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DATE: October 20, 2005

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

FROM: Office of the General Counsel (Fordham, Scott) *c.f.f. - AK*
Division of Competitive Markets & Enforcement (Pruitt) *z* *WMS*

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

AGENDA: 11/01/05 – Regular Agenda – Motion to Dismiss Count IV of Complaint – Oral Argument Not Requested – Participation at the Commissioner's Discretion.

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Deason

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050581.RCM.DOC

Case Background

On August 30, 2005, KMC Telecom III LLC and KMC Telecom V, Inc. (KMC) filed its Complaint against Sprint-Florida, Incorporated (Sprint-FL) and Sprint Communications Company, Limited Partnership (Sprint LP) for failure to pay intrastate access charges pursuant to interconnection agreement and tariffs, and for violation of Section 364.16(3)(a), Florida Statutes. On September 20, 2005, Sprint-FL and Sprint LP filed their Answer and Affirmative Defenses to KMC's Complaint.

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On September 19, 2005, Sprint-FL filed its Motion to Dismiss Count IV of KMC's Complaint, and on September 26, 2005, KMC filed its Response to Sprint-FL's Motion to Dismiss Count IV of KMC's Complaint.

This recommendation addresses Sprint-FL's Motion to Dismiss Count IV of KMC's Complaint. That count alleges violation of a Confidential Settlement and Release Agreement between KMC and Sprint-FL.

Discussion of Issues

Issue 1: Should the Commission grant Sprint-FL's Motion to Dismiss Count IV, Violation of Confidential Settlement and Release Agreement, of KMC's Complaint?

Recommendation: Yes. Staff recommends that Sprint-FL's Motion to Dismiss Count IV of KMC's Complaint be granted. Count IV seeks relief for alleged violation of the Confidential Settlement and Release Agreement (Settlement Agreement), over which this Commission lacks subject matter jurisdiction. (L. Fordham)

Staff Analysis:

Sprint-FL's Motion to Dismiss Count IV

Sprint-FL relates that KMC's Complaint includes a claim in Count IV that Sprint-FL violated a Settlement Agreement that KMC entered into with Sprint-FL in May 2002. Sprint-FL notes that the agreement in question was never filed with or approved by this Commission, nor was it required to be. That Settlement Agreement required that certain amendments to the existing KMC/Sprint-FL interconnection agreement and, ultimately, a new KMC/Sprint-FL interconnection agreement, be executed and filed with the Commission. According to Sprint-FL, the amendment was filed and deemed approved by the Commission on November 19, 2002, in Docket No. 020876-TP. A new interconnection agreement between KMC and Sprint-FL was filed and deemed approved by the Commission on October 24, 2003, in Docket No. 030860-TP.

Sprint-FL argues that the general standard for a Motion to Dismiss is whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Sprint-FL notes that in disposing of a motion to dismiss the Commission must assume all of the allegations of the Complaint are true. Varnes v. Dawkins, 624 So. 2d 349 (Fla. 1st DCA 1993). In addition, urges Sprint-FL, fundamentally, the Commission must have subject matter jurisdiction over the claims asserted in order to rule on a complaint or petition. Sprint-FL notes this Commission has recognized that it has no general authority to enforce contracts. The Commission also has recognized that it has specific authority to enforce the terms of interconnection agreements and amendments to those agreements, based on its statutory authority to approve those agreements. See, Order No. PSC-04-0423-FOF-TP, issued April 26, 2004, in Docket No. 031125-TP. (BellSouth/IDS Dismissal Order)

Sprint-FL notes that, while KMC alleges that Sprint-FL violated Amendment No. 1 to the 1997 MCI agreement, the allegation is founded on the terms of the Settlement Agreement that is the subject of Count IV of this Complaint. Sprint emphasizes that in the BellSouth/IDS Dismissal Order, the Commission dismissed a claim filed by IDS against BellSouth for violation of a settlement agreement not filed with the Commission, based on the Commission's lack of subject matter jurisdiction to resolve contractual disputes. Similarly, argues Sprint-FL, the Commission lacks subject matter jurisdiction over KMC's claims against Sprint-FL relating to the Settlement Agreement, and, therefore, the Commission should dismiss Count IV of KMC's Complaint.

KMC's Response to Sprint-FL's Motion to Dismiss

KMC responds that Sprint-FL has failed to demonstrate as a matter of law why its Motion to Dismiss Count IV should be granted. In support of its argument, KMC cites from Order No. PSC-04-1204-FOF-TP, issued December 3, 2004, in Docket No. 041144-TP, as follows:

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." *Id.*

First, argues KMC, Sprint-FL's argument that this Commission does not possess general authority to enforce contracts is not the issue raised by Count IV. Rather, the issue raised by Count IV goes to rates, terms, and conditions associated with the application and implementation of the parties' obligations for reciprocal compensation under an approved interconnection agreement. KMC further urges that, while this obligation was implemented by the Amendment No. 1 attached to the Sprint-FL Motion, the issue raised by Count IV is whether that obligation continued, and was otherwise included within KMC's subsequent adoption of the FDN Agreement. Thus, whether, and to what extent, the Settlement Agreement continued to remain effective is a mixed question of law and fact that does not merit dismissal as a matter of law.

Second, KMC claims that Sprint-FL takes issue with the fact that the Settlement Agreement was not filed with the Commission. As a matter of law, argues KMC, the Commission has not adopted a rule requiring that all contracts and agreements between carriers be filed with the Commission. While Section 364.07(1), Florida Statutes, authorizes the Commission to require the filing of contracts between carriers, there is no Commission rule requiring such filing. According to KMC, the reciprocal compensation terms of the Settlement Agreement were a continuing legal obligation. Therefore, the obligation continued as a question of fact and law and does not constitute a basis for dismissal.

Third, argues KMC, the BellSouth/IDS Dismissal Order relied upon by Sprint-FL does not stand for the proposition that as a matter of law the Commission is without jurisdiction to hear all such contract-based claims that have not been filed and approved by the Commission. As this Commission said in the BellSouth/IDS Dismissal Order: "We find BellSouth's argument is without merit to the extent that it argues that IDS's complaint fails to state a cause of action merely because the Complaint requires us to refer to a privately negotiated settlement agreement and federal law to settle the dispute." Order No. PSC-04-0423-FOF-TP at 8 (April 26, 2004). Thus, claims KMC, as a matter of law, there is no basis for immediate dismissal of a claim based

solely on the fact that the underlying agreement was “a private agreement” or otherwise not filed with the Commission.

Finally, argues KMC, the BellSouth/IDS Dismissal Order is factually distinguishable from the instant case. The Settlement Agreement at issue in the IDS-BellSouth case, Docket No. 031125-TP, goes to a financial agreement to settle a dispute between the parties. The Settlement Agreement at issue in Count IV of the KMC Complaint goes to the heart of the interconnection relationship between KMC and Sprint-FL - the rates, terms, and conditions of reciprocal compensation for the exchange of local traffic. In this context, Sprint-FL’s attempt to dismiss KMC’s Count IV goes to the relevancy of the agreement and the facts and circumstances regarding whether, and to what extent, the agreement applies or continues to apply. Sprint-FL’s allegations regarding whether the Settlement Agreement was effective simply do not constitute a basis, as a matter of law, for dismissing the complaint. Therefore, KMC requests that the Commission deny Sprint-FL’s Motion to Dismiss Count IV of the KMC Complaint.

Analysis

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When “determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.” Id.

Additionally, in order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. See Keena v. Keena, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. Jesse v. State, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). Therefore, this Commission must determine whether the Legislature has granted it any authority to find that Sprint-FL has violated a private settlement agreement. Staff recommends that it has not.

Count IV of the Complaint seeks a finding that Sprint-FL violated a confidential Settlement Agreement with KMC. This Commission has recognized that it has no general authority to enforce contracts, and that a settlement agreement is in essence a contract. See BellSouth/IDS Dismissal Order. The Commission has, however, recognized that it has specific authority to enforce the terms of interconnection agreements and amendments to those agreements, based on its statutory authority to approve those agreements. Id.

In this case, KMC attempts to tie the allegations in Count IV to the parties’ interconnection agreements by alluding to the intent and ultimate goal of the Settlement

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Agreement. Staff believes KMC's argument is without merit. Regardless of the intent or effect, the Settlement Agreement remains a separate contract, not enforceable by this Commission. Staff emphasizes that the requirements of the Settlement Agreement that did get incorporated into the actual interconnection agreement can be addressed as alleged violations in that context. Additionally, dismissal of Count IV does not prevent the Commission from considering the Settlement Agreement as evidence in the current dispute. However, staff agrees with Sprint-FL that the Commission is not the appropriate forum to enforce this Settlement Agreement that was neither filed nor approved by the Commission. Accordingly, staff recommends that Sprint-FL's Motion to Dismiss Count IV of KMC's Complaint be granted.

Issue 2: Should this docket be closed?

Recommendation: No, this docket should remain open pending resolution of the remainder of the issues contained therein. **(L. Fordham)**

Staff Analysis: Regardless of the decision on this recommendation the matter will be set for an administrative hearing. Accordingly, the docket should remain open pending further proceedings.