

State of Florida



Public Service Commission

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DATE: October 12, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Keating, Fordham) *BK DS*
Division of Competitive Markets & Enforcement (Marsh, Pruitt) *gem y mnt*

RE: Docket No. 041144-TP – Complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated.

AGENDA: 10/18/05 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested – Participation at the Commissioners' Discretion¹

COMMISSIONERS ASSIGNED: Baez, Deason, Bradley

PREHEARING OFFICER: Bradley

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\041144.RCM.DOC

Case Background

On September 24, 2004, Sprint-Florida, Incorporated (Sprint) filed its complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively KMC) for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs, and for alleged violation of Section 364.16(3)(a), F.S. On January 31, 2005, Order No. PSC-05-0125-PCO-TP was issued, establishing the procedures to govern the conduct

¹ Staff notes that the administrative hearing in this matter was held on July 12, 2005. While technically post-hearing, staff believes it is within the Commissioner's discretion to receive argument on this Motion to Dismiss, because of the purely legal question presented.

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of the parties in the resolution of this Docket. Thereafter, the schedule for this matter was modified by Order No. PSC-05-0402-PCO-TP, issued April 18, 2005. The hearing in this matter was conducted on July 12, 2005.

The parties filed briefs on August 16, 2005, and reply briefs on September 7, 2005. Thereafter, the parties met for one last effort at resolving their dispute between themselves. KMC then filed a Motion to Dismiss on September 16, 2005. Staff was informed on September 19, 2005, that the parties' negotiations were not successful. On September 23, 2005, Sprint filed its Response in Opposition to KMC's Motion to Dismiss. On October 4, 2005, KMC filed an Amended Motion to Dismiss, and Sprint responded on October 11, 2005. This recommendation addresses the Motion to Dismiss and its alternative request for a stay of the proceedings pending the outcome of matters before the FCC.

Staff notes that the question of the Commission's jurisdiction will also be an issue presented for the Commission's final consideration as a post-hearing matter. The issue is as follows:

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

The Commission's decisions on the Motion to Dismiss will serve as *res judicata* with regard to Issue 1 in the case, if the Commission does decide to proceed to address the issues in dispute.²

Summary

KMC is asking that the Commission dismiss this proceeding, because it lacks authority to adjudicate a dispute regarding traffic that allegedly constitutes enhanced services. KMC contends that enhanced services traffic is solely within the jurisdiction of the FCC. Furthermore, KMC contends that this traffic is IP-enabled. KMC contends that the FCC has indicated its intent to address the appropriate handling of this traffic through the IP-enabled services rulemaking proceeding. Thus, KMC argues that this dispute is outside this Commission's jurisdiction to address. KMC adds, however, that if this Commission does not believe that dismissal is appropriate, then it should, at a minimum, stay this proceeding pending the outcome of the FCC's IP-Enabled Services Rulemaking proceeding. KMC asserts that staying this proceeding would prevent any conflicting rulings between this Commission's decisions in this case, and the FCC's decisions in the IP-Enabled Services proceeding.

KMC also filed an Amended Motion to Dismiss on October 4, 2005, wherein it cited to several new Petitions for Declaratory Statements that have been filed at the FCC asking the FCC to determine whether wholesale transmission providers that use IP technology to transport long distance calls are "interexchange carriers," and thus, subject to access charges. These Petitions

² Staff notes that while this situation puts the case in a somewhat awkward posture, particularly since jurisdiction is an issue for the Commission's post-hearing consideration, Florida law clearly allows the filing of a Motion to Dismiss for lack of subject matter jurisdiction at any time. That being said, staff also notes that it is generally preferable, to the extent possible, to receive any potentially dispositive motions prior to hearing in the matter in order to avoid unnecessary expense of Commission and party resources, and in the interest of judicial economy.

before the FCC are based on facts substantially similar to the facts presented in this case, and one such Petition addresses the actions of an entity allegedly involved in the transport of traffic at issue in this Docket. In its Amended Motion, KMC again asks that the Commission consider staying its proceedings pending the outcome of these FCC proceedings, if the Commission does not believe dismissal is appropriate.

Sprint believes that the Commission has jurisdiction under state law to address the issues before it, and that the Commission has not been preempted from taking action. Sprint also argues that a stay is not appropriate as it is unlikely that any action in the IP-Enabled Services Rulemaking proceeding would have any retroactive impact, and emphasizes that the dispute at issue here covers a limited timeframe, from approximately July 2002 through May 2004. Sprint further contends that KMC's amended Motion is procedurally improper and a barely camouflaged attempt to further bolster its arguments on the merits. Sprint adds that the cases referenced in the Amended Motion do not provide any additional support to KMC's suggestion that deferral to the FCC is required.

Staff recommends that the Commission has authority under state law to resolve all the issues in this complaint, and has not been preempted by the FCC. Thus, staff is recommending that the Motion to Dismiss be denied.

As for KMC's request that the Commission stay these proceedings pending the outcome of the FCC's IP-Enabled Services Rulemaking proceeding or the Petitions for Declaratory Ruling by Southwestern Bell, Vartec, and Grande Communications, staff recommends that this request also be denied. While staff recognizes some merit in avoiding possibly conflicting decisions between this Commission and the FCC, the anticipated delay associated with awaiting the outcome of the FCC proceedings appears to outweigh the benefits of deferring to the FCC.

Discussion of Issues

ISSUE 1: Should KMC's Motion to Dismiss, or alternative request for stay of these proceedings, be granted?

RECOMMENDATION: No. The Commission has jurisdiction to address the issues presented in this case and has not been specifically preempted. Staff further recommends that KMC's alternative request that the proceeding be stayed pending the outcome of FCC proceedings be denied. **(FORDHAM, B. KEATING)**

STAFF ANALYSIS:

I. STANDARD OF REVIEW

Generally, a motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). In this case, however, KMC alleges that the Commission lacks subject matter jurisdiction to hear the complaint, because the traffic at issue is

within the exclusive purview of the FCC. Staff notes that Florida courts, including the Florida Supreme Court, have held that the issue of federal preemption is a question of subject matter jurisdiction. Boca Burger, Inc. v. Richard Forum, 2005 Fla. LEXIS 1449; 30 Fla. Law Weekly S 539 (Fla. July 7, 2005); *citing* Jacobs Wind Elec. Co. v. Dep't of Transp., 626 So. 2d 1333, 1335 (Fla. 1993); Bankers Risk Mgmt. Servs., Inc. v. Av-Med Managed Care, Inc., 697 So. 2d 158, 160 (Fla. 2d DCA 1997); Fla. Auto. Dealers Indus. Benefit Trust v. Small, 592 So. 2d 1179, 1183 (Fla. 1st DCA 1992). Lack of subject matter jurisdiction may be properly asserted in a motion to dismiss. See Fla. R. Civ. P. 1.140(b). Florida courts regularly review arguments concerning subject matter jurisdiction on motions to dismiss. See, e.g., Bradshaw v. Ultra-Tech Enters., Inc., 747 So. 2d 1008, 1009 (Fla. 2d DCA 1999) (affirming dismissal of complaint based on ERISA preemption of state law); Doe v. Am. Online, Inc., 718 So. 2d 385, 388 (Fla. 4th DCA 1998) (rejecting the argument that a federal preemption defense constituted an affirmative defense that should have been raised in an answer, not on a motion to dismiss); Bankers, 697 So. 2d at 160 (addressing an issue raised in defendant's motion to dismiss regarding federal preemption of plaintiff's claims).

In considering this question, staff notes that a motion to dismiss based on lack of subject matter jurisdiction may properly go beyond the four corners of the complaint when it raises solely a question of law. See Mancher v. Seminole Tribe of Florida and Seminole Management Assoc. 708 So. 2d 327 (Fla. 1998); *citing* Houghtaling v. Seminole Tribe of Fla., 611 So. 2d 1235 (Fla. 1993); Seminole Police Dept. v. Casadella, 478 So. 2d 470, 471 (Fla. 4th DCA 1985). Staff construes this to mean that the Commission may also consider other legal authority beyond that set forth in the Petition and the Motion. Furthermore, the question of subject matter jurisdiction can be raised at any time. Stel-Den of Am., Inc. v. Roof Structures, Inc., 438 So. 2d 882, 884 (Fla. 4th DCA 1983), *rev. denied*, 450 So. 2d 488 (Fla. 1984).

II. ARGUMENTS

A. **Sprint's Petition**

In its Petition, Sprint has alleged that KMC has violated Florida law, Sprint's tariffs, and the parties' interconnection agreements by knowingly delivering interexchange traffic to Sprint over local trunks to avoid access charges. Sprint argues not only that this is a specific violation of Section 364.16(3)(a), Florida Statutes, but also that the Commission clearly has jurisdiction to address the complaint as set forth in Section 364.16(3)(b), Florida Statutes, which 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 provider knowingly violates paragraph (a), the commission shall have jurisdiction to arbitrate bona fide complaints arising from the complaint, have access to all relevant customer records and accounts of any telecommunications company.

Sprint contends that the charge party numbers, which determine the jurisdiction of the traffic for billing purposes, were altered so that Sprint would unknowingly bill the traffic as local, rather than interexchange traffic.

Sprint alleges that, with the assistance of Agilent Technologies, it investigated concerns regarding traffic being routed to it by KMC. Sprint contends that investigation revealed that intrastate interexchange traffic originating with a Sprint local customer was being routed to an IXC, then back to KMC for delivery to Sprint in another local calling area. Sprint asserts that its investigation revealed that Carrier Identification Codes (CICs) and IXC trunks were used to route the traffic to KMC, which then sent the traffic to Sprint over local interconnection trunks.

As a result of receiving the traffic from KMC over local interconnection trunks, Sprint claims that it not only underbilled KMC applicable intrastate interexchange access charges, but overpaid KMC at the higher contractual reciprocal compensation rate applicable to voice traffic, \$.006467 per minute, than at the lower reciprocal compensation rate applicable to ISP traffic \$.0007 per minute, because the ratio of terminating to originating local minutes was improperly skewed.

Sprint contends that the Commission has jurisdiction to resolve complaints arising out of the parties' interconnection agreements pursuant to Sections 251 and 252 of the federal Telecommunications Act and Sections 364.16, 364.161, and 364.162, Florida Statutes. Furthermore, Sprint argues that the parties' interconnection agreements themselves, specifically Section 23 in each of them, provide that the Commission has jurisdiction to resolve disputes over the terms and conditions of the agreements.

B. KMC's Motion to Dismiss

KMC argues that, based on the record that has been developed in this case, the briefs that have been filed, and recent judicial clarifications regarding the applicable law, Sprint's complaint against KMC should be dismissed for lack of subject matter jurisdiction, or, in the alternative, held in abeyance until the FCC concludes an outstanding docket that "goes to the heart" of Sprint's claims against KMC.

KMC contends that it has made a prima facie case that the traffic at issue is traffic from a single KMC customer, PointOne, who sent IP-enabled services traffic over local PRIs for termination in Tallahassee and Fort Myers. Although Sprint disputes that the traffic was IP-enabled, as well as whether KMC's customer was an enhanced service provider, KMC argues that it has made a sufficient case to show that this traffic, and the attached legal questions, are outside the Commission's jurisdiction. KMC argues that, because the factual questions are outside the Commission's jurisdiction to address, the case must be dismissed. At a minimum, KMC contends that the Commission should defer to the FCC until the conclusion of the FCC's proceeding.

KMC emphasizes that while Sprint is only seeking recovery for allegedly intrastate calls, the evidence it submitted pertained to both intrastate and interstate calls. KMC contends that the evidence inextricably links the interstate and intrastate traffic. As such, KMC argues that a final decision cannot be based entirely upon Sprint's intrastate tariff. KMC maintains that

consideration of Sprint's complaint requires the application of federal law and policies that are wholly within the FCC's jurisdiction; thus, KMC asserts that dismissal is the only appropriate action.

KMC further maintains that the courts have also recognized the limited role of state commissions over IP-enabled telephony services.³ KMC adds that the FCC currently has an open rulemaking proceeding to address regulatory treatment of IP-enabled service offerings, which would include the PointOne services at issue here. KMC argues that until the FCC proceeding has concluded, the state commissions have no role in deciding the appropriate intercarrier compensation for this traffic.

In addition, KMC argues that the FCC has stated on numerous occasions that access charges do not apply to enhanced services.⁴ KMC acknowledges that the FCC has on one occasion decided that access charges are applicable to enhanced services - its decision regarding AT&T's Petition for Declaratory Ruling regarding AT&T's IP-enabled services. AT&T's Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges, 19 FCC Rcd 7457, 7466-68 at ¶¶ 14-15, 17 (2004). KMC asserts, however, that the FCC's decision in that case was very limited. Furthermore, KMC contends that the fact that it was the FCC that conducted the analysis in the first instance should not be overlooked. KMC argues that, as stated by the FCC in the Vonage case, ". . . [the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities."⁵ KMC argues that subsequent rulings by the FCC on similar questions indicate that the FCC intended its ruling on AT&T's IP Telephony services to be strictly limited to services that are identical to AT&T's service at issue in that case.⁶

KMC argues that the FCC has clearly and consistently determined that IP-enabled enhanced services traffic is inherently interstate, and specifically stated that the FCC, rather than the state commissions, has the authority to determine the regulatory treatment of IP-enabled services. Vonage Declaratory Ruling, 19 FCC Rcd. 22404, ¶1 (2004). KMC further contends that in each of the cases referenced by the parties to this proceeding, the FCC asserted its authority to make the determination as to the appropriate treatment of IP-enabled services. Regardless of the outcome of each case, KMC emphasizes that the FCC asserted its jurisdiction to undertake the analysis in the first instance. Thus, KMC contends that if the Commission fails to recognize the FCC's primary jurisdiction to determine the proper regulatory treatment of

³ Citing Vonage Holdings Corp. v. Minn. Publ. Utils. Comm'n, 290 F.Supp. 2d 993, 997, 1001-1002 (D. Minn. 2003), aff'd. (8th Cir. Dec. 22, 2004); and Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n., No. 04 Civ. 4306 (S.D.N.Y. July 16, 2004).

⁴ Citing MTS and WATS Market Structure, 97 FCC RCD 2d 682, 715; Amendment of Part 69 of the Commission's Rules Relating to Enhanced Serv. Providers, 3 FCC Rcd 2631 (1988); Access Charge Reform, 12 FCC RCD 15982, 16133 (1997); Developing a Unified Intercarrier Compensation Regime, 16 FCC RCD 9610, 9613 (2001); and Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501 (1998).

⁵ Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, FCC 04-267, 19 FCC Rcd 22404, at para. 1 (Nov. 12, 2004)(Vonage Declaratory Ruling).

⁶ Citing AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs., 20 FCC Rcd. 4826, ¶¶ 1 - 2 (2005).

PointOne's traffic, the Commission runs a significant risk of its decision ultimately coming into conflict with FCC decisions. Thus, KMC suggests that the Commission dismiss the complaint for lack of jurisdiction, or at a minimum, defer to the FCC's IP Enabled Services Rulemaking proceeding, WC Docket No. 04-36, 2004 WL 439260.

Finally, KMC contends that the FCC's authority in this area has recently been confirmed by the courts. KMC explains that in August of this year, the U.S. District Court for the Eastern District of Missouri dismissed a complaint by Southwestern Bell against PointOne to collect access charges. In the case, Southwestern Bell sought to collect access charges from VarTec, Unipoint d/b/a PointOne, and Transcom. The court determined that these carriers were least cost routers providing the "IP transmission" of the calls. The court, however, dismissed UniPoint from the case, rejecting the plaintiff's assertions that the complaint pertained to tariff enforcement outside the FCC's authority. KMC emphasizes that the court reached the following conclusion:

. . . in order to determine whether the UniPoint defendants are obligated to pay the tariffs in the first instance, the Court would have to determine either that the UniPoint defendants are IXCs or that access charges may be assessed against entities other than IXCs. The first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC. The Court's entrance into these determinations would create a risk of inconsistent results among courts and with the Commission. The FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance.

Southwestern Bell Telephone, L.P. v. VarTec Telephone, Inc., 2005 WL 2033416, at 4 (E.D. Mo., Aug. 23, 2005). With regard to the case before the Florida Commission, KMC contends that the issue is the same as that addressed by the VarTec court.

KMC also references a case out of the U.S. District Court for the Western District of New York, wherein Frontier Telephone attempted to collect access charges from USA Datanet, a VoIP provider. KMC contends that in that case, the court discussed at length the federal proceedings involving IP-enabled services and concluded that since Frontier was disputing whether Datanet's service provide enhanced functionality, there was a potential for conflict with the FCC's ongoing proceedings. Thus, the court stayed its proceedings pending the outcome of FCC proceedings. KMC acknowledges that there are some factual distinctions between the referenced cases and this proceeding, but argues that the legal principles at issue are the same.

Furthermore, KMC notes that the traffic at issue was originated by one former KMC customer, PointOne. As such, the activity that is the source of this complaint is no longer an issue, and the alleged injury to Sprint is not ongoing. As such, KMC argues there is no harm in holding this proceeding in abeyance pending the outcome of the FCC's IP Enabled Services rulemaking proceeding. KMC adds that deferral to the FCC would be consistent with the Commission's decision in Docket No. 000475-TP to hold that proceeding in abeyance pending the FCC's resolution of a declaratory ruling addressing issues similar to those at issue before the Commission in that Docket. Order No. PSC-01-2309-PCO-TP.

In its amended Motion, KMC again asserts that if the Commission does not believe dismissal is appropriate, it should, at a minimum, stay this proceeding pending the outcome of proceedings at the FCC. By its amended Motion, KMC suggests that the Commission should defer to the FCC pending the resolution of three new Petitions for Declaratory Rulings recently filed with the FCC.

Specifically, KMC refers to a Petition that Southwestern Bell filed with the FCC, on September 19, 2005, asking that the FCC address the issue of so-called "IP in the middle" providers, WC Docket No. 05-276. Southwestern Bell argues that these companies, which provide wholesale transmission services and allegedly provide services that would constitute an "integral part" of a long distance call, should be deemed interexchange carriers, and thus, subject to access charges. One of the carriers about which Southwestern Bell complains is Unipoint d/b/a PointOne, the same entity that allegedly transported the traffic at issue between KMC and Sprint in this proceeding. Southwestern Bell argues therein that while PointOne and companies like it hold themselves out to be enhanced services providers, they are really no different than any other third party wholesale transmission provider, referred to as Least Cost Routers (LCRs), in that these carriers transport traffic between exchanges and deliver it to the ILEC for termination. Such wholesalers are liable for access charges. Southwestern Bell contends that the only difference between PointOne and traditional LCRs is that PointOne uses VoIP to transmit the call between carriers, and thus, PointOne contends it is not subject to access charges, because it is providing an "enhanced service." Southwestern Bell further explains that another means by which these companies improperly avoid access charges is by terminating the traffic to a CLEC, who in turn passes it off to the ILEC over local interconnection arrangements. Another method used, according to Southwestern Bell, is for the LCR to purchase PRI service out of intrastate tariffs and terminate the traffic directly over those connections. Staff notes that these allegations are nearly identical to the issues presented in this case, and involve a common denominator, PointOne.

Vartec had previously filed a Petition for Declaratory Ruling with the FCC addressing similar issues to those presented by the Southwestern Bell Petition, albeit seeking the opposite conclusion.⁷ The FCC issued a Notice of the pleading and comment cycle for these Petitions on September 26, 2005, indicating that these Petitions would be addressed together and on the same schedule. Initial comments are due November 10, 2005, and reply comments are due December 12, 2005.

KMC also references a Petition for Declaratory Statement filed by Grande Communications on October 3, 2005, wherein Grande is asking the FCC to find that local carriers may rely upon self-certifications from their customers that the traffic the customers are sending them is VoIP traffic that undergoes a net protocol conversion or is otherwise enhanced.⁸ Grande is asking for a determination that if a local provider receives such certification from a customer, then the local provider can sell the customer local services out of the provider's tariff, and that the traffic ultimately carried using those local services be deemed exempt from access charges. KMC has made similar assertions in this proceeding.

⁷ Vartec's Petition, and the FCC's Notice, indicate Vartec actually filed on August 20, 2004.

⁸ The FCC released the Notice of its pleading cycle for Grande's Petition on October 12, 2005. Initial comments are due December 12, 2005, and reply comments are due January 11, 2006.

C. Sprint's Response

Sprint argues that KMC's assertions that the FCC has preempted the state commissions on the issue of intercarrier compensation for VoIP traffic are without merit. Sprint maintains that even if the FCC has asserted jurisdiction to determine the appropriate intercarrier compensation for VoIP traffic, it has never asserted jurisdiction to make the factual determination as to whether the traffic in question is enhanced services traffic or VoIP traffic. Furthermore, contends Sprint, the FCC's jurisdiction simply does not extend to the application of interconnection agreements and state law. Sprint adds that the Commission should not defer to the FCC on the question of the jurisdictional nature of VoIP traffic, but notes that even if the Commission decides that is the prudent course of action, the Commission should still proceed to render a determination on the purely factual questions in this Docket of whether the traffic at issue is VoIP.

Sprint argues that a review of the Commission's enabling statutes clearly demonstrates that the Legislature contemplated the Commission would take action with regard to allegations such as those at issue in this proceeding. Specifically, Sprint references Section 364.16(3), Florida Statutes, which 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 this subsection and shall, upon such complaint, have access to all relevant customer records and accounts of any telecommunications company.

Sprint contends that no credible argument has been put forward as to why the Commission does not have authority to determine whether a violation of this statute occurred. Sprint emphasizes that while the Commission may ultimately conclude that the traffic at issue is not subject to access charges, and thus no violation of state law occurred, the Commission is nevertheless obligated to render a decision on Sprint's allegations under state law. Sprint adds that even if the Commission determines that the traffic in question is VoIP traffic, the Commission has authority under Section 364.02(13), Florida Statutes, to determine whether or not access charges apply. Section 364.02(13), Florida Statutes, states, in pertinent part:

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.

Sprint further argues that the Commission also has authority to resolve this complaint because it involves allegations that KMC violated the parties' interconnection agreements. Sprint argues that under Section 364.162, Florida Statutes, the Commission has the authority to resolve disputes arising out of interconnection agreements. In addition, Section 252 of the Federal Act, as interpreted by the FCC, the courts, and the Commission, authorizes the state commissions to interpret and enforce interconnection agreements.⁹ Sprint adds that in exercising the Commission's authority to interpret and apply the interconnection agreements, it must apply federal law and FCC rulings in making its determinations.

In addition, Sprint contends that the Florida Legislature has recently made it even more clear that the Commission has authority to resolve intercarrier compensation disputes regarding VoIP traffic. Sprint explains that in the 2005 Legislative session, the Legislature enacted provisions that clarify that the Commission still has authority to resolve interconnection disputes regarding VoIP traffic, even though the traffic itself is not subject to regulation by the Commission.¹⁰

Sprint further contends that the Commission has clear authority to enforce Sprint's intrastate tariffs.¹¹ Sprint acknowledges that some of the call records it has relied upon in this case include interstate calls, but emphasizes that this is only due to the fact that Sprint was unable to separate the interstate calls from the intrastate calls when it produced the call detail records and the SS7 summary reports. Sprint emphasizes that it has only made claims before the Florida Commission with regard to intrastate traffic. Sprint contends that the inclusion of the data regarding the interstate calls is simply extra data and should not be viewed as undermining Sprint's claims under state law.

As for KMC's contention that it has made a "prima facie" case that the traffic at issue is VoIP traffic, Sprint argues that KMC has only provided hearsay evidence that PointOne is an enhanced services provider or VoIP provider. Sprint emphasizes that hearsay evidence is allowable in administrative proceedings, but cannot be the sole basis for a finding.¹² Sprint argues that KMC did not provide any direct evidence, such as testimony from a representative or employee of PointOne, regarding the true nature of the traffic at issue. Thus, Sprint contends that KMC has not made a "prima facie" case. Sprint adds that Black's Law Dictionary defines "prima facie" as a case that, ". . . will prevail until contradicted and overcome by other evidence." Sprint contends that to establish such a case, there must be some basis in competent substantial evidence, which contemplates something more than hearsay evidence, according to Sprint.

Sprint also argues that even if a hearsay-based case is sufficient to make a prima facie showing, Sprint has offered sufficient rebuttal evidence contradicting KMC's assertions. Thus,

⁹ BellSouth v. MCI Metro Access Transmission Serv., 317 F. 3d 1270 (11th Cir. 2003).

¹⁰ Sprint references Section 364.02(13), F.S., which provides, in pertinent part, "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."

¹¹ Citing 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 No. PSC-98-1385-FOF-EI, in Docket No. 981216-EI.

¹² Citing Durrall v. Unemployment Appeals Commission, 742 So. 2d 166 (Fla. 4th DCA 1999).

Sprint contends that KMC now has the burden of showing by a preponderance of the evidence that the traffic at issue is enhanced services or IP-enabled traffic. Sprint argues that KMC has failed to meet this burden.

Sprint maintains that even if the Commission determines that KMC has made a prima facie showing that the traffic at issue is IP-enabled traffic, the Commission still has authority under state and federal law to determine if the FCC's enhanced services exemption from access charges is applicable. Sprint argues that the Commission must make the secondary determination of whether KMC was providing a local service to PointOne by routing traffic from PointOne's physical location in Orlando to Ft. Myers and Tallahassee. Sprint maintains that the Commission must also determine if this meets the definition of local traffic set forth in the parties' interconnection agreements.

Finally, Sprint explains that even if the Commission determines that KMC has adequately demonstrated that the PointOne traffic is VoIP traffic, the FCC has not preempted the Commission's authority to determine the appropriate intercarrier compensation for such traffic. Sprint notes that preemption is not presumed, but must be explicitly stated. See Qwest v. Minnesota Public Utilities Commission, 380 F. 3d 367, 374 (U.S. 8th Cir. 2004). Sprint explains that in the FCC's decisions on VoIP traffic, the FCC has made very limited, specific rulings. In the pulver.com Free World Dialup Declaratory Ruling, the FCC only determined that a very specific VoIP service was not subject to access charges. See WC Docket No. 03-45, FCC 04-27, released February 19, 2004. In the AT&T IP Telephony Service Declaratory Ruling, the FCC determined that another specific type of VoIP traffic was subject to access charges. See WC Docket No. 02-161, FCC 04-97, released April 21, 2004. In the Vonage Declaratory Ruling, Sprint contends that the FCC determined that the traffic was "jurisdictionally mixed," but declined to decide 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. The FCC did preempt states to some extent, but only with regard to application of "legacy regulations" to Vonage-type services. See WC Docket No. 03-211, FCC 04-267, released December 12, 2004. Thus, Sprint concludes that the cases cited support Sprint's position, rather than KMC's.

Sprint further argues that abeyance pending the FCC's resolution of its rulemaking proceedings is not appropriate. Sprint contends that there is no timeframe within which the FCC is required to act, and there is no guarantee that the FCC will act. Sprint argues that the Commission has clear authority under state and federal law to resolve this matter, and should do so. Sprint adds that even if the FCC does eventually act, that decision will be prospective in nature, and would not invalidate any prior Commission decision to the contrary. As such, Sprint asks that the Commission deny KMC's Motion to Dismiss, reject the request for deferral, and proceed with a post-hearing decision in this matter.

In response to KMC's Amended Motion, Sprint argues that KMC's October 4, 2005, filing is really a thinly-veiled attempt to bolster KMC's positions and arguments on the merits of the case. Sprint even notes that one of the Declaratory Statements, the Grande Petition, referenced by KMC was apparently authored by counsel that also represents KMC. Thus, Sprint argues the filing of that Petition in this Docket amounts to an unauthorized supplementation of

KMC's post-hearing briefs. Even if the Commission accepts and considers the amended motion, Sprint argues that KMC has not demonstrated any further reason why this case should be dismissed, nor has it provided any basis for deferral to the FCC. Sprint contends that KMC has not produced any evidence that the traffic at issue is VoIP traffic; thus, the jurisdictional issues raised by KMC are really not at issue.

As for deferral to the FCC, Sprint argues that the cases offered by KMC as a basis for deferral raise nothing new and in no way preclude the Commission from ruling in this case. Furthermore, Sprint contends, the referenced cases are not on point with the issues currently pending before this Commission. Sprint contends that in each of the FCC cases referenced by KMC, a declaratory ruling is sought based on federal law regarding the payment of access charges by IXCs. Sprint argues that none of the cases address CLECs' obligations under Florida law or interconnection agreements. Thus, Sprint argues that the resolution of these cases will not address the issue before this Commission, and that it is highly unlikely that the FCC's decisions on the pending petitions for declaratory rulings will be applied retroactively. Sprint concludes by further emphasizing that, contrary to KMC's assertions, it will be harmed by delay, because it will lessen the likelihood that it will be able to recover monies from KMC even if the Commission ultimately rules in Sprint's favor.

III. ANALYSIS

While this is clearly a complex issue, staff believes that KMC has, ultimately, expanded the cited FCC decisions beyond their intended application, and in that light, recommends that the Commission has authority under both state and federal law to resolve the dispute before it. Furthermore, because the allegations at issue in this proceeding cover a limited time period, and the allegations are not ongoing, staff recommends that the Commission decline to defer this matter pending the outcome of the FCC's IP-Enabled Services Rulemaking proceeding, WC Docket No. 04-36. The Commission may, however, wish to consider deferring consideration of these issues pending the outcome of another FCC proceeding, WC Docket No. 05-276, which is a Petition by Southwestern Bell for a Declaratory Ruling.

At the outset, staff believes the Commission has jurisdiction to resolve this matter. The strongest argument for the Commission's authority with regard to this issue is based upon the clear provisions of Section 364.16(3)(b), Florida Statutes, which provide that anyone with a "substantial interest may petition the commission for an investigation of any suspected violation of paragraph (a)." (emphasis added). The statute further provides that the Commission shall then arbitrate complaints that arise from a violation of subsection (a). Staff believes that this language not only authorizes the Commission to investigate the allegations before it, but requires the Commission to take action to determine the veracity of, and to resolve, those allegations. This provision does not preclude the Commission from ultimately reaching a decision that no violation has occurred, but does require action by the Commission to investigate the alleged violation. When read in conjunction with Section 364.02(13), Florida Statutes, and Section 364.162, Florida Statutes, staff believes that additional support for the Commission's authority in this matter can be gleaned from the Legislature's clear expression that the Commission may

continue to resolve interconnection disputes for the types of services that KMC alleges are at issue, and should do so pursuant to its authority to resolve interconnection disputes.

With regard to the cases referenced by KMC for the proposition that the Commission is preempted in this area, staff believes each may be distinguished from this case or contained specific limiting language that would preclude broad application. For instance, in the Vonage Declaratory Ruling, FCC 04-267, staff notes that in that case, there was not a factual question as to what service was being provided by Vonage. Rather, the sole question before the FCC was whether it should preempt a Minnesota Public Utilities Commission decision that applied traditional "telephone company" regulations to Vonage's DigitalVoice service, an IP-enabled service. The FCC concluded that it would preempt the Minnesota Commission's decision, specifically stating that the FCC is the appropriate body for determining whether certain regulations apply to Vonage's service and other similar IP-enabled services. FCC 04-267 at ¶1. The FCC went on to say that, for those services that share the same basic characteristics as the service provided by Vonage, ". . . we believe it highly unlikely that the Commission [FCC] would fail to preempt state regulation of those services to the same extent." Staff believes that the Vonage decision does clearly indicate the FCC's intent to act with regard to any regulations applied to VoIP. However, staff finds two aspects of the decision distinguishable from this case. First, there was no question as to the service Vonage was providing, but there is a question as to the service at issue in this proceeding. Second, the matter at issue in the Vonage Declaratory Ruling was the Minnesota Commission's decision that traditional regulation applied to Vonage's service, i.e. Vonage needed to be certificated, file a tariff, and provide and fund 911 services. Here, the question is not one of the application of traditional regulatory requirements to VoIP service, but whether and to what extent intercarrier compensation is due for the service at issue. In other words, the issue is not a matter of what duties and obligations are owed to the State in order to offer this service, but what duties and obligations are owed between two carriers for the exchange of traffic.

As for the AT&T Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, FCC 05-41, KMC argues that this case shows that the FCC asserted its jurisdiction to determine whether the services at issue were telecommunications services in the first instance, and also whether access charges are due for termination of those services. However, staff notes that the Petition filed by AT&T initiating the FCC's proceeding asked the FCC to determine the applicability of access charges because AT&T believed that the traffic at issue should be considered interstate traffic for purposes of determining the appropriate access charges. AT&T also sought the FCC's guidance because it believed that the service provided should be considered an "information service" as defined by the FCC, which would exclude it from access charges altogether. Thus, AT&T's petition was properly before the FCC as it was seeking a ruling definitively classifying the traffic as either interstate, which would have diverged from prior FCC decisions that prepaid card services are jurisdictionally mixed, or an "information service." AT&T was seeking the interpretation and application of federal law to the facts of its situation. Here, Sprint is seeking the application of state law to a dispute in which the true nature of the traffic involved is at issue.

In the AT&T Phone-to-Phone IP Telephony Declaratory Ruling, supra, staff acknowledges that the FCC was clear that its decision therein was limited; however, staff notes

that the FCC recognized in Footnote 1 that AT&T's intent behind the petition was to also provide guidance to states in the assessment of intrastate access charges. Staff believes this is notable because: (1) the FCC did not give any indication that consideration by state commissions regarding the applicability of intrastate access charges was inappropriate; and (2) the FCC did not give any indication that its decisions therein regarding the applicability of interstate access charges were preemptive of state action to consider the applicability of intrastate charges.

With regard to the case of Frontier Telephone of Rochester, Inc. v. USA Datanet Corp., supra, the U.S. District Court for the Western District of New York was not presented with the question of whether the state PUC or the FCC was the appropriate forum for resolving the issues presented in that case. Instead, the only question presented was whether the court should dismiss its proceeding under the doctrine of primary jurisdiction, because the FCC was currently considering the issue. The court declined to dismiss, but instead stayed its proceedings, in recognition of the FCC's technical and policy expertise in the area and the risk of inconsistent rulings. Furthermore, based on the case background presented, it appears that the allegations at issue in that case were ongoing. Thus, that case can be distinguished on the basis that there was no clear state law question presented.

Similarly, in the case of Southwestern Bell Telephone, L.P. v. VarTec Telephone, Inc., Southwestern Bell pursued its claims for access charges against VarTec, UniPoint, and Transcom in the federal district court in the first instance. The only question before the court was whether the court should dismiss for failure to state a cause of action or in deference to the FCC to allow the FCC to address the matters at issue in the IP-Enabled Services rulemaking proceeding. No questions of state law were raised, and there is no indication that Missouri has a statutory provision similar to Section 364.16(3), Florida Statutes. Initially, the court decided to dismiss the case, without prejudice, in view of the FCC's technical and policy expertise in the area, noting that it did not believe a stay was appropriate, because it believed no party had specifically requested a stay. The court went on to say that it did not believe dismissal on the basis of failure to state a cause of action was appropriate. In response, however, to a Motion to Amend, the Court entered a stay of its proceedings, rather than dismissal, in recognition that the FCC does not have authority to adjudicate tariff collections; thus, the parties would have to return to the Court for further relief depending upon the FCC's decision.¹³ This case can, however, also be distinguished on the basis that no clear state law question was presented.

As for KMC's suggestion that the Commission should, at a minimum, consider deferral to the FCC, staff recommends that the Commission reject this approach.¹⁴ Staff recommends against deferral of this proceeding pending the outcome of the FCC's IP Telephony Rulemaking proceeding due to the likely length of that proceeding and the fact that it is unlikely that the FCC

¹³ The Court also noted error in that the Plaintiff's had requested a stay at Footnote 23 of their opposition to the motions to dismiss. Southwestern Bell Telephone v. VarTec, supra, September 29, 2005, Memorandum and Order at p. 3.

¹⁴ Staff notes that Sprint has argued that this request is procedurally improper. While the propriety of the deferral request is not entirely clear, staff has been unable to find any clear prohibition against such a filing, and notes that the request is largely based on relatively recent filings in other venues. As such, while staff believes the request should be rejected, staff believes the Commission can rule upon the alternative request.

will implement a broad, retroactive application to its final decisions.¹⁵ Staff does recognize that the Petitions for a Declaratory Statement, particularly those filed by Southwestern Bell and Vartec in WC Docket No. 05-276, closely track the issues presented in this proceeding. As such, there is, quite arguably, significant merit in deferring this Commission's consideration pending the outcome of WC Docket No. 05-276. Staff is, nevertheless, concerned that the FCC is under no obligation to act on a Petition for a Declaratory Ruling within any specified time frame; therefore, it could be quite some time before a ruling is obtained. Furthermore, those Petitions do not clearly address preemption of any specific state law, such as Section 364.16, Florida Statutes, nor do they call into question state law requirements applicable to CLECs. In addition, while the Grande Communications Petition raises the issue of a CLEC's ability to rely upon certification from ESPs, staff does not believe resolution of that Petition addresses all of the issues in this case. Staff, therefore, recommends against staying the proceedings in this Docket pending the outcome of any of the referenced FCC proceedings.

IV. CONCLUSION

Based on the foregoing, staff believes that the Commission has state law authority to act by addressing all of the issues in this case, and has not been preempted at this time from addressing these questions.¹⁶ As such, staff recommends that the Motion to Dismiss be denied. Staff also recommends against staying the proceedings in this Docket pending the outcome of any referenced FCC proceedings.

In the end, staff agrees with Sprint's assertion that the Commission should, to the extent allowed by the record developed in this proceeding, make a decision regarding whether the traffic at issue is IP telephony or some other enhanced services traffic in recognition of the Commission's statutory obligation to investigate the complaint. The Commission may then proceed to address the other issues in this case, if it so chooses and to the extent the record allows, even though aspects of those issues may also be under consideration by the FCC,¹⁷ or it

¹⁵ In fact, the FCC has previously indicated in its Declaratory Ruling addressing AT&T's Phone-to-Phone IP Telephony Services, FCC 04-97, at ¶23, that retroactive application would best be addressed on a case-by-case basis.

¹⁶ The U.S. Supreme Court has explained that:

. . . an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. . . . An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374, 375 (1986).

¹⁷ Staff believes that the Commission can make a finding as to the application of federal law or an FCC Order to the extent that the finding is necessary or useful to the Commission's decision regarding a state provision on the same or related issue, such as whether traffic was delivered for which access charges were applicable. Cf. Gully v. First National Bank, 299 U.S. 109, 115 (1936) ([n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of a suit); and Bernice Richard v. Rosenman Colin Freund Lewis & Cohen, 1985 U.S. Dist.

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can decide to defer pending the outcome of either referenced FCC proceeding. For the reasons set forth above, however, staff recommends against deferral.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issue 1, this matter should proceed to consideration of staff's post-hearing recommendation.
(FORDHAM, B. KEATING)

STAFF ANALYSIS: If the Commission approves staff's recommendation and declines to dismiss or stay this proceeding, staff recommends that the case remain open for purposes of final resolution of the issues presented in this proceeding. If, however, the Commission grants the Motion to Dismiss, this Docket should be closed.

LEXIS 15483(S.D.N.Y. 1985)(state court could interpret or consider federal law to the extent necessary to apply objective test for legal malpractice arising under state law).