

State of Florida



## Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** November 18, 2004

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

**FROM:** Office of the General Counsel (Rockette-Gray, Fordham)  
Division of Competitive Markets & Enforcement (Pruitt)

**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:** 11/30/04 – Regular Agenda–Motion to Dismiss–Decision Prior to Hearing - Parties May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** Attachments 1, 2, and 3 are not included in the Word version of this document.

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

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### Case Background

On September 24, 2004, pursuant to Rules 28-106.201 and 25-22.036, Florida Administrative Code, Sprint-Florida, Incorporated (Sprint) filed a complaint against KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC (collectively “KMC”). Sprint alleges that KMC knowingly terminated intrastate interexchange traffic over local interconnection arrangements, in violation of Section 364.16(3)(a), to avoid paying Sprint access service charges. Sprint also asserts that this misrouting of access traffic has resulted in an overpayment of reciprocal compensation paid to KMC for local minutes terminated to KMC by Sprint. On October 14, 2004, KMC filed a Motion to Dismiss Sprint’s complaint for failure to state a claim upon which relief may be granted, improper joinder of KMC Data LLC and KMC Telecom V, failure to request an audit, and use of an unauthorized methodology to recalculate traffic. On October 21, 2004, Sprint filed its response to KMC’s Motion to Dismiss.

The Commission has jurisdiction over this matter pursuant to Section 364.16(3)(a), Florida Statutes.

### **Discussion of Issues**

**Issue 1:** Should the Commission grant KMC's Motion to Dismiss?

**Recommendation:** No. Staff recommends that KMC's Motion to Dismiss be denied. **(Rockette-Gray, Fordham)**

#### **Staff Analysis:**

##### I. Standard of Review

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.

##### II. Argument

KMC argues that Sprint has failed to state a claim upon which relief can be granted because Sprint has not abided by the dispute resolution provisions governing the parties. According to KMC, Sprint's complaint contravenes the dispute resolution provisions set forth in the 1997 MCI-Sprint Agreement and the 2001 FDN-Sprint Agreement, both of which KMC adopted, as well as Sprint's Access Tariff. ("1997 MCI Agreement," see Attachment 1, "FDN Agreement," see Attachment 2, and "Sprint's Access Tariff," see Attachment 3). KMC asserts that the Agreements and Tariff govern the local interconnection and traffic exchange between itself and Sprint, including audit requirements within the dispute resolution provisions. It contends that Sprint's unilateral study of selected traffic records does not meet the audit requirements of the interconnection agreements and Sprint's tariff. Essentially, KMC argues that Sprint has not acted in good faith in trying to resolve their differences and has prematurely filed a complaint with this Commission.

Additionally, KMC maintains that Sprint improperly joined KMC Data LLC and KMC Telecom V in its complaint. KMC maintains that during the period that Sprint alleges to be in question concerning interexchange traffic, KMC Data LLC did not have any customers, and

KMC Data LLC and KMC Telecom V did not deliver any interexchange or local traffic to Sprint.

KMC asserts also that Sprint failed to join an enhanced service provider (name redacted) which KMC contracted with to transport certain traffic at issue as an indispensable party to the complaint. KMC contends this enhanced service provider was the party ultimately responsible for transporting traffic to KMC.

Finally, KMC puts forth the argument that Sprint's ultimate issue is one of backbilling. Essentially, KMC claims that even if Sprint makes a valid case for monies it is due based on backbilling, no legal basis exists for the Commission to authorize backbilling against KMC on the unpaid access charges and reciprocal compensation payments. KMC points out the only possible basis is under Sprint's Access Tariff which allows backbilling only if supported by an audit. Since an audit was not performed, KMC alleges the Commission has no basis to allow Sprint to backbill KMC.

In response, Sprint argues that a claim upon which relief can be granted has been stated because KMC is in violation of Section 364.16(3) F.S. due to KMC's unlawful delivery of access traffic over local interconnection arrangements. Sprint maintains that the statute does not require an audit be performed before a "substantially affected party" can bring a complaint before the Commission. Sprint alleges it meets the requirement of a "substantially affected party" under the statute and therefore has stated a valid claim with its request for an investigation. Sprint further alleges that an audit under the Interconnection Agreements is not required nor is it a "condition precedent" to filing a complaint for violation of such agreements. Rather, Sprint maintains the provisions which deal with an audit under the agreements are permissive, rather than mandatory. Sprint adds that the agreements did not limit the parties on recalculation methods which could be used for an appropriate determination of traffic access charges. Therefore, Sprint alleges that the recalculation method it used to distinguish interexchange traffic from local was proper under the applicable interconnection agreements.

Secondly, Sprint argues that KMC Data LLC and KMC Telecom V, Inc. are properly joined parties. Sprint asserts that both are proper parties because they are parties to the current Interconnection Agreement between Sprint and KMC and will be parties to the agreement that is currently in arbitration in Docket No. 031047-TP. Additionally, Sprint states that KMC Telecom V, Inc. is properly joined because it is a party to the 2002 Agreement between Sprint and MCI.

Sprint further argues that the party that KMC refers to as an enhanced service provider is in actuality a customer of KMC and is unknown to Sprint. Sprint asserts KMC admitted it routes traffic to Sprint on behalf of this enhanced service provider. Sprint further alleges this provider is not part of any agreement that Sprint has with KMC. Therefore, Sprint contends such an enhanced service provider should not be considered an indispensable party.

Finally, Sprint asserts that no limitations were placed on the parties' right to backbill under any of the Agreements if a violation concerning incorrect billing were discovered. Further, Sprint states that the Commission has the inherent authority to order a company be backbilled pursuant to Section 364.16(3), Florida Statutes, which authorizes the Commission to

investigate a regulated company's records and accounts in response to a complaint filed against it.

### III. Analysis

In determining if Sprint's complaint states a cause of action upon which relief can be granted, an analysis of Section 364.16(3)(a), Florida Statutes, is necessary since Sprint bases its primary argument on that statutory provision. Section 364.16(3)(a) states:

No local exchange telecommunications company or competitive local exchange telecommunications 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.

Sprint alleges that Section 364.16(3)(a) was violated by KMC because KMC intentionally altered some originating numbers that determine the jurisdiction of the traffic. Traffic jurisdiction is characterized as local or interexchange traffic. Sprint states in its complaint that the jurisdiction of telecommunications traffic has historically been determined by the originating and terminating end points of a call, which KMC does not dispute.

Staff believes Section 364.16(3)(a) is clear in its directive concerning what conduct is prohibited. The statute clearly prohibits a telecommunications company from knowingly delivering interexchange traffic over local interconnection arrangements if that interexchange traffic is subject to terminating access charges. Staff believes Sprint's complaint raises as a question of fact whether KMC knowingly delivered or terminated access traffic over a local interconnection arrangement without paying the appropriate charges. Since Sprint specifically alleges in its complaint that KMC has engaged in such prohibited conduct under the statute, staff believes that Sprint has stated a cause of action upon which relief could be granted.

#### Prematurity

KMC contends that the dispute resolution provisions of the 1997 MCI-Sprint Agreement and the 2001 FDN-Sprint Agreement provide for a mandatory audit before Sprint or KMC can file a complaint with the Commission alleging a billing discrepancy related to payment of access charges and reciprocal compensation. KMC argues that since no audit has been conducted, the complaint is premature and should be dismissed.

The question of whether the conduct of an audit is a contractual condition precedent to KMC's liability for alleged underpayments or overcharges is an issue to be decided by the Commission either at hearing or on a motion for summary final order. Staff believes that the existence of this issue does not affect the Commission's jurisdiction to hear Sprint's complaint and is not a legal prerequisite to the accrual of a cause of action. See San Marco Contracting Company v. Department of Transportation, 386 So.2d 615 (Fla. 1<sup>st</sup> DCA 1980). Thus, the alleged failure to have performed an audit is not a proper basis to dismiss the complaint.

### Improper Joinder

Additionally, KMC states that its Motion to Dismiss should be granted because Sprint improperly joined KMC Data LLC and KMC Telecom V in its complaint. KMC claims that both KMC Data LLC and KMC Telecom V were not involved in any interexchange or local traffic activity during the timeframe Sprint alleges the unlawful delivery and termination of interexchange traffic occurred. Although the Commission is not bound by the Florida Rules of Civil Procedure governing joinder of parties, staff believes that Fla. R. Civ. P. 1.250 dealing with misjoinder of parties offers guidance for the disposition of the issue KMC raises. Fla. R. Civ. P. 1.250 (a) states “Misjoinder of parties is not a ground for dismissal of an action. Any claim against a party may be severed and proceeded with separately.” Using the rule as a guide, staff believes the issue of whether KMC Data LLC and KMC Telecom V are improperly joined should not weigh in this Commission’s decision on whether or not to grant KMC’s Motion to Dismiss.

### Failure to Join Indispensable Party

KMC asserts also that Sprint failed to join a certain enhanced service provider (name redacted) which KMC has contracted with to deliver traffic. KMC contends that some or all the traffic at issue in Sprint’s complaint is traffic that is transported by this enhanced service provider.

The concept of indispensable party is not specifically provided for in the Florida Administrative Code. The courts define an “indispensable party” as one who has such an interest in the subject matter of the action that a final adjudication cannot be made without affecting the party's interest or without leaving the controversy in such a situation that its final resolution may be inequitable. W.R. Cooper, Inc. v. City of Miami Beach, 512 So. 2d 324, 326 (Fla. 3d DCA 1987). In Order No. PSC-99-0648-PCO-WS, issued April 6, 1999 (Docket No. 981609-WS),<sup>1</sup> the Commission construed this judicial definition as having similar meaning to Rule 28-106.109, Florida Administrative Code, which governs the effect of agency proceedings on non-parties. That rule states:

[I]f it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that the absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

Based on the rule cited above, KMC’s enhanced service provider (over whom the PSC does not have regulatory jurisdiction) may very well have an indirect interest in the resolution of Sprint’s Complaint. However, staff believes that the enhanced service provider is not an indispensable party, since the issue of whether KMC knowingly delivered traffic to Sprint without paying the appropriate compensation does not appear to require the presence of this third-party. Therefore, staff believes that KMC’s Motion to Dismiss should be denied as it

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<sup>1</sup> See also Order No. PSC-03-1331-FOF-TL, issued November 21, 2003.

relates to failure to join an indispensable party. KMC certainly has the opportunity to request an order, in accordance with Rule 28-106.109, Florida Administrative Code, that the enhanced service provider be notified of the proceeding and offered an opportunity to join. KMC also can make use of any available non-party discovery methods to obtain information that it requires for the presentation of its case.

#### Jurisdiction to Grant Requested Relief

Finally, KMC argues that the Commission has no legal authority to authorize backbilling in this instance, because that remedy is barred by the application of the parties' contract or by Sprint's tariff, and is not otherwise authorized in the statutes. KMC emphasizes that what Sprint is seeking is: (1) an adjustment to the historical traffic volumes exchanged between the companies; (2) permission to backbill KMC for any underpayments on intrastate access charges; and (3) a refund of any overpayments of reciprocal compensation made by Sprint to KMC because the ratio of traffic between the companies had been improperly skewed. KMC argues that there is simply no legal basis for this type of backbilling over multiple years, and further emphasizes that Sprint has not referenced any such legal authority in its Complaint.

Sprint disagrees, and in turn notes that KMC itself has not presented any legal authority for its contention that the Commission is prohibited from allowing Sprint to backbill. Furthermore, Sprint argues that it did, in fact, reference specific portions of its interconnection agreement with KMC that provide for backbilling, as well as specific statutory authority, Section 364.16, Florida Statutes, pursuant to which Sprint is authorized to seek relief. Sprint adds that this same provision includes the inherent authority for the Commission to provide the appropriate remedy, including backbilling, when violations are found.

Section 364.16(3)(b) specifically provides that:

(b) Any party with a substantial interest [i.e. Sprint] may petition the commission for an investigation of any suspected violation of paragraph (a). In the event any certificated local exchange service provider [i.e. KMC] 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.

Staff believes that this provision grants the Commission the implied authority to "make the pot right" when violations of this provision are found, which would include the authority to allow a company to be backbilled if it is proved the company knowingly delivered interexchange traffic through a local interconnection arrangement without paying the appropriate access charges. While the proper interpretation of Section 364.16(3) is ultimately a question for the Commission to determine later in these proceedings, Sprint's complaint is sufficient to withstand KMC's Motion to Dismiss.

IV. Conclusion

Staff believes Sprint has filed a claim upon which relief can be granted based on Section 364.16(3). Therefore, staff believes that it is appropriate for the Commission to proceed with this docket. Based on the foregoing, staff recommends that KMC's Motion to Dismiss be denied.

Docket No. 041144-TP  
Date: November 18, 2004

**Issue 2:** Should this docket be closed?

**Recommendation:** No. If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending resolution of Sprint's complaint. **(Rockette-Gray, Fordham)**

**Staff Analysis:** If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending resolution of Sprint's complaint.