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 pursuant to its interconnection agreement and Sprint's tariffs and for violation of Section 364.16(3)(a), Florida Statutes.	)))))))	Docket No. 041144-TP

REBUTTAL TESTIMONY OF

MARVA BROWN JOHNSON

ON BEHALF OF

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

MAY 10, 2005

DOCUMENT NUMBER-DATE
04557 MAY 10 05
FPSC-COMMISSION CLERK

1 **Q. PLEASE STATE YOUR NAME FOR THE RECORD.**

2 A. I am 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. ARE YOU THE SAME MARVA BROWN JOHNSON THAT PREFILED**

10 **DIRECT TESTIMONY IN THIS CASE?**

11 **A.** Yes, I am.

12 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

13 **A.** I have reviewed the pre-filed testimony of Sprint's witnesses, Christopher

14 Schaffer, Mitchell Danforth, William Wiley, James Burt, and Kenneth

15 Farnan in this matter. As explained herein, Sprint has utterly failed to

16 demonstrate through the testimony of these five witnesses that KMC

17 engaged in any improper conduct in violation of Florida law, the parties'

18 interconnection agreements, or Sprint's tariff. In addition, Sprint has

19 failed to substantiate the level of its alleged damages in this case by

20 failing to provide the data upon which its case is based. Finally, Sprint

21 has failed to provide any basis for proceeding against KMC Data, and

22 relying upon OCNs as a basis for retaining KMC V as a party is

1 inappropriate. In short, Sprint's case is built upon assumptions and
2 conclusions that are not supported in law or in fact.

3 **Q. CAN YOU SUMMARIZE SPRINT'S POSITION IN THIS PROCEEDING**
4 **FROM THE TESTIMONY OF ITS WITNESSES?**

5 **A.** Yes. Sprint's entire claim is predicated on three principal premises, all of
6 which are fundamentally flawed. First, Sprint asserts without any
7 substantiation whatsoever that Customer X was an interexchange carrier
8 and that, therefore, the calls Customer X originated over the Primary Rate
9 ISDN ("PRI") services provided to Customer X by KMC should be
10 assessed access charges. Second, Sprint incorrectly claims that KMC
11 knew that Customer X's calls were not local calls but rather were
12 interexchange calls subject to access charges. Third, Sprint assumes
13 without a shred of proof and contrary to all of the evidence that KMC
14 changed the signaling associated with Customer X's calls and deliberately
15 misrouted the traffic so as to fool Sprint into treating the calls as local
16 when they properly were only subject to treatment as interexchange
17 traffic.

18 **Q. PLEASE EXPLAIN WHY SPRINT'S CHARACTERIZATIONS OF THE**
19 **CUSTOMER AS AN INTEREXCHANGE CARRIER, AND OF THE**
20 **TRAFFIC AS INTEREXCHANGE TRAFFIC, ARE WRONG.**

21 **A.** As an initial matter, Sprint witness Wiley, page 12, lines 3-10, draws the
22 conclusion that traffic is telecommunications traffic and interexchange
23 carrier traffic without asking the question, or even acknowledging the

1 issue, of whether KMC was entitled to treat Customer X as an end user
2 and the traffic as enhanced service traffic. The Commission cannot
3 ignore those questions. Sprint is wrong because the KMC customer that
4 we have previously identified as the sole source of this traffic, the
5 Customer X identified in my direct testimony, did not hold itself out as a
6 carrier. Customer X was neither certified by, nor registered with, the
7 Florida Public Service Commission, as a carrier. In order to operate as a
8 local exchange or an interexchange carrier in Florida, Customer X would
9 have to have been certificated or registered with the Commission, would
10 have been reachable by end users through either presubscription or
11 carrier access code dialing (101XXXX or 950-XXXX), and have tariffs on
12 file. Absent this, they could not offer telecommunications services in the
13 state of Florida. By not seeking and obtaining certification, it is clear that
14 Customer X did not deem itself as a telecommunications carrier.
15 From the Commission's perspective, Customer X did not offer
16 interexchange services or any telecommunications services to the public.
17 To the contrary, Customer X identified itself to KMC as an enhanced
18 service provider, as it continues to do to the world today. My Exhibit ___
19 (MBJ-8) contains excerpts of pages from Customer X's website. As an
20 enhanced service provider, Customer X was entitled to have KMC treat it
21 in the exact fashion as all non-carrier business customers are treated.
22 Telecommunications law and practice has always put the onus on

customers to self-certify and not to use common carrier services for any

2 unlawful purpose.

3 **Q. PLEASE EXPLAIN HOW ENHANCED SERVICES PROVIDERS ARE TO**

4 **BE TREATED.**

5 **A.** Certainly. As I explained in my initial testimony, enhanced service

6 providers are classified as end users under the Federal Communications

7 Commission's ("FCC's") rules, and their services are exempt from the

8 imposition of carrier access charges, such as those that Sprint seeks to

9 apply to the traffic in question in this case.

10 **Q. TO WHAT TYPES OF TRAFFIC DO ACCESS CHARGES APPLY?**

11 **A.** Access charges apply only to interexchange toll traffic.

12 **Q. SPRINT'S WITNESS BURT IMPLIES, AT PAGES 14-16, THAT KMC**

13 **KNEW THAT CUSTOMER X WAS A CARRIER SEEKING TO USE**

14 **KMC'S SERVICES AS A WAY TO AVOID ACCESS CHARGES. HOW**

15 **DO YOU RESPOND?**

16 **A.** Notwithstanding Mr. Burt's innuendo, KMC had no such knowledge. In

17 fact, Mr. Burt's innuendo is a prime example of Sprint's flawed logic.

18 Apparently, Sprint has taken the position that enhanced services traffic,

19 such as VoIP, is subject to access charges. Of course, this position is

20 factually and legally flawed. What KMC in fact knew is that Customer X

21 represented itself as an enhanced services provider. There was nothing

22 that came to KMC's attention at the time that the PRI circuits were

23 established that would have led KMC to conclude otherwise. There was

1 nothing that ever came to KMC's attention that would have led KMC to
2 conclude that Customer X was an interexchange carrier, that its calls were
3 somehow interexchange in nature, and that the traffic coming in over the
4 PRIs was subject to carrier access charges. While I was not the sales
5 person who negotiated the initial sale of local services to Customer X, I
6 was involved in the process of provisioning service to Customer X and in
7 the attempts I described in my Direct Testimony to obtain an MSA. I was
8 also involved in working with the KMC sales and provisioning staff to
9 ensure that the local service requested by Customer X was properly
10 arranged for and provided. At no time in my involvement with Customer X
11 were there any indications that Customer X was anything but an
12 enhanced services provider. Mr. Menier provides additional information
13 regarding the business relationship between KMC and Customer X in his
14 rebuttal testimony.

15 **Q. WERE THERE ANY INTERNAL INDICATIONS THAT THE SERVICE**
16 **CUSTOMER X WAS REQUESTING WAS DESIGNED TO AVOID**
17 **ACCESS CHARGES?**

18 **A.** No, not at all. In fact, all internal indications were that Customer X was an
19 enhanced services provider. By virtue of being an enhanced services
20 provider, Customer X was entitled to purchase local services from KMC,
21 which meant that Customer X would not be paying access charges. That
22 was it.

1 **Q. ONCE SERVICE WAS ESTABLISHED FOR CUSTOMER X, WAS**
2 **THERE ANYTHING THAT INDICATED TO KMC THAT CUSTOMER X**
3 **WAS NOT AN ENHANCED SERVICES PROVIDER?**
4 **A.** During the entire relationship between KMC and Customer X in Ft. Myers
5 and Tallahassee, from mid 2002 to June 2004, KMC had no basis for it to
6 question Customer X's representations that it was an enhanced service
7 provider and its services were enhanced VoIP services. Contrary to Mr.
8 Burt's assertion that handing off "substantial amounts of traffic" is
9 automatically "suspect," KMC has a number of large customers with
10 "substantial" traffic volumes – that's why we're in the business. His other
11 assertion that KMC new that this "substantial" traffic was "preponderantly
12 intrastate toll traffic" is equally baseless – as all the KMC witnesses have
13 testified on direct and rebuttal, KMC had no basis for looking at any calling
14 number information because Customer X was an enhanced services
15 provider. The assumptions Mr. Burt has made are each without any
16 basis, and when you combine them, his whole analysis falls like a house
17 of cards. Even with all of Sprint's so-called evidence in its five sets of
18 testimony, then, as now, KMC has no reason to believe that the traffic in
19 question was interexchange toll traffic subject to access charges.
20 **Q. SO, HOW DO YOU ADDRESS THE SPECIFIC ARGUMENTS IN**
21 **SPRINT'S TESTIMONY THAT THE TRAFFIC COMING OVER THE PRIs**
22 **WAS SUBJECT TO ACCESS CHARGES?**

1 **A.** There is nothing in the testimony of Sprint's five witnesses that directly
2 supports that conclusion, only conjecture and speculation. Sprint witness
3 Burt, at page 20, acknowledges that the nature of the traffic determines
4 whether traffic is subject to access charges. Sprint continues to avoid
5 recognizing that irrespective of the calling number information, enhanced
6 services are not subject to access charges. Paradoxically, Sprint has
7 refused to undertake a wider investigation into the characteristics of the
8 traffic for which, in this case, it claims access charges are due, choosing
9 to rest its case upon speculation and assumption.
10 **Q. EXPLAIN IN MORE DETAIL WHY SPRINT IS WRONG TO CLAIM THAT**
11 **KMC KNEW THAT CUSTOMER X'S CALLS WERE NOT LOCAL**
12 **CALLS BUT RATHER WERE INTEREXCHANGE CALLS?**
13 **A.** As I have already stated, KMC had no reason to believe that Customer X
14 was anything other than what it declared itself to be, namely an enhanced
15 service provider. Under the FCC's rules and orders, would-be customers
16 of local services are not required to do anything more than self-declare
17 that they are enhanced services providers to qualify for the Enhanced
18 Service Provider exemption. Under Florida law, enhanced service
19 providers are not required to submit their operations to any form of
20 certification, nor are they required to gain any regulatory concurrence or
21 approval in connection with their operations. Customer X was not, as I
22 noted, ever certificated by the Florida Public Service Commission as an
23 IXC, and under the current statutory framework, Customer X has not

1 complied with any of the other regulatory and legal requirements
2 applicable to IXCs. Sprint's witnesses have not suggested otherwise.
3 Customer X consistently stated both to KMC and to the public that
4 its services were enhanced services. Moreover, Customer X has been
5 very clear that its enhanced services were not the same type of VOIP
6 services that were at the heart of the AT&T Declaratory Ruling Petition
7 that Sprint cites as the being instructive here. See, again, my Exhibit __
8 (MBJ-8) and also Exhibit ___ (MBJ-9), which consists of various FCC
9 filings made by Customer X. Sprint would have this Commission believe
10 that when presented with uncontroverted evidence that Customer X was
11 an enhanced service provider and not an interexchange carrier, KMC
12 should have known the unknowable. There was neither a duty nor a basis
13 for KMC to conduct any type of unilateral investigation as to whether
14 Customer X was an interexchange carrier and to assess if the traffic it was
15 generating over the PRI trunks was interexchange traffic.
16 **Q. WAS THERE ANY OTHER EVIDENCE THAT THE TRAFFIC IN**
17 **QUESTION WAS NOT INTEREXCHANGE TOLL SERVICES?**
18 **A.** Yes. Customer X did not presubscribe the PRI services to any
19 interexchange carrier. In addition, Customer X elected to have KMC
20 provide toll denial so that its PRI lines could not be used to originate
21 anything but local calling.
22 **Q. MR. WILEY STATES BEGINNING AT PAGE 12 THAT THE FACT THAT**
23 **THE CALLING PARTY NUMBERS WERE FROM OUTSIDE THE**

1 **LOCAL CALLING AREAS IN FT. MYERS AND TALLAHASSEE**
2 **DEMONSTRATES THAT THE CALLS WERE INTEREXCHANGE IN**
3 **NATURE. HOW DO YOU RESPOND?**
4 **A.** The mere existence of calling party numbers from exchanges outside the
5 Ft. Myers and Tallahassee calling areas is not enough to show that the
6 traffic in question was interexchange *telecommunications* traffic. Calling
7 party number does not define the nature of the traffic. Sprint would have
8 this Commission believe that you should look only at the calling party
9 number and terminating numbers for each call and that is the beginning
10 and end of the analysis. By taking this approach, Sprint ignores
11 undertaking the inquiry that would be necessary for it to prove its case,
12 namely, to prove that the traffic was not enhanced. Sprint does not shift
13 the burden to KMC by simply making allegations and conclusory
14 statements and by ignoring the parts of the law that knock out its claims.
15 In this threshold investigation the originating and terminating ends of the
16 call become irrelevant. As is more fully discussed in the rebuttal
17 testimony of KMC's witness Paul Calabro, KMC was required to provide
18 Customer X with *local* access lines since Customer X as an enhanced
19 services provider.
20 **Q.** **SPRINT WITNESS BURT CONTENDS AT PAGES 9-10 THAT THE**
21 **FCC'S DECISION IN ITS *AT&T DECLARATORY RULING* SHOULD**
22 **DECIDE THIS CASE. HOW DO YOU RESPOND?**

1 **A.** There are two FCC decisions involving AT&T that must be discussed.
2 First, the FCC's *AT&T Declaratory Ruling* from April 2004, found that
3 access charges applied to a certain type of IP telephony traffic, and that
4 such charges applied *against the IXC carrying such traffic*. Consequently,
5 even on a superficial level, this FCC decision does not even address the
6 current situation, where Sprint takes the unprecedented step of seeking to
7 impose access charges against a local exchange carrier, rather than any
8 IXCs that may have been involved. Making Sprint's efforts to extrapolate
9 the AT&T decision to the present circumstances even more dubious is the
10 fact that the local exchange carrier in question, KMC, only had a
11 relationship with an end user customer, Customer X. While consistent
12 with the FCC decision, Sprint has allegedly identified a number of IXCs
13 involved with the traffic in question, yet Sprint inexplicably has not
14 pursued the collection of access charges against these known IXCs.
15 Sprint should be seeking to collect access charges, if they apply as Sprint
16 thinks, against those carriers, and any other IXCs that carried the alleged
17 interexchange toll traffic, and not KMC who had no relationship with these
18 carriers and which, if Sprint is correct, would owe KMC access charges as
19 well.
20 **Q. IS THERE ANY OTHER REASON THAT THE APRIL 2004 *AT&T***
21 ***DECLARATORY RULING* DOES NOT APPLY?**
22 **A.** Putting aside for the moment that access charges and the *AT&T*
23 *Declaratory Ruling* apply only to IXCs, not LECs, for Sprint to prevail on

1 the basis of the FCC's April 2004, *AT&T Declaratory Ruling,* Sprint would

2 have to meet its burden of proof and demonstrate that the traffic in

3 question falls within the same category as that before the FCC. As the

4 FCC described the AT&T situation in the "IP in the middle decision":

5 When the call reaches AT&T's network, AT&T converts it
6 from its existing format into an IP format and transports it
7 over AT&T's Internet backbone. AT&T then converts the call
8 back from the IP format and delivers it to the called party
9 through local exchange carrier (LEC) local business lines.
10 We clarify that, under the current rules, the service that
11 AT&T describes is a telecommunications service upon which
12 interstate access charges may be assessed. We emphasize
13 that our decision is limited to the type of service described by
14 AT&T in this proceeding, i.e., an interexchange service that:
15 (1) uses ordinary customer premises equipment (CPE) with
16 no enhanced functionality; (2) originates and terminates on
17 the public switched telephone network (PSTN); and (3)
18 undergoes no net protocol conversion and provides no
19 enhanced functionality to end users due to the provider's use
20 of IP technology.
21
22 FCC 04-97, Order, at para. 1 (April 21, 2004).

23 Sprint has not demonstrated that Customer X's service was such

24 that Customer X's name can simply be substituted for AT&T's, something

25 which it would have to show for the FCC's decision to be applicable.

26 Indeed, Sprint has not provided any information that the traffic in question

27 from Customer X was this type of traffic. On the other hand, KMC has

28 provided extensive evidence through its direct and rebuttal testimony that

29 Customer X was, and apparently still is, providing enhanced services.

30 I should also add that the FCC took pains to point out that its ruling

31 was very narrowly circumscribed. The FCC said: "This order, however,

32 addresses *only AT&T's specific service,* and that service does not involve

1 a net protocol conversion and does not meet the statutory definition of an
2 information service." FCC 04-97, Order, at para. 13 (emphasis added).
3 Again, Sprint has failed to show that the traffic in question has anything to
4 do with AT&T's specific service. Accordingly, the April 2004 *AT&T*
5 *Declaratory Ruling* does not at all support Sprint's claims against KMC.

6 **Q. CAN YOU ALSO RESPOND TO MR. BURT'S RELIANCE ON THE**
7 **MORE RECENT AT&T DECLARATORY RULING ON CALLING**
8 **CARDS?**

9 **A.** Yes, I can. At pages 9-10, Mr. Burt relies upon the more recent FCC
10 AT&T Declaratory Ruling involving pre-paid calling card services for the
11 proposition that an end-to-end analysis should apply, but reliance on this
12 approach ignores several key distinctions. First, the passage cited by Mr.
13 Burt at page 9 of his testimony specifically says that it applies only to
14 determine "the jurisdiction of calling cards." Since there is no evidence
15 that Customer X was providing calling card services, Sprint's reliance on
16 this AT&T ruling seems misplaced. Second, Sprint has not offered any
17 evidence that the enhanced services offered by Customer X have any
18 corollary to the services at issue in the calling card declaratory ruling other
19 than different end points to each call, which I have already discussed, is
20 not the beginning and end of the analysis.

21 **Q. SO THESE FCC DECISIONS ARE REALLY NOT APPLICABLE IN THIS**
22 **CASE?**

1 **A.** Yes, and the narrow applicability of these rulings was recently
2 underscored by the April 28, 2005, decision of the U.S. Bankruptcy Court
3 for the Northern District of Texas in *Transcom Enhanced Services, LLC,*
4 Case No. 05-31929-HDH-11. There the court found that a wholesale
5 provider of IP-based transmission services serving mostly long distance
6 carriers of voice and data was providing enhanced services, and was
7 entitled to purchase local services as a local end user customer *without*
8 the application of access charges. A copy of the *Transcom Enhanced*
9 *Services* decision is attached hereto as Exhibit ___ (MBJ-10). An added
10 significance to the *Transcom Enhanced Services* case is that the fact that
11 calls may have originated on a local exchange carrier such as Sprint and
12 been carried by an IXC, such as Sprint's IXC affiliate, does not obviate the
13 possibility that KMC's customer for the PRIs was a self-declared
14 enhanced service provider providing enhanced services.
15 **Q. MR. BURT ALSO TESTIFIES THAT THE COMMISSION SHOULD**
16 **ATTACH SOME SIGNIFICANCE TO THE FACT THAT CUSTOMER X**
17 **LEFT KMC WHEN PRESSED BY KMC TO EXECUTE THE MSA AND**
18 **THE NEW VoIP ADDENDUM. DO YOU AGREE?**
19 **A.** No. This does not prove anything except that Customer X made a
20 business decision to not execute the MSA and the VoIP Addendum. To
21 conclude on the basis of these actions that Customer X knew it was not
22 an enhanced services provider is really ridiculous. As a consequence of
23 Customer X's decision, Customer X chose to migrate its traffic off the

1 KMC network. Period. Presumably, Customer X is still operating in
2 Tallahassee and Ft. Myers today through another carrier.

3 **Q. IF THE COMMISSION ULTIMATELY DETERMINES THAT THIS IS**
4 **TELECOMMUNICATIONS TOLL TRAFFIC, ISN'T KMC LIABLE FOR**
5 **THE ACCESS CHARGES UNDER THE STATUTE,**
6 **INTERCONNECTION AGREEMENT TERMS, OR TARIFF PROVISIONS**
7 **CITED BY SPRINT?**

8 **A.** No, KMC is not liable under any of these provisions. If you carefully read
9 the tariff and interconnection provisions, they establish the proposition that
10 known telecommunications toll traffic should be routed over access
11 trunks, not local trunks. In other words, toll traffic goes over toll trunks
12 and local traffic goes over local trunks – that is how you build your
13 network. This is what is cited by Mr. Burt at pages 21-23 of his direct
14 testimony. None of these provisions are really damages provisions – they
15 address how co-carriers operate in the real world; they establish the
16 principles by which the carriers operate. There is nothing in these
17 provisions that shifts to KMC the IXC's obligation to pay access charges if
18 the traffic is found to be telecommunications toll traffic.

19 Florida Statutes section 364.16(3)(a) is no different. Subsection
20 3(a) only sets up a prohibition – a LEC shall not knowingly deliver over a
21 local interconnection to another LEC traffic for which access charges
22 would apply. Putting aside the "knowingly" element for a moment, the
23 statute does not say that the LEC that hands off a call to the terminating

1 LEC is the one that pays the access charges. Moreover, you must read
2 364.16(3)(a) with the next paragraph, section 364.16(3)(b). Section
3 364.16(3)(b) grants the Commission the authority to investigate
4 complaints and "to have access to all relevant customer records and
5 accounts." The statute would not have granted such authority to the
6 Commission to look behind the last connecting carrier to its customer –
7 the preceding entity – unless the intent was to have the responsible party
8 pay. There is no basis for the Legislature to impose on a LEC the IXC's
9 duty to pay access charges.
10 Sprint's theory of why KMC should be liable for everything
11 assumes, like many aspects of its case, that since KMC was the last
12 carrier that handed off the traffic to Sprint that KMC had to know what was
13 going on. Sprint's theory is that it can avoid a proper investigation and
14 take the easiest target, the party with the least information about what
15 happened, and make that party pay the access charges bill. Once KMC
16 has been tagged with this liability, Sprint's "theory" continues that KMC
17 can then file its own lawsuit against Customer X or whomever, and litigate
18 the case all over again. Even assuming what has not been proven here –
19 that access charges apply to the traffic in question – this is a colossal
20 waste of resources and time and creates an unfair burden on KMC. But
21 more importantly, this is contrary to the statutory directive to find the root
22 cause of the problem and have the party responsible for the traffic pay for
23 it – that's the way the whole system is designed.

1 **Q. AND WHAT ABOUT THE KNOWINGLY ELEMENT OF THE STATUTE?**

2 **A.** As I have already demonstrated, KMC did knowingly engage in any
3 scheme to deprive Sprint of access charges. Indeed, if there was any
4 basis for this traffic being telecommunications toll traffic, the likely
5 rationale economic course would have been for Customer X to have
6 established direct access trunks to Sprint like every other IXC has done to
7 reach Sprint's customers. The only way to put KMC in the middle
8 between Customer X and Sprint would have KMC charging Customer X
9 for access charges, which would have been more economically attractive
10 to KMC than charging Customer X the PRI rates that it did because
11 Customer X was entitled to local services. KMC did not do this because
12 Customer X was an enhanced services provider. Contrary to Mr. Burt's
13 further assumptions at page 14 of his direct testimony that KMC engaged
14 in this conduct because it had a financial incentive to do so are just flat out
15 wrong. KMC is in the business to make money. We would have come
16 out much better if KMC had charged access rates rather than the flat-
17 rated PRIs which we sold to Customer X.

18 **Q. IF THE COMMISSION RULES THAT SPRINT IS ENTITLED TO**
19 **ACCESS CHARGES FOR THE TRAFFIC IN QUESTION, DOES KMC**
20 **AGREE WITH THE CALCULATIONS AND RESULTING NUMBERS**
21 **FROM THE VARIOUS SPRINT WITNESSES?**

22 **A.** No, KMC does not agree.

23 **Q. WHAT ARE THE PROBLEMS WITH THE SPRINT CALCULATIONS?**

1 **A.** First, Sprint must demonstrate why KMC, as a CLEC, is the party
2 obligated to pay the access charges on this traffic. Being the last carrier
3 in the chain, which is the essence of Sprint's argument, does not cut it. *If*
4 Customer X was sending telecommunications traffic, *and if* the
5 telecommunications traffic was interexchange traffic, *and if* Customer X
6 was therefore an IXC, *then* it seems it would be Customer X that owes the
7 access charges, not KMC. This also means that Customer X was
8 operating without proper authorization from this Commission, which would
9 be a whole other problem for Customer X. But with respect to any access
10 charges that may be due, access charges are paid by the IXCs, not by a
11 CLEC. Tim Pasonski, in his rebuttal testimony, will further address the
12 deficiencies in the Sprint calculations and the support therefore.
13 **Q. IS IT POSSIBLE SOME OTHER CARRIER WOULD BE LIABLE FOR**
14 **THE ACCESS CHARGES?**
15 **A.** If within the context of all of the applicable law and facts it should be
16 determined that this traffic is interexchange telecommunications traffic
17 subject to access charges, and not enhanced services traffic, then some
18 earlier carrier in the communications path would be the party that is
19 responsible for the payment of access charges. For example, Sprint has
20 identified several IXCs in its Agilent study, and they may be the
21 appropriate IXCs that should bear the access charges if it determined that
22 Customer X should not be assessed access charges.
23

1 **Q. ARE YOU SAYING THAT KMC DOES NOT HAVE ANY LIABILITY IF**
2 **THIS IS FOUND TO BE TELECOMMUNICATIONS TRAFFIC?**
3 **A.** For access charges, we have none. If the traffic in question was
4 interexchange telecommunications traffic for which Sprint is due access
5 charges, then the access charges are due from the IXC, or Customer X,
6 or some other party, but not from KMC. However, KMC and Sprint did
7 exchange local compensation for this traffic. Thus, some accounting or
8 reconciliation of the local traffic compensation would be appropriate to
9 reconcile what KMC and Sprint paid each other, but this is an independent
10 accounting separate from the access charge liability issue.
11 **Q. SO WHAT SHOULD THE COMMISSION DO IN THIS CASE?**
12 **A.** In short, for failing to provide the data to substantiate its claims, the
13 Commission should find that Sprint failed to fulfill its burden of proof. It
14 must be remembered that the matters Sprint complains about were time
15 limited and limited to a single KMC customer. If the Commission
16 determines factually and legally that the traffic at question was not
17 enhanced services traffic, then Sprint should be directed to recover its lost
18 access charges from Customer X or whoever is the applicable IXC. As for
19 KMC, there should be some type of accounting to reconcile the local
20 compensation amounts that were paid. Finally, if the Commission has not
21 done so in the context of this case, then the Commission should conduct
22 a broader investigation into the issues raised by KMC's claims against
23 Sprint and Sprint's IXC affiliate since all the evidence indicates that the

1 Sprint companies are engaged in an ongoing and continuing effort to deny
2 KMC access charges.

3 Q. **DO YOU HAVE ANY RESPONSE TO THE SPRINT TESTIMONY THAT**
4 **ALL THREE KMC ENTITIES SHOULD BE PARTIES TO THIS**
5 **PROCEEDING?**

6 A. The Sprint testimony does not support all three KMC entities being a party
7 to this proceeding.

8 First, the best Mr. Schaffer could offer on KMC Data being a party
9 was that KMC Data has a certificate from the Commission and is a party
10 to an interconnection agreement with Sprint. There is not a single shred
11 of evidence linking KMC Data and Customer X or any of the minutes of
12 use that are at issue in this case.

13 Next, as for KMC V, I agree that the OCNs for the telephone
14 numbers Sprint has identified are assigned to KMC V. However, it has
15 been clear that arrangements between Sprint and KMC have been
16 conducted on behalf of KMC III and not KMC V. For example, the local
17 interconnection trunks between KMC and Sprint were ordered by KMC III
18 and not KMC V. While KMC III may have used a telephone number
19 assigned to KMC V, the bottom line is the same; KMC III is the only
20 proper party to this proceeding. If this is not true, then KMC III should
21 also be dismissed since Sprint has not offered any evidence of its
22 involvement in this matter.

In view of all of the evidence, there is no reason for KMC Telecom V, Inc. or KMC Data LLC to be a party to this proceeding, especially since Sprint has not presented any facts specific to services provided to these entities. Moreover, the traffic that is subject to this proceeding is traffic that was routed over facilities ordered by and billed to KMC Telecom III, Inc. and the backbilling switched access charges assessed by Sprint were specifically backbilled to KMC Telecom III, LLC. Clearly, KMC Telecom V, Inc. and KMC Data LLC should be dismissed from Sprint's claims.

Q. CAN YOU SUMMARIZE YOUR REBUTTAL TESTIMONY?

A. Yes. Sprint is factually incorrect on all three points that underlie its claims against KMC. First, KMC's Customer X was not an interexchange carrier or other type of telecommunications carrier. Second, KMC did not know and had no reason to believe that its customer's calls were interexchange in nature. In fact, based on KMC's knowledge of Customer X and its understanding of the FCC's Enhanced Service Provider exemption, KMC remains convinced that Customer X's calls were indeed local in nature. Third, KMC neither altered the signaling associated with its Customer X's calls, nor misrouted that traffic to Sprint. The three premises underlying Sprint's claims are factually wrong as demonstrated above. To prevail against KMC, all three points would have to be demonstrated. Instead, Sprint swung and missed three times. Sprint is out.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

Docket No. 041144-TP
Witness: Johnson
Exhibit _____(MBJ-8) is Confidential

Docket No. 041144-TP
Witness: Johnson
Exhibit _____(MBJ-9) is Confidential

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
TRANSCOM ENHANCED SERVICES, LLC,	§	**Case No. 05-31929-HDH-11**
	§	
	§	
Debtor.	§	

MEMORANDUM OPINION

On April 14, 2005, this Court considered Transcom Enhanced Services, LLC's (the "Debtor's") Motion To Assume AT&T Master Agreement MA Reference No. 120783 Pursuant To 11 U.S.C. § 365 ("Motion").[1] At the hearing, the Debtor, AT&T, and Southwestern Bell Telephone, L.P., et al ("SBC Telcos") appeared, offered evidence, and argued. These parties also submitted post-hearing briefs and proposed findings of fact and conclusions of law supporting their positions. This memorandum opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 151, and the standing order of reference in this district. This matter is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(A) & (O).

I. Background Facts

This case was commenced by the filing of a voluntary Bankruptcy Petition for relief under Chapter 11 of the Bankruptcy Code on February 18, 2005. The Debtor is a wholesale

[1]Debtor's Exhibit 1, admitted during the hearing, is a true, correct and complete copy of the Master Agreement between Debtor and AT&T.

provider of transmission services providing its customers an Internet Protocol ("IP") based network to transmit long-distance calls for its customers, most of which are long-distance carriers of voice and data.

In 2002, a company called DataVoN, Inc. invested in technology from Veraz Networks designed to modify the aural signal of telephone calls and thereby make available a wide variety of potential new services to consumers in the area of VoIP. The FCC had long supported such new technologies, and the opportunity to change the form and content of the telephone calls made it possible for DataVoN to take advantage of the FCC's exemption provided for Enhanced Service Providers ("ESP"s), significantly reducing DataVoN's cost of telecommunications service.

On September 20, 2002, DataVoN and its affiliated companies filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas, before Judge Steven A. Felsenthal. Southwestern Bell was a claimant in the DataVoN bankruptcy case. On May 19, 2003, the Debtor was formed for purposes of acquiring the operating assets of DataVoN. The Debtor was the winning bidder for the assets of DataVoN and on May 28, 2003, the bankruptcy court approved the sale of substantially all of the assets of DataVoN to the Debtor. Included in the order approving the sale, were findings by Judge Felsenthal that DataVoN provided "enhanced information services".

On July 11, 2003, AT&T and the Debtor entered into the AT&T Master Agreement MA Reference No. 120783 (the "Master Agreement"). In an addendum to the Master Agreement, executed on the same date, the Debtor states that it is an "enhanced information services" provider, providing data communications services over private IP networks (VoIP), such VoIP

services are exempt from the access charges applicable to circuit switched interexchange calls, and such services would be provided over end user local services (such as the SBC Telcos).

AT&T is both a local-exchange carrier and a long-distance carrier of voice and data. The SBC Telcos are local exchange carriers that both originate and terminate long distance voice calls for carriers that do not have their own direct, "last mile" connections to end users. For this service, SBC Telcos charge an access charge. Enhanced service providers ("ESP's") are exempt from paying these access charges, and the SBC Telcos had been in litigation with DataVoN during its bankruptcy, and has recently been in litigation with the Debtor, AT&T and others over whether certain services they provide are entitled to this exemption to access charges.

On April 21, 2004, the FCC released an order in a declaratory proceeding between AT&T and SBC (the "AT&T Order") that found that a certain type of telephone service provided by AT&T using IP technology was not an enhanced service and was therefore not exempt from the payment of access charges. Based on the AT&T Order, before the instant bankruptcy case was filed, AT&T suspended Debtor's services under the Master Agreement on the grounds that the Debtor was in default under the Master Agreement. Importantly, the alleged default of the Debtor is not a payment default, but rather pursuant to Section 3.2 of the Master Agreement, which, according to AT&T, gives AT&T the right to immediately terminate any service that AT&T has reason to believe is being used in violation of laws or regulations.

AT&T asserts that the services that the Debtor provides over its IP network are substantially the same as were being provided by AT&T, and therefore, the Debtor is also not exempt from paying these access charges. At the point that the bankruptcy case was filed, service had been suspended by AT&T pending a determination that the Debtor is an ESP, but

AT&T had not yet assessed the access charges that it asserts are owed by the Debtor.

II. Issues

The issues before the Court are:

(1) Whether the Debtor has met the requirements of § 365 in order to assume the Master Agreement; and

(2) Whether the Debtor is an enhanced service provider ("ESP"), and is thus exempt from the payment of certain access charges in compliance with the Master Agreement.[2]

---

[2] AT&T has stated in its Objection to the Motion that since it does not object to the Debtor's assumption of the Master Agreement provided the amount of the cure payment can be worked out, the Court need not reach the issue of whether the Debtor is an ESP. However, this argument appears disingenuous to the Court. AT&T argues that the entire argument over cure amounts is a difference of about $28,000.00 that AT&T is willing to forgo for now. However, AT&T later states in its objection (and argued at the hearing):

> To be sure, this is not the total which ultimately Transcom may owe. It is also possible that . . . Transcom will owe additional amounts if it is determined that it should have been paying access charges. But at this point, AT&T has not billed for the access charges, so under the terms of the Addendum, they are not currently due. . . . AT&T is not requiring Transcom to provide adequate assurance of its ability to pay those charges should they be assessed, but will rely on the fact that post-assumption, these charges will be administrative claims. . . . Although Transcom's failure to pay access charges with respect to prepetition traffic was a breach, the Addendum requires, as a matter of contract, that those pre-petition charges be paid when billed. This contractual provision will be binding on Transcom post-assumption, and accordingly, is not the subject of a damage award now."

AT&T Objection p. 3-4. As will be discussed below, in evaluating the Debtor's business judgment in approving its assumption Motion, the Court must determine whether or not its approval of the Motion will result in a potentially large administrative expense to be borne by the estate.

AT&T argues against the Court's jurisdiction to determine this question as part of an assumption motion. However, the Court wonders if AT&T will make the same argument with regard to its post-assumption administrative claims it plans on asserting for past and future access charges that it states it will rely on for payment instead of asking for them to be included as cure

III. Analysis

Under § 365(b)(1), a debtor-in-possession that has previously defaulted on an executory contract[3] may not assume that contract unless it: (A) cures, or provides adequate assurance that it will promptly cure, the default; (B) compensates the non-debtor party for any actual pecuniary loss resulting from the default; and (C) provides adequate assurance of future performance under such contract. *See* 11 U.S.C. § 365(b)(1).

In its objection, briefing and arguments made at the hearing, AT&T does not object to the Debtor's assumption of the Master Agreement, provided the Debtor pays the cure amount, as determined by the Court. It does not expect the Debtor to cure any non-monetary defaults, including payment or proof of the ability to pay the access charges that have been incurred, as alleged by the SBC Telcos, as a prerequisite to assumption. *See In re BankVest Capital Corp.*, 360 F.3d 291, 300-301 (1st Cir. 2004), *cert. denied*, __ U.S. __, 124 S.Ct. 2874, 159 L.Ed. 2d 776 (2004) ("Congress meant § 365(b)(2)(D) to excuse debtors from the obligation to cure non-monetary defaults as a condition of assumption.").

Only the Debtor offered evidence of the cure amounts due at the hearing totaling $103,262.55. Therefore, based on this record, the current outstanding balance due from Debtor to AT&T is $103,262.55 (the "Cure Amount"). Thus, upon payment of the Cure Amount Debtor's Motion should be approved by the Court, provided the Debtor can show adequate assurance of future performance.

AT&T argues that this is where the Court's inquiry should cease. Since AT&T has

---

payments under the present Motion.

[3] The parties agree that the Master Agreement is an executory contract.

suspended service under the Master Agreement, whether or not the Debtor is an ESP, and thus exempt from payment of the disputed access charges is irrelevant, because no future charges will be incurred, access or otherwise. This is because no service will be given by AT&T until the proper court makes a determination as to the Debtor's ESP status. However, in its argument, AT&T ignores the fact that part of the Court's necessary determination in approving the Debtor's motion to assume the Master Agreement is to ascertain whether or not the Debtor is exercising proper business judgment. *See In re Lilgeberg Enter., Inc.*, 304 F.3d 410, 438 (5th Cir. 2002); *In re Richmond Leasing Co.*, 762 F.2d 1303, 1309 (5th Cir. 1985).

If by assuming the Master Agreement the Debtor would be liable for the large potential administrative claim, to which AT& T argues that it will be entitled,[4] or if the Debtor cannot show that it can perform under the Master Agreement, which states that the Debtor is an enhanced information services provider exempt from the access charges applicable to circuit switched interexchange calls, and the Debtor would loose money going forward under the Master Agreement should it be determined that the Debtor is not an ESP, then the Court should deny the Motion. On this record, the Debtor has established that it cannot perform under the Master Agreement, and indeed cannot continue its day-to-day operations or successfully reorganize, unless it qualifies as an Enhanced Service Provider.

AT&T and SBC Telcos argue that a forum selection clause in the Master Agreement should be enforced and that any determination as to whether the Debtor is an ESP, and thus exempt from access charges, must be tried in New York. While this argument may have validity in other contexts, the Court concludes that it has jurisdiction to decide this issue as it arises in the

---

[4] See n. 2 above.

context of a motion to assume under § 365. *See In re Mirant Corp.*, 378 F.3d 511, 518 (5th Cir. 2004) (finding that district court may authorize the rejection of an executory contract for the purchase of electricity as part of a bankruptcy reorganization and that the Federal Energy Regulatory Commission did not have exclusive jurisdiction in this context); *see also, Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056 (5th Cir. 1997) (Bankruptcy Court possessed discretion to refuse to enforce an otherwise applicable arbitration provision where enforcement would conflict with the purpose or provisions of the Bankruptcy Code).

In re Orion, which is heavily relied upon by AT&T, is inapplicable in this proceeding. *See In re Orion Pictures Corp.,* 4 F.3d 1095 (2d Cir. 1993). On its face, *Orion* is distinguishable from this case in that in *Orion*, the debtor sought damages in an adversary proceeding at the same time it was seeking to assume the contract in question under Section 365. The bankruptcy court decided the Debtor's request for damages as a part of the assumption proceedings awarding the Debtor substantial damages. Here, the Debtor is not seeking a recovery from AT&T under the contract which would augment the estate. Rather the Debtor is only seeking to assume the contract within the parameters of Section 365. Similar issues to the one before this Court have been advanced by another bankruptcy court in this district.

The court in *In re Lorax Corp.*, 307 B.R. 560 (Bankr. N.D. Tex. 2004), succinctly pointed out that a broad reading of the Orion opinion runs counter to the statutory scheme designed by Congress. *Lorax*, 307 B.R. at 566 n. 13. The *Lorax* court noted that *Orion* should not be read to limit a bankruptcy court's authority to decide a disputed contract issue as part of hearing an assumption motion. *Id.* To hold otherwise would severely limit a bankruptcy court's inherent

equitable power to oversee the debtor's attempt at reorganization and would diffuse the bankruptcy court's power among a number of courts. The *Lorax* court found such a result to be at odds with the Supreme Court's command that reorganization proceed efficiently and expeditiously. *Id.* at 567 (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 376 (1988)). This Court agrees. The determination of the Debtors status as an ESP is an important part of the assumption motion.

Since the Second Circuit's 1993 *Orion* opinion, the Second Circuit has further distinguished non-core and core jurisdiction proceedings involving contract disputes. In particular, if a contract dispute would have a "much more direct impact on the core administrative functions of the bankruptcy court" versus a dispute that would merely involve "augmentation of the estate," it is a core proceeding. *In re United States Lines, Inc.*, 197 F.3d 631, 638 (2d Cir. 1999) (allowing the bankruptcy court to resolve disputes over major insurance policies, and recognizing that the debtor's indemnity contracts could be the most important asset of the estate). Accordingly, the Second Circuit would reach the same conclusion of core jurisdiction here since the dispute addressed by the Motion "directly affect[s]" the bankruptcy court's "core administrative function." *United States Lines.* at 639 (citations omitted).

Determination, for purposes of the motion to assume, of whether the Debtor qualifies as an ESP and is exempt from paying access charges (the "ESP Issue") requires the Court to examine and take into account certain definitions under the Telecommunications Act of 1996 (the "Telecom Act"), and certain regulations and rulings of the Federal Communications Commission ("FCC"). None of the parties have demonstrated, however, that this is a matter of first impression or that any conflict exists between the Bankruptcy Code and non-Code cases.

Thus, the Court may decide the ESP issues for purposes of the motion to assume.

Several witnesses testified on the issues before the Court. Mr. Birdwell and the other representatives of the Debtor were credible in their testimony about the Debtor's business operations and services. The record establishes by a preponderance of the evidence that the service provided by Debtor is distinguishable from AT&T's specific service in a number of material ways, including, but not limited to, the following:

(a) Debtor is not an interexchange (long-distance) carrier.

(b) Debtor does not hold itself out as a long-distance carrier.

(c) Debtor has no retail long-distance customers.

(d) The efficiencies of Debtor's network result in reduced rates for its customers.

(e) Debtor's system provides its customers with enhanced capabilities.

(f) Debtor's system changes the content of every call that passes through it.

On its face, the AT&T Order is limited to AT&T and its specific services. This Court holds, therefore, that the AT&T Order does not control the determination of the ESP Issue in this case.

The term "enhanced service" is defined at 47 CFR § 67.702(a) as follows:

> 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 restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

The term "information service" is defined at 47 USC § 153(20) as follows:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Dr. Bernard Ku, who testified for SBC was a knowledgeable and impressive witness. However, during cross examination, he agreed that he was not familiar with the legal definition for enhanced service.

The definitions of "enhanced service" and "information service" differ slightly, to the point that all enhanced services are information services, but not all information services are also enhanced services. See First Report And Order, *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, as amended, 11 FCC Rcd 21905 (1996) at ¶ 103.

The Telecom Act defines the terms "telecommunications" and "telecommunications service" in 47 USC § 153(43) and (46), respectively, as follows:

> The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received. (emphasis added).

> The term "telecommunications service" means the offering of *telecommunications* for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used. (emphasis added).

These definitions make clear that a service that routinely changes either the form or the content of the transmission would fall outside of the definition of "telecommunications" and therefore would not constitute a "telecommunications service."

Whether a service pays access charges or end user charges is determined by 47 C.F.R.

§ 69.5, which states in relevant part as follows:

> (a) End user charges shall be computed and assessed upon end users . . . as defined in this subpart, and as provided in subpart B of this part. (b) Carrier's carrier charges [i.e., access charges] shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities *for the provision of interstate or foreign telecommunications services*. (emphasis added).

As such, only telecommunications services pay access charges. The clear reading of the above provisions leads to the conclusion that a service that routinely changes either the form or the content of the telephone call is an enhanced service and an information service, not a telecommunications service, and therefore is required to pay end user charges, not access charges.

Based on the evidence and testimony presented at the hearing, the Court finds, for purposes of the § 365 motion before it, that the Debtor's system fits squarely within the definitions of "enhanced service" and "information service," as defined above. Moreover, the Court finds that Debtor's system falls outside of the definition of "telecommunications service" because Debtor's system routinely makes non-trivial changes to user-supplied information (content) during the entirety of every communication. Such changes fall outside the scope of the operations of traditional telecommunications networks, and are not necessary for the ordinary management, control or operation of a telecommunications system or the management of a telecommunications service. As such, Debtor's service is not a "telecommunications service" subject to access charges, but rather is an information service and an enhanced service that must pay end user charges. Judge Felsenthal made a similar finding in his order approving the sale of the assets of DataVoN to the Debtor, that DataVoN provided "enhanced information services". *See* Order Granting Motion to Sell, 02-38600-SAF-11, no. 465, entered May 29, 2003. The

Debtor now uses DataVoN's assets in its business.

Because the Court has determined that the Debtor's service is an "enhanced service" not subject to the payment of access charges, the Debtor has met its burden of demonstrating adequate assurance of future performance under the Master Agreement. The Debtor has demonstrated that it is within Debtor's reasonable business judgment to assume the Master Agreement.

Regardless of the ability of the Debtor to assume this agreement, the Court cannot go further in its ruling, as the Debtor has requested to order AT&T to resume providing service to the Debtor under the Master Agreement. The Court has reached the conclusions stated herein in the context of the § 365 motion before it and on the record made at the hearing. An injunction against AT&T would require an adversary proceeding, a lawsuit. Both the Debtor and AT&T are still bound by the exclusive jurisdiction provision in § 13.6 of the Master Agreement, as found by the United States District Court for the Northern District of Texas, Hon. Terry R. Means. As Judge Means ruled, any suit brought to enforce the provisions of the Master Agreement must be brought in New York.

IV. Conclusion

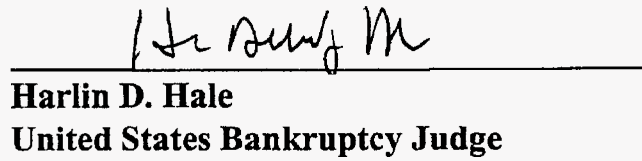
In conclusion, the Court finds that the provisions of 11 U.S.C. § 365 have been met in this case. Because the Court finds that the Debtor's service is an enhanced service, not subject to payment of access charges, it is therefore within Debtor's reasonable business judgment to assume the Master Agreement with AT&T.

Only the Debtor offered evidence of the cure amounts at the hearing. Based on the record at the hearing, the current outstanding balance due from Debtor to AT&T is $103,262.55. To

assume the Master Agreement, the Debtor must pay this Cure Amount to AT&T within ten (10) days of the entry of the Court's order on this opinion.

A separate order will be entered consistent with this memorandum opinion.

SIGNED: 4/28/05



Harlin D. Hale
United States Bankruptcy Judge