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Timolyn Henry

From: Whitt, Chrystal [REG] [Chrystal.Whitt@sprint.com]
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Filed on behalf of:

Susan S. Masterton

Attorney

Law/External Affairs

Sprint

1313 Blairstone Rd.

Tallahassee, FL 32301

M/S FLTLHO0103

Voice (850)-599-1560

Fax (850)-878-0777

susan.masterton@sprint.com

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Susan S. Masterton
Attorney

Law/External Affairs
FTLH00107
Post Office Box 2214
1313 Blair Stone Road
Tallahassee, FL 32316-2214
Voice 850 599 1560
Fax 850 878 0777
susan.masterton@mail.sprint.com

September 23, 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 Response in Opposition to KMC's Motion to Dismiss.

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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**CERTIFICATE OF SERVICE
DOCKET NO. 041144-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail this 23rd day of September, 2005 to the following:

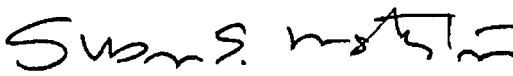
Division of Legal Services
Lee Fordham/ Beth Keating
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

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

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

Kelley Drye & Warren LLP
Chip Yorkgitis / Barbara Miller
1200 19th Street, N.W.,
Fifth Floor
Washington, DC 20036

Floyd Self, Esq.
Messer, Caparello & Self, P.A.
215 S. Monroe Street, Ste. 701
Tallahassee, FL 32302



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)	Filed: September 23, 2005
Section 364.16(3)(a), Florida Statutes.)	
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SPRINT-FLORIDA, INCORPORATED'S RESPONSE TO KMC'S MOTION TO DISMISS

Pursuant to Rule 28-106.204, F.A.C., Sprint-Florida, Incorporated ("Sprint") files this Response in opposition to KMC Telecom III LLC's, KMC Telecom V, Inc.'s and KMC Data LLC's (collectively, "KMC's") Motion to Dismiss.

INTRODUCTION

At the eleventh hour, KMC has filed this Motion to Dismiss asserting that the Commission does not have subject matter jurisdiction to rule on Sprint's Complaint. KMC asserts this lack of subject matter jurisdiction even though the Complaint involves allegations that KMC violated a state law that the Commission is explicitly empowered to enforce. And, KMC asserts this lack of subject matter jurisdiction even though the Complaint involves allegations that KMC violated its interconnection agreements with Sprint, again, issues that the Commission has clear jurisdiction to resolve under state and federal law. KMC's arguments regarding the Commission's lack of jurisdiction appear to rest on KMC's unproven assertions regarding the nature of the traffic that is at issue in this Complaint. That is, KMC is asserting that because the traffic is voice over Internet protocol ("VoIP") traffic, neither the state law nor the interconnection agreements apply.

Rather, according to KMC, the jurisdiction to determine how intrastate VoIP traffic should be treated for intercarrier compensation purposes is vested solely with the FCC.

As Sprint has repeatedly argued in its testimony and briefs, KMC's argument that the FCC has completely preempted the issue of intercarrier compensation for VoIP traffic is without merit. But, even if the FCC had preempted to itself the legal question of the intercarrier compensation that applies to intrastate VoIP traffic, the FCC has never asserted jurisdiction over the factual determination of whether the evidence shows that the traffic at issue is, in fact, enhanced services or VoIP traffic. Nor does the FCC's jurisdiction extend to the legal issues concerning how the characterization of the traffic affects the application of state law or the interconnection agreements.

Recognizing that its assertion of lack of subject matter jurisdiction is unfounded, at best, KMC asks the Commission to defer a ruling in this docket until the FCC clarifies the jurisdictional nature of VoIP traffic and the intercarrier compensation that applies to VoIP traffic. Sprint disputes that federal or state law requires the Commission to defer to the FCC on these issues and urges the Commission to render a decision on the issues as set forth in Sprint's briefs. However, even if the Commission were to determine that deferring to the FCC the issue of the appropriate intercarrier compensation for VoIP traffic is appropriate, the Commission must still decide, on the basis of the evidence in the record, whether the traffic is VoIP and arguably under the FCC's, rather than the Commission's, jurisdiction.

ARGUMENT

The Commission clearly has subject matter jurisdiction under section 364.16(3), F.S.

An administrative agency's subject matter jurisdiction is established by the Legislature. See, *Deltona Corp. v. Mayo*, 342 So. 2d 510 (Fla. 1977) A review of the enabling statutes for the agency is necessary to determine whether and agency has subject matter jurisdiction over a particular matter. In the case of Sprint's allegations that KMC violated section 364.16(3), F.S., the Legislature has explicitly directed the Commission to investigate and resolve complaints regarding suspected violations. Specifically, section 364.16(3), F.S., states:

(a) 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.

(b) 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

There is absolutely no credible basis to argue that the Commission lacks subject matter jurisdiction to determine whether a violation of this statute has occurred. While the Commission may ultimately determine that the evidence shows that the nature of the traffic Sprint alleges was terminated in violation of the statute is such that no violation occurred, under section 364.16(3), F.S., the Commission is not only empowered but is obligated to render a decision on Sprint's allegations.

In addition, even if the Commission determines that the traffic at issue is or might be VoIP traffic, state laws authorizes the Commission to determine whether or not access charges should apply to the traffic and, therefore, whether KMC has violated section 364.16(3), F.S., as Sprint has alleged. Section 364.02(12), F.S., specifically states:

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 voice over Internet protocol service.

Therefore, under state law, the Commission clearly has subject matter jurisdiction to determine the issues raised in Sprint's Complaint and must deny KMC's Motion to Dismiss regarding these allegations.

The Commission has jurisdiction to determine Sprint's allegations that KMC violated its interconnection agreements with Sprint

Similar to Sprint's allegations that KMC violated state law, it is virtually indisputable that the Commission has the jurisdiction to determine Sprint's allegations that KMC violated the parties' interconnection agreements. First, section 364.162, F.S., explicitly gives the Commission the authority to resolve disputes regarding interconnection. Second, § 252 of the 1996 Telecommunications Act (47 U.S.C. § 252) authorizes the Commission to approve interconnection agreements, and this section has been interpreted by the FCC, the courts and this Commission to include the interpretation and enforcement of those agreements. See, *BellSouth v. MCI metro Access Transmission Serv.*, 317 F. 3d 1270 (11th Cir. 2003). This jurisdiction includes the obligation for the Commission to apply federal law and FCC rulings in making its determinations as to the meaning and application of the provisions of the interconnection agreement. In addition,

the interconnection agreements reflect the parties' agreement that the Commission is the appropriate forum to resolve disputes under the agreements' terms.¹

Clearly, the Commission not only has the authority, but the obligation, under the law to resolve Sprint's allegations that KMC violated its interconnection agreements by terminating nonlocal traffic over its local interconnection trunks with Sprint and by failing to pay access charges on the toll traffic. While the Commission may find, based on the evidence in the record, that the nature of the traffic is such that a violation of the interconnection did not or might not have occurred, it must first make a factual determination concerning the nature of the traffic and further determine how the terms of the interconnection agreement apply to traffic of that nature. These determinations include the application of the prevailing federal law on the issues.

Even if the Commission believes that the evidence in the record is sufficient to make the factual determination that the traffic at issue is enhanced services or VoIP traffic (which Sprint disputes) such a determination does not usurp the Commission's jurisdiction to determine whether the interconnection agreements have been violated by the manner in which KMC terminated that traffic to Sprint. First, as discussed above, it is specifically within the Commission's jurisdiction to apply the federal law related to VoIP to its resolution of the parties' interconnection agreement dispute. Second, state law specifically gives the Commission the authority to resolve issues regarding intercarrier compensation for VoIP. See, section 364.02(12), F.S., quoted above. In fact, legislation enacted by the Legislature in 2005 clarifies that, while VoIP is not subject to regulation by the Commission, the Commission continues to have specific authority to resolve

¹ See footnote 2 of Sprint's Initial Post-hearing Statement and Brief ("Sprint's Initial Brief") for citations to the relevant interconnection agreement provisions.

interconnection disputes concerning such traffic. See, Section 14, of ch. 2005-132, L.O.F.² Therefore, under state and federal law, the Commission clearly has subject matter jurisdiction to determine the issues raised in Sprint's Complaint and must deny KMC's Motion to Dismiss regarding these allegations.

The Commission has jurisdiction to enforce Sprint's intrastate tariffs

Once again, there is no sound basis to argue that the Commission does not have subject matter jurisdiction to enforce Sprint's intrastate tariffs. See, Order No. PSC-98-1385-FOF-EI in Docket No. 981216-EI, *In re: Complaint of Mr. Paul Leon and Mr. Joseph Olazabal against Florida Power and Light Company regarding tariffs for moving electric light poles*. KMC argues that the evidence in Sprint's Complaint includes interstate as well as intrastate traffic. (KMC Motion to Dismiss at paragraph 4) Sprint does not dispute that the SS7 records it produced to support its claims include call records that show that interstate interexchange traffic, as well as intrastate interexchange traffic, was terminated over KMC's local interconnection trunks with Sprint. Because SS7 records are collected on a daily basis and the individual call records cannot be separated readily by jurisdiction, Sprint was unable to separate the interstate calls from the intrastate calls in producing these records. Similarly, the SS7 monthly summary reports summarize all of the traffic (both interstate and intrastate) terminated over the local interconnection trunks, although the summary separately delineates the information by jurisdiction. However, Sprint properly made its claims before this Commission based on the intrastate traffic only. While the evidence presented might contain some extra data

² Specifically, section 364.02(13), F.S., amended in 2005, states: Notwithstanding s. 364.013, and the exemption of services pursuant to this section, the commission may arbitrate, enforce, or approve interconnection agreements, and resolve disputes as provided by 47 U.S.C. ss. 251 and 252, or any other applicable federal law or regulation.

involving interstate traffic, that in no way undermines the validity of the evidence related to intrastate traffic, nor does it alter the Commission's jurisdiction to rule on Sprint's Complaint as to the intrastate traffic.

And, again, while KMC has alleged that the nature of the traffic, i.e., VoIP, invokes the FCC's exclusive jurisdiction, that does not obviate the need for the Commission to make the factual determination that the traffic is, or might be, VoIP traffic and, therefore, that Sprint's intrastate tariffs do not apply. Therefore, the Commission clearly has subject matter jurisdiction to determine the issues raised by Sprint's Complaint and must deny KMC's Motion to Dismiss regarding these allegations.

KMC has not produced competent evidence that the traffic is VoIP traffic

KMC asserts that it has made a "prima facie" case that the traffic at issue in Sprint's Complaint is VoIP traffic. (KMC Motion at paragraph 2) In addition, KMC asserts that it has produced competent evidence that the traffic is VoIP. (KMC Motion at paragraph 7) To the contrary, as discussed at length in Sprint's Reply Brief, KMC has produced nothing but hearsay evidence that the PointOne traffic is enhanced service or VoIP traffic. (Sprint's Reply Brief at pages 6 and 7) While hearsay evidence is permissible in administrative proceedings, hearsay evidence alone is not sufficient to prove the truth of the matter asserted in an administrative proceeding under Florida law. See, *Durrall v. Unemployment Appeals Commission*, 742 So. 2d 166 (Fla. 4th D.C.A. 1999.) See also, Sprint's Reply Brief at page 6 and section 120.57(1)(c), F.S. None of the evidence related to the nature of PointOne's traffic constitutes an exception from the hearsay rule.³

³ Section 90.801, F.S., sets forth the definition of hearsay. Section 90.803, F.S., sets forth the exceptions to the hearsay rule.

KMC appears to believe that its second-hand representations that PointOne said its traffic was enhanced services or VoIP traffic and PointOne's self-serving e-mails and letters to KMC and submissions in unrelated proceedings somehow constitute testimony by PointOne (KMC's Motion at paragraph 7). However, KMC did not provide PointOne as a witness in this docket, PointOne made no direct statements in this docket and PointOne was not made available by KMC for cross-examination. Therefore, while the communications between PointOne and KMC may provide evidence of KMC's understanding of the nature of the traffic, under the definition of hearsay, PointOne's statements cannot be considered competent evidence of the actual nature of the traffic.

Black's Law Dictionary defines a "prima facie case" as one that "will prevail until contradicted and overcome by other evidence." Necessarily, to be sufficient a prima facie case must be based on competent evidence, which requires something more than hearsay evidence, as discussed above. Even if KMC's mere assertions that the traffic was VoIP, combined with its hearsay evidence that PointOne said that the traffic was VoIP, were viewed as establishing a prima facie case, Sprint has clearly rebutted KMC's assertions. (Sprint's Reply Brief at pages 3 and 4) In the face of Sprint's rebuttal, KMC has the burden to produce a preponderance of direct evidence to prove its assertion that the traffic was in fact enhanced services or VoIP traffic. (Sprint's Reply Brief at page 5) KMC has failed to produce this evidence and, therefore, the Commission has no legitimate basis to find that the traffic was enhanced services or VoIP traffic. Since the alleged nature of the traffic is the fundamental basis for KMC's Motion to Dismiss, as well as KMC's defense to Sprint's allegations, the Commission must deny KMC's Motion to Dismiss, and render a decision in a favor of Sprint.

KMC is not providing a local service to PointOne

Even if the Commission decides that KMC has produced sufficient evidence to make a determination that the traffic at issue is, or might be, enhanced services or VoIP traffic, the Commission clearly has authority under state and federal law to determine the applicability of the enhanced services exemption as it relates to Sprint's claims under the statute and the interconnection agreements. Specifically, the Commission must determine whether KMC was providing a local service to PointOne by routing the traffic from PointOne's physical location in Orlando for termination by Sprint in Tallahassee and Ft. Myers, thereby making section 364.16(3), F.S., inapplicable. In addition, the Commission has clear jurisdiction to determine whether this interexchange, interLATA routing was local traffic as defined in the parties' interconnection agreements and, based on this finding, determine the applicable intercarrier compensation for the traffic under the interconnection agreements.

As discussed thoroughly in Sprint's Initial Brief, the interconnection agreements unambiguously define local traffic as traffic that originates and terminates in the same Sprint local calling area. (Sprint's Initial Brief at pages 17-18) In addition, the interconnection agreements clearly delineate that reciprocal compensation applies only to local traffic as defined in the agreements and that access charges apply to the termination of toll traffic and are to be paid by the party that terminates such traffic. (Sprint's Reply Brief at footnote 20) Also, by reference to and incorporation of the Commission's Order No. PSC-96-1231-FOF-TP, the interconnection agreements require that the party terminating traffic over local interconnection facilities prove that the traffic is local or pay access charges for the traffic. Even if the Commission accepts KMC's unproven

assertions that the traffic is VoIP and accepts KMC's assertion that the FCC has jurisdiction over VoIP traffic regardless of the jurisdiction of the original calling party, this Commission clearly has the jurisdiction and the obligation to resolve the intercarrier compensation due for the traffic based on the nature and jurisdiction of the services KMC provided to PointOne. Therefore, the Commission must deny KMC's Motion to Dismiss and, since KMC's routing of PointOne's traffic cannot be considered local traffic under the law or interconnection agreements, the Commission should render a decision in favor of Sprint on the Complaint.

The FCC has not preempted the Commission's jurisdiction to resolve Sprint's Complaint

Finally, Even if the Commission accepts as sufficient KMC's unproven assertions that the traffic is VoIP traffic, KMC is incorrect that the FCC has preempted the Commission's authority to determine the intercarrier compensation due for intrastate VoIP traffic. Sprint has discussed the FCC's rulings regarding VoIP traffic in detail in its initial and reply briefs. (Sprint's Initial Brief at pages 34-36; Sprint's Reply Brief at pages 11-13) To date, the FCC's rulings on VoIP traffic have resulted in only a single determination that a very specific type of VoIP traffic was enhanced services traffic not subject to access charges. See, WC Docket No. 03-45, *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, FCC 04-27, released February 19, 2004. In another ruling the FCC determined that a specific type of VoIP traffic was telecommunications traffic subject to access charges. See, 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. And, in the only other FCC

ruling regarding a specific type of VoIP, the FCC declined to make a determination as to whether VoIP traffic that was originated or terminated using a broadband connection was telecommunications or enhanced services or whether access charges were due if the traffic used the public switched network for origination or termination. See, WC Docket No. 03-211, *Vonage Holdings Corporation Petition for Declaratory Ruling concerning an Order of the Minnesota Public Utilities Commission*, FCC 04-267, released December 12, 2004.

In the *Vonage* ruling, the FCC determined that the *Vonage* type traffic was “jurisdictionally mixed” and preempted states only regarding specific regulation of the service. *Vonage* at ¶ 18. While KMC has interpreted that narrow preemption to mean that the FCC has preempted state jurisdiction over any facet of any type of traffic that might possibly be VoIP traffic, KMC’s interpretation of the law is without merit. Rather, preemption is not favored in the law and must be explicitly stated. See, *Qwest v. Minnesota Public Utilities Commission*, 380 F. 3d 367, 374 (U.S. 8th Cir. 2004) Based on the case law the Commission would be in error to interpret the *Vonage* decision as pre-empting the Commission’s clear authority under state and federal law to rule on Sprint’s allegations that KMC violated state law and its interconnection agreement by terminating PointOne’s intrastate interexchange traffic over local interconnection trunks without paying access charges.

The cases cited by KMC in its Motion to Dismiss at paragraphs 10 and 11 support Sprint’s position in this case rather than KMC’s. Both cases demonstrate that KMC, who has a contractual relationship with Sprint and who is bound by section 364.16(3), F.S., is the appropriate entity for Sprint to pursue for access charges under the interconnection

agreements and the law. In addition, both cases support that the Commission, rather than a civil court, is the appropriate forum in which to seek relief. As far as the Thrifty Call case cited by KMC in paragraph 13 of its Motion, the FCC docket to which the Commission deferred was not a generic rulemaking docket but was a request for a declaratory statement concerning the same traffic that was at issue in BellSouth's Complaint before the FPSC. Certainly, that case is distinguishable from Sprint's Complaint relating to specific KMC-terminated traffic as it relates to the FCC generic IP-Enabled Services docket.

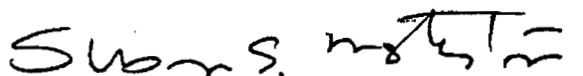
While the FCC does have an open docket to consider rulemaking regarding VoIP, including intercarrier compensation issues, there is no timeframe within which the FCC must act and no guarantee that the FCC will act. As discussed above, the Commission has clear authority to rule on Sprint's Complaint under state and federal law, applying federal law as it exists today to its ruling. Even if the FCC were to act in its rulemaking docket to preempt the states and further determine the intercarrier compensation applicable to VoIP traffic, that decision would be prospective only and could not serve to invalidate the Commission's decision in this two party complaint docket based on the current state of the law. Therefore, the Commission should deny KMC's request to defer, as well as KMC's Motion to Dismiss, and render a decision on Sprint's allegations that KMC violated state law and its interconnection agreements with Sprint.

CONCLUSION

KMC's arguments that the Commission lacks subject matter jurisdiction over Sprint's Complaint are wholly without merit. Recognizing that it has no legitimate basis for requesting dismissal of Sprint's Complaint, KMC alternatively has asked the

Commission to defer a ruling on Sprint's Complaint until some unknown and unknowable time in the future when the FCC might render additional rulings relating to VoIP that possibly preempt and conflict with the Commission's potential rulings on Sprint's Complaint. There is no valid basis for the Commission to grant KMC the relief it seeks and, thereby, deny Sprint a determination regarding the allegations in its Complaint. The Commission should deny KMC's Motion to Dismiss and deny KMC's request for a deferral. Sprint has demonstrated by a preponderance of the evidence that KMC terminated intrastate, interexchange traffic over its local interconnection trunks with Sprint in violation of state law and the parties' interconnection agreements. In so doing, KMC failed to pay Sprint the tariffed intrastate access charges that were due under the law, the interconnection agreements and Sprint's tariffs. The Commission should render a decision in favor of Sprint and order KMC to pay the access charges KMC owes Sprint, as well as refund the amount Sprint overpaid in reciprocal compensation due to the improperly terminated KMC traffic.

Respectfully submitted this 23rd day of September 2005.



SUSAN S. MASTERTON
P.O. Box 2214
Tallahassee, FL 32316-2214
(850) 599-1560 (phone)
(850) 878-0777 (fax)
susan.masterton@mail.sprint.com

ATTORNEY FOR SPRINT