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April 22, 1999

**VIA OVERNIGHT MAIL**

Ms. Blanca S. Bayo  
Director, Division of Records and Reporting  
Florida Public Service Commission  
Room 110, Easley Building  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0870

Re: Docket No. 980253-TX

Dear Ms. Bayo:

Enclosed for filing on behalf of KMC Telecom Inc. and KMC Telecom II, Inc. (collectively, "KMC"), please find an original and fifteen (15) copies of KMC's Comments in the above-referenced matter.

Thank you for your attention to this filing. We would appreciate your acknowledgment of receipt of this filing by date-stamping the enclosed additional copy of these Comments and returning the same in the envelope provided. Please do not hesitate to contact us with any questions you may have regarding this filing.

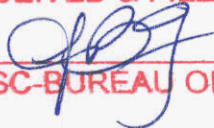
Very truly yours,



Morton J. Posner  
Michael R. Romano

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**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Proposed Rules 25-4.300, F.A.C.,                    )  
Scope and Definitions; 25-4.301, F.A.C.,                )  
Applicability of Fresh Look; and 25-4.302,             )  
F.A.C., Termination of LEC Contracts                    )       DOCKET NO. 980253-TX

**COMMENTS OF  
KMC TELECOM INC. AND KMC TELECOM II, INC.  
IN SUPPORT OF ADOPTION OF A FRESH LOOK RULE**

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Dated: April 22, 1999



**I. THE NEED FOR A FRESH LOOK RULE**

ILECs such as BellSouth, GTE, and Sprint/United continue to exercise market power in the local exchange market. They continue to have the ability and incentive to engage in anticompetitive activities that limit KMC's ability to provide alternative service options to customers. In particular, ILECs have used their market power to lock up customers that make heavier use of telecommunications services and would naturally qualify for volume and term discounts. Thus, customers who want to take advantage of such discounts have been prompted to sign up for long-term contracts with the ILECs that contain excessive termination penalties. In a market where the only service options are to take month-to-month service from the ILEC or service for several years from the ILEC at a lower rate, it only makes sense that many customers would choose the latter option.

It should be made clear that KMC does not consider all long-term contracts to be inherently anticompetitive. In fact, the company would agree that in a properly functioning competitive marketplace, long-term contracts can provide a useful mechanism for attracting customers and delivering cost savings to those customers in exchange for a minimum service commitment. The problem with many ILEC long-term contracts, however, is that customers were induced to sign them before there was effective competition in the Florida local exchange market. Contracts entered into with the ILEC when that ILEC was the only carrier capable of offering services to the customer are inherently anticompetitive, tying the customer to the ILEC before the customer becomes aware that alternative local exchange carriers ("ALECs") may soon enter the market (even though the ILEC may very well be aware of the competitive entry on the horizon). Allowing those customers that have entered into long-term contracts with the ILECs

while no other carriers were active in the local exchange market to escape these contracts without facing substantial termination penalties would finally give such customers the kinds of choices envisioned by the Telecommunications Act of 1996 ("1996 Act").

A fresh look rule would also allow carriers to succeed or fail in the local exchange market on the merits of their service offerings rather than any incumbent advantage. All of the Commission's efforts to promote competition in the local exchange market, and all of the strides taken by ALECs to provide lower-cost, quality service options, will be diminished in stature if ILECs are permitted to protect a significant segment of their customer base from competitive influences.

Contracts entered into following passage of the 1996 Act are not inherently "competitive," because there has hardly been a "flash-cut" to a fully competitive market. The reality is that competitors are still today just entering many local exchange markets, and even where entry occurred soon after passage of the 1996 Act, one would likely be hard-pressed to claim that effective competition has taken root. In fact, KMC's experience in its Florida markets indicates that the ILECs have not stopped using these long-term contracts and have thereby inhibited competitive entry.

In fact, it is clear that the ILECs still hold monopoly-era market shares in Florida, and can therefore use long-term contracts even today to lock up significant parts of their embedded customer bases. For example, while BellSouth served 6,302,016 lines in Florida as of September 30, 1998, it had only provisioned 102,687 lines to ALECs through resale and another 2,990 to

ALECs through the use of unbundled loops.<sup>1</sup> This means that all of the ALECs combined using BellSouth's loops or resold services had a market share of approximately 1.6% in BellSouth's Florida service territory. Although ALECs may also serve customers solely through the use of their own facilities, the data provided above shows that BellSouth's market share has not been perturbed to any significant degree nearly three years after the 1996 Act became law. Therefore, the date that the 1996 Act became law – February 8, 1996 – is an inadequate measure to use as the date after which ILEC contracts that have been executed by customers are exempt from the fresh look rule.

## **II. CHANGES TO THE PROPOSED FRESH LOOK RULE**

KMC supports the Commission's proposed fresh look rule. This rule will serve the desired purpose of ensuring that each and every Florida consumer has the opportunity to consider newly available competitive telecommunications choices. KMC believes, however, that a few changes are necessary to ensure that the rule is most effective in achieving this desired purpose.

First, as matter of clarity and style, KMC recommends that the rule should include a separate, detailed definition of "eligible contracts." While the "Scope" of the proposed rule (section 25-4.300(1)) references eligible contracts and addresses certain items that are included as eligible contracts under the rule, the rule could be made more clear by further (and separately) defining eligible contracts and the scope of the services they cover. KMC therefore recommends that the Commission insert a new subsection (a) in section 25-4.300(2) as described in

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<sup>1</sup> See BellSouth's responses to the Common Carrier Bureau's Third Survey of Local Competition, located at the Federal Communications Commission website, [http://www.fcc.gov/ccb/local\\_competition/survey3/responses/Lec98-3.pdf](http://www.fcc.gov/ccb/local_competition/survey3/responses/Lec98-3.pdf).

Attachment KMC-1 to clarify what constitutes an eligible contract and to define further the term "local telecommunications service," so that contracts for the provision of any local telecommunications service by the ILEC are covered within the definition of eligible contracts.

KMC also recommends that the Commission address more clearly the question of what kinds of termination liability may be imposed under its proposed rules. Section 25-4.302(3) currently provides that termination liability under the fresh look rule "shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract." It is clear, however, that imposing these nonrecurring costs upon customers may very well undermine the effectiveness of a fresh look rule by deterring end users from terminating their contracts. Quite simply, disputes between the ILECs and customers regarding termination liability could result in a stalemate. Moreover, the high nature of these termination charges may deter many customers from taking advantage of the fresh look opportunity. Thus, in the interest of promulgating an effective fresh look rule, KMC urges the Commission to revise its rule to provide that there be no termination liability for customers wishing to switch to other carriers under this rule.

If the Commission does allow ILECs to impose termination charges in connection with their purported nonrecurring costs, it must ensure that disputes over this liability are resolved fairly and in a timely manner. As a preliminary matter, it is important that the ILECs bear the burden of proving the actual nonrecurring costs they incur as a result of the termination of the contract. Moreover, given that any delay in switching the customer works to the ILECs' benefit and thwarts the purpose of a fresh look, the Commission should ensure that the rule provides for speedy resolution of disputes over whether the ILEC has in fact incurred nonrecurring costs for

which it may impose termination liability under the rule. KMC therefore recommends that the Commission establish an expedited procedure under which it will resolve disputes over whether a particular customer should be required to compensate the ILEC for actual nonrecurring costs in connection with the terminated contract. Specifically, the Commission should resolve within 30 days any petition filed by an end user, or the ALEC to which an end user wishes to switch service under the fresh look rule, in cases of a dispute with the LEC over termination liability.

The Commission should also make clear that if the end user (or the ALEC) disputes the Statement of Termination Liability provided by the ILEC under this expedited procedure, the end user will have more than 30 days from receipt of that Statement to provide a Notice of Termination to the ILEC in response, as is currently the case under section 25-4.302(4) of the proposed rules. Instead, if the end user or the ALEC to which the end user wishes to switch service dispute the termination liability by petitioning the Commission for expedited resolution, the end user should be given 30 days from the date that the Commission resolves the dispute to provide a Notice of Termination.



### III. CONCLUSION

KMC commends the Commission for its initiative in proposing a fresh look rule. Adopting such a rule will give many Florida consumers the opportunity to avail themselves of newly available competitive telecommunications opportunities, and ultimately promote the development of competition in the Florida local exchange market. KMC therefore urges that the Commission adopt its proposed fresh look rule, as modified in accordance with the recommendations set forth in these Comments and Attachment KMC-1.

Respectfully submitted,



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Dated: April 22, 1999

**ATTACHMENT KMC-1**  
**KMC PROPOSED CHANGES TO FRESH LOOK RULE**

**25-4.300 Scope and Definitions.**

(1) Scope. For the purposes of this Part, all contracts that include local telecommunications services offered over the public switched network, between LECs and end users, which were entered into prior to the effective date of this rule, that are in effect as of the effective date of this rule, and are scheduled to remain in effect for at least six months after the effective date of this rule will be contracts. Only eligible contracts, as defined herein, will be eligible for Fresh Look. Local telecommunications services offered over the public switched network are defined as those services which include provision of dial-tone and flat-rated or message-rated usage. If an end user exercises an option to renew or a provision for automatic renewal, this constitutes a new contract for purposes of this Part, unless penalties apply if the end user elects not to exercise such option or provision. This Part does not apply to eligible contracts between end users and those LECs which had fewer than 100,000 access lines as of July 1, 1995, and have not elected price-cap regulation. Eligible contracts include Contract Service Arrangements and tariffed term plans in which the rate varies according to the end user's term commitment.<sup>1</sup>

(2) For the purposes of this Part, the definitions to the following terms apply:

(a) "Eligible Contracts" - All contracts between LECs and end users that: (i) include the provision by a LEC of any local telecommunications services (including dial-tone, flat-rated or message-rated usage, private line, and advanced local telecommunications and data services); (ii) were entered into prior to the effective date of this rule; (iii) are in effect as of the effective date of this rule; and (iv) are scheduled to remain in effect for at least six months after the effective date of this rule. Eligible contracts shall include any customer-specific arrangements or tariffed term service plans under which a customer is subject to termination liability or requirements if it ceases to purchase local telecommunications services from the LEC. If an end user exercises an option to renew or a provision for automatic renewal is contained in an eligible contract, such renewal shall not be considered an eligible contract for purposes of this Part, unless liability or other requirements apply if the contract fails to renew pursuant to such option or provision.<sup>2</sup>

(b) "Fresh Look Window" - . . .

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<sup>1</sup> See KMC Comments at 4-5.

<sup>2</sup> *Id.*

25-4.302 Termination of LEC Contracts.

(3) (a) Within ten business days of receiving the Notice of Intent to Terminate . . .

(b) If an end user or the carrier to which that end user wishes to switch service under this rule should dispute the amount of termination liability calculated by the LEC in its Statement of Termination Liability under this subsection (3):

(i) the affected end user or the carrier to which that end user wishes to switch service under this rule may petition the Commission for resolution of the dispute within 30 days; and

(ii) the burden shall be on the LEC to justify the amount of termination liability that it seeks to impose.<sup>3</sup>

(4) From the date the end user receives the Statement of Termination Liability from the LEC, the end user shall have 30 days to provide a Notice of Termination. If the end user does not provide a Notice of Termination within 30 days, the eligible contract shall remain in effect, provided however, that if the end user or the carrier to which that end user wishes to switch service under this rule disputes the amount of termination liability calculated by the LEC in its Statement of Termination Liability, the end user shall have 30 days from an order by the Commission resolving the dispute to provide a Notice of Termination consistent with the terms of the Commission order.<sup>4</sup>

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<sup>3</sup> *Id.* at 5-6.

<sup>4</sup> *Id.*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of COMMENTS OF KMC TELECOM INC. AND KMC TELECOM II, INC. IN SUPPORT OF ADOPTION OF A FRESH LOOK RULE has been served upon the following parties by Overnight Delivery\* and U.S. Mail this 22<sup>nd</sup> day of April, 1999.

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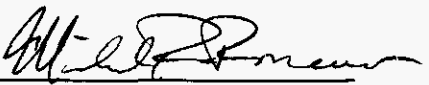
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