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August 16, 2005

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 041144-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated is Sprint's Post-Hearing Statement and Brief.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions regarding this electronic filing, please do not hesitate to call me at 850-599-1560.

Sincerely,

A handwritten signature in black ink that reads "Susan S. Masterton".

Susan S. Masterton

Enclosure

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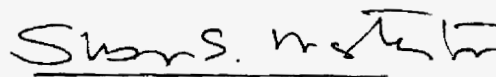
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Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint-Florida, Incorporated) Docket No. 041144-TP
Against KMC Telecom III LLC,)
KMC Telecom V, Inc. and KMC Data LLC,)
for failure to pay intrastate)
Access charges pursuant to its interconnection)
Agreement and Sprint's tariffs and for violation of)
Section 364.16(3)(a), Florida Statutes.) Filed: August 16, 2005
_____)

**SPRINT FLORIDA INCORPORATED'S
POST-HEARING STATEMENT AND BRIEF**

Pursuant to the Orders Establishing Procedure, Order No. PSC-05-0125-PCO-TP and Order No. PSC-05-0402-PCO-TP, Sprint-Florida, Incorporated ("Sprint") files this Post-hearing Statement and Brief.

INTRODUCTION

Sprint filed this Complaint against KMC to seek payment of access charges that Sprint should have received from KMC for interexchange traffic that was delivered by KMC over local interconnection trunks to Sprint. Industry standard call detail records, generated from SS7 records show that from July 2002 through approximately May 2004 KMC has engaged in systematic, continuous and intentional actions to avoid paying Sprint access charges for interexchange toll traffic bound for termination by Sprint. And, call detail records show that, while the amount of wrongfully terminated traffic has decreased substantially since May 2004, KMC continues to terminate interexchange traffic to Sprint over its local interconnection trunks. In its arguments related to the individual issues, Sprint will show that KMC has violated Florida law, KMC's interconnection agreements with Sprint and Sprint's access tariffs by knowingly

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terminating interexchange traffic over local interconnection trunks and failing to pay applicable access charges for the traffic.

SUMMARY OF THE RELEVANT FACTS

During the period of time relevant to Sprint's Complaint, Sprint and KMC operated under several interconnection agreements; all had substantially similar language as it relates to the violations alleged in this Complaint. From July 2002 through July 2003, KMC and Sprint operated under the 1997 MCI Agreement. From July 2003 until June 2004, the parties operated under the FDN agreement. And from June 2004 through March 2005 the parties operated under the 2002 MCI agreement. [Tr. 55, Burt Direct Testimony, page 6, lines 4-12] Sprint will discuss the specific relevant provisions of these agreements in the body of its brief.

As Mr. Wiley describes in this direct testimony, Sprint is interconnected to KMC via a local interconnection trunk group that uses signaling system 7 (SS7) for call by call signaling. [Tr. 32, Wiley Direct Testimony, page 4, lines 8-16] This network to-network interconnection system provides "out of band" call detail signaling information that sets up, provides supervision, and disconnects supervision for telephone calls. [Id.] Instead of using tones to pass routing and number identification information over the circuits used for the voice path of the call, SS7 sends this information over a separate link and correlates this call setup information with the voice circuit connected between two switches. [Id.] Sprint uses the Agilent system to extract, interpret and record this SS7 data. [Tr. 32, Wiley Direct Testimony, page 4, lines 1-3, Tr. 34, page 6, lines 19-23] In simple terms, the Agilent system looks at call detail records captured from the SS7 system and, using the originating telephone number and the terminating telephone number, determines if a call is local, interstate or intrastate interLATA. [Tr. 34, Wiley Direct Testimony, page 6, lines 10-14]

Regarding the KMC traffic KMC terminated to Sprint that is the subject of this Complaint, the Agilent system provided information that showed a large percentage of calls coming from KMC's switches did not meet the standardized SS7 criteria for the charge number the calling party number and the jurisdiction information parameter (JIP). [Tr. 40, Wiley Direct Testimony, page 12, lines 1-10] The records showed that while the charge number and JIP was attributed to the KMC switch and the calls purportedly originated within KMC's network switches, the calling party number revealed that the calls actually originated in areas outside of KMC's network. A large percentage of these calls were intrastate interLATA calls. [Id.] Termination of this traffic over local interconnection trunks violated Sprint's agreement with KMC concerning the proper routing of traffic. [Id.]

The population of originating calling party numbers outside of the local access area over originating PRI trunks was not relegated to a small number of trunk groups. Sprint's research from traffic collected on the Sprint-KMC local interconnection trunks, showed that hundreds of KMC Ft. Myers and Tallahassee local trunks were found to carry traffic that had an originating charge number and JIP assigned to the KMC switches and that originated outside the serving area. (Tr. 40, Wiley Direct Testimony, page 12, lines 12-22) These calls could not have come from other switching entities and tandemed through the KMC switch. [Id.] Since the JIP and charge number both are assigned to KMC, this traffic must have originated over these KMC trunk group(s) unless some non-standard routing or digit manipulation occurred. [Id.] Sprint used Agilent SS7 monthly summary records, a compilation of all the daily call detail records (CDRs), to create of monthly summary to develop the appropriate percentage of local, interstate, and intrastate interLATA and local traffic. (Hearing Exhibit No. 22, Aggarwal Deposition, page 41, lines 12-18; Tr. 36, Wiley Direct Testimony, page 6, lines 10-13) These percentage were applied

to the MOUs from June of 2002 through November 2004 to develop the access charge billing amounts KMC should have been compensating Sprint. [Tr. 116, Aggarwal Direct Testimony, page 4, lines 11-18] In addition, to validate Sprint's internal research using the Agilent system, Sprint retained Agilent to conduct an independent study of a week of KMC call detail records to determine if Sprint's findings regarding the jurisdictional nature of the traffic and the PLU/PIU percentages were correct. [Hearing Exhibit No. 22, Aggarwal Deposition, page 60, lines 1-23] The Agilent findings verified what Sprint had discovered through its own research and are included in the record of this proceeding in Hearing Exhibits 33 and 34, Exhibits WLW-2 and WLW-3.

ISSUES, POSITIONS AND DISCUSSION

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

Sprint's Position: **The Commission has jurisdiction to address Sprint's Complaint pursuant to sections 152, 251 and 252 of the Telecommunications Act of 1996 and pursuant to sections 364.01, 364.16, 364.162 and 364.163, Florida Statutes.**

Argument

Sprint alleges that KMC has violated Florida law, its interconnection agreements with Sprint and Sprint's tariffs by knowingly delivering interexchange traffic over local interconnection trunks for termination to Sprint for the purpose of avoiding Sprint's tariffed intrastate access charges. The Commission clearly has jurisdiction to address Sprint's Complaint under the applicable federal and state statutes and Commission and judicial precedent. Section 364.16(3)(a), F.S., prohibits a local exchange company (either an ILEC or a CLEC) from

knowingly terminating interexchange traffic over local interconnection arrangements to avoid the payment of access charges. Specifically, the statute provides:

No local exchange telecommunications company or competitive local exchange company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

The section further provides that a local exchange company may request the Florida Public Service Commission to enforce this provision. Specifically, section 364.16(3)(b), F.S., states:

Any party with a substantial interest may petition the commission for an investigation of any suspected violation of paragraph (a). In the event any certificated local exchange service provider knowingly violates paragraph (a), the commission shall have jurisdiction to arbitrate bona fide complaints arising from the requirements of the subsection and shall, upon such complaint have access to all relevant customer records and accounts of any telecommunications company.

Sprint has alleged that KMC's termination of the traffic that is the subject of this Complaint violates section 364.16(3), F.S. The Commission has clear statutory authority to determine whether a violation of section 364.16(3), F.S., has occurred.

In addition, under sections 251 and 252 of the Telecommunications Act and under sections 364.16 and 364.161, and 364.162, F.S., the Commission has the authority to resolve Sprint's Complaint that KMC violated its interconnection agreements with Sprint by terminating interexchange traffic over local interconnection trunks. Section 252 gives the Commission the authority to approve interconnection agreements entered into through negotiations or as a result of arbitrations. This authority has been held to include the authority to resolve disputes concerning the terms of the interconnection agreements.¹

¹ See, *In re: Complaint of BellSouth Telecommunications against IDS Telecom LLC to enforce interconnection agreement deposit requirements*, Order No. PSC-04-0824-PAA-TP in Docket No. 040488-TP citing *BellSouth v. MCI Metro Access Transmission Services*, 317 F. 3d 1270, 1275 (11th Circuit 2003)

Similar to the federal law, section 364.16, F.S., 364.161, and 364.162, F.S., authorize the Commission to approve interconnection agreements and arbitrate disputes. Section 364.162(1), F.S., specifically authorizes the Commission to resolve disputes concerning the terms and conditions of interconnection. And, Sprint's interconnection agreements with KMC recognize the Commission's authority in resolving disputes concerning the agreements. [Tr. 55, Burt Direct Testimony, page 6, lines 13-14] The Dispute Resolution sections of the applicable interconnection agreements specifically set forth the Florida Public Service Commission jurisdiction over disputes between Sprint and KMC.² Clearly the Commission has the authority to resolve Sprint's claims that KMC violated the terms of the parties' interconnection agreements by terminating interexchange traffic over local interconnection trunks and failing to pay Sprint's tariffed access charges.

Finally, Sprint has alleged that KMC violated Sprint's access tariffs by failing to pay the tariffed terminating access rate applicable to interexchange traffic. 47 U.S.C. §152 delineates the federal jurisdiction over interstate services and the state jurisdiction over intrastate services. 47 U.S.C. §201 and section 364.163, F.S., delineate the FCC's and the Commission's jurisdiction over interstate and intrastate access charges, respectively. Commission decisions and case law recognize that valid tariffs have the

² 1997 MCI Agreement, Part B General Terms and Conditions, Section 23.1: "The Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement...."

FDN Agreement, Part A, Section 23: "The Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement...."

2002 MCI Agreement, Part A, Section 23: "The Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement...."

The 1997 MCI Agreement, the FDN Agreement and the 2002 MCI Agreement all define Commission as the Florida Public Service Commission.

force of law and the Commission has jurisdiction to settle disputes related to the enforcement of these tariffs.³

KMC has alleged that the traffic that is the subject of this complaint is Voice over Internet Protocol (“VoIP”) traffic. [Tr. 146, Johnson Direct Testimony, page 15, line 11] In its affirmative defenses, KMC appears to take the position that this Commission has no jurisdiction over Sprint’s Complaint because the FCC has declared VoIP services to be “interstate” services under the jurisdiction of the FCC rather than state Commissions. First, other than bare assertions based on hearsay communications from Unipoint, KMC has not proven that the interexchange traffic it terminated over its local interconnection trunks with Sprint was VoIP traffic or enhanced services traffic as KMC now characterizes it. Second, even if the traffic is presumed to be VoIP, based on KMC’s unsubstantiated allegations, KMC erroneously interprets the FCC rulings regarding the nature and jurisdiction of VoIP traffic. The FCC has never ruled that all forms of traffic that use the internet protocol at some point in the transmission constitute enhanced services traffic. To date, the FCC has only found that one type of VoIP service is an “information service” and that is traffic that originates and terminates on a computer network, uses special originating and terminating software and routing, and never touches the public switched telephone network. [*In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, released February 19, 2004 (“pulver.com Declaratory Ruling”) at ¶¶ 5 and 9] In WC Docket No. 02-161, *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, FCC 04-97, released April 21, 2004 (“AT&T Declaratory Ruling”), the FCC specifically found that traffic

³ See, *Maddalena v. Southern Bell*, 382 So. 2d 1246 (Fla. 4th DCA 1980); *In re: Complaint by Mr. Paul Leon and Mr. Joseph Olazabal against Florida Power and Light Company regarding tariffs for moving electric light poles*, Order

that meets certain characteristics (that, is phone to phone traffic that may use the internet protocol somewhere in the intermediate stages of the transmission) is, indeed, telecommunications traffic, subject to intercarrier compensation the same as any other voice telecommunications traffic. [AT&T Declaratory Ruling at ¶ 19] The only other FCC decision ruling on a specific form of VoIP traffic was the Vonage decision. While the FCC found that Vonage type traffic, that is, traffic that originates or terminates to a broad band internet connection, is jurisdictionally mixed and in the nature of an interstate service, it declined to rule on the nature of the traffic as either telecommunications or information services, and it declined to rule on the applicable intercarrier compensation for the use of the public switched network to originate or terminate the traffic. [*Vonage Holdings Corporation Petition for Declaratory Ruling concerning an Order of the Minnesota Public Utilities Commission*, FCC 04-267, released December 12, 2004 (“Vonage Declaratory Ruling”) at ¶ 14, footnote 46, and ¶¶ 18 and 44] While withholding a specific ruling on intercarrier compensation in the Vonage docket, in the IP-Enabled Services NPRM proceeding, the FCC clearly stated its position that traffic that uses the public switched network should pay the appropriate intercarrier compensation for that use, whether or not IP protocol was used somewhere in the transmission. [*In the Matter of IP-Enabled Services*, FCC 04-28 released March 10, 2004 (IP Enabled Services NPRM) at ¶ 33] Therefore, KMC is flatly wrong in implying that the FCC issued some blanket statement that all traffic that uses the internet protocol is enhanced services traffic and that the FCC pre-empted this Commission’s jurisdiction over all such traffic.

In addition, Florida law specifically addresses the Commission’s jurisdiction relating to VoIP traffic. While Section 364.02(12), F.S., excludes VoIP as a service regulated by the Commission, the subsection explicitly states that “Nothing herein shall affect the rights and

obligations of any entity related to the payment of switched network access rates or other intercarrier compensation, if any, related to the voice-over-Internet protocol service.” Therefore, the statute explicitly reserves the Commission’s jurisdiction to resolve Sprint’s Complaint related to access charges due Sprint from KMC, even if the traffic is, as KMC alleges, VoIP traffic.

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

Sprint’s Position: **Yes. All three entities are parties to applicable interconnection agreements with Sprint. In addition, KMC III and KMC V have engaged in specific actions related to the improper and unlawful delivery by KMC of access traffic for termination to Sprint over KMC’s local interconnection trunks with Sprint.**

Argument

KMC has argued that KMC Data LLC and KMC Telecom V are not proper parties to Sprint’s Complaint. [Tr. 138, Johnson Direct Testimony, page 7 lines 6-11; Tr. 178, Johnson Rebuttal, page 19, lines 6-20] KMC bases this argument on its representations that neither entity was involved in the traffic that is the subject of Sprint’s Complaint and, therefore, neither entity can be held liable for the access charges due Sprint for this traffic. [Id.] Sprint included KMC III, KMC V and KMC Data LLC as parties to the Complaint because all three are certificated as CLECs in Florida and all three are parties to one or more of KMC’s interconnection agreements with Sprint. [Tr. 97, Schaffer Direct Testimony, page 2, lines 15-20] When it initially filed its Complaint, Sprint had insufficient knowledge of the relationships among the various KMC entities to which Sprint provided service under the interconnection agreements, since KMC had been unresponsive to Sprint’s attempts to gather information from KMC regarding the traffic that is the subject of Sprint’s Complaint. KMC subsequently has alleged that KMC Data LLC does

not provide service in Florida and has no customers. [Hearing Exhibit No. 26, Johnson Deposition, page 22, lines 4 &5 and page 24, lines 1-3] Sprint has no evidence to the contrary, but still includes KMC Data as a party because it has entered into a Florida interconnection agreement with Sprint.⁴

Regarding KMC V, Sprint's internal records and industry records available to Sprint show that KMC V was closely involved in the traffic that is the subject of Sprint's complaint. Because of this, KMC V should be held responsible, along with KMC III, for violating Florida law and KMC's interconnection agreements with Sprint by knowingly delivering interexchange traffic over local interconnection trunks to Sprint for the purpose of avoiding access charges. The evidence of KMC V's involvement in this traffic includes the following. First, the evidence shows that KMC V owned the charge party numbers assigned to the customer that KMC says is responsible for the access bypass traffic identified by Sprint (i.e., Unipoint. [Tr. 99, Schaffer Direct Testimony, page 4, lines 10-12 and Hearing Exhibit No. 44, Exhibit CMS-2] Second, in response to discovery, KMC identified the OCN 8982 as belonging to KMC V. [Hearing Exhibit No. 7, KMC's Response to Sprint's Interrogatory No. 29(b)] The Local Exchange Routing Guide ("LERG") shows that the charge party numbers assigned to Unipoint by KMC belong to the OCN 8982 that is assigned to KMC V. Third, the evidence also shows that the interconnection facilities (i.e., local trunks) used to deliver the traffic to Sprint that is the subject of Sprint's Complaint, were ordered under KMC V's OCN 8982. [Tr. 104, line 8 through Tr. 105, line 4, Schaffer Rebuttal Testimony, and Hearing Exhibit No. 45, Exhibit CMS-3] It is astonishing that KMC sincerely argues that KMC V is not a proper party to Sprint's Complaint when KMC V is a party to the applicable interconnection agreements, it owned the charge party

⁴ In her deposition (Hearing Exhibit No. 26) on page 25, lines 5-8, Ms. Johnson expresses KMC's view that the interconnection agreement may be assigned among related KMC entities without Sprint's consent.

numbers used to make the interexchange traffic look local, and it ordered the local interconnection trunks over which the traffic was delivered to Sprint.

KMC has changed its story several times on the involvement of KMC V in this case. KMC stated under oath in a discovery response that KMC III owned the charge party numbers assigned to the customer that KMC says is responsible for the offending traffic identified by Sprint. [Hearing Exhibit No. 6, KMC's Response to Sprint's Interrogatory No. 12] After Sprint filed its direct testimony and discovery responses demonstrating that KMC V was the owner of the relevant numbers in the LERG, KMC changed its story. [Hearing Exhibit No. 6, KMC's Response to Staff's Interrogatory No. 12] Later, when questioned about the inconsistencies in its testimony and discovery responses, KMC attempted to say that the numbers really belonged to KMC III and they just hadn't made the relevant "record changes" to reflect the correct ownership. [Hearing Exhibit No. 26, Johnson Deposition, page 26, lines 22-23] Finally, in response to further inquiry from Sprint, KMC admitted that KMC V owned the OCN under which the numbers are assigned and under which the facilities were ordered during the entire time period that is the subject of this Complaint. [Hearing Exhibit No. 26, Johnson Deposition, page 34, lines 1-8, Hearing Exhibit No. 45, CMS-3]

In a final desperate attempt to limit responsibility to only one KMC affiliate, for reasons not readily apparent to Sprint, KMC argued that KMC III should be dropped as a party. [Tr. 178, Johnson Rebuttal Testimony, page 19, lines 20-22] KMC even had the audacity to imply that Sprint had provided no evidence proving that KMC III is also responsible. [Id.] Of course, Sprint did not need to provide independent evidence of KMC III's responsibility, since KMC by its own assertions and admissions has indicated that KMC III is a proper party. KMC has stated that KMC III was the entity that provided the services to Unipoint and also that KMC III was the

entity that received Sprint's bills for the interconnection services used to deliver Unipoint's traffic to Sprint for termination.⁵ [Tr. 137, Johnson Direct Testimony, page 6, lines 14-16]

Unless KMC's testimony is false, KMC III shares responsibility with KMC V for the scheme KMC employed to misrepresent Unipoint's interexchange traffic as local traffic and deliver it to Sprint over local interconnection trunks for termination, thereby avoiding the payment of access charges rightfully due Sprint. There is absolutely no support or justification in the law for the position apparently espoused by KMC's counsel in his opening statement [Tr. 27, lines 6-10] that two entities, which are jointly parties to the applicable interconnection agreements and jointly engaged in the activities that Sprint alleges to be unlawful under its Complaint, cannot be found jointly responsible to Sprint for the access charges that should have been paid under the law and the interconnection agreements.

KMC Data LLC is a certificated CLEC in Florida and was a party to at least one of the interconnection agreements that KMC had with Sprint. On this basis alone KMC Data LLC is a proper party to this Complaint. KMC V and KMC III were joint parties to applicable interconnection agreements and jointly engaged in the activities that give rise to this Complaint. Nothing in the interconnection agreements indicates that liability under the agreements should be divided or allocated among the various KMC entities. Therefore, both KMC V and KMC III are proper parties to Sprint's Complaint and they should be held jointly responsible for their actions and for the payment to Sprint of the wrongfully avoided access charges

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?

⁵ KMC has also stated that both KMC III and KMC V use the same ACNA – KMM- which Sprint uses for the KMC billings. Schaffer Rebuttal Testimony, Tr. 105, lines 6-7, Hearing Exhibit 6, KMC Response to Sprint's Interrogatory No. 29(a).

Sprint's Position: **No. Neither Sprint's interconnection agreements nor Sprint's tariffs require Sprint to conduct an audit as a condition precedent to pursuing its claims against KMC.**

Argument

KMC appears to have abandoned its position that the interconnection agreements and/or Sprint's tariffs required Sprint to conduct an audit prior to filing its Complaint. [Hearing Exhibit No. 26, Johnson Deposition, at page 10, lines 5-8] Even if the Commission finds that KMC has not conceded this point, KMC was wrong in its assertion because the applicable interconnection agreements and Sprint's tariffs permit but do not require an audit in connection with billing disputes or allegations of agreement violations. There is nothing in the Interconnection Agreements applicable between Sprint and KMC that states that an audit must be performed prior to a complaint being filed. And, there is nothing in Sprint's Access Services Tariff requiring an audit.

The applicable interconnection agreements are the 1997 MCI Agreement, the FDN Agreement and the 2002 MCI Agreement. In KMC's Motion to Dismiss Sprint's Complaint, filed October 15, 2004, KMC alleges that Part A, Section 22.1 and Attachment IV, Section 8.2 of the 1997 MCI interconnection agreement require an audit before pursuing a complaint. Section 22.1 allows audits but does not require them. Specifically the applicable language is "The auditing Party may perform up to two (2) Audits per twelve (12) month period" [Hearing Exhibit No. 10] Section 8.2 addresses the responsibilities of the Parties with regarding usage reports. Section 8.2 specifically states "Either Party may request an audit of such usage reports on no fewer than ten (10) day's" [Hearing Exhibit No. 10] Thus, there is no language in the

1997 MCI Agreement requiring an audit; rather, both sections allow audits and detail the rights and limitations associated with such audits.

Similarly, the FDN agreement allows but does not require an audit. Section 7.1 specifically states “Subject to each Party’s reasonable security requirements and except as may be otherwise specifically provided in this Agreement, either Party, at its own expense, may audit the other Party’s books.....” [Hearing Exhibit No. 12] Again, it is an option, not a requirement. Finally, the 2002 MCI Agreement also permits but does not require an audit. [Hearing Exhibit 13]

Sprint’s Access Service Tariff, Section E2.3.11.D.1, cited by KMC in its Motion to Dismiss, also allows an audit by the Company but does not require one. The cited tariff provision is not applicable to this Complaint, as it addresses the misreporting of PIUs for traffic that is properly routed over access trunks, while this complaint involves the wrongful termination of access traffic over local interconnection trunks. However, even if the Commission finds that Section E2.3.11.D.1 applies, it does not require an audit. The specific language E2.3.11.D.1 states “...when a billing dispute arises or when a regulatory commission questions the reported PIU, the Company may, upon written request, require the customer to provide call detail records which will be audited to” [Tr. 57, Burt Direct Testimony, page 8, lines 11-20]

Thus, neither the Interconnection Agreements nor the Access Services Tariffs “require” an audit. As the Commission has already decided correctly, an audit is not required for Sprint to pursue this action against KMC for wrongfully avoided access charges.

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

Sprint's Position: **The jurisdiction and compensation for the traffic delivered by KMC to Sprint should be based on the end points of the calling and called parties. The calls that are the subject of Sprint's Complaint originated from end-users outside the local calling area of the Sprint end-users where the calls terminated.**

Argument

As Mr. Burt states in his Direct Testimony, it is common industry practice to determine jurisdiction based on the originating and terminating end points of the calling parties. [Tr. 58, Burt Direct Testimony, page 9, lines 4-9] If the originating and terminating end points are within the same local calling area, the jurisdiction of the call is local. If the originating and terminating end points are within the state, but outside the local calling area, the jurisdiction is intrastate toll. If the originating and terminating end points are in different states, the jurisdiction is interstate toll. [Id.] Pursuant to applicable law and the parties' interconnection agreements, the inter-carrier compensation for all traffic that terminates to Sprint's network should be based on the jurisdictional nature of the traffic. Local traffic should be subject to reciprocal compensation rates, intrastate toll traffic should be subject to intrastate access rates and interstate toll traffic should be subject to interstate access rates.

Historically, the FCC has determined the jurisdiction of a call using an end-to-end analysis. [Vonage Declaratory Ruling at ¶ 17 citing *Bell Atlantic v. FCC*, 206 F. 3d 1, 3 (D.C. Cir. 2000)] The FCC confirmed the continuing viability of the "end-to-end" analysis to establish the jurisdiction of a call as recently as February 23, 2005 in WC Docket No. 03-133, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, FCC 05-41, released February 23, 2005 ("AT&T Prepaid Calling Card Ruling"). At ¶5 of the AT&T Prepaid Calling Card Ruling, the FCC states:

For purposes of determining the jurisdiction of calling card calls, the Commission has applied an “end-to-end” analysis, classifying long distance calls as jurisdictionally interstate or intrastate based on the end points, not the actual path, of each complete communication. Under the Commission’s end-to-end analysis, intrastate access charges apply when customers use prepaid calling cards to make interexchange calls that originate and terminate within the same state, even if the centralized switching platform is located in a different state.

The AT&T Prepaid Calling Card Order also states that the routing of a call does not change the jurisdiction. In other words, the jurisdiction of a call is determined by the end points of the calling parties regardless of how the call is routed. [AT&T Prepaid Calling Card Ruling at ¶ 28] In addition, the FCC’s decision in the AT&T Declaratory Ruling confirms that jurisdiction is determined based on the end points of the call regardless of how the call might be routed in between those end points. [AT&T Declaratory Ruling at ¶ 12]

In its Generic Reciprocal Compensation Order⁶, the Commission confirmed that a call’s jurisdiction is to be determined by the originating and terminating endpoints of the call. In addressing an issue relating to the appropriate intercarrier compensation for virtual NXX traffic, the Commission stated “We believe that the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the endpoints of a particular call.” [Generic Reciprocal Compensation Order at page 31] In addition, the Commission stated, “We believe this is true regardless of whether the call has been rated as local for the originating end user.” [Id.] While the KMC traffic at issue in this Complaint is not specifically virtual NXX traffic, it shares similar characteristics in that KMC assigned local NPA/NXX charge numbers to the traffic in order to make it appear local to the Ft. Myers and Tallahassee areas in which the calls terminated, even though the traffic originated from calling parties in distant local calling areas and was transported by KMC to the Ft. Myers and Tallahassee local calling areas from

Unipoint's physical location in Orlando. [Tr. 192a, line 11 through 192b, line 7, Twine Direct Testimony]

Given the Commission's basic end-to-end decision in the Generic Reciprocal Compensation Order for VNXX traffic, i.e., local telephone numbers assigned outside the local calling area do not make calls local, it is inconceivable that KMC could not have known that the traffic was not local. Further, not only was the routing of the traffic between Orlando and Tallahassee or Ft. Myers interexchange toll, but the subject traffic did not even originate in Orlando and the charge numbers were not working telephone numbers. If all carriers were allowed to treat such calls as local, it would have a significant, industry-wide impact. Because of the nature of the KMC-originated traffic at issue here and the CLEC-terminated virtual NXX traffic at issue in the Generic Reciprocal Compensation docket, the Commission's ruling in that docket is equally applicable here. That is, as the Commission held:

We find that carriers shall be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is assigned. In addition, we find that the intercarrier compensation for these numbers shall be based upon the end points of the particular calls." [Order at pages 34-35]

The definition of "local traffic" in the Sprint/KMC interconnection agreements also relies on the originating and terminating end points of a call to determine the appropriate jurisdiction for intercarrier compensation purposes. The 1997 MCI agreement contains the following definition:

"LOCAL TRAFFIC" means traffic that is originated and terminated within a given local calling area, or Expanded Area Service ("EAS") area, as defined by state Commissions or, if not defined by State Commissions, then as defined in existing Sprint tariffs. [cite to ICA in hearing exhibit]

The FDN Agreement contains the following substantially similar definition:

⁶ *In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Order No. PSC-02-1248-FOF-TP in Docket No. 000075-TP, issued September 10, 2002.

“Local Traffic,” for the purposes of this Agreement the Parties shall agree that “Local Traffic” means traffic (excluding CMRS traffic) that is originated and terminated within Sprint’s local calling area, or mandatory expanded area service (EAS) area, as defined by State commissions or, if not defined by State commissions, then as defined in existing Sprint tariffs. For this purpose, Local Traffic does not include any Information Access Traffic. Neither Party waives its’ rights to participate and fully present its’ respective positions in any proceeding dealing with the compensation for Internet traffic. [cite to ICA in hearing exhibit]

In addition, the current interconnection agreement effective between the parties defines local traffic as:

LOCAL TRAFFIC, for purposes of reciprocal compensation, means any telephone call that originates in one exchange and terminates in either the same exchange, or other local calling area associated with the exchange (e.g. Extended Area Service) as defined and specified in Section A3 of Sprint’s General Exchange Subscriber Service Tariff. The applicability or inapplicability of this definition to any traffic does not affect either Party’s right to define its own local calling areas for the purpose of charging its customers to originate calls. [Tr. 60, Burt Direct Testimony, page x, lines 10-18]

The Sprint Access Service Tariffs also provide that jurisdiction is determined based on the end points of a call. Section E 2.3.11(A)(1) states:

Pursuant to Federal Communications Commission order F.C.C. 85-145 adopted April 16, 1985, intrastate usage is to be developed as though every call that enters a customer *network from a calling location* within the same state as that in which the called station (as designated by the called station number) is situated is an intrastate communication and every call for which the point of entry is in a state other than that where the called station (as designated by the called station number) is situated is an interstate communication. *The manner in which a call is routed through the telecommunications network does not affect the jurisdiction of a call, i.e.; a call between two points within the same state is an intrastate communication even if the call is routed through another state.* [Tr. 61, Burt Direct Testimony, page x, lines 1-11]

KMC argues that the “putative physical ends points of a call” are irrelevant in determining the jurisdiction of enhanced services traffic. [Tr. 146, Johnson Direct Testimony, page 15, lines 11-13] There is no basis in the law, and certainly no basis in the language of the interconnection agreements that govern the exchange of traffic

between the parties, that supports KMC's claim. While the FCC has said that enhanced services traffic is exempt from originating access charges and that providers may purchase local services to access the local telephone network, the FCC has never said that any services purchased by enhanced services providers become local services because they are used for enhanced services traffic.⁷ Rather, the FCC and Commission decisions discussed above, as well as the interconnection agreement between the parties, unambiguously provide that for the purpose of determining the appropriate intercarrier compensation, the jurisdiction of the traffic exchanged between the parties is to be determined based on the originating and terminating points of a call. In addition, KMC has asserted that Unipoint's traffic is VoIP traffic. The FCC has never found that VoIP traffic generally is enhanced service traffic. Nor has the FCC ruled that VoIP traffic generally is exempt from access charges as an enhanced service.

Under the applicable law and the terms of the parties' interconnection agreements, the traffic that is the subject of this complaint is not local by any stretch of the imagination. The SS7 records produced by Sprint show that the calls originated with calling parties in one local calling area and terminated to called parties in another local calling area. [Tr. 40, Wiley Direct Testimony, page 12, lines 4-7] Even assuming, *arguendo*, that the traffic at issue originated with Unipoint, as KMC asserts, rather than with the true calling parties, the origination of the traffic from Unipoint's location in Orlando to Sprint's customers in Ft. Myers or Tallahassee is not a local service. [Tr. 77, Burt Rebuttal page 3, lines 1-4, Tr. 45, Wiley Rebuttal, page 3, lines 7-9]

KMC alleges *ad nauseum* that the PRI services it provided to Unipoint were "local" services. [E.g., Tr. 151, Johnson Direct, Tr. 191a, Twine Direct, Calabro Rebuttal, Tr. 220, Tr. 222, Tr.

⁷ See, e.g., *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Services Providers*, CC Docket No. 87-215, Order No. 88-151, released on April 27, 1988 ("Enhanced Services Exemption

224, Tr. 227, Tr. 230, Tr. 231, Tr. 234, Tr. 235, Tr. 237, Tr. 238] However, KMC's claims that it is providing Unipoint with a retail "local" PRI service are not borne out by KMC's tariffs. KMC's price list identifies the local calling area for KMC's Tallahassee local exchange service area as Alligator Point, Bristol, Carabelle, Crawfordville, Greensboro, Greenville, Gretna, Havana, Hosford, Monticello, Panacea, Quincy, Saint Marks, Sopchoppy, and Chattahoochee. The Ft. Meyers (sic), local exchange service area includes Bonita Springs, Cape Coral, Fort Meyers (sic) Beach, No. Cape Coral, Pine Island, Lehigh Acres, Sanibel-Captiva Islands, and North Fort Meyers (sic) (See Hearing Exhibit No. 6, Attachment to KMC's Response to Sprint's Interrogatory No. 15, bate stamp 000105, Second Revised Sheet 48, Section 2.11, Effective November 1, 2002). Orlando is not local to either the Ft. Myers or Tallahassee exchange. The price list (Original Sheet 48.1) also provides a list of Expanded Local Calling Areas; for Ft. Myers this includes LaBelle, Naples, North Naples, Punta Gorda and Immokalee, but not Orlando. The Expanded Local Calling Area for Tallahassee includes Madison, but not Orlando. Section 4.1 of the Price List addresses the rates for intraLATA calling, however there is no language which addresses interLATA traffic.

KMC's Florida Intrastate Telecommunications Services Tariff, addresses interLATA calls on 1st Revised Sheet 40, Section 3.4.1, KMC Long Distance Service (LDS), subsection A) see "Switched LCS" and again on 1st Revised Sheet 42, Section 3.4.3 (A) Operator Service. Further, KMC's "Traffic Termination and Billing Agreement" (See Hearing Exhibit No. 6, KMC attachment to Sprint's Interrogatory No. 4, Bate Stamp 000009, Section 1.7) which appears to be KMC's boiler plate language for its interconnection with other CLECs, defines local for purposes of reciprocal compensation as follows: "The exchange areas (also known as "local calling areas") established by the incumbent local exchange carrier(s) within INSERT STATE

Order") at footnote 53.

shall be the exchange areas used to determine whether traffic constitutes Local Telephone Exchange Service (including Internet Traffic) for purpose of this Agreement.”

While there was much discussion regarding the jurisdiction of call forwarded traffic during the depositions of Sprint’s and KMC’s witnesses, call forwarded traffic is not a significant issue regarding the KMC traffic that is the subject of Sprint’s Complaint. As Mr. Schaffer stated in his deposition, Sprint has determined that less than one percent of the KMC traffic was “redirected” or call forwarded traffic. (Hearing Exhibit No. 20, Schaffer Deposition at page 41, lines 13-22] In any event, KMC is not claiming that Unipoint’s traffic is call forwarded traffic and Sprint agrees. [KMC’s Late-filed Hearing Exhibit No. 9 and Sprint’s Late-filed Hearing Exhibit No. 4]

In summary, under applicable law and the parties’ interconnection agreements, the jurisdiction of a call is determined by its originating and terminating end points. That is how the Commission should determine the jurisdiction of the traffic delivered by KMC to Sprint that is the subject of Sprint’s Complaint. Under that properly applied analysis, the traffic for which Sprint seeks access charges is not local traffic, regardless of whether the originating point is determined to be the originating calling party or KMC’s PRI customer, Unipoint, is determined to be the originating point. While KMC’s witness Mr. Calabro seems to believe that if you say something is true often enough, then it becomes true, there is no amount of iteration and reiteration that can make the Unipoint traffic local under the law or the definition of “local traffic” in the parties’ interconnection agreement.

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?

Sprint’s Position: **Yes. KMC knowingly received access traffic from Unipoint, inserted a charge party number local to the local calling area where the calls were terminated and sent this

access traffic over local interconnection trunks to avoid access charges. Sprint is due applicable access charges of \$3,466,521, minus any reciprocal compensation payments.**

Argument

Sprint has presented substantial direct evidence in this proceeding that unequivocally demonstrates that KMC sent interexchange traffic to Sprint over its local interconnection trunks. The SS7 records collected by Sprint using the Agilent Business Intelligence System show that traffic originated from a calling party in one local calling area in the state but was delivered by KMC to Sprint for termination to a called party in another local calling area. [Tr. 40, Wiley Direct Testimony, page 12, lines 1-22, Hearing Exhibit Nos. 35 & 36, Revised Exhibits WLW-4 and WLW-5] Sprint has produced correlated call records (that is, records for calls that originate with Sprint end users in one local calling area and terminate to Sprint end users in a different local calling area) that show the interexchange nature of the calls and show that the calls were handed off to interexchange carriers on the originating end. [Hearing Exhibit 3, Sprint's Response to KMC's Interrogatory No. 6 (Powerpoint entitled "KMC Correlated Call Records"); Attachment to Sprint's Supplemental Response to KMC's POD No. 15, CD of 4-19-04 correlated call records] To validate Sprint's internal analysis of the SS7 records, Sprint commissioned and has produced an independent study by Agilent Technologies, which confirms that the traffic that KMC sent Sprint is interexchange traffic. [Tr. 41, Wiley Direct Testimony, page 13, lines 17-18, Hearing Exhibit No. 33, Exhibit WLW-2] Accompanying the Agilent study is the week of call detail records relied on by Agilent to conduct the study. [Tr. 42, Wiley Direct Testimony, page 14, lines 1-2, Hearing Exhibit No. 34, Exhibit WLW-3] In addition, customer billing records that Sprint was able to obtain for calls that originated from Sprint customers indicate that those calls were dialed and charged as long distance calls. [Tr 92, Burt

Rebuttal, page 18, lines 12-18 and Hearing Exhibit No. 41, Exhibit JRB-2] Sprint has submitted more than sufficient, competent substantial evidence to support its claim.

In addition to proving that the traffic that was wrongfully terminated over local interconnection facilities was interexchange traffic, section 364.16(3)(a), F.S., requires Sprint to show that KMC knowingly terminated the traffic to Sprint over local interconnection facilities. The record shows that KMC knew it was engaging in access bypass from the very beginning of the negotiations with Unipoint. In e-mail correspondence between KMC's Vice President, Chris Menier, and Sam Shiffman, at Unipoint. (Hearing Exhibit 7, KMC's Response to Sprint's Interrogatory No. 15, POD No. 5, Bate Stamp 699 thru 701) specifically in a May 28, 2002, e-mail, Mr. Menier acknowledged that LECs would not be anxious to provide the "access bypass" services Unipoint was seeking and that KMC was willing to provide. [Hearing Exhibit 7, KMC's Response to Sprint's Interrogatory No. 15, POD No. 5] Clearly KMC's scheme to provide PRIs to bypass access charges with the anticipation that 100% of the traffic would be outbound indicates KMC's knowing complicity in the scheme. [Hearing Exhibit 7, KMC's Response to Sprint's Interrogatory No. 15, POD No. 5, Bate Stamp Page 0696]

In order to disguise the traffic as local, KMC admits in Mr. Twine's Direct Testimony, [Tr. 192a, line 4 through 192b, lines 7] that it used PRIs and programmed its switch to insert non-working local (Tallahassee, Ft Myers) telephone numbers in the charge party field of the ANI records that Sprint uses for billing in accordance with standard industry billing practices.⁸ [Tr. 48, Wiley Rebuttal Testimony, page 6, lines 19-21] Not only were the telephone numbers KMC assigned to Unipoint non-working numbers, but despite KMC's representation that the charge party numbers were necessary for billing purposes, the numbers were not shown anywhere on KMC's PRI invoices to Unipoint. [Hearing Exhibit No. 27, Twine's Deposition,

page 45, line 6 and Hearing Exhibit No. 7, KMC's Response to Sprint's POD No. 12] Mr. Twine attempts to explain why the charge party number used by KMC was not included on Unipoint's bills. However, KMC failed to produce a copy of any other PRI service bill which did not include the customer's billing telephone number, which Sprint had requested at a late-filed exhibit to Mr. Twine's deposition. Sprint can only assume that such bills do not exist. [Hearing Exhibit No. 27, Twine Deposition, pages 44-49]

Unipoint and KMC began to cover their tracks after the AT&T Declaratory Ruling made it clear that inserting "IP in the middle" of an otherwise standard voice call did not change interexchange traffic into local traffic. [Tr. 64, Burt Direct Testimony, page 15, lines 15-19] Unipoint and KMC attempted to justify their access bypass scheme by claiming the subject traffic was enhanced services and, thus, not subject to access charges. [Hearing Exhibit Nos. 55 & 56, Exhibits MJB-1 and MJB-2] For instance, to facilitate this attempted cover-up Customer X apparently changed its name to include the words enhanced services, after the fact. [Hearing Exhibit No. 7, KMC's Response to Sprint's Interrogatory No. 15, POD No. 5, Bate Stamp Page 0619] The evidence clearly shows the traffic was originated over the public switched network as a circuit switched end user long distance call via an IXC and terminated using the same circuit switched technology. [Tr. 92, Burt Rebuttal Testimony, page 18, lines 12-18 & Hearing Exhibit No. 41, Exhibit JRB-2] KMC has been given numerous opportunities to prove that Internet protocol is used in some manner for the traffic in question, but has failed to do so. One must conclude, therefore, that the traffic in question is anything but standard voice traffic. Even giving KMC the benefit of the doubt, at best the traffic could have been transported in a middle link or possibly switched using a packet technology. In the AT&T Declaratory Ruling, the FCC has clearly determined that this type of VoIP service is a telecommunications service subject to

⁸ Cite to Chris's deposition re: nonworking numbers

access charges. [FCC 04-97, ¶ 24] Ignoring the obvious, KMC's witnesses use partial quotes and flawed conclusions in an attempt to confuse the issues and dodge KMC's responsibilities under Florida law.

Sprint has calculated that \$3,466,521 is due through March 2005 for the access charges KMC knowingly avoided. These access charges were determined using the same methodology that Sprint currently uses to bill access charges to several large IXCs. As Ms. Aggarwal explains in her testimony, since KMC altered the true jurisdiction of the traffic, Sprint was unable to charge appropriate amounts on the original bill. [Tr. 115, Aggarwal Rebuttal Testimony, page 3, lines 20-23] Consequently Sprint had to determine the jurisdiction of the traffic and apply charges outside its normal process. [Aggarwal Rebuttal Testimony, Tr. 116, page 4, lines 1-5]

The Agilent acceSS7 system is the only means available to Sprint today to determine the correct jurisdiction when the switch records have been altered. [Wiley Rebuttal Testimony, Tr. 48, line 13 through Tr. 49, line 4] Ms. Aggarwal explains in her Rebuttal Testimony (Tr. 116 line 11 through Tr. 117, line 9 ck) the methodology Sprint used to calculate the access charges due from KMC. Sprint analyzed the SS7 traffic records to identify interexchange traffic over KMC's local interconnection trunks. Once the trunks were identified, Sprint used the monthly SS7 CDR Summary Reports to calculate the factors using the jurisdiction of the SS7 minutes of use. The SS7 CDR Summary Report is a monthly summation of each day's SS7 Call Detail Records for a particular month. [Hearing Exhibit No, 22, Aggarwal Deposition, page 41, lines 12-18] The jurisdiction of the minutes was based upon the calling party numbers to the called party numbers in the SS7 Call Detail Records. Sprint then applied the calculated PLU and PIU to the billed minutes, utilizing CASS (Sprint's Carrier Access Support System), to determine what should be interstate, intrastate and local minutes. A true-up was done to the billed usage to

determine the difference between what the customer was initially billed as local and intraLATA toll minutes and the corrected amount to include the additional access charges. Appropriate rates (i.e., access rates from Sprint's interstate and intrastate access tariffs and local rates from the parties' interconnection agreement) were then applied to determine the additional charges to be billed to KMC. The interstate rates used were average yield based on interstate access revenue for all carriers in Florida divided by the corresponding interstate access minutes for that month. The intrastate access rates used were based on KMC previously billed rates. Local reciprocal compensation rates used were composite rates based on end office switching, tandem switching and common line elements per the interconnection agreement

In addition to arguing that the traffic is not subject to access charges because the traffic was enhanced services traffic or at least that KMC didn't know it was subject to access charges, KMC attempts to escape its responsibility for the access charges Sprint should have received by arguing that Sprint has not sufficiently explained or justified its methodology for calculating the access charges. Principally, KMC argues that Sprint should be required to reproduce, ostensibly for KMC's review, the millions of individual call detail records for the two and a half years of traffic that KMC wrongfully terminated over local interconnection facilities. [Tr. 212, Twine Rebuttal Testimony, page 9, lines 3-22] KMC's arguments are merely a ruse to misdirect the Commission's attention from KMC's deliberate actions to avoid Sprint's access charges so that KMC can escape without any financial repercussions.

Sprint has explained the undue time and expense that would be involved for Sprint to access the historical call detail records and create documents that reflect only those calls terminated by KMC. [Tr. 42, Wiley Direct Testimony, page 14, lines 2-9 and Hearing Exhibits 2 & 3, Sprint's Response and Supplemental Response to KMC's POD No. 1] The Commission

has already held that under the applicable discovery rules Sprint is not required to assume this burden. The discovery rules do not require Sprint to produce all of the hundreds of millions of call detail records. Sprint has submitted sufficient evidence to prove its case, both as to the behavior and the amounts due, through its submission of a random sample of 27 days of call detail records representing the applicable period [Tr. 42, Wiley Direct Testimony, page 14, lines 9-12, Hearing Exhibit 35, WLW-4 and Hearing Exhibit 2, Sprint's Response to Staff's Interrogatory No. 21] and the SS7 CDR Summary Reports [Hearing Exhibit No. 3, Sprint's Response and Supplemental Response to KMC Interrogatory No. 15] In addition, Sprint has provided more than ample explanation of its calculations in its testimony [Tr. 116, line 11 through Tr. 117, line 9, Aggarwal Rebuttal Testimony] and its discovery responses [Hearing Exhibits No. 2 & 3, Sprint's Response and Supplemental Response to KMC's Interrogatory No. 15, Sprint's Response and Supplemental Response to KMC's Interrogatory Nos. 78 and 79]

The methodology used by Sprint to calculate the access charges due was reasonable and appropriate and in accordance with industry practice. KMC left Sprint no choice but to calculate the backbilled access charges by using billing factors, since KMC's own actions denied Sprint the ability to create a typical access bill using the real-time switch records. While Sprint believes that the methodology it used to calculate the access charges was reasonable, KMC expressed concerns about the fluctuation of Agilent's SS7 CDR collection rate, thus raising doubts about the calculation. To address these concerns Sprint has calculated the charges based on two additional methods, using the amounts set forth in the SS7 summary reports produced by Sprint in its supplemental response to KMC Interrogatory No. 15 (included in the record as part of Hearing Exhibit No. 3) and also the SS7 call detail records included as Revised Exhibit WLW-5 (Hearing Exhibit No. 36). First, Sprint applied the average PLU and PIU for July 2002 through

November 2004 to the total billed volume. Based on this calculation the access charges were \$3,493,454, compared to the charges Sprint calculated to bill KMC which were 3,460,731 through November 2004. Second, Sprint calculated PLU and PIU based on 27 days of CDRs provided to KMC for the time period of July 2002 to November 2004 and applied these factors to the total billed MOU. Based on this calculation the access charges were \$3,261,832. In addition, the billing dollars calculated by Agilent based on its independent study of a week's worth of KMC call detail records also were similar to the dollars calculated by Sprint using the monthly SS7 summary reports. [Hearing Exhibit No. 33 at page 13] Given that all these methods yielded materially similar results, there is sufficient evidence to support that the access charges Sprint billed KMC are accurate and reasonable.

The development and application of factors to determine appropriate billing are standard in the industry. In fact, Sprint's tariffs (which mirror the tariffs of other Florida ILECs) set forth a process to develop factors for backbilling when it is determined that an interexchange company's PIU factors are in error. [Tr. 48, Wiley Rebuttal Testimony, page 6, lines 16-21; Hearing Exhibit 21, Aggarwal Deposition at page 112, lines 17-21] And as the Agilent witness testified in his deposition, the Agilent system was designed for and routinely has been used for just that purpose. [Hearing Exhibit 23, Miller Deposition at page 65, lines 7-14] KMC argues that the interconnection agreements or standard industry practice require Sprint to produce a standard CABS bill created from switch records, but KMC knows these switch records do not exist because of KMC's deliberate actions in terminating access traffic over local trunks. This argument by KMC is nothing more than an attempt to place all of the burden of KMC's bad behavior on Sprint.

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?

Sprint's Position: **Sprint generally cannot distinguish enhanced services traffic from voice traffic sent over local trunks. However, billing records for certain calls originated and terminated to Sprint end users show that the subject traffic is voice telecommunications traffic. KMC fails to demonstrate that the traffic involves enhanced services.**

Argument

When traffic is sent to Sprint over local interconnection trunks in the same manner as local voice traffic, Sprint cannot tell whether the traffic is "enhanced services" traffic. The traffic that is the subject of this Complaint appeared to Sprint to be no different from any other voice traffic Sprint terminates to its customers. KMC claims that Unipoint told KMC that the subject traffic was enhanced services traffic and, therefore, the KMC was required to provide "local" services to Unipoint to terminate the traffic. But there is nothing in the documents produced by KMC which supports the allegation that the traffic is enhanced services prior to the FCC's Order in the AT&T Declaratory Ruling. In fact, the term "enhanced services" does not appear in the correspondence between KMC and Unipoint prior to 2004, after Sprint had started backbilling KMC for the subject traffic. In Hearing Exhibit 7, KMC's 4th supplemental response to Sprint's Interrogatory No.15, POD 5 KMC produced 284 pages of documents reflecting KMC's e-mail negotiations with Unipoint and includes the red lined versions of KMC's Telecom Master Services Agreement, KMC's Addendum to Master Services Agreement, and Master Primary Rate Interface Services Agreement exchanged between KMC and Unipoint. The emails and attachments provided in response to this POD, with emails beginning on May 18, 2002, (page 129 of 284) and ending on October 12, 2004, (page 36 of 284) do not include the words "enhanced services" until an attachment to an email from Unipoint to KMC.(see Bate Stamp

Page 0664) In that red-lined document UniPoint added to its name the words "Enhanced Services, Inc. a Delaware" (Bate Stamp page 0619, at the top of the page). The actual language regarding enhanced services is on Bate Stamp page 0671. Thus, from May 18, 2002, through March of 2004, nearly two full years, there are no documents or language in the emails between KMC and its customer which state that the subject traffic is enhanced services traffic, despite Ms. Johnson's assertion that negotiations for a VoIP amendment began in July 2002. [Hearing Exhibit No. 26, Johnson Deposition Transcript at page 116, line 25] Conversely, within these same documents, there are numerous references to the subject traffic as either VoIP or telecommunications traffic.⁹

With regard to the subject traffic, as the call detail records demonstrate, the called number by the originating end users were long distance numbers, the calls originated on the public switched network, the calls were routed using the North American Numbering Plan and the calls terminated to end users over the public switched network using circuit switched technology. Thus, assuming the Internet protocol was used at some point in the transmission of the traffic in question, under the FCC's AT&T Declaratory Ruling, the subject traffic is telecommunications traffic and cannot by any stretch of the imagination be classified as information (or enhanced) services.

KMC's attempts to explain and justify its termination of long distance traffic to Sprint over local interconnection facilities are flawed for several reasons. First, the service provided is plain old long distance service and KMC has provided nothing more than post mortem enhanced service verbiage, beginning in 2004, to support its allegation that the traffic is enhanced services; Second, even if the traffic was truly enhanced services, the alleged exemption would not apply

⁹ See, Bate Stamp page 0611; Bate Stamp page 0696; Bate Stamp page 0746; Bate Stamp page 0745.

because the FCC's orders only provide for enhanced service providers to use LOCAL business lines, not the interLATA non-local facilities provided to Unipoint; third, the FCC's enhanced services exemption was designed to eliminate originating access charges for enhanced service provider bound traffic, not terminating access charges which are the subject of this complaint; and fourth, the FCC has confirmed what essentially is common sense, i.e., access charges do apply to IP phone to phone traffic, even where an adjunct information element is present because it does not change the fundamental nature of the service as a telecommunications service.

1) The service Unipoint and KMC are providing is nothing more than plain old long distance service.

The preponderance of evidence in this case indicates that Unipoint was nothing more than a wholesale terminator of toll traffic, which contracted with KMC to terminate large volumes of traffic to Sprint over interconnection facilities in order to bypass access charges (Hearing Exhibit No. 7, KMC's Response to Sprint's Interrogatory No. 15, POD 5 Bate Stamp page 699 thru 701). The calling party number on the call detail records (Hearing Exhibit No. 36, Exhibit WLW-5) and the correlated call records (Hearing Exhibit No. 41; Exhibit JRB-2) demonstrate that the subject calls were originated using the North American Numbering Plan and were not originated to an ISP and subsequently completed as VoIP traffic. This does not preclude the use of an IP technology at some point in the transmission of the call; however, these calls were originated and terminated over the Public Switched Telephone Network. Thus, at best if the traffic is VoIP at all, it would be the Phone-to-Phone IP traffic for which access charges are and have been deemed to apply per the FCC's order in the AT&T Declaratory Ruling docket (Tr. 67-69, Burt Direct Testimony).

2) Even if the traffic was truly enhanced services, the alleged enhanced services exemption would not apply because the FCC exemption was limited to local business lines and required that surcharges be applied to private lines to qualify for the exemption.

Ms. Johnson in her Direct Testimony claims that VoIP is an enhanced service and enhanced services are exempt for access charges. (Tr. 146, Johnson Direct Testimony, page 15, beginning on line 17) However, the basis of her testimony is an incorrect, incomplete and selective reading of the FCC's orders. She indicates that in 1983 upon the break up of AT&T the FCC adopted an Enhanced Services access charge exemption.¹⁰ But Ms. Johnson failed to address the circumstances under which the exemption is applicable. Specifically, the FCC's Order 83-356, Paragraph 88, stated "In cases where the surcharge is levied, no transport or other carrier access charges will be imposed for associated local exchange service. Customers instead will remain subject to business **local** exchange service charges for the line between the reseller, sharer switch, enhanced service node or PBX and the telephone company's local switch."

The FCC exemption was intended to address the bypass of access charges by customers with PBX service and interstate private line service, that is, the "leaky" PBX. Resellers and Enhanced Services providers were allowed the same switched access exemption as leaky PBX customers. In order to qualify for the switched access exemption, surcharges were applicable for private line services connected to the PBX or enhanced service provider's node. The surcharge, \$25.00 was based on a mathematical calculation which estimated about 6.4 percent of the traffic over the private line would leak into the local network. The intent of the FCC surcharge was to compensate the local telephone company for the incidental use, i.e., estimated at 6.4 percent of the traffic over the interstate facility, of the company's network even when the calls were placed over a private line or private network. Further, the service had to be a **local** service between the

telephone company's switch and the enhanced services node. KMC admitted that the services provided to Unipoint were between Orlando and Ft. Myers or Tallahassee, and as explained above these exchanges, are not within the same local calling areas. Obviously, the arrangement KMC had with Unipoint was not a local exchange service between the company switch and Unipoint's switch/node. In addition, as shown by the bills to Unipoint, (Hearing Exhibit No. 7, KMC's Response to Sprint's POD No. 12) there were no private line surcharges billed to Unipoint, as would have been appropriate to qualify for the switched access charge exemption. FCC Rule 69.5 (c) addresses the application of special access surcharges that are applicable when carrier's carrier charges (i.e., access charges) are not assessed upon users of exchange facilities.

3) The FCC's exemption was for originating access charges for enhanced service provider bound traffic, not terminating access charges which are the subject of this complaint.

Sprint's claims for access charge payments for the subject traffic are for traffic delivered by Unipoint to KMC and routed by KMC to Sprint over local interconnection facilities. That is, the subject traffic was terminating traffic. And, as the FCC clearly states, "enhanced service providers (ESPs) should not be subjected to originating access charges for ESP-bound traffic." (IP-Enabled Services NPRM) Not only was the FCC exemption limited to ESP-bound traffic, but the subject traffic in this proceeding indicates that originating access charges were applied on the originating end of the traffic. (Hearing Exhibit No. 41, Exhibit JRB-2) Certainly, if the subject traffic was truly ESP-bound traffic, the IXCs would not have paid originating access charges for the traffic. The treatment of this traffic on the originating end is a further indication of the disingenuousness of KMC's ESP defense.

¹⁰ Cite to 1983 Order

4) The FCC has confirmed what essentially is common sense, i.e., access charges do apply to IP phone to phone traffic, even where an adjunct information element is present, as it does not change the fundamental nature of the service as a telecommunications service.

Ms. Johnson claims that the FCC's "Developing a Unified Intercarrier Compensation Regime Docket," Docket No. 01-92, exempted VoIP traffic from access charges. [Tr 147, Johnson Direct Testimony, page 16, lines 2-6"] A complete reading of the order and the footnote to the sentence Ms. Johnson refers to clearly indicates that the traffic the FCC was exempting was "IP telephony". What Mrs. Johnson failed to quote was the text preceding her quote and the footnote to the sentence she was quoting. Further, she misquoted the FCC's language by substituting the word "is" for the word "are" which, in the context of the entire sentence, significantly changes the meaning of the sentence. The complete text of the FCC's Order, paragraph 6, defines the exemption as follows: "(e.g., long distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption)." Thus, with the corrected text, long distance calls handled by ISPs using IP telephony, not VoIP services, generally are exempt from access charges. Further, in footnote 5 to the above quoted sentence from paragraph 6, the Order defines Internet telephony as "...a subset of IP telephony that is distinguished by the fact that it is provided over the public Internet and uses the domain-name system for routing." As has been clearly demonstrated by the correlated call records, the KMC traffic that is the subject of Sprint's Complaint was nothing more than long distance traffic billed to basic local service subscribers on their monthly telephone bills. (Hearing Exhibit No. 41, Exhibit JRB-2)

Contrary to KMC's assertions that VoIP traffic is presumptively exempt from access charges, the only case where the FCC specifically exempted IP telephony from access charges is

in the Pulver.com case where the VoIP traffic at issue used domain-name routing and did not access the public switched network. [pulver.com Declaratory Ruling]. In contrast, in the AT&T Declaratory Ruling, the FCC specifically has confirmed that access charges are applicable to where the connections are phone to phone, undergo no network protocol change and use the North American Numbering Plan for routing the calls. (AT&T Declaratory Ruling; Tr. 67 & 68, Burt Direct Testimony) Contrary to Mrs. Johnson's selective partial quotes, a complete reading of the FCC's Report to Congress (CC Docket No. 96-45), beginning on Tr. 148, line 9 and ending on Tr. 149, line 8, paragraphs 88 and 89, clearly supports the FCC's 2004 ruling in the AT&T Declaratory Ruling proceeding. Specifically, in the 1998 Report the FCC stated:

88. "Phone-to-phone" IP telephony services appear to present a different case. In using the term "phone-to-phone" IP telephony, we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephone or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.

89. Specifically, when an IP Telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over a packet-switched IP network. These providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate Internet-based calls. From a functional standpoint, users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Thus the record before us suggests that this type of IP telephony lacks the characteristics that would render them information services within the meaning of the statute, and instead bear the characteristics of telecommunications services."

And, in the Vonage Order in which the FCC declared that certain broadband VoIP services are interstate in nature, the FCC found that the services were jurisdictionally mixed and specifically declined to rule on the nature of such services as either telecommunications or information services and declined to rule on the intercarrier compensation due for the use of the public switched network to originate or terminate Vonage-type VoIP calls. [Vonage Declaratory Ruling]

While there may be some specific types of IP services which the FCC has determined to be exempt from access charges, e.g., Pulver.com, the FCC has not exempted VoIP services in general, and specifically it has determined that phone-to-phone IP using the public switched network is not exempt from access charges, i.e., AT&T (FCC 04-97). In fact, in the IP-Enabled Rulemaking Docket, Order No. FCC 04-28, the FCC said "As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network." (Paragraph 33) As a policy matter and lacking an order to the contrary by the FCC, there is no basis for defining an intercarrier compensation scheme for VoIP traffic different from what exists today, i.e., based on an end-to-end jurisdictional analysis. And, the FCC has expressed its agreement with this policy in the IP-Enabled Services NPRM, as has the FPSC in the Reply Comments it submitted to the FCC in that docket.

KMC further attempts to escape liability for its actions by claiming that even if the Commission determines that this is interexchange traffic subject to access charges under the AT&T Declaratory Ruling only IXCs can be held liable for any avoided access charges. [Tr. 169, Johnson Rebuttal Testimony, page 10, line 4] KMC's reading of the AT&T Declaratory Ruling ignores footnote 92, which states that a CLEC can be held liable if the applicable interconnection

agreement imposes such liability. Contrary to Ms. Johnson's assertions in her Rebuttal Testimony (Tr. 173, line 8 through Tr. 174, line 23), Sprint's interconnection agreements with KMC plainly define local traffic for reciprocal compensation purposes as traffic which originates and terminates in Sprint's local calling areas. The agreements also clearly require that local and non-local traffic be terminated over separate trunks and that access charges apply to non-local traffic. In addition, also contrary to Ms. Johnson's interpretation of that statute in her Rebuttal Testimony, section 364.16(3)(a), F.S., places the burden to properly terminate traffic on the interconnecting local exchange carriers. KMC's knowing termination of the nonlocal Unipoint traffic violated interconnection agreements with Sprint and Florida law and KMC is liable for the avoided access charges under any reasonable construction of the AT&T Ruling.

KMC's arguments that the subject traffic could not be access because Unipoint was not a carrier lack merit. First, based on the e-mail correspondence reflecting the services Unipoint ordered from KMC, it appears Unipoint was purchasing carrier trunking arrangements rather than end user services. [Hearing Exhibit 7, KMC Response to Sprint Interrogatory No. 15, POD 5, at pages 259 – 262 of 284] And, under Florida law, a "carriers' carrier," that is a carrier who provides services only to other carriers, such as the services Unipoint apparently provided to IXCs, is exempt from certification. [section 364.02(13)(a), F.S.] It could also be argued that KMC was, itself, acting as an interexchange carrier for the subject traffic given that the PRI circuits KMC provided were interexchange circuits not local circuits. Under this construction KMC would clearly be liable to Sprint for the avoided access charges even under a narrow reading of the AT&T Declaratory Ruling.

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?

Sprint's Position: **Yes. Since the traffic KMC terminated to Sprint is interexchange traffic, KMC is required to pay access charges to Sprint for this traffic. Sprint has determined that \$3,466,521 is due through March 2005.**

Argument

Sprint's interconnection agreements with KMC provide that nonlocal (i.e., toll or interexchange) terminating traffic is to be compensated at the applicable access charges. [Hearing Exhibit Nos. 10, 11, 12 & 13] In addition, the Florida law requires the payment of "appropriate charges for such terminating access services." [364.16(3)(a), F.S.] The appropriate rates from Sprint's intrastate access tariff were applied to determine the additional charges to be billed to KMC. [Tr. 116, Aggarwal Rebuttal, Page 4, lines 21-23] The intrastate rates used were based on previous billed rates. [Tr. 117 Aggarwal Rebuttal, Page 5, lines 3-4] The traffic KMC terminated to Sprint that is the subject of Sprint's complaint was nonlocal, interexchange traffic in that, first, it was originated by a calling party outside the local calling area of the Sprint end user to whom the call was terminated and, second, KMC transported the traffic from Unipoint's physical location in Orlando outside the terminating Sprint end users' local calling areas in Ft. Myers and Tallahassee. (Tr. 77, Burt Rebuttal, Page 3, lines 11-15) Because the traffic is non-local, interexchange traffic, KMC should have paid Sprint its tariffed access charges as the interconnection agreements required. Instead, by terminating this non-local traffic over local interconnection trunks, KMC paid the reciprocal compensation rate rather than the access rate, in violation of the interconnection agreements. Sprint applied the proper intrastate access rates to the improperly terminated traffic, using the PLU/PIU factors discussed in detail in Issue x. [Tr.

116, Aggarwal Rebuttal, Page 4, lines 21-23, Tr. 117, Aggarwal Rebuttal, Page 5, lines 3-4 and Hearing Exhibit 51, Exhibit RA-2]

Therefore, under Florida law, the applicable interconnection agreements and Sprint's tariffs, KMC owes Sprint compensation in the amount of the access charges that should have been paid minus the reciprocal compensation amounts that should have been paid. Sprint has calculated that amount to be \$3,466,521 through March 2005.

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?

Sprint's Position: **Yes. The parties' interconnection agreements require local and interexchange traffic to be terminated over separate trunks. The traffic that is the subject of Sprint's Complaint is interexchange traffic, which KMC wrongfully terminated over its local interconnection trunks with Sprint. Sprint has determined that \$3,466,521 is due through March 2005.**

Argument

By delivering interexchange traffic to Sprint over local interconnection trunks, KMC not only violated section 364.16(3)(a), F.S., but also violated the terms of its interconnection agreements with Sprint. The definition of local traffic in the relevant interconnection agreement is set forth above. In addition, each agreement contains a provision that requires that separate trunks be used for the termination of local traffic and the termination of access traffic. [Tr 70-72, Burt Direct Testimony, Hearing Exhibit Nos. 10 and 12 and 13] The use of separate trunks is required until and unless the parties agree to use multi-jurisdictional trunks and establish operational parameters for their use. There is no evidence that the parties agreed to use multi-

jurisdictional trunking arrangements. Therefore, because KMC used local interconnection trunks to terminate traffic that was not local traffic as defined in the parties' agreements, Sprint billed KMC reciprocal compensation for the traffic rather than the access charges that were due.

As discussed above, even it is assumed for the sake of argument that the traffic originated with Unipoint at its Orlando premises and then was transported to KMC's switches in Ft. Myers and Tallahassee for termination by Sprint in these local areas, the traffic clearly is not local traffic as defined in the parties' interconnection agreements. The interconnection agreements define local traffic as traffic that originates and terminates in Sprint's local calling areas as set forth in Sprint's tariffs. Traffic that originates with KMC's customer in Orlando and is terminated to Sprint's end users in Ft. Myers or Tallahassee is not local traffic under this definition. [Tr. 47, Wiley Rebuttal Testimony, page 5, lines 17-23] Further, KMC's own price lists do not define Orlando to Tallahassee or Orlando to Ft. Myers traffic as local. (Hearing Exhibit No. 6, KMC's Response to Sprint's POD No. 4)

KMC argues that since the traffic was alleged to be enhanced services traffic then the definition of local traffic in the interconnection agreements does not apply. [Tr. 146, Johnson Direct Testimony, page 15, lines 11-13] This is absolutely not true. The interconnection agreements do not mention enhanced services traffic, nor do they provide an exception for enhanced services traffic for the purposes of determining the traffic that is to be delivered over local interconnection trunks and subject to reciprocal compensation. [Tr. 89, Burt Rebuttal, page 15, lines 6-8] While Sprint does not agree that Unipoint's traffic is enhanced services traffic, enhanced services providers are entitled only to purchase local services (*In the Matter of MTS and WATS Market Structure*, FCC 83-356, ¶ 88) in lieu of paying originating access charges for ESP-bound traffic (IP-Enabled Services NPRM, ¶ 25.). Traffic that is otherwise toll traffic, such

as traffic that originates in Orlando and terminates in Ft. Myers or Tallahassee, does not become local traffic under the agreement or for purposes of intercarrier compensation because the originating end user is an enhanced services provider. [Burt Tr. 94, Rebuttal Testimony, page 20, lines 10-16]

KMC was told by Unipoint that the traffic was VoIP traffic and that the service KMC knew that terminated traffic would be perceived by the ILECs as "access bypass." [Hearing Exhibit No. 7, KMC's Response to Sprint's Interrogatory No. 15, POD No. 5, Bate Stamp Page 0700] KMC also knew that the Orlando to Ft. Myers or Tallahassee routing arrangement did not conform to the definition of local traffic in the interconnection agreements and that the agreements made no exception for enhanced service traffic or for VoIP traffic. Yet, KMC chose not to consult with Sprint as to whether Sprint agreed that KMC's mechanism for terminating Unipoint's traffic was consistent with the terms of the parties' interconnection agreements. (Tr. 89, Burt Rebuttal Testimony, page 15, lines 17-18) KMC did not consult with Sprint because KMC knew from the beginning that Sprint would consider the arrangement "access bypass" and would never agree that it was permissible under the interconnection agreements or knowingly consent to it.

KMC's willful delivery of Unipoint's interexchange traffic to Sprint over local interconnection trunks violated the parties' interconnection agreements and caused Sprint to erroneously bill KMC reciprocal compensation rather than the access charges that were properly due for this traffic. The Commission should require KMC to pay Sprint the \$3,466,521 million in access charges that would have been due Sprint if the traffic had been properly identified and routed.

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?

Sprint's Position: **Sprint's backbilling is limited, if at all, by the applicable statutes of limitations.**

Argument

There is nothing in the applicable interconnection agreements between KMC and Sprint that limit Sprint's ability to backbill KMC for the access charges Sprint should have received but for the deliberate actions KMC took in violation of the interconnection agreements to bypass Sprint's access charges. [Tr. 73, Burt Direct, page 24, lines 15-17] Similarly, Sprint's tariffs contain no restrictions on backbilling the access charges that should have been due to Sprint if KMC hadn't wrongfully delivered the traffic to Sprint over local interconnection trunks. [Id.] If any limits apply to Sprint's ability to backbill KMC, they would be the limits set forth in the applicable statutes of limitations. Section 95.11(2), F.S., provides a five-year limitations period for actions alleging contract violations. The Commission has recognized the applicability of this five year limitations period to disputes under interconnection agreements in Order No. PSC-03-1139-FOF-TP in Docket No. 020960, In Re: Verizon arbitration with Covad.

Other relevant limitations periods set forth in the Florida Statutes include the four-year limitations period applicable to statutory violations in section 95.11(3)(f), F.S. (which governs Sprint's allegations that KMC violated section 364.16(3)(a), F.S.) and the four-year limitations period for actions founded on fraud in section 95.11(3)(j), F.S. Sprint's claims relating to KMC traffic dating back to July 2002 are well within even the shorter four-year limitations period.

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

Sprint's Position: **Yes. By sending non-local access minutes to Sprint over local facilities, KMC inflated the amount of local or "voice" traffic, and, as a result, Sprint overpaid reciprocal compensation by three times for the minutes of use that KMC incorrectly routed in this fashion. Sprint has overpaid KMC at least \$741,396.**

Argument

KMC is interconnected with Sprint for the exchange of local traffic, including ISP traffic. The FCC's ISP Remand Order released April 27, 2001, in Dockets No. 96-98 and 99-68 entitled *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic* ("ISP Remand Order") established an interim compensation regime addressing intercarrier compensation for telecommunication traffic delivered to internet service providers (ISPs) and the treatment and compensation for local traffic. [FCC 01-131]¹¹ A key element of the FCC's order was the assumption that where two carriers were exchanging traffic, if one carrier's traffic exceeded the other carrier's traffic by a ratio of three (3), all traffic above the ratio was presumed to be ISP-bound traffic and compensated at the ISP-bound traffic rate as set forth in the FCC's order. [FCC 01-131, paragraph 79] Because KMC sent non-local access traffic over the local interconnection facilities between Sprint and KMC, Sprint was compensating KMC for the traffic Sprint was sending to KMC, threefold for each non-local access minute KMC sent to Sprint over the local interconnection facilities at the contract rates for local traffic.¹² [Tr. 122, Danforth Direct Testimony, page 4, lines 4-8]

Mr. Danforth explains the methodology used to calculate the number of local minutes for which KMC was compensated at the reciprocal compensation rates in his Direct Testimony,

¹¹ Sprint opted into the ISP Remand Order in Florida on February 1, 2002.

Tr.122, page 4, line 12 through Tr. 123, page 5, line 2. According to Mr. Danforth, in order to determine the number of local minutes for which KMC would be compensated at the reciprocal compensation rates specified in the interconnection agreement, the number of minutes originated by KMC and terminated to Sprint was multiplied by three. This calculation determined the number of Sprint-originated minutes that were below the 3:1 ratio (presumed by Sprint to be local minutes) and the number of Sprint-originated minutes that were above the 3:1 ratio (presumed by Sprint to be ISP-bound minutes). The Sprint-originated minutes above the 3:1 ratio (presumed by Sprint to be ISP-bound minutes) and under the growth cap were compensated at the rates described in the FCC's *ISP Remand Order*.¹³ Because KMC was sending non-local access minutes over local facilities, KMC inflated the amount of its local or "voice" traffic; this caused Sprint to overpay reciprocal compensation by three times for the minutes-of-use that KMC incorrectly routed in this fashion. Because the contractual local or voice rates are substantially higher than the ISP-bound traffic rates, Sprint overpaid by that rate differential multiplied by the number of minutes that were sent incorrectly as if they were local or voice traffic. [Danforth Direct Testimony, Tr. 124, page 6, lines 3-8] As a result of the application of the 3:1 ratio in the *ISP Remand Order*, Sprint overpaid KMC 3 times the volume of local or voice minutes at the reciprocal compensation rates for a total of \$741,396). [Tr. 124, line 12 through Tr.125, line 2, Danforth Direct Testimony; and Hearing Exhibit 53, Exhibit MSD-1]

While KMC has disputed that it terminated interexchange traffic over local interconnection trunks to Sprint, KMC has not disputed the impact on Sprint's reciprocal compensation payments should the Commission find in Sprint's favor on that issue. To the extent that the Commission

¹² The overpayment occurred only during the time period that the 1997 MCI Agreement was in effect, as the FDN agreement provided for bill and keep for both voice and ISP bound traffic.

¹³ The interim compensation regime also provided a method to calculate and apply a growth cap to the number of ISP-Bound minutes, but the growth cap is not at issue in this proceeding.

finds that KMC improperly terminated interexchange traffic as local traffic, the Commission should find that Sprint is due a refund of its commensurately inflated reciprocal compensation payments as described above.

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?

Sprint's Position: **KMC should be required to pay Sprint within ten days of the Commission's final order all monies determined to be due to Sprint.**

Argument

By its deliberate and wrongful actions, KMC denied Sprint over \$3 million in access compensation and caused Sprint to overpay more than \$700,000 in reciprocal compensation. The applicable interconnection agreements between the parties require KMC to pay interest in the amount of 1.5% per month on any backbilled charges.¹⁴ The Commission should order KMC

¹⁴ 1997 MCI agreement:

Att VIII, 3.1.17

Sprint will assess late payment charges to MCI in accordance with the applicable tariff, if any. If there is no applicable tariffed late payment charges then Sprint will assess late payment charges equal to the lesser of 1.5% per month of the balance due or the maximum allowed by law, until the amount due including late payment charges is paid in full.

FDN

Section 6.3:

Subject to the terms of this Agreement, the Parties shall pay invoices by the due date shown on the invoice. For invoices not paid when due, late payment charges will be assessed under § 6.5. If the payment due date is a Saturday, Sunday or a designated bank holiday, payment shall be made the next business day.

Section 6.5:

The billing party will assess late payment charges to the billed party equal to the lesser of one and one-half percent (1.5%) per month or the maximum rate allowed by law for commercial transactions, of the balance due, until the amount due is paid in full.

MCI 2002 Agreement, Att 8

to pay the access charge amounts set forth in Sprint's brief and to refund the reciprocal compensation amounts Sprint overpaid, with interest within 10 days of a Commission order finding in favor of Sprint in this proceeding.

CONCLUSION

This proceeding was initiated by a Complaint Sprint filed against KMC for knowingly delivering interexchange traffic over its local interconnection trunks with Sprint in order to avoid access charges that would otherwise be due to Sprint for the traffic. KMC's wrongful termination of the traffic is a violation of Florida law, KMC's interconnection agreements with Sprint and Sprint's tariffs. In support of its claims, Sprint has provided a valid sample of multiple days of call detail records that show that the traffic KMC terminated over its local interconnection trunks with Sprint was originated by numerous different calling parties in different local calling areas, in fact different LATAs, from the Sprint Ft. Myers and Tallahassee local calling areas where the calls were terminated. As its defense to Sprint's claims, KMC alleges that the KMC customer that is responsible for this traffic is an "enhanced services provider" that is entitled to purchase local services and is exempt from access charges. But, KMC cannot describe the nature of these alleged "enhanced services" except to say that the customer is a VoIP provider and has self-certified that its traffic is an "enhanced service." There is no FCC or Florida Commission decision classifying VoIP as an enhanced service or holding that VoIP services that use the public telephone network for origination or termination of traffic are exempt from access charges.

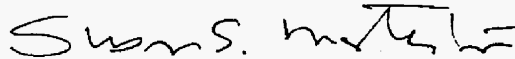
3.1.17 The Parties will assess late payment charges equal to the lesser of 1.5% per month of the balance due or the maximum allowed by law, until the amount due including late payment charges is paid in full.

In addition, the PRI circuits KMC uses to transport Unipoint's traffic from Orlando to Tallahassee or Ft. Myers are not local services. These circuits are transported between Orlando and Ft. Myers or Tallahassee over interexchange interLATA transport facilities leased by KMC from an interexchange long distance carrier. In order to make the traffic look local KMC assigned a billing number local to the terminating end users to the PRIs, even though the telephone numbers KMC assigned were non-working telephone numbers. KMC's switches were conveniently programmed to insert these Tallahassee and Ft. Myers telephone numbers into the charge party fields in the call records such that the billing records of the toll calls that KMC was sending to Sprint appeared as local calls. KMC claims that these non-working telephone numbers inserted into the charge party field to make the calls appear local were the billing telephone numbers for the PRI services KMC was providing to Customer X, even though the telephone numbers do not even appear on the monthly bills KMC sent to Customer X for these facilities.

The call detail records Sprint examined and has offered as evidence in this proceeding for the calls show that the calls originated, not from Unipoint as KMC testifies, but from many different end users in many different cities in Florida and across the United States. Sprint has provided copies of customers' bills that show where long distance calls, placed by Sprint residential end users through long distance carriers, and billed to residence these customers as long distance charges on their monthly telephone bills, were routed by KMC to Sprint end users as local calls. The record is also clear that the methodology Sprint used to determine the amount of avoided access charges is reasonable and in accordance with standard industry practice. Sprint urges the Commission to carefully consider all of the record evidence. In doing that, the

Commission will find more than ample support for Sprint's claims and render a ruling in Sprint's favor.

RESPECTFULLY SUBMITTED this 16th day of August 2005.



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