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CHARTERED
May 14, 1998

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VIA FEDERAL EXPRESS

Ms. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Re: Petition to Initiate Rulemaking Pursuant to Section 120.54(5), Florida Statutes, to
Incorporate "Fresh Look" Requirements to all Incumbent Local Exchange
Company (ILEC) Contracts - Docket No. 980253-TX

Dear Ms. Bayo:

Enclosed for filing are the original and five (5) copies of Comments of KMC Telecom Inc. and KMC Telecom II, Inc. in the above-referenced docket. Also enclosed is a high density disk with the Comments on it in WordPerfect 6.1.

Please date-stamp and return the extra copy of the Comments to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance. Should you have any questions regarding this matter, please feel free to contact me.

Sincerely,



Eric N. Einhorn

- ACK _____
- AFA _____
- APP Caldwell
- CAF _____ Enclosures
- CMU 2
- CTR _____
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DOCUMENT NUMBER-DATE

05430 MAY 15 98

FPSC-RECORDS/REPORTING

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**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In Re:)
Petition to Initiate Rulemaking Pursuant to)
Section 120.54(5), Florida Statutes, to)
Incorporate "Fresh Look" Requirements to) Docket No. 980253-TX
all Incumbent Local Exchange Company)
(ILEC) Contracts) Filed: May 14, 1998

**COMMENTS OF KMC TELECOM INC.
AND KMC TELECOM II, INC.**

KMC Telecom Inc. and KMC Telecom II, Inc. ("KMC"), by counsel, hereby jointly submit Comments regarding the proposed fresh look rules of Time Warner AxS of Florida, Inc. ("Time Warner") and the Florida Competitive Carriers Association. A substantial number of Florida consumers are locked into long-term service arrangements – contract and/or tariff-based – for local exchange services that were entered into before the advent of local exchange competition. Many of these long-term arrangements prevent alternative local exchange service providers ("ALECs") such as KMC from competing for the customers' business for years. As such, KMC respectfully suggests that there is a need for the Commission to require that ILECs provide their customers with a fresh look opportunity to be freed from the restriction of long term contracts which were entered into before competition. Continuation of long-term arrangements between ILECs and their principal customers will operate to substantially delay the commencement of competition in the local exchange market. Such a result is contrary to the pro-competitive goals of the Telecommunications Act of 1996 and the Florida Statutes.

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FPSC-RECORDS/REPORTING

I. A FRESH LOOK PROCEDURE IS A COMMON CONSUMER PROTECTION DEVICE WHICH HAS BEEN USED BY THE FCC AND STATE COMMISSIONS

Fresh look policies have been adopted for numerous telecommunications services by the Federal Communications Commission ("FCC") and several state commissions. The FCC has acknowledged the anticompetitive concerns raised by long term contracts executed in a less than fully competitive environment. The FCC's concerns are two-fold: "captivity" and "leverage." First, the FCC has identified that customers tied to long term contracts once telecommunications markets open to competition are "captive" and may not change carriers without incurring "substantial costs."^{1/} As the FCC stated in the context of opening the access market to competition:

The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to "lock-up" the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. To address this, we conclude that certain ILEC customers with long-term access arrangements will be permitted to take a "fresh look" to determine if they wish to avail themselves of a competitive alternative.^{2/}

Second, the FCC is concerned about the ability of incumbent carriers to "leverage" market power. As the FCC described a variant of this problem in the context of 800 service:

[I]everaging could occur, for example if AT&T offered a "captive" 800 service subscriber discounts on 800 service conditioned upon the customer's purchase of another service from AT&T -- for example if AT&T offered a customer a bundled contract of 800 service and WATS service, with ten percent discounts on each. In this example, assuming equal usage of 800 and WATS, an AT&T competitor would

^{1/} *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5906 (1991), *order on recon.*, 7 FCC Rcd 2677 (1992).

^{2/} *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-64 (1992)(*Special Access Order*).

have to offer a twenty percent discount on WATS in order to win the customer's WATS business.^{3/}

Possible discount of one service in connection with the "captive" service is only an example illustrating that incumbents with captive customers possess considerable market power relative to new entrants. As a result, the FCC has frequently required the imposition of fresh look provisions in order to allow customers with long term contracts to avail themselves of the benefits offered by increased competition in telecommunications markets.^{4/} Thus, the FCC has supported the imposition of "fresh look" requirements in order to allow customers with long term contracts to avail themselves of the benefits offered by increased competition in the telecommunications market.

Numerous state public utility commissions have also imposed "fresh look" requirements. The Wisconsin, Ohio, and New Hampshire commissions have all recently adopted fresh look procedures for local exchange customers. The Wisconsin Public Service Commission found that:

a fresh-look procedure would promote competition in telecommunications by increasing the number of potential customers available to new entrants, and by

^{3/} *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd at 5906 n.234.

^{4/} *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98 at ¶ 1095 (released August 8, 1996), rev'd in part on other grounds, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1996), cert. granted, 118 S. Ct. 879 (Jan. 26, 1998); *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, 5207-10 (1994) ("fresh look" available to ILEC customers who wish to sign with competitive access providers); *Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" imposed as condition of grant of licenses under Title III of Communications Act).

significantly expanding the choices for customers to a larger array including, potentially, several facilities-based telecommunications network providers.^{5/}

Likewise, the Public Utilities Commission of Ohio recently imposed a “fresh look” requirement in the local exchange market, noting that:

the existence of certain long-term arrangements raise potential anticompetitive concerns since these arrangements have the effect of locking out the competition for an extended period of time and prevent consumers from obtaining the benefits of this competitive local exchange environment.^{6/}

The Ohio Commission not only established a “fresh look” period for local exchange customers subject to long-term contracts, but also required the ILEC to inform its customers of this opportunity upon inquiry.^{7/}

Most recently, the New Hampshire Public Utilities Commission also recently issued an order adopting a fresh look procedure patterned on Ohio’s. That procedure creates a fresh look window in each geographic area in which the Commission verifies that local competition exists. According to that Commission, “the existence of numerous long-term contracts significantly impairs the development of a fully competitive market.”^{8/}

^{5/} *Supplemental Findings of Fact, Conclusions of Law and Interim Order re Investigation of the Appropriate Standards to Promote Effective Competition in the Local Exchange Telecommunications Market in Wisconsin*, Docket No. 05-TI-138, at 4 (Pub. Service Comm’n of Wisconsin, September 19, 1996) (emphasis in original).

^{6/} *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio P.U.C. June 12, 1996).

^{7/} *Id.* at Appendix A, Section VI.I.

^{8/} *Order Granting Fresh Look Opportunity for Certain Bell Atlantic Customers, Freedom Ring, L.L.C. Petition Requesting that Incumbent LECs Provide Customers with a Fresh Look Opportunity*, Order No. 22,798, at 18 (N.H. P.U.C. Dec. 8, 1997).

In addition to states that have already adopted fresh look for local exchange customers, KMC is aware that the states of Alabama,^{9/} Maine,^{10/} North Carolina,^{11/} and Tennessee^{12/} all have local exchange fresh look proceedings pending.

A number of states, including Florida, have already adopted fresh look procedures in other contexts. In *Intermedia Communications of Florida, Inc.*, the Florida Public Service Commission allowed a “fresh look” for LEC private line and special access services, stating that:

[I]ntroducing competition, or extending the scope of competition, provides end users of particular services with opportunities that were not available in the past. However, these opportunities are temporarily foreclosed to end users if they are not able to choose competitive alternatives because of substantial financial penalties for termination of existing contract arrangements. A fresh look proposal will enhance an end user’s ability to exercise choice to best meet its telecommunication needs.”^{13/}

^{9/} Order Establishing Rulemaking Proceeding, *In the matter of the arbitration between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc.*, Docket Nos. 25703 & 25704 (Ala. P.S.C. Feb. 11, 1998).

^{10/} Public Utilities Commission Inquiry Into Whether Incumbent Local Exchange Carriers Should Be Required to Provide Their Customers with an Opportunity to Terminate Special Contracts, Pursuant to Request for Rulemaking by Freedom Ring Limited Liability Company, Docket No. 96-699 (Me. P.U.C.). On April 8, 1998, the Commission issued data requests to Bell Atlantic.

^{11/} Order of the North Carolina Utilities Commission Requesting Comments Regarding Jurisdiction to Implement Fresh Look Requirements, Docket No. P-100, Sub. 133 (Oct. 6, 1997)

^{12/} Joint Rulemaking Petition by ICG Telecom Group, et al. To Implement Fresh Look Requirements, Docket 98-00046 (Tenn. Reg. Auth.)

^{13/} *Intermedia Communications of Florida, Inc.*, 1994 WL 118370 (Fla. P.S.C.), *reconsidered*, 1995 WL 579981 (Fla. P.S.C., Sep. 21, 1995); *see Re Development of a Statewide Policy Regarding Local Interconnection Standards*, 1994 WL 148757 (Ill. C.C. 1994) (providing customers with a 180 day fresh look period to terminate special access agreements of three years or more with incumbent LECS).

In Pennsylvania, the state Commission was faced with a plan by an incumbent, GTE, to provide discounts for customers committing to contracts for intraLATA toll service of between one and three years. The Commission refused to accept GTE's proposal unless GTE offered the customers a "fresh look" by waiving the early termination charge for customers who choose to terminate the GTE plan within one year from the date that intraLATA presubscription was implemented within the customer's exchange. The Pennsylvania Commission based its order upon the following rationale:

Our main concern here is that a GTE customer who locks into a one, two or three year term agreement with GTE Easy Savings Plan, before intraLATA presubscription is implemented in a particular exchange, would be required by GTE's tariffs to pay a penalty in the instance a more suitable intraLATA service became available. As such, GTE could be viewed as cornering the market because of the early penalty charge that was established before intraLATA presubscription was implemented.^{14/}

Finally, the public utility commissions in both New Jersey and California have each approved settlements which include "fresh look" provisions as well.^{15/}

Numerous regulatory agencies have recognized that long-term service arrangements such as those to which ILECs in Florida have repeatedly been a party, when entered into prior to the time of competitive entry, will stifle and inhibit such entry by foreclosing from competition the patronage of the best customers. At the time at which ILECs induced such customers to enter into such

^{14/} *Pennsylvania Public Utility Comm'n. v. GTE North Inc.* 1996 WL 552841, at *4 (Pa. P.U.C. August 8, 1996).

^{15/} *In re Sprint*, 1994 WL 386294 (N.J. B.P.U.) ("fresh look" imposed in a settlement related to the Board's investigation of intraLATA competition); *Pacific Bell*, Decision 93-06-032, 1993 WL 766927 (Cal. P.U.C. 1993) (approving settlement authorizing fresh look for intraLATA MTS, WATS, and 800 number service).

contracts, neither KMC nor any other new entrant had the ability to compete for the customers' patronage. Indeed, in many cases, new entrants did not exist when long-term service arrangements were commenced, and the customer did not realize that it was foreclosing opportunities to contract with new entrants in a competitive environment. Yet by the time that KMC and other new entrants are legally able to compete for the customers' patronage, such patronage is foreclosed from them, often for periods of as long as five years. This is clearly in derogation of free competition, operates as a barrier to entry in violation of Section 253 of the Federal Act, and is contrary to the public interest.

II. FRESH LOOK DOES NOT VIOLATE THE CONSTITUTION

A. Fresh look does not violate the Contracts Clause

The proposed fresh look rules would not violate the Contracts Clause of the United States Constitution. The proposed rules do not contemplate unilateral termination of long-term contracts. Rather, the rules would free customers from contracts which may no longer represent a fair bargain due to changed regulatory circumstances. Under such circumstances, no substantial impairment of contracts in violation of the Contracts Clause occurs. *See City of Charleston v. PSC*, 57 F.3d 385, 394 (4th Cir. 1995) (finding no substantial impairment of contract on similar facts). It is well-settled that public utilities contracts are made subject to the state's authority to modify those contracts in the public interest. *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109,112 (1937); *Arkansas Natural Gas Co. v. Arkansas Railroad Comm'n*, 261 U.S. 379, 382 (1923); *see Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) (application of proper regulatory authority may not be defeated by private contractual obligations).

B. Fresh look does not violate the Takings Clause

Similarly, fresh look poses no cognizable violation of the Takings Clause of the Fifth Amendment to the United States Constitution. The Takings Clause provides that “private property” may not “be taken for public use, without just compensation.” Regulatory takings may occur where the government does not actually take property for its own use, but regulates property in a manner that creates the “functional equivalent” of an “ouster.” *Yee v. Escondido*, 503 U.S. 519, 522 (1992). Whether property has been taken by regulation such that it raises taking concerns is determined by examination of the value of the business *as a whole*. A taking cannot occur unless a rate order *taken as a whole* produces overall rates so low as to “jeopardize the financial integrity of the [regulated] companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital.” *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *see also Federal Power Comm’n v. Texaco, Inc.*, 417 U.S. 380, 390-391 (1974); *FPC v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575, 607 (1942). A LEC cannot reasonably allege that fresh look would cause any such impact.

III. CERTAIN MODIFICATIONS TO A PROPOSED FRESH LOOK RULE ARE NECESSARY

As outlined above, a fresh look policy is necessary to guarantee that Florida businesses and residents will truly be able to take advantage of competitive services provided by viable competitors. Both Time Warner and the Competitive Carriers Association have submitted proposed fresh look rules. Although KMC submits the following suggestions for the modification of Time Warner’s proposed rule, KMC does not oppose either proposal.

a. LEC Market

The “LEC Market” should be defined by the local exchange (NXX) in which an ALEC completes commercially available service. Section 2(c) of the Time Warner proposal, however, defines the “LEC Market” as “the local exchange area defined by the *county* in which an ALEC is authorized to originate telecommunications services in competition with such LEC.” (Emphasis added). At a recent workshop, Time Warner acknowledged that availability of fresh look on an NXX basis would be more appropriate. As such, Section 2(c) should instead state: “LEC Market - the local exchange (NXX) in which an ALEC completes commercially available service.”

b. Automatic Renewal

Time Warner’s proposal would make contracts with at least 180 days remaining, exclusive of any automatic renewal period, eligible for fresh look. The exclusion of automatic renewal periods for determining whether a contract is eligible for fresh look may have the unintended effect of shielding many contracts from a fresh look opportunity. KMC understands that many Florida Centrex contracts last only one year and contain automatic renewal provisions. Section 3(a)(1) of the Time Warner proposed rule, however, only recognizes these contracts for fresh look if their remaining terms exceed 180 days or if the contract assesses a charge or penalty for not renewing the contract. If this Section is included in the fresh look rule, many of these contracts (i.e., those with less than six months remaining) will not be eligible for a fresh look. Such a result would not be in the public interest. Thus, Section 3(a)(1) should be stricken.

If this Section is not stricken, the word “charges” should be added in addition to the word “penalties,” to read as follows (with the words in bold indicating the addition):

1. Options to renew and automatic renewals are not included in the determination of the contract term unless **charges and/or** penalties under such contract are to be applied if the customer elects to not exercise such options.

This modification would clarify that non-renewal by a customer that triggers a requirement for any payment by that customer would qualify the contract for fresh look.

d. Public Notice

In addition to the Public Notice requirements in Section 5 of the Time Warner proposed rule, language should be added to require the Public Service Commission to post educational material on its World Wide Web Site: (1) regarding the fresh look process generally; (2) indicating the opening dates of specific fresh look windows; and (3) providing contact information for carriers and Commission Staff available to answer questions about fresh look.

e. Liability for Termination

KMC opposes any customer liability for the early termination of eligible contracts during the fresh look window. Section 8 of the Time Warner proposed rule should be stricken in its entirety.

IV. CONCLUSION

There is a compelling need to offer Florida consumers a fresh look at long-term ILEC commitments for telecommunications services. Providing a “fresh look” with respect to such pre-existing long-term service arrangements would serve to promote competition. ILECs have locked up a substantial portion of lucrative telecommunications markets through long-term service arrangements entered into in a non-competitive environment. Indeed, some business services provided by ILECs are only available on a long-term basis. Unless the Commission

requires a fresh look, such Florida consumers will remain, for extended periods of time, trapped in arrangements entered into in a monopoly environment, and thereby denied the benefits extended by the introduction of competition into the local exchange market. Such an eventuality is inconsistent with the pro-competitive aims of Florida and federal law. Accordingly, the Commission should adopt the Time Warner proposed rule with the above-stated modifications.

Respectfully submitted this 14th day of May, 1998.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded via first-class U.S. Mail, postage prepaid, to the following on this 14th day of May, 1998.

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