, 47-52; 82-83); Exh. 2 (Sprint Supp. Resp. to KMC Interog. 15). Sprint witness Aggarwal conceded in her deposition that these CDR Summary Reports – and therefore the jurisdictional factors calculated therefrom – are based on a fraction of the actual call data, and that Sprint’s assumptions, extrapolations, and guesses were used to fill in the gaps in Sprint’s actual knowledge. Exh. 22 (Aggarwal Depo., at 42, 71-73). On average, during the time period in question when the bulk of the traffic at issue was exchanged, *i.e.*, between July 2002 and June 2004, Sprint looked at only 70% of the traffic in the Tallahassee market, which accounts for 75% of the alleged access charges. Exh. 22 (Aggarwal Depo., at 84); Exh. 2 (Sprint Supp. Resp. To KMC Interog. 15). Without analysis and without support Sprint simply assumed the CDRs it did review for each month to be representative and made unfounded extrapolations as to the jurisdictional nature of *all* of the traffic routed over the trunks. *Id.*<sup>8</sup>

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<sup>8</sup> The affidavit of Brian Staihr attached to the testimony of Sprint witness Wiley and later supplemented in an 11<sup>th</sup> hour discovery response was offered for a *completely different purpose*, namely that the one-day-a-month of Agilent system CDRs offered by Sprint in discovery was representative of the *nature* of the CDRs generated for the types of traffic that KMC sent Sprint over the relevant time period. As such, this sample was offered for a very limited purpose. As Sprint witness Aggarwal explained at her deposition, which was seconded by Sprint witness Wiley at his, these CDRs were not equivalent to the CDRs on which Sprint’s calculations were based. Exh. 22 (Aggarwal Depo., at 101). In fact, they were only a small subset, and Ms. Aggarwal explained that one could not take the one-day-a-month sample of CDRs and each any of the numbers calculated by Sprint for that month, such as the jurisdictional factors. Exh. 22 (Aggarwal Depo., at 101, 103). Moreover, the statements in Staihr’s affidavit regarding confidence in the representative nature of the sample are highly suspect. While Dr. Staihr claims that the batches of CDRs were randomly selected on an hourly basis, witness Wiley confirmed that, in fact, they were

In support of its calculations, Sprint offered Ritu Aggarwal, who oversees the Sprint group which calculated the access charge recovery Sprint seeks. The use and problematic nature of Sprint's incomplete data is clearly illustrated by Aggarwal's Deposition. Exhibit No. 3. Over the period July 2002 through November 2003, Sprint only examined a volume of traffic that represented 71% of the traffic billed. Exh. 22 (Aggarwal Depo., at 84 and Exh. 3 to Aggarwal Depo. (page 1, column titled "% Billed")). 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. *Id.* at 84-85, 89, 92-93, 101-03. Sprint made no attempt to determine why or what call data was missing from the CDR Summary Reports at page 1 of Aggarwal Deposition Exhibit No. 3. *Id.*<sup>9</sup> Without knowing why these significant percentages of traffic were not included in the records on which Sprint relies, or the characteristics of the CDRs that were unavailable (for example, were entire days of CDRs missing, was traffic from certain trunks missing?), it is not possible to come to any kind of conclusion as to whether the jurisdictional percentages Sprint used are reliably descriptive of the traffic for each month as a whole.<sup>10</sup> In fact, when pressed, Ms. Aggarwal could not even offer

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selected on a daily basis. Thus the basis of Dr. Staihr's conclusions is simply false. *See* Ex. 35 (Staihr Affidavit). Further, Dr. Staihr offers no evidence at all for an underlying but unstated assumption central to his simplistic conclusions, that the characteristics of the traffic over the time period in question are homogenous. Sprint offered no evidence on this whatsoever.

<sup>9</sup> Sprint did not, for example, examine what days of traffic were missing, or whether there were certain trunks for which data was not available for some days, leading to the month's shortfall. Exh. 22 (Aggarwal Depo., at 94-95). As witness Sam Miller from Agilent explained, and Agilent's own study showed, there could be considerable variations in traffic patterns and volumes depending upon what day of the week it was, or whether a day was a holiday. Exh. 24 (Miller Depo., at 28-29); Exh. 33 (Wiley Direct Testimony Exhibit, WLW-2 Agilent Study at 4). Sprint offered no evidence whatsoever that for those months when considerable amounts of traffic were not represented by Agilent CDRs, that the traffic that was included (or excluded) did not skew the results. This is one of the questions that must be addressed in an accounting or audit, as Sprint's numbers could be off by hundreds of thousands of dollars as a result of only minor corrections to the calculation of the jurisdictional factors.

<sup>10</sup> Underscoring yet further the need for an audit is the fact that Sprint never made any attempt to assess the reliability of the Agilent computer system at all for the purposes used in generating Sprint's backbills to KMC for access charges or the damages calculations for which it is offered. Exh. 22 (Aggarwal Depo., at 110-11). Sprint 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 using an independent method of calculation, there is absolutely no way to conclude whether the numbers found in the CDR Summary Reports are accurate and reliable.

any assurances that Sprint had not billed for too many minutes when bills were sent out for reciprocal compensation. Exh. 22 (Aggarwal Depo., at 93-94).

Notably, Ms. Aggarwal made clear that there would be reliability problems if Sprint had looked at as few of 50% of the CDRs in any month. Exh. 22, (Aggarwal Depo., at 71). Yet looking at Aggarwal Depo. 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%, respectively, of the volume of MOUs to which the jurisdictional factors were applied. Exh. 22 (Aggarwal Depo. Exhibit No. 3 at 1, column titled "% Billed"). 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 compensation amounts KMC paid -- where Sprint seeks a net refund from KMC of reciprocal compensation payments based on the reductions in reciprocal compensation that KMC should have, according to Sprint, paid Sprint. *See* Issue No. 8.

Numerous other flaws in Sprint's calculations that will require an audit to examine and, as necessary, correct exist as well:

- When questioned, Ms. Aggarwal could not explain the cause for, or justify the apparently aberrational differences in (typically in Sprint's favor) the applied tariff rates in Sprint's calculations. Exh. 22 (Aggarwal Depo., at 56-58). While the intrastate rates Sprint applied for almost the entire period differed on a monthly basis by a small margin, centering around \$0.056, there were four months -- September to December 2003 -- when the rates inexplicably surged, reaching as high as \$0.0669. Exh. 49 (Aggarwal adoption of KJF-3, p. 1, col. F). Even if one applied the highest rate outside this four month period, \$0.0573, the rates Sprint calculated for that period, everything else being equal
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would have been over \$60,000 lower. The reason for this surge would have to be explored in an audit.

- Sprint completely failed to factor in or even consider the fact that it calculated its jurisdictional factors based on a different time period than the MOUs to which it actually applied these jurisdictional factors. Exh. 22 (Aggarwal Depo. at 43-44). Given the variance between factors from month to month this is not an insignificant discrepancy. *See* Exh. 21 (Aggarwal Depo. Exh.3).
- Sprint improperly concluded that all traffic delivered without a CPN was subject to intrastate access charges. Exh. 22 (Aggarwal Depo., at 69). Sprint's tariff provides, to the contrary, that access is to be billed based upon the discret access charge rate elements applicable to a call – the mere presence or absence of calling party number information is not a factor in the calculation of access charges let alone the determinative factor in whether the highest possible access charge rate can be applied to a call. *See generally*, Sprint Access Service Tariff for the various rate elements.

Because of the fundamental and deep-seated flaws in Sprint's data and logic, only an audit reviewing the available CDRs, as opposed the CDR Summary Reports relied upon by Sprint in its Complaint, for the relevant months to assess what was included or excluded from the pool of MOUs which Sprint used in its calculation of the jurisdictional factors, can determine the reliability of Sprint's calculations and identify the areas in which modifications are required.

Just as important as the shortcomings of the data, or more specifically the CDR Summary Reports, upon which Sprint relied, is the extremely limited sampling it has provided to this Commission and to KMC in support of these claims of damages. The evidence that Sprint has provided consists of summaries and Sprint's interpretations of the SS7 information and a sample

of one day a month of the actual CDRs from July 2002 until January 2005. As already explained above, the CDR Summary Reports are insufficient as they are based on fractions of the overall traffic sent, as well as assumptions and conclusions made by Sprint but not supported by any evidence or investigation on their part. Providing the sample of actual CDRs does not rectify the fatal flaws in the evidence offered. Ms. Aggarwal admitted that one could never look just at the one day that had been provided for any given month and arrive at any of the the numbers on the CDR Summary Reports, such as the all-important jurisdictional factors. Exh. 22 (Aggarwal Depo., at 100-104). Rather, one would have to examine all of the call detail records that Sprint examined, as well as understand what CDRs were included and not included, as described in detail above. In order to actually verify Sprint's conclusions, it is necessary to examine the CDRs themselves, which, at this point, can only be done by an audit.

If damages are due, they cannot be awarded without an audit. As the record stands now, Sprint's "proof" of the amount of damages consists of summary documents consisting of interpretations of a fraction of the actual call data with the blanks left by the missing data filled in by Sprint's assumptions and extrapolations, and with the entire claim topped off by Sprint essentially saying "trust us." None of this constitutes sufficient competent substantial evidence in the record upon which to base any calculation of access charges, reciprocal compensation, or any other form of monetary recovery.

**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?**

**SUMMARY:** \*\* PointOne presented itself as an ESP. Based on the record, its traffic must be presumed to be enhanced services. The traffic received over PointOne's local PRIs was

delivered over local trunks. Sprint's interconnection agreements or tariffs do not abrogate KMC's obligation under federal law to provide local service to ESPs. \*\*

**KMC POSITION:**

Except for a small amount of call forward traffic, all of the remaining traffic at issue was enhanced services traffic from PointOne, during the period from approximately July 2002 to June 2004. Tr. 136 (Johnson Direct, at p. 5, lines 20-22; p. 6, lines 13-15; p. 7, lines 7-8; p. 20, line 6 through p. 21, line 6).

ESPs are entitled to purchase local common carrier services from carriers, such as KMC, to gain access to local public switched networks and then combine those local services with other processes and applications, such as storage and retrieval functions, computer processing, protocol processing and Internet functions, to offer enhanced services to their customers. Tr. 221 (Calabro Rebuttal, at p. 7, lines 6-10). Once a request for local services was made by PointOne, which had represented itself as an enhanced service provider, KMC was required to provide the customer with local services, in this case local PRIs. PointOne presented itself to KMC as an enhanced services provider, and self-certified that it qualified for the ESP exemption, and was not using common carrier services for any unlawful purpose. Tr. 143, 145-146 (Johnson Direct p. 12, lines 2-17; p. 14, lines 17-19; p. 15, lines 9-13). There is no legal requirement, nor is there any policy or practice in the telecommunications industry that required KMC to question the customer's credentials, or to perform any type of independent investigation to confirm the representations of the customer. Tr. 220-221 (Calabro Rebuttal, at p. 6, line 20 through p. 7, line 5); *see also* fuller discussion under Issue No. 5, *supra*).

The type of enhanced services, IP telephony, provided by PointOne fall within a category of traffic over which the FCC has asserted jurisdiction and for which the FCC has declined to

determine that access charges are appropriate absent a service-by-service review. Tr. 146-147 (Johnson Direct p. 15, line 9 through p. 16, line 6); *see also* discussion under Issue No. 1, *supra*. The traffic KMC received over those local PRIs was first switched in the Tallahassee and Ft. Myers markets and then delivered to Sprint over local interconnection trunks between KMC and Sprint in those 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 ignores KMC's obligations under applicable federal law 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.

The fact that PointOne was located in Orlando does *not* obviate the reality that it ordered and received local services to the Tallahassee and Ft. Myers markets. The switching, terminations, and other services KMC provided to PointOne were local to Tallahassee and Ft. Myers. *See full discussions* under Issues Nos. 4 and 5.

As the party seeking to collect access charges on the traffic in question, Sprint has the burden of proof to show that access charges are applicable to the traffic in question; it cannot shift that burden of proof to KMC simply by billing KMC access charges. In this case, Sprint has failed to demonstrate that the traffic in question was, under the FCC and Commission rules applicable to this proceeding, anything other than local traffic. Tr. 222-223 (Calabro Rebuttal, at p. 8, line 8 through p. 9, line 4).

**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?**

**SUMMARY:** \*\* The disputed traffic is IP telephony, which requires no access charges. KMC was entitled to accept self certification by the ESP, and was required to provide local PRIs. Access charges resulting from future FCC action would be due from the customer or IXCs. Sprint provided no verification of the charges. \*\*

**KMC POSITION:**

As written, Sprint's switched access tariff in Florida applies to the origination and termination of interexchange traffic. Sprint is entitled, under its access tariff to assess access charges only to interexchange carriers and end user customers that avail themselves of Sprint's access services related to interexchange tariff. Sprint Access Services Tariff, Section 3.1.4. Sprint's tariffed access charges do not apply to the origination or termination of local traffic that is exchanged with another local exchange carrier. Sprint is not free to extend its access charges to persons and entities for the origination and termination of services if not provided for in its tariff on file with the Commission.

KMC is not liable for access charges under Sprint's tariff. As is more fully discussed at Issues No. 1 and 5, the disputed traffic is associated with *local* PRI services that KMC, as a local exchange carrier, provided an end user customer. KMC did not exchange interexchange traffic with Sprint. (See Issue No. 5.) KMC's customer, PointOne, was a self-certified enhanced services provider of IP telephony who, under the FCC access charge exemption was qualified to access the local public telephone network through the purchase of local services. (See Issue No.



1). As explained above, KMC has already paid the proper compensation for the traffic in question when it paid Sprint reciprocal compensation, as originally invoiced by Sprint

Even if, however, this Commission were to find that the traffic in question is subject to access charges, under Sprint's tariffs such charges would not be due from KMC but rather from the IXC or PointOne. Tr. 144 (Johnson Direct p. 13, lines 6-11); Tr. 223 (Calabro Rebuttal, at p. 9, lines 7-10). Sprint Access Services Tariff, Section 3.1.4. Were Sprint entitled to pursue the payment of access charges against such other persons or entities, credits for the reciprocal compensation KMC has already paid for the traffic in question would be required.

Finally, assuming this Commission were somehow to conclude that KMC was liable for access charges in this case, the amount of damages to which Sprint would be entitled cannot be determined from the record in this matter. As discussed above in Issue 5, Sprint has utterly failed to meet its burden with respect to proving the amount of damages. Sprint's calculations and data are fundamentally flawed, as are the conclusions drawn therefrom. Moreover, Sprint has repeatedly failed to provide KMC and the Commission 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. In addition, Sprint's tariff, as explained in Issue No. 5, requires Sprint to first develop jurisdictional use factors pursuant to an accounting before access charges could be assessed. For the reasons stated above and in the discussion under Issue No. 5, before any access charges could be recovered from KMC for any portion of the traffic in dispute, assuming *arguendo* a finding that KMC is liable for such charges, an accounting would be necessary. Further, credits for the reciprocal compensation KMC has already paid for the traffic in question would be required.

**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?**

**SUMMARY:** \*\* KMC did not knowingly deliver interexchange traffic over local interconnection trunks in violation of the Interconnection Agreement. No additional amount is due beyond that which KMC has already paid. If it is determined that future FCC action requires access charges, Sprint must refund compensation KMC has paid for this traffic. \*\*

**KMC POSITION:**

No. As discussed in detail in response to Issue 5, KMC did not deliver interexchange traffic to Sprint over local interconnection trunks. Accordingly, there was no violation of the terms of the Interconnection Agreement. Given the representation by PointOne that it was an ESP, KMC acted reasonably, in good faith, and consistently with the practice of the industry in providing this customer with local service and routing its calls as local calls. Tr. 224 (Calabro Rebuttal, at p. 10, lines 2-7 and 15-18); Tr. 182-183 (Menier Rebuttal, at 3-4). *See also* discussion in Issues Nos. 1 and 5. The manner in which KMC treated the calls from PointOne's PRIs in terms of delivering them to Sprint over local interconnection trunks was consistent with the nature of those calls as local use calls. Tr. 227-228 Calabro Rebuttal, at p. 13, line 9 through p. 14, line 4). Therefore, there was simply no violation of the interconnection agreements.

Even if KMC had violated the interconnection agreements in sending interexchange traffic over local interconnection trunks, Sprint's remedy would be limited to adjustments in reciprocal compensation previously paid by the parties to each other, as discussed in Issue No. 10. Access charges associated with the traffic, if any, would be recoverable from the interexchange carriers or end user customers involved, not KMC, as explained in Issue No. 7.

As the interconnection agreements make clear, access charges for interexchange traffic exchanged between the parties are recoverable pursuant to the terms and conditions of Sprint's filed access tariffs, and those documents do not allow Sprint to assess access charges against a fellow local exchange carrier, such as KMC in this case.

Finally, as explained several times above (Issues 5 and 7), assuming this Commission were somehow to conclude, which it should not, that KMC was liable for access charges in this case, the amount of access charges to which Sprint would be entitled cannot be determined from the record in this matter. Sprint has utterly failed to meet its burden with respect to proving the amount of damages. Sprint's calculations and data are fundamentally flawed, as are the conclusions drawn therefrom. Moreover, Sprint has repeatedly failed to provide KMC and the Commission 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. In addition, Sprint's tariff, as explained in Issue No. 5, requires Sprint to first develop jurisdictional use factors pursuant to an audit before access charges could be assessed. For the reasons stated above and in the discussion under Issue No. 5, before any access charges could be recovered from KMC for any portion of the traffic in dispute, assuming *arguendo* a finding that KMC is liable for such charges, an audit or accounting would be necessary. Further, credits for the reciprocal compensation KMC has already paid for the traffic in question would be required. Tr. 174-175 (Johnson Rebuttal, at 15-16). 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.

**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?**

**SUMMARY:** \*\* 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. \*\*

**KMC 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?**

**SUMMARY:** \*\* Sprint did not overpay. KMC paid reciprocal compensation on the disputed traffic. Sprint's payment was, in part, based upon traffic for which KMC paid reciprocal compensation. No refund is appropriate. If the traffic was not ESP or IP telephony, access charges would be due from PointOne or IXCs. \*\*

**KMC POSITION:**

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 PointOne and/or the interexchange carriers associated with this traffic and not from KMC. In this situation there

would be a 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?**

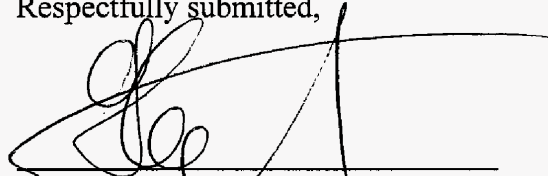
**SUMMARY:** \*\* If this was not ESP or IP telephony, access charges are due from PointOne or IXCs. An accounting is necessary to reconcile payments made against those Sprint has not paid that are past due. Amounts due to Sprint should be held in abeyance pending the resolution of KMC's claims. \*\*

**KMC POSITION:**

In the event it is determined that PointOne was not an enhanced services provider or that the traffic at issue was not 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 shall 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.

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 16<sup>th</sup> day of August, 2005.

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