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To: Filings@psc.state.fl.us
Subject: 041144-TP Sprint's Response to KMC's Amended Notice to Dismiss
Attachments: 041144 Sprint's Res to KMC's amended Notice to Dismiss.pdf

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October 11, 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 to KMC's Amended Notice 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

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

**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 11th day of October, 2005 to the following:

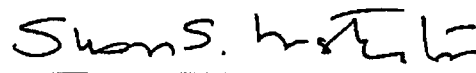
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Susan S. Masterton

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint-Florida, Incorporated)
Against KMC Telecom III LLC,)
KMC Telecom V, Inc. and KMC Data LLC,)
for failure to pay intrastate)
Access charges pursuant to its interconnection)
Agreement and Sprint's tariffs and for violation of)
Section 364.16(3)(a), Florida Statutes.)
_____)

Docket No. 041144-TP

Filed: October 11, 2005

SPRINT-FLORIDA, INCORPORATED'S RESPONSE TO KMC'S AMENDED 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") Amended Motion to Dismiss (hereinafter, "October Motion").

INTRODUCTION

Although KMC couches its October Motion as an "Amended Motion to Dismiss" it is actually an attempt to bolster its position on the issues in this docket and amounts to an unauthorized addendum to its post-hearing brief or, at best, an unauthorized "reply" to Sprint-Florida, Incorporated's Response to KMC's September 16, 2005 Motion to Dismiss (hereinafter, "Sprint's Response and "September Motion," respectively). While KMC justified the late-filing of its Motion to Dismiss on the procedural grounds that a motion to dismiss for lack of subject matter jurisdiction is proper at any time, this procedural rule does not apply to KMC's request to defer or to its right to argue its positions regarding the substantive issues in the proceeding before the Commission.¹

¹ It is notable that October 3, 2005 Petition for Declaratory Ruling filed by Grande Communications apparently was authored, at least in part, by the same attorneys who are representing KMC in this docket.

Because KMC's Motion is procedurally inappropriate, the Commission should reject it as it consistently has rejected other such unauthorized pleadings. [See, e.g., *In re: Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. for violations of the Telecommunications Act of 1996*; Order No. PSC-00-1777-PCO-TP in Docket No. 980119-TP, issued September 28, 2000.]

Even if the Commission decides to consider KMC's new motion to defer Sprint's Complaint, the Motion lacks merit and should be denied.²

ARGUMENT

The Commission clearly has jurisdiction to resolve Sprint's Complaint

Sprint has discussed in detail in Sprint's Post-hearing Statement and Brief (hereinafter, "Sprint's Initial Brief") and Response to KMC's September Motion the basis upon which the Commission has the clear authority and, in fact, the responsibility to resolve Sprint's allegations that KMC violated state law, its interconnection agreements with Sprint and Sprint's tariffs by failing to pay Sprint access charges that should have been paid on interexchange, interLATA traffic that KMC wrongfully terminated to Sprint over local interconnection trunks. [Sprint's Initial Brief at pages 4-9; Sprint's Response at pages 3-7] In the October Motion, KMC again asserts that it has made a "prima facie"

The submission of that pleading in this docket under the guise of an "amended motion" appears to be nothing more than a blatant attempt by KMC to augment the arguments in its posthearing briefs.

² It is specious for KMC to base its request for deferral on the need to "conserve Commission resources." [October Motion at ¶ 8] The parties have been litigating this case for over a year and all phases of the proceeding are (or, at least, should be) complete except for the staff recommendation and Commission vote. The parties and the Commission have invested considerable resources to this point, including activities related to addressing the numerous dubiously founded motions KMC has filed since the inception of the case. To this point, KMC has filed three Motions to Dismiss (one of which has been denied), an untimely and improper counterclaim (which was stricken); a Motion to Delay (denied), a Motion for Audit (denied), three Motions to Compel discovery from Sprint which (resulted in rulings which have largely supported that Sprint responded fully and completely to the requested discovery) and a Motion for Reconsideration (denied). Now, at a time in the proceeding when the case should be coming to closure, KMC has filed two additional procedurally questionable and wholly baseless motions that require a renewed unnecessary investment of Commission and staff time and resources to address.

showing that the traffic in question was VoIP or enhanced services traffic, that the FCC has pre-empted the Commission's jurisdiction over this traffic (regardless of whether it is intrastate or interstate by end to end jurisdiction) and that the FCC has determined that access charges are not due for this traffic. As Sprint has thoroughly addressed in its previous pleadings, KMC's assertions lack merit in all respects.

First, there is no competent, direct evidence in the record of this case to support KMC's assertion that the traffic in question is VoIP or enhanced services traffic. While KMC has produced hearsay evidence that PointOne provides VoIP services generally, it has not produced a scintilla of direct evidence regarding the traffic at issue in Sprint's Complaint. In fact, through the course of this proceeding KMC has continually denied that it had any direct knowledge of the nature of PointOne's traffic, instead relying entirely on PointOne's assertions that the traffic was VoIP or enhanced services and thus exempt from access charge. [See, Hearing Exhibit No. 6, KMC's Response to Staff's Interrogatory No. 6 and KMC's Response to Sprint's Interrogatory No. 2; Hearing Exhibit No. 30, Calabro Deposition, page 16, lines 12-15] Since KMC's September and October Motions both rest on its assertion that the traffic is VoIP and, therefore, under the FCC's rather than this Commission's jurisdiction, the Commission must first determine as a factual matter that the traffic is VoIP traffic, before it can even reach the issue of whether dismissal or deferral is appropriate. Sprint asserts that there is no competent record evidence that the Commission can rely on to make this finding. If the traffic was actually VoIP traffic, KMC easily could have obtained evidence from its customer, PointOne, to support its position. However, rather than produce such evidence, PointOne ended its use of KMC's services to terminate its traffic to Sprint. Ultimately,

KMC failed to obtain this evidence from PointOne or produce any direct evidence supporting its assertion for the record.³

KMC's unsubstantiated assertions regarding VoIP are merely an attempt to confuse the issue and avoid or delay a Commission ruling. The real issue raised by Sprint's Complaint is not whether the PointOne traffic KMC terminated to Sprint is subject to access charges, which the FCC has already confirmed in prior orders (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), rather the threshold issue is whether the subject traffic is VOIP traffic at all. Sprint has provided concrete evidence to show that its matching of correlated call records found that the traffic originated from POTs local exchange customers, was routed through interexchange customers, and was delivered by KMC to Sprint for termination to POTs local exchange customers. For the related customer bills that Sprint reviewed, in every instance the traffic was identified as end user originated traffic to long distance carriers and billed as long distance to the end users in the long distance section of their telephone bills. Not once was a call routed or billed by any entity other than an IXC. [Hearing Exhibit No. 7, Sprint's Response to KMC's PODs Nos. 6 and 7; Hearing Exhibit No. 41, Exhibit JRB-2]

Further, as discussed at length in Sprint's Reply Brief, the interconnection agreements place the burden of proving the traffic is local, and not toll, squarely on KMC. Attachment 1, Section 4.2 of the 1997 MCI Agreement states as follows:

³ As stated by SBC in its Petition for Declaratory Ruling on pages 26 and 27, "It is established law that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him, citing *International Union, United Autoworkers v. NLRB*, 459 F. 2d 1329, 1336 (D.C. Cir. 1972); *Alabama Power Co. v. FPC*, 511 F. 2d 583 383, 391, n.14 (D.C. Cir. 1974)."

Compensation for the termination of toll traffic and the origination of 800 traffic between the interconnecting parties shall be based on the applicable access charges in accordance with FCC and Commission Rules and Regulations including but not limited to Order PSC-96-1231-FOF-PP, Docket Number 95-0985-PP, and consistent with the provisions of Attachment IV of this Agreement. (Hearing Exhibit No. 10)

And Part C, Section 37.2 of the FDN Agreement states:

Compensation for the termination of toll traffic and the origination of 800 traffic between the interconnecting parties shall be based on the applicable access charges in accordance with FCC and Commission Rules and Regulations and consistent with the provisions of Part F of this Agreement. Toll traffic for purposes of this Agreement means as it is commonly used in the industry and includes communications between two points in different rate centers. (Hearing Exhibit No. 12)

[Emphasis added.]

The FPSC Order explicitly incorporated into the 1997 MCI Agreement and generally incorporated into the FDN Agreement specifically places the burden on the CLEC, in this case, KMC, to prove that calls are local. The exact language from the referenced order is as follows:

“we find that the company terminating the call should receive terminating switched access from the originating company unless the originating company can prove that the call is local.” *In Re: Resolution of petition(s) to establish nondiscriminatory rates, terms and conditions for interconnection involving local exchange companies and alternative local exchange companies pursuant to section 364.162, F.S.; Order No. PSC-96-1231-FOF-TP*, at page 2.

KMC has failed to meet this burden for the traffic that is at issue in Sprint’s Complaint.

KMC is not providing a local service to PointOne

Once again, as Sprint has iterated and reiterated in its briefs and Response to KMC’s September Motion, even if the Commission were to accept KMC’s hearsay assertions that the traffic is VoIP or enhanced services as establishing a colorable likelihood that the traffic might be VoIP or enhanced services, the Commission must still

look at KMC's routing of the traffic from PointOne's physical location in Orlando to Sprint's local calling areas in Tallahassee and Ft. Myers to determine if that routing constituted local calling under the statute or the interconnection agreements. [Sprint's Initial Brief at pages 19-21; Sprint's Reply Brief at pages 7-11; Sprint's Response at pages 9-10] KMC purports to now know (despite earlier disavowals) that the traffic was VoIP and argues that VoIP traffic is "enhanced services" traffic exempt from access charges under the FCC's enhanced services exemption. While Sprint disagrees with these arguments (and has thoroughly discussed and refuted them in its briefs and Response to the September Motion), KMC's assertions still raise a question as to whether the interexchange, interLATA PRI services KMC provided PointOne constitute the provision of local service under the interconnection agreements, the state law and as contemplated by the enhanced services exemption. There appears to be nothing in the dockets referenced by KMC currently pending before the FCC that will address the specific routing used by KMC and at issue in Sprint's Complaint.

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

As Sprint has argued time and again, even if the Commission were to determine that the traffic in question was possibly VoIP, the FCC has not usurped the Commission's jurisdiction to resolve issues regarding the appropriate intercarrier compensation due Sprint. [Sprint's Initial Brief at pages 7-9; Sprint's Response at pages 10-12] The FCC has definitively determined that only one type of VoIP traffic is clearly "information services" traffic under the jurisdiction of the FCC. [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.] It has definitively determined that another type of VoIP traffic (which Sprint's evidence shows is the type of traffic KMC terminated to Sprint, if it is VoIP at all) is clearly telecommunications traffic and subject to the traditional jurisdictional and intercarrier compensation provisions applicable to all telecommunications traffic. [*AT&T Declaratory Ruling*.] The Vonage Order, which apparently is KMC's primary support for its argument that the Commission lacks subject matter jurisdiction over Sprint's Complaint, first, relates only to one particular type of VoIP that originate or terminates on a broadband connection (Sprint's evidence in this case shows that the traffic at issue originated and terminated as POTs traffic and KMC has presented no evidence to the contrary); second, declares that that traffic is "jurisdictionally mixed" not interstate; third, asserts FCC jurisdiction over the states' ability to impose certain types of regulations only; and fourth, declines to rule on the jurisdiction of the traffic for intercarrier compensation purposes or to rule on the intercarrier compensation that is due. [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.] As Sprint discussed in its Response to the September Motion, these rulings in no way form the basis for a Commission determination that it lacks jurisdiction over the subject matter of Sprint's Complaint, nor do they support a decision by the Commission to defer a ruling pending later FCC action. [Sprint's Response at pages 10-12] Instead, they support Sprint's claims in this proceeding and provide clear guidance to the Commission that the FCC has not determined VoIP traffic categorically to be enhanced services or exempt from access charges.

The proceedings KMC references provide no grounds for deferring resolution of Sprint's Complaint

Sprint thoroughly responded to KMC's original arguments for dismissal or deferral in its Response to the September Motion. The (in some cases) newly opened and pending FCC dockets KMC references in its October Motion raise nothing new. Despite these pending proceedings, the Commission is not precluded from ruling, and should rule, on Sprint's Complaint without waiting for FCC action at some indeterminate and undeterminable time in the future. Contrary to KMC's representations, these cases are not on point with Sprint's Complaint.⁴ All of them request declaratory rulings regarding the payment of access charges by IXCs pursuant to the federal law and FCC regulations. None of them address a CLEC's obligations under Florida law or its interconnection agreements regarding the definition of local traffic, the proper routing of such traffic or the payment of access charges when toll traffic is improperly terminated in violation of the law and the agreements. Therefore, the resolution of these dockets cannot resolve the primary issues that are outstanding in Sprint's Complaint and the Commission has no basis or reason for deferring its decision on these issues until the FCC rules.

In addition to not being strictly applicable, these future decisions will not automatically operate retroactively to change the current status of the law as it applies to the traffic at issue in Sprint's Complaint. Any decision presumptively would be prospective in nature and would not serve to undo the Commission's decision in this docket. KMC's argument that Sprint is not harmed by a delay also lacks merit. KMC has already transferred the Florida operations of one of its subsidiaries that is a Respondent in

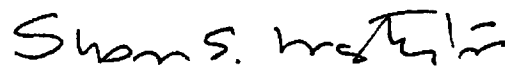
⁴ Interestingly, the pleadings provided by KMC create a telling picture of the dilemma faced by carriers like Sprint when IXCs, middlemen like PointOne and CLECs like KMC conspire together to avoid paying lawful access charges. Each party points the finger at someone else and during the lengthy ensuing litigation process many involved players go out of business, foreclosing any possibility of recovery by the carrier who is rightfully due compensation.

this docket. [See, Docket No. 050182-TL, *In re: Joint petition for waiver of carrier selection requirements of Rule 25-4.118, F.A.C., to allow KMC Telecom III LLC to transfer certain customer accounts to Telcove Investments, LLC.*] Any further delay only reduces the possibility that, should the Commission rule in Sprint's favor on the issues in this docket, Sprint will be able to collect the moneys that it should rightfully have received for this traffic beginning in July 2002.

CONCLUSION

KMC's October Motion is simple one other in a long line of filings by KMC in an attempt to delay the resolution of Sprint's Complaint. KMC's position that the Commission lacks jurisdiction over Sprint's Complaint is without merit. Likewise, KMC's suggestion that the Commission delay ruling on Sprint's Complaint pending FCC action at some undefined future date is also unfounded. The Commission should deny KMC's Motions and render a decision in this case.

Respectfully submitted this 11th day of October 2005.



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