

ORIGINAL

LAW OFFICES
Messer, Caparello & Self
A Professional Association

Post Office Box 1876
Tallahassee, Florida 32302-1876
Internet: www.lawfla.com

February 28, 2005

RECEIVED
FEB 28 PM 4:49
COMMISSION
CLERK

BY HAND DELIVERY

Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 041144-TP

Dear Ms. Bayó:

Enclosed for filing in the above referenced docket on behalf of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC ("KMC") are the following documents:

1. An original and fifteen copies of the Public Direct Testimony of Marva Brown Johnson; and 02021-05
2. An original and fifteen copies of the Direct Testimony of Timothy E. Pasonski; and 02024-05
3. An original and fifteen copies of KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC's Answer, Affirmative Defenses and Confidential Counterclaim to Sprint-Florida, Inc.'s Complaint. 02027-05

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,


Floyd R. Self

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER - DATE

02021 FEB 28 05

cc: Parties of Record

CMP
 COM 3
 CIR Org "filed"
 ECR
 GCL 1
 OPC
 MMS
 RCA
 SCR
 SEC 1 FRS/amb
 OTH Enclosures

COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DIRECT TESTIMONY OF

MARVA BROWN JOHNSON

ON BEHALF OF

KMC TELECOM III LLC,
KMC TELECOM V, INC.,
AND
KMC DATA LLC

PUBLIC VERSION

FEBRUARY 28, 2005

DOCUMENT NUMBER-DATE

02021 FEB 28 05

FPSC-COMMISSION CLERK

1 Q. PLEASE STATE YOUR NAME FOR THE RECORD.

2 A. My name is Marva Brown Johnson.

3 Q. WHO IS YOUR EMPLOYER AND WHAT IS YOUR BUSINESS
4 ADDRESS?

5 A. I am employed by KMC Telecom Holdings, parent company of KMC
6 Telecom III LLC ("KMC III"), KMC Telecom V, Inc. ("KMC V"), and KMC
7 Data LLC ("KMC Data"). My business address is 1755 North Brown Road,
8 Lawrenceville, Georgia 30043.

9 Q. WHAT IS YOUR JOB TITLE AND WHAT ARE YOUR
10 RESPONSIBILITIES?

11 A. I am Vice President and Senior Regulatory Counsel. I also hold the officer
12 position of Assistant Secretary.

13 Q. PLEASE DESCRIBE YOUR POSITION AT KMC.

14 A. I manage the organization that is responsible for federal regulatory and
15 legislative matters, state regulatory proceedings and complaints, and local
16 rights-of-way issues.

17 Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL
18 BACKGROUND.

19 A. I hold a Bachelors of Science in Business Administration (BSBA), with a
20 concentration in Accounting, from Georgetown University; a Masters in
21 Business Administration from Emory University's Goizuetta School of
22 Business; and a Juris Doctor from Georgia State University. I am
23 admitted to practice law in the State of Georgia.

1 I have been employed by KMC since September 2000. I joined KMC as
2 the Director of ILEC Compliance; I was later promoted to Senior
3 Regulatory Counsel and this is the position that I hold today.

4 Prior to joining KMC as the Director of ILEC Compliance, I had over
5 ten years of telecommunications-related experience in various areas
6 including consulting, accounting, and marketing. From 1990 through
7 1993, I worked as an auditor for Arthur Andersen & Company. My
8 assignments at Arthur Andersen spanned a wide range of industries,
9 including telecommunications. In 1994 through 1995, I was an internal
10 auditor for BellSouth. In that capacity, I conducted both financial and
11 operations audits. The purpose of those audits was to ensure compliance
12 with regulatory laws as well as internal business objectives and policies.
13 From 1995 through September 2000, I served in various capacities in MCI
14 Communications' product development and marketing organizations,
15 including as Product Development – Project Manager, Manager - Local
16 Services Product Development, and Acting Executive Manager for
17 Product Integration. At MCI, I assisted in establishing the company's local
18 product offering for business customers, oversaw the development and
19 implementation of billing software initiatives, and helped integrate various
20 regulatory requirements into MCI's products, business processes, and
21 systems.

22 **Q. PLEASE IDENTIFY ALL STATE COMMISSIONS TO WHICH YOU HAVE**
23 **SUBMITTED TESTIMONY.**

1 A. I have submitted testimony in proceedings before the following
2 commissions: the Alabama Public Service Commission; the North
3 Carolina Utilities Commission; the Florida Public Service Commission; the
4 Georgia Public Service Commission; the Louisiana Public Service
5 Commission; the Public Service Commission of South Carolina; the
6 Mississippi Public Service Commission; the Kentucky Public Service
7 Commission; and the Tennessee Regulatory Authority.

8 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

9 A. I am providing direct testimony on KMC's behalf in support of KMC's
10 opposition to the claims made by Sprint in its Complaint in this case.
11 Specifically, in my testimony, I will describe KMC's response to the
12 demands made by KMC that it pay access charges for the traffic in
13 question. I will address KMC's relationship with its customer **BEGIN**
14 **CONFIDENTIAL:**
15 **END CONFIDENTIAL** (hereinafter referred to as "Customer X"), whose
16 traffic, as explained by KMC witness Tim Pasonski in his direct testimony,
17 KMC has determined is the focus of Sprint's allegations. I will explain
18 KMC's understanding that Customer X was an enhanced service provider
19 supporting voice over Internet Protocol ("VoIP") services, such that the
20 traffic KMC received and routed from Customer X over the PRI facilities
21 leased by Customer X were required to be treated as local. I will also
22 describe the FCC's pronouncements on the proper treatment of enhanced
23 services traffic, including VoIP. Finally, in my testimony, I will address
24 KMC's counterclaims against Sprint for the fraudulent diversion of toll

1 traffic to avoid access charges and Sprint's failure to pay reciprocal
2 compensation for transport and termination services provided to Sprint in
3 Florida.

4 **Q. PLEASE DESCRIBE KMC'S OPERATIONS AND SERVICES WITHIN**
5 **FLORIDA.**

6 A. Certainly. KMC V, KMC III, and KMC Data are, collectively, nationwide
7 facilities-based providers of next-generation telecommunications
8 infrastructure and services, providing fiber-based integrated data, voice,
9 and Internet communications services. They offer these services to
10 business, government and institutional end-users, enhanced service
11 providers, Internet service providers, long distance carriers, and wireless
12 service providers. They are, collectively, certified to provide
13 telecommunications services to 49 states, the District of Columbia, and
14 Puerto Rico. In Florida, KMC operates in BellSouth, Sprint, and Verizon
15 territories. KMC III is authorized by the Commission to provide
16 competitive local exchange service (CLEC Certificate No. 7093) and
17 resold interexchange service (IXC Certificate No. 7092). Likewise, KMC V
18 has been authorized to provide competitive local exchange
19 telecommunications services (CLEC Certificate No. 470) and
20 interexchange telecommunications services (IXC Certificate No. 7531).
21 KMC Data has been authorized to provide competitive local exchange
22 telecommunications service (CLEC Certificate No. 7955) and
23 interexchange telecommunications service (IXC Certificate No. 7956).

1 KMC provides a wide variety of integrated voice, data and internet
2 services to enterprises in the state of Florida, including local exchange
3 service, PRI services, private line services, and resold interexchange
4 services.

5 **Q. WHAT IS YOUR UNDERSTANDING OF SPRINT'S CLAIMS AGAINST**
6 **KMC?**

7 A. Sprint claims that KMC III, KMC V, and KMC Data violated Florida state
8 law, the parties' interconnection agreements with Sprint, and Sprint's state
9 tariffs by sending interexchange traffic to Sprint over local interconnection
10 trunks, for which access charges, not reciprocal compensation, should
11 have been paid. Sprint also claims that, under the parties' reciprocal
12 compensation arrangements, and as a result of KMC sending
13 interexchange traffic over local interconnection trunks, Sprint overpaid
14 KMC for reciprocal compensation, entitling Sprint to a refund.

15 **Q. WHAT TRAFFIC IS AT QUESTION IN THIS COMPLAINT**
16 **PROCEEDING?**

17 A. Based upon Sprint's Complaint and the data provided by Sprint to date,
18 including KMC's analysis thereof, the only traffic that is in question is
19 traffic generated by KMC III's former customer. Customer X, an enhanced
20 service provider, received PRI service from KMC from approximately July,
21 2002 through approximately May, 2004. Traffic from those PRIs was
22 delivered by KMC to Sprint over local interconnection trunks for
23 termination in the Tallahassee and Ft. Myers markets. Mr. Pasonski, in his

1 direct testimony, explains how KMC determined that only traffic from this
2 former customer is implicated by the Complaint.

3 **Q. YOU STATE THAT THE TRAFFIC IN QUESTION WAS CARRIED BY**
4 **KMC III, CORRECT?**

5 A. Yes.

6 **Q. DID KMC V AND KMC DATA PROVIDE SERVICES TO CUSTOMER X**
7 **IN FLORIDA?**

8 A. No.

9 **Q. WHAT IS YOUR UNDERSTANDING THE CLAIMS AGAINST KMC V**
10 **AND KMC DATA?**

11 A. Sprint makes the same allegations against KMC V and KMC Data that it
12 makes against KMC III. As I noted earlier, Sprint's claims are for a definite
13 set of traffic sent to Sprint in the Tallahassee and Ft. Myers markets over
14 the period July 2002 through May 2004. Significantly, however, only KMC
15 III sent the traffic in question, and only KMC III was invoiced by Sprint for
16 the traffic in question. By naming KMC V and KMC Data as parties in this
17 case, Sprint has demonstrated at best that it is confused. Sprint submitted
18 its bills over the entire period to "KMC Telecom," which those preparing
19 Sprint's Complaint may believe is a moniker that applies equally to all
20 three of the named KMC Companies. However, in 2001, KMC Telecom
21 Holdings, the parent company of the three named defendants,
22 consolidated the operations of two of its operating subsidiaries, KMC
23 Telecom, Inc., which had always been separate from KMC V and KMC

1 Data, and KMC Telecom II, Inc., into KMC III, which was the surviving
2 subsidiary. Sprint may have overlooked notices that KMC sent to Sprint
3 on December 7, 2001, indicating that there no longer would be a KMC
4 Telecom, Inc. Attention to these notices likely would have cleared up any
5 confusion on Sprint's part regarding which KMC entity with which it was
6 exchanging traffic. But the bottom line is that KMC V and KMC Data did
7 not handle any of the traffic in question. Sprint has not provided any
8 documentation or other data to implicate these two KMC affiliate entities
9 and KMC V and KMC Data simply should not be a part of this complaint
10 proceeding. Accordingly, KMC Data and KMC V should be dismissed as
11 parties from the case.

12 **Q. WHEN DID SPRINT FIRST INDICATE TO KMC THAT SPRINT**
13 **BELIEVED KMC WAS SENDING TRAFFIC OVER LOCAL**
14 **INTERCONNECTION TRUNKS IN FLORIDA THAT WERE SUBJECT TO**
15 **ACCESS CHARGES?**

16 A. The first indication that Sprint claimed KMC might be sending
17 interexchange traffic over local interconnection trunks was a letter dated
18 November 6, 2003, attached to the Complaint as Attachment 5. Sprint
19 represented to KMC that its conclusions were based on an analysis of "the
20 call detail and billing records to determine the jurisdiction of the minutes of
21 use (MOU) and their originating Calling Party Number." In the November
22 6, 2003 letter, Sprint also advised KMC of its intention to back-bill KMC for

1 traffic that Sprint unilaterally determined was intrastate toll traffic for the
2 period from July 2002 through August 2003.

3 **Q. DID SPRINT, IN FACT, BILL KMC ACCESS CHARGES FOR THE**
4 **TRAFFIC IN QUESTION?**

5 A. Yes. Consistent with Sprint's threat, Sprint back-billed KMC Telecom III,
6 LLC, on the November 12, 2003 invoice for the amount of BEGIN
7 CONFIDENTIAL \$1,768,453.00 (Tallahassee) and \$658,645 (Fort Myers)
8 END CONFIDENTIAL.

9 **Q. WHAT WAS KMC'S RESPONSE TO THE NOVEMBER 6, 2003,**
10 **LETTER AND THE SUBSEQUENT BACK-BILL?**

11 A. Pursuant to the dispute resolution provisions of the underlying
12 interconnection agreement and the standard business practice between
13 KMC and Sprint, KMC filed a timely dispute of these charges on
14 December 4, 2003. KMC's dispute advised Sprint that KMC did not
15 generate the volume of intrastate switched access traffic for which Sprint
16 was back-billing.

17 **Q. DID KMC TAKE ANY OTHER STEPS IN RESPONSE TO THE**
18 **NOVEMBER 6, 2003, LETTER AND NOVEMBER 12, 2003, BACK-**
19 **BILL?**

20 A. Yes, KMC made clear that Sprint had not, in any event, provided KMC
21 with adequate supporting detail to allow KMC to analyze or verify the
22 charges. Sprint has an unambiguous obligation to provide supporting
23 detail for carrier usage billing, consistent with the industry standards for

1 Carrier Access Billing ("CABs"). But neither the November 6, 2003
2 correspondence from Sprint nor the November 12, 2003 invoices from
3 Sprint contained sufficient detail for KMC to conduct any meaningful
4 assessment of Sprint's assertions. In fact, the only information that Sprint
5 provided KMC was a summary of the amounts due for each month. In an
6 effort to review and assess the merits of Sprint's assertions and to
7 respond accordingly, on December 4, 2003, simultaneously with filing its
8 dispute, KMC requested that Sprint provide KMC with call detail records
9 and applicable tariff references supporting Sprint's assessment of the
10 referenced charges and any assertion that Sprint had regarding its
11 entitlement to back bill for the specified period.

12 **Q. DID SPRINT ISSUE ADDITIONAL ACCESS CHARGE BILLS FOR**
13 **TRAFFIC IT CLAIMED KMC WAS IMPROPERLY ROUTING OVER**
14 **LOCAL INTERCONNECTION TRUNKS?**

15 A. Yes. Sprint issued further bills for the traffic in question from November
16 2003 through August 2004. KMC has consistently disputed the
17 unsubstantiated switched access charges.

18 **Q. DID SPRINT PROVIDE KMC WITH ADDITIONAL DETAIL REGARDING**
19 **THE BILLS?**

20 A. To some extent, yes. During a conference call on January 28, 2004,
21 Sprint agreed to provide KMC with the raw data for September 10, 2003
22 which was used in Sprint's assessment of its claims. It should be noted
23 that KMC never waived its rights to receive, nor waived Sprint's obligation

1 to provide, supporting CABs billing records for all of the back-billed usage.
2 Nonetheless, in effort to understand the basis for Sprint's demands, KMC
3 agreed to analyze the September 10, 2003 call data Sprint agreed to
4 provide. On February 24, 2004, KMC received a CD-ROM from Sprint
5 which included four (4) hours of summary data for September 10, 2003.
6 On March 1, 2003, KMC advised Sprint that the summary sample data
7 provided by Sprint was inadequate due to the fact that the data was not
8 the raw SS7 data requested and therefore it did not contain several data
9 elements necessary for KMC's analysis. The sample summary data also
10 prompted additional questions for Sprint from KMC's access cost
11 management group. Communications between the two companies
12 regarding the sufficiency of Sprint's data and clarifications with regard to
13 the data continued between KMC and Sprint over the course of the month
14 of March 2004.

15 **Q. DID SPRINT EVER CORRECT THE DEFICIENCIES KMC ALLEGED**
16 **REGARDING THE DATA PROVIDED ON FEBRUARY 24, 2004?**

17 A. On April 6, 2004, Sprint provided KMC with additional data that enabled
18 KMC to begin to analyze the validity of Sprint's switched access back-
19 billing. As a result of KMC's subsequent analysis, of the data provided to
20 KMC on April 6, 2004, as detailed by Mr. Pasonski in his Direct Testimony,
21 KMC was able to determine that Sprint back-bills to KMC were for traffic
22 Customer X sent over the PRIs to KMC in both Ft. Myers and
23 Tallahassee.

- 1 **Q. ONCE KMC IDENTIFIED THE TRAFFIC AS THAT OF CUSTOMER X,**
2 **WHAT STEPS DID IT TAKE?**
- 3 A. In effort to further evaluate the merits of Sprint's assertions as to nature of
4 the traffic, on April 21, 2004, KMC notified Customer X of Sprint's
5 demands and that KMC's review of Sprint's data revealed that all of the
6 usage associated with the back-bills was traffic carried over Customer X's
7 PRI circuits provisioned by KMC. See MBJ-1, Confidential Exhibit ____.
8 KMC advised Customer X that, although KMC would continue to research
9 and dispute the merits of Sprint's claim, KMC required information from
10 Customer X regarding the traffic in question. KMC requested that
11 Customer X provide additional information regarding the nature of the
12 traffic by April 26, 2004.
- 13 **Q. DID KMC TAKE PUNATIVE ACTION IN ORDER TO IDENTIFY AND**
14 **ADDRESS THE NATURE OF THE TRAFFIC DELIVERED TO KMC**
15 **FROM CUSTOMER X?**
- 16 A. Yes. KMC further advised Customer X in the April 21, 2004, letter that in
17 the event that Customer X was utilizing KMC's services to deliver traffic
18 other than enhanced services traffic, specifically other than Voice Over
19 Internet Protocol traffic ("VoIP"), KMC would terminate Customer X's PRI
20 services.
- 21 **Q. WHAT WAS CUSTOMER X'S RESPONSE TO THE APRIL 21, 2004,**
22 **LETTER?**

1 A. On May 3, 2004, KMC received a response from Customer X to KMC's
2 April 21, 2004 notice. See MBJ-2, Confidential Exhibit _____. Customer X
3 confirmed that the traffic sent to KMC by Customer X was enhanced
4 service traffic and specifically indicated the following:

5 as we have communicated to you and as we have
6 presented several times to the FCC Commissioners
7 and staff, [Customer X] is an Enhanced Service
8 Provider providing unregulated information and/or
9 enhanced services to its customers. This is vastly
10 different than AT&T's self-proclaimed regulated
11 telecommunications service and/or the services
12 described by AT&T's filings related to its petition.
13

14 Customer X further advised KMC that Customer X "is an Enhanced
15 Service Provider, offering information and/or enhanced services to a wide
16 variety of customers, and such traffic is to be treated as local traffic and its
17 therefore exempt from paying access charges as defined by the FCC."
18 See MBJ-2, Confidential Exhibit _____.

19 **Q. DID CUSTOMER X PROVIDE KMC WITH THE INFORMATION KMC**
20 **REQUESTED REGARDING THE NATURE OF THE TRAFFIC IN**
21 **QUESTION?**

22 A. No. Despite additional follow up by KMC, Customer X did not provide
23 KMC with any additional information requested by KMC. In fact, Customer
24 X migrated its traffic off of KMC's network on or around May 3, 2004.
25 KMC continued to pursue additional information from Customer X in order
26 to adequately analyze and respond to Sprint's claims. Both before and
27 after Sprint filed its Complaint, KMC has continued to seek additional

1 information from Customer X in order to analyze more completely the
2 jurisdictional nature of the traffic and to evaluate the merits of Sprint's
3 complaint. I would add that KMC has also unsuccessfully sought
4 additional information from Sprint, beyond the mere four (4) hours of data
5 provided from September 10, 2003, to understand the basis of Sprint's
6 complaint. The information requested from Sprint is essential to evaluate
7 Sprint's claims and to identify any and all IXCs associated with the traffic
8 that Sprint asserts is terminating switched access traffic. If the traffic is
9 not enhanced services traffic and otherwise switched access traffic, the
10 IXCs are the parties that should pay any access charges that may be due
11 and not KMC

12 **Q. HAS KMC HAD ANY SUCCESS IN IDENTIFYING IXCS ASSOCIATED**
13 **WITH THE TRAFFIC IN QUESTION?**

14 A. As discussed more fully in the testimony of Tim Pasonski, to date, KMC
15 has associated some portion of that traffic with two IXCs, Sprint and one
16 other IXC.

17 **Q. HOW DID KMC COME TO THE DECISION TO ENTER INTO AN**
18 **ARRANGEMENT TO SELL SERVICES TO CUSTOMER X?**

19 A. Contrary to what Sprint implies in its Complaint, there was nothing special,
20 from KMC's perspective, about KMC's "decision" to sell PRI circuits to
21 Customer X. As I noted earlier, KMC provides a wide variety of integrated
22 voice, data, and internet local and long distance services to enterprises in
23 the state of Florida. Among these services are PRI circuits, which are

1 high capacity circuits – typically DS1 circuits – channelized for voice
2 communications, often used by enterprise customers in conjunction with a
3 PBX. It is not at all unusual for enhanced service providers to use PRI
4 circuits. So when Customer X approached KMC in 2002 and requested
5 PRI circuits, there was nothing remarkable about it. Customer X
6 represented just another PRI customer for KMC and was treated as such.
7 KMC understood Customer X to be an enhanced service provider, which
8 cleared up any doubts there may have been regarding its eligibility for end
9 user services, such as two-way PRIs.

10 **Q. ARE YOU SAYING THAT THERE WAS NO SPECIAL ARRANGEMENT**
11 **BETWEEN KMC AND CUSTOMER X?**

12 A. That is exactly what I am saying.

13 **Q. DID CUSTOMER X EVER EXPRESS OR INTIMATE TO KMC ANY**
14 **PARTICULAR PURPOSE FOR ORDERING PRI CIRCUITS, FOR**
15 **EXAMPLE TO ASSIST INTEREXCHANGE CARRIERS SEEKING TO**
16 **AVOID ACCESS CHARGES?**

17 A. No. Customer X simply presented itself as an end user enhanced service
18 provider Customer X requesting two-way PRIs, and that is how KMC was
19 required to treat the company.

20 **Q. DID KMC RECEIVE ANY COMPENSATION FROM CUSTOMER X**
21 **OTHER THAN THE MONTHLY CHARGES FOR THE PRI CIRCUITS?**

1 A. No. Attached as MBJ-3, Confidential Exhibit ____, are samples of the bills
2 which KMC submitted to Customer X for the PRI's in question.¹ As you
3 can see from these bills, Customer X simply was billed monthly charges
4 for the facilities involved and the PRI circuits carried over them, as well as
5 the typical surcharges and taxes for PRI services. By way of comparison,
6 I have attached to my testimony as MBJ-4, Exhibit ____, the page from
7 KMC's tariff for PRI Circuits.

8 **Q. WHY DID KMC TREAT CUSTOMER X'S TRAFFIC AS LOCAL?**

9 A. Customer X always and consistently identified itself as an enhanced
10 service provider and that the traffic sent over the PRI trunks was
11 enhanced services traffic, specifically, VoIP. KMC and all other carriers
12 are required to treat enhanced services traffic as local traffic, regardless of
13 the putative physical endpoints of the communications.

14 **Q. WHAT IS THE BASIS FOR KMC'S UNDERSTANDING THAT**
15 **ENHANCED SERVICES TRAFFIC IS SUBJECT TO TREATMENT AS**
16 **LOCAL?**

17 A. Under current and long-standing FCC policy, enhanced services, including
18 VoIP and other IP-based offerings have not been treated as
19 telecommunications services, and enhanced services providers have been
20 entitled to purchase *end user local telecommunications* services to
21 support their offerings. As such, enhanced services communications have

¹ Please note that one of the bills states it is service for Pensacola, but my billings department tells me that is a misprint and that the bill really is for the Tallahassee service.

1 not been subject to access charges, but have been treated as local
2 communications. Indeed, the FCC, when initiating its *Intercarrier*
3 *Compensation* rulemaking in 2001, recognized that historically the FCC
4 had not imposed access charges on VoIP traffic. The FCC stated clearly
5 in its Notice of Proposed Rulemaking that “IP telephony [is] generally
6 exempt from access charges.”²

7 **Q. WHAT ARE THE ORIGINS FOR THE TREATMENT OF ENHANCED**
8 **SERVICES TRAFFIC AS LOCAL TRAFFIC?**

9 A. This general treatment of enhanced services traffic, including VoIP, has its
10 roots in the FCC’s enhanced services access charge exemption adopted
11 upon the break-up of AT&T. In 1983, the FCC determined that providers
12 of enhanced services would be exempted from access charges as the
13 FCC instituted the access charge regime under which the LECs, in large
14 part, still operate today for purposes of intercarrier compensation with
15 interexchange carriers.³ That exemption was reaffirmed five years later,⁴
16 and then again in 1997.⁵

17 With the emergence of rudimentary forms of VoIP telephony, the
18 FCC first reviewed questions regarding the appropriate compensation for
19 such services in the context of a larger review of universal service issues.

² *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

³ *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983).

⁴ *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988).

1 In its resulting *Report to Congress* in 1998, the FCC contended that it did
2 not have an adequate record on which to conclude that any form of VoIP
3 services should be subject to access charges.⁶ The FCC reached no
4 definitive conclusions regarding the regulatory classifications of *any type*
5 *of VoIP*. The FCC, in fact, prefaced its entire discussion of the IP-
6 Telephony issue with the unequivocal caveat: “We do not believe,
7 however, that it is appropriate to make any definitive pronouncements in
8 the absence of a more complete record focused on individual service
9 offerings.”⁷ Again, once the Commission engaged in its brief and tentative
10 analysis in the *Report*, it explained further that

11 [b]ecause of the wide range of services that can be
12 provided using packetized voice and innovative CPE,
13 we will need, *before making definitive*
14 *pronouncements*, to consider whether our tentative
15 definition of phone-to-phone IP telephony accurately
16 distinguishes between phone-to-phone and other
17 forms of IP telephony, and is not likely to be quickly
18 overcome by changes in technology. We defer a
19 more definitive resolution of these issues pending the
20 development of a more fully-developed record
21 because we recognize the need, when dealing with
22 emerging services and technologies in environments
23 as dynamic as today’s Internet and
24 telecommunications markets, to have as complete
25 information and input as possible.⁸

⁵ *Access Charge Reform*, 12 FCC Rcd 15982, 16133 (1997).

⁶ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (“Report to Congress”).

⁷ *Id.* at 11541.

⁸ *Id.* at 11544 (emphasis added).

1 The Commission also noted that, even were it to conclude in some future
2 rulemaking proceeding in which a full record was developed, that certain
3 forms of IP Telephony were telecommunications services, it did not follow
4 that the providers of those services would pay the same access charges
5 as carriers offering circuit-switched interexchange services. The
6 Commission anticipated that, in that event, it would “face difficult and
7 contested issues related to the assessment of access charges on these
8 providers.”⁹

9 **Q. SINCE THE 1998 REPORT TO CONGRESS, HAS THE FCC CLARIFIED**
10 **THE PROPER TREATMENT OF VOIP OR OTHER IP-ENABLED**
11 **SERVICES?**

12 A. Since then, the FCC has examined several discrete situations involving
13 certain VoIP services and addressed whether access charges should
14 apply. Notably, in only one of these, the so-called *AT&T Declaratory*
15 *Ruling* issued in April 2004,¹⁰ has the FCC concluded that access charges
16 for certain types of services that use Internet protocol are proper. In that
17 decision, the FCC emphasized the narrowness of its decision, namely that
18 where Internet protocol is used solely for transmission purposes for 1+-
19 dialed interexchange calls, there is no net protocol conversion, and there
20 are no enhanced features or functionalities enabled by the use of the IP,

⁹ *Id.* at 11545.

¹⁰ *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 (Apr. 21, 2004).

1 the traffic in question is telecommunications services traffic and is subject
2 to access charges.¹¹ Notably, the FCC made clear that its declaratory
3 ruling was both narrow and temporary in nature. The FCC stated that the
4 treatment of the specific type of VoIP traffic at issue in the *AT&T*
5 *Declaratory Ruling* was subject to change based upon its more
6 comprehensive review in the currently pending *IP-enabled Services* and
7 *Intercarrier Compensation* proceedings.¹²

8 **Q. DOES KMC CONTEST WHETHER ACCESS CHARGES SHOULD**
9 **APPLY TO THE TYPE OF TRAFFIC ADDRESSED IN THE AT&T**
10 **DECLARATORY RULING?**

11 A. No. KMC has previously made clear to Sprint and the Commission that
12 KMC recognizes and will abide by the *AT&T Declaratory Ruling*.
13 However, KMC interprets this agreement according to its terms, and does
14 not believe that access charges apply to all traffic that terminates on the
15 public switched telephone network. Such traffic may have originated on a
16 broadband connection and undergone a net protocol conversion. Vonage,
17 for example, provides such services, and KMC believes these types of
18 VoIP services are not subject to access charges, absent a future FCC
19 ruling stating that access charges do apply. The same is true for many
20 other IP-enabled services which offer users enhanced features and
21 functionalities or which undergo a net protocol conversion before local

¹¹ *Id.* ¶ 18.

¹² *Id.*

1 exchange carriers like KMC and Sprint might terminate the traffic from
2 such services to PSTN customers.

3 **Q. WAS THE CUSTOMER X TRAFFIC AT ISSUE IN THIS COMPLAINT**
4 **PROCEEDING TRAFFIC THAT FALLS UNDER THE FCC'S AT&T**
5 **DECLARATORY RULING?**

6 A. Not to KMC's knowledge. In fact, as indicated earlier, Customer X
7 specifically advised KMC that Customer X's traffic was "vastly different
8 than AT&T's . . . service and/or the services described by AT&T's filings
9 related to its [FCC] petition." See MBJ-2, Confidential Exhibit _____. KMC's
10 understanding was that Customer X was providing enhanced services.
11 Customer X presented itself as an enhanced service provider entitled to
12 the local PRI circuits that it ordered. KMC had and has no information to
13 suggest that the traffic in question used Internet protocol solely for
14 purposes of transmitting 1+-dialed interexchange calls, there is was no net
15 protocol conversion, or that there were no enhanced features or
16 functionalities enabled by the use of any Internet protocol. When Sprint
17 began making its demands, KMC sought such information from Customer
18 X but Customer X was not forthcoming with any additional information
19 about its services, other than to continue to maintain that it was an
20 enhanced service provider. At the same time, Customer X migrated all of
21 its traffic off of the KMC-provided PRIs in May and June 2004. See the
22 MBJ-1, MBJ-2, MBJ-3, and MBJ-5, Confidential Exhibits to my testimony.
23 Attachment 4 to the Sprint Complaint reflects this migration, as the traffic

1 levels for which Sprint claims access charges in this proceeding drops
2 sharply in volume in May 2004. June 2004 is the last month for which
3 Sprint seeks compensation. The fact that Sprint has not raised any claims
4 for access charges beyond the time Customer X was a KMC customer
5 only confirms that the sole traffic at issue to Sprint's claim belonged to
6 Customer X.

7 **Q. DOES KMC HAVE ANY SPECIFIC INFORMATION REGARDING**
8 **WHETHER AND HOW INTERNET PROTOCOL WAS USED**
9 **REGARDING THE TRAFFIC IN QUESTION?**

10 A. No.

11 **Q. DOES KMC OFFER VOIP SERVICES OR OTHER IP-ENABLED**
12 **SERVICES TO ITS CUSTOMERS?**

13 A. At this time, and during the period in question in this proceeding, KMC
14 does not and did not utilize Internet Protocol within its network to provide
15 retail services terminating in Florida. So the answer, regarding retail
16 services, is no. KMC does provide services, on a wholesale basis, to
17 enable enhanced service providers the ability to originate and terminate
18 their services, including VoIP. Customers wishing to purchase KMC's
19 wholesale services must represent and warrant that the service that the
20 enhanced VoIP service that they are utilizing KMC's services to provide
21 meets the following definition:

22 **Voice over Internet Protocol" or "VoIP" is an Enhanced**
23 **Service that utilizes TCP/IP a variety of upper layer protocols**
24 **such as the User Datagram Protocol and the Transport**
25 **Control Protocol as a means to provide two-way real time**

1 voice communications over public internet backbone packet
2 IP networks. VoIP as defined herein is exclusively limited to
3 traffic that utilizes TCP/IP as a transmission network protocol
4 from the end user's originating equipment to the terminating
5 equipment or gateway. VoIP traffic does not include traffic
6 that: (1) is originated and terminated on the public switched
7 telephone network ("PSTN") as circuit-switched long
8 distance traffic; (2) is 1+ traffic, routed over Feature Group D
9 trunks; (3) uses ordinary customer premises equipment
10 ("CPE") with no enhanced functionality; and (4) undergoes
11 no net protocol conversion and provides no enhanced
12 functionality to end users due to the provider's use of IP
13 technology.
14

15 **Q. HOW SHOULD THE COMMISSION RESOLVE SPRINT'S COMPLAINT?**

16 **A.** First, it should dismiss, summarily, the complaint against KMC V and KMC
17 Data because they simply did not send Sprint any of the traffic in question.
18 As to KMC III, the Commission should find that KMC properly routed the
19 enhanced services traffic in question to Sprint over local interconnection
20 trunks. More specifically, the Commission should conclude that KMC III
21 did not violate state law, the parties' interconnection agreement, or
22 Sprint's tariff by sending the traffic over the local interconnection trunks
23 and that KMC does not owe Sprint access charges for this traffic. Further,
24 the Commission should conclude that Sprint's claim to a refund of
25 reciprocal compensation is unwarranted since the traffic in question was
26 properly sent over the local interconnection trunks.

27 **Q. DOES KMC HAVE ANY COUNTERCLAIMS TO RAISE IN THIS**
28 **PROCEEDING?**

29 **A.** Yes, KMC has two basic counterclaims against Sprint. First, Sprint in
30 Tallahassee and Ft. Myers has been working with its IXC affiliate to divert

1 access traffic away from the toll or access trunks and presumably route it
2 over the local interconnection trunks, and this diversion of traffic by
3 Sprint's IXC affiliate appears to be happening statewide. Second, Sprint
4 has violated the terms of a Confidential Settlement Agreement and
5 withheld reciprocal compensation payments due to KMC.

6 **Q. CAN YOU PLEASE ADDRESS THE FIRST CLAIM THAT SPRINT HAS**
7 **BEEN DIVERTING ACCESS TRAFFIC AWAY FROM KMC.**

8 **A.** Yes. As KMC was analyzing the claims raised by Sprint against KMC in
9 this docket, KMC looked at all of the traffic Sprint was sending to KMC in
10 the state of Florida. An examination of the traffic Sprint was sending to
11 KMC over the Sprint-KMC local interconnection trunks caused us to also
12 look at the access trunks we have with IXCs, both of which involve the
13 Sprint local tandem at one end. This investigation revealed that in the
14 Tallahassee and Ft. Myers markets that Sprint's IXC was effectively not
15 terminating any traffic to KMC over the toll trunks and that our access
16 revenues from Sprint's IXC have declined to nearly zero.

17 **Q. WHAT DID KMC DO WITH THIS INFORMATION?**

18 **A.** Mr. Pasonski will discuss the detailed analysis in his testimony, but KMC
19 did two things. First, for the Tallahassee and Ft. Myers markets we share
20 with Sprint, we went back to the beginning of 2002 and evaluated all of the
21 traffic Sprint's IXC terminated to KMC. Second, on the basis of the
22 information we learned about the Tallahassee and Ft. Myers markets, we
23 looked at other Florida markets and the traffic Sprint's IXC affiliate was

1 sending to KMC in Clearwater, Daytona Beach, Melbourne, Pensacola,
2 and Sarasota.

3 **Q. WHAT DID KMC CONCLUDE IN THIS ANALYSIS?**

4 A. KMC's first conclusion was that it appeared that Sprint was doing the
5 same thing it was accusing KMC of doing in this Complaint. In
6 Tallahassee and Ft. Myers Sprint was routing to KMC, from its tandem,
7 what appears to be toll traffic over the local interconnection trunks. As
8 KMC analyzed our toll traffic from Sprint's IXC affiliate being routed
9 through the Sprint tandems in Tallahassee and Ft. Myers, we saw that
10 over time terminating access traffic from Sprint's IXC declined and then
11 disappeared.

12 **Q. WHAT HAPPENED IN THE OTHER KMC MARKETS WHERE SPRINT
13 IS NOT THE INCUMBENT LEC?**

14 A. The data varied by market, but the overall pattern was clear – Sprint's IXC
15 traffic was being systematically diverted from the access trunks. As a
16 result, KMC's access revenues from Sprint's IXC affiliate have been in
17 serious decline. This is a much more serious problem as it is a still
18 continuing plan of fraud, as compared to sprint's claim against KMC
19 which, at worse, involved only one customer for a limited period of time.

20 **Q. HAS KMC CALCULATED HOW MUCH ACCESS REVENUE IT HAS
21 LOST BY SPRINT'S ACTIONS?**

22 A. Yes, by our calculations so far, Sprint has diverted over BEGIN
23 CONFIDENTIAL \$1 million dollars END CONFIDENTIAL in access

1 revenues. Mr. Pasonski can address the detailed calculations for this
2 figure.

3 **Q. PLEASE EXPLAIN THE SECOND CLAIM KMC HAS AGAINST**
4 **SPRINT?**

5 A. The second claim that KMC has against Sprint is due to Sprint's failure to
6 violate the terms of a Confidential Settlement Agreement. See MBJ-7,
7 Confidential Exhibit _____. Relevant for purposes of KMC's claims, Sprint
8 and KMC agreed that for purposes of their interconnection agreements
9 that the FCC's ISP Order on Remand (Order FCC 01-131, adopted April
10 18, 2001) would be deemed effective in Florida on May 1, 2002. Pursuant
11 to this settlement, Sprint and KMC executed Amendment No. 1, dated
12 June 26, 2002, to specifically implement the ISP reciprocal compensation
13 provisions of the MOU. The amendment specified the rates for the
14 exchange of local interconnection traffic as well as Information Access
15 Traffic. At that time, the local interconnection arrangements of the parties
16 were governed by KMC's adoption of the MCImetro Access Transmission
17 Services, Inc. interconnection agreement effective April 1, 1999.

18 **Q. DID SPRINT HONOR THE RECIPROCAL COMPENSATION**
19 **PAYMENTS UNDER THIS AMENDMENT?**

20 A. Yes, they did for awhile, until KMC opted into the FDN interconnection
21 agreement in July 2003.

22 **Q. WHAT HAPPENED THEN?**

1 A. When KMC opted into the FDN interconnection agreement, Sprint took the
2 position that the Confidential Settlement Agreement no longer applied,
3 and so Sprint was no longer obligated to pay reciprocal compensation for
4 ISP traffic.

5 **Q. HOW DID KMC RESPOND TO THIS SITUATION?**

6 A. KMC sent Sprint a Notice of Default and asked that Sprint work with KMC
7 to address Sprint's default on the Confidential Settlement Agreement.
8 See MBJ-6, Confidential Exhibit _____. KMC and Sprint have discussed this
9 on various occasions, but Sprint has refused to pay reciprocal
10 compensation for this traffic. However, it should be noted that Sprint has
11 agreed to pay reciprocal compensation, consistent with the terms of the
12 Confidential Settlement Agreement and the FCC's ISP Order on Remand,
13 in the replacement interconnection agreement which is pending before the
14 Florida Public Service Commission in Docket No. 031047.

15 **Q. WHY DOES KMC BELIEVE THAT SPRINT IS OBLIGATED TO**
16 **CONTINUE TO PAY RECIPROCAL COMPENSATION ON THIS**
17 **TRAFFIC?**

18 A. This was a comprehensive settlement which served to resolve multiple
19 outstanding disputes between the parties in multiple jurisdictions. One of
20 the critical components of that settlement was to accept the effectiveness
21 of the FCC's ISP Order and to continue to pay reciprocal compensation for
22 ISP traffic. There was no time, specific interconnection agreement, or
23 other limitation on the parties' obligations under the confidential settlement

1 agreement. The only potential limitation was whatever the parties might
2 agree to in a subsequent negotiated or arbitrated agreement. Thus,
3 KMC's adoption of another interconnection until such time as it could
4 negotiate or arbitrate a successor interconnection agreement did not end
5 the effectiveness of this provision of the Settlement Agreement.

6 **Q. HAS KMC CALCULATED HOW MUCH IT BELIEVES THAT SPRINT**
7 **HAS WITHHELD IN RECIPROCAL COMPENSATION FROM KMC?**

8 A. Yes, we believe the total reciprocal compensation withheld to date is
9 approximately **BEGIN CONFIDENTIAL: END**
10 **CONFIDENTIAL.**

11 **Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

12 A. Yes, it does.

EXHIBIT MBJ-1

IS

CONFIDENTIAL

EXHIBIT MBJ-2

IS

CONFIDENTIAL

EXHIBIT MBJ-3

IS

CONFIDENTIAL

EXHIBIT MBJ-6

IS

CONFIDENTIAL

EXHIBIT MBJ-7

IS

CONFIDENTIAL