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September 7, 2005

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 041144-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated is Sprint's Reply Brief.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions, please do not hesitate to call me at 850/599-1560.

Sincerely,

A handwritten signature in black ink that reads "Susan S. Masterton". The signature is written in a cursive, slightly slanted style.

Susan S. Masterton

Enclosure

**CERTIFICATE OF SERVICE
DOCKET NO. 041144-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail this 7th day of September, 2005 to the following:

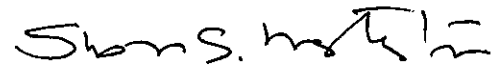
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Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint-Florida, Incorporated) Docket No. 041144-TP
Against KMC Telecom III LLC,)
KMC Telecom V, Inc. and KMC Data LLC,)
for failure to pay intrastate)
Access charges pursuant to its interconnection)
Agreement and Sprint's tariffs and for violation of)
Section 364.16(3)(a), Florida Statutes.) Filed: September 7, 2005
_____)

SPRINT-FLORIDA, INCORPORATED'S REPLY BRIEF

Pursuant to the agreement of the parties at the hearing in this matter on July 12, 2005, and Order No. PSC-05-0871-PCO-TP granting KMC's Motion for Extension of Time, Sprint-Florida, Incorporated ("Sprint") files this Reply Brief.

INTRODUCTION

In its Complaint, Sprint has alleged that KMC violated section 364.16(3), Florida Statutes, and Sprint's interconnection agreements with KMC by deliberately and wrongfully terminating interexchange traffic to Sprint over local interconnection facilities without paying Sprint's tariffed access charges that were otherwise due for this traffic. KMC has not denied that the traffic that is the subject of Sprint's Complaint is interexchange traffic as evidenced by the calling and called party numbers, but instead has asserted that this traffic is exempt from access charges because it is enhanced service traffic, specifically Voice over Internet Protocol (VoIP) traffic.

Sprint has met its burden of proof as the Complainant in this docket by producing a preponderance of competent, substantial evidence that shows that the traffic: 1) was interexchange traffic in that it originated and terminated in different local calling areas or exchanges; 2) was subject to access charges in that it was interexchange traffic and the calls were dialed and billed (in cases where Sprint could identify the calling party) as toll

calls and routed through interexchange carriers at the originating end of the calls; 3) was delivered by KMC to Sprint for termination over local exchange trunks; and 4) that KMC knew that this manner of termination to Sprint was "access bypass" and, therefore, that access charges would be due for this traffic if it was properly terminated to Sprint. In addition, Sprint has demonstrated by a preponderance of the evidence that the interconnection agreements applicable between the parties required that only local traffic (defined as traffic originating and terminating in the same Sprint local calling area) and certain intraLATA traffic be terminated over local interconnection facilities and that toll traffic be terminated over separate trunks. Finally, Sprint has demonstrated that under the interconnection agreements and the law, KMC's routing of the subject traffic from PointOne's physical location in Orlando for termination to Sprint's customers in Ft. Myers and Tallahassee did not meet the definition of local traffic in the parties' interconnection agreements and, in itself, was a violation of the agreements.

While Sprint has presented an abundance of direct and substantial evidence to support its claims against KMC, KMC has produced only speculation and hearsay evidence to support its affirmative assertion that the subject interexchange traffic was exempt from access charges as VoIP "enhanced services" traffic. Based on the record and the applicable federal and state law, the Commission has no logical choice except to find that KMC violated section 364.16(3), F.S. and its interconnection agreements with Sprint by wrongfully and improperly terminating interexchange traffic as local traffic and thereby avoiding access charges rightfully due Sprint.

ARGUMENT

Burden of Proof

In its initial Post-hearing Statement and Brief (hereinafter, "KMC's Initial Brief"), KMC asserts that Sprint has not met its burden of proof and has presented no evidence to support its claims. Under the evidentiary standard applicable in administrative proceedings, Sprint must prove by a preponderance of the evidence that KMC violated state law and its interconnection agreements with Sprint by terminating interexchange traffic otherwise subject to access charges over its local interconnection facilities with Sprint.¹ In administrative proceedings the burden of proof rests with the party asserting the affirmative of an issue.² Under this standard, Sprint must prove all of the elements of the alleged statutory and interconnection agreement violations.³

¹ § 120.57(1)(j), F.S. See, *HRS v. Career Service Commission*, 289 So. 2d 412 (Fla. 1974); *American Insurance Assoc. v. Dept. of Insurance*, 518 So. 2d 1342, 1346 (Fla. 1st DCA 1987) When an agency imposes a fine or other penalty for a statutory violation, the "clear and convincing" evidentiary standard applies. *Dept. of Banking and Finance v. Osborne Stern*, 670 So. 2d 932 (Fla. 1996) But, in this Complaint docket between two parties to determine appropriate intercarrier compensation amounts, the evidentiary standard is appropriately the "preponderance of the evidence." See, *In re: Complaint of Mother's Kitchen Ltd against Florida Public Utilities Company regarding refusal or discontinuance of service*, Order No. PSC-98-1254-FOF-GU in Docket No. 970365-GU, issued Sept. 22, 1198; *In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief and others*, Order No. PSC-98-1216-FOF-TP, Docket Nos. 971478-TP, 980184-TP, 980495-TP, and 980499-TP, issued Sept. 15, 1998.

² See, *Young v. Dept. of Community Affairs*, 625 So. 2d 831 (Fla. 1993). See, also, *Fla. Dept. of Transportation v. JWC Company, Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *Balino v. Dept. of Health and Rehabilitative Services*, 348 So. 2d 349 (Fla. 1st DCA 1977).

³ Section 364.16(3)(b), F.S., authorizes the Commission to investigate alleged violations of s. 364.16(3)(a), F.S. At the Agenda Conference during which KMC's Motion to Dismiss Sprint's Complaint was denied, staff indicated that it believed that sufficient information to resolve the Complaint could be gathered through the discovery process. [November 30, 2004 Agenda Conference Transcript, Item No. 5, page 12] Staff propounded discovery to both KMC and Sprint and participated in the depositions of KMC and Sprint witnesses.

Contrary to KMC's assertions, Sprint has presented abundant direct and competent evidence of each element of the alleged violations.⁴ As enumerated in Sprint's Initial Brief, Sprint has presented a sample of 27 days of SS7 call detail records (CDRs) encompassing the period of time applicable to the Complaint which clearly show that traffic that originated from a calling party in one local calling area was delivered over KMC's local interconnection trunks to Sprint for termination to a called party in another local calling area (i.e., Sprint's Tallahassee or Ft. Myers local calling area). [Hearing Exhibit No. 36, Revised Exhibit WLW-5] In addition to the 27 days of CDRs, Sprint produced a study by Agilent Technologies, and the call detail records supporting that study, that confirm what the sample CDRs show. [Hearing Exhibit Nos. 33 and 34, Exhibits WLW-2 and WLW-3] These records demonstrate that the calls at issue in this proceeding were initiated as toll calls and were routed to IXCs on the originating side. In addition, Sprint has submitted as evidence correlated call records and a composite of Sprint customer bills and excerpts from the SS7 records that show that some of these calls were initiated by Sprint originating customers as toll calls to the dialed numbers of Sprint terminating customers and that the originating customers were billed by IXCs for these calls as toll calls. [Hearing Exhibit No. 41, Exhibit JRB-2; Hearing Exhibit No. 7, Sprint's Response to KMC's POD Nos. 6, and 7] And, to support the billing factors used by Sprint to determine the access charges that should have been paid, Sprint produced the summary SS7 monthly reports that reflect all of the call detail records gathered from the Agilent system. [Hearing Exhibit No. 3, Attachment to Sprint's Supplemental Response to KMC's Interrogatory No. 15]

⁴ KMC continues to argue that Sprint has not presented sufficient evidence against KMC V and KMC Data. [KMC's Initial Brief at pages 12-13] Sprint believes that it has presented more than sufficient evidence to implicate these entities as parties. [Sprint's Initial Brief at pages 9-12]

As KMC itself has admitted, the substantial majority of the calls that are the subject of Sprint's Complaint reflected one of two "charge party" numbers local to the terminating local calling areas. [Tr. 141, Johnson Direct Testimony, page 10, lines 19-23; Tr. 191, Twine Direct Testimony, page 5, lines 9-12] KMC has asserted that these charge party numbers were the billing telephone numbers that it assigned to its customer, PointOne, to enable the customer to deliver VoIP traffic from PointOne's physical location in Orlando to KMC's switches in Tallahassee and Ft. Myers so that KMC could then deliver that traffic to Sprint for termination as local calls. [Tr. 192a and 192b, Twine Direct Testimony page 9, line 9 through page 10, line 7]

KMC has also asserted that this VoIP traffic was "enhanced services traffic" as a matter of fact and that, as such, this VoIP traffic was exempt from access charges as a matter of law. [KMC's Answer and Affirmative Defenses at ¶ 16; KMC's Initial Brief at pages 8-10] Under the evidentiary rules applicable to administrative proceedings, KMC bears the burden of proving the truth of this assertion.⁵ In addition, in an order on reconsideration of the Commission's decision in Docket No. 950985-TP, its original docket implementing local competition in Florida, the Commission placed on CLECs the burden to demonstrate that traffic terminating to an ILEC over local interconnection arrangements is local, relying on section 364.16(3)(a), Florida Statutes, as the basis for its ruling.⁶ Specifically, the Commission stated "[w]e find that that the company terminating the call should receive terminating switched access from the originating company unless the originating company can prove that the call is local." [Order No. PSC-96-1231-FOF-

⁵ See, cases cited in footnote 2. See, also, *In re: Complaint of Harold Keathley against BCD Industries, Inc.*, Order No. 13611 in Docket No. 830329-WS issued August 24, 1984 at pages 3 and 4.

TP at page 23] The 1997 MCI and 2002 MCI interconnection agreements adopted by KMC specifically incorporate this Order by reference, while the FDN Agreement contains a general reference to relevant Commission regulations and orders. (Footnote 21 *infra* sets forth the relevant interconnection agreement language.)

KMC has failed to meet its evidentiary burden, instead relying on hearsay evidence in the form of self-serving statements of PointOne to KMC, or in public forums, that PointOne provides enhanced services and that the traffic it was delivering to KMC was enhanced services. Hearsay evidence is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.” [§ 90.801, Florida Statutes] Pursuant to the rules of administrative procedure, hearsay evidence is not admissible in an administrative proceeding as the sole evidence to prove the truth of the matter asserted. Rather, it is admissible only to explain or supplement other direct evidence entered into the record of the proceeding. [§ 120.57(1)(c), Florida Statutes] There is absolutely no direct evidence in the record that PointOne’s traffic is enhanced services traffic. In fact, KMC has emphatically stated that it has no first hand knowledge of the nature of the traffic. [Hearing Exhibit No. 6, KMC’s Response to Staff’s Interrogatory No. 6 and KMC’s Response to Sprint’s Interrogatory No. 2; Hearing Exhibit No. 30, Calabro Deposition, page 14, lines 12-15]

The hearsay statements of PointOne do not provide sufficient or competent evidence that the traffic is enhanced services traffic despite KMC’s assertions otherwise. In addition, KMC is wrong when it says that Sprint has not rebutted this hearsay evidence. The CDRs, correlated call records and related customer bills produced by Sprint all prove

⁶*In re: Resolution of petition(s) to establish nondiscriminatory rates, terms, and conditions for interconnection involving local exchange companies and alternative local exchange companies pursuant to Section 364.162, F.S., Order No. PSC-96-1231-FOF-TP, in Docket No. 950985-TP issued October 1, 1996.*

that the traffic that is the subject of Sprint's Complaint was nothing more than phone-to-phone interexchange voice traffic. Given the evidence presented by Sprint that demonstrates that the traffic appears to be telecommunications traffic initiated as toll traffic and routed to IXCs before it entered KMC's network and the further evidence presented by Sprint that calls originated with Sprint's POTs customers, terminated to Sprint's POTs customers and were billed to Sprint's originating customers by IXCs as toll calls, the Commission has no evidentiary basis for accepting KMC's hearsay allegations that the traffic is enhanced services traffic exempt from access charges.

Voice traffic terminated in this manner would clearly be subject to access charges

There is no question that if the traffic that is the subject of this Complaint were determined to be traditional voice traffic it would be interexchange traffic subject to access charges. [Tr. 78-79, Burt Rebuttal Testimony, page 4, line 1, through page 5, line 18; Tr. 47, Wiley Rebuttal Testimony, page 5, lines 1-23; Hearing Exhibit No. 30, Calabro Deposition, page 40, line 15 through page 41 line 3 and page 95, line 1 through page 96 line 12] This proposition is true whether the traffic is considered to have been originated with the originating calling party number reflected in the SS7 CDRs or the traffic is considered to have originated at PointOne's physical location in Orlando.

KMC insists that the PRI services it provided to PointOne were local services. [KMC's Initial Brief at page 23] However, KMC does not explain how traffic that originates in Orlando (or other cities and states) but terminates to end users in Ft. Myers or Tallahassee meets the definition of local traffic under Sprint's interconnection agreements or the law. Sprint discusses the definition of the local traffic in the interconnection agreements extensively its initial brief. [Sprint's Initial Brief at pages 17-18] In addition, Sprint discusses the Commission's application of the end-to-end jurisdictional analysis for

determining whether a call is local or toll in the Generic Reciprocal Compensation Order. [Sprint's Initial Brief at pages 15-17] Based on the end points of the call, as reflected by the evidence in this proceeding, the traffic that is the subject of Sprint's Complaint is clearly not local traffic.

The Commission's decision in the only previous case in which it ruled on a violation of section 364.16(3), F.S., supports the conclusion that if PointOne's traffic was voice traffic, the routing mechanism implemented by KMC would violate the statute.⁷ In the *Telenet* case the Commission considered a scheme by Telenet to use BellSouth's call forwarding services to route calls between different local calling areas as local calls. The Commission found that Telenet's use of call forwarding to convert toll calls to local calls violated section 364.16(3), F.S. [*Telenet* at page 24] An important consideration in the Commission's decision was the fact that if an IXC were to complete the same calls they would be toll calls subject to access charges. [*Telenet* at pages 7, 18, 20] While the facts in that case are not identical to the situation with KMC's PointOne traffic, the Commission's decision supports Sprint's assertion that if PointOne's service was a traditional voice service it would violate the provisions of the statute.⁸ Clearly then, under the accepted definition of local traffic as it applies to intercarrier compensation for voice traffic, the interexchange PRI services provided by KMC to PointOne were not local services under either the interconnection agreement or the law or tariffs.

Rather than explaining directly how PointOne's traffic can be considered local, KMC relies instead on the maxim that "what you say three times (or more) is true." If

⁷In re: *Petition for arbitration of dispute with BellSouth Telecommunications, Inc. regarding call forwarding, by Telenet of South Florida, Inc.*, Order No. PSC-97-0462-FOF-TP, in Docket No. 961346-TP, issued April 23, 1997

KMC addresses this question at all, it appears to espouse the position that the traffic was local because the interexchange transport KMC provided to PointOne between Orlando and Ft. Myers or Tallahassee constituted a “long local loop.” Also, KMC appears to assert that the jurisdiction of the traffic should be determined by where it is switched, rather than where it is originated. [KMC’s Initial Brief at page 24] KMC offers no legal support for its positions and Sprint asserts that there is none.

First, the term “local loop” has generally been defined in the context of the unbundled network element requirements imposed on ILECs. In that context, the FCC has defined a “local loop” as the “transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises.” [FCC Rule 51.319(a)(1)] Given that ILEC central offices are located within the exchanges in which the ILEC provides local service to its customers, this definition assumes that the customer is located in the same local calling area as the ILEC central office. Sprint could find no references “long local loops” in FCC or Commission rules or orders. However, given that the definitions of “local” for the purposes of the interconnection agreement and in the FCC and Commission Orders, discussed previously in this brief and in Sprint’s Initial Brief, encompass origination and termination in the same local exchange area, and given that Orlando to Ft. Myers or Tallahassee does not constitute the local calling area of Sprint or KMC, it is difficult to see how the transport arrangement for the PRI services provided by KMC to PointOne could be considered local.

Second, Sprint has found no instance where either the FCC or the Commission has determined that the jurisdiction of a call is based on where it is switched. And, such a

⁸ In its order denying reconsideration of the *Telenet* decision, the Commission stated, “we may not, in the general case, validate any telecommunications service that violates any provision of ch. 364, F.S.” [Order No. PSC-97-0861-FOF-TP].

finding would be inconsistent with the Commission's determination in the Generic Reciprocal Compensation Order that CLECs are required to have only one point of interconnection per LATA and that traffic that originates and terminates within the same local calling area is local, regardless of whether the POI is located outside the terminating local calling area and the call is, therefore, switched by the CLEC outside that local calling area.⁹ In addition, toll calls are switched by the terminating local exchange carrier in the local calling area in which the calls terminate via local switching.¹⁰ Therefore, where a call is switched has no bearing on whether a call is local or toll.

Third, KMC suggests that the jurisdictional treatment of traffic between interconnected carriers is directly linked to how KMC characterizes the jurisdiction of traffic or services to its customers. Nothing could be further from the truth. KMC has the right to charge and treat a customer's traffic in any manner it chooses, but only with respect to the relationship between KMC and its customer. This is completely separate and in no way related to the jurisdictional treatment of traffic between KMC and other carriers is governed by applicable interconnection agreements and tariffs.

If the interexchange PRI services KMC provided PointOne were not local services, as defined under the interconnection agreements and the law applicable to traditional voice traffic, then it is difficult to see how KMC could have been providing PointOne with a local service pursuant to the FCC's enhanced services exemption. KMC's assertions can only be accepted as true if the mere fact that a service is used to provide enhanced services makes that service local in nature, regardless of whether it is a local or access service when used to provide telecommunications services. There is no reading of applicable FCC

⁹*In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Order No. PSC-02-1248-FOF-TP in Docket No. 000075-TP, issued September 10, 2002, at page 25.

orders or rules that supports such an interpretation. Rather, the enhanced services provider exemption allows “enhanced service providers to be treated as end users and thus may use local business lines for access for which they pay local business rates...”¹¹

VoIP that terminates to the PSTN is not exempt from access charges

Because the traffic that is the subject of Sprint’s Complaint would be interexchange (toll) traffic subject to access charges if it were determined to be voice traffic, then the only possible basis for the Commission to determine that it was not subject to access charges would be that it was enhanced services traffic, specifically VoIP traffic, as KMC argues (though without supporting evidence). Sprint has discussed above how KMC has not met its burden of proving that the traffic is enhanced. In addition, Sprint discusses at length in its initial brief how the FCC has never said that all VoIP traffic is enhanced services traffic, nor held that all traffic that uses the Internet Protocol at some point in the transmission is exempt from access charges. [Sprint’s Initial Brief at pages 34-36] The FCC has determined that a VoIP service was an enhanced (or information) service not subject access charges on only one occasion and that was in the pulver.com case where the traffic at issue never touched the public switched network.¹² Inarguably, the pulver.com decision does not apply to this case, since the traffic uses the public switched network on at least the terminating end and, as Exhibit JRB-2 shows, in many (if not all) cases on the originating end as well. In contrast, the FCC specifically ruled that voice services that use the Internet Protocol at an intermediary point in the transmission, but begin and end on the public

¹⁰ See, Sprint Florida Access Service Tariff, Section E6.1.3(c).

¹¹ *In the Matter of Amendments to Part 69 of the Commission’s Rules Relating to Enhanced Services Providers*, CC Docket No. 87-015, FCC 88-151, released April 27, 1988.

¹² *In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, released February 19, 2004 (“pulver.com Declaratory Ruling”) at ¶¶ 5 and 9.

switched network and involve no net change in protocol, are telecommunications services and are specifically subject to access charges in the same manner as other telecommunications services.¹³

In addition to the AT&T Declaratory Ruling, the FCC has frequently indicated that VoIP traffic that uses the public switched network in the same manner as circuit switched voice traffic should be subject to the same intercarrier compensation mechanism as traditional voice traffic. [See, *In the Matter of Federal-State Joint Board, Report to Congress*, CC Docket No. 96-45, released April 10, 1998 at ¶¶ 88 and 89; *In the Matter of IP-Enabled Services*, FCC 04-28 released March 10, 2004 (“IP Enabled Services NPRM”) at ¶ 33] The FPSC has also stated that access charges are due when VoIP traffic is terminated over the public switched network in the same manner as traditional voice traffic. [See, *In re: Petition of BellSouth Telecommunications, Inc. for Section 252(b) arbitration of interconnection agreement with Intermedia Communications, Inc.*, Order No. PSC-00-1519-FOF_TP in Docket No. 991854-TP, issued August 22, 2000 at page 57; Generic Reciprocal Compensation Order at page 37] In addition, this Commission has expressed the same sentiments in its comments to the FCC in the IP-Enabled Services NPRM docket.¹⁴ Because many of these statements pre-date KMC’s relationship with PointOne, KMC had no valid legal basis for assuming that the “access bypass” it facilitated for PointOne was sanctioned by the FCC or this Commission.¹⁵

¹³ In WC Docket No. 02-161, *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, released April 21, 2004 (“AT&T Declaratory Ruling”) at ¶ 19.

¹⁴ Reply Comments of the Florida Public Service Commission, *In the Matter of IP-Enabled Services*, WC Docket No. 04-38, filed July 14, 2004, at page 19.

¹⁵ In fact at the inception of the relationship KMC and PointOne discussed the ILECs’ opposition to their scheme. [Hearing Exhibit No. 7, KMC’s 4th Suppl. Response to Sprint’s Interrogatory No. 15 and POD No. 5, at page 144 of 284].

KMC also argues that the FCC has pre-empted state commission jurisdiction over all aspects of VoIP traffic. [KMC's Initial Brief at page 5] This argument, too, is a misrepresentation of the FCC's rulings. In its most recent ruling on Vonage's broadband VoIP offering, the FCC determined that VoIP traffic was "jurisdictionally mixed."¹⁶ The FCC pre-empted the states as far as the imposition of certain legacy regulations on Vonage-type VoIP traffic, e.g., regulation of the rates a Vonage type provider may charge for its VoIP services and also regulations regarding service quality, universal service and 911.¹⁷ However, the FCC specifically declined to rule on whether Vonage-type service is a telecommunications or information service and specifically declined to rule on the intercarrier compensation that is applicable to Vonage-type service.¹⁸

As discussed above, KMC has failed to submit competent evidence that PointOne's traffic was VoIP traffic of any kind. But, even if the Commission determines that there is sufficient evidence that PointOne's traffic might be VoIP services, there is no legal precedent that prevents the Commission from determining that the traffic is not, and never was, exempt from access charges.

KMC knew that it was bypassing Sprint's access charges

While KMC has failed to prove with competent, direct evidence that PointOne's traffic was enhanced services traffic, it also offers its reliance on PointOne's representations of the nature of its traffic as proof that KMC did not "knowingly" terminate access traffic to Sprint. [KMC's Initial Brief at page 23] However, KMC'S disingenuous characterization of itself as the "duped" party is belied by the evidence in the

¹⁶ *Vonage Holdings Corporation Petition for Declaratory Ruling concerning an Order of the Minnesota Public Utilities Commission*, FCC 04-267, released December 12, 2004 ("Vonage Declaratory Ruling") at ¶18.

¹⁷ Vonage Declaratory Ruling at ¶ 46.

¹⁸ Vonage Declaratory Ruling at ¶ 44.

record, as well as KMC's own actions in devising the manner of the services it provided to PointOne. First, as Sprint discusses in its Initial Brief, the e-mail correspondence between KMC and PointOne when KMC's was negotiating the provisioning of the service shows that KMC was well aware of the nature of the traffic and that ILECs would consider KMC's termination of the traffic over local interconnection trunks to be access bypass. [Hearing Exhibit No. 7, KMC's 4th Suppl. Response to Sprint's Interrogatory No. 15 and POD No. 5, at pages 142 and 144 of 284] Second, KMC compounded the access bypass scheme by setting up interLATA interexchange PRIs from PointOne's physical location in Orlando to terminate PointOne's VoIP traffic to Sprint.¹⁹ And, to ensure that Sprint would not easily catch on to the scheme, KMC assigned PointOne charge party numbers that were local to the Ft. Myers and Tallahassee local calling areas, respectively, knowing full well that under industry standard practices the local charge party number would be used for billing purposes and, therefore, Sprint's billing system would not detect the inappropriate routing of the call. [Tr. 48, Wiley Rebuttal Testimony, page 6, lines 19-21] As Sprint's witnesses explain, the only way that Sprint could ascertain the scheme was through special studies conducted using the Agilent Business Intelligence System, which could review the underlying SS7 records to determine the true originating calling numbers. [Tr. 48 and 49, Wiley Rebuttal Testimony, page 6 line 21 through page 7, line 4]

KMC tries to justify the local nature of the interexchange PRIs it provided to PointOne by saying they provided "local calling" in the Tallahassee and Ft. Myers local calling areas. KMC maintains that the services were local, even though KMC's tariffs do

¹⁹ KMC alleges that the PointOne's "local PRIs" only allowed for local communications between PointOne and Tallahassee and Ft. Myers. However, the e-mail correspondence between KMC and PointOne indicate that service was also provided between PointOne in Orlando and end users in other ILEC local calling areas. [Hearing Exhibit No. 7, KMC 4th Suppl. Response to Sprint's Interrogatory No. 15 and POD No. 5, at page 108 of 284].

not support that KMC offered local calling services in Orlando or from Orlando to Ft. Myers or Tallahassee. [Sprint's Initial Brief at page 20] KMC also postulates that the services were local because if someone from Orlando called PointOne it would be a long distance call, while if someone from Ft. Myers or Tallahassee called PointOne it would be a local call. However, KMC conveniently ignores the fact that it provided only termination services to PointOne, not local calling, since KMC acknowledged from the beginning that PointOne's traffic would be 100% outbound. [Hearing Exhibit No. 7, KMC's 4th Suppl. Response to Sprint's Interrogatory No. 15 and POD No. 5, at page 140 of 284] Also, the telephone numbers inserted into the charge party field were nonworking numbers. [Hearing Exhibit No. 20, Schaffer Deposition, page 23, lines 20-25] There is no evidence in the record that any working numbers were ever assigned to PointOne. [Hearing Exhibit 30, Calabro Deposition, page 40, lines 10-18] Finally, KMC did not even use the charge party numbers on the bills it sent to PointOne, despite KMC's assertions that the numbers were necessary for billing purposes. [Sprint's Initial Brief at page 23]

The evidence in the record is simply uncontroverted that KMC provided access bypass services to PointOne with full knowledge that the nature and manner of the services violated both its interconnection agreement with Sprint and the statutory prohibition on terminating toll traffic over local trunks. And, certainly, since Sprint called KMC's attention to the activity in November 2003, KMC could no longer claim that it was not knowingly providing access services over its local interconnection trunks with Sprint. [Hearing Exhibit No. 3, Sprint's Response to KMC's 1st PODs, Nov. 7, 2003 e-mail from Linda Regier]

Access charges may be assessed against KMC

Recognizing the copious evidence that Sprint has presented that the traffic that is the subject of Sprint's Complaint was interexchange traffic subject to access charges, KMC attempts to deflect the responsibility for paying the access charges to others, despite KMC's substantial and knowing participation in the access avoidance scheme. [KMC's Initial Brief at page 44] Regardless of KMC's misdirection, both the law and the interconnection agreements place responsibility for the avoided charges on KMC. First, section 364.16(3)(a), F.S., specifically prohibits local exchange companies from knowingly terminating traffic subject to access charges over local interconnection trunks without paying applicable access charges. KMC engaged in exactly the behavior prohibited by the statute when it delivered to Sprint over local interconnection trunks PointOne's traffic (which originated either in diverse and distant local calling areas based on the calling parties or in Orlando if the traffic is deemed to have originated with PointOne). In addition, the interconnection agreements require that the parties deliver only local traffic over local trunks²⁰ and that the parties deliver toll traffic over separate trunks and pay appropriate access charges.²¹ In addition, Order No. PSC-96-1231-FOF-TP, which is

²⁰ Hearing Exhibit No. 10, 1997 MCI Agreement, Attachment IV, Section 1.1.2; Hearing Exhibit No. 12, FDN Agreement, Part F, Section 57.1.1.2; Hearing Exhibit No. 13, 2002 MCI Agreement, Attachment 4, Section 1.1.2.

²¹ Hearing Exhibit No. 10, 1997 MCI Agreement, Attachment 1, Section 4.2 provides:

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, Docket Number 95-0985-PP, and consistent with the provisions of Attachment IV of this Agreement.

Hearing Exhibit No. 12, FDN Agreement, Part C, Section 37.2 provides:

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 and consistent with the provisions of Part F of this Agreement. Toll traffic for purposes of this Agreement means as it is commonly used in the industry and includes communications between two point in different rate centers.

specifically incorporated in both MCI agreements by reference and generally incorporated in the FDN agreement, authorizes Sprint to charge KMC access charges, unless KMC can prove that the traffic that is the subject of Sprint's Complaint is local. Specifically, the Order states:

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.
[at page 23]

Clearly, KMC disregarded these provisions when it terminated PointOne's traffic to Sprint in Ft. Myers and Tallahassee.

KMC relies on the AT&T Declaratory Ruling for its proposition that access charges for VoIP, if determined to be applicable, are assessed against IXCs not CLECs. [KMC's Initial Brief at page 2] However, the AT&T ruling provides an exception in footnote 92, wherein the FCC states that a CLEC can be held liable if the applicable interconnection agreement imposes liability.²² KMC also cites to Sprint's tariff as imposing access charges only against interexchange carriers or end users. However, contrary to KMC's erroneous claim, Section E1.1A of Sprint's Access Service Tariff specifically states the tariff is applicable to Interexchange Carriers, Alternative Local Exchange Companies and to end user. Further, for KMC and Sprint, the interconnection

Hearing Exhibit No. 13, 2002 MCI Agreement, Attachment 1, Section 4.2 provides:

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, Docket Number 95-0985-PP, and consistent with the provisions of Attachment 4 of this Agreement.

²² The FCC did not specifically address the retroactivity of access charges for AT&T Declaratory ruling traffic. Rather, the FCC left that determination up to a case by case evaluation of the equities of a particular situation. [AT&T Declaratory Ruling at ¶ 23] In this case the equities, as well as the law and the interconnection agreements, clearly support the retroactive application of access charges for the access traffic KMC delivered to Sprint.

agreement provisions apply for traffic exchanged between the parties. The agreements state that for toll traffic access charges will apply, making KMC liable for the avoided access charges due Sprint.²³

KMC is wrong in asserting that the Commission may not hold it liable for access charges even if the Commission determines that access charges should have been paid to Sprint for the PointOne traffic. KMC was an instrumental and willing participant with PointOne in the access charge avoidance scheme. And, KMC benefited financially from the access bypass services it provided to PointOne. [Hearing Exhibit No. 7, KMC 4th Suppl. Response to Sprint's Interrogatory No. 15 and POD 5, page 163 of 284] The Commission may and should hold KMC fully responsible for its actions.

Sprint has presented sufficient evidence to support its access billings

KMC argues that even if the Commission determines that access charges are due for the interexchange traffic KMC terminated to Sprint over local interconnection trunks, Sprint has submitted insufficient evidence to support the factors used to calculate the access charges due. [KMC's Initial Brief at page 14] On the contrary, Sprint has submitted more than sufficient evidence to support its billings. First, as explained in Sprint's Initial Brief, Sprint used the SS7 monthly summary reports to jurisdictionalize the traffic and develop the appropriate billing factors. Agilent was designed to be used in this way and is used by Sprint and other ILECs to determine IXC PIU billing factors. [Tr. 48, Wiley

²³ Finally, as Sprint discussed in its initial brief, it is a reasonable interpretation of the facts and the law that PointOne and KMC were acting as IXCs for the termination of the traffic that is the subject of Sprint's Complaint. [Sprint's Initial Brief at page 37] The fact that PointOne was not certificated with the Florida Commission is irrelevant, since it appears PointOne would have been acting as a "carrier's carrier" and would, therefore, have been exempt from certification. [§ 364.02(13)(a), Florida Statutes] If PointOne is deemed to be an end user, as KMC asserts, then KMC appears to have acted as an IXC for the services it provided PointOne to deliver its Orlando traffic to end users in Ft. Myers and Tallahassee for termination. From the Commission's website it appears that KMC was actively certificated during the relevant period as an IXC to provide interexchange services in Florida: KMC Telecom III LLC, Certificate No. 7092; KMC Telecom V, Inc., Certificate No. 7531; KMC Data LLC, Certificate No. 010825.

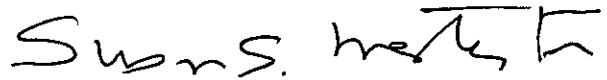
Rebuttal Testimony, page 6, lines 15-19; Hearing Exhibit No. 20, Schaffer Deposition, page 29, lines 18 through page 30 lines 17] Second, Sprint commissioned the Agilent Technologies' study to validate its internal calculations, and the Agilent study supports the amounts billed by Sprint. [Hearing Exhibit 22, Aggarwal Deposition, page 18, lines 10-19; Hearing Exhibit No. 33, Exhibit WLW-2] Third, in response to KMC's allegations that Sprint's calculations were deficient, Sprint 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's Initial Brief at pages 27-28] All of this evidence refutes KMC's assertions that Sprint's methodology for calculating the past due access charges is flawed. However, to the extent that the Commission believes that Sprint has not sufficiently supported its access billings, Sprint welcomes a Commission audit or accounting of Sprint's records, which Sprint is certain will ultimately serve to verify, not discount, Sprint's methodology and calculations.

Finally, KMC asserts that Sprint's tariffs limit backbilling for past due access charges only after an audit and then only for the previous quarter. [KMC Brief at pages 31, 40, and 43] However, as Sprint explains in its Initial Brief, the cited tariff is applicable only to backbilling based on erroneous PIUs. [Sprint's Initial Brief at page 14] The tariff does not apply to Sprint's Complaint based on KMC's violation of state law and the parties' interconnection agreement. Neither the statute nor the interconnection agreements require an audit or limit Sprint's ability to backbill if a violation is found. [Sprint's Initial Brief at pages 14 and 42] In addition, the audit provisions in the tariff are discretionary, not mandatory, and therefore, even if applicable to this dispute do not mandate that an audit be performed.

CONCLUSION

Sprint has met its burden to prove by the preponderance of the evidence that KMC violated section 364.16(3), F.S. and its interconnection agreements with Sprint by knowingly and wrongfully terminating interexchange traffic to Sprint over local interconnection facilities without paying Sprint's tariffed access charges that were otherwise due for this traffic. KMC's only defense is that the traffic is VoIP enhanced services traffic and that it was providing local services an enhanced services provider in accordance with FCC regulations. KMC has failed to establish any element of its defense either as a matter of fact or as a matter of law. Therefore, the Commission should find in favor of Sprint on all counts of its Complaint and order KMC to pay to Sprint the avoided access charges Sprint has determined are due, as well as order KMC to refund to Sprint reciprocal compensation that Sprint overpaid as a result of KMC's wrongful termination of access traffic over its local interconnection arrangements with Sprint.

RESPECTFULLY SUBMITTED this 7th day of September 2005.



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