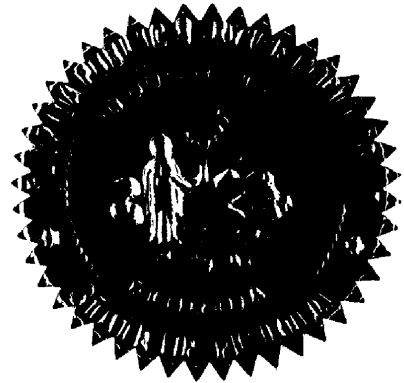


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 041144-TP

In the Matter of:

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.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 15

BEFORE: CHAIRMAN BRAULIO L. BAEZ
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER RUDOLPH "RUDY" BRADLEY

DATE: Tuesday, October 18, 2005

PLACE: Betty Easley Conference Center
 Room 148
 4075 Esplanade Way
 Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
 Official FPSC Hearings Reporter
 (850) 413-6732

DOCUMENT NUMBER-DATE

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1 PARTICIPATING:

2 FLOYD R. SELF, ESQUIRE, representing KMC Data LLC,
3 KMC Telecom III LLC and KMC Telecom V, Inc.

4 SUSAN S. MASTERTON, ESQUIRE, representing
5 Sprint-Florida, Incorporated.

6 BETH KEATING, ESQUIRE, and LEE FORDHAM, ESQUIRE,
7 representing the Florida Public Service Commission Staff.

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P R O C E E D I N G S

CHAIRMAN BAEZ: We'll go back on the record.

Commissioners, we are on Item 15.

MS. KEATING: Commissioners, Beth Keating, Staff Counsel.

Item 15 is staff's recommendation on KMC's motion to dismiss this case for lack of subject matter jurisdiction. Staff recommends that the motion be denied because the Commission has clear state law authority under Section 364.16, Subsection 3, Florida Statutes, to investigate and resolve this dispute. There has been no federal preemption of this authority to date.

Furthermore, staff suggests that deferral doesn't appear to present any real significant benefits, because the cases that are currently pending before the FCC are not bound by any well-defined time frame, and they don't specifically address the question of a state commission's authority to resolve a dispute such as this under state law.

In addition, in the cases pending before the FCC, there is no question as to whether the service at issue was an enhanced service or VOIP service, whereas that is a factual question pending before the Commission in this complaint. Oral argument has not been requested, but the parties are here, if you have questions, and staff is also available for any questions.

1 CHAIRMAN BAEZ: Commissioners, questions?

2 COMMISSIONER DEASON: I have a question for staff.

3 CHAIRMAN BAEZ: Sure.

4 COMMISSIONER DEASON: In your recommendation,
5 specifically at Page 12, in the first full paragraph under the
6 analysis section you indicate that the Commission may wish to
7 consider deferring consideration of the issues pending the
8 outcome of another FCC proceeding, which is Docket Number
9 05-276. Can you give me some more particulars about that
10 particular docket?

11 MS. KEATING: Yes, sir. That is the SBC petition for
12 declaratory statement, and it does bring up some general
13 questions about the types of service that have been allegedly
14 provided by one of the customers from which this complaint has
15 arisen, and it does present some similar questions. So there
16 could be some merit in deferring, but we think that any merit
17 related to that is outweighed by the amount of time that we
18 expect it will probably take for the FCC to resolve the
19 question, and the fact that like the other petitions that are
20 pending before the FCC, there is no real question about any
21 state law authority or specific state law questions presented.

22 COMMISSIONER DEASON: We don't have a time frame for
23 that?

24 MS. KEATING: (Indicating no.)

25 COMMISSIONER DEASON: It's uncertain.

1 MS. KEATING: Yes, sir. There is a pleading cycle
2 that has been established, but there is no defined time frame
3 by which the FCC actually has to act on those pleadings.

4 COMMISSIONER DEASON: But in an ideal situation, it
5 would be nice to have the benefit of that --

6 MS. KEATING: It would, yes, sir.

7 COMMISSIONER DEASON: -- in our determination.

8 MS. KEATING: And staff does recognize that there is
9 certainly some merit in that. We just think that it is
10 outweighed by the amount of time, and the fact that it still
11 leaves the Commission with a state law question.

12 CHAIRMAN BAEZ: Would any -- I'm sorry, Commissioner.

13 COMMISSIONER DEASON: I have one follow-up for --

14 CHAIRMAN BAEZ: Go ahead.

15 COMMISSIONER DEASON: -- I guess Mr. Self.

16 First of all, do you agree with staff that it would
17 be helpful to have that for consideration here?

18 MR. SELF: Yes, I agree it would be helpful. In
19 fact, obviously my position is I think you have to at least
20 defer and let the FCC resolve now three separate -- four,
21 actually, if you count the IP-enabled services case, but you
22 have got three declaratory statement dockets which are not
23 exactly on all fours with this case. But a lot of the issues,
24 as the staff said, are the same or are going to affect how you
25 may or may not dispose of issues after those cases have been

1 resolved.

2 COMMISSIONER DEASON: Now, part of the problem which
3 staff indicates in their analysis is that whatever the FCC
4 decides and whenever they decide, it is probably going to be
5 for a prospective application and not necessarily to resolve
6 past disputes. I'm not trying to put words in staff's mouth,
7 but that is my general understanding of what they are saying.

8 Let me ask you this question: There are amounts in
9 dispute between your company and Sprint. If this Commission
10 deferred action, would you be willing to post a bond to cover
11 that amount to cover the -- it's a finite period of time that
12 is in dispute here, is my understanding. Would you be willing
13 to post a bond to cover that, given the extreme uncertainty of
14 the time period before the FCC would make a decision?

15 MR. SELF: I would have to ask the client as to
16 whether they would post a bond. They would probably want to
17 inquire whether you would accept a corporate undertaking in
18 lieu of a bond. But the answer to either of those, I would
19 need to consult with the client and see what they would say.

20 COMMISSIONER DEASON: And in all fairness, Ms.
21 Masterton, I'll allow you to answer in terms of whether there
22 would be any benefit in deferring to get FCC action, and would
23 a bond be acceptable if the Commission were inclined to defer
24 action, pending FCC action.

25 MS. MASTERTON: Well, obviously our position is that

1 there is no need to defer, and that you shouldn't defer, and we
2 don't believe that the FCC decisions that are pending are going
3 to answer all or even maybe most of the questions that are
4 outstanding in this dispute under the state law and the
5 interconnection agreements, although we do think they may shed
6 some light on some of the issues related to VOIP. But we still
7 think there is a huge issue as to whether there is any evidence
8 in the record to support that this traffic is VOIP. So we
9 don't think that deferral is appropriate.

10 But to the extent you all decided that were the case
11 and that KMC was willing to post a bond to ensure that we would
12 receive payment should we ultimately prevail, I mean, that
13 would be acceptable. Without that, I think we would feel that
14 our ability to recover was greatly at risk.

15 COMMISSIONER DEASON: Mr. Chairman, that's all of my
16 questions, at least at this point.

17 CHAIRMAN BAEZ: Let me get a couple of questions out,
18 because some of the things have been said -- Mr. Self
19 identified three or four dockets, and now he readily admits
20 that they are not on all fours with the issue here. But can we
21 get four out of three, I mean, collectively?

22 MR. SELF: Commissioner, if I may, the most recent
23 case, the Grande case, which the FCC put out for notice on
24 October 12th, and which the staff mentions in one of the
25 footnotes, one of the critical issues in that case is the whole

1 question as to self-certification. Is it appropriate for a
2 carrier to accept self-certification? And if you have a
3 self-certified IP-enabled services customer, then can you pass
4 that traffic on and not pay access charges. That sounds
5 exactly like or pretty darn close to one of the critical issues
6 in the case that's pending in this docket.

7 The whole question of, you know, whether access
8 charges apply, what kind of compensation, I mean, I think
9 between the four dockets, you certainly have a reasonable
10 possibility that, depending on how the FCC resolves those, it
11 might totally knock out Sprint's case here entirely.

12 CHAIRMAN BAEZ: Let me ask this, because there was
13 some -- Commissioner Deason's questions involved some
14 prospective application regardless of whether we agree or
15 disagree that the outstanding FCC dockets have any bearing on
16 our actions. Are you relatively certain that we won't be in a
17 position to have to undo decisions as we have had to do before?
18 And I've got to tell you, you know, whenever you hear let's
19 wait because there are several FCC dockets that may address the
20 issue, or partially address the issue, I will confess right
21 here to a knee-jerk reaction in favor of holding off to see if
22 we can get a much more settled picture. I think that is human
23 nature.

24 And certainly we have had enough experience at this
25 Commission with having to undo or correct decisions to have

1 them lay down with subsequent FCC decisions that I don't feel
2 guilty about saying that I have a knee-jerk reaction, or at
3 least it pricks up your ears. Are we relatively certain that
4 even knowing these things, that we are not going to be in a
5 similar position?

6 MS. KEATING: If I could give you a short answer, and
7 then maybe go through them and clarify it.

8 CHAIRMAN BAEZ: Okay.

9 MS. KEATING: The short answer is yes, sir, we are
10 relatively certain with maybe some emphasis on relatively.

11 CHAIRMAN BAEZ: See, that's the problem.

12 MS. KEATING: There are four cases that KMC has
13 referred to. One of them is the enhanced services rulemaking
14 proceeding. That one I'm a little more certain of would be
15 applied on a prospective basis. The declaratory statements, it
16 is not entirely clear. They are filed to address specific
17 situations, but the policy rulings that come out of them would
18 have a broader effect on industry. We anticipate they would be
19 applied prospectively, but it is not entirely clear.

20 CHAIRMAN BAEZ: Commissioner Deason, a question to
21 you. I mean, you delved, or you asked the parties a question
22 of what kind of holding pattern would be satisfactory for us to
23 actually defer this. And it almost sounds to me, based on Mr.
24 Self's answer to your question, that we would have to
25 necessarily defer this in order to consider whether to hold

1 it -- whether to actually consider whether we have some
2 acceptable terms to hold it in abeyance. Would it be your
3 intent to suggest a deferral, or --

4 COMMISSIONER DEASON: Well, I'm at a little bit of a
5 quandary. I think this case is complete. I mean, we have the
6 full cycle of pleadings, correct? It's ripe for decision.

7 MS. KEATING: (Indicating yes.)

8 COMMISSIONER DEASON: It's just a matter, I think, of
9 staff filing a recommendation and putting it in front of us to
10 make a decision. It's just a question of how much we feel that
11 getting FCC input would be helpful to us. And I'm more
12 inclined from the perspective of getting that input so we don't
13 have to undo and redo. If staff is comfortable that based upon
14 the Florida-specific statutory questions, those issues that
15 come up about that we have the jurisdiction to do that, and
16 that we are not sure we are going to get good FCC guidance, and
17 whatever guidance we get, it's going to be prospective in
18 nature, not necessarily something that is going to undo what we
19 do here in this docket, I'm comfortable going forward.

20 I guess I asked the questions about -- tried to
21 ascertain how helpful FCC input would be, and if we could get a
22 guarantee or a commitment, a bond, to make sure that whatever
23 determination we ultimately make, that there are funds
24 available to see that that decision is carried out.

25 But I'm not uncomfortable with just going forward and

1 making our decision based upon the record in this case and
2 staff's recommendation that this would be filed. If we accept
3 staff's recommendation, what is the schedule for the remainder
4 of this case, do we know? Before the end of the year, I take
5 it.

6 MS. KEATING: Before the end of the year, yes, sir.

7 MS. PRUITT: (Inaudible. Microphone not on.)

8 COMMISSIONER DEASON: 17th of November, I guess for
9 an agenda around the end of November or the first of December.

10 MS. PRUITT: The 29th of November.

11 COMMISSIONER DEASON: Mr. Chairman, I'm not
12 uncomfortable doing that. I was just trying to explore, trying
13 to get some sensitivity here as to the perceived benefit from
14 staff's point of view. It was in their recommendation there,
15 they suggested that we could if we wanted to, and I was just
16 trying to further explore the benefits of that.

17 CHAIRMAN BAEZ: And here is what leads me to my
18 uncertain feelings is that there is enough, there is enough
19 acknowledgment of some, you know, indeterminate level of
20 guidance or benefit, and so on, that the staff actually left it
21 open to say, well, you know, you can defer. I mean, it is
22 always implied that a deferral is possible. But to actually go
23 down and put it in writing as an alternative -- and I also
24 heard Ms. Masterton, on behalf of her client, say that there
25 may be some additional guidance available.

1 I mean, I think there is a consensus that we are not
2 going to get an answer, a 100 percent solution out of any of
3 these dockets whether individually or collectively. But that
4 even parties on opposite sides of it agree that there may be
5 some ability for us to gain some additional knowledge. Now,
6 that creates even more uncertainty. You know, I'm really on
7 the fence with this, because I would like to get it decided
8 sooner rather than later and move forward, but then now come
9 all of these scars of the past.

10 COMMISSIONER DEASON: Mr. Chairman, may I make a
11 suggestion, throw it out?

12 CHAIRMAN BAEZ: We are talking about it.

13 COMMISSIONER DEASON: Okay. We could accept staff's
14 recommendation to deny the motion to dismiss, and indicate our
15 intention at this point to take this up for an agenda
16 conference at the end of November, but leave KMC the ability to
17 renew their request for stay with an accompanying guarantee of
18 some sort that the Commission would find acceptable. Just put
19 the ball back in their court. And if we found that acceptable
20 and felt like there would be additional benefit from getting
21 FCC input, we could take it up that the time.

22 But I agree with staff's recommendation that the
23 motion to dismiss should be denied. There is no question about
24 that. And without -- and I would not be willing to consider a
25 stay or a deferral without some type of guarantee in hand of an

1 adequate nature to protect the ultimate decision that we make
2 if it pans out that there has to be some type of a payment from
3 KMC to Sprint.

4 CHAIRMAN BAEZ: I could be comfortable with that.

5 COMMISSIONER BRADLEY: So your motion would allow KMC
6 to --

7 COMMISSIONER DEASON: We would deny his motion to
8 dismiss, but give him the latitude to renew the motion to
9 defer. But indicate at this point that without some type of
10 guarantee in hand at that point, I would prefer a bond. I
11 don't think we have the time to have our staff do an analysis
12 to whether a corporate undertaking would be acceptable. We
13 normally have financial staff do that determination. I don't
14 think we have the luxury of giving that amount of time.

15 So I would say that if KMC feels that strongly about
16 it, that if they have bond in hand of a sufficient amount, then
17 under those conditions we would at that point consider deferral
18 or staying the matter for FCC action. Is that something --
19 first of all, let me throw that out. Is that something that is
20 within our discretion to do? I'll just throw that out to
21 staff.

22 CHAIRMAN BAEZ: The denial even of the request to
23 hold in abeyance isn't with prejudice or anything. I mean,
24 there is always leave to renew based on some enhanced
25 circumstance which we have already outlined.

1 MS. KEATING: Yes, sir, I think that is certainly
2 something that is within the Commission's discretion.

3 COMMISSIONER BRADLEY: Let me ask Mr. Self a
4 question. How does that work for you if you need to get your
5 client's permission? I mean, what does Commissioner Deason's
6 recommendation create for you in terms of a situation?

7 MR. SELF: As I'm listening to this, I need to work
8 pretty fast. And I would envision something that really would
9 be relatively short that would basically say, KMC, you know,
10 would hereby renew its request to stay these proceedings, and
11 subject to such stay, KMC would propose the following guarantee
12 with respect to the amount that's in dispute that Sprint has
13 raised. Does that seem about right, Commissioner Deason?

14 COMMISSIONER DEASON: That sounds good to me.

15 MS. MASTERTON: And then Sprint would, if it felt
16 that it was necessary, have the ability to have some input on
17 the adequacy of the guarantee offered by KMC, right?

18 COMMISSIONER DEASON: I would anticipate that would
19 only be fair, in my opinion, yes.

20 MS. MASTERTON: Okay. Thank you.

21 COMMISSIONER DEASON: And, if need be, I guess it
22 could be maybe the first issue we take up at the November
23 agenda.

24 COMMISSIONER BRADLEY: Okay.

25 COMMISSIONER DEASON: Conceivably, I suppose. I know

1 that means staff still has to file a recommendation. But I'm
2 sure it has probably already been prepared anyway, it is just a
3 matter of filing it.

4 CHAIRMAN BAEZ: They are just checking the typos at
5 this point. Very well.

6 Commissioner Deason, I'll take your suggestion in the
7 form of a motion. Is there a second?

8 COMMISSIONER BRADLEY: Second.

9 CHAIRMAN BAEZ: And is everybody clear on what we are
10 walking away with? Very well. That is a motion on Issue 1, I
11 guess.

12 COMMISSIONER DEASON: Let me clarify one thing. We
13 are working under such short time frame that I'm not so sure it
14 is necessary for Sprint to file something in writing, that we
15 would give them the ability to orally argue at the agenda as to
16 whether the bond or whatever mechanism is suggested as to
17 whether it is adequate. I'm not so sure we're going to have
18 time to have a complete cycle of filings and responses.

19 MS. MASTERTON: That's fine.

20 COMMISSIONER BRADLEY: Let me ask this question.
21 What if at the subsequent hearing Sprint determines that the
22 bond is not sufficient? Does that mean that the deal is off?

23 COMMISSIONER DEASON: We're going to have to make
24 that determination. They can have input as to whether in their
25 opinion it's sufficient, but ultimately it is going to be our

1 call as to whether the bond or whatever mechanism is presented
2 is sufficient.

3 COMMISSIONER BRADLEY: Is staff going to have enough
4 in order to determine the sufficiency of a bond, if that
5 becomes an issue?

6 MS. KEATING: Yes, sir.

7 COMMISSIONER BRADLEY: So basically what we are doing
8 is holding this matter in abeyance.

9 COMMISSIONER DEASON: And maybe we need to put a time
10 frame -- if Mr. Self's client is so inclined, there needs to be
11 a time certain for him to make that filing.

12 COMMISSIONER BRADLEY: Well, the reason I said
13 abeyance is because Mr. Self doesn't -- he doesn't know if his
14 client is going to agree to --

15 CHAIRMAN BAEZ: No, Commissioner, just to explain at
16 least the mechanics of it. The motion would be to deny KMC's
17 motion to dismiss.

18 COMMISSIONER BRADLEY: Okay.

19 CHAIRMAN BAEZ: Which is essentially accepting
20 staff's recommendation on that matter. And it has been
21 clarified for us and for all that the opportunity for Mr. Self
22 on behalf of his client to renew a request for this Commission
23 to hold a decision on the actual matter post-hearing in
24 abeyance is still available to him. And the -- I guess we can
25 call it a condition, and the condition to his ability to renew

1 that request would have to include his company's presentation
2 or offer of a bond to secure the monies in controversy in the
3 docket. Okay.

4 So Mr. Self has, and I guess the suggestion of a time
5 frame which we will get to in a minute, but Mr. Self does have
6 the opportunity on behalf of his client to come back and say,
7 Commission, please hold it in abeyance, and my client is
8 willing to put up a bond for the monies that are in dispute.
9 And then we can consider that request in particular. And there
10 was some talk of some time frame or some turn around. And, you
11 know, Mr. Self already recognized he has to move really fast.

12 MR. SELF: Mr. Chairman, I would like to certainly
13 let the Commission know, and Sprint, yes or no, certainly by
14 Friday.

15 CHAIRMAN BAEZ: Sure.

16 MR. SELF: And in terms of filing something at least
17 maybe no later than next Tuesday, that would be a week. And I
18 would try and consult with Sprint. Obviously if we could agree
19 on the bond, the guarantee, the mechanism, the amount --

20 CHAIRMAN BAEZ: It could be a joint filing, as well.

21 MR. SELF: That would help.

22 CHAIRMAN BAEZ: And, Ms. Keating, any objections at
23 this point to a Tuesday filing? I don't see any problem with
24 that, Commissioner, do you?

25 COMMISSIONER DEASON: That seems to be moving very

1 quickly.

2 CHAIRMAN BAEZ: That is moving very quickly.

3 MS. KEATING: We can do it.

4 COMMISSIONER BRADLEY: Did I second it?

5 CHAIRMAN BAEZ: There is no second yet.

6 MR. MELSON: Commissioner?

7 CHAIRMAN BAEZ: There is a second. Mr. Melson.

8 MR. MELSON: On that timetable, it might be possible
9 to get this matter back before you at the first agenda in
10 November if we got an extension of the rec filing. And that
11 might be preferable to trying to do it --

12 CHAIRMAN BAEZ: And you can work with my office, and
13 we will try and accommodate that. Very well.

14 There is a motion and a second to deny the motion to
15 dismiss and leave open, obviously understanding the opportunity
16 to renew the motion for the request for abeyance, and a second.
17 All those in favor say aye.

18 (Unanimous affirmative vote.)

19 CHAIRMAN BAEZ: And I guess Issue 2, we are going to
20 accept staff's recommendation on that, as well?

21 COMMISSIONER BRADLEY: What is --

22 CHAIRMAN BAEZ: That the docket stays open.

23 COMMISSIONER DEASON: I move that the docket stay
24 open.

25 COMMISSIONER BRADLEY: Second.

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CHAIRMAN BAEZ: All those in favor say aye.
(Unanimous affirmative vote.)
CHAIRMAN BAEZ: Very well. Thank you all.

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STATE OF FLORIDA)

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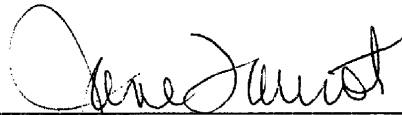
COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 25th day of October, 2005.



JANE FAUROT, RPR
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