

State of Florida



Public Service Commission

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DATE: February 23, 2006

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

FROM: Office of the General Counsel (Wiggins, L. Fordham) *Wiggins*
Division of Competitive Markets & Enforcement (Pruitt, Marsh) *Pruitt Marsh*

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: 03/07/06 – Regular Agenda – Post-Hearing Motions for Reconsideration – Oral Argument Requested – Participation at the Discretion of the Commission

COMMISSIONERS ASSIGNED: Deason

PREHEARING OFFICER: Deason

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”), alleging that KMC knowingly terminated intrastate interexchange traffic over local interconnection arrangements, in violation of Section 364.16(3)(a), Florida Statutes, to avoid paying Sprint access charges. Sprint also asserted that this misrouting of access traffic has resulted in an overpayment of reciprocal compensation to KMC for local minutes terminated to KMC by Sprint.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Docket No. 041144-TP
Date: February 23, 2006

The hearing in this matter was conducted on July 12, 2005, and on December 19, 2005, the Commission issued its Order on Sprint's Complaint, Order No. PSC-05-1234-FOF-TP (Order). On January 3, 2006, KMC filed its Motion for Reconsideration of Order No. PSC-05-1234-FOF-TP, and Request for Oral Argument, and on January 13, 2006, Sprint filed its Response to KMC's Motion, and Sprint's Cross-Motion for Reconsideration. KMC did not file a response to Sprint's Cross-Motion for Reconsideration.

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., 294 So. 2d at 317.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant KMC's Request for Oral Argument?

STAFF RECOMMENDATION: No. The Request for Oral Argument should be denied. (L. Fordham)

STAFF ANALYSIS:

KMC's Motion

KMC filed its Request for Oral Argument pursuant to Rule 25-22.058 and Rule 25-22.060(1)(f), Florida Administrative Code. KMC states that oral argument will aid the Commission in comprehending and evaluating the issues before it, particularly given that outgoing Commissioners Baez and Bradley will have been replaced by new members of the Commission. Although the new Commissioners will have access to the record, the opportunity for the parties to explain the substance and effect of the Motion for Reconsideration will allow the Commissioners to gain a more thorough understanding and clarification of the issues raised therein. This is particularly true, argues KMC, with respect to understanding the arguments pertaining to the impermissible shift in the burden of proof to KMC, the legal background and basis to the FCC's rulings on enhanced services, and the problems KMC has encountered thus far with respect to an impartial, independent auditor.

Sprint's Response

Sprint notes that KMC has requested oral argument on its Motion for Reconsideration on the basis that new Commissioners must be assigned to rule on the Motion since two of the original panel members have left. In making this request, Sprint claims KMC has ignored the unambiguous provisions of Section 350.01(5), F.S., which states that "a petition for reconsideration shall be voted upon by those Commissioners participating in the final disposition of the proceeding." Since Commissioners Baez and Bradley are no longer with the Commission, Commissioner Deason is the only Commissioner who is eligible under the statute to rule on KMC's Motion. Sprint urges that the parties have engaged in oral argument, or presented opening statements, before the Commission on numerous occasions as this docket progressed. Also, the parties' positions are clearly presented in KMC's Motion and Sprint's Response. Since the basis for KMC's Request for Oral Argument is an erroneous interpretation of the governing law, and since additional argument on the issues raised by KMC will add nothing to the pleadings that would assist in the Commission ruling on KMC's Motion, Sprint contends the Commission should deny KMC's Request for Oral Argument.

Recommendation

Staff believes that oral argument will not aid the Commission in comprehending and evaluating the issues before it because these issues were fully addressed by both parties in the pleadings filed in this Docket. Consequently, staff recommends that KMC's Request for Oral

Argument be denied. However, staff believes that the decision to either grant or deny oral argument is solely within the discretion of the Commission. Should the Commission decide to grant Oral Argument, staff recommends that it be limited to five minutes for each party.

ISSUE 2: Should the Commission grant the Motion for Reconsideration filed by KMC?

RECOMMENDATION: KMC's Motion for Reconsideration should be denied. It does not identify a material mistake of fact or law made in rendering the Commission's decision. (L. Fordham, Pruitt, Marsh)

STAFF ANALYSIS:

KMC's Motion for Reconsideration

KMC requests that the Commission reconsider certain aspects of its Order - Issues 4 and 6 in which Sprint was found to have met its burden of demonstrating that access charges were due for the disputed traffic, Issue 4 regarding the method of establishing the jurisdictional nature of enhanced services traffic, and Issues 8 and 10 which establish the parameters for conducting an audit of the disputed traffic.

Allegation 1: The Commission improperly shifted the burden of proof to KMC to demonstrate that access charges were not due to Sprint (Issues 4 and 6).

KMC argues the Commission's decision to consider all of the traffic at issue in this case as intrastate interexchange traffic for which terminating access charges apply was the direct result of an improper shifting of the burden of proof from the entity asserting that such charges apply, Sprint, to the entity against which the complaint was made, KMC. KMC urges that "The burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Department of Transportation v. J. W. C. Co., Inc., 396 So.2d 778, 788 (Fla. 1st DCA 1981). Thus, according to KMC, Sprint is required to prove all of the material allegations of its Complaint, which allegations include that KMC wrongfully terminated interexchange traffic over local interconnection trunks. The traffic was identified and accounted for by KMC as enhanced services traffic. Thus, claims KMC, if Sprint disputed that fact, it was its duty to present a prima facie case that the relevant facts that formed the basis for the identification of the traffic were incorrect. As applied to this case, that evidence would have to include evidence that the traffic was not enhanced services traffic. KMC argues that, despite Sprint's failure to present any competent, substantial evidence to support the allegations in its Complaint, the Commission entered its Order granting the relief requested by Sprint because

KMC allegedly failed to prove the incorrectness of Sprint's allegations. By so doing, claims KMC, the Commission overlooked or failed to consider the appropriate burden of proof in this case as established by J. W. C. and its progeny.

Allegation 2: The Commission improperly rejected competent substantial evidence that the traffic at issue was enhanced services traffic and failed to shift the burden of proof to Sprint to rebut that evidence (Issue 6).

KMC notes that the Order analogized the issue of enhanced services traffic to that of an affirmative defense, for which the burden of proof rests with the party advancing the defense. However, KMC argues, even if the burden of proving the invalidity of Sprint's allegations properly rests with KMC, the Commission overlooked or failed to consider that KMC presented un rebutted evidence that the traffic was enhanced service traffic. The Order acknowledged that self-certification by enhanced services providers is the method of demonstrating the nature of such traffic accepted by both Sprint and KMC, and generally constitutes the standard in the industry. Order at pp. 33-34. KMC urges that evidence of the standard of practice in an industry is competent substantial evidence upon which a finding may be based. See, Lockwood v. Baptist Regional Health Services, Inc., 541 So.2d 731, 732 (Fla. 1st DCA 1988). KMC argues it presented prima facie evidence that the PointOne traffic consisted of enhanced services traffic.

Further, urges KMC, Sprint presented no competent substantial evidence to rebut KMC's prima facie case that the traffic at issue was enhanced services traffic. According to KMC, the Commission cannot reject competent substantial evidence that, in effect, stipulates the industry standard, and decide the issue on the basis that "[t]he evidence in the record is inconclusive." KMC argues the Commission overlooked or failed to consider the body of case law that establishes that the industry standard is evidence of a type and nature sufficient to support a finding of fact. Even if the issue of enhanced services traffic is in the nature of an affirmative defense, once KMC submitted evidence that the service was enhanced services traffic in the form of the industry standard customer certification for identifying enhanced services traffic, the burden shifted to Sprint to demonstrate that the traffic was other than enhanced services traffic.

The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. Westerheide v. State, 888 So.2d 702, 705 (Fla. 5th DCA 2004)

Thus, according to KMC, Sprint failed to make an evidentiary case to support its Complaint, and failed to meet its burden of proof. Accordingly, argues KMC, under Florida law, the relief

requested must be denied. Last, argues KMC, in failing to require Sprint to meet the ultimate burden of proof, the Commission overlooked or failed to consider Florida law requiring that such failure result in a denial of the requested relief.

Allegation 3: The Commission overlooked or failed to consider that a determination of the jurisdictional nature of enhanced services traffic is not based on the end points of such traffic (Issue 4).

KMC notes the Order states that "it is well established that the jurisdiction of traffic should be based on the end points of a call." Order at 17. In making that analysis, KMC argues that the Commission overlooked or failed to consider the restrictions on identifying the end points of enhanced services traffic, and the effect of such a decision on the exemption of enhanced services traffic from assessment of access charges. KMC urges that the Commission has earlier ruled in the Reciprocal Compensation Order that intercarrier compensation for non-enhanced VNXX traffic is based on the end points of a call rather than on the originating and terminating NPA/NXXs. However, notes KMC, the Commission did not rule on that issue with respect to enhanced services traffic.

KMC argues that the Commission erroneously relied on the AT&T Declaratory Ruling as the basis for its decision, causing it to overlook or fail to consider that the AT&T Declaratory Ruling was decided as to IXC's and not CLECs, and was limited solely to a consideration of transport, and not to termination fees.

KMC notes that enhanced services traffic includes a number of services, including dial-up VoIP, broadband VoIP, wireless, and call forwarded traffic and the parties' billing systems are not capable of distinguishing toll from enhanced services traffic. Order at 34-36. By deciding that the jurisdictional nature of enhanced services traffic be based on the geographic location of the calling and called parties, KMC alleges the Commission overlooked or failed to consider the FCC's classification of this traffic as information services traffic, and the FCC's determination that an end-point analysis is not appropriate when analyzing enhanced services traffic.¹ According to KMC, the basis for the FCC's decision is that when enhanced services are used, there is no feasible way to determine where the person on, for example, the VoIP end of the call is located.

Accordingly, KMC urges that the Commission overlooked or failed to consider that its decision that the determination of the jurisdiction of enhanced services traffic is to be based on the physical location of the end user customers has the direct effect of inappropriately permitting the assessment of access charges on enhanced services.

Allegation 4: The Commission overlooked or failed to consider that the parties may be unable to agree upon an objective and independent third-party auditor, and should thus hold open the possibility of a Commission-conducted audit (Issues 8 and 10).

¹ Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Order, FCC 04-267 (released November 12, 2004).

KMC notes the Order requires that "an independent third party auditor should be engaged by the parties The parties should jointly select the third-party auditor and should submit a report to this Commission indicating the target date for the issuance of the auditor's report within 60 days of the issuance of the order in this proceeding." Order at 48-49. In its Order, the Commission made no contingency for the possibility that the parties may be unable to agree upon an objective and independent third-party auditor. KMC believes that the test for independence and impartiality is whether the auditor would be equally willing to audit KMC or Sprint's records. In that regard, KMC reports it has opened discussions with several audit companies. Although several indicated a willingness to audit KMC, none expressed a corresponding willingness to audit Sprint. Therefore, KMC has no confidence as to the objectivity and independence of those companies. Accordingly, the Commission has overlooked or failed to consider that, regardless of the good faith efforts of the parties, a private, independent third party auditor acceptable to both parties may not be available. Therefore, KMC requests that if the parties, within 15 days of the effective date of the Order, are unable to agree on an auditor, that the Commission perform the audit, with all costs of the audit to be shared equally between the parties as required by the Order. Order at 48.

Allegation 5: Request for temporary relief from enforcement of order.

KMC notes that a motion for reconsideration generally may not stay the effect of the order being reconsidered. Rule 25-22.060(c), Florida Administrative Code. Therefore, until this matter is resolved, KMC requests that the Commission temporarily not require the parties to engage the independent auditor and to otherwise temporarily refrain from enforcing its Order with respect to the engagement of the auditor. KMC agrees that the parties should utilize the time during the pendency of this Motion to continue to identify and evaluate potential auditors; however, given the issues raised by this Motion it would be inefficient, expensive, and wasteful for the parties to secure and proceed with the audit as the Order directs since the issues raised in this Motion go to both the finding that KMC pay access charges and the audit process itself. Also, a temporary stay of the audit during the pendency of this Motion will not harm Sprint, as the relief Sprint seeks is purely monetary, and in the event KMC does not prevail on its Motion, Sprint is protected and would be made whole by the payment of additional interest.

Sprint's Response to KMC's Motion for Reconsideration

Sprint claims that KMC has failed to meet the standard for reconsideration of a Commission order in that KMC has failed to identify a point of fact or law that the Commission has overlooked or failed to consider in rendering its decision. According to Sprint, KMC merely reargues the points it made in its testimony and briefs, and the Commission fully considered those arguments in rendering its decision. Therefore, urges Sprint, KMC's Motion for Reconsideration should be denied.

Issues 4 and 6

Burden of Proof

Sprint argues that the Commission correctly found that Sprint had the burden of demonstrating by a preponderance of the evidence that the traffic at issue was not local traffic and, therefore, that it was traffic subject to access charges under the law and the parties' interconnection agreements. Order at 39. Sprint notes it produced copious evidence that the calls originated and terminated in different local calling areas. KMC argued that the traffic was exempt from the access charges that would normally apply because it was "enhanced services" traffic. Order at 32. According to Sprint, the Commission correctly held that this assertion was an affirmative defense,² and that, under the relevant evidentiary standard and the terms of the interconnection agreements and Commission orders, KMC bears the burden of proving this assertion. Order at 39 and 40. Also, argues Sprint, the Commission correctly found that the hearsay evidence offered by KMC was insufficient to meet this burden. Further, Sprint claims KMC falsely states that Sprint did not rebut its assertions that the traffic was enhanced services traffic. In its testimony, discovery responses, depositions, and briefs Sprint vigorously disputed KMC's assertion that the traffic was enhanced services traffic, KMC's assertion that VoIP traffic is necessarily enhanced services traffic, and KMC's assertion that VoIP traffic is exempt from access charges.

Sprint also claims that KMC erroneously argues that the hearsay evidence it presented concerning the nature of the traffic somehow becomes competent, direct evidence because self-certification (hearsay) is the "industry standard for determining the nature of the traffic." First, Sprint urges that KMC confuses industry practice relating to how a carrier treats a customer's traffic for the purposes of providing services under its tariff with the standard in an administrative proceeding for weighing the evidence to resolve disputed issues of material fact. Regardless of whether a carrier might be willing to accept the self-certification of a customer for the purposes of providing service, this practice cannot turn hearsay evidence into direct evidence within the context of a section 120.57 administrative proceeding. Second, Sprint claims KMC failed to produce evidence that self-certification is, in fact, the industry standard.

Jurisdiction of Enhanced Services Traffic

Sprint urges that KMC erroneously requested reconsideration because the Commission failed to consider the effect of its ruling on the applicability of access charges to "enhanced services" traffic. In fact, argues Sprint, the Commission explicitly considered the effect of its ruling on enhanced services traffic, stating:

The jurisdiction and compensation of a call shall be based on its end points, unless otherwise specified in the applicable interconnection agreement.

² Black's Law Dictionary defines an "affirmative defense" as a "matter asserted by the defendant which, assuming the complaint to be true, constitutes a defense to it." In this instance KMC did not dispute that the subject traffic originated and terminated in different local calling areas (i.e., was "interexchange traffic"), but rather KMC asserted access charges did not apply because the traffic was "enhanced services" traffic, meaning it was exempt from access charges pursuant to FCC regulations.

Notwithstanding this decision, enhanced services traffic may be exempt from access charges. Order at 18.

Sprint notes that the enhanced services exemption does not depend on establishing the local nature of enhanced services traffic. Order at 44. Rather, enhanced services traffic is explicitly recognized by the FCC as interstate traffic that would be subject to access charges if the access charge rules were strictly applied. (Order at 9 and 44; See, In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, FCC Order No. 83-356) According to Sprint, it is because the FCC has determined that enhanced services traffic is jurisdictionally not local traffic that an exemption from access charges is necessary.

Issue 8 and 10

Sprint joins KMC in asking the Commission to reconsider its rulings on Issues 8 and 10 as they relate to the requirement that the parties agree on an independent third party to audit the records necessary to determine the amount of access charges due Sprint from KMC and the amount of reciprocal compensation KMC should refund to Sprint. However, staff will not summarize Sprint's arguments here regarding this issue, as they will be more fully detailed in the discussion regarding Sprint's Cross-Motion for Reconsideration.

KMC's Motion for Reconsideration Does Not Affect Liability

Sprint notes that KMC has not sought reconsideration of the Commission's decision in Issue 7, holding that under the terms of the interconnection agreements KMC must pay Sprint's tariffed access charges for the subject traffic. Nor has KMC requested reconsideration of the portions of Issues 8 and 10 holding that KMC must pay Sprint access charges and refund reciprocal compensation payments under the provisions of the interconnection agreements. Sprint argues that, while in Issue 6 the Commission found that the evidence did not allow it to establish with certainty the nature of the traffic, in Issues 7 and 8 the Commission determined that such a finding was not necessary for deciding what intercarrier compensation was due under the terms of the interconnection agreements. Order at 39 and 44. Rather, claims Sprint, the Commission determined that the evidence clearly established that the traffic at issue was not local traffic as defined in the parties' interconnection agreements and that KMC had improperly terminated this nonlocal traffic over local interconnection trunks in violation of the interconnection agreements. Order at 44. In addition, Sprint notes, the Commission found that the evidence established that the traffic was subject to Sprint's tariffed access charges under the terms of these agreements. Order at 41. Sprint observes that KMC has not challenged any of these rulings (and has no valid basis for doing so). Even if the Commission should grant KMC's Motion for Reconsideration in its entirety, Sprint urges it would not change the Commission's ultimate decision that KMC is liable to Sprint for access charges and reciprocal compensation overpayments.

Request for Temporary Relief

Sprint disagrees with KMC's assertion that additional delay will not harm Sprint since the relief Sprint seeks is only monetary. Sprint notes that it filed its Complaint on September 24,

2004, and the case has been in progress for approximately 18 months so far. During that time, KMC has transferred the Florida customer base of KMC III to another carrier (See Docket No. 050182-TP), has asked the Commission to cancel KMC III's CLEC certificate (See Docket No. 050641-TL), and has applied to the FCC to discontinue providing services because "it cannot pay its underlying network providers." (See Document No. 10489-05, filed with the Commission in Generic Docket No. 050000-OT). For these reasons, Sprint disagrees that additional delay will not harm its ability to collect the money KMC owes Sprint. Rather, any delay further reduces Sprint's chances of recovering any of the monies KMC owes Sprint.

Recommendation

The Motion for Reconsideration should be denied. The motion did not identify a mistake of fact or law in the Commission's decision. Instead, the Motion merely reargued the same positions KMC argued throughout discovery and in its Briefs. Though Sprint joined with KMC in requesting reconsideration of Issues 8 and 10, staff will not summarize Sprint's arguments here, as they will be more fully detailed in the discussion regarding Sprint's Cross-Motion for Reconsideration. Accordingly, staff recommends that KMC's Motion for Reconsideration be denied.

ISSUE 3: Should the Commission grant the Cross-Motion for Reconsideration filed by Sprint?

RECOMMENDATION: The Cross-Motion for Reconsideration should be granted in part and denied in part. Sprint identified a mistake of fact or law in the Commission's decision on Issue 6; however, such mistake is not sufficient to warrant a different finding for the issue. Sprint has also identified a mistake of fact or law in the Commission's decisions on Issues 8 and 10. Reconsideration on these issues should be granted in part. Sprint's methodology for calculation of the amount owed by KMC should be accepted, subject to the adjustments specified in Order No. PSC-05-1234-FOF-TP, issued December 19, 2005. Accordingly, the previously ordered audit would be unnecessary. Sprint should revise its calculations to reflect the adjustments and file them with this Commission within 30 days of the issuance of the reconsideration order. (L. Fordham, Marsh, Pruitt)

STAFF ANALYSIS:

Sprint's Cross-Motion for Reconsideration

As set forth in the Case Background, on January 13, 2006, Sprint filed a Cross-Motion asking this Commission to reconsider its findings in this case. The specific arguments raised are

addressed as outlined in the following analysis. KMC did not file a response to the Cross-Motion.

Issue 6

Sprint advises that it presented Exhibit JRB-2 (Hearing EXH 41) as evidence that the sample calls listed in that exhibit represent voice traffic that was terminated to Sprint Florida's POTS subscribers via KMC trunks. Sprint argues that the Commission, in determining that this exhibit did not demonstrate the point made by Sprint, failed to consider several key points.

Sprint provides information in its motion that shows where certain files are located in the record. Sprint notes that certain files in Confidential EXH 3 contain correlated call records for the originating and terminating ends of the sample calls. Sprint also advises that the difference in dates is explained by the column headings. Sprint explains that the headings show that the data was collected on a particular date, while the date and time of a call are contained in another column. Sprint argues that the information contained in the call detail records (CDRs) shows the trunk groups used by KMC, as well as the charge party numbers associated with PointOne.

Sprint also argues that the record shows that two apparent discrepancies between the bills and the summary in Exhibit JRB-2 as noted in the Order are readily explained. First, Sprint advises that the difference in two of the IXCs shown on the customer's bills are due to the fact that the IXC shown is a d/b/a of the provider noted in the call records. Sprint points out that the provider shown in the CDRs noted above does match Sprint's summary in Exhibit JRB-2. Sprint contends that the difference in the carrier on the bill versus the CDRs supports Sprint's statement that "there could be any number of scenarios by which carriers pass traffic from one to another that eventually gets terminated to an end user." Second, Sprint explains that the difference in the time of day for one of the calls is due to a difference in time zone.

Analysis and Recommendation

Upon examination of the files contained in Confidential EXH 3, staff agrees with Sprint that the information that staff was previously unable to locate is contained in the record. Staff believes the exhibit does show that the trunk groups used to transport the traffic are trunk groups assigned to KMC, and that the charge party numbers in question are contained in the files. Staff also agrees with Sprint's explanation that the date staff originally found in the file is the date the information was gathered, not the date of the calls.

However, while the use of a d/b/a by an IXC may be a reasonable explanation for the difference between the IXC shown on the customer bill and that shown in Sprint's summary and in the CDRs, Sprint points to no such explanation in the record. Staff also questions Sprint's statement that the traffic is passed off from one carrier to another before it is terminated. Staff does not believe that this statement supports the fact that the originating call detail record shows something different than the originating customer bill. Staff agrees that the call originated and terminated in two different time zones. However, this fact does not explain why the originating CDR has a different time than that shown on the originating customer's bill. Staff believes that

on these two points, the Commission did not fail to consider any facts contained in the record in reaching its decision.

After review of the CDRs containing the data that corresponds to the sample calls, staff believes that such data does appear to show that the six calls were terminated over KMC's local interconnection trunks. The customer bills in Exhibit JRB-2 also appear to be indicative that the calls were merely voice calls. However, the record also contains evidence that only eight percent of the traffic has correlated call detail records. The remaining traffic could fall under a number of categories, such as broadband or dial-up Internet VoIP traffic or certain wireless traffic, as well as access traffic, as insisted by Sprint. The Commission found that "the SS7 characteristics of the traffic in this case could apply to various types of traffic other than access traffic." (Order at 36) Accordingly, staff believes that the Commission's decision on Issue 6 as initially rendered is appropriate and should not be reconsidered.

Issue 8

Sprint asks that the Commission reconsider its decision regarding the methodology used by Sprint in calculating the amount due for improperly terminated traffic. Sprint argues that the Commission overlooked evidence that the amount owed, according to Sprint, is based on Percent Local Usage (PLU) factors that were calculated using the summary reports of each month's SS7 call detail records, not on a sample of the traffic. Sprint states that the Commission also misinterprets the affidavit of Dr. Staihr in determining that a sample was used to derive a PLU factor. Sprint points out that the affidavit describes the mechanism by which a sample was obtained but does not state the purpose of the sample. Rather, Sprint advises that the sample was used to support Sprint's position that KMC used a local charge number in the delivery of interexchange traffic over local interconnection trunks. Further, Sprint notes that the sample was developed to provide KMC with call detail records requested by KMC.

Sprint explains that the actual methodology used by Sprint was explained by Sprint witness Aggarwal. Sprint notes that the calculations were based on the monthly summary of CDRs. Sprint also advises that the summary reports were used to determine the correct jurisdiction of traffic and to revise the PLU factor using the total SS7 minutes and the SS7 minutes by jurisdiction. Sprint further advises that the revised PLU factor was then used to determine the correct billing.

Sprint argues that, while its methodology may not be perfect, it is a reasonable approach for determining backbillings of the magnitude in question. Sprint requests that "the Commission should reconsider its decision on Issue 8 and find that KMC owes Sprint \$3,450,701 for the period from July 2002 through May 2004. . . ." (Cross-Motion, p. 18)

Analysis and Recommendation

Sprint points out in its Cross-Motion that witness Aggarwal explained the methodology used by Sprint. Staff notes that the witness stated ". . . Sprint used monthly SS7 CDR Summary Reports to calculate the factors using the jurisdiction of the SS7 minutes of use." (TR 116) However, she went on to say that "[t]he jurisdiction of the minutes is based upon the calling

party numbers to the called party numbers in the SS7 Call Detail Records.” (TR 116) The same statement was made by Sprint witness Wiley. (TR 41) Staff notes that neither witness testified that the monthly SS7 CDR Summary Reports were actually used to calculate the jurisdiction to revise the PLU factor. Rather, witness Wiley stated that “Sprint developed a percentage of interstate, intrastate interLATA and local traffic based on the Agilent Study.” (TR 41) Sprint witness Farnan stated that the calculations in his exhibits were made using “the results of the SS7 study information.” (TR 112) Additionally, there is nothing apparent in witness Aggarwal’s exhibits to show the CDR Summary Reports were used to calculate a factor. A percentage is shown on each page of the exhibit. Each page is purported to be the SS7 CDR Summary Report for a given month. There is no information apparent in this exhibit that would allow a factor to be calculated. Rather, a percentage is brought to each page from somewhere else. The record is replete with information that the SS7 Call Detail Records were only sampled. As a result, staff came to the conclusion that the second sentence cited above refers to a sample that is used to calculate a percentage that is then applied to the information contained in the SS7 CDR Summary Reports to determine a dollar figure for a given month. (EXH 50; EXH 51)

Sprint also cites EXH 2, Supplemental Response to KMC’s Interrogatory Nos. 15 and 79. In response to Interrogatory 15, Sprint states that “[t]he summary report provides the jurisdiction of the SS7 MOU which is based upon the calling party numbers to the called party numbers from the SS7 CDRs.” (EXH 2, p. 125) Staff believes this is simply a restatement of the description in witness Aggarwal’s rebuttal testimony cited above.

Sprint further states that the Supplemental Response to KMC Interrogatory No. 79 explains that the SS7 monthly summary reports were used to determine the correct jurisdiction of KMC’s traffic and a revised PLU factor was developed by using the total SS7 minutes and the SS7 minutes by jurisdiction. (Cross Motion, p. 17) As stated in EXH 2, p. 349, the methodology to calculate the “Total Approximate Monthly Usage Charges” is as follows:

Correct jurisdiction as [sic] determined by actual SS7 traffic. Data is extracted from SS7 data warehouse [Agilent] for each month for customer’s specific trunk groups. Daily Call Detail Records (CDRs) are summarized into a monthly report by Date, Minutes by Jurisdiction, Called State, Carrier, Transit and No CPN flags, Trunk Group Number and Two-Six Code and total Calls. SS7 jurisdictionalizes based on Calling Party Number to Called party Number. The Corrected PLU is calculated based on SS7 minutes by jurisdiction divided by total SS7 minutes.

Staff believes this explanation supports the methodology Sprint claims that it used to calculate the dollar amount owed by KMC. It appears to staff that Sprint’s witnesses did not accurately describe the methodology used by Sprint.

Staff agrees that the affidavit of Sprint witness Staihr does not state the purpose of the sample. Based on Sprint’s clarification of its methodology, staff believes that the sample described by Dr. Staihr was not used to determine the jurisdiction of the traffic.

Based on the clarification of its methodology provided by Sprint, staff believes Sprint's jurisdictionalization of traffic is based on the monthly summaries of SS7 records, not on a sample. Accordingly, staff believes the concerns with the methodology have been resolved and the methodology should be accepted, subject to the adjustments approved in the Order. Accordingly, the previous finding regarding the necessity for an audit is no longer valid. Neither party asked for reconsideration of the adjustments. Those adjustments are:

- Call-Forwarded Traffic should be removed.
- Interstate Traffic should be removed.
- Appropriate intrastate access charges should be applied in accordance with the appropriate tariff.
- Traffic with no CPN should be included. (Order, p. 48)

Issue 10

In Sprint's Cross-Motion for Reconsideration Sprint states on page 18, "In reaching its decision on Issue 10, the Commission apparently overlooked the relationship of the two calculations." Staff notes that the calculation of the amount of reciprocal compensation that KMC should refund to Sprint was derived from the calculations to determine the amount of access charges due. This relationship was acknowledged on page 51 of the Order, which reads, "Sprint overpaid reciprocal compensation by three times the rate differential multiplied by the number of misrouted access minutes."

Staff notes that on June 26, 2002, Sprint and KMC adopted Amendment No. 1 to the 1997 MCI Interconnection Agreement to implement Order FCC 01-131, on the exchange of local and ISP-bound traffic. (EXH 11, pp. 1-4) The amendment was effective until the adoption of the FDN agreement on June 20, 2003. (TR 55; BR at 44).

Analysis and Recommendation

While staff agrees that routing interstate and intrastate access traffic over local interconnection trunks would skew the 3:1 ratio in determining the number of Sprint-originated minutes that were above or below the ratio, staff does not agree with the rate calculation used by Sprint. Sprint witness Dansforth states that since the contractual voice rates are substantially higher than the ISP-bound traffic rates, Sprint overpaid in accordance with the rate differential. (emphasis added) (TR 124) However, in witness Dansforth's Confidential Exhibit 53, Sprint neglected to acknowledge that some payment was due to KMC for the termination of the Sprint traffic by applying the voice rate in section 3.1.1 of Amendment 1 to the 1997 MCI agreement, instead of the rate differential (found by subtracting the ISP rate found in section 4 of Amendment 1 to the 1997 MCI agreement from the voice rate).

Staff no longer believes an audit is necessary to address its concerns with Issue 10 since the methodology used by Sprint in Issue 8 has been clarified. Sprint should be directed to make the following modifications to its Reciprocal Compensation Expense Overpayment Calculation (Confidential Exhibit 53):

(1) Adjust, to the extent relevant, the minutes in the column entitled "Non-Transit Access MOU for Recip Comp Expense Overpayment" in accordance with staff's recommended adjustments in Issue 8;

(2) Make adjustments to column entitled "FCC ISP Remand Order (FCC 01-131) 3:1 Ratio" based on any modifications to (1) above;

(3) Change the figures in the column entitled "Voice Rate" to reflect the rate differential;

(4) Recalculate the figures in the column entitled "Recip Comp Expense Overpayment."

Conclusion

Staff recommends that the Cross-Motion for Reconsideration should be granted in part and denied in part. Sprint identified a mistake of fact or law in the Commission's decision on Issue 6; however, such mistake is not sufficient to warrant a different finding for that issue. Sprint has also identified a mistake of fact or law in the Commission's decisions on Issues 8 and 10. Reconsideration on these issues should be granted in part. Sprint's methodology for calculation of the amount owed by KMC should be accepted, subject to the adjustments specified in Order No. PSC-05-1234-FOF-TP, issued December 19, 2005. Sprint should revise its calculations to reflect the adjustments and file them with this Commission within 30 days of the issuance of the reconsideration order. Further, staff now recommends that an audit, as detailed in the Order, is no longer necessary.

Issue 4: Should this docket be closed?

Recommendation: No. If the Commission accepts staff's above recommendations, the Docket should remain open pending Commission approval of the revised figures to be submitted by Sprint. (Fordham)

Staff Analysis: If the Commission accepts staff's above recommendations, the Docket should remain open pending Commission approval of the revised figures to be submitted by Sprint.