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May 19, 1998

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: 980253-TX ("Fresh Look") Docket

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of Comments by BellSouth Telecommunications, Inc., which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Edward L Rankin III (BW)

Edward L. Rankin, III

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Enclosures

cc: All parties of record
A. M. Lombardo
R. G. Beatty
William J. Ellenberg II

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to initiate rulemaking pursuant to Section 120.54(7), F.S., to incorporate "Fresh Look" requirements in all incumbent local exchange company contracts, by Time Warner AxS of Florida, L.P., d/b/a Time Warner Communications	)	Docket No. 980253-TX
	)	Filed: May 19, 1998

COMMENTS BY BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Comments on the proposed "Fresh Look" rules of Time Warner AxS of Florida, L.P., d/b/a Time Warner Communications ("Time Warner") and the Florida Competitive Carriers Association ("FCCA"):

Introduction

Through their respective proposed rules, Time Warner and FCCA ("Petitioners") request that the Commission adopt rules implementing a Fresh Look requirement, which, essentially, would allow parties that have entered into otherwise valid and binding contracts with BellSouth after the advent of competition to rescind those contracts without incurring the termination liability to which those parties agreed -- at the time of execution -- and that formed a central underpinning of the rates set forth in the contracts.

For the reasons set forth herein, the proposed rules should be rejected and this docket closed because: (1) the Commission does not have the statutory authority to undertake the Draconian action requested by the Petitioners; (2) the rules proposed by the Petitioners, even if the Commission had the statutory

authority to adopt them, would be constitutionally infirm; and (3) the proposed rules are unnecessary and would embroil the Commission and local exchange carriers in a regulatory quagmire.

A. The Commission Lacks the Statutory Authority to Abrogate Contracts Between Public Utilities and Their Customers.

The Fresh Look requirement proposed by the Petitioners would require massive intervention by the Commission into private contracts between ILECs and their customers. However, Chapter 364 of the Florida Statutes does not confer such authority upon the Commission. Because the Commission is a statutory creation and is granted authority in derogation of common law rights, it has only such authority as is clearly granted to it upon a strict construction of the statutes. See, Florida Bridge Co. v. Bevis, 363 So. 2d 799 (Fl. Sup. Ct. 1978) (Commission's powers are only those that are conferred expressly or impliedly by statute; a reasonable doubt as to the lawful existence of a particular power exercised by the Commission must be resolved against exercise thereof).

If the Legislature had intended for the Commission to intervene in the marketplace in the obtrusive manner envisioned by the Petitioners, the Legislature would have made a specific grant of authority to the Commission. Applying general rules of statutory construction, it is clear that the Legislature did not grant -- and the Commission, therefore, does not have -- the statutory authority to conduct this massive and drastic intervention that Petitioners request the Commission to undertake with respect to the very contracts between

telecommunications public utilities and their customers that the Commission has specifically approved.

Furthermore, the Commission's rulemaking authority is more circumscribed than Petitioners suggest. The Florida Statutes grant no authority, whether express or implied, to the Commission to abrogate private contracts between utilities and their customers through its rules. Because the Commission is not empowered to abrogate existing contracts between a utility and its customers, promulgating the rules advocated by the Petitioners purporting to give the Commission such power clearly would be unlawful.

Although Time Warner sings the praises of Fresh Look as an essential element of local competition, the only Fresh Look requirement adopted by the FCC in its entire 700-page Interconnection order, was in connection with CMRS Providers. In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98 (Aug. 8, 1996). The FCC had adopted rules requiring that interconnection agreements with CMRS Providers comply with principles of mutual compensation and that each carrier pay reasonable compensation for transport and termination of the other carrier's calls. Concluding that many such agreements provided for little or no compensation, in violation of the Commission's rules, the FCC ordered that CMRS providers that were party to pre-existing agreements that provide for non-mutual compensation "have the option to renegotiate these agreements with no termination liabilities or other contract penalties." Id. ¶ 1094. The FCC did not abrogate these contracts, nor did the FCC seek to impose a Fresh Look

requirement on all long-term contracts between incumbents and their customers, as Petitioners seek to do here.

The FCC decisions cited by Time Warner illustrate that the FCC generally has limited its use of a Fresh Look requirement as a means to remedy a contract containing legally questionable provisions.[1] The FCC has not endorsed a sweeping application of Fresh Look requirements as a means of promoting competition, notwithstanding any suggestion by Time Warner to the contrary.

Indeed, in In re: Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997), the FCC expressly rejected a Fresh Look requirement for schools and libraries subject to long-term contracts, which Petitioners' have proposed here. As the FCC reasoned:

> We find that these proposals would be administratively burdensome, would create uncertainty for those service providers that had previously entered into contracts, and would delay delivery of services to those schools and libraries that took the initiative to enter into such contracts. In addition, we have no reason to believe that the terms of these contracts are unreasonable. Indeed, abrogating these contracts or adopting these other proposals would not necessarily lead to lower pre-discount prices, due to the incentives the states, schools, and libraries had when negotiating the contracts to minimize costs. Finally, we note there is no suggestion in the statute or legislative history that Congress anticipated abrogation of existing contracts in this context.

Id. ¶ 547. Such reasoning is equally applicable here, and is fatal to Petitioners' proposed rules.

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[1] For example, in In re: Amendment of the Commission's Rules Relative To Allocation of the 849-851/894-896 MHZ Bands, 6 FCC Rcd 4582 (July 11, 1991), the FCC held that airlines could terminate long-term contracts entered into with GTE for the provision of air-ground radiotelephone service without regard to the termination provisions in the contract. In reaching this holding, the FCC found that GTE had entered into contracts that bound airlines exclusively to GTE for periods

Time Warner also ignored the fact that a number of other State Commissions have expressly refused to adopt the type of Fresh Look requirements at issue here. See, In re: New England Tel. & Tel. Co., Docket 5713 (Vt. Public Serv. Bd. Aug. 20, 1997) (holding that "NYNEX should not be required to give its customers a 'fresh look" because there was "no reason to free these customers from the obligations that they knowingly took on"); In re: City Signal, Inc., Case No. U-10647 (Mich. Public Serv. Comm'n Feb. 23, 1995) (rejecting "fresh look" proposal, noting that "customers should be aware of the risk involved in entering into long-term contracts" in an increasingly competitive marketplace); In re: Illinois Bell Tel. Co., Case No. 94-0096, 94-0117, 94-0146 (Illinois Commerce Comm'n April 7, 1995) (rejecting "fresh look" proposal and holding that, "[i]n the absence of evidence that the contracts were entered into for anti-competitive purposes, we will not disturb them"); In re: MFS Communications Co. Inc, PUC Docket No. 16189 (Texas Public Utility Comm'n November 7, 1996) (holding that "SWBT is not required to provide a fresh look opportunity for its customers currently under long term plans"); In re: Northwest Payphone Association v. U.S. West, Docket No. UT-920174 (Wash. Utilities & Trans. Comm'n March 17, 1995) (rejecting "fresh look" proposal, noting that "the Commission ordinarily refrains from interfering in contracts between U.S. West and its customers").

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exceeding the term of GTE's license, which, according to the FCC, "was contrary to the public interest ...." Id. ¶ 8. No similar concern is present here.

In short, the Commission should decline to initiate the rulemaking procedure sought by the Petitioners because it asks for something that the Commission lacks the statutory authority to do --namely, promulgate regulations that abrogate existing contracts between public utilities and their customers. The Petitioners cannot confer such authority upon the Commission simply in the name of increased competition or in light of decisions from other jurisdictions.

B. The Proposed Rules Are Unconstitutional, Even Assuming The Commission Had the Statutory Authority to Promulgate Them

BellSouth also submits that there are significant constitutional problems with Petitioners' request for a Fresh Look requirement. The Commission is an administrative agency of the State whose statutory powers are dual in nature: legislative and quasi-judicial. Rulemaking by the Commission is an exercise of its delegated legislative - not judicial - authority . It is undisputed that, in exercising its legislative authority, the Commission may not exceed the limitations imposed upon the Legislature by the State and Federal Constitutions. See, Riley v. Lawson, 143 So. 619 (Fl. Sup. Ct. 1932) ("authority given to regulate carriers must be considered as having been conferred to be exercised according to constitutional limitations").

Petitioners are not asking the Commission, in its judicial capacity, to determine the constitutionality of an act of the Legislature, nor is BellSouth. Instead, Petitioners seek to have the Commission, in its legislative capacity, adopt a rule which will abrogate existing contracts, which BellSouth submits would be unconstitutional. BellSouth, recognizing the rulemaking authority of the

Commission, is informing the Commission of the constitutional impact of the act which it has been petitioned to take. In so doing, BellSouth is ensuring that the Commission understands that its rulemaking authority is not unfettered, but is subject to, and constrained by, both the State and Federal Constitutions. BellSouth's position is simple: Petitioners ask the Commission to make a rule which violates the constitutional protections afforded all citizens of this State and Nation, and the Commission cannot do that.

1. The adoption of a fresh look requirement would violate the Contract Clause of the Federal and State Constitutions.

The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " U.S. Const. art. I, § 10, el. 1. See also, Ala. Const. art. 1 § 22 ("That no...law...impairing the obligations of contracts...shall be passed."). When applied to state actions that have the effect of impairing the obligations of one or more private parties under contracts, this prohibition has been interpreted to mean that no state may take legislative or administrative action that substantially impairs a contractual obligation, unless such action is justified as reasonable and necessary to achieve an important public purpose. United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977).

The United States Supreme Court has noted that any action adjusting the rights of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. Id. at 22. For cases of severe impairment of contractual rights, a careful examination of the nature and purpose of the State action is necessary. Allied Structural Steel Co.

v. Spannaus, 438 U.S. 234, 244 (1978). State action is especially egregious - in a constitutional sense - where, as here, it impairs the contracts of a narrow class of persons in order to meet its desired purpose. Id. at 248.

While public utilities are subject to the "police power" of the State, such "police power" does not give the State, or the Commission, the right to do as it pleases without regard for the rights of its citizens, including public utilities. Id. at 241. The State and Federal Constitutions place limits on the exercise by the States of this power. "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." Id. at 242. So, the question is not whether the State's "police power" is greater than the right of the private parties to enter into valid, binding contracts--it is. The question is whether an action of the State, or the Commission, pursuant to this police power is within the constitutional limits which are placed upon the States.

Resolution of this question involves a tripartite analysis. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410-13 (1983). The initial inquiry is whether the state action has, in fact, operated as a "substantial impairment" of a contractual relationship. If a substantial impairment is found, the State, in justification, must have a significant and legitimate public purpose behind the regulation. If such a public purpose can be identified, the adjustment of the rights and responsibilities of the contracting parties must be based upon

reasonable conditions and must be of a character appropriate to the public justifying the state action. Id.

The threshold inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). In this present case, there is no question that (1) Contract Service Arrangements ("CSAs") are valid, binding contracts between private parties and (2) a Fresh Look requirement would impair the obligations of these contracts. Indeed, Time Warner's Petition itself explains that "Fresh Look will provide customers of [ILECs] a one-time opportunity to opt out of extended contracts [and] . . . termination liabilities in such contracts should be either canceled or substantially limited ...." (Time Warner Petition, p. 1).

Similarly unproblematic is a determination that the impairment of CSAs by a Fresh Look requirement would be "substantial." This inquiry is crucial because "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." Spannaus, 438 U.S. at 244. The United States Supreme Court has explained that:

> Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and

> obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245. While the United States Supreme Court has provided some guidance as to what constitutes a "substantial impairment" in cases where state action amounts to less than a total destruction of contractual expectations, such an inquiry is unnecessary in this case since a Fresh Look requirement would amount to a total impairment of the CSAs in question, which is clearly a "substantial impairment."

Since "Fresh Look" will operate as a "substantial impairment" of CSAs, the Commission must have a significant and legitimate public purpose, "such as the remedying of a broad and general social and economical problem," behind the adoption of the requested amendment to the Commission's Rules. Energy Reserves, 459 U.S. at 411-12. "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." Id. at 412. Because the impairment caused by a Fresh Look requirement is absolute, the height of the hurdle such a state action must clear is high. No such significant and legitimate public purpose underlies the Petition, much less one that can clear the highest of hurdles.

The proponents of Fresh Look attempt to justify the need to abrogate CSAs on the basis of a need to stimulate competition in the local exchange market. Even assuming that this were a sufficiently "significant and legitimate public purpose," or that such a public purpose were not already being satisfied by Florida's existing statutory and regulatory provisions, a close examination of

Fresh Look reveals that its purpose is not public, but rather is private. The sole purpose behind Fresh Look is a one-time destruction of CSAs so that the competitors of ILECs can take ILEC's largest customers and commit them to extended contracts of their own. The only beneficiaries of such an action will be competing providers like the Petitioners and a small number of large customers.

It is laughable for Petitioners to even imply that the largest customers of the ILECs somehow lack for competitive alternatives, or that this imagined dearth of competitive alternatives facing the largest customers is a "general social or economic problem." If the Petitioners were honestly concerned with trying to address a "general social or economic problem" in Florida, through the stimulation of competitive alternatives, they would propose a rule that would stimulate competition in smaller, rural exchanges, not Miami or Orlando. Instead, under the guise of Fresh Look, Petitioners seek to have the Commission use the police power of this State to help them "cherry pick" the largest and most lucrative customers. There is not a public purpose underlying this request, only a private purpose -- greed.

Finally, and assuming some significant and legitimate public purpose could be found to justify a Fresh Look requirement -- and it cannot -- "the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Energy Reserves, 459 U.S. at 412 (quoting U.S. Trust, 431 U.S. at 22). The proposed Fresh Look requirement cannot be characterized as either "reasonable" or "appropriate." It

seeks to destroy CSAs which are prima facie just and reasonable in order to stimulate competition in what is already the most competitive segment of the local exchange market. It seeks to destroy contracts which were entered into only in situations where competition already existed, and allow one party to those contracts -- the customers, to avoid the termination liability to which they freely agreed.

Moreover, having avoided the termination liability, these large customers will enjoy the added luxury of "shopping their business" in the already competitive marketplace, while the vast majority of consumers receive no benefit. In contrast, ILECs not only lose their customers, contractual right to termination liability, and other contractual rights, but also bear much of the administrative burden, along with the Commission, of a Fresh Look requirement. Petitioners ask the Commission to take these actions despite the fact that no express legal authority exists for the Commission to abrogate these contracts. There simply is nothing "reasonable" or "appropriate" about such a process, especially when its sole purpose is to benefit only a narrow group of customers and competitors.

2. The adoption of a fresh look requirement would constitute an unconstitutional taking of property without just compensation.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."

U.S. Const. amend V.[2] Like the Contract Clause, the Taking Provision operates as a limit upon the State's inherent police power. The United States Supreme Court has explained that:

> [S]ome [values incident to property] are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). This limitation on the police power prohibits the taking of private property except for a public, rather than private, purpose and without the payment of just compensation.

A taking can occur as to an intangible property interest. Ruckelhaus v. Mansanto Co., 467 U.S. 986, 1003-04 (1984). Contract rights are a form of property and as such may be taken for a public purpose only if just compensation is paid. U.S. Trust, 431 U.S. at 19, f.n. 16. Accordingly, the valid contracts entered into by ILECs with their customers are property rights protected by the Takings Clause of the Fifth Amendment.

"It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking . . ." Ruckelhaus, 467 U.S. at 1004. Instead, "'[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to taking.'" Id.

[2] This restriction is applied to the States through the Fourteenth Amendment. See,

(quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)). While no "set formula" has been developed for determining when a "taking" has occurred, the Supreme Court has identified several factors that should be considered. These include "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." Id. at 1005. A "reasonable investment-backed expectation" has been defined as "more than a 'unilateral expectation as an abstract need." Id.

Adoption of a Fresh Look requirement will undoubtedly constitute a "taking" of ILECs' property interest in the CSAs, as Petitioners propose a plan that will allow for the total abrogation of these contracts. Fresh Look will: (1) deprive ILECs of the benefit of their bargain, (2) inflict additional economic losses in the future as valuable customers are allowed to enter extended contracts with competitors, and (3) impose additional regulatory burdens and expenses on ILECs which are unnecessary, unfair and a cost which was not contemplated at the time the CSAs were negotiated and for which, therefore, no recovery can be made.

The CSAs are the embodiment of ILECs' "investment-backed expectations"; they are the bargained-for rights and obligations of ILECs with respect to their customers. They are also the means by which ILECs can protect their relationship with these customers, which represents a "property interest" that is constitutionally protected. Id. at 1011 (holding that a corporation had a reasonable investment-backed expectation with respect to its control over the

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Chicago B. & O. R. Co. v. Chicago, 166 U.S. 226 (1897).

use and dissemination its trade secrets, and once same are disclosed to others the corporation has lost its property interest in the data.)

The "taking" of ILECs' property is impermissible unless the confiscated property is used for a "public purpose." The "public use" requirement of the Taking Clause is "coterminous with the scope of a sovereign's police power." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984). The requisite "public purpose" exists where the government acts "to protect the lives, health, morals, comfort and general welfare of the people. . . ." Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 503 (1987).

Although stimulating competition might constitute a valid "public purpose," as described above the proposition before the Commission would not produce this result. The taking of ILECs' property solely for the benefit of a few large customers and competitors, who already operate in a competitive local exchange market, produces a private, rather than a public, benefit. Even if such a public benefit were to exist, ILECs bear the entire burden and receive no advantage from this process which in any way compensates them for the "taking" of their property.[3] Thus, a Fresh Look requirement would take the private property of

[3] For example, there is no provision in the proposed Fresh Look requirement for the destruction of extended contracts entered into by the Petitioners or other CLECs in order to allow ILECs to enjoy the same benefit as Petitioners and to compete for their customers.

ILECs without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[4]

C. Petitioners' Proposed Rules Are Administratively Unworkable and Unnecessary

Even assuming the Commission had the statutory authority to grant Petitioners' request and putting aside the constitutional infirmities associated with the proposed rules, a superficial and cursory reading of the Petition reveals the frightening extent of Commission involvement and, thus, resources, necessary to implement Petitioners' Fresh Look requirement. Thus, according to rules proposed by Time Warner:

1. A CLEC would notify the Commission of an interconnection agreement with an ILEC;
2. The Commission would verify that the interconnection agreement is "operational," which would require a determination by the Commission of whether or not the CLEC is certificated, whether or not the CLEC has filed a price list, whether or not the CLEC and the ILEC have either filed "an executed, approved interconnection" agreement with the Commission or the Commission has verified the ability of the CLEC to purchase interconnection services under a Commission-approved Statement of Generally Available Terms and Conditions, and

[4] BellSouth believes that Petitioners' proposed rules suffer from other constitutional infirmities, including violating the Equal Protection clause and constituting unlawful class legislation. However, for sake of brevity, BellSouth will not address each of these issues here.

"completion by the CLEC of its first commercial call within an ILEC market";

3. The ILEC would provide the requesting CLEC with a list of contracts eligible for Fresh Look "in the relevant [ILEC] exchanges";
4. The Commission would then declare a date for the "commencement of the Fresh Look window";
5. The Fresh Look window for the exchange would remain open "for twelve (12) months after Commission certification that an interconnection agreement is operational";
6. During the twelve-month Fresh Look window, ILEC customers could terminate the of contracts with the ILEC and execute contracts with CLECs;
7. The question of what contracts are eligible for Fresh Look would be subject to a complaint procedure;
8. The filing of a complaint would toll the twelve-month Fresh Look period
9. ILECs would be required to give notice to all of their Florida customers "the first time Fresh Look is declared by the Commission in any of the individual LEC's exchanges" by bill inserts approved by the Commission;
10. "[T]he Commission should use public information mechanisms at its disposal, including the issuance of press releases to inform the public about Fresh Look";

11. Also, the Commission should adopt a "neutral notice describing FreshLook, its purpose and operation for use in informing customers";
12. Upon inquiry by a customer about Fresh Look, ILECs should be required to provide the Commission's Fresh Look Notice to the customer by mail;
13. ILECs should be directed to designate one point of contact within each company to which all Fresh Look inquiries should be directed;
14. Election by a customer to terminate an ILEC contract under Fresh Look would serve to reduce and perhaps eliminate any customer liability for termination charges to the ILEC;
15. The ILEC would be responsible for determining the termination liability, if any, upon notice of termination from the customer, which may be oral or written;
16. The ILEC must inform the customer of its termination liability within three (3) business days of the termination;
17. All disputes concerning termination liability are to be resolved by the Commission through the complaint process; and
18. ILECs must bear the burden of justifying any termination liability in disputes.

Moreover, under the rules proposed by FCCA:

1. A customer can terminate any contract with an ILEC that has a term greater than 180 days;

2. A customer has 4 years within which to terminate the contract it executed with an ILEC;

3. The Commission is responsible for notifying the public of the Fresh Look and, presumably, for answering the myriad of questions such notice is sure to engender (or for referring those questions to the appropriate ILEC);

4. A customer who terminates an ILEC contract during the 4-year Fresh Look period incurs no liability for termination charges it agreed to pay when it executed the contract with the ILEC;

5. Not only will the Commission's complaint procedure be used to resolve inevitable Fresh Look disputes, the disputes must be resolved within 90 days of the filing of the complaint.

It does not take a genius to recognize that Petitioners are attempting to dig a regulatory black hole for both the Commission and the telecommunications companies of this State. Indeed, what Fresh Look would do is to thrust the Commission into an administrative quagmire of complaints and notices and endless irreconcilable disputes -- a muddy swamp through which CLECs, ILECs, and the Commission would slog day after day. Under the Petitioners' approach, the Commission would be required to decipher and implement issues surrounding: (1) the notice provisions; (2) the verification functions; (3) the "operational" requirement; (4) the list of eligible contracts; (5) when a CLEC has completed its first commercial call; (6) whether a LEC customer has executed a contract with a CLEC during the twelve-month window; and (7) when the twelve-

month Fresh Look period has been tolled. It is clear that these procedures constitute a regulatory nightmare, which, like some second-rate Dracula movie, should be dispatched with the procedural equivalent of a wooden stake to the heart: a summary dismissal of this proposed rulemaking proceeding.

Like the B-movie Dracula, Petitioners' claims also collapse when exposed to the realities of daylight. For example, Time Warner's assertion that customers entered into existing CSAs with BellSouth "before the advent of competition is simply untrue. (Petition, ¶ 35). In fact, the sole basis for initial Commission authorization of the CSA process in 1983 was the existence of a competitive alternative (i.e. opportunity to bypass LEC facilities) for the customer in question. See, Docket No. 820537-TP, Order No. 12765 (Dec. 9, 1983). Moreover, BellSouth filed 313 of the 420 CSAs currently in effect with the Commission after the passage of the Telecommunications Act of 1996 and 355 after the Florida legislature authorized local competition in 1995. Thus, even if the parties were to somehow survive the regulatory quagmire their proposed rules present, they would most certainly need divine intervention to resolve the myriad of issues arising out of the reality of the competitive alternatives that existed at the time BellSouth's customers voluntarily entered into these legally binding contracts.[5]

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[5] For example, customers, particularly large sophisticated ones, who made service decisions after the enactment of the Federal telecommunications legislation, did so with the knowledge that competitive alternatives were, or would soon be, available for the full array of services that they desired to purchase. These customers could, and some did, elect to sign shorter-term agreements or to simply acquire those services on a month-to-month basis in order to keep their options open. It would be unfair to BellSouth now to require a Fresh Look for those customers and, indeed, for those CSAs in which customers entered into long term agreements after the passage of the legislation, because those customers did so with the knowledge that the

Indeed, when customers enter into a CSA with BellSouth, they must have competitive alternative available to them. BellSouth explicitly states as much in its CSA filings with the Commission. In fact, many CSAs involve the provision of Centrex or ESSX service, and Private Branch Exchange ("PBX") service which has long been acknowledged as a competitive alternative to ESSX service. CSA customers, therefore, have always had a competitive alternative available for at least some portion of their service needs, and severing the portions of a CSA for which a competitive alternative was available would be problematical at best. Thus, the CSAs BellSouth has entered into, and which the Commission has approved, represent BellSouth's response to this competitive marketplace. Petitioners' proposed rules represent nothing more than an attempt to obtain through rulemaking that which they lost in the marketplace.

Conclusion

Petitioners' request for a Fresh Look is fundamentally flawed. There is no clear and unambiguous grant of authority by the Legislature of the type necessary to support the Commission abrogating existing contracts between public utilities and their customers. Furthermore, such Draconian action would be unconstitutional, at least in part, because it serves no important public purpose and represents nothing more than an attempt to transfer BellSouth's revenue -- already won by BellSouth in the competitive marketplace -- to later-arriving CLECs. Finally, customers currently receiving services under a CSA had

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telecommunications marketplace was being opened to competition. This, however, is exactly the kind of action that Petitioners are urging the Commission to undertake.

a competitive alternative available to them when they entered into the CSA, and CLECs have the authority to resell those CSAs today. So, for these and the other reasons set forth in this motion, the Commission should assiduously avoid the implementation of a Fresh Look requirement -- one that, BellSouth submits, would constitute an administrative and a regulatory nightmare of the first magnitude. For all of these reasons, BellSouth respectfully urges the Commission to refuse to initiate a Fresh Look rulemaking and close this docket..

Respectfully submitted this 19th day of May, 1998

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CERTIFICATE OF SERVICE
Docket No. 980253-TX

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 19th day of May, 1998 to the following:

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