

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 17, 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 (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:** 11/29/2005 – Regular Agenda – Post-hearing Decision – Participation is Limited to Commissioners and Staff

**COMMISSIONERS ASSIGNED:** Baez, Deason, Bradley

**PREHEARING OFFICER:** Bradley

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\041144\REC.DOC

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**Table of Contents**

<u>Issue</u>	<u>Description</u>	<u>Page</u>
	Abbreviations and Acronyms .....	4
	Case Background .....	6
	Burden of Proof.....	7
	Overview .....	9
1	What is the Florida Public Service Commission's jurisdiction to address all or part of this complaint? .....	13
2	Are KMC Data LLC and KMC Telecom V, Inc. properly included as parties to this complaint?.....	19
3	Under the Interconnection Agreements with KMC or Sprint's tariffs, is Sprint required to conduct an audit as a condition precedent to bringing its claims against KMC or for KMC to be found liable?.....	22
4	What is the appropriate method to determine the jurisdictional nature and compensation of traffic? .....	25
5	Did KMC knowingly deliver interexchange traffic to Sprint over local interconnection trunks in violation of Section 364.16(3)(a), Florida Statutes? If yes, what is the appropriate compensation and amount, if any, due to Sprint for such traffic?.....	29
6	Was any of the traffic that is the subject of Sprint's complaint enhanced services traffic? If yes, how is enhanced services traffic delivered to Sprint from KMC to be treated under the Interconnection Agreements, Sprint's tariffs, and applicable law? .....	40
7	Was KMC required to pay Sprint its tariffed access charges for the traffic that is the subject of this complaint? If yes, what is the appropriate amount, if any, due to Sprint for such traffic?.....	51
8	Did KMC deliver interexchange traffic to Sprint over a local interconnection trunks in violation of the terms of the Interconnection Agreements with Sprint? If yes, what is the appropriate compensation and amount, if any, due to Sprint for such traffic?.....	56
9	To what extent, if any, is Sprint's backbilling limited by its Interconnection Agreements with KMC, Sprint's tariffs, or other applicable law? .....	66
10	Did Sprint overpay reciprocal compensation to KMC? If yes, what is the appropriate refund, if any, due to Sprint?.....	68

11	If the Commission determines that KMC owes Sprint compensation for any traffic delivered by KMC to Sprint that is the subject of this complaint or refunds for overpayment of reciprocal compensation, what are the appropriate payment arrangements? .....	71
12	Should this docket be closed? .....	74

**Abbreviations and Acronyms**

Act	Telecommunications Act of 1996
AMA	Automatic Message Accounting
BR	Brief
CDR	Call Detail Record
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CN	Charge Number
CP	Called Party
CPE	Customer Premises Equipment
CPN	Calling Party Number
DSL	Digital Subscriber Line
ESP	Enhanced Services Provider
EXH	Exhibit
FCC	Federal Communications Commission
FDN	Florida Digital Network, Inc. d/b/a FDN Communications
FPSC	Florida Public Service Commission
ICA	Interconnection Agreement
IP	Internet Protocol
ISP	Internet Service Provider
IXC	Interexchange Company
JIP	Jurisdiction Information Parameter
KMC	KMC Telecom V, Inc., KMC Telecom III, LLC, KMC Data LLC
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
LNP	Local Number Portability
MCI	MCIMetro Access Transmission Services, LLC
MOU	Minute of Use
MSA	Metropolitan Statistical Area
NPA	Numbering Plan Area
NXX	Central office code or prefix
OCN	Operating Company Number
PBX	Private Branch Exchange
PIU	Percentage of Interstate Usage
PLU	Percentage of Local Usage
POTS	Plain Old Telephone Service

Docket No. 041144-TP  
Date: November 17, 2005

PRI	Primary Rate Interface
PSTN	Public Switched Telephone Network
Sprint	Sprint Florida, Incorporated
SS7	Signaling System 7
TR	Transcript
VoIP	Voice over Internet Protocol

### **Case Background**

On September 24, 2004, 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 charges. Sprint also asserts that this misrouting of access traffic has resulted in an overpayment of reciprocal compensation 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.

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.

On February 28, 2005, KMC filed its Answer, Affirmative Defenses and Counterclaims. On February 28<sup>th</sup> the Parties also filed direct testimony in this docket. 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.

The schedule for this docket was modified by Order No. PSC-05-0402-PCO-TP, issued April 18, 2005. On May 10, 2005, rebuttal testimony was filed in this docket.

On May 20, 2005, Order No. PSC-05-0558-PCO-TP was issued striking KMC's Counterclaim with leave to refile as a separate complaint which rendered KMC's Motion for Audit moot.

The hearing in this matter was conducted on July 12, 2005. The parties filed briefs on August 16, 2005, and reply briefs on September 7, 2005. Thereafter, the parties met for one last effort at resolving their dispute between themselves. KMC then filed a Motion to Dismiss on September 16, 2005. Our staff was informed on September 19, 2005, that the parties' negotiations were not successful. On September 23, 2005, Sprint filed its Response in Opposition to KMC's Motion to Dismiss. On October 4, 2005, KMC filed an Amended Motion to Dismiss, and Sprint responded on October 11, 2005. On November 1, 2005, Order No. PSC-05-1065-FOF-TP was issued denying KMC's Motion to Dismiss and its alternative request for a stay of the proceedings pending the outcome of matters before the FCC.

### **Burden of Proof**

Because this case presents some unique questions regarding burden of proof, staff includes this brief analysis of the burden of proof in a complaint proceeding. As a general matter, administrative agencies, such as this Commission, measure proof by the preponderance of the evidence, while the reviewing court will review the agency's order under the competent substantial evidence standard. Fla. Dept. of Health and Rehabilitative Service v. Career Service Comm., 289 So. 2d 412 (Fla. 4<sup>th</sup> DCA 1974). A conclusive showing of the evidence is not required in administrative proceedings. Id.

Burden of proof can have different meanings depending upon the posture of the case at issue. The Florida First District Court of Appeal has succinctly explained this dichotomy in Florida Dept. of Transportation v. J.W.C. Company,

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 the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

396 So. 2d 778, 787 (Fla. 1<sup>st</sup> DCA 1981). More specifically, ". . . the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Id. at 788; *citing* Balino v. Dept. of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1<sup>st</sup> DCA 1977). See also Withers v. Metropolitan Dade County, 290 So. 2d 573 (Fla. 3<sup>rd</sup> DCA 1974). While the true burden of proof does not shift, Florida courts have explained that the burden of going forward with the case does shift as evidence is produced. As explained by the Florida Supreme Court,

Strictly speaking, the burden of proof does not shift during the course of the trial. It remains with the party on whom it is cast by law. Nevertheless, the phrase 'burden of proof' is sometimes used in a secondary sense to designate the obligation resting on a party to meet with evidence a prima facie case presented against him. It has been said, for example, that if an affirmative defense or plea is raised in the case, the 'burden of proof shifts' to the defendant after the plaintiff has proved his allegations by a fair preponderance of the evidence. But modern authorities use the term 'burden of producing evidence' or 'burden of going forward with the evidence' to express this concept; and when used in this sense, the burden may shift several times in one case.

In re: Estate of Ziy v. Bowen, 223 So. 2d 42, fn 2 (Fla. 1969); *citing* 13 Fla. Jur. Evidence § 59. Thus, in a complaint, a prima facie case may be sufficient to survive a motion to dismiss

for failure to state a cause of action and may shift the burden of going forward to the defendant. Nevertheless, in order to win, the preponderance of the evidence must be in the complainant's favor, and it remains the complainant's burden throughout the case to produce the evidence necessary to meet that burden.

Of particular concern in this case is the burden of proof associated with affirmative defenses, because KMC has raised as an affirmative defense the assertion that the traffic at issue in this proceeding is traffic that is exempt from access charges regardless of the physical endpoints of the call. Generally, an affirmative defense, such as this, can also be viewed as an "avoidance" of the allegations against the defendant. Essentially, the defendant who asserts an affirmative defense is acknowledging the potential veracity of the allegations being made, but is saying that for some legal or factual reason, the consequences associated with the allegations do not apply to the defendant's conduct. The defendant carries the burden of proving this "affirmative" aspect of the defense by a preponderance of the evidence. See Ferry-Morse Seed Company v. Hitchcock Packing, 426 So. 2d 958 (Fla. 1983); Mandell v. Fortenberry, 290 So. 2d 3 (Fla. 1974); and Smith v. Town of Bithlo, 344 So. 2d 1288 (Fla. 4<sup>th</sup> DCA 1977). The assertion of an affirmative defense does not, however, alter the fact that the complainant carries the burden of proof to prove his case by a preponderance of the evidence.



### Overview

The focus of Sprint's complaint is its allegation that KMC wrongfully terminated toll traffic on Sprint's network in violation of Florida Statutes, the parties' interconnection agreements, and Sprint's tariffs to avoid payment of access charges that otherwise would be due to Sprint. More specifically, Sprint argues that KMC knowingly delivered interexchange traffic over its local interconnection trunks with Sprint. KMC acknowledges that the traffic in question does not originate and terminate in the same local calling area, but argues that this fact is irrelevant because the traffic at issue is enhanced services traffic. According to KMC, enhanced services traffic is not subject to access charges.

Based on the parties' agreements, staff believes that the initial burden to go forward with the complaint is met by Sprint if it demonstrates by a preponderance of the evidence that the traffic at issue is not local.<sup>1</sup> While KMC argues that it is also Sprint's burden to demonstrate that the traffic is not exempt enhanced services traffic, staff believes that the provisions of the interconnection agreements, when read in conjunction with the statutory provisions and prevailing case law applicable to affirmative defenses, require that KMC prove that the traffic is enhanced. Thus, it then falls to KMC to demonstrate by a preponderance of the evidence that the traffic is not subject to access charges because the traffic is exempt. In accordance with the parties' interconnection agreements, which incorporate by reference Commission Order No. PSC-96-1231-FOF-TP, KMC can meet its burden simply by providing evidence that the calls at issue are actually local calls.<sup>2</sup> In accordance with Section 120.57 (1)(c), however, KMC cannot meet its burden through the proffer of hearsay evidence alone. In an administrative proceeding, hearsay evidence may only be used to supplement or explain other evidence, and is not sufficient on its own to support a finding.

There are twelve issues for the Commission to decide regarding this complaint. Staff has provided a summary of each issue and its recommendation below. Where appropriate staff has combined discussion of similar issues.

Issues 1, 2, and 3 are legal/threshold matters. Issue 1 considers this Commission's jurisdiction to address all or part of Sprint's complaint. While KMC argues the majority of the traffic in question falls under the jurisdiction of the FCC, staff believes that consistent with the Commission's prior decision in Order No. PSC-05-1065-FOF-TP, issued in this docket, and Section 364.16(3)(b), Florida Statutes, the Commission has jurisdiction in this matter and should address the allegations presented in Sprint's complaint.

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<sup>1</sup> Section 364.16(3)(a), Florida Statutes, provides, in pertinent part, that "No local exchange telecommunications company or competitive local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply. . . ."

<sup>2</sup> "When it cannot be determined whether a call is local or toll, the local exchange provider originating the call shall be assessed terminating switched access charges for that call unless the local exchange provider originating the call can provide evidence that the call is actually a local call." Order No. PSC-96-1263-FOF-TP at p. 23.

Issue 2 explores whether or not KMC Data LLC and KMC Telecom V, Inc. are properly included as parties to the complaint. Sprint argues that these entities are properly included because they are parties to applicable interconnection agreements with Sprint and have engaged in specific actions related to this complaint. On the other hand, KMC argues that these parties had no customers and exchanged no traffic with Sprint in the relevant markets. Moreover, KMC Data's interconnection agreement with Sprint, standing alone, is not enough to make it a defendant. Staff agrees that KMC Data LLC should be dismissed as a defendant because there is no nexus between it and the circumstances giving rise to this case. However, KMC V should be retained as a joint defendant because KMC V is a party to the applicable ICA, it owned the charge party numbers at issue in this case, and the local interconnection trunks over which traffic was delivered to Sprint were apparently ordered in KMC V's name. Staff believes that nexus to be sufficient to justify the inclusion of KMC V as a defendant in this Complaint.

Issue 3 asks if Sprint is required to conduct an audit before bringing a claim against KMC or in order for KMC to be found liable. Like Issue 1, this issue has already been addressed in part by this Commission when it considered KMC's October 14, 2004 Motion to Dismiss Sprint's Complaint. In Order No. PSC- 04-1204-FOF-TP issued in this docket, the Commission concluded that ". . . the alleged failure to have performed an audit is not a proper basis to dismiss the complaint." Moreover, in its brief KMC conceded that an audit was not necessary prior to the complaint being filed and specifically refers to the Commission's prior decision on the matter. As such, staff recommends that the Commission reaffirm its decision on this matter that an audit is not required prior to this complaint being addressed by the Commission. However, in the prior decision the Commission was not asked to address the issue of whether or not an audit was a condition precedent for KMC to be found liable. Staff believes that neither the parties' ICAs nor Sprint's tariffs require an audit before a determination can be made whether KMC is liable. Staff notes while an audit is not a prerequisite to finding liability, an audit may be necessary to determine the amount of liability.

Issue 4 addresses the appropriate method to determine the jurisdictional nature and compensation for traffic. Staff believes that unless otherwise specified in the applicable interconnection agreements, the jurisdiction and compensation of a call should be based on its end points. Notwithstanding this conclusion, staff believes that enhanced services traffic may be exempt from access charges. Using end points to determine the jurisdiction of a call is a well established practice. Moreover, this recommendation is consistent with the Commission's decision in its Investigation Into Appropriate Methods To Compensate Carriers For Exchange Of Traffic Subject To Section 251 Of The Telecommunications Act Of 1996, Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002 (Reciprocal Compensation Order). In that Order the Commission stated "we believe that the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call."

In Issue 5 the Commission is asked to determine whether KMC *knowingly* delivered interexchange traffic to Sprint over local interconnection trunks in violation of Florida Statutes and if so, what is the appropriate compensation and amount owed to Sprint. Sprint argues that KMC knowingly participated in access charge avoidance based on three points: 1) KMC sold non-local circuits to PointOne (a/k/a Unipoint) and inserted a non-working telephone number in

the charge party field of the call records, which masked the jurisdiction of the traffic; 2) an email from KMC witness Menier to PointOne indicated knowing participation; and 3) the actions of KMC upon receipt of the bills from Sprint and upon the issuance of the AT&T Declaratory Order by the FCC showed that KMC knew the traffic in question was subject to access charges. KMC argues that it sold PointOne local PRIs as required by the FCC; therefore, the traffic in question was properly treated as local in nature. After reviewing the data provided, including emails between KMC and PointOne, staff believes that some of the actions of KMC appear suspect, but at the same time, these questionable actions also can be interpreted in a way that supports KMC's position. Thus, staff does not believe that the record conclusively shows that KMC *knowingly* violated Section 364.16(3)(a), Florida Statutes. As such, there is no need to determine the appropriate compensation and amount owed to Sprint based on this issue.

The issue of whether or not any of the traffic that is the subject of Sprint's complaint is enhanced services traffic and how enhanced services traffic should be treated is discussed at length in Issue 6. In trying to resolve this issue, staff reviewed Sprint's test calls and SS7 records and KMC's reliance on its customer's (PointOne) self-certification that it was an enhanced service provider. After analyzing the evidence in the record, staff believes it is inconclusive as to whether the subject traffic is enhanced services traffic. Staff notes that by its own admission Sprint stated it generally cannot distinguish enhanced services traffic from voice traffic.

Issues 7 and 8 both address situations in which access charges may be owed to Sprint from KMC. In Issue 7 Sprint argues that the traffic in question is interexchange traffic, which requires KMC to pay Sprint access charges for termination of the traffic under the terms of the parties' ICAs. KMC asserts that the traffic in question is enhanced, and therefore access charges do not apply. KMC further asserts that if the Commission determines that the disputed traffic was not enhanced traffic, access charges would be due from PointOne or IXCs, not KMC. As noted earlier in this Overview, staff believes that the provisions of the interconnection agreements, when read in conjunction with the statutory provision and prevailing case law applicable to affirmative defenses, require that KMC prove that the traffic is enhanced traffic and not subject to access charges. Staff does not believe KMC has met this burden. Therefore, staff recommends that the Commission find that KMC is required to pay Sprint its tariffed access charges for the traffic in question. The specific amount owed for this traffic is addressed in Issue 8. Staff's recommendation in Issue 8 also turns on the terms included in the parties' interconnection agreements. Staff believes that KMC delivered interexchange traffic to Sprint over local interconnection trunks in violation of its ICAs with Sprint. Staff recommends that the amounts owed should be determined through an audit or accounting, subject to the adjustments noted by staff.

In Issue 9 the Commission must determine to what extent, if any, Sprint is limited by the parties' ICAs, its tariffs, or other applicable law in backbilling KMC. Staff believes that Sprint's backbilling is only limited by Section 95.11(2), Florida Statutes, which provides for a five-year limitation period for actions based on contract violations. Staff's recommendation is also consistent with the Commission's prior decision in Docket 020960-TP, Order No. 03-1139-FOF-TP.

Issue 10 addresses whether or not Sprint overpaid reciprocal compensation to KMC and if so, what is the appropriate refund due to Sprint. Consistent with staff's conclusions in prior issues, staff believes KMC sent non-local access minutes to Sprint over local facilities, thereby inflating the assumed amount of local traffic minutes sent by Sprint to KMC, which caused Sprint to overpay reciprocal compensation to KMC. The specific amount of overpayment should be determined based on an audit. Responsibility for payment of the cost of the audit should be handled in the same manner as recommended in Issue 8.

Issue 11 discusses what payment arrangements are appropriate if the Commission determines that KMC owes Sprint any monies. If the Commission approves staff's recommendations in Issues 8 and 10, audits would need to be performed before the specific amount of monies owed can be determined. Therefore, as discussed in Issue 8, the audit reports should be submitted to the Commission when complete for a determination of further steps required, specifically the timeline for payment of monies owed.

Last, as recommended in Issue 12, this docket should remain open until the audits are complete, reviewed by this Commission, and a timeline for payment established.

### **Discussion of Issues**

**Issue 1:** What is the Florida Public Service Commission's jurisdiction to address all or part of this complaint?

**Recommendation:** The Commission should affirm that it has jurisdiction to investigate and address the allegations presented in Sprint's complaint pursuant to Section 364.16 (3)(b), Florida Statutes, consistent with Order No. PSC-05-1065-FOF-TP. **(B. Keating, L. Fordham)**

### **Position of the Parties**

**Sprint:** The Commission has jurisdiction to address Sprint's Complaint pursuant to sections 152, 251 and 252 of the Telecommunications Act of 1996 and pursuant to sections 364.01, 364.16, 364.162 and 364.163, Florida Statutes.

**KMC:** The overwhelming majority of the traffic in question in this case falls under the jurisdiction of the FCC, which has asserted sole jurisdiction over the proper regulatory treatment - including the applicability of access charges - of IP telephony traffic.

### **Staff Analysis:**

## **PARTIES' ARGUMENTS**

### **Sprint**

Sprint argues that KMC has violated Florida law, Sprint's tariffs, and the parties' interconnection agreements by knowingly delivering interexchange traffic to Sprint over local trunks to avoid access charges. Sprint argues not only that this is a specific violation of Section 364.16(3)(a), Florida Statutes, but also that the Commission clearly has jurisdiction to address the complaint as set forth in Section 364.16(3)(b), Florida Statutes, which states:

Any party with a substantial interest may petition the commission for an investigation of any suspected violation of paragraph (a). In the event any certificated local exchange service provider knowingly violates paragraph (a), the commission shall have jurisdiction to arbitrate bona fide complaints arising from the requirements of the subsection and shall, upon such complaint, have access to all relevant customer records and accounts of any telecommunications company.

(Sprint BR at 4 – 5)

In addition, Sprint contends that the Commission has jurisdiction to resolve complaints arising out of the parties' interconnection agreements pursuant to Sections 251 and 252 of the federal Telecommunications Act and Sections 364.16, 364.161, and 364.162, Florida Statutes. Furthermore, Sprint argues that the parties' interconnection agreements themselves, specifically Section 23 in each of them, provide that the Commission has jurisdiction to resolve disputes over the terms and conditions of the agreements. (Sprint BR at 6)

Finally, Sprint also alleges that KMC has violated Sprint's access tariffs by failing to pay the tariffed access rate. Sprint explains that 47 U.S.C. §201 and Section 364.163, Florida Statutes, delineate both the FCC's and the Commission's jurisdiction with regard to interstate and intrastate access charges, while case law holds that tariffs have the force and effect of law, and are enforceable by the Commission. *Citing Maddalena v. Southern Bell*, 382 So. 2d 1246 (Fla. 4<sup>th</sup> DCA 1980); and *In re: Complaint by Mr. Paul Leon and Mr. Joseph Olazabal against Florida Power and Light Company regarding tariffs for moving electric light poles*, Order No. PSC-98-1385-FOF-EI, in Docket No. 981216-EI. (Sprint BR at 6 – 7)

In response to KMC's allegations that the Commission does not have jurisdiction, because the traffic at issue is enhanced services traffic, and specifically, VoIP traffic, Sprint contends that whether the traffic is VoIP traffic or ESP traffic is yet to be determined. Even if it is VoIP traffic, Sprint argues that the FCC has not determined that all VoIP traffic is enhanced services traffic, but has, instead, stated that certain VoIP traffic is telecommunications traffic, subject to intercarrier compensation. (Sprint BR at 8; *citing* In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, FCC 04-97, April 21, 2004, at ¶ 19).

Sprint further asserts that under evidentiary rules, KMC bears the burden of demonstrating that the traffic at issue was, in fact, enhanced services traffic. Sprint notes that the Commission has also considered a related question of proof in Docket No. 950985-TP, wherein the Commission found, based upon Section 364.16(3), Florida Statutes, that “[w]e find that the company terminating the call should receive terminating switched access from the originating company unless the originating company can prove the call is local.” Order No. PSC-96-1231-FOF-TP, at p. 23. (Sprint Reply BR at 5)

Finally, Sprint contends that the FCC has indicated that VoIP traffic that uses the public switched network in the same manner as circuit switched traffic should be subject to the same intercarrier compensation.<sup>3</sup> Sprint notes that the Commission has also stated that access charges are due when VoIP traffic is terminated over the public switched network in the same manner as circuit switched traffic.<sup>4</sup> Furthermore, Sprint contends that the FCC has not preempted state commission jurisdiction over all aspects of VoIP traffic, as KMC contends. Rather, Sprint argues, the FCC only preempted states as to the application of so-called “legacy regulations” on Vonage-type services. Sprint emphasizes that the FCC specifically declined to determine: (1) whether a Vonage-type VoIP service is a telecommunications service or information service; and (2) what type of intercarrier compensation is appropriate. Sprint adds that regardless of these arguments, KMC has failed to submit any evidence that the traffic at issue is VoIP in the first place. (Sprint Reply BR at 13 – 14).

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<sup>3</sup> *Citing* In the Matter of Federal-State Joint Board, Report to Congress, CC Docket No. 96-45, released April 10, 1998 at ¶¶ 88 and 89; and In the Matter of IP-Enabled Services, FCC 04-28, released March 10, 2004, at ¶ 33.

<sup>4</sup> *Citing* Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc., Order No. PSC-00-1519-FOF-TP, issued August 22, 2000 at page 57.

KMC

KMC addresses this issue as a question of whether the Commission has authority to grant the relief requested by Sprint in this docket. KMC contends that it does not. (KMC BR at 4)

KMC contends that the traffic at issue is enhanced services traffic, more specifically IP telephony traffic, from one particular end use customer – PointOne. KMC argues that the FCC has determined that enhanced services traffic, such as IP telephony traffic, is interstate in nature; thus, the FCC is the final arbiter on any disputes regarding the appropriate treatment of such traffic, including intercarrier compensation. KMC emphasizes that, although the Commission approved the parties’ interconnection agreement, the parties exchanged the traffic pursuant to federal policies applicable to this traffic, which call for the traffic to be treated as if it were local in nature and not subject to access charges. (KMC BR at 4-5)

KMC contends that the FCC has recognized the limited role of state commissions with regard to this traffic, citing the FCC’s decision in *Petition for Declaratory Ruling That pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Serv.*, 19 FCC Rcd 3307, ¶¶ 17- 18 (2004), and Footnotes 47–68 of the FCC’s decision regarding Vonage’s request for a declaratory statement, 19 FCC Rcd 22404 (2004). KMC further maintains that the courts have also recognized the limited role of state commissions over IP-enabled telephony services.<sup>5</sup> KMC adds that the FCC currently has an open rulemaking proceeding to address the regulatory treatment of IP-enabled service offerings, which would include the PointOne services at issue here. KMC argues that until the FCC proceeding has concluded, the state commissions have no role in deciding the appropriate intercarrier compensation for this traffic. (KMC BR at 5 – 6)

In addition, KMC argues that the FCC has stated on numerous occasions that access charges do not apply to enhanced services.<sup>6</sup> KMC acknowledges that the FCC has upon one occasion decided that access charges are applicable to enhanced services - its decision regarding AT&T’s Petition for Declaratory Ruling regarding AT&T’s IP-enabled services. AT&T’s Petition for Declaratory Ruling that AT&T’s IP Telephony Services Are Exempt from Access Charges, 19 FCC Rcd 7457, 7466-68 at ¶¶ 14-15, 17 (2004). KMC asserts, however, that the FCC’s decision in that case was very limited. Specifically, KMC explains that the FCC found that access charges are due when Internet Protocol is used only for “transmission purposes for 1+ dialed interexchange calls, where there was no net protocol conversion, and where there were no enhanced features or functionalities enabled by the use of IP.” (KMC BR at 7) KMC argues that subsequent rulings by the FCC on similar questions indicate that the FCC intended its

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<sup>5</sup> Citing Vonage Holdings Corp. v. Minn. Publ. Utils. Comm’n, 290 F.Supp. 2d 993, 997, 1001-1002 (D. Minn. 2003), aff’d. (8<sup>th</sup> Cir. Dec. 22, 2004); and Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm’n, No. 04 Civ. 4306 (S.D.N.Y. July 16, 2004).

<sup>6</sup> Citing MTS and WATS Market Structure, 97 FCC RCD 2d 682, 715; Amendment of Part 69 of the Commission’s Rules Relating to Enhanced Serv. Providers, 3 FCC Rcd 2631 (1988); Access Charge Reform, 12 FCC RCD 15982, 16133 (1997); Developing a Unified Intercarrier Compensation Regime, 16 FCC RCD 9610, 9613 (2001); and Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501 (1998).

ruling on AT&T's IP Telephony services to be strictly limited to services that are identical to AT&T's service at issue in that case.<sup>7</sup> (KMC Brief at 7)

KMC argues that the FCC has clearly and consistently determined that IP-enabled enhanced services traffic is inherently interstate, and specifically stated that the FCC, rather than the state commissions, has the authority to determine the regulatory treatment of IP-enabled services. (KMC Reply BR at 2; *citing Vonage Declaratory Ruling*, 19 FCC Rcd. 22404, ¶1 (2004)). Thus, KMC contends that if the Commission fails to recognize the FCC's primary jurisdiction to determine the proper regulatory treatment of PointOne's traffic, the Commission runs a significant risk of its decision ultimately coming into conflict with FCC decisions. Thus, KMC suggests that the Commission should dismiss the complaint for lack of jurisdiction. (KMC Reply BR at 3)

Finally, KMC contends that the FCC's authority in this area has recently been confirmed by the courts. KMC explains that in August of this year, the U.S. District Court for the Eastern District of Missouri dismissed a complaint by Southwestern Bell against PointOne to collect access charges. In the case, Southwestern Bell sought to collect access charges from VarTec, Unipoint d/b/a PointOne, and Transcom. The court determined that these carriers were least cost routers providing the "IP transmission" of the calls. The court, however, dismissed UniPoint from the case, rejecting the plaintiff's assertions that the complaint pertained to tariff enforcement outside the FCC's authority. KMC emphasizes that the court reached the following conclusion:

... in order to determine whether the UniPoint defendants are obligated to pay the tariffs in the first instance, the Court would have to determine either that the UniPoint defendants are IXCs or that access charges may be assessed against entities other than IXCs. The first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC. The Court's entrance into these determinations would create a risk of inconsistent results among courts and with the Commission. The FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance.

Southwestern Bell Telephone, L.P. v. VarTec Telephone, Inc., 2005 WL 2033416, at 4 (E.D. Mo., Aug. 23, 2005). With regard to the case before the Florida Commission, KMC contends that the issue is the same as that addressed by the VarTec court.

KMC also references a case out of the U.S. District Court for the Western District of New York, wherein Frontier Telephone attempted to collect access charges from USA Datanet, a VoIP provider. KMC contends that in that case, the court discussed at length the federal proceedings involving IP-enabled services and concluded that since Frontier was disputing whether Datanet's service provide enhanced functionality, there was a potential for conflict with the FCC's ongoing proceedings. Thus, the court stayed its proceedings pending the outcome of FCC proceedings. KMC acknowledges that there are some factual distinctions between the referenced cases and this proceeding, but argues that the legal principles at issue are the same.

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<sup>7</sup> Citing AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs., 20 FCC Rcd. 4826, ¶¶ 1 – 2 (2005).



Furthermore, KMC notes that the traffic at issue was originated by one former KMC customer, PointOne. Thus, KMC argues that the complaint should be dismissed, because the Commission lacks sufficient jurisdiction to resolve the issues.

## ANALYSIS

### A. History

By way of background, enhanced service providers or ESPs are a class of service providers that the FCC has in the past acknowledged as being among a variety of users of LEC interstate access services. The FCC defines "enhanced services" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a). The 1996 Act describes these services as "information services." *See* 47 U.S.C. § 153(20) ("information service" refers to the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11516 (1998) (Universal Service Report to Congress) (the "1996 Act's definitions of telecommunications service and information service essentially correspond to the pre-existing categories of basic and enhanced services"). *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, CC Docket No. 01-92.

Since 1983, the FCC has exempted ESPs, now known as information service providers (ISPs), including those that provide service related to the Internet, from the payment of certain interstate access charges. ISPs are, instead, treated as end users for the purpose of applying access charges and are entitled to pay local business rates for their connections to LEC central offices. This policy, known as the "ESP exemption," has been reviewed by the FCC on a number of occasions and retained each time. *See* First Reconsideration of 1983 Access Charge Order, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access and would experience rate shock that could affect their viability if full access charges were instead applied); *see also* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*) ("the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired"); Access Charge Reform Order, 12 FCC Rcd at 16133-35, paras. 344-48 ("maintaining the existing pricing structure ... avoids disrupting the still-evolving information services industry"); and ESP Exemption Order, 3 FCC Rcd at 2635 n.8, 2637 n.53. *See also* Access Charge Reform Order, 12 FCC Rcd at 16133-35, paras. 344-48. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, CC Docket No. 01-92.

### B. Jurisdictional Analysis

At the outset, staff believes the Commission has jurisdiction to resolve this matter, as clearly set forth in Order No. PSC-05-1065-FOF-TP. In that Order, the Commission denied

KMC's Motion to Dismiss concluding that the Commission does have jurisdiction over this matter, contrary to KMC's contention that jurisdiction rests solely with the FCC.

As set forth in that Order, the strongest argument for the Commission's authority with regard to this issue is based upon the clear provisions of Section 364.16(3)(b), Florida Statutes, which provide that anyone with a "substantial interest may petition the commission for an investigation of any suspected violation of paragraph (a)." (emphasis added). The statute further provides that the Commission shall then arbitrate complaints that arise from a violation of subsection (a). As the Commission found,

This language not only authorizes us to investigate the allegations before us, but requires us to take action to determine the veracity of, and to resolve, those allegations. This provision does not preclude us from ultimately reaching a decision that no violation has occurred, but does require action by this Commission to investigate the alleged violation. When read in conjunction with Section 364.02(13), Florida Statutes, and Section 364.162, Florida Statutes, additional support for our authority in this matter can be gleaned from the Legislature's clear expression that we may continue to resolve interconnection disputes for the types of services that KMC alleges are at issue, and should do so pursuant to our authority to resolve interconnection disputes.

Order No. PSC-05-1065-FOF-TP at p. 11.

With regard to the cases referenced by KMC for the proposition that the Commission is preempted in this area, the Commission also addressed those cases in its Order on the Motion to Dismiss, and concluded that the cases may be distinguished with the biggest distinguishing factor being that none of the cases at issue presented a state law question to the court or the FCC, unlike this case.

### **CONCLUSION**

Based on the foregoing, the Commission should affirm that it has jurisdiction to investigate and address the allegations presented in Sprint's complaint pursuant to Section 364.16 (3)(b), Florida Statutes, consistent with Order No. PSC-05-1065-FOF-TP.

**Issue 2:** Are KMC Data LLC and KMC Telecom V, Inc. properly included as parties to this complaint??

**Recommendation:** Staff recommends that KMC Data LLC should be dismissed as a defendant in this Complaint because there is no nexus between it and the circumstances giving rise to this docket. Additionally, staff recommends that KMC V should be retained as a joint defendant with KMC III, because an adequate nexus has been demonstrated. **(L. Fordham, B. Keating)**

### **Position of the Parties**

**Sprint:** Yes. All three entities are parties to applicable interconnection agreements with Sprint. In addition, KMC III and KMC V have engaged in specific actions related to the improper and unlawful delivery by KMC of access traffic for termination to Sprint over KMC's local interconnection trunks with Sprint.

**KMC:** KMC Data and KMC V had no customers and exchanged no traffic with Sprint in the relevant markets. KMC Data's interconnection agreement with Sprint, standing alone, is not enough to make it a defendant if KMC III's use of KMC V OCNs does not alter that the traffic was KMC III's.

### **Staff Analysis:**

## **PARTIES' ARGUMENTS**

### **Sprint**

Sprint notes that KMC has argued that KMC Data LLC and KMC Telecom V are not proper parties to Sprint's Complaint, based on its representations that neither entity was involved in the traffic that is the subject of Sprint's Complaint. (TR 138) Therefore, neither entity can be held liable for the access charges due Sprint for this traffic. Id. Sprint advises that it included KMC III, KMC V, and KMC Data LLC as parties to the Complaint because all three are certificated as CLECs in Florida and all three are parties to one or more of KMC's interconnection agreements with Sprint. (Schaffer TR 2) When it initially filed its Complaint, Sprint states it had insufficient knowledge of the relationships among the various KMC entities to which Sprint provided service under the interconnection agreements, since KMC had been unresponsive to Sprint's attempts to gather information from KMC regarding the traffic that is the subject of Sprint's Complaint. According to Sprint, KMC subsequently has alleged that KMC Data LLC does not provide service in Florida and has no customers. (Johnson TR 22-24) Sprint claims it still includes KMC Data as a party because it has entered into a Florida interconnection agreement with Sprint.

Regarding KMC V, Sprint urges that its internal records and industry records available to Sprint show that KMC V was closely involved in the traffic that is the subject of Sprint's complaint. Because of this, KMC V should be held responsible, along with KMC III, for knowingly delivering interexchange traffic over local interconnection trunks to Sprint for the purpose of avoiding access charges. According to Sprint, the evidence of KMC V's involvement in this traffic includes the following: First, the evidence shows that KMC V owned the charge-

party numbers assigned to the customer (Unipoint) that KMC says is responsible for the access bypass traffic identified by Sprint. (Schaffer TR 4; EXH 44) Second, in response to discovery, KMC identified the OCN 8982 as belonging to KMC V. (EXH 7) The Local Exchange Routing Guide (“LERG”) shows that the charge party numbers assigned to Unipoint by KMC belong to the OCN 8982 that is assigned to KMC V. Third, the evidence also shows that the interconnection facilities (i.e., local trunks) used to deliver the traffic to Sprint that is the subject of Sprint’s Complaint, were ordered under KMC V’s OCN 8982. (Schaffer TR 8; EXH 45)

Sprint claims that KMC has changed its story several times on the involvement of KMC V in this case. First, KMC stated under oath in a discovery response that KMC III owned the charge party numbers assigned to the customer that KMC says is responsible for the offending traffic identified by Sprint. (Sprint BR at 11) After Sprint filed its direct testimony and discovery responses demonstrating that KMC V was the owner of the relevant numbers in the LERG, KMC changed its story. (EXH 6) Later, when questioned about the inconsistencies in its testimony and discovery responses, KMC attempted to say that the numbers really belonged to KMC III and they just hadn’t made the relevant “record changes” to reflect the correct ownership. (Sprint BR at 11) Finally, in response to further inquiry from Sprint, KMC admitted that KMC V owned the OCN under which the numbers were assigned and under which the facilities were ordered during the entire time period that is the subject of this Complaint. (Sprint BR at 11)

Sprint argues there is no support or justification in the law for the position apparently espoused by KMC’s counsel in his opening statement that two entities, which are jointly parties to the applicable interconnection agreements and jointly engaged in the activities that Sprint alleges to be unlawful under its Complaint, cannot be found jointly responsible to Sprint for the access charges that should have been paid under the law and the interconnection agreements. (TR 27) KMC Data LLC is a certificated CLEC in Florida and was a party to at least one of the interconnection agreements that KMC had with Sprint. On this basis alone KMC Data LLC is a proper party to this Complaint, argues Sprint. KMC V and KMC III were joint parties to applicable interconnection agreements and jointly engaged in the activities that give rise to this Complaint. According to Sprint, nothing in the interconnection agreements indicates that liability under the agreements should be divided or allocated among the various KMC entities. Therefore, urges Sprint, both KMC V and KMC III are proper parties to Sprint’s Complaint and they should be held jointly responsible for their actions and for the payment to Sprint of the wrongfully avoided access charges.

### KMC

KMC argues that KMC Data and KMC V are not properly parties to this case because they never had any customers in the Tallahassee and Ft. Myers markets and never exchanged any traffic with Sprint in those markets. According to KMC, the trunks were ordered and paid for by KMC III and KMC III alone. (Johnson TR 6-7) KMC claims Sprint has offered no evidence linking KMC Data to any of the calls. (Johnson TR 7) And the mere fact that KMC Data has an interconnection agreement with Sprint is not enough to make it a defendant in this case if KMC Data never exchanged traffic with Sprint. Moreover, argues KMC, that agreement postdates Sprint’s complaint in this proceeding.

KMC urges that, as for KMC V, Sprint has offered only a single flawed rationale linking that carrier to the traffic at issue: the OCNs for the telephone numbers associated with the calls in question were assigned to KMC V. (Schaffer TR 4-5) However, claims KMC, the fact that KMC III used the KMC V numbers does not change the fundamental fact that the traffic at issue was KMC III traffic, and not exchanged between KMC V and Sprint. (Johnson TR 21-22, 24-26,28).

Assuming Sprint's theories on liability are correct, KMC argues, there is no liability by association or by virtue of common ownership. If there was, KMC notes, then it was improper to dismiss KMC's counterclaims against Sprint's IXC affiliate. According to KMC, whatever theoretical justification Sprint may have once had for bringing the complaint against all three KMC companies before discovery, testimony, and depositions, if any, KMC Data and KMC V should now be dropped as defendants based upon the competent substantial evidence of record.(KMC BR at 13)

### Analysis

Staff is persuaded by KMC's argument that there is absolutely no nexus between KMC Data LLC and the transactions which are the subject of this docket. Though KMC Data LLC has entered into an interconnection agreement with Sprint, it has never exchanged any traffic with Sprint in Florida, and was in no way involved in facilitating the present transactions. Sprint did not even allege anything other than the existence of the interconnection agreement, and a common ownership umbrella. Staff does not believe that establishes a nexus sufficient to justify naming KMC Data LLC as a defendant in this Complaint.

However, staff is more persuaded by Sprint's argument regarding the involvement of KMC V in the circumstances giving rise to this docket. Sprint argues that KMC V is a party to the applicable interconnection agreements, it owned the charge party numbers at issue in the case, and the local interconnection trunks over which the traffic was delivered to Sprint were apparently ordered in KMC V's name. It is well documented that the Local Exchange Routing Guide ("LERG") shows that the charge party numbers assigned to Unipoint by KMC belong to the OCN 8982 that is assigned to KMC V. Also, the evidence indicates that the interconnection facilities (i.e., local trunks) used to deliver the traffic to Sprint that is the subject of Sprint's Complaint, were ordered under KMC V's OCN 8982. Staff believes that nexus to be sufficient to justify the inclusion of KMC V as a defendant in this Complaint.

### CONCLUSION

Based on the foregoing, staff recommends that KMC Data LLC should be dismissed as a defendant in this Complaint, and KMC V should be retained as a joint defendant with KMC III.

**Issue 3:** Under the Interconnection Agreements with KMC or Sprint's tariffs, is Sprint required to conduct an audit as a condition precedent to bringing its claims against KMC or for KMC to be found liable?

**Recommendation:** No. There is no provision in the Interconnection Agreements with KMC or Sprint's tariff that requires an audit prior to filing a complaint with this Commission or that requires an audit to establish liability. **(Pruitt)**

### **Position of the Parties**

**Sprint:** No. Neither Sprint's interconnection agreements nor Sprint's tariffs require Sprint to conduct an audit as a condition precedent to pursuing its claims against KMC.

**KMC:** Access charges should be collected from the calling party and/or IXC(s) selected by the calling party. IXCs, under Sprint's tariffs, are responsible for access charges. Sprint's tariff requires that access charges be paid only after usage factors are established, which can occur only after an audit or accounting.

**Staff Analysis:** This issues addresses two questions:

- 1) Is an audit required prior to filing a complaint with this Commission, and
- 2) Is an audit required to establish liability?

## **PARTIES' ARGUMENTS**

### **Sprint**

Sprint witness Burt states that there is no language in the applicable Interconnection Agreements between Sprint and KMC (the 1997 MCI Agreement, the FDN Agreement and the 2000 MCI Agreement) that requires an audit prior to a complaint being filed. The witness also states there is no language in Sprint's Access Services Tariff that requires an audit. (TR 56; BR at 13)

The witness notes that Part A, Section 22.1 and Attachment IV, Section 8.2 of the 1997 MCI interconnection agreement allow audits and detail their rights and limitations, but do not require audits before pursuing a complaint, and points to a portion of Part A, Section 22.1 which states, "The auditing Party may perform up to two (2) Audits per twelve (12) month period . . . ." The witness also quotes a portion of Attachment IV, Section 8.2, "Either Party may request an audit of such usage reports on no fewer than ten (10) [business] day's (sic). . . ." (TR 56-57; EXH 10, pp. Part A 18, IV 9; BR at 13-14)

Witness Burt also points to the FDN agreement as providing for an audit as an option, not as a requirement. The witness refers to Section 7.1 of the FDN agreement which states in part, ". . . either Party, at its own expense, may audit the other Party's books . . ." (TR 57; EXH 12, p.

15) Sprint also points out the 2002 MCI Agreement does not require but permits an audit. (BR at 14)

In addressing Sprint's Access Service Tariff, Section E2.3.11.D.1, witness Burt testifies that this section is permissive and does not require an audit. He specifically notes the language which states, ". . . when a billing dispute arises or when a regulatory commission questions the reported PIU, the Company may, upon written request, require the customer to provide call detail records which will be audited to . . . ." The witness does not believe the tariff section is applicable to this complaint, because "it addresses the misreporting of PIUs for traffic that is properly routed over access trunks, while this complaint involves the wrongful termination of access traffic over local interconnection trunks." (TR 57; BR at 14)

Sprint also notes that KMC appears to no longer believe that the agreements or Sprint's tariffs require an audit prior to filing a complaint and refers to KMC witness Johnson's deposition. (BR at 13; EXH 26, p. 10)

### KMC

In its brief KMC concedes that "an audit is not a condition precedent to the bringing of a complaint," and refers to the Commission's decision on KMC's first Motion to Dismiss in Order No. PSC-04-1204-FOF-TP, issued December 3, 2004. (BR at 13 – 14) KMC witness Johnson explains that there is no need to provide testimony on an issue that has already been decided by the Commission. (EXH 26, p. 10)

Witness Johnson believes that some "accounting" is necessary "if the Commission determines that switched access charges are due to Sprint . . ." but that payment would be due from an IXC or from PointOne, not KMC. The witness also states that "some accounting or reconciliation of the local traffic compensation would be appropriate to reconcile what KMC and Sprint paid each other . . ." (TR 177; EXH 26 p. 9; BR at 14)

KMC questions the accuracy of the amount of access charges Sprint has billed and believes that "this would amount to the establishment of a PIU for the local interconnection trunks . . ." which can only be set after an audit according to Section E2.3.11.D.1 of Sprint's Access Services Tariff. (BR at 14 - 15)

### ANALYSIS

On October 14, 2004, KMC filed a Motion to Dismiss Sprint's Complaint. Among KMC's allegations was that the Complaint was premature because of Sprint's failure to conduct an audit. In Order No. PSC-04-1204-FOF-TP the Commission found "[t]he alleged failure to have performed an audit is not a proper basis to dismiss the complaint." Both Parties agree that this portion of the issue has been settled.

The second part of this issue is whether conducting an audit is a contractual condition precedent to KMC being found liable for alleged underpayments or overcharges. The Parties do not agree on whether or not Section E2.3.11.D.1 of Sprint's Access Services Tariff applies to this issue. Sprint believes the audit provision is permissive and applies to calculating the PIU for traffic routed over access trunks. KMC believes that a PIU must be determined for the local interconnection trunks to accurately compute any access charges, which can only be established after an audit.

Staff notes the audit provision in Sprint's Access Services Tariff is not on point with this issue, does not require an audit prior to filing a complaint, nor does it establish liability. As such, staff believes an audit is not necessary to determine liability for access charges or reciprocal compensation but may be necessary to determine actual amounts owed. The need for any follow-up audit is addressed in Issues 8.

### **CONCLUSION**

There is no provision in the Interconnection Agreements with KMC or Sprint's tariff that requires an audit prior to filing a complaint with this Commission or that requires an audit to establish liability.



**Issue 4:** What is the appropriate method to determine the jurisdictional nature and compensation of traffic?

**Recommendation:** The jurisdiction and compensation of a call should be based on its end points, unless otherwise specified in the applicable interconnection agreement. Notwithstanding this conclusion, enhanced services traffic may be exempt from access charges. **(Marsh)**

### **Position of the Parties**

**Sprint:** The jurisdiction and compensation for the traffic delivered by KMC to Sprint should be based on the end points of the calling and called parties. The calls that are the subject of Sprint's Complaint originated from end-users outside the local calling area of the Sprint end-users where the calls terminated.

**KMC:** ESPs are treated as end users purchasing local services. KMC is required to provide ESPs with local end user services, including local PRIs. None of the calls at issue in this case are subject to access charges. KMC paid reciprocal compensation consistent with the local nature of the services provided.

### **Staff Analysis:**

## **PARTIES' ARGUMENTS**

### **Sprint**

Sprint witness Burt argues that "It is common industry practice to determine jurisdiction based on the originating and terminating end points of the calling parties." (TR 58) He states that the FCC recently confirmed, in its Prepaid Calling Services docket, that the end points of a call, not the actual path, are appropriate to classify long distance calls as jurisdictionally interstate or intrastate.<sup>8</sup> (TR 58-59) Witness Burt notes that the FCC affirmed, in its AT&T Declaratory Ruling,<sup>9</sup> that the use of Internet Protocol for a portion of the transmission of traffic that originates and terminates on the public switched network does not change the character of the call as a telecommunications service. (TR 59) He advises that the FCC rejected AT&T's position, finding that AT&T's routing of traffic through its Internet backbone does not change the nature of the traffic from a telecommunications service to an information service. (TR 59)

Witness Burt notes that the FPSC addressed the jurisdiction of traffic in Investigation Into Appropriate Methods To Compensate Carriers For Exchange Of Traffic Subject To Section 251 Of The Telecommunications Act Of 1996, Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002 (Reciprocal Compensation Order), stating "we believe that the classification of traffic as either local or toll has historically been, and should continue to be,

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<sup>8</sup> WC Docket No. 03-133, *In the Matter of AT&T Petition for Declaratory Ruling Regarding Prepaid Calling Card Services*, CC Docket No. 03-133, FCC 05-41, ¶ 5.

<sup>9</sup> *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, adopted April 14, 2004, released April 21, 2004.

determined based upon the end points of a particular call.” (TR 80; Order, p. 30) He continues that the FPSC also found that “. . . traffic that originates in one local calling area and terminates in another local calling area would be considered intrastate exchange access under the FCC’s revised Rule 51.701(b)(1).” (TR 81; Order, p. 31)

Sprint argues in its brief that although the traffic in question is not virtual NXX traffic, it is similar in that KMC assigned local NPA/NXX charge numbers to the traffic, even though it was originated in a distant local calling area. (Sprint BR at 16) Sprint quotes the FPSC’s conclusion in the Reciprocal Compensation Order that:

We find that carriers shall be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is assigned. In addition, we find that the intercarrier compensation for these numbers shall be based upon the end points of the particular calls.<sup>10</sup> (Sprint BR at 17)

Sprint witness Burt asserts that each of the three Interconnection Agreements that apply to this complaint, the 1997 MCI Agreement, the FDN Agreement, and the 2002 MCI Agreement, define local traffic as originating and terminating in a given local calling area. (TR 59-60) Sprint points out in its brief that all three of the agreements rely on the end points of the call to determine jurisdiction. (Sprint BR at 17-18)

### KMC

KMC witness Johnson argues that the FCC has not treated VoIP and other IP-based offerings as telecommunications services. (TR 146) Witness Johnson asserts that the treatment of enhanced services traffic, including VoIP, stems from an access charge exemption established in 1983, when the FCC instituted the access charge regime. (TR 147) She advises that the FCC reached no definitive conclusions regarding any type of VoIP in its 1998 Report to Congress<sup>11</sup>:

. . . [b]ecause of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, *before making definitive pronouncements*, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony. . . . (TR 148) [emphasis by witness]

Witness Johnson argues that since the Report to Congress was issued, the FCC has considered several situations involving certain VoIP services. (TR 149) She notes, in particular,

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<sup>10</sup> Ibid., pp. 34-35.

<sup>11</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998).

the FCC's AT&T Declaratory Ruling<sup>12</sup> where it found that access charges may be appropriate for certain types of services that use Internet Protocol (IP). (TR 149) She points out that the decision is very narrow, in that it applied only to calls "where the Internet protocol is used solely for transmission purposes for 1+-dialed interexchange calls, there is no net protocol conversion, and there are no enhanced features or functionalities enabled by the use of the IP." (TR 149) She advises that a comprehensive review of this and other issues was taking place in the FCC's *IP-enabled Services* Docket. (TR 150)

Witness Johnson contends that KMC must treat enhanced services traffic as local, regardless of the putative physical endpoints of the communications. (TR 146) She adds that the FCC generally considers IP telephony to be exempt from access charges.<sup>13</sup> (TR 147) She notes that PointOne, the company that handed off the traffic to KMC, has consistently maintained that its traffic is enhanced services traffic, specifically VoIP. (TR 146)

### ANALYSIS

Staff believes it is well established that the jurisdiction of traffic should be based upon the end-points of a call.<sup>14</sup> However, KMC raises a valid exception to the payment of access charges in the form of the FCC's access charge exemption. Staff agrees with KMC that the decisions made by the FCC thus far indicate the application of access charges to VoIP calls is appropriate in only very narrow circumstances. The question to be answered, then, is whether the exemption applies to the traffic in this case, as discussed in later issues.

Staff notes that in the Reciprocal Compensation Order, the FPSC declined to rule on IP telephony, stating that it was a nascent technology and the FPSC did not want to make decisions that could constrain its emergence. However, the FPSC also stated that "a call is determined to be local or long distance based upon the end points of the particular call. As such, the technology used to deliver the call, whether circuit-switching or IP telephony, should have no bearing on whether reciprocal compensation or access charges should apply."<sup>15</sup> Although the FPSC reserved any generic judgment on the issue until the market for IP telephony developed further, it also stated that carriers could petition for decisions regarding specific IP telephony services through arbitration or complaint proceedings.<sup>16</sup>

### CONCLUSION

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<sup>12</sup> *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, adopted April 14, 2004, issued April 21, 2004..

<sup>13</sup> See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

<sup>14</sup> See Order No. PSC-02-1248-FOF-TP. Investigation Into Appropriate Methods To Compensate Carriers For Exchange Of Traffic Subject To Section 251 Of The Telecommunications Act Of 1996, Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002.

<sup>15</sup> *Ibid.*, p. 36.

<sup>16</sup> *Ibid.*, p. 38.

Docket No. 041144-TP  
Date: November 17, 2005

Staff recommends that the jurisdiction and compensation of a call should be based on its end points, unless otherwise specified in the applicable interconnection agreement. Notwithstanding this conclusion, enhanced services traffic may be exempt from access charges.

**Issue 5:** Did KMC knowingly deliver interexchange traffic to Sprint over local interconnection trunks in violation of Section 364.16(3)(a), Florida Statutes? If yes, what is the appropriate compensation and amount, if any, due to Sprint for such traffic?

**Recommendation:** No. KMC did not knowingly violate Section 364.16(3)(a), Florida Statutes. (Marsh)

**Position of the Parties**

**Sprint:** Yes. KMC knowingly received access traffic from Unipoint, inserted a charge party number local to the local calling area where the calls were terminated and sent this access traffic over local interconnection trunks to avoid access charges. Sprint is due applicable access charges of \$3,466,521, minus any reciprocal compensation payments.

**KMC:** KMC did not knowingly deliver interexchange traffic to Sprint over local trunks. KMC provided an ESP customer with local PRIs as required by the FCC. The associated traffic properly was treated as local in nature. KMC has paid reciprocal compensation for the traffic in question. No further compensation is due.

**Staff Analysis:**

Section 364.16(3)(a), Florida Statutes, states:

(a) 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.

At issue is whether KMC knowingly delivered access traffic to Sprint over local interconnection trunks, in violation of the statute.

**PARTIES' ARGUMENTS**

Sprint's contention that KMC knowingly participated in access charge avoidance is based upon three major points: 1) KMC sold non-local PRIs to PointOne<sup>17</sup> and inserted a local PRI number into the charge party number parameter of the SS7 records, which masked the jurisdiction of the traffic; 2) an email from KMC witness Menier to PointOne indicated knowing participation; and 3) the actions of KMC upon receipt of the bills from Sprint and upon the issuance of the AT&T Declaratory Ruling by the FCC showed that KMC knew the traffic in question was subject to access charges. (Burt TR 64, 77, 84)

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<sup>17</sup> UniPoint and PointOne are the same company.

### **Insertion of Charge Numbers for PRIs**

#### **Sprint**

Sprint witness Burt states that KMC changed the called party number [sic] in the SS7 records to a local PRI number, thus making the call appear local. (TR 63) He contends that “KMC proactively programmed the PRI’s [sic] to default to the local PRI number rather than retaining the originating calling party number in the call detail record.” (TR 63) Sprint witness Wiley contends that the use of PointOne’s numbers homed to Tallahassee and Ft. Myers rate centers makes the traffic appear local. (TR 77)

Witness Wiley states that “a large percentage of calls coming from KMC’s switches did not meet the standardized criteria for CN [Charge Number], CPN [Calling Party Number] and JIP [Jurisdiction Information Parameter].” (TR 40) He advises that the calls appeared to originate within KMC’s network, but an examination of the calling party number showed that the calls actually originated in areas outside of KMC’s network, and contained a large percentage of intrastate interLATA calls. (TR 40) He argues that this shows that KMC violated its agreement with Sprint regarding proper use of interconnection trunk arrangements. (TR 40)

Witness Wiley explains that there are a number of signaling messages that control the establishment, duration and disconnection of calls. (TR 32, 34) He states that the fields in the records that are used to determine routing and origination of calls are calling party number (CPN), Charge Number (CN), and Jurisdiction Information Parameter (JIP), as well as the Called Party (CP) field. (TR 35) He adds that the charge number may be omitted under certain circumstances. (TR 37) He also advises that the JIP, which is used primarily for local number portability (LNP), may be included or not “as a LEC option based on the outgoing trunk group.” (TR 38)

Witness Wiley advises that in normal operation, the CPN number and CN could both be used if they were different. (TR 38-39) He contends, however, that unlike the records of the calls from KMC, the CPN and CN should have a relationship between the two. (TR 39) He advises that the charge number denotes the billing number of the trunk group it supports and is assigned by the carrier at the originating switch. (TR 39) Witness Wiley asserts that in a number of cases, where traffic on a trunk group had an originating charge number and JIP assigned to the KMC switches, the trunk groups “were found to carry traffic that originated outside the serving area.” (TR 40)

Witness Wiley explains that Sprint does not use the CPN to determine the jurisdiction of a call on a day-to-day basis. (TR 48) He states that Sprint must use a special study to determine the jurisdiction of a call where the calling party number and charge party number are from different calling areas. (TR 48-49)

Witness Wiley argues that the “configuration of providing a customer premises in Orlando with local number connections in Tallahassee and Fort Myers violates the North American Numbering Plan Assignment Guidelines.” (TR 45) He asserts that a call for a customer located in Ft. Myers or Tallahassee, which is in a different serving area, numbering

plan area (NPA), and Local Access and Transport Area (LATA) from Orlando, should have had a charge party number with an Orlando NPA. (TR 47) He states that “[s]ince KMC willfully provided its Orlando customer with numbers for Ft. Myers and Tallahassee, KMC must have knowingly violated the rules for numbering to [mask] the Orlando presence of the traffic in order to escape access charges for the traffic from this customer.” (TR 47)

Witness Burt argues that “[t]he PRI circuits KMC sold to PointOne may be end user services, but they are not local services.” (TR 76) He explains that those PRIs do not originate and terminate within the same local calling area, but instead originate in Orlando, Florida, and terminate in either Tallahassee or Fort Myers, Florida, making the calls interexchange by jurisdiction. (TR 76-77) Witness Burt opines that the fact that the PRI circuits are interexchange supports Sprint’s claims that KMC was knowingly attempting to avoid access charges. (TR 77) He asserts that “the fact that KMC knowingly populated the records by assigning [PointOne’s] number homed to the Tallahassee and Ft. Myers rate centers to make the traffic appear to be local supports Sprint’s claims that access charges are due for this traffic.” (TR 77)

Witness Burt contends that “[i]t is suspect that a carrier could hand-off substantial amounts of traffic, especially preponderantly intrastate toll traffic, which is bound for Sprint end users, through KMC without KMC knowing it would be more efficient for the carrier to directly interconnect with Sprint.” (TR 63) He argues that there must be some financial incentive to route large volumes of traffic through KMC for delivery to Sprint end-users. (TR 63) He states that KMC used a programming option so that the PRIs over which the calls were transported default to a local PRI number “rather than retaining the originating calling party number in the call detail record.” (TR 63) Witness Burt avers that the inclusion by KMC of certain language in contracts with its customers appears to shift liability for payment of access charges to KMC’s customers, which he argues is an indication of a “knowing” violation. (TR 64)

Witness Burt asserts that “[t]he tests that Sprint did in an attempt to identify the intermediate IXC for the traffic that originated on its network indicated that the customers originating the subject traffic were presubscribed to IXCs, not Enhanced Service Providers.” (TR 86) He argues that “[t]his further proves the point that KMC and [PointOne] knowingly entered into a clandestine arrangement to terminate interexchange long distance traffic over local interconnection trunks to avoid the payment of access charges contrary to KMC’s interconnection agreements with Sprint.” (TR 86)

### KMC

KMC witness Johnson acknowledges that Section 364.16(3)(a), Florida Statutes, sets up a prohibition against a LEC knowingly delivering access traffic over local interconnection trunks. (TR 173) Nevertheless, she argues that the statute does not require a LEC that hands off traffic to another LEC be liable for access charges. (TR 173-174) She argues that the provision in Section 364.16(3)(b) to have access to all relevant customer records and accounts gives the Commission authority to “look behind the last connecting carrier to its customer. . . .” (TR 174) She opines that the intent of the law is to have the responsible party pay. (TR 174)

KMC witness Johnson states that a former KMC customer, PointOne, who purchased PRI service from July 2002 through May 2004, generated the traffic in question. (TR 136) She avers that KMC provides a number of services, including PRI circuits, to various entities in Florida. (TR 144) She explains that PRIs are high capacity circuits that are commonly used by enhanced service providers, as well as other entities. (TR 144-145) Witness Johnson asserts that a number of KMC customers have substantial amounts of traffic, not just PointOne, so the presence of large volumes of traffic is not an indication of any wrongdoing on the part of KMC. (TR 165) She contends that there was no special arrangement between KMC and PointOne. (TR 145) She notes that KMC treated PointOne in the same way as it did any other customer. (TR 145)

Witness Johnson notes that traffic from PointOne's PRIs was delivered by KMC to Sprint over local interconnection trunks for termination in the Tallahassee and Ft. Myers markets. (TR 136) Witness Johnson argues that the fact that the calling party numbers are from exchanges outside of Ft. Myers and Tallahassee is not proof that the traffic was interexchange *telecommunications* traffic. (TR 168) [emphasis by witness] She contends that PointOne consistently maintained that the traffic was enhanced services traffic, specifically Voice Over Internet Protocol (VoIP). (TR 146)

Witness Johnson argues that Sprint assumes since KMC handed off the traffic that it knew what was going on. (TR 174) She states that "Sprint's theory is that it can avoid a proper investigation and take the easiest target, the party with the least information about what happened, and make that party pay the access charges bill." (TR 174) She claims that it places an unfair burden on KMC to be put into a position to have to sue PointOne for recovery of the charges. (TR 174) She contends that this is "contrary to the statutory directive to find the root cause of the problem and have the party responsible for the traffic pay for it . . . ." (TR 174)

KMC witness Twine states that he evaluated the SS7 data provided by Sprint for four hours of summary detail records when it was provided by Sprint in early April 2004. (TR 189) He explains that the SS7 records contain originating and terminating line information, from which KMC could determine whether the calls did come from outside the local calling area. (TR 190) He notes that KMC was particularly interested in the charge party number, which is transmitted separately from the calling party number. (TR 190) He advises that in some instances ". . . the entity associated with the charge party number may not bear any relation to the entity originating, or responsible for paying for the origination of, the communication." (TR 191) As a result of his analysis, witness Twine concludes that, except for a de minimus amount of traffic that was call forwarded by KMC customers, the traffic contained the charge party number associated with the PRI circuits purchased from KMC by PointOne. (TR 191A)

Witness Twine contends that "[i]ndustry SS7 standards and the Lucent Technical Reference Document for KMC's 5ESS switches (235-080-100) in Tallahassee and Ft. Myers require that the Billing Telephone Number for PRIs be used to populate the charge party number field in SS7 signaling information." (TR 191A-191B) He explains that there is a separate number associated with each PRI circuit, but there is also a single billing telephone number associated with the entire PRI group. (TR 191B) Witness Twine notes the reason the charge party number was needed is that there was a minutes-of-use threshold above which additional charges applied for PointOne's PRIs; thus, KMC needed to track the overall minutes of use. (TR 192) He avers



that this limited use did not require the use of calling party numbers, so KMC did not track them. (TR 191C)

Witness Twine clarifies that KMC did not change any preexisting information in the SS7 records; rather, the charge party number field was populated with the billing number associated with the PRI group for billing purposes. (TR 205) He argues that the presence of the CPN information confirms that Sprint could have determined the originating line numbers at any time. (TR 192A) He asserts that the origination of the call was never masked or hidden. (TR 192A) He adds that the calling party number was not manipulated by KMC. (TR 208) He avers that the calling party number was passed intact to Sprint on every call. (TR 208) He remarks that if it had not been, Sprint would not have been able to conduct its investigation using the Agilent system. (TR 209) He concludes that there is no requirement that the charge party number and the calling party number be the same. (TR 209)

Witness Twine contends that “[t]he charge party number has no bearing on whether the traffic was unregulated enhanced services traffic or regulated telecommunications traffic, which is a threshold question that must be answered.” (TR 207) He states that “[i]f the traffic were telecommunications traffic, then the calling party number, not the charge number would be used to determine jurisdiction. . . .” (TR 207-208)

Witness Twine explains that “. . . the way in which KMC handled the SS7 information on [PointOne’s] PRI circuits serving Tallahassee and Ft. Myers, by inserting the Billing Telephone Number into the SS7 charge party number field and using that parameter, *rather than the Calling Party Number*, for KMC’s billing purposes, is common to all KMC’s PRI subscribers.” (TR 193) [emphasis by witness] KMC witness Calabro advises that the PRIs that KMC provisioned to PointOne were User-Network trunk groups that connected PointOne’s customer premises equipment to KMC’s local network. (TR 226-227) Witness Calabro contends that KMC programmed its switch to use PointOne’s billing telephone number as the charge party number because PointOne is an end user. (TR 231) He states that this is normal industry practice. (TR 231) He asserts that neither Lucent’s 235-080-100 Translation Guide for the 5ESS switch, nor the Lucent 235-190-104 ISDN Feature Description, constitutes a hard and fast requirement that cannot be deviated from. (TR 232)

Witness Calabro argues that it would have been wrong for KMC to populate the SS7 records in such a way as to make the calls appear to be interexchange in nature, since PointOne is an end user. (TR 235) He advises that KMC used Automatic Message Accounting (AMA) records, not SS7 records, for billing, in accordance with the industry norm. (TR 225) He contends that there was no reason for KMC to look at the SS7 data, as Sprint has done, to determine if there was a relationship between the calling party number and the charge party number. (TR 226)

Witness Johnson argues that it would have been “more economically attractive” to KMC to charge PointOne access charges, but it did not do so because PointOne was an enhanced services provider. (TR 175) She contends that Sprint witness Burt’s assumption that KMC had a financial incentive to charge for the flat-rated PRIs is wrong. (TR 175)

Witness Calabro argues that ESPs are not required at the state or federal level to prove that they are providing enhanced services before purchasing local services but, rather, may self-certify their status. (TR 220) He asserts that “it has never been the role of common carriers to investigate individual customers.” (TR 220) He opines that KMC’s treatment of PointOne reflected the industry norm. (TR 220-221) Witness Calabro contends that this Commission knows PointOne is not a carrier, because PointOne has never sought certification as an IXC. (TR 229) He argues that Sprint’s claim that it would have been more efficient for PointOne to purchase services directly from Sprint is a red herring. (TR 230) He states that KMC’s services compare favorably to any and all of Sprint’s services. (TR 230) He adds that KMC is under no obligation to suggest to its customers that it might be more efficient for them to interconnect directly with Sprint. (TR 230)

### **Menier Email**

#### **Sprint**

Sprint witness Burt states that emails between KMC and PointOne address bypass of access charges that would save PointOne thousands of dollars a month on termination charges. (TR 84) He notes in particular that the emails state “[t]he LECs will not be too anxious to provide ‘access bypass’ services so a CLEC is the obvious choice.” (TR 85; EXH 40, pp. 121-122) Witness Burt argues that PointOne could have terminated traffic directly to Sprint more efficiently, so that “[t]here has to be a financial incentive, which does not exist if the traffic clearly is exempt from access charges as KMC asserts.” (TR 85)

Witness Burt contends that KMC’s responses to Sprint discovery show “that KMC was aware of the value of avoiding access charges and communicated this to [PointOne].” (TR 83) He opines that KMC’s emails show that KMC recognized that delivering the traffic in question to Sprint would be problematic. (TR 83) Witness Burt also points to a contract KMC was negotiating that contained language explaining that PRIs were to be used exclusively for enhanced, information or VoIP services, and that VoIP traffic could be lawfully terminated to the PSTN as local traffic, exempt from access charges. (TR 83-84) He argues that KMC did not ask the FPSC for a decision on the exempt nature of this traffic, or share the information contained in the PointOne correspondence with Sprint. (TR 84)

#### **KMC**

KMC witness Menier asserts that KMC was not knowingly aiding PointOne in the avoidance of access charges, as represented by Sprint. (TR 181) He explains that he knows KMC did not do so, because he was the primary person involved in the negotiation of the agreements with PointOne for PRIs. (TR 181) He notes that when PointOne contacted KMC in the spring of 2002 about purchasing services, he was the person who responded to that inquiry. (TR 181-182) He states that the sale was similar to the sale of PRIs to other wholesale customers by KMC. (TR 182) He opines that customers like PointOne come to CLECs for services because they offer

“more flexible service arrangements, better prices and better customer service than the ILECs did.” (TR 185)

Witness Menier adds that PointOne told him that it was an enhanced services provider that supported other entities that provide VoIP services, and that it was not a telecommunications provider. (TR 183) He avers that he believed PointOne’s assertions that it was an enhanced services provider, based on his experience as a former ISP owner and purchaser of PRI services. (TR 184) Nevertheless, witness Menier states he was not surprised by Sprint’s request for access charge payments, because he understands that incumbent LECs disagree with the applicability of the access charge exemption for certain traffic. (TR 185)

KMC states that “Sprint seizes upon one phrase within a series of e-mails between Mr. Menier and PointOne at the time the PRIs were being established as supposed evidence that PointOne sought to evade access charges that Sprint believes otherwise would be due for the traffic PointOne generated over the PRIs.” (KMC Reply BR at 10-11, referencing Sprint BR at 41) KMC contends that the email was an indication that KMC was aware that Sprint would likely not afford PointOne the ESP treatment that KMC agreed it was entitled to. (KMC Reply BR at 11) KMC points out that the testimony of its witness Menier was unchallenged, as Sprint did not depose him. (KMC Reply BR at 10)

### **Behavior of KMC**

#### Sprint

Witness Burt states that KMC, upon receiving a bill from Sprint, immediately challenged PointOne to prove that the traffic in question was enhanced services traffic. (TR 86) He notes that KMC accepted PointOne’s self-certification that it was an enhanced services provider without any substantiation. (TR 87) He remarks that KMC also advised PointOne that KMC expected it to be responsible for any access charges that were due. (TR 86)

Witness Burt states that the FCC had already addressed the type of traffic at issue in 1998, so that KMC by its actions “must have known” that the traffic it was passing to Sprint was subject to access charges. (TR 64) He contends that KMC attempted to “cover its tracks” after the FCC issued the AT&T Declaratory Ruling. (TR 64) Witness Burt notes that KMC contacted PointOne on the day the AT&T Declaratory Ruling was released to express concerns that the traffic being questioned by Sprint was the same type as that addressed in the FCC’s ruling. (TR 69) He adds that KMC terminated its relationship with PointOne not long after sending the letter. (TR 69)

#### KMC

KMC witness Johnson advises that a November 6, 2003, letter from Sprint was the first indication that Sprint believed certain traffic delivered over local interconnection trunks was subject to access charges. (TR 138) She notes that subsequently, on November 12, 2003, Sprint

did invoice KMC for the traffic. (TR 139) She states that KMC filed a timely dispute of these and subsequent charges. (TR 139-140) She argues that Sprint did not provide adequate supporting detail for KMC to verify the charges at that time. (TR 139) She asserts that all KMC received initially was a summary of the amounts due for each month. (TR 140) She explains that through data provided by Sprint on April 6, 2004, KMC was able to determine that the traffic in question was sent by PointOne over PRIs to KMC in Ft. Myers and Tallahassee. (TR 141)

Witness Johnson asserts that once the involvement of PointOne had been verified, KMC notified PointOne of the disputed traffic on April 21, 2004, asking that it provide information regarding the nature of the traffic by April 26, 2004. (TR 142) She adds that KMC also advised PointOne that if it was providing traffic other than enhanced services traffic over the PRIs, that KMC would terminate service to PointOne. (TR 142) Witness Johnson notes that KMC received a response on May 3, 2004, in which PointOne stated:

. . . as we have communicated to you and an [sic] as we have presented several times to the FCC Commissioners and staff, [PointOne] is an Enhanced Service Provider providing unregulated information and/or enhanced services to its customers. This is vastly different than AT&T's self-proclaimed regulated telecommunications service and/or the services described by AT&T's filings related to its petition. (TR 143)

Witness Johnson argues that there is no significance to the fact that PointOne migrated its traffic off of KMC's network other than that PointOne "made a business decision to not execute the MSA and the VoIP Addendum." (TR 172) She contends that witness Burt's reliance on this event as proof that PointOne was not an enhanced services provider is unfounded. (TR 172)

## ANALYSIS

### Insertion of Charge Numbers for PRIs

Staff notes that initially Sprint believed that in certain SS7 data, the charge party number was changed so that the traffic appeared to be local when it was toll traffic. (TR 77) It appears to be permissible for users of ISDN PRI services to use the billing number as the charge party number, but it is not required. (EXH 2, p. 18) Ultimately, Sprint agreed that the signaling information provided by KMC was not altered, but rather a number was inserted into the charge party parameter of the SS7 records. (EXH 2, p. 194)

As explained by Sprint witness Wiley, a call detail record gives a record of calls going through the network to determine whether it is a chargeable call for billing purposes. (EXH 16, p. 17) He advised that the logic in a PRI or an SS7 message will place the charge party number into the originating number field in a CDR. (EXH 16, p. 19) He explained that if the calling party number is present, it is used for billing purposes, but if a charge party number is present, it is used instead. (EXH 16, p. 19) He noted that the Sprint switch eliminates the calling party number when the charge number is present, based on Bellcore documentation for the AMA bill format. (EXH 16, p. 20) Witness Wiley also explains that for calls that come over local trunks,

some would not have individual CDRs because the provision of the detail records can be turned on or off on a trunk-group basis. (EXH 16, p. 21) Witness Wiley agreed that the manner in which information is used for billing is dependent upon which AMA records it uses, and that companies are bound by their own tariffs and auditing guidelines as to how that is done. (EXH 16, p. 54) Witness Wiley was not aware of any notification to KMC that Sprint would use charge party number to determine the jurisdiction of a call. (EXH 16, p. 56)

Staff believes the simple fact is that KMC inserted certain numbers associated with PointOne's PRIs into the charge party parameter of the SS7 records. KMC states it did so for billing purposes, due to the cap on minutes that was part of the service it provided to PointOne. (TR 192) It appears to staff that KMC believed this was appropriate. Staff notes there is disagreement between the parties as to what the proper switch programming is. Thus, it seems there may be some aspects of the programming guides that leave matters to interpretation. Further, Sprint agrees that companies are bound by their own tariffs and auditing guidelines as to how to use data for billing. (EXH 16, p. 56) Again, there appears to be some leeway. There is no evidence in the record that shows KMC was aware of the manner in which Sprint performed billing functions. (EXH 16, p. 56) It appears that KMC applies access charges on calling party and called party numbers, based on its own access tariff. (EXH 6, p. 335) Thus, it appears the insertion of a charge party number would not alter KMC's own billing, and there no evidence KMC knew Sprint used a different approach. Staff can understand why Sprint believes the actions of KMC appear suspect. However, staff does not believe the record shows by a preponderance of the evidence that KMC deliberately made the traffic appear local to avoid payment of access charges to Sprint.

### **Menier Email**

Sprint puts notable weight on one email of KMC witness Menier to PointOne, where he uses the term "access bypass." [quotes in email] (TR 85; EXH 40, pp. 121-122) Staff notes that the emails leading up to that referenced by Sprint witness Burt discuss VoIP and indemnification to KMC if the local exchange company will not accept the VoIP traffic. (EXH 40, pp. 119-120) KMC contends in its brief that the reference to access bypass was an indication of witness Menier's knowledge that Sprint believes VoIP traffic is subject to access charges, as stated in his rebuttal testimony. (KMC Reply Br at 11; TR 185) Sprint is on record in this docket as saying just that. (EXH 17, pp. 69-70)

Staff believes the email by itself is not proof that KMC was knowingly involved in an access avoidance scheme. KMC witness Menier was the person who wrote the email, and he denies that there was any such intent on the part of KMC. Given Sprint's position that VoIP is not enhanced services traffic, along with Sprint's belief that the traffic in this case is phone-to-phone VoIP, it is not hard to believe that Sprint considers VoIP traffic to be access bypass. Staff believes the use of that phrase in an email, particularly given the denial of any wrongdoing by witness Menier, is not proof that KMC knowingly did anything wrong.

### **Behavior of KMC**

Staff notes that KMC confirmed the involvement of PointOne in the traffic at issue in April 2004, the same month that the FCC released the AT&T Declaratory Ruling. The record shows that KMC repeatedly asked for documentation of the traffic. While Sprint's claim was made in November 2003, according to KMC witness Johnson, a small amount of call detail records were provided on April 6, 2004, that permitted KMC to analyze the traffic. Given the coincidence of the April 21, 2004, release date of the AT&T Declaratory Ruling, staff believes Sprint's reliance on the April 21 date of KMC's letter to PointOne is unfounded. There is no convincing evidence, in staff's view, that the issuance of the ruling triggered a reaction by KMC. Staff believes that KMC's determination that PointOne's traffic was the cause of a multi-million dollar claim by Sprint for access charges is a far more plausible explanation for the actions of KMC.

While KMC's concerns are evident in its letter to PointOne, staff believes that if KMC was a knowing participant in the improper routing of traffic, its concerns would have arisen much sooner. Staff notes that, in the April 21, 2004 letter to PointOne, KMC indicated a willingness to vigorously oppose the claim, but advised PointOne that if unsuccessful, KMC would expect PointOne to pay any charges. KMC also requested additional information to be provided as to the nature of the traffic to aid KMC in its opposition to the access charge claim. (EXH 6, p. 146B)

Staff believes that PointOne made plain in its response on May 3, 2004, that it considers itself to be an "Enhanced Service Provider providing unregulated information and/or enhanced services to its customers." (EXH 6, p. 146G) PointOne argued in its letter that the services it provides are vastly different from those that were the subject of AT&T's FCC petition. (EXH 6, p. 146G) This assertion on the part of PointOne is consistent with KMC's insistence that it understood PointOne to be an enhanced services provider, and that the traffic that was handed off by PointOne was enhanced services traffic. It is clear from the record that KMC relied on this assertion in providing PRIs to PointOne as an end user. Staff agrees that the actions of KMC subsequent to the release of the FCC's AT&T Declaratory Ruling show concern with the traffic. However, such actions do not indicate to staff that KMC knowingly engaged in improper behavior.

It appears to staff that the key to this question is the portion of the statute that states "for which terminating access service charges would otherwise apply."<sup>18</sup> There is no question that KMC knew the traffic came from outside the local calling area. However, staff believes that the record does not show that KMC was involved in access avoidance with the intention of terminating traffic in violation of the statute. While staff cannot be certain that KMC made correct interpretations of the facts in making its decision to sell PRI services to PointOne, it appears to staff that KMC had a reasonable basis to believe it was handling the traffic correctly.

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<sup>18</sup> Section 364.16(3)(a), Florida Statutes.

Docket No. 041144-TP  
Date: November 17, 2005

**CONCLUSION**

Staff recommends that KMC did not knowingly violate Section 364.16(3)(a), Florida Statutes.

**Issue 6:** Was any of the traffic that is the subject of Sprint's complaint enhanced services traffic? If yes, how is enhanced services traffic delivered to Sprint from KMC to be treated under the Interconnection Agreements, Sprint's tariffs, and applicable law?

**Recommendation:** The evidence in the record is inconclusive as to whether the subject traffic is enhanced services traffic or voice traffic. Since the nature of the traffic cannot be determined, treatment of enhanced services under the interconnection agreements, tariffs and law need not be decided. (Marsh)

### **Position of the Parties**

**Sprint:** Sprint generally cannot distinguish enhanced services traffic from voice traffic sent over local trunks. However, billing records for certain calls originated and terminated to Sprint end users show that the subject traffic is voice telecommunications traffic. KMC fails to demonstrate that the traffic involves enhanced services.

**KMC:** PointOne presented itself as an ESP. Based on the record, its traffic must be presumed to be enhanced services. The traffic received over PointOne's local PRIs was delivered over local trunks. Sprint's interconnection agreements or tariffs do not abrogate KMC's obligation under federal law to provide local service to ESPs.

**Staff Analysis:** The FCC has defined enhanced services as "any offering over the telecommunications network which is more than a basic transmission service."<sup>19</sup> The FCC advised that such services include

[s]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.<sup>20</sup>

Considerable discussion has taken place in this case regarding whether the traffic involved was Voice over Internet Protocol (VoIP) traffic. Therefore, an FCC explanation of VoIP services may prove useful:

VoIP technologies, including those used to facilitate IP telephony, enable real-time delivery of voice and voice-based applications. When VoIP is used, a voice communication traverses at least a portion of its communications path in an IP packet format using IP technology and IP networks. VoIP can be provided over the public Internet or over private IP networks. VoIP can be transmitted over a variety of media (e.g., copper, cable, fiber, wireless). Unlike traditional circuit-switched telephony, which establishes a dedicated circuit between the parties to a voice transmission, VoIP relies on packet-switching, which divides the voice transmission into packets and sends them over the fastest available route. Thus,

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<sup>19</sup> FCC 98-67, ¶ 25, citing Computer II Final Decision, 77 FCC 2d at 419, para. 93.

<sup>20</sup> Ibid., citing para 94.



VoIP uses available bandwidth more efficiently than circuit-switched telephony and allows providers to maintain a single IP network for both voice and data.<sup>21</sup>

## **PARTIES' ARGUMENTS**

### **Is The Traffic Enhanced Services?**

#### **Sprint**

Sprint witness Burt states that “KMC made two bad assumptions that led to this dispute. First, KMC assumed the traffic [PointOne] was delivering to KMC was enhanced services traffic and, second, KMC assumed that enhanced services traffic could automatically be terminated to Sprint over local interconnection trunks.” (TR 89) He argues that in order to demonstrate that the traffic in question is enhanced services traffic, KMC would have to show that the traffic met the requirements of the FCC’s rule defining enhanced services. He contends that KMC would also have to demonstrate that IP is used in the transmission of the traffic, and that such use is not the same as that described in the AT&T Declaratory Ruling. (EXH 2, p. 185)

Witness Burt asserts that Sprint has no evidence that the traffic in question is truly enhanced services traffic. (TR 66) He states that call records for calls originated by Sprint end users as well as end users of other local exchange companies indicate the calls originated on standard access lines and were routed to IXCs before being terminated on Sprint’s network as local traffic. (TR 66) He contends that “[b]ased on this SS7 information and associated call records these calls appear to be interexchange voice calls.” (TR 66)

Witness Burt states that Sprint has sample calls that show that the traffic is plain voice traffic. (TR 92 referencing EXH 41) He explains that the subscriber invoices provided in his exhibit show that the calls are from POTS subscribers. He adds that a sample call was traced to the KMC local interconnection trunks with Sprint. (TR 92) He notes that the terminating numbers in the SS7 records provided correspond to the telephone numbers on the Sprint Florida subscriber invoices. (TR 92)

Witness Burt argues that “[t]he Direct Testimony of Ms. Johnson (Johnson Direct, page 11, lines 16-20) removes any doubt that the traffic that is subject to this dispute is VoIP traffic.” (TR 90) He asserts that witness Johnson agrees that VoIP traffic is not necessarily enhanced traffic. (TR 90) He also points to KMC witness Johnson’s testimony, where she advises that KMC requires customers to represent and warrant that the VoIP services they are providing through use of KMC services meet a certain definition of VoIP, which states, among other things, that VoIP calls do not originate or terminate on the PSTN as circuit switched long-distance traffic. (TR 87, 152-153) He contends that if KMC had validated the nature of the traffic as suggested by KMC witness Johnson, KMC would not have had to attempt to obtain

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<sup>21</sup> *Petition for Declaratory Ruling that AT&T’s IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, Order (April 21, 2004), ¶3.

information from PointOne on the nature of the traffic. (TR 87, 152-153) Witness Burt states that based on three letters between KMC and PointOne, Sprint does not believe PointOne is an enhanced services provider. He notes that in the letters, KMC asks for documentation that the traffic is enhanced services traffic. He adds that PointOne “restates its claim that it is an enhanced services provider, but doesn’t provide any information to prove this claim. . . .” (EXH 2, pp. 183-184) Witness Burt contends that PointOne is an interexchange carrier because it is transporting interexchange calls. (EXH 18, p. 59) Witness Burt opines that a company’s actions determine whether it meets the definition of a carrier, regardless of whether it had a certificate. (EXH 18, p. 58)

Witness Burt advises that the traffic in question was significantly reduced upon the issuance of the AT&T Declaratory Ruling. (TR 68) Citing letters between KMC and PointOne, he points out that KMC contacted PointOne on the day that the AT&T Declaratory Ruling was released to express concerns that the traffic was the same phone-to-phone VoIP-type traffic identified in the AT&T case. (TR 69) He notes that KMC states that it terminated its relationship with PointOne shortly after the AT&T order was issued. (TR 69) He opines that “if the provider or KMC had been able to demonstrate that the traffic was truly enhanced services traffic, there would have been no reason for the traffic to have stopped.” (TR 69) He contends that KMC must have believed it was at risk and decided to discontinue its relationship with PointOne as a result. (TR 69) He argues that a claim that a company is an enhanced services provider does not make it one; rather, it is the nature of the traffic that determines whether it is enhanced or not. (TR 69)

### KMC

KMC witness Johnson states that PointOne consistently maintained that the traffic it delivered was enhanced services traffic, specifically VoIP. (TR 146) Witness Johnson advises that although she did not negotiate the initial sale to PointOne, she did work with the KMC sales and provisioning staff on the matter. (TR 164) She asserts that she never received any indication that PointOne was anything other than an enhanced services provider, or that it was attempting to improperly avoid access charges. (TR 164) Witness Johnson contends that “[t]here’s no standard by which I could have measured [PointOne’s] status as an ESP. The FCC didn’t set out any precertification requirements or guidelines for ESPs.” (EXH 26, p. 70)

Witness Johnson states that KMC does not know whether or how Internet Protocol was used for the traffic in question. (TR 152) She explains that PointOne never provided the information about its services that KMC requested, in spite of additional follow-up by KMC. (TR 143) She asserts that PointOne did advise KMC that its traffic was different from the AT&T traffic at issue in the FCC proceeding. (TR 151) She notes that PointOne “migrated its traffic off of KMC’s network on or around May 3, 2004.” (TR 143, 151) She adds that Sprint’s exhibits detailing traffic reflect this fact, because the traffic dropped dramatically after that date. (TR 151-152)

Witness Johnson argues that Sprint was predisposed to believe the traffic in question was fraudulent, so it did not consider the possibility that it was enhanced services traffic. (EXH 26, p.

90) She maintains, however, that the presence or absence of CPN does not define a telecommunications call. (EXH 26, p. 90) She contends that an analysis of originating and terminating call records considers parameters of telecommunications services and does not test whether traffic is enhanced services. (EXH 26, pp. 91-92) She complains that Sprint designed tests to identify telecommunications traffic by default, not to determine whether there were enhanced services involved. (EXH 26, p. 92)

KMC witness Calabro argues that Mr. Miller of Agilent<sup>22</sup>, like Sprint, was also predisposed to believe that the relationship of calling party number to called party number indicated jurisdiction. He notes, however, that Mr. Miller was unaware of the enhanced service provider exemption from access charges, could not say where the calls came from, and could not recognize that the calls came from KMC's enhanced service provider customer. (EXH 30, p. 80) Witness Calabro contends that if Mr. Miller understood these things, he would have come to a different conclusion about the nature of the traffic. (EXH 30, p. 81) He asserts that it is important to discern what happened in the middle of the calls before coming to the conclusion that access charges apply. (EXH 30, p. 93)

Witness Calabro testifies that he was unable to determine what enhanced services PointOne provides, but he believes that they could have provided "[a]ny activity that operated on protocol conversion, storage, content manipulation, [or] used computer processing." (EXH 30, p. 15) He avers that enhanced services are any services that meet the [47 C.F.R. 64.702] definition. (EXH 30, p. 15) He cites FCC Rule Sec. 64.702(a), which states:

For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restricted information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act. (TR 219)

He notes that the definition is "very similar to the term Information Service which was defined in the Communications Act of 1934 as amended in 1996 as the offering of 'a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.' 47 U.S.C. § 153(20)" (TR 219-220) He states that the FCC includes Internet Service Providers and VoIP offerings in this classification; however, he provided no cites in support of this position. (TR 220)

In reviewing a bill provided by Sprint, KMC witness Calabro states that the manner in which a call shown on the bill was enhanced is not discernible from the bill or from the portion of the information that Sprint provided. (EXH 30, p. 28) He posits that the persons on the bill may have been customers of PointOne. (EXH 30, p. 28) He notes that the FCC has declined to

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<sup>22</sup> Mr. Miller is employed by Agilent Technologies as a solution architect. (EXH 24, p. 8) Agilent provides data services for SS7 information, which were used in the preparation of this case. (EXH 22, p. 18)

require billing by ILECs for enhanced services, so if there was an additional bill from PointOne, he was not surprised that it was not included on the Sprint bill. (EXH 30, p. 29)

Witness Calabro agrees that certain traffic of PointOne came from different LATAs and different states. (EXH 30, pp. 22, 52) However, he argues that the call detail records provided by Sprint were comprised of managed data including material that did not come from the SS7 data, although he does not contend that there was mismanagement of the data. (EXH 30, p. 51)

KMC witness Johnson contends that Sprint has not demonstrated that the FCC's AT&T Declaratory Ruling applies to the PointOne traffic. (TR 170) She asserts that the ruling does not support Sprint's claim. (TR 171) She argues that Sprint witness Burt's reliance on the FCC *Pre-Paid Calling Card Services* Order is also misplaced. (TR 171) She notes that the ruling applies only to determine the jurisdiction of calling cards. (TR 171) She states that Sprint has not shown any similarity between the traffic in this ruling and the PointOne traffic. (TR 171)

### **How should Enhanced Services Traffic be compensated?**

#### Sprint

Witness Burt insists that, regardless of whether PointOne is an enhanced services provider, the interconnection agreements between Sprint and KMC govern the appropriate form of intercarrier compensation. (EXH 2, p. 185) Witness Burt notes that enhanced services are not identified in the interconnection agreements as a separate type of traffic for compensation purposes. (TR 89) He explains that the only categories included are local, ISP-bound and toll traffic. (TR 89) He asserts that if KMC wanted to terminate enhanced services traffic to Sprint, it should have discussed the matter with Sprint beforehand. (TR 89)

Witness Burt states that the use of Internet protocol at some point between an IXC's network and KMC's network would not change Sprint's position on the type of compensation that is due. (TR 67) He avers that the FCC confirmed in its AT&T Declaratory Ruling that access charges apply to certain phone-to-phone VoIP traffic. (TR 67) He claims that "Sprint's evidence shows that the traffic being terminated to Sprint over local interconnection trunks appears to be 'phone-to-phone' VoIP that meets the criteria spelled out by the FCC in the AT&T order." (TR 67) Witness Burt notes that the FCC has declined to rule on whether access charges apply to VoIP that has a net change in protocol but originates or terminates on the public switched network.<sup>23</sup> (TR 92-93)

#### KMC

KMC witness Calabro explains that when the FCC implemented its initial access charge regime<sup>24</sup> IXCs were required to pay access charges for use of the local exchange networks of

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<sup>23</sup> FCC WC Docket No. 03-211, FCC 0-4-267, ¶44.

<sup>24</sup> FCC CC Dockets No. 78-72 MTS and WATS Market Structure and No. 80-286 Jurisdictional Separations proceeding.

LECs. (TR 218) He adds that the FCC exempted Enhanced Services Providers (ESPs) from such charges, allowing them instead to be classified as end users. (TR 219) He opines that ESPs “can purchase local services, including Primary Rate ISDN services (PRIs), from the local exchange carriers of their choosing, just as all non-carrier, business customers can do.” (TR 219) KMC witness Johnson also states that the treatment of enhanced services traffic, including VoIP, stems from an access charge exemption established in 1983, when the FCC instituted the access charge regime. (TR 147)

KMC witness Johnson argues that the FCC has not treated VoIP and other IP-based offerings as telecommunications services. (TR 146) She contends that KMC must treat enhanced services traffic as local, regardless of the putative physical endpoints of the communications. (TR 146) She adds that the FCC generally considered IP telephony to be exempt from access charges. (TR 147) [See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001)] (TR 147)

Witness Johnson explains that the FCC has considered compensation for VoIP telephony several times. (TR 149) She notes the most recent occasion was in the AT&T Declaratory Ruling issued April 2004.<sup>25</sup> (TR 149) She states that the FCC determined that access charges are due for traffic where Internet Protocol is used solely for transmission purposes for 1+ dialed interexchange calls, there is no net protocol conversion, and there are no enhanced features or functionalities enabled by the use of the IP. (TR 149) She argues that KMC has no information to suggest that the traffic delivered to Sprint met these conditions. (TR 151)

## ANALYSIS

### Is The Traffic Enhanced Services?

While Sprint witness Burt claimed the traffic being terminated appears to be phone-to-phone VoIP, he stated that Sprint cannot distinguish enhanced services traffic from any other voice traffic. (TR 66) Sprint witness Schaffer also admitted that Sprint cannot distinguish calls made using VoIP. He stated that Sprint does not know where some of the calls came from, only that they were delivered to Sprint by KMC. (EXH 20, p. 82) Staff notes that KMC does not claim to know with certainty whether the calls involved are enhanced services traffic. Rather, KMC relied upon the assertions of its customer, PointOne, and accepted that the traffic was enhanced services that would be exempt from access charges.

For ease of discussion, staff has segmented the analysis into several broad topics, including Sprint’s sample calls, KMC’s reliance on PointOne’s self-certification, possible types of traffic as indicated by SS7 records, and finally, compensation for enhanced services traffic.

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<sup>25</sup> *Petition for Declaratory Ruling that AT&T’s IP Telephone Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, Order April 21, 2004

### Test Calls

As discussed above, witness Burt stated that Sprint provided sample calls that show that the traffic is plain voice traffic. (TR 92 referencing EXH 41) He also noted that a sample call was traced to the KMC local interconnection trunks with Sprint. (TR 92) He explained that the terminating numbers in the SS7 records provided correspond to the telephone numbers on the Sprint Florida subscriber invoices. (TR 92) Sprint asserted the test calls prove the traffic is the same type of phone-to-phone telecommunications traffic described in the AT&T Declaratory Ruling. (EXH 2, p. 182; referencing EXH 41)

Staff examined exhibit 41, JRB-2, which is a confidential CD comprised of customer bills and a corresponding summary that appears to have been compiled by Sprint, titled "SS7 Call Records with Charge Party Number [of PointOne]." (EXH 41, files on CD) In the summary portion, Sprint detailed information about seven sample calls. Of those, staff was able to match six of the summarized calls to the bills. The seventh call has no corresponding bill. Out of the six calls, two do not match the time of day between the bill and the summary; one has a discrepancy of one hour, the other, one minute. Staff suspects the one-minute difference could be due to rounding of seconds into minutes, but does not understand the one-hour difference. Two of the six bills show a different long-distance carrier than Sprint listed in the summary.

Most of the information shown in the summary cannot be verified at all by staff, including all of the information that Sprint claims shows KMC handed off the traffic as local with an inserted charge party number. (EXH 41, files on CD) Staff attempted to find the corresponding files in the call detail records provided by Sprint. However, upon finding a file labeled with the same date, April 19, 2004, which is the date of the six sample calls, staff ascertained that the calls in the file were actually from April 20, 2004. A search for the telephone numbers of the sample calls turned up nothing. Staff performed the same exercise in a number of other CD files with no results. Thus, staff could not tie the sample calls on the customer bills to the call detail records. (EXH 3, item 2, CD file 041904.xls, and others) Staff could find nothing in the record that ties the Sprint customer bills to KMC, other than the typed table that Sprint holds out as SS7 records.

In a discussion of attempted test calls, Sprint witness Schaffer states that the test calls made by Sprint did not originate on any of the trunks used to originate the calls terminated by KMC to Sprint as local calls, because Sprint did not know how to make the test calls work. (EXH 20, p. 82) He states that none of the test calls were made from any of the original calling party numbers that appear in the calls in this case. (EXH 20, p. 83) He also concedes that none of the test calls were made using VoIP telephony services. (EXH 20, p. 83)

Based on staff's analysis, it appears that Sprint's exhibit 41 JRB-2 proves nothing other than the fact that some Sprint customers made toll calls to Sprint customers in other areas. Staff is concerned with the errors found in the purported SS7 summary. Staff also believes nothing in Sprint's exhibit definitively ties the calls to KMC.

As an additional note, in staff's view, there is nothing in the bills to indicate any participation or benefit from an "access avoidance" scheme by the customers. A simple calculation reveals that the per-minute rates paid for the calls vary greatly. (EXH 41, files on

CD) If there were an access avoidance scheme, it would appear that the end users were unwitting participants.

### Self-Certification

Staff notes that Sprint, like KMC, does not require customers to demonstrate that they are enhanced service providers prior to providing local services to those customers. (EXH 2, pp. 327-329) Witness Burt agreed that Sprint does not have a certification process for enhanced service providers; rather, Sprint relies on its tariff to ensure appropriate use of services. (EXH 18, p. 20)

Sprint witness Burt stated that Sprint has tariff provisions that address the appropriate use of services so that Sprint can comply with Section 364.16(3)(a) of Florida Statutes. (EXH 18, p. 17) He states that there is a self-certification process. (EXH 18, p. 24) However, he noted Sprint also might evaluate on a case-by-case basis situations where large volumes of traffic are being terminated or unusually large numbers of circuits or services are being purchased. (EXH 18, p. 18)

KMC pointed out that “Sprint’s practice regarding ESP self-certification is not materially any different from KMC’s (and what happened in this case) and certainly includes no additional restrictions or certifications.” (KMC BR at 26; see EXH 18, pp. 20-21, 23-34) KMC argued that “KMC, like Sprint and the rest of the industry, must rely upon the certification of its customers.” (KMC BR at 27)

It appears to staff that Sprint would hold KMC to a different standard than it holds itself. Nevertheless, what a company claims to be and what it is may be two different things. Staff believes the self-certification alone is not proof of the nature of the traffic. Thus, other factors must be considered in making the determination.

### Possible Types of Traffic

While staff believes the record is inconclusive as to whether the traffic in question is or is not enhanced services traffic, there is evidence as to some of the possibilities. It is instructive to understand some of the difficulties that arise in trying to determine jurisdiction of traffic based upon SS7 records. In trying to ascertain what categories the traffic might fall into, staff explored with the parties what the SS7 records would reflect for various traffic types.

### Dial-Up Internet VoIP

Witness Burt claimed that Sprint has evidence that shows the calls “[appear] to be ‘phone-to-phone’ VoIP that meets the criteria spelled out by the FCC in the AT&T order.” (TR 67) In examining this assertion, staff determined that record evidence shows that the SS7 records for a Dial-Up Internet VoIP call are indistinguishable from other voice calls, as discussed below.

Sprint noted that VoIP Internet telephony can be provided using dial-up Internet service, in which a customer first makes a dial-up connection to the Internet to connect to an Internet Service Provider (ISP) and then initiates a call using software provided by the ISP. (EXH 2, p. 58) Sprint explained that if the call to the ISP is a local call, no call record is generated at the originating end, because the call is not billable. (EXH 2, p. 58) However, if the call to the ISP were made by dialing a long-distance number, a call record is created which contains the originating number of the calling party. (EXH 2, p. 58) At the terminating end, Sprint stated that it cannot determine if a call was made using dial-up VoIP, because there is nothing in the AMA standards to indicate that the call was made through a dial-up IP network. (EXH 2, p. 59)

Sprint witness Shaffer admitted that nothing in the call record standards indicates that a call was made through a dial-up ISP network. (EXH 2, p. 58) Witness Schaffer conceded that, “[s]ince there are no technical standards or fields defined in the AMA to identify a VoIP originated call, Sprint cannot accurately state what fields or the values that would or would not be populated in the AMA record.” (EXH 20, Late Filed Deposition Exhibit 5)

KMC agreed that IP telephony can be provided using dial-up Internet Service. (EXH 6, p. 50c) KMC stated that it does not expect to see a difference in the call records between VoIP or POTS calls. (EXH 6, p. 50d) KMC argued that “[t]he fact that a call record has originating [sic] calling party number information associated within exchange [sic] in a different LATA from that in which the communication terminates to an end user does not indicate that a call is not a VoIP call.” (EXH 6, p. 50d) Citing several sources, KMC asserted that many providers of VoIP services, whether dial-up or broadband, populate the SS7 calling party number field for purposes of Caller ID. (EXH 6, p. 50d) Thus, it appears to staff that the appearance of a calling party number in a terminating call record is not necessarily an indication that a call was originated on the PSTN. Staff notes that Sprint is unable to determine where much of the subject traffic comes from.

### Broadband Internet VoIP

As noted above, an originating call record might be produced for dial-up Internet VoIP under certain circumstances. However, Sprint witness Schaffer stated that a call using VoIP over DSL would not have an originating AMA record, because it would not go through the PSTN. (EXH 20, p. 81) He acknowledged that a VoIP call made over DSL would not have a correlated call detail record. (EXH 20, p. 84)

If the call terminated to the PSTN, Sprint stated that it does not know if a calling party number would be signaled for population in the AMA record. (EXH 2, p. 59) As previously noted by KMC, providers may populate the SS7 calling party number field for purposes of Caller ID. (EXH 6, p. 50d) As with dial-up Internet telephony, Sprint advised there is no indication in the SS7 terminating records that the call originated as VoIP on DSL. (EXH 2, p. 59) Sprint also admitted it cannot determine whether or not the traffic sent to Sprint on KMC’s local interconnection trunk groups are VoIP originated. (EXH 2, p. 87)



### Wireless

Sprint witness Wiley advised by way of example, that if a Miami wireless subscriber makes a call while in the Tallahassee area to a Tallahassee end user, it would come across Sprint's wireless trunks. However, if that same wireless provider had an arrangement with KMC, Sprint did not know how the call would appear in the SS7 records. (EXH 15, pp. 91-92) Witness Wiley opined that such calls would not have a charge party number. He admitted that the Agilent study was performed based on calling party numbers, not charge party numbers, so the universe of calls could possibly include wireless calls. (EXH 15, pp. 92-93)

### Call-Forwarded Traffic

Sprint witness Wiley stated that if a call is forwarded from outside its territory, Sprint would not have a record of the originating leg of the call. (EXH 16, pp. 89-90) Thus, staff notes that call-forwarded traffic could comprise a portion of the traffic that had no correlated call detail records.

Staff notes that only 8% of the traffic had correlated call detail records (CDRs). In the Agilent study, only 2.5% had correlated CDRs. Correlated CDRs are made when there are both an originating and a terminating call detail record. The remaining traffic could be access traffic as insisted by Sprint. It also could be broadband or dial-up Internet VoIP traffic. (EXH 2, p. 59) It could potentially be wireless traffic, if routed through a CLEC. (EXH 15, pp. 91-92) In summary, staff believes that the SS7 characteristics of the traffic in this case could apply to various types of traffic other than access traffic.

### **How should Enhanced Services Traffic be compensated?**

Sprint agreed that the FCC's enhanced services exemption permits ESPs to be treated as end users, which allows the ESP to purchase local service or access service as an end user from a LEC. (EXH 2, p. 171) Nevertheless, Sprint insisted that an ESP's end-user status has nothing to do with the intercarrier compensation that applies between the local exchange carrier providing service to the ESP and any other carrier that the local service provider exchanges traffic with; rather, such intercarrier compensation is governed by their interconnection agreements. (EXH 2, p. 171) Sprint's position is that access charges should apply to VoIP calls. (EXH 18, p. 69) As noted by Sprint witness Burt, there are no contract provisions between KMC and Sprint for enhanced services traffic. (EXH 18, pp. 84-85)

Sprint argued in its brief that the access charge exemption was intended to address the bypass of access charges by customers with PBX service and interstate private line service, also known as "leaky" PBX.<sup>26</sup> (Sprint BR at 32) Sprint stated that a surcharge of \$25 applied to each line. (Sprint BR at 32) Sprint argued that, since PointOne paid no such surcharge, it was not entitled to an access charge exemption. (Sprint BR at 33)

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<sup>26</sup> FCC Order 83-356, ¶88.

KMC responded that the passage cited by Sprint applies only to interstate private lines and has no bearing on the access charge exemption. KMC explains that, although the FCC established both the surcharge and the access charge exemption in the same order,<sup>27</sup> it draws clear distinctions between them. KMC cites the order:

[T]he policy problems underlying the ESP exemption and the rules for the leaky PBX traffic are different. The former is based on concerns about rate shock on ESPs from the application of access charges; the latter is based on the inability to distinguish leaked interstate traffic from ordinary local calling over certain end user lines. *Thus, the ESP exemption represents an affirmative decision to provide ESPs with special treatment; the leaky PBX rules are not really an "exemption" at all (in the sense of an affirmative policy determination that leaked traffic should receive special treatment) but a pragmatic accommodation to measurement difficulties.* [Emphasis by KMC] (ONA NPRM, 4 FCC Rcd 3983, ¶ 41) (KMC Reply BR at 18)

Staff agrees that the ESP exemption could apply to certain categories of traffic. Contrary to the position of KMC witness Calabro, the FCC has not definitively included VoIP traffic in the enhanced services category; rather, the FCC has found in certain cases that access charges may apply to VoIP traffic, as discussed throughout this recommendation. Based on staff's discussion above, staff does not believe it can be determined from the record in this case whether the traffic involved is enhanced services traffic.

### **CONCLUSION**

Staff recommends that the evidence in the record is inconclusive as to whether the subject traffic is enhanced services traffic or voice traffic. Since the nature of the traffic cannot be determined, treatment of enhanced services under the interconnection agreements, tariffs and law need not be decided.

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<sup>27</sup> IMTS and WATS Market Structure, 97 FCC 2d 682, ¶¶ 80-83

**Issue 7:** Was KMC required to pay Sprint its tariffed access charges for the traffic that is the subject of this complaint? If yes, what is the appropriate amount, if any, due to Sprint for such traffic?

**Recommendation:** KMC should be required to pay Sprint its tariffed access charges for the traffic that is the subject of this complaint. The amount is discussed in Issue 8. **(Marsh)**

**Position of the Parties**

**Sprint:** Yes. Since the traffic KMC terminated to Sprint is interexchange traffic, KMC is required to pay access charges to Sprint for this traffic. Sprint has determined that \$3,466,521 is due through March 2005.

**KMC:** The disputed traffic is IP telephony, which requires no access charges. KMC was entitled to accept self certification by the ESP, and was required to provide local PRIs. Access charges resulting from future FCC action would be due from the customer or IXCs. Sprint provided no verification of the charges.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

**Sprint**

Sprint witness Burt argues that “the basis for whether KMC is required to pay access charges for the toll traffic that it delivered to Sprint over local interconnection trunks is the language in the Interconnection Agreements between Sprint and KMC, the language in Sprint’s Access Tariff and Florida Statutes.” (TR 70) He states that all of these require KMC to pay access charges on traffic that is not local. (TR 70)

Witness Burt states that Sprint’s Access Services Tariff addresses the jurisdictional nature of the traffic, in that intrastate usage is comprised of calls that enter a customer network from a calling location within the same state, regardless of the routing of the calls. (TR 60-61)

Sprint points out in its reply brief that this Commission addressed the payment of access charges in Order No. PSC-96-1231-FOF-TP, stating:

When it cannot be determined whether a call is local or toll, the local exchange provider originating the call shall be assessed terminating switched access charges for that call unless the local exchange provider originating the call can provide evidence that the call is actually a local call. (Sprint Reply BR at 17; Order, p. 23)

Sprint advises that the order is specifically incorporated by reference into both MCI agreements adopted by KMC, and generally incorporated into the FDN agreement. (Sprint Reply BR at 16-17)

Sprint contends that KMC's reliance on the FCC's AT&T Declaratory Ruling is misplaced, because the FCC indicates in footnote 92 that a CLEC can be held liable, based on the interconnection agreement. (Sprint Reply BR at 17)

### KMC

KMC witness Johnson states that KMC is not liable for access charges under the statute, interconnection agreement terms, or tariff provisions cited by Sprint. (TR 173) She contends that Sprint must provide additional information about the traffic in question, so that KMC can properly evaluate Sprint's claims and identify any IXCs associated with the traffic. (TR 144) She opines that "[i]f the traffic is not enhanced services traffic and otherwise switched access traffic, the IXCs are the parties that should pay any access charges that may be due and not KMC." (TR 144)

KMC witness Calabro agrees that Sprint's tariffed access charges would be due if the traffic in question were interexchange traffic. (TR 221-222) However, like witness Johnson, he asserts that the IXC would owe the charges, not KMC. (TR 222) He contends that ". . . Sprint has failed to undertake a wider investigation into the nature of the traffic, choosing to rely upon speculation and assumption." (TR 222) He notes that Sprint witness Burt "admits that Sprint lacks the ability to discern the nature of the traffic at issue in this proceeding and is not able to distinguish enhanced service traffic from other traffic." (TR 222)

Witness Johnson states Sprint is asserting without substantiation that PointOne is an IXC. (TR 161) She complains that Sprint does not consider whether KMC was entitled to treat PointOne as an end user. (TR 161-162) She opines that the fact that PointOne never sought certification from the FPSC makes it clear that PointOne does not consider itself to be a telecommunications carrier. (TR 162) She avers that "[t]elecommunications law and practice has always put the onus on customers to self-certify and not to use common carrier services for any unlawful purpose."<sup>28</sup> (TR 162-163) She adds that "[t]here was neither a duty nor a basis for KMC to conduct any type of unilateral investigation as to whether [PointOne] was an interexchange carrier and to assess if the traffic it was generating over the PRI trunks was interexchange traffic." (TR 167)

Witness Johnson argues the FCC determined in its AT&T Declaratory Ruling that where access charges applied, they were due from the IXC that carried the traffic. (TR 169) She notes that the FCC did not address the situation where access charges were imposed on a local exchange carrier, rather than the IXC. (TR 169) She complains that although Sprint has identified a number of IXCs in this case, it did not seek to collect the access charges from them. (TR 169) She adds that KMC had no relationship with the IXCs. (TR 169)

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<sup>28</sup> Witness Johnson did not cite any specific orders or rules.

### ANALYSIS

As discussed above by Sprint, this Commission has addressed the payment of access charges previously in Order No. PSC-96-1231-FOF-TP. That order makes no exception for enhanced services traffic. Staff notes that the order is specifically referenced in the 1997 MCI agreement. (EXH 10, 1997 MCIMetro Agreement, Attachment 1, Price Schedule, Section 4.2) It is also referenced in the 2002 MCIMetro/Sprint agreement. (EXH 13, p. 36) Staff located the corresponding paragraph in the FDN agreement, but was unable to find a reference, specific or general, to the FPSC Order. (EXH 12, p. 30) Toll traffic, as set forth in Hearing Exhibit 12, Part C, Section 37.2, which is the FDN agreement adopted by KMC, is to be given the meaning commonly used in the industry and “. . . includes communications between two points in different rate centers.” The effective dates of each agreement are noted by Sprint witness Burt:

1997 MCI Agreement – September 13, 2000 through June 19, 2003

FDN Agreement – June 20, 2003 through June 13, 2004

2002 MCI Agreement – June 14, 2004 to present. (Burt TR 55)

Staff determined that the 1997 MCI agreement, for example, states:

Compensation for the termination of toll traffic and the origination of 800 traffic between the interconnecting parties shall be based on the applicable access charges in accordance with FCC and Commission Rules and Regulations including but not limited to Order PSC-96-1231-FOF-PP [sic], Docket Number 95-0985-PP [sic]. . . . (EXH 10, 1997 MCI Agreement, Attachment 1, Price Schedule, Section 4.2; EXH 2, p. 10)

Sprint argues in its brief that the interconnection agreements with KMC provide that access charges apply for non-local traffic. (Sprint BR at 38) Each of the three agreements defines local traffic in a similar manner, as discussed above.

Sprint also advises that Section E1.1A of its Access Service Tariff specifically states it applies to Interexchange Carriers, Alternative Local Exchange Companies and end users. (Sprint Reply BR at 17) Staff notes that Sprint did not provide a cite, and staff was unable to locate this tariff provision in the record.

Based on the parties' agreements, staff believes that the initial burden to go forward with the complaint is met by Sprint if it demonstrates by a preponderance of the evidence that the traffic at issue is not local.<sup>29</sup> While KMC argues that it is also Sprint's burden to demonstrate that the traffic is not exempt enhanced services traffic, staff believes that the provisions of the

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<sup>29</sup> Section 364.16(3)(a), Florida Statutes, provides, in pertinent part, that “No local exchange telecommunications company or competitive local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply. . . .”

interconnection agreements, when read in conjunction with the statutory provisions and prevailing case law applicable to affirmative defenses, require that KMC prove that the traffic is enhanced services traffic. Thus, it then falls to KMC to demonstrate by a preponderance of the evidence that the traffic is not subject to access charges because the traffic is exempt. As discussed in Issue 6, staff believes that the evidence in the record is inconclusive on this point; thus, KMC has not met its burden.

In responses to discovery, Sprint stated that KMC should pay access charges because the charge party numbers inserted into the SS7 records were assigned to KMC, and KMC also provided the PRIs that were used to transport traffic across LATA lines. (EXH 2, p. 5) Additionally, Sprint argued that there is a contractual relationship between Sprint and KMC, not Sprint and some other party. (EXH 2, p. 5) Sprint added that except for some instances where Sprint is both the originating and terminating carrier, Sprint is unable to identify the IXCs involved in the traffic. (EXH 2, p. 5)

Sprint also explained that it did not contact the IXCs involved in the traffic because it could identify only a small percentage of the IXCs since a large volume of the traffic was not originated from Sprint customers. (EXH 2, p. 189) Sprint pointed out that correlated call records that enabled it to identify an IXC were available for only 8 percent of the traffic. (EXH 26, p. 108)

KMC argues in its brief that Section 3.1.4 of Sprint's Access Services Tariff applies only to IXCs and end users that avail themselves of Sprint's access services. (KMC BR at 39) KMC also argues that the access tariff Section E6.1 states that switched access service "is available to *customers for their use in furnishing their services to end users.*" (KMC Reply BR at 19) [emphasis by KMC] KMC contends that, if this Commission were to find that access charges are due, they would be due from the IXC or PointOne. (KMC BR at 40)

KMC witness Johnson contends that Sprint could have sued PointOne and the IXCs as SBC did in proceedings elsewhere. Witness Johnson notes that Sprint had a direct relationship with the IXCs that it handed traffic to, and could have just as easily asked the IXCs about the traffic as it did KMC. (EXH 26, p. 99)

Staff agrees with Sprint that KMC should pay any access charges that are owed for non-local traffic that it terminated to Sprint over local interconnection trunks. As noted by Sprint, the FCC stated in the AT&T Declaratory Ruling that although access charges are typically due from IXCs, it does not preclude charging them to CLECs where agreements provide for it. Staff notes that the full footnote also states:

. . . To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.<sup>30</sup>

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<sup>30</sup> *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, Order (April 21, 2004, ¶ 23, fn 92)

As previously discussed, the interconnection agreements adopted by KMC require the payment of access charges. Staff believes payment of the charges by KMC is compliant with the FCC's statement.

Staff notes that KMC had a contractual relationship with PointOne. Even where Sprint has a contractual relationship with IXCs, staff agrees that Sprint should not have to track down carriers of traffic that has been handed off several times before ultimately reaching Sprint's network. Staff believes both the agreement and the tariffs are applicable to the traffic. Therefore, without clear evidence that the traffic is otherwise exempt, access charges are due pursuant to the parties' agreements and the tariff.

### **CONCLUSION**

Staff recommends that KMC should be required to pay Sprint its tariffed access charges for the traffic that is the subject of this complaint. The amount is discussed in Issue 8.

**Issue 8:** Did KMC deliver interexchange traffic to Sprint over local interconnection trunks in violation of the terms of the Interconnection Agreements with Sprint? If yes, what is the appropriate compensation and amount, if any, due to Sprint for such traffic?

**Recommendation:** Yes. KMC delivered interexchange traffic to Sprint over local interconnection trunks in violation of the terms of its Interconnection Agreements with Sprint. However, the amount cannot be determined based on this record. The parties should obtain an audit or accounting to determine the amount, subject to the adjustments noted by staff. **(Marsh)**

### **Position of the Parties**

**Sprint:** Yes. The parties' interconnection agreements require local and interexchange traffic to be terminated over separate trunks. The traffic that is the subject of Sprint's Complaint is interexchange traffic, which KMC wrongfully terminated over its local interconnection trunks with Sprint. Sprint has determined that \$3,466,521 is due through March 2005.

**KMC:** KMC did not knowingly deliver interexchange traffic over local interconnection trunks in violation of the Interconnection Agreement. No additional amount is due beyond that which KMC has already paid. If it is determined that future FCC action requires access charges, Sprint must refund compensation KMC has paid for this traffic.

**Staff Analysis:** This issue differs from previous issues in that this issue asks specifically whether KMC is in violation of its interconnection agreement. Several previous issues also ask whether compensation is due. Staff has addressed the matter of compensation in this issue.

## **PARTIES' ARGUMENTS**

### **Sprint**

Sprint witness Burt notes that three interconnection agreements apply to this complaint: the 1997 MCI Agreement, the 2002 MCI Agreement, and the FDN Agreement, which each define local traffic as traffic that originates and terminates in a given local calling area. (TR 59-60) He argues that KMC has violated its contract based on the contract language that defines the manner in which traffic is to be terminated. (TR 70) Witness Burt asserts that the agreements place the responsibility on each party to route traffic on the appropriate trunks. (TR 73) He contends that "KMC cannot escape its responsibility to comply with the terms of the interconnection agreement by deflecting responsibility to its customers, in this case a self-described enhanced services provider." (TR 73)

Witness Burt argues that KMC's characterization of the circuits sold to PointOne as "local PRI circuits" does not take precedence over the interconnection agreements. (TR 79) He states that KMC certainly knew that calls from Orlando to Tallahassee or Fort Myers were not local under the interconnection agreements, regardless of KMC's assertions that it did not know where the traffic was before it reached KMC's network. (TR 77)



KMC

KMC witness Johnson does not agree with the calculations provided by Sprint because she does not think Sprint has demonstrated why KMC would be the party obligated to pay. (TR 175-176) She contends that if the traffic were telecommunications traffic, and therefore PointOne is an IXC, it would be PointOne that is liable for the charges. (TR 176) She notes that in such a case PointOne would be operating without proper authorization from this Commission. (TR 176) She adds that it may be appropriate for the IXCs identified by Sprint in its Agilent study to pay the charges. (TR 176)

**Traffic Involved and Amounts**

Sprint

Sprint witness Wiley states that Sprint developed a percentage of interstate, intrastate interLATA and local traffic for KMC based on the Agilent study. He adds that these percentages were applied to KMC's MOUs from June 2002 through November 2004 to develop the access charge billing amounts KMC should have been compensating Sprint. (TR 41)

Witness Wiley advises that Sprint only maintains six months of the call detail records online although portions of other months may also be available. (TR 42) He notes that all other data is archived on tapes with a third party vendor. (TR 42) He contends that it takes approximately two days to process a calendar day of archival records. (TR 42) He asserts that the amount of work involved to obtain and analyze the records led Sprint to develop a statistically valid random sample of the call detail records. (TR 42)

Sprint witness Aggarwal explains that Sprint uses SS7 CDR Summary Reports to calculate PLU and PIU factors which are then applied to billed minutes to determine whether the usage should be classified as interstate, intrastate or local. (TR 116) She continues that the calculated PLU and PIU factors are applied to the billed minutes. (TR 116) She adds that appropriate rates from Sprint's interstate and intrastate access tariffs and local rates from the parties' interconnection agreement were applied to determine the amount of additional charges that are due. (TR 116-117) She notes that a true-up is done to determine the amounts still owed based on the additional access charges. (TR 116)

According to witness Aggarwal, Sprint used the Agilent system, which is a "data warehouse for SS7 traffic" to perform its traffic study. (EXH 22, p. 18) The study performed by Agilent also used the Agilent system, but was done in addition to the Sprint study. (EXH 22, p. 18) Agilent captures the SS7 signals and makes them "more user-friendly." (EXH 22, p. 19) Information is captured throughout the day at "fairly regular intervals." (EXH 22, p. 20) Witness Aggarwal states that the Agilent system captures the majority, but not all, of the minutes billed by Sprint. (EXH 22, p. 42)

Witness Aggarwal notes that the interstate rates used were averages based on interstate access revenue for all carriers in Florida divided by the corresponding interstate access minutes

for that month. (TR 117) She explains that intrastate rates used were based on previously billed rates, and that local rates were composite rates based on end office switching, tandem switching and common line elements per the interconnection agreement. (TR 117) She contends that while the amount of improperly terminated traffic is much less than it was prior to May 2004, there is still improper termination of traffic. (TR 117) She notes that Sprint is continuing to monitor and adjust KMC's traffic for access traffic. (TR 117)

### KMC

KMC witness Twine contends that Sprint has consistently refused to provide the detail behind the calculation of damages. (TR 211) He complains that Sprint provided only 3% of the call detail for a period of twenty-seven months, which is comprised of one day of data for each month. (TR 211-212) He argues that this is not the sample upon which Sprint is basing its claim. (TR 212) He states that KMC has not been able to verify the PIUs and PLUs associated with the traffic. (TR 212) He adds that neither KMC nor the Commission can verify the MOUs that Sprint is claiming without the full data. (TR 212)

KMC argues in its brief that a significant amount of traffic was not accounted for in the studies performed by Sprint. KMC asserts that "[w]ithout knowing why these significant percentages of traffic were not included in the records on which Sprint relies, or the characteristics of the CDRs that were unavailable (for example, were entire days of data missing from a monthly period, was traffic from certain trunks missing?), it is not possible to come to any kind of conclusions as to whether the jurisdictional percentages Sprint used are reliably descriptive of the traffic for each month as a whole." (KMC BR at 33) KMC explains that an examination of Sprint witness Aggarwal's deposition exhibits shows that, for the months November 2002, December 2002, May 2003, and June 2003, Sprint considered only 37%, 48%, 48% and 53%, respectively, of the volume of MOUs to which the jurisdictional factors were applied. (KMC BR at 34; EXH 22; EXH 21 Deposition Exhibit 3)

KMC lists a number of other flaws (KMC BR at 34-35):

- Aberrational differences in the applied tariff rates in Sprint's calculations, which ranged from \$0.056 to \$0.0669 (EXH 22, pp. 56-58)
- Jurisdictional factors based on a different time period than the MOUs to which they were applied, thus failing to consider variations in monthly traffic. (EXH 22, pp. 43-44; EXH 21, Deposition Exhibit 3)
- Improper conclusion that all traffic delivered without a CPN was subject to intrastate access charges. (EXH 22, p. 69)

As a result of these problems, KMC argues that the amount of access charges cannot be determined from the record in this case. (KMC BR at 40) KMC states that because Sprint's methods in calculating the amount of access charges are flawed, a post-decision audit or accounting will be necessary to determine an amount. (KMC BR at 31) Due to the concerns

outlined by KMC, it insists that “. . . only an audit reviewing the available CDRs, as opposed [to] the CDR Summary Reports relied upon by Sprint in its Complaint . . . can determine the reliability of Sprint’s calculations and identify the areas in which modifications are required.” (KMC BR at 35)

KMC asserts that the small amount of traffic that Sprint continues to see appears to be call forwarded traffic. (EXH 6, p. 50b)

### **ANALYSIS**

According to Sprint, the interconnection agreements adopted by KMC each specify that equal access InterLATA or IntraLATA interexchange traffic is to be exchanged over separate trunks from non-equal access intraLATA toll and local traffic. (EXH 2, pp. 6-8) At the same time, it is evident to staff that the agreements adopted by KMC allow the parties to combine access traffic with local traffic on the same trunks. (Burt TR 71; EXH 2, p. 7) However, such an approach requires that the parties *agree* to do so. (Burt TR 71, citing the ICA) [Emphasis by staff] As noted by Sprint witness Burt, “the fact that the interconnection agreements don’t separately address enhanced services traffic should have resulted in KMC discussing and gaining agreement from Sprint as to the proper intercarrier compensation for this traffic.” (TR 89) Staff has verified that the agreements also state that compensation for termination of toll traffic between the interconnecting parties will be based upon applicable access charges in accordance with FCC and Commission rules. (EXH 2, pp. 10-11)

Staff agrees with Sprint’s point in a previous issue that the FCC has not determined that enhanced services traffic is local traffic. For policy reasons, the FCC granted an exemption from payment of access charges for certain types of services. Thus, even if the traffic is enhanced services traffic, under the parties’ agreements, it is still non-local traffic that was improperly terminated over local interconnection trunks, based on the language in the parties’ interconnection agreements. As such, unless KMC can show that the exemption applies, access charges are due. As discussed in Issue 6, KMC has not provided convincing evidence to support its affirmative defense that the traffic in question is enhanced services traffic or that it is subject to the exemption.

### **Traffic Involved and Amounts**

In understanding Sprint’s calculations, it is important to sort out the different studies and calculations that have taken place. Staff believes that the actual amount claimed by Sprint comes from summary call detail records. Sprint provided exhibits with tables and spreadsheets that are clearly not the SS7 records themselves, as noted elsewhere by KMC witness Calabro. Staff has determined that there is a summary page for each month through February 2005. (EXH 51) It appears to staff that the minutes of use are adjusted in each summary page to reclassify them from local to intrastate and interstate minutes. Staff notes that transit traffic is shown, but is not included in the totals. (EXH 50, 51)

Staff believes an important distinction is that there is an Agilent *system*, and an Agilent *study*. While the Agilent study relies on data produced by the Agilent system, it is based on different days than are chosen for the sample described in the affidavit of Sprint employee Dr. Brian Staihr, as described below. (EXH 33, 35)

Based on the affidavit of Dr. Staihr, Sprint collected a sample comprised of call detail records for one day per month for the applicable period to calculate the factors that are applied to adjust minutes from the summary call records. (EXH 35) For ease of discussion, staff will call this the Sprint study. (In some places, it appears Sprint may refer to this study as the Agilent study. See, for example, Wiley TR 41) An examination of Sprint witness Aggarwal's exhibits shows that a blended access charge rate is applied to the adjusted minutes to derive a dollar amount. (EXH 50)

Staff's review of the Agilent study reveals that it is based on one week of data beginning September 15, 2003, and ending September 21, 2003. (EXH 33, p. 4, non-confidential portion) Staff believes Agilent performs a similar calculation to Sprint's. It appears that for purposes of this docket, Sprint uses the Agilent study as a crosscheck. Staff notes the purpose stated in the Agilent study is to perform future studies of the same kind, for a share of the revenues it enables Sprint to obtain. (EXH 33, p. 3, non-confidential portion) Thus, in staff's opinion, Agilent is not independent and its calculations must be considered accordingly.

Staff notes that Sprint did not file actual SS7 records. As pointed out by KMC witness Calabro, the files contain "managed data," with information that would not have come from the SS7 records. (EXH 30, p. 51)

## **Discussion**

The affidavit of Dr. Staihr that is attached to witness Wiley's testimony explains the methodology used to derive the sample used by Sprint to calculate billing factors. Dr. Staihr states:

. . . [t]hat he chose the days for the sample through random number generation, using the months beginning November 1, 2002 and ending January 31, 2005. That this time period involved 823 days at 24 hours a day, which equaled 19,752 population hours. That one day per month (or 27 days) at 24 hours per month [sic] equates to 648 sample hours. That a sample size of 648 with a population of 19,752 (the equivalent of a statistically infinite population) produces results at a 95% confidence level and a .04 confidence interval. (EXH 35, p. 1)

Staff sees an apparent incongruity in the statement of Dr. Staihr, who was not a witness in this case. He indicates that a sample of 27 days was chosen through random number generation from a period of 27 months. Through an examination of the material filed by Sprint, it is clear that the CDRs provided by Sprint represent one day per month. Dr. Staihr's statement confirms this fact. If the days were randomly chosen, staff believes there could be more than one day for some months, and no days for other months in the sample. Staff also notes an inconsistency in

the time period chosen. The minutes of use and adjustments presented by witness Aggarwal are for the period July 2002 through February 2005, while the factors applied to the minutes are from a sample of days from November 2002 through January 2005. (EXH 35, 51) Although KMC expresses concerns about the sample as noted in its brief, staff notes that neither side presented an expert witness on statistical sampling. Nevertheless, there is enough inconsistency in this and other factors discussed elsewhere to cause concern about the validity of the sample used by Sprint.

Staff also is concerned with a number of other discrepancies in the record as to how the billing factors were calculated and applied. As already noted, Sprint witness Wiley stated that the Agilent study was used to determine the factors. (TR 41) This is in conflict with the affidavit of Dr. Staihr, which is attached to witness Wiley's testimony as an exhibit. (EXH 35) Sprint witness Aggarwal stated that Sprint used the monthly SS7 CDR Summary Reports to calculate the factors. (TR 116) It appears to staff that the CDR Summary Reports are used to apply factors to the minutes of use in these reports, not to develop the factors themselves.

Further cause for concern is that witness Aggarwal advised that there is not a one-to-one relationship between actual billed minutes and the calculated PLU factor. (EXH 22, p. 86) Staff notes that the Sprint witness stated that she has no knowledge of the amount of variability in the amount of billed traffic across the days of a month. (EXH 22, p. 100) According to witness Aggarwal, Sprint tried to capture a full 24-hour period for each day used in the billing sample, but did not compare it to the billed traffic for the day; rather, Sprint used all of the SS7 traffic it had available for the day. (EXH 22, pp. 102-103) She agreed that the amount of billed traffic differed from the amount of traffic captured in the SS7 records. (EXH 22, p. 103) Witness Aggarwal explained that the Agilent system captures a large percentage of the minutes that Sprint bills, but not all of them. She stated that she does not know why it does not capture all of the minutes of use. (EXH 22, p. 42) She conceded that in November 2002, the study only considered 37 percent of the traffic, but she did not know why this or other months varied in the amount of traffic captured. (EXH 22, pp. 84-85, 89) She also agreed that certain days, or certain hours of certain days, might not be collected. (EXH 22, p. 92) Witness Aggarwal admitted that minutes that are unbilled for whatever reason are used in the determination of jurisdictional factors. (EXH 22, p. 88) These statements are another indication to staff of incongruities in the Sprint calculations, as already noted by KMC. (KMC BR at 33-34)

Sprint witness Aggarwal explained that all traffic that does not have a CPN is considered to be intrastate. (EXH 22, p. 69) She states that this treatment is consistent with Sprint's access tariff. (EXH 22, p. 72) She explains that Sprint develops a factor for such traffic and applies it to all of KMC's MOUs to determine the amount of traffic without a CPN. (EXH 22, pp. 70-73) KMC argues in its brief that "Sprint's tariff provides, to the contrary, that access is to be [billed] based upon the [discrete] access charge rate elements applicable to a call. . . ." (KMC BR at 35) Staff notes that KMC refers generally to the Sprint Access Service Tariff, but does not cite a specific provision.

Sprint argues in its brief that it calculated the amount owed using several different methods. Initially, Sprint used billing factors, followed by additional methods to check the accuracy of the calculations, using the amounts from the SS7 summary reports. Sprint states the

application of a PLU and PIU based on the summary reports produced a figure of \$3,493,454, while the use of PLU and PIU factors based on 27 days of call detail records totaled \$3,261,832, through November 2004. (Sprint BR at 27-28) Sprint states that the charges actually calculated to bill KMC were \$3,460,731 for the same period. (Sprint BR at 28; EXH 33, p. 13) Staff totaled the figures in Sprint's KMC Billing Summary for that period, and arrived at a figure of \$3,462,733. (see EXH 51)

By totaling the dollar amounts on Sprint Exhibit 51, RA-2, staff determined that the total included in Sprint's brief is a few hundred dollars more than the totals in Exhibit RA-2. It appears that this is due to the fact that the brief includes amounts through March 2005, while the exhibits end with February 2005. The total in the brief is also higher than the amount shown in testimony, although the amount in testimony appears tied to a document produced by Sprint titled "KMC Correlated Call Record," which includes traffic through August 2003. (Aggarwal TR 112; Sprint BR at 22; EXH 19, Deposition Exhibit 2, p. 13) Staff notes that, based on Sprint's representations, the method based on total volume, which appears to be used for the figure in the brief, produces results approximately seven percent higher than the method using factors based on 27 days of CDRs.

KMC complains that "[i]gnoring that the record has been closed, Sprint's brief offered two alternate calculations in the space of four sentences as supposed independent verification of its calculation. . . ." (KMC Reply BR at 15) KMC argues that, even if the methods are accepted, the difference of several hundred thousand dollars is not trivial. (KMC Reply BR at 15) KMC argues that "[u]nlike Sprint's earlier calculations, where KMC could at least confirm some of the arithmetic, these alternatives leave many questions as to even the simple math since Sprint, guilty of many an elementary school math teacher's refrain, did not show its work." (KMC Reply BR at 15, fn 12) KMC contends that the lack of rigor in the calculations confirms the need for an accounting. (KMC Reply BR at 15, fn 12)

Sprint responds that it "used the evidence in the record to employ two additional methodologies as a check on the accuracy of its calculations. Using both an average of all the monthly summary reports and also using the data from the 27 days of sample CDRs confirmed that Sprint's initial calculations were reasonable." (Sprint Reply BR at 19) Sprint states that it "welcomes a Commission audit or accounting of Sprint's records. . . ." (Sprint Reply BR at 19)

Staff agrees with KMC that many details of the methodologies employed by Sprint are not apparent from the record. Staff attempted to replicate Sprint's numbers, using the data in the record, but was unable to do so.

Staff notes several areas where we believe Sprint's figures warrant adjustment.

Sprint's requested amount includes charges for call-forwarded traffic. According to Sprint, call-forwarded traffic was not excluded from the calculation used for Sprint's claim. (EXH 22, p. 33; EXH 18, p. 96) Sprint witness Aggarwal explains that Sprint would have to do a manual calculation to exclude the call-forwarded traffic from the calculation of damages, and since it represented only a small portion of the traffic, Sprint did not exclude it. (EXH 22, p. 34) Sprint witness Wiley advised that call forwarding accounted for about six tenths of one percent

of the calls. Witness Wiley agreed that he could determine what percentage of the calls studied were call forwarded, but he could not correlate those to the bills sent to KMC. (EXH 15, p. 98) Staff believes identifiable call-forwarded traffic should be excluded.

Staff determined that the amount computed by Sprint includes charges for interstate traffic. (EXH 50, pp. 1-33; Sprint BR at 22) Staff notes that interstate traffic is not within the jurisdiction of this Commission. Therefore, interstate traffic should be removed.

As noted above, Sprint witness Aggarwal states that all traffic that does not have a calling party number is classified as access traffic.<sup>31</sup> (EXH 22, p. 69) Although she asserts that such practice is consistent with Sprint's access tariff, staff notes that she does not cite the tariff provision. KMC argues in its brief that witness Aggarwal's assertion is not in accordance with Sprint's access tariff. (KMC BR at 35) However, as noted above, KMC provides no specific cites. Witness Aggarwal's position is unrebutted in the record. Accordingly, staff believes traffic without a CPN may be included in the minutes to be billed.

Staff also has concerns about the rate that is applied, as pointed out by KMC. (KMC BR at 34-35) It is clear from the difference in the rate, which ranged from \$0.056 to \$0.0669 per minute of use, that it is not a tariffed rate. (KMC BR at 34-35; EXH 22, pp. 56-58) Sprint witness Aggarwal asserted that the rate used was essentially the tariff rate. (EXH 22, p. 53) Later she stated that "the rate was based on billed dollars divided by billed minutes for intrastate only." (EXH 22, p. 55) She did not know why an analysis was performed to determine a rate to use, rather than using the rate in the tariff. (EXH 22, p. 54) Witness Aggarwal agreed that the best way to determine the exact amount would be to determine the correct jurisdiction of the traffic then apply the correct rate. (EXH 22, p. 57) Staff believes the appropriate access rates, in accordance with the applicable tariff, should be used.

Regarding the claimed amount Sprint is requesting for the period since May 2004, staff determined that the figure for each month is very small. (EXH 50, p. 1) Staff notes that Sprint identified six-tenths of one percent of the total traffic for all months as call forwarded traffic. (EXH 15, p. 91) Staff determined that traffic coming from outside the local calling area after May 2004 is a few percent of the traffic. As a result, staff notes the amount is not significantly higher than the previously identified call-forwarded traffic. Staff was unable to find any call details for this traffic, and believes that KMC's explanation that it is call-forwarded traffic is plausible, given the small amount. Therefore, staff believes the small amounts of traffic, which occurred after PointOne migrated its traffic away from KMC in May 2004, should be eliminated from the calculation.

Staff believes the use of a sample is appropriate in the circumstances, since Sprint is trying to reconstruct figures after the fact. However, there is considerable record evidence that the traffic used to develop factors may not be complete and may not correspond with the time period over which the factors were applied. Therefore, a determination must be made as to the reliability of the factors.

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<sup>31</sup> Staff has confirmed the statement of Sprint witness Aggarwal.

In summary, staff agrees there are a number of problems with Sprint's methodology as discussed by KMC, with additional problems noted by staff. Accordingly, staff believes an audit is warranted.

### **Audit**

The parties' agreements contain certain provisions for audits. The 1997 MCIMetro agreement provides that each party is to bear its own expenses for an audit. (EXH 10, p. 18) It also states that "[t]he reasonable cost of special data extractions required by the auditing Party to conduct the Audit or Examination will be paid for by the auditing Party." (EXH 10, p. 18) A "Special Data Extraction" is defined as "the creation of an output record or informational report (from existing data files) that is not created in the normal course of business." (EXH 10, p. 18) The 2002 MCIMetro agreement contains the same language. (EXH 13, pp. 16-17) The FDN agreement also provides that a party will bear its own expenses in connection with an audit. (EXH 11, p. 16) However, it does not address the expenses further. However, staff would note that this proceeding is fundamentally a billing dispute which, in accordance with the provisions of the agreements, has been brought to the Commission for resolution. Accordingly, since there strictly speaking is not an "auditing party," we believe this Commission has latitude as to how and from whom the costs of the audit can be recovered. Staff notes while we have concluded elsewhere that KMC improperly delivered traffic to Sprint, we also concluded that KMC did not knowingly violate Section 364.16(3)(a), Florida Statutes. On balance, we believe it would be reasonable for the parties to share equally the costs of the audit.

Staff believes the time period to be covered in the audit should be July 2002 through May 2004. This is the time period used in Sprint witness Aggarwal's exhibit, excluding the period after PointOne migrated its traffic away from KMC's network. (EXH 51)

The following adjustments should be made, as previously discussed by staff:

- 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.

Finally, staff believes an independent third party auditor should be engaged by the parties to determine the amount owed, which may be based on a statistically valid random sample or other methodology, as the entity deems appropriate. The parties should jointly select the third-party auditor and should submit a report to the 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. Staff would recommend that the parties exercise best efforts so that the audit is completed expeditiously. Upon completion, the audit report should be submitted for review by the



Commission, for a determination of further steps required (including the timeline for any refunds).

### **CONCLUSION**

As discussed in previous issues, the record is uncontroverted that the traffic exchanged between KMC and Sprint meets the definition of “toll” traffic in the parties’ interconnection agreements. Nevertheless, Sprint’s sampling methodology appears to contain flaws that render it unreliable. Further, the amount requested by Sprint contains figures for traffic that staff believes is inappropriate for this claim.

Therefore, staff recommends that KMC delivered interexchange traffic to Sprint over local interconnection trunks in violation of the terms of its Interconnection Agreements with Sprint. However, the amount cannot be determined based on this record. The parties should obtain an audit or accounting to determine the amount, subject to the adjustments noted by staff.

**Issue 9:** To what extent, if any, is Sprint's backbilling limited by its Interconnection Agreements with KMC, Sprint's tariffs, or other applicable law?

**Recommendation:** Sprint's backbilling is only limited by Section 95.11 (2) , Florida Statutes. (Pruitt, B. Keating)

**Position of the Parties**

**Sprint:** Sprint's backbilling is limited, if at all, by the applicable statutes of limitations.

**KMC:** Sprint is limited by its tariff such that it can only back bill access charges for the quarter in which an audit is completed and the quarter prior to the audit. Section 95.11, Florida Statutes, would otherwise generally apply.

**Staff Analysis:**

**PARTIES' ARGUMENTS**

**Sprint**

Sprint's witness Burt states that there are no backbilling limitations in the interconnection agreements, Sprint's tariffs, or in Section 364.16(3)(a), Florida Statutes, for misrouted traffic. The witness explains that Section 95.11(2), Florida Statutes, provides for a five-year limitation period for actions based on contract violations. The witness asserts that the Commission in Docket No. 020960-TP, Order No. PSC-03-1139-FOF-TP, ". . . recognized the applicability of the five-year statutory limitations period to billing disputes under interconnection agreements . . . ." (TR 73; BR at 42)

The witness also notes that Sections 95.11(3)(f) and (j), Florida Statutes, provide for a four-year limitation period for actions based on statutory liability or action based on fraud, respectively. Witness Burt states that Sprint's backbilling from July 2002 is within even this shorter time period. (TR 74; BR at 42)

Sprint states that the backbilling provision tied to a permissive audit in its Access Tariff only applies to erroneous PIUs and not to this Complaint. (Reply BR at 19)

**KMC**

KMC chose to address this issue only in its post-hearing brief. (EXH 6, p. 55) KMC believes that "Sprint is limited by its tariff such that it can only back bill access charges for the quarter in which an audit is completed and the quarter prior to the audit." KMC concedes that "Section 95.11, Florida Statutes, would otherwise generally apply." (BR at 43)

### **ANALYSIS**

Staff has previously addressed the PIU audit section, E.3.11.D.1, in Sprint's Access Services Tariff, in Issue 3. The audit section provides for a permissive audit of access traffic over access trunks, not misrouted access traffic over local interconnection trunks, which is the basis of this Complaint. Thus, Section E.3.11.D.1 does not apply.<sup>32</sup>

In Issue 5 staff asserted its belief that KMC did not knowingly violate Section 364.16(3)(a), Florida Statutes. Therefore, staff does not believe that Section 95.11(3), Florida Statutes, applies to the backbilling limitation. Since there are no limitations to backbilling in Sprint's Access Services Tariff or Interconnection Agreement with KMC that warrant a departure from Florida's five-year statute of limitation, staff believes that Section 95.11(2), Florida Statutes, applies. The backbilling time period at issue in this Complaint, from 2002, is well within the five-year statute of limitation.

### **CONCLUSION**

Sprint's backbilling is only limited by Section 95.11 (2) , Florida Statutes.

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<sup>32</sup> Staff notes that the backbilling period cited by KMC for Section E.3.11.D.1 of Sprint's Access Services Tariff was erroneous. The period includes the quarter the audit was completed, the quarter prior to the completion of the audit, and two quarters following the completion of the audit.

**Issue 10:** Did Sprint overpay reciprocal compensation to KMC? If yes, what is the appropriate refund, if any, due to Sprint?

**Recommendation:** Yes. An audit of the traffic in question should be completed by an independent third party to determine the appropriate refund. Responsibility for payment of the cost of the audit should be handled in the same manner as recommended in Issue 8. **(Pruitt)**

**Position of the Parties**

**Sprint:** Yes. By sending non-local access minutes to Sprint over local facilities, KMC inflated the amount of local or “voice” traffic, and, as a result, Sprint overpaid reciprocal compensation by three times for the minutes of use that KMC incorrectly routed in this fashion. Sprint has overpaid KMC at least \$741,396.

**KMC:** Sprint did not overpay. KMC paid reciprocal compensation on the disputed traffic. Sprint’s payment was, in part, based upon traffic for which KMC paid reciprocal compensation. No refund is appropriate. If the traffic was not ESP or IP telephony, access charges would be due from PointOne or IXC’s.

**Staff Analysis:**

**PARTIES’ ARGUMENTS**

**Sprint**

Sprint witness Dansforth states that from July 2002 to June 2003 Sprint overpaid reciprocal compensation to KMC because access traffic was sent over Sprint’s local interconnection trunks. The witness avers that Sprint is interconnected with KMC for the exchange of local and ISP-bound traffic. The witness explains that in 2001 the FCC’s ISP Remand Order<sup>33</sup> established an interim compensation plan which addressed intercarrier compensation of traffic delivered to internet service providers (ISPs) and the treatment and compensation of local traffic. (TR 121; BR at 43)

The witness states that a crucial component in the FCC’s order, which Sprint adopted in Florida on February 1, 2002, was the assumption that “if one carrier’s traffic exceeded the other carrier’s traffic by a factor of three (3), all traffic above the 3:1 ratio was presumed to be ISP-bound traffic and compensated at the ISP-bound traffic rate as set forth in the FCC’s order,” and all traffic below the 3:1 ratio was presumed to be local (voice) minutes to be compensated at the reciprocal compensation rate in the interconnection agreement. Witness Dansforth notes that Sprint derived the number of local (voice) minutes to be compensated at the reciprocal compensation rate by multiplying the number of CLEC originated minutes that terminated to Sprint by three, and this calculation also determined the number of Sprint originated minutes that were above the 3:1 ratio and assumed to be ISP-bound. The witness also states that “[i]n this

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<sup>33</sup> Order FCC 01-131 was released April 27, 2001, in Dockets No. 96-98 and 99-68 entitled In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic.

case, three times the number of KMC-originated minutes terminated by Sprint is presumed to be the number of Sprint originated voice or [l]ocal traffic terminated by KMC.” (TR 122-123; BR at 43)

Witness Dansforth explains that because KMC routed access traffic over local interconnection trunks, KMC inflated its local traffic minutes of use which resulted in Sprint over paying reciprocal compensation threefold due to the misrouted traffic. The witness notes that the local (voice) rate is higher than the ISP rate and argues that “Sprint overpaid by that rate differential multiplied by the number of minutes that were sent incorrectly as if they were [l]ocal or voice traffic.” (TR 124; Conf. EXH 53, p.1; BR at 44)

### KMC

KMC witness Johnson states that the Commission should find that Sprint is not entitled to a refund of reciprocal compensation “since the traffic in question was properly sent over the local interconnection trunks.” (TR 153; BR at 43) The witness also notes that if access charges are owed to Sprint that they should be paid by entities other than KMC. In this situation, there would need to be an accounting of the reciprocal compensation paid by both Sprint and KMC that is separate from the access charge issue. (TR 177) KMC believes the accounting should be conducted by an independent third party or the Commission. (BR at 44)

### ANALYSIS

Staff notes that on June 26, 2002, Sprint and KMC adopted Amendment No. 1 to their 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).

While staff agrees that routing 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 Sprint’s calculations. Sprint overpaid reciprocal compensation by three times the rate differential multiplied by the number of misrouted access minutes. However, in Confidential Exhibit 53 it appears the minutes are multiplied by the local rate in section 3.1.1 of Amendment 1 to the 1997 MCI agreement. Staff is also concerned that in reviewing the calculations provided by Sprint it cannot be determined whether or not any KMC originated local traffic was rightfully included in applying the 3:1 ratio, which could also skew the results.

KMC argues that if Sprint is owed access charges, an accounting of the reciprocal compensation paid by both KMC and Sprint should be conducted. Staff notes that any audit conducted as recommended in Issue 8 to determine the appropriate access charges owed by KMC to Sprint inherently should take into account any reciprocal compensation payments made by KMC for such traffic.

Docket No. 041144-TP  
Date: November 17, 2005

Staff believes an audit is appropriate to address staff's concerns with Sprint's calculations as outlined above. The audit should be for the period July 2002 through June 19, 2003. Responsibility for payment of the cost of the audit should be handled in the same manner as recommended in Issue 8.

### **CONCLUSION**

An audit of the traffic in question should be completed by an independent third party to determine the appropriate refund. Responsibility for payment of the cost of the audit should be handled in the same manner as recommended in Issue 8.

**Issue 11:** If the Commission determines that KMC owes Sprint compensation for any traffic delivered by KMC to Sprint that is the subject of this complaint or refunds for overpayment of reciprocal compensation, what are the appropriate payment arrangements?

**Recommendation:** The appropriate payment arrangements should be determined after the audits conducted as directed in Issues 8 and 10 are complete. A late payment charge of 1.5% per month should be paid by KMC. **(Pruitt, B. Keating)**

### **Position of the Parties**

**Sprint:** KMC should be required to pay Sprint within ten days of the Commission's final order all monies determined to be due to Sprint.

**KMC:** If this was not ESP or IP telephony, access charges are due from PointOne or IXCs. An accounting is necessary to reconcile payments made against those Sprint has not paid that are past due. Amounts due to Sprint should be held in abeyance pending the resolution of KMC's claims.

### **Staff Analysis:**

## **PARTIES' ARGUMENTS**

### **Sprint**

Sprint believes the Commission should order KMC to pay within ten days of the Commission's final order over \$3 million in access charges, more than \$700,000 in reciprocal compensation, and 1.5% interest per month for late payment charges. Sprint witness Dansforth states that the payment should be made by wire transfer.<sup>34</sup> (TR 125; BR at 45-46) Sprint cites to Attachment VIII, Section 3.1.17 of the 1997 MCI Agreement, Section 6.5 of the FDN Agreement, and Attachment 8, Section 3.1.17 of the 2002 MCI Agreement as the applicable agreement provisions that require KMC to pay interest in the amount of 1.5% per month on backbilled charges. (EXH 10, p. VIII-26; EXH 12, p. 15; EXH 13, p.336)

Specifically, the agreements state:

1997 MCI Agreement, Att VIII, 3.1.17:

Sprint will assess late payment charges to MCI in accordance with the applicable tariff, if any. If there is no applicable tariffed late payment charges then Sprint will assess late payment charges equal to the lesser of 1.5% per month of the balance due or the maximum allowed by law, until the amount due including late payment charges is paid in full.

2001 FDN Agreement, Section 6.5:

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<sup>34</sup> Sprint witness Dansforth provides the appropriate bank account number and transit routing number in his direct testimony.

The billing party will assess late payment charges to the billed party equal to the lesser of one and one-half percent (1.5%) per month or the maximum rate allowed by law for commercial transactions, of the balance due, until the amount due is paid in full.

MCI 2002 Agreement, Att 8, Section 3.1.17:

The Parties will assess late payment charges equal to the lesser of 1.5% per month of the balance due or the maximum allowed by law, until the amount due including late payment charges is paid in full.

### KMC

KMC states that if it is determined that access charges are owed, PointOne or various interexchange carriers, not KMC, would owe the charges to Sprint. KMC believes that an accounting will be necessary to resolve the reciprocal compensation payments between Sprint and KMC, and that any amounts that might be due from KMC should be suspended until KMC's complaint against Sprint with offsetting claims has been resolved. (BR at 44-45)

KMC argues that the applicable interest rate should be "the statutorily determined rate of 0.0058% per month (or 0.0001918 per day)" instead of 1.5% per month. KMC notes that all three agreements contain the requirement that the lesser of the 1.5% or the maximum rate set by law is the applicable interest rate. KMC references Section 55.03, Florida Statutes, and the statutorily set rate of 0.0058% per month made by the Chief Financial Officer of the State of Florida as the applicable rate because it is less than 1.5% per month. (Reply BR at 20)

## ANALYSIS

### Interest Rate

Staff notes that the testimony on this issue was sparse. In fact, KMC chose to address the issue of payment arrangements only in its post-hearing briefs. (EXH 6, KMC-1, p.55) Even though Sprint and KMC agree on the same late payment sections of the applicable agreements, each party has its own interpretation for the calculation of the late payment charge. Each late payment section states that the charge will be "the **lesser** of 1.5% per month . . . or the maximum allowed by law. . . ." (emphasis added) Sprint believes 1.5% per month is the lesser while KMC believes that the rate established under Section 55.03, Florida Statutes, 0.0058 per month, is the lesser. (Sprint BR at 45-46; KMC Reply BR at 20)

Section 55.03, Florida Statutes, requires the Chief Financial Officer of the State of Florida to establish the interest rate payable on judgments beginning January 1<sup>st</sup> of each year. On December 1, 2004, the interest rate on judgments was set at 7% a year (.0001918 per day) for the year 2005. Section 55.03.Florida Statutes, applies to judgments, decisions of a court, and



sets the interest on the amount awarded at the end of the proceeding until the award is fully paid. It is not used to calculate the amount of the judgment itself. Because Section 55.03, Florida Statutes, only applies to court ordered judgments, it does not apply in this situation.

Under Florida's usury provision in Section 687.02, Florida Statutes, 18% per year or 1.5% per month is the maximum allowed for the payment of interest on contracts. Although late payment charges in tariffs and agreements filed with the Commission do not constitute interest payments under the usury statutes<sup>35</sup>, the Parties chose to limit the late payment interest rate in their agreements to the lesser of 1.5% per month or the maximum rate allowed by law. Therefore, staff believes that a late payment charge of 1.5% per month is appropriate.

### Timing of Payment

KMC argues that other entities should be responsible if access charges are owed and that an "accounting" is necessary to resolve reciprocal compensation payments. These concerns have been addressed in previous issues. KMC also believes that any payments due to Sprint should be held in abeyance until Docket No. 050581-TP, *Complaint of KMC Telecom III LLC and KMC Telecom V, Inc. against Sprint Florida, Incorporated and Sprint Communications Company Limited Partnership for alleged failure to pay access charges pursuant to interconnection agreement and Sprint's tariffs, and for alleged violation of Section 364.16(3)(a), Florida Statutes*, is resolved. Sprint has requested that payment be received within 10 days of the Commission's final order.

Since staff is recommending that audits be conducted in Issues 8 and 10 it appears premature to discuss timing of payments at this time. Staff believes as discussed in Issue 8, the audit reports should be submitted to the Commission when complete for a determination of further steps required, including the timeline for payment.

### CONCLUSION

The appropriate payment arrangements will be determined after the Commission has reviewed the audit conducted for Issues 8 and 10. A late payment charge of 1.5% per month should also be paid by KMC.

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<sup>35</sup> October 31, 2002 ruling by Florida Supreme Court, No. SC01-2205, *BellSouth Telecommunications, Inc. vs. E. Leon Jacobs, Jr., et al.* "...the PSC relied up industry history in denoting the Company's late payment charge to be within the preexisting 'nonbasic service category'. . . its determination that the interest charge is a 'service' BellSouth renders its delinquent customers for carrying their unpaid balances is quite logical." December 12, 2002, in Docket No. 021024-WU, Order No. PSC-02-1752-TRF-WU, the Commission approved a late charge of 1.5% or \$5, whichever amount is higher.

Docket No. 041144-TP  
Date: November 17, 2005

**Issue 12:** Should this docket be closed?

**Recommendation:** No. If the Commission approves staff's recommendation, this Docket should remain open pending the Commission's review of the audits for Issues 8 and 10. The Commission should then establish a timeline for the payment of the appropriate refund amount as determined by the auditor. **(B. Keating, Pruitt)**

**Staff Analysis:** If the Commission approves staff's recommendation, this Docket should remain open pending the Commission's review of the audits and the establishment of a timeline for payment.