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Timolyn Henry

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Sent: Monday, September 19, 2005 4:47 PM
To: Filings@psc.state.fl.us
Subject: 050581 Sprint- Florida's Motion to Dismiss Count of IV of KMC's Complaint
Attachments: Motion to Dismiss Count IV of KMC Complaint.pdf

Filed on behalf of:

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Docket No. 050581

Title of filing: Sprint-Florida's Motion to Dismiss Count of IV of KMC's Complaint

Filed on behalf of: Sprint-Florida

No. of pages: 10

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FPSC-COMMISSION CLERK

9/19/2005

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September 19, 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. 050581-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated is Sprint-Florida's Motion to Dismiss Count IV of KMC's Complaint.

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". The signature is written in a cursive, slightly slanted style.

Susan S. Masterton

Enclosure

DOCUMENT NUMBER-DATE

08843 SEP 19 05

FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE
DOCKET NO. 050581-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. Mail this 19th day of September, 2005 to the following:

Florida Public Service Commission
Kira Scott/ Lee Fordham
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Nancy Pruitt/Ann Marsh
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

KMC Telecom III LLC/ KMC Telecom V, LLC
Mike Duke/Marva B. Johnson
1755 North Brown Road
Lawrenceville, GA 30043-8119

Messer Law Firm
Floyd R. Self
P. O. Box 1876
Tallahassee, FL 32302-1876



Susan S. Masterton
Susan S. Masterton

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of KMC Telecom III LLC and) Docket No. 050581-TP
KMC Telecom V, Inc. against Sprint-Florida,)
Incorporated and Sprint Communications)
Company Limited Partnership for alleged)
failure to pay intrastate access charges pursuant to)
interconnection agreement and Sprint's tariffs, and) Filed: September 19, 2005
for alleged violation of Section 364.16(3)(a), F.S.)
_____)

SPRINT-FLORIDA, INCORPORATED'S MOTION TO DISMISS
COUNT IV OF KMC'S COMPLAINT

Pursuant to Rule 28-106.204, Florida Administrative Code, Sprint-Florida, Incorporated ("Sprint-FL") hereby files this Motion to Dismiss Count IV of KMC's Complaint.

1. KMC served the Complaint that is the subject of this docket against Sprint-FL and Sprint Communications Company Limited Partnership ("Sprint LP") via hand-delivery to the undersigned counsel on August 30, 2005. Pursuant to Rule 28-106.204, F.A.C., The respondents have 20 days to file a Motion to Dismiss the Complaint or any part of it.¹
2. The Complaint asserts several claims relating to Sprint-FL, Sprint LP, or both. These claims primarily involve KMC's allegations that Sprint LP and/or Sprint-FL avoided paying access charges that were due to KMC. In addition to these access charge claims, KMC has included a claim that Sprint-FL violated a confidential settlement agreement that KMC entered into with Sprint-FL in May 2002. (Count IV, paragraphs 33-36) This agreement was never filed with or approved by the Commission, nor was it

¹ Consistent with Rule 28-106.203, F.A.C., the staff has established a due date for Sprint-FL's and Sprint LP's responses to KMC's Complaint of September 20, 2005. Sprint-FL and Sprint LP intend to file their responses in accordance with that date. However, given the 20-day time frame established by Rule 28-106.204, F.A.C., for filing Motions to Dismiss and since Sprint-FL was served with the Complaint on August 30, 2005, in an abundance of caution, Sprint-FL is filing this Motion separately on September 19, 2005.

DOCUMENT NUMBER-DATE

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required to be. The settlement agreement required that certain amendments to the existing KMC/Sprint interconnection agreement and, ultimately, a new KMC/Sprint interconnection agreement, be executed and filed with the Commission. The amendment was filed and approved by the Commission on November 19, 2002 in Docket No. 020876-TP. (The Amendment is attached to this Motion as Attachment A) A new interconnection agreement between KMC and Sprint was filed and approved by the Commission on October 24, 2003 in Docket No. 030860-TP.

3. In addition to KMC's claim that Sprint violated the confidential settlement agreement, in Count V of its Complaint KMC also alleges that Sprint violated the terms of the interconnection agreement referred to in paragraph 2. Sprint-FL will respond to these claims in its Answer.

4. The general standard for a Motion to Dismiss is whether the complaint alleges sufficient facts to state a cause of action as a matter of law. In disposing of a Motion to Dismiss the Commission must assume all of the allegations of the Complaint are true. *Varnes v. Dawkins*, 624 So. 2d 349 (Fla. 1st DCA 1993). In addition, fundamentally, the Commission must have subject matter jurisdiction over the claims asserted in order to rule on a complaint or petition.²

5. The Commission has recognized that it has no general authority to enforce contracts. The Commission also has recognized that it has specific authority to enforce the terms of interconnection agreements and amendments to those agreements, based on

² See, e.g., Order No. PSC-01-2178-FOF-TP, issued November 6, 2001, in Docket No. 010345-TP, *In the Matter of Petition by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Inc. for Structural Separation of BellSouth Telecommunications, Inc into Two Distinct Wholesale and Retail Corporate Subsidiaries*, Order No. PSC-99-1054-FOF-EL, issued May 24, 1999, in Docket No. 981923-EI, *In Re: Complaint and petition of John Charles Heekin Against Florida Power & Light*.

its statutory authority to approve those agreements. See, Order No. PSC-04-0425-FOF-TP, issued April 26, 2004 in Docket No. 031125-TP, *In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service by IDS Telecom LLC* (hereinafter “BST/IDS Dismissal Order”).³

6. In Count IV of its Complaint KMC alleges that Sprint-FL violated the provisions of the May 2002 Confidential Settlement and Release Agreement by failing to pay reciprocal compensation pursuant to its terms. (KMC Complaint at paragraph 36) While KMC also alleges that Sprint-FL violated Amendment No. 1 to the 1997 MCI agreement, the allegation is founded on the terms of the Confidential Settlement and Release Agreement. (KMC Complaint at paragraph 34) In the BST/IDS Dismissal Order, the Commission dismissed a claim filed by IDS against BellSouth for violation of a settlement agreement not filed with the Commission, based on the Commission’s lack of subject matter jurisdiction to resolve contractual disputes. (BellSouth/IDS Dismissal Order at page 9) Similarly, the Commission lacks subject matter jurisdiction over KMC’s claims against Sprint-FL relating to the Confidential Settlement and Release Agreement, and, therefore, the Commission should dismiss Count IV of KMC’s Complaint.

Wherefore, Sprint-FL requests that the Commission dismiss Count IV of KMC’s Complaint for lack of subject matter jurisdiction.

³ See, also, s. 364.162, F.S., and *BST v. MCIMetro Access Transmission Serv.*, 317 F. 3d 1270 (11th Cir. 2003)

Respectfully submitted this 19th day of September 2005.



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ATTORNEY FOR SPRINT-FLORIDA,
INCORPORATED

**AMENDMENT NO. 1 TO
INTERCONNECTION AND RESALE AGREEMENT
BETWEEN
SPRINT-FLORIDA, INCORPORATED AND
KMC TELECOM III, INC. AND KMC TELECOM V, INC.**

This Amendment No. 1 is made this 26th day of June, 2002, by and between Sprint-Florida, Incorporated ("Sprint") and KMC Telecom III, Inc. and KMC Telecom V, Inc. (collectively "KMC"). (Sprint and KMC may be referred to individually as a "Party" and collectively as the "Parties").

BACKGROUND:

Whereas, the Parties entered into an Interconnection and Resale Agreement ("Agreement"), which consists of an opt-in of Sprint and MCImetro Access Transmission Services, Inc. interconnection and resale agreement, on April 1, 1999 for the state of Florida.

Whereas, on February 1, 2002, Sprint elected to offer the interim compensation rates established by the Federal Communications Commission ("FCC") in its *Order on Remand and Report and Order*, FCC 01-131, CC Dockets No. 96-98 and 99-68, adopted April 18, 2001 (the "ISP Compensation Order") and wish to amend the Agreement to reflect such election.

Whereas, the Parties also wish to amend the Agreement to reflect the application of reciprocal compensation for Local Traffic consistent with the FCC Rule 51.711(a)(3) (47 C.F.R. § 51.711(a)(3)) and any Applicable Rules for the state of Florida.

Whereas, the Parties are currently negotiating a replacement interconnection and resale agreement. It is the Parties intent to negotiate a replacement interconnection and resale agreement by August 5, 2002. The replacement interconnection and resale agreement terms will supercede the current Agreement and all amendments, including this Amendment No. 1.

In consideration of the promises and agreements contained in this Amendment No. 1, the Parties agree as follows:

1. This Amendment No. 1 reflects the application of the rates contained in the ISP Compensation Order and FCC Rule 51.711(a)(3) (47.C.F.R. § 51.711(a)(3)) and any applicable state law effective May 1, 2002.
2. Except as otherwise indicated, defined terms in this Amendment have the same meaning as in the Agreement. The following definitions are added or substituted to the Agreement:

2.1 "FCC Interim Inter-carrier Compensation Mechanism" means the interim inter-carrier compensation mechanism established by the FCC in paragraphs 77-94 of the ISP Compensation Order.

2.2 "Information Access Traffic," for the purposes of this Agreement, is traffic that is transmitted to or returned from the Internet at any point during the duration of the transmission between the Parties.

2.3 "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.

Notwithstanding, the Parties agree that if the Commission has defined the local calling area for purposes of reciprocal compensation in an order applicable to the Parties, the Parties will abide by that order. For this purpose, Local Traffic does not include any Information Access Traffic (*see* ISP Compensation Order); and/or (2) telecommunications traffic exchanged by a LEC and a CMRS provider that originates and terminates within the same Major Trading Area, as defined in 47 CFR § 24.202(a). Neither Party waives its' rights to participate and fully present its' respective positions in any proceeding dealing with the compensation for Internet traffic.

I. Information Access Traffic

3. All Local Traffic and Information Access Traffic delivered to one Party by the other Party that does not exceed a 3:1 ratio of terminating to originating minutes of use, on a state-wide basis, is presumed to be Local Traffic.

3.1 The rates to be charged for the exchange of Local Traffic are the rates set forth in the Agreement and are reflected below .

3.1.1 Local Traffic Rate:

End Office:	\$0.003671
Tandem Switching:	\$0.002085
Common Transport:	\$0.000711
Combined Tandem Rate:	\$0.006467

4. Consistent with Sprint's election of the FCC Interim Inter-carrier Compensation Mechanism, Information Access Traffic is not considered Local Traffic subject to reciprocal compensation, but is instead traffic subject to compensation as described by the FCC Interim Inter-carrier Compensation Mechanism. Information Access Traffic will be compensated at the rates established by the FCC. The rates shall be applied consistent with the provisions of Attachment IV of the Agreement.

- 4.1 Beginning with the effective date of this Amendment No. 1, the terminating Party will bill the originating Party a rate of \$0.0010 per MOU for Information Access Traffic delivered to the terminating Party.
- 4.2 To the extent that this Amendment No. 1 remains in effect, beginning on June 14, 2003, the terminating Party will bill the originating Party a rate of \$0.0007 per MOU for Information Access Traffic delivered to the terminating Party.
5. All combined Local Traffic and Information Access Traffic delivered to a Party that exceeds a 3:1 ratio of terminating to originating traffic minutes of use, on a state-wide basis, is presumed to be Information Access Traffic. This presumption may be rebutted by either Party consistent with the provisions of the ISP Compensation Order.
6. Notwithstanding anything to the contrary, the volume of Information Access Traffic for which one Party may bill the other is subject to a growth cap. The growth cap will be applied as follows.
 - 6.1. To determine the base-line for compensation purposes calculate the number of Information Access Traffic minutes for which each Party was compensated during the first quarter of 2001, multiply times four and multiply that number by 1.10.
 - 6.2. In 2002, the Parties will compensate each other for Information Access Traffic up to a ceiling equal to the number of Information Access minutes for which each Party was compensated during 2001 on an annualized basis, plus an additional ten percent growth factor.
 - 6.3. To the extent this Amendment No. 1 remains in effect in 2003, the Parties will compensate each other for Information Access Traffic up to the number of Information Access Traffic minutes for which each Party was compensated during 2002.
7. If at any point after the Effective Date of this Amendment, Sprint no longer offers to terminate Local Traffic or Information Access Traffic at the FCC Rates set forth in subsection 4 for any carrier, including but not limited to CLECs and CMRS providers, Sprint shall notify KMC immediately of this choice and the rate of Information Access Traffic termination shall be the rate for reciprocal compensation for Local Traffic as set forth in Table One of the Agreement. If the Parties are unable to agree on whether Sprint is offering to exchange traffic as described in this Part I, they shall invoke the dispute resolution procedures in the Agreement.

II. Tandem Switching

8. The Parties agree that, for purposes of this Agreement, KMC's switch shall be considered to serve a geographic area comparable to the geographic area served by Sprint's local tandem switch (the "Sprint Switch Service Area") within the meaning of FCC Rule 51.711(a)(3) (47 C.F.R. § 51.711(a)(3)) and any applicable state law. KMC has provided a letter of self-certification that it serves a geographic area comparable to the geographic area served by Sprint's tandem switch. Sprint has reviewed KMC's self-certification and agrees that for purposes of this Amendment No. 1, KMC meets the geographic comparability requirements set forth in FCC Rule 51.711(a)(3) (47 C.F.R. § 51.711(a)(3)) and applicable state law.

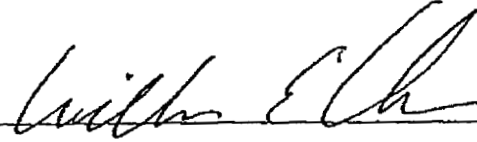
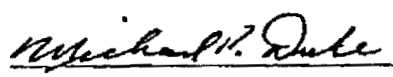
III. Miscellaneous Terms and Conditions

9. Other than as set forth above, the Agreement remains unchanged and in full force and effect. In the event of a conflict between the terms of the Agreement and this Amendment, this Amendment will control.
10. Except as otherwise indicated, defined terms in this Amendment No. 1 have the same meaning as in the Agreement.
11. This Amendment No. 1 executed by authorized representatives of Sprint and KMC is made a part of and incorporates the terms and conditions of the Agreement.
12. The Parties agree that the Commission and/or FCC has jurisdiction to address the issues and disputes that may arise during and as a result of the implementation of this Amendment. Except to the extent that certain issues are reserved herein for Commission determination, either Party may choose to bring a dispute hereunder before any government entity possessing jurisdiction to address such disputes.

IN WITNESS WHEREOF, Sprint and KMC has caused this Amendment No. 1 to be executed by its duly authorized representatives.

"Sprint"

"KMC"

By:		By:	
Name (typed):	<u>William E. Cheek</u>	Name:	<u>Michael P. Duke</u>
Title:	<u>President - Wholesale Markets</u>	Title:	<u>Director - Government Affairs</u>
Date:	<u>7/22/02</u>	Date:	<u>6-30-02</u>