

State of Florida



Public Service Commission

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

DATE: May 5, 2005

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

FROM: Office of the General Counsel (B. Keating, Fordham)
Division of Competitive Markets & Enforcement (Marsh, 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: 05/17/05 – Regular Agenda -Oral Argument Requested

CRITICAL DATES: July 12, 2005 hearing.

SPECIAL INSTRUCTIONS: None

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

Case Background

On September 24, 2004, Sprint-Florida, Incorporated (Sprint) filed its complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively KMC) for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs, and for alleged violation of Section 364.16(3)(a), F.S.

On October 15, 2004, KMC filed a motion to dismiss, and on October 21, 2004, Sprint filed its response to KMC's motion to dismiss. On December 3, 2004, Order No. PSC-04-1204-FOF-TP was issued denying KMC's motion to dismiss. On January 19, 2005, the parties met to identify issues to be resolved in this proceeding. On January 30, 2005, the Order Establishing Procedure, Order No. PSC-05-0125-PCO-TP, was issued.

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On February 28, 2005, KMC filed its Answer, Affirmative Defenses and Counterclaims, and on March 4, 2005, KMC filed its Motion for Audit. On March 18, 2005, Sprint filed its response to KMC's Motion for Audit and simultaneously, filed a Motion to Strike the Answer, Affirmative Defenses and Counterclaim, and Motion to Dismiss the Counterclaim or, in the Alternative, Motion to Bifurcate the Counterclaim, of KMC. On March 25, 2005, KMC filed its response. This recommendation addresses the various pending motions.

The Commission has jurisdiction over this matter pursuant to Sections 364.16(3)(b) and 364.162(1), Florida Statutes

Discussion of Issues

Issue 1: Should the Commission grant KMC's request for oral argument or presentation regarding Sprint's Motion to Strike, Motion to Dismiss and, in the alternative, Motion to Bifurcate?

Recommendation: Yes. Because this matter has not yet been to hearing and the questions presented are somewhat unique, staff recommends that the Commission entertain oral presentations from the parties. The length of such presentations is at the Commission's discretion. Staff recommends that they be limited to 10 minutes per party. (**B. Keating, Fordham**)

Staff Analysis: The questions before the Commission in this recommendation are complex, and the Motion for Audit, to the best of staff's knowledge, is a question of first impression for the Commission. As such, staff believes that oral argument may be helpful to the Commission in rendering its decision in this matter. Furthermore, in accordance with Rule 25-22.0021(1), Florida Administrative Code, the Commission typically entertains oral argument on issues brought for consideration prior to a hearing on the matter. Thus, for these reasons, staff recommends that the Commission entertain oral argument. If preferred, the Commission may wish to establish a limitation on the length of presentations, in which case, staff recommends a limitation of 10 minutes per party.

Issue 2: Should Sprint's Motion to Strike KMC's Answer, Affirmative Defenses, and Counterclaim and Motion to Dismiss the Counterclaims or, in the alternative, Motion to Bifurcate the Counterclaim, or any portion thereof, be granted?

Recommendation: Staff recommends that the Motions be granted, in part, and denied, in part, to the extent that the Counterclaim should be stricken. (**B. Keating, Fordham**)

Staff Analysis:

Sprint has asked for various alternative, and ostensibly distinct, forms of relief through the umbrella of this motion. KMC responded in kind. The arguments are, however, somewhat intertwined. Thus, staff discusses these alternatives in one issue with a single analysis and recommendation; however, the arguments are presented in accordance with the type of relief requested.

I. Arguments

A. Motion to Strike

1. Sprint

Sprint argues that KMC's Answer, Affirmative Defenses and Counterclaim should be stricken, because those pleadings are improper, untimely, and are not authorized by the Order Establishing Procedure issued January 30, 2005, Order No. PSC-05-0125-PCO-TP. Citing Rule 28-106.203, Florida Administrative Code, Sprint acknowledges that it is not mandatory for a Respondent or party to file an "answer" to a complaint or petition filed with the Commission.¹ However, Sprint argues that if a response is filed, the Commission has generally recognized the 20-day time-frame followed in civil practice and set forth in Rule 1.140, Florida Rules of Civil Procedure. In this case, Sprint notes that KMC exercised its rights under Rule 28-106.204, Florida Administrative Code, to respond first with a Motion to Dismiss 20 days after the Complaint was filed, a motion that was ultimately denied by the Commission. Sprint contends that while the filing of that Motion to Dismiss tolled the time for filing KMC's answer, once the Motion was resolved by the Commission, KMC should have had only 10 days to file its Answer to Sprint's Complaint, at least under civil rules of practice. Sprint notes that, arguably, KMC's answer was due in as little as 5 days from the Order Denying the Motion to Dismiss, because that would be the remaining time left on the original response period (20 days, plus 5 days service by mail), and that under the broadest interpretation of the applicable rules, KMC would have had only 25 days to file its answer. Sprint emphasizes, however, that KMC did not file its Answer until a full 85 days after the Order Denying the Motion to Dismiss was issued², subsequent to the Issue Identification meeting, the procedural order, and the filing of direct testimony.

Sprint contends that KMC's late filing of its Answer, Affirmative Defenses, and Counterclaim severely prejudices Sprint at this point in the proceeding, because direct testimony has already been filed in the case. As such, Sprint did not have an opportunity to address any of

¹ Rule 28-106.203, F.A.C. states a "respondent may file an answer to the petition."

² See Docket 041144-TP, Order No. PSC-04-1204-FOF-TP, issued December 3, 2004.

the factual issues or affirmative defenses KMC raised in its pleadings. Specifically, Sprint argues that while it is still exploring through discovery issues raised in KMC's Counterclaim, KMC actually addressed those issues in its pre-filed direct testimony, which was filed on the same date as KMC's Answer.

Sprint further asserts that if KMC is allowed to go forward with its untimely filed Counterclaim, a significant delay will result in the procedural schedule which was authorized by the Order Establishing Procedure. Sprint states it believes that "KMC's motivation for waiting so long to file its pleading is solely KMC's desire to delay the proceeding."

Sprint notes that KMC relies upon a situation that arose in Docket No. 031125-TP, in which BellSouth was allowed to file a Counterclaim late in the proceeding as support for KMC's filing in this case. Sprint emphasizes that in that case, BellSouth had alleged that it had been unable to file the Counterclaim earlier because it had been unable to obtain the information necessary to support its claims. Sprint notes that KMC has made no such allegation to support its filing in this matter, and in that case, the Commission specifically found that allowing the late-filed Counterclaim would not unnecessarily delay the case or prejudice the opposing party. Sprint contends that the situation in this case is significantly different and merits a different conclusion.

Sprint claims that granting its Motion to Strike KMC's Counterclaim would not prevent KMC from bringing forth those allegations at a later date in a separate proceeding. Sprint notes that while not directly applicable, the Rules of Civil Procedure applicable to counterclaims may be helpful to the Commission in addressing this question. Sprint contends that under the Rules of Civil Procedure, KMC's Counterclaim would be considered "permissive" and not "compulsory," meaning the claims may be considered together, but are not required to be considered together. Generally, Sprint notes, the Commission has relied on Rule 28-106.108, Florida Administrative Code, in considering whether to consolidate separate matters. That rule provides that separate matters may be consolidated if no party will be unduly prejudiced by such consolidation.³ Sprint contends, in this instance, case law should be persuasive in deciding if KMC's Counterclaim should be retained for consideration in this case. In particular, Sprint cites *Londono v. Turkey Creek*, 609 So. 2d 14 (Fla. 1992), wherein the Court adopted the "logical relationship" test to determine if a counterclaim is compulsory or not. Sprint asserts that the "logical relationship" test consists of a court or administrative body making a finding of fact determining whether a counterclaim arose from the same transaction or factual circumstances upon which the initial complaint is based. Sprint alleges that KMC's Counterclaim and the issues it raises pertain to, for the most part, Sprint Communications Company Limited Partnership (Sprint LP), which is a separate subsidiary owned by Sprint's corporate parent, Sprint Corporation, and the traffic at issue in the Counterclaim was largely terminated outside of Sprint-Florida's local service territory. Thus, Sprint argues the issues in the Counterclaim do not need to be addressed in this proceeding, and can (and should) proceed separately.

³ Rule 28-106.108, F.A.C. "if there are separate matters which involve similar issues of law or fact, or identical parties, the matter may be consolidated if it appears that consolidation would promote the just, speedy...and would not unduly prejudice the rights of a party."

Finally, Sprint argues that KMC's pleadings should be stricken because KMC filed its Answer and Counterclaim solely for the purposes of harassment and delay because KMC's claims are not reasonably related to Sprint's Complaint. Sprint claims KMC had knowledge long before the actual filing of its pleading that it intended to file an answer and counterclaim in this case. Sprint references page 10 of the November 30, 2004, Agenda Conference Transcript, wherein counsel for KMC indicated an intent to file an answer and counterclaim in the case. Sprint also made note of the fact that at the January 19, 2005, issues identification meeting, KMC indicated again the possibility of filing a counterclaim. Aside from the fact KMC's Counterclaim was filed more than a month after the Issue ID meeting, Sprint argues that it cannot adequately ascertain any factual or legal basis for the allegations raised in the Counterclaim. Sprint maintains that KMC's Counterclaim consists mainly of allegations against Sprint LP. Sprint indicates KMC has drawn conclusions based on facts that KMC knows to be unreliable and unrelated to Sprint's Complaint. In order to connect Sprint-Florida to its claims, Sprint argues KMC is falsely alleging that a direct relationship exists between Sprint-Florida, Incorporated and Sprint LP, which is an entity wholly separate from Sprint-Florida, and is attempting to invoke a logical nexus for its Counterclaim based on unreliable and unrelated facts and conclusions.

2. KMC

Citing Rule 28-106.203, Florida Administrative Code, KMC argues that there is no defined limitation on the time in which an Answer and Counterclaim can be filed. KMC further asserts that there is no other applicable rule restricting KMC's ability to file an Answer, and emphasizes that the Commission has, in cases such as Docket No. 031125-TP, allowed other companies to file counterclaims well after the 20 days that Sprint argues is applicable.

KMC also argues that it does, in fact, have a reason for its delay. KMC contends that, similar to BellSouth's situation in Docket No. 031125-TP, it only discovered the Sprint L.P.'s evasion of access charges through its own investigation of the allegations raised in Sprint-Florida's complaint. KMC adds that there was no other motivation for it to investigate Sprint call routing and billing records other than to defend against Sprint-Florida's complaint.

KMC contends that Sprint's Motion discounts the complexity of this issue and the interrelation of the questions presented. Furthermore, KMC argues that Sprint is simply attempting to avoid Commission scrutiny of its own behavior in seeking to have KMC's Counterclaim removed from consideration in this proceeding.

In conclusion, KMC argues that it filed its Counterclaim in as timely a manner as possible given the circumstances, that the issues raised therein are directly and integrally related to the issues in Sprint's complaint against KMC, and that retaining the Counterclaim issues in this case will not unduly prejudice Sprint.

B. Motion to Dismiss Counterclaim

1. Sprint

Sprint argues first that the Counterclaim should be dismissed, because the allegations therein are against Sprint LP, a long distance subsidiary of Sprint Corporation, Sprint-Florida's parent company. Sprint-Florida emphasizes that Sprint LP and Sprint-Florida are entirely separate entities that operate independently, offer different services in Florida, under different regulatory structures. Thus, Sprint argues that under Rule 1.170 of the Florida Rules of Civil Procedure and *Smith v. Whispering Pine Village*, 656 So.2d 623 (Fla. 5th DCA 1995), the Counterclaim should be dismissed, because it is directed to a nonparty, rather than the *opposing* party.

Furthermore, Sprint argues that the allegations in the counterclaim do not arise out of the same transactions or even the same legal requirements that gave rise to Sprint's complaint against KMC. Sprint emphasizes that it is seeking relief against KMC for violation of the provisions of Section 364.16(3), Florida Statutes, which is inapplicable to IXCs, such as Sprint LP. Sprint also notes that KMC does not have an interconnection agreement with Sprint LP as it does with Sprint-Florida, Incorporated. Thus, Sprint argues that the bases for the allegations in the Complaint and the Counterclaim are entirely different. Sprint adds that KMC's allegations against Sprint LP involve termination of traffic outside Sprint-Florida's service area which, by implication, could involve other CLECs or ILECs, who are not currently parties in this case.

In addition, Sprint argues that KMC's Counterclaims or a portion of the Counterclaims, should be dismissed for lack of subject matter jurisdiction as it relates to the allegation in Count III of the Counterclaims. Count III alleges Sprint violated a Confidential Settlement and Release Agreement executed by the parties in resolution of various reciprocal compensation disputes in various states. Sprint asserts this Commission has recognized it has no general authority to enforce contracts aside from interconnection agreements and amendments to those agreements.⁴ Since KMC does not argue in its Counterclaim that Sprint violated any provision of any interconnection agreement or amendment thereto, which was filed and approved by the Commission, Sprint argues this Commission lacks subject matter jurisdiction to resolve any violation KMC alleges under the contractual Confidential Settlement and Release Agreement executed between the parties.

Finally, Sprint argues that KMC's Counterclaim should be dismissed because it fails to state a cause of action and fails to comply with Rule 28-206.201, F.A.C.⁵ Sprint argues that KMC has failed to identify any provision in any interconnection agreement that has been violated by Sprint-Florida or Sprint LP, or to identify any statute or rule that has been violated. Sprint also contends that KMC's allegations are based entirely on speculation. Sprint argues KMC has not only failed to identify a specific entity that may be responsible for the alleged unlawful traffic termination, KMC does not provide any information on such traffic relating to timeframe, specific location, or specific traffic to support its claim.

⁴ Sprint references Docket 031125-TP, Order No. PSC-04-0423-FOF-TP, issued April 6, 2004.

⁵ Rule 28-206.201, F.A.C. set forth requirements for "Initiation of Proceeding" before an Agency.

2. KMC

KMC argues Sprint's Motion to Dismiss KMC's Counterclaim should be denied. KMC argues in its Response that its Counterclaim is not defective for its joinder of Sprint's IXC affiliate, Sprint LP. KMC claims that Sprint LP is subject to Section 364.16(3)(a) by virtue of the fact that Sprint-Florida and Sprint LP share the same corporate parent, the Sprint Corporation. Also, KMC states the fact that Sprint and Sprint LP both hold certificates of public convenience and necessities with the Commission, bearing identical addresses and websites, should be considered compelling for purpose of KMC's Counterclaims. KMC further asserts that both Sprint-Florida and Sprint LP were involved in routing converted toll traffic over local interconnection trunks in Tallahassee and Fort Myers without paying KMC appropriate access charges. Finally, KMC alleges it is appropriate to join Sprint LP under Rule 28-106.109, F.A.C., because a determination of KMC's rights in this proceeding is intertwined with determining what role Sprint LP played with Sprint in routing the toll traffic.⁶

KMC claims that it has asserted in its Counterclaim factual and legal issues that are similar to those raised in Sprint's Complaint. KMC states the factual issues of "how alleged IXC traffic is routed between various carriers and types of carriers, and legal issues of when access charges are triggered and to whom they are payable" are similar and possibly indistinguishable between Sprint's Complaint and KMC's Counterclaims. Additionally, KMC argues that its claims arise from the same transaction or factual circumstances upon which Sprint's Complaint is based.

KMC asserts that this Commission does have jurisdiction to consider whether a breach occurred under the Confidential Settlement and Release Agreement executed between KMC and Sprint. KMC claims the Agreement is "integral to a complete review and interpretation of the reciprocal compensation provisions of the interconnection agreements" because it forms the basis of one of the interconnection agreements KMC adopted.

KMC argues that its Counterclaims do state a cause of action and comply with Rule 28-206.201, F.A.C. KMC contends the Counterclaims clearly allege that Sprint-Florida knowingly misrouted intrastate interexchange traffic over local interconnection trunks in violation of Florida law as well as the parties' interconnection and settlement agreements. KMC claims Rule 28-206.201, F.A.C., only applies to documents filed to initiate a proceeding. KMC states an Answer, Affirmative Defenses and Counterclaims, by definition, do not "initiate a proceeding."

Finally, KMC adds that "inclusion of its Counterclaim issues may necessitate a delay, but any such delay does not rise to the level of "prejudice" to Sprint."

C. Motion to Bifurcate

1. Sprint

In the alternative, Sprint requests that KMC's Counterclaims be bifurcated if this Commission does not grant Sprint's Motion to Dismiss. Sprint cites Rule 1.270 of the Florida

⁶ Rule 28-106.109, F.A.C. provides for "notice to interest parties."

Rules of Civil Procedures and Rule 28-106.211, F.A.C., as authority for bifurcation in an administrative proceeding if doing so would promote fairness, and avoid prejudice and delay. Sprint argues that to allow KMC's Counterclaims, which are untimely, poorly pled, and unrelated to Sprint's Complaint, would prejudice Sprint and delay resolution to its Complaint.

2. KMC

KMC reiterates its argument that similarity of law, fact and identical parties exist between the parties' claims. Therefore, KMC contends that "simultaneous consideration and resolution" should be undertaken by the Commission based on both KMC's Counterclaim and Sprint's Complaint.

II. Analysis and Recommendation

At the outset, staff agrees with KMC that there is no definitive provision establishing the time for filing an Answer in Commission proceedings, and the time for filing an Answer was not otherwise established for this proceeding in an Order. As such, KMC's filing, while notably late in the proceeding, is not in direct violation of any rule or Order of the Commission. While Sprint states that the Commission has acknowledged the 20-day response period applicable in civil proceedings, that time period is simply not an enforceable rule of the Commission.⁷ Thus, the Motion to Strike should not be granted based solely on the fact that the Answer was filed more than 20 days after the Complaint, or more than 10 days after the Order on the Motion to Dismiss.

It is, however, fully within the Commission's authority to strike a pleading that is unduly prejudicial, has been filed simply for purposes of harassment and delay, or is otherwise a sham pleading. See Section 120.569(2)(e) and (g), Florida Statutes; Rules 28-106.211 and 28-106.108, Florida Administrative Code; and Rules 1.140(f) and 1.150(a), Florida Rules of Civil Procedure. At the outset, staff recommends that KMC's Answer, Affirmative Defenses, and Counterclaim do not appear to constitute a "sham" pleading, nor do they appear to have been filed solely for purposes of harassment or delay. Again, while filed notably late in the proceeding, KMC's assertions that it was unable to file earlier, because it only recently discovered the situation are plausible and not dissimilar from the situation in which BellSouth was allowed to file a late counterclaim in Docket No. 031125-TP.

The Commission should then consider: (1) the impacts on the case schedule; (2) the alleged undue prejudice imposed upon Sprint and its ability to prepare its case; (3) whether the issues are, in fact, integrally related; and (3) the administrative efficiencies associated with either striking the Answer, Affirmative Defenses, and Counterclaim or consolidating the issues in this proceeding. Staff notes, that should it so choose, the Commission could strike any portion of KMC's pleading or all of the pleading. Thus, for instance, the Commission could strike the Counterclaims, but allow the Answer and Affirmative Defenses to be retained, which is the course of action staff recommends in this instance.

⁷ To the contrary, in 1998, the Commission sought a waiver from the Uniform Rules to retain Rule 25-22.037(1), F.A.C., which provided a time frame for filing Answers, and that request was denied.

Staff acknowledges that there would certainly be administrative efficiencies associated with retaining KMC's Counterclaims in this proceeding. However, this case is significantly advanced in the schedule. The complaint in this matter was filed September 24, 2004. The hearing in this matter is currently scheduled for July 12, 2005.⁸ The Direct Testimony date was February 28, 2005, and the Rebuttal Testimony date is set for May 10, 2005. Although supplemental testimony could possibly be included to remedy some of the concerns raised, the timing would likely preclude any meaningful discovery on that supplemental testimony.

Furthermore, the allegations raised by KMC in its Complaint, while pertinent to a sister company of Sprint-Florida, are not directly related to Sprint-Florida. Thus, KMC's allegations do not constitute a true counterclaim. Since the allegations do not appear to arise out of the same transactions and allegations as those presented in the Complaint, albeit similar alleged facts and arguments, it is also not a proper cross-claim. It appears, instead, that KMC has a separate, but similar, complaint. As noted by both KMC and Sprint, even if the "Counterclaim" is considered separate, it is certainly within the Commission's authority under Rule 28-106.109, Florida Administrative Code, to consolidate the complaints for hearing for purposes of administrative efficiency. In this instance, however, staff does not believe that it will promote administrative efficiency to consolidate the matter. Instead, the Counterclaim should be stricken with KMC being allowed to refile its allegations as a separate complaint, subject to any jurisdictional and legal sufficiency arguments that might be made. Staff notes that while bifurcation would be another option should the Commission wish to retain the Counterclaim, but address it separately, staff nevertheless views this as a separate matter that can, and should be addressed separately.

If the Commission approves staff's recommendation, the Commission need not reach the jurisdictional and sufficiency questions raised in the context of Sprint's request for dismissal of the Counterclaim.⁹ Looking solely at Sprint's arguments that the "Counterclaim" is not truly a counterclaim as contemplated by the Florida Rules of Civil Procedure, staff believes that striking the Counterclaim is the more procedurally proper action to take, as opposed to dismissal.¹⁰

For all the reasons cited above, staff recommends that Sprint's Motion to Strike KMC's Answer, Affirmative Defenses, and Counterclaim, and Motion to Dismiss the Counterclaims or, in the alternative, Motion to Bifurcate the Counterclaim, be granted, in part, to the extent that the Counterclaim should be stricken.

⁸ Originally, this matter was set for hearing on May 18, 2005, but due to initial concerns raised and subsequent motions filed regarding KMC's Answer, Affirmative Defenses, and Counterclaim, the hearing was postponed.

⁹ Staff notes, however, that the Florida Supreme Court has recognized that the PSC is without authority to resolve private contract issues involving a telecommunications company. Teleco Communications Company v. Clark, 695 So. 2d 304 (Fla. 1997).

¹⁰ 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).

Issue 3: Should KMC's Motion for Audit be granted?

Recommendation: If the Commission approves staff's recommendation in Issue 2, staff believes that KMC's Motion for Audit is rendered moot; therefore, no vote would be required.

If the Commission denies staff's recommendation in Issue 2, staff recommends that the Motion for Audit be denied. **(B. Keating, Fordham)**

Staff Analysis:

KMC argues that this Commission should conduct an audit to investigate and determine if Sprint and Sprint LP have engaged in unlawful conduct to avoid payment of access charges due KMC. KMC contends it has experienced a reduction in the number of minutes in its terminating toll traffic in the Clearwater, Daytona Beach, Ft. Myers, Melbourne, Pensacola, Sarasota, and Tallahassee markets. KMC states it has reason to believe, based on its analysis, that Sprint LP deliberately converted the termination of toll traffic in these areas to avoid the payment of access charges to KMC as the terminating carrier.

KMC notes that numerous provisions in the parties' interconnection agreements allow either party to request an audit to determine their rights and obligations. In this instance, KMC believes that such an audit is necessary and the most fair and expeditious means of determining what has actually occurred. KMC contends that the Commission's enabling statutes allow it to undertake this course of action on its own, apparently implying that the Commission can also do so at a party's request. KMC further argues that in this case, the Commission should conduct the audit in order to fully fulfill its role as fact-finder in this proceeding.

Sprint asserts the Commission should deny KMC's Motion for an Audit because the Motion requests a "broad-based and ill-defined" audit. Sprint characterizes the request as a request for a "fishing expedition" to help KMC uncover evidence that might help it with its Counterclaims against Sprint, noting that KMC's Motion calls for the Commission to audit Sprint LP's termination of interexchange traffic to KMC in several local calling areas within the state, including but not limited to Sprint-Florida territory. Sprint adds that the audit would include examining records of unidentified tandem service providers in other service areas as well. Sprint argues that while it has offered factual support for its claims against KMC, KMC is, essentially, asking the Commission to find the support for KMC's claims against Sprint.

Sprint also argues that the parties' interconnection agreements and tariffs do not allow either party to request an audit; rather, the audits are to be conducted by the requesting party with the expense being shared by the parties, or born by the requesting party. Sprint contends that the agreements do not contemplate that the parties would be able to ask the Commission to conduct the audit. Sprint adds that it can find nothing in KMC's tariffs that would authorize the Commission to conduct an audit.

Sprint disagrees with KMC's contention that the Commission's authorizing statutes would allow it to conduct such an audit. Sprint contends that the Commission no longer has full access to the books and records of an IXC, although it arguably can obtain information necessary to resolve a complaint through the discovery process. Sprint acknowledges that the Commission

has in past cases undertaken audits in the context of billing disputes, but emphasizes that in those cases, the Commission initiated the audit on its own to reconcile the parties' positions. Here, Sprint contends that the audit is merely to find support for KMC's allegations.

Having considered the arguments of both parties, staff recommends that the Commission deny KMC's Motion for Audit. While staff recognizes that KMC's request is certainly innovative, staff is concerned that granting such a request would be inappropriate and could present an appearance of bias in the case. In particular, staff emphasizes that this matter is before the Commission in the context of a complaint by Sprint against KMC. In this context, the Commission serves in the role of the fact-finder and ultimate decision-maker in the case. It is the parties' responsibility to conduct discovery, submit facts into evidence, and, thereafter, make their best case, whereupon the Commission will decide who has carried the burden of proof. Unlike a compliance proceeding in which Commission staff serves in a prosecutorial function, this proceeding is between these two parties. Inserting the Commission into the process would only serve to blur the lines between the parties, as litigants before the Commission, and the Commission, as decision-maker in the case. It could also promote an appearance (albeit false) of bias if the decision-maker were to pursue an investigatory role at the behest of one party and over the objections of the other. Thus, as a policy matter, staff recommends against granting the Motion.¹¹

Staff recognizes that, if the Motion is granted, this would not be the first time in a complaint proceeding where staff has been involved in extensive discovery or even an audit; however, staff emphasizes that in other instances in which extensive discovery or an audit has been conducted in a complaint or similar proceeding, the investigation has been done at staff's own behest out of concern that the record as developed by the parties is simply inadequate. Such is not the case here, as the audit would be conducted in response to one party's request. Furthermore, while staff is conducting discovery in this case, staff does not believe that the record at this point requires an audit in order for the Commission to have sufficient evidence upon which to make a decision. As such, staff believes that this situation can and should be differentiated from other situations.¹²

Staff believes that the Commission has the statutory authority under Sections 364.16(3)(b) and 350.117(2), Florida Statutes, to conduct the type of audit requested by KMC if it so chooses, and because the parties' interconnection agreement does not define or limit who the auditor may be, the agreement itself does not appear to preclude the Commission or its staff. Nevertheless, staff emphasizes that the Commission is clearly not required to take on such an investigatory role in this context and recommends that the Commission should decline to perform the audit in this instance for the reasons set forth above. Declining to undertake the role of auditor would not impair the Commission's ability to fully process and resolve the complaint,

¹¹ Staff also has concerns that if an audit were performed at KMC's request in this case, the Commission could find itself on the proverbial "slippery slope," where requests for similar audit become the norm, rather than a novelty. The time and regulatory expense associated with such audits, particularly if conducted on a regular basis would, in staff's opinion, far outweigh the benefits incurred to the Commission in its decision-making role and to state regulatory policy as a whole.

¹² Staff also notes that this request comes at a time when the case is well-advanced with a hearing currently scheduled for July 12, 2005. It is likely that an audit would delay the proceedings in this matter.

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because Section 364.16(3)(b), Florida Statutes, clearly provides that the Commission shall have access to any relevant customer records and account information necessary to resolve the complaint. Staff believes that any such information can be obtained, as necessary, through the ordinary course of discovery in the Docket.

Staff further notes that nothing precludes the parties from engaging another independent auditor in accordance with the terms of the parties' interconnection agreement.

Issue 4: Should this Docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issues 2 and 3, this docket should remain open pending resolution of Sprint's Complaint. **(B. Keating, Fordham)**

Staff Analysis: If the Commission approves staff's recommendation in Issues 2 and 3, this docket should remain open pending resolution of Sprint's Complaint.