ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7645

NEW YORK OFFICE
919 THIRD AVENUE
NEW YORK, NY 10022

June 15, 1999

VIA OVERNIGHT DELIVERY

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

99 JUN 16 PM 9:36

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 Posthearing 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 Posthearing 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,

Michael R. Romano

AFA
APP
CAF
CMU 1
CTR
EAG
LEG
MAS 5
OPC
RRR 1
SEC 1
WAW
OTH

Enclosures

cc: Attached Service List

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
07280 JUN 16 99
FPSC-RECORDS/REPORTING

ORIGINAL

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

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

Richard M. Rindler
Morton J. Posner
Michael R. Romano
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel)
(202) 424-7645 (Fax)

Counsel for
KMC Telecom Inc.
and KMC Telecom II, Inc.

Dated: June 15, 1999

TABLE OF CONTENTS

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

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

KMC Telecom Inc. and KMC Telecom II, Inc. (collectively "KMC"), by undersigned counsel and pursuant to Order No. PSC-99-0547-PCO-TX, hereby file their Posthearing Comments regarding the Commission's proposed fresh look rule. KMC asserts that the testimony and other evidence presented at the hearing make clear the need for a fresh look rule in the Florida local exchange market. BellSouth Telecommunications Inc. ("BellSouth") and GTE Florida Incorporated ("GTE") attempt to insulate their long-term contracts from a fresh look rule by claiming that these contracts are the product of a competitive environment. Yet the remarks of BellSouth and GTE demonstrate that these incumbent local exchange carriers ("ILECs") confuse *potential* competition (the promise of competition as legislation or regulation opens the market) and *paper* competition (the number of certified competitors or interconnection agreements signed) with *effective* competition (the number of facilities-based competitors operating in the market). There was no effective competition when customers were locked into their long-term contracts with the ILECs. Thus, for the reasons explained in the prehearing comments filed by KMC and other parties, and as the evidence at the hearing demonstrated, the

Commission has both jurisdiction and justification to adopt a fresh look rule in Florida with respect to ILEC long-term contracts and tariffed term plans.

I. THE COMMISSION HAS JURISDICTION TO ADOPT A FRESH LOOK RULE.

A. The Florida Statutes Provide the Commission With Authority to Provide Consumers with a Fresh Look at ILEC Long-Term Contracts and Tariffed Term Plans.

BellSouth and GTE erroneously argue that nothing in Chapter 364 of the Florida Statutes provides the Commission with the authority to impose a fresh look rule for long-term ILEC contracts and tariffed term plans offered by the ILECs.[1] To the contrary, there are several sections of Chapter 364 that provide the Commission with the ability to review and revise the rates and practices of ILECs, even when those rates and practices may be embodied in customer contracts or term plans. First, section 364.07 states that every telecommunications company "shall file with the commission . . . any contract, agreement, or arrangement . . . relating in any way to the construction, maintenance, or use of a telecommunications facility or service . . . ."[2] Section 364.14 of the Florida Statues further states that where the Commission finds that the rates charged for a service are excessive, it is required to "determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order."[3]

---

[1] BellSouth Comments at 2 (filed Apr. 23, 1999); Tr. at 82 (GTE counsel Caswell stating that Chapter 364 does not permit a fresh look rule).

[2] Fla. St. § 364.07 (1997).

[3] *Id.* at § 364.14.

Finally, section 364.19 specifically addresses the Commission's authority to regulate contracts: "The Commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons."[4]

In the face of this clear statutory authority, BellSouth argues that the Commission does not have the "statutory authority to authorize the abrogation of such agreements after the parties have entered into them, and have begun to perform in reliance on the promises they have exchanged."[5] This reasoning is specious. Nothing in section 364.19 forecloses Commission authority over contracts between telecommunications companies and their customers following approval of such contracts. If the Florida legislature had intended to limit the Commission's authority in the manner envisioned by BellSouth, it could have more appropriately stated that the Commission "may approve" – rather than "may regulate" – the terms of customer contracts. The use of the term "regulate" does not provide any sound basis for concluding that Commission "regulation" stops at a specific point in time. Rather, a more sensible and supportable reading of the statute leads to the conclusion that the Commission may regulate customer contracts on a continuing basis.

In effect, BellSouth and GTE would have the Commission conclude that the long-term contracts between the ILECs and their customers are created in a vacuum. BellSouth and GTE are highly regulated public utilities subject to the jurisdiction of the Commission. While they

---

4 *Id.* at § 364.19.

5 BellSouth Comments, at 2.

have been given the ability to enter into contracts or employ tariffed term plans for certain services, this does not allow the ILECs to escape the Commission's regulation. Indeed, it could be said that a finding that the Commission lacks authority to review and revise these contracts through the adoption of a fresh look rule would be tantamount to a ruling that the services offered by ILECs under contracts fall outside of the Commission's jurisdiction. Such a ruling is clearly contrary to sound public policy and the plain language of Chapter 364.

Finally, even if the Commission were to conclude for some reason that Chapter 364 does not allow it to review and revise the rates and terms of ILEC contracts, Chapter 364 certainly does not cede the Commission's authority over the rates and terms of tariffed term service plans. By definition, the rates, terms, and conditions of these term service plans are within the Commission's jurisdiction, as it is the Commission that has allowed the tariff containing these term plans to take effect. As noted above, section 364.14 of the Florida Statutes clearly provides the Commission with the authority to fix the rates for service by a telecommunications company if it becomes clear that the rates currently being charged by the company are unjust or unreasonable. Thus, nothing prevents the Commission from revisiting and revising tariffed term plans, just as it would for any other service provided by the ILECs pursuant to tariff.

B. A Fresh Look Rule Would Not Violate the U.S. Constitution.

KMC devoted a substantial portion of its Responsive Comments in this docket to a discussion of the constitutional implications (or more appropriately, the lack of constitutional implications) associated with adopting a fresh look rule. Thus, KMC will refrain from repeating

those arguments in their entirety herein, and refers the Commission to its Responsive Comments for an analysis of why a fresh look rule would not violate the U.S. Constitution,[6] notwithstanding the contrary claims of BellSouth and GTE.

KMC must take umbrage, however, with GTE's comment at the hearing that a fresh look rule would violate the Constitution because it is not in the public interest to allow a fresh look at long-term ILEC contracts.[7] For the reasons explained in the comments of KMC and other parties and as discussed further in section II. below, a fresh look rule would clearly be in the public interest, as the public interest is defined under Florida law,[8] in that it would promote the development of a competitive marketplace by allowing customers to revisit contracts that were entered into when there was no effective competition in the local exchange market. Thus, as discussed more fully in the Responsive Comments filed by KMC, there is no reason to believe that the adoption of a fresh look rule would violate the Contracts Clause.

II. THE COMMISSION HAS JUSTIFICATION FOR ADOPTING A FRESH LOOK RULE BECAUSE THE ILECS' LONG-TERM CONTRACTS WERE NOT FORMED IN A COMPETITIVE ENVIRONMENT.

The ILECs attempt to discourage the application of a fresh look rule in Florida by claiming that such a rule is unnecessary because the market in which their contracts with

---

[6] KMC Responsive Comments, at 1-6 (filed Apr. 28, 1999).

[7] Tr. at 81.

[8] *See id.* at 90 (GTE counsel acknowledging that it is a clear statement of public policy in Florida that competition is in the public interest).

customers were formed is competitive. The ILECs, however, miss the mark badly in assessing the state of competition in Florida. As a preliminary matter, comments by BellSouth witness Johnston at the hearing make clear that the ILECs confuse "awareness" of competition with actual competition. Mr. Johnston claimed at the hearing - without any support - that competition has existed in Florida for some time, because alternative local exchange carrier ("ALEC") sales forces were out early, making customers aware that a competitive choice was coming even though no service was yet available from the ALECs.[9] Yet awareness of competition does not equate to actual competition. While Mr. Johnston asserts that awareness of future competitive choices "gets the ball rolling," this is not the same as the customer actually being able to choose between BellSouth and another carrier. A customer needing a telecommunications service when there is only one provider offering that service in the market cannot wait several months or more for a company that is just taking the steps to offer competitive service. Rather, a customer is much more likely to take the lowest rates currently available in the market - which, most often, have been the rates associated with long-term contracts or tariffed term plans.

Nor does the promise of legislative or regulatory activity opening a market to competitive entry translate into effective competition. While it was a welcome and much-needed development, the Florida legislature's decision to open the local exchange market to competition on July 1, 1995 did not mean that the market became instantaneously competitive on that date.

---

[9] *Id.* at 64-65.

Similarly, the enactment of the Telecommunications Act of 1996 ("1996 Act") did not allow carriers to flood into the Florida local exchange market and offer a true alternative to each and every Florida consumer on February 8, 1996. As KMC noted in its Responsive Comments, as of September 30, 1998 – more than three years after the Florida legislature tried to open the market, and more than nineteen months after Congress enacted the 1996 Act – ALECs were serving only 1.6% of the customers in BellSouth's Florida service territory through unbundled loops or resold lines. Likewise, in GTE's service territory, ALECs had a 2.0% market share through resale, and no customers were being served through unbundled loops as of September 30, 1998.[10] While it is true that some ALECs may also be serving customers over their own facilities, there is no reason to believe that the number of customers being served exclusively through competitive facilities is so significant as to make the market effectively competitive. Even BellSouth noted at the hearing that in the business market in its service territory, ALEC market share is approximately 5% for all of BellSouth's competitors combined.[11] Thus, most Florida customers have had little, if any, exposure to services offered by facilities-based competitors, who can use their facilities to structure service offerings that differ from those offered by the incumbents.

---

[10] *See* KMC Responsive Comments at 7-8 (citing Bell South and GTE responses to the Common Carrier Bureau's Third Survey of Local Competition, located at the FCC website, http://www.fcc.gov/ccb/local_competition/survey3/responses/Lec98-3.pdf).

[11] Tr. at 57.

GTE further argued at the hearing that the number of certificated ALECs and effective interconnection agreements should be considered a proxy for competition. Specifically, GTE witness Robinson claimed that 250 ALEC certifications and 100 interconnection agreements were sufficient evidence of the competitive status of the local exchange market.[12] Yet Mr. Robinson soon retreated to the argument that only 55 of these agreements were "operational,"[13] and further questioning by Commissioner Clark revealed that for all this paper competition cited by GTE, no more than "between four and ten" carriers are actually providing a facilities-based alternative to GTE local telephone service today.[14] In fact, GTE could only cite three carriers by name in support of this much lower estimate.[15] (And, again, GTE had not provided a single unbundled network element to any of these carriers as of September 1998.) These low figures make clear that paper competition, such as the number of certifications granted or interconnection agreements signed, should not be mistaken for effective competition in determining whether the ILECs' long-term contracts and tariffed term plans are the product of a competitive environment.

Finally, a review of several exhibits provided at the hearing offers further insight into how BellSouth has used its long-term contracts and tariffed term plans to lock up customers for

---

12 *Id.* at 100-101.

13 *Id.* at 101.

14 *Id.* at 110.

15 *Id.* at 109.

years to come. In Staff Exhibit 1, for example, BellSouth furnished information detailing its use of long-term customer contracts and tariffed term plans. This exhibit shows that there are 82 tariffed term plans that became effective during 1995 and that will not expire until January 2000 at the earliest, and March 2003 at the latest. Staff Exhibit 1 also shows that there are 386 tariffed term plans under which customers who signed up for service in 1996 will continue to receive service through at least January 2000; over 340 of these 1996 plans extend into the year 2001 or beyond.[16] BellSouth's own Exhibit CNJ-1 further indicates that 1,669 of its tariffed term plans will not expire until at least 2001.[17] In light of the evidence described above showing the absence of a competitive local exchange market, and this data provided at the hearing showing that many Florida consumers could be denied the benefits of competition well into the next century, KMC submits that the Commission has good cause and a sound basis for providing a fresh look to consumers subject to long-term contracts or tariffed term plans with the ILECs.[18]

---

[16] Staff Exh. 1 (Response of BellSouth to Staff Data Request dated Mar. 30, 1999, Item No. 4, Attachment).

[17] BellSouth Exh. CNJ-1, at 2. According to this exhibit, 48% of BellSouth's customer contracts and 51% of BellSouth's tariffed term plans would expire in 2001 or later. *Id.* at 1-2.

[18] BellSouth counsel implied at the hearing that an ALEC customer contract or term plan might "present the same sort of obstacle" as a long-term arrangement between a customer and BellSouth. Tr. at 20. Such reasoning is inapposite. By definition, an ALEC is always going to be at least the second carrier in a market. Thus, there is always at least one alternative to the ALEC's service – the ILEC. Accordingly, ALEC contracts and term plans cannot be anticompetitive because the customer always has a choice between two providers of service.

III. A FRESH LOOK HAS BEEN USED BY NUMEROUS REGULATORS - INCLUDING THIS COMMISSION - TO OPEN MARKETS TO COMPETITIVE ENTRY.

KMC's Responsive Comments contained a detailed overview of the rulings in which the Federal Communications Commission ("FCC") and several state commissions, including this Commission, have adopted fresh look rules. Rather than reiterating the scope and intent of those decisions here, KMC simply refers the Commission to KMC's Responsive Comments in support of the proposition that regulators have previously viewed a fresh look rule as a valuable tool in the effort to open telecommunications service markets to competition.[19] In fact, it should be noted that several of these fresh look opportunities have been granted to consumers in the context of local exchange services,[20] and this Commission has previously found the fresh look device to be useful in prying open a telecommunications service market in which "existing contract arrangements" would hinder the development of competition.[21] It would be contrary to the public interest to deny consumers of local exchange services a similar chance to take advantage of the benefits associated with a more competitive market.

---

[19] KMC Responsive Comments, at 10-16.

[20] *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 (P.U.C.O. June 12, 1996); *In the Matter of the Petition of Freedom Ring Communications, L.L.C. Requesting that the Commission Require that Incumbent LECs Provide Customers with a Fresh Look Opportunity*, Docket No. DR96-420, Order No. 22,798 (N.H.P.U.C. Dec. 8, 1997).

[21] *Intermedia Communications of Florida, Inc.*, 1994 WL 118370 (Fla. P.S.C.), *reconsidered*, 1995 WL 579981 (Fla. P.S.C.).

IV. CONCLUSION

Adopting a fresh look rule would best serve the purpose of opening the local exchange market to competitive entry. Only a fresh look rule will ensure that each and every Florida consumer has the opportunity to avail themselves of newly available service options in the manner envisioned by the Florida legislature and Congress. KMC's recommended changes to the Commission's proposed rule would promote this purpose by identifying more clearly the kinds of contracts that will be subject to a fresh look, and by expediting the resolution of disputes that may arise under the fresh look regime. KMC therefore respectfully requests that the Commission adopt the fresh look rule proposed its March 24, 1999 Notice of Rulemaking, as modified in Attachment A to KMC's Comments.

Respectfully submitted,

Richard M. Rindler
Morton J. Posner
Michael R. Romano
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel)
(202) 424-7645 (Fax)

Counsel for
KMC Telecom Inc.
and KMC Telecom II, Inc.

Dated: June 15, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of POSTHEARING 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 15TH day of June, 1999.

Peter M. Dunbar, Esquire
Barbara Auger, Esquire
Pennington, Moore, Wilkinson,
Bell and Dunbar
Post Office Box 10095
Tallahassee, FL 32302-2095

Laura L. Gallagher, Esquire
Suite 201
204 S. Monroe Street
Tallahassee, FL 32301

Kimberly Caswell, Esquire
GTE Florida Inc.
Post Office Box 110
FLTC0007
Tampa, FL 33601-0110

Nancy White, Esquire
c/o Nancy Sims
BellSouth Telecom., Inc.
150 South Monroe Street
Suite 400
Tallahassee, FL 32301-1556

Monica Barone, Esquire
Sprint Communications Co.
Mailstop GAATLIN0802
3100 Cumberland Circle
Atlanta, Georgia 30339

Vicki Gordon Kaufman, Esq.
McWhirter, Reeves,
McGlothlin, Davidson, Rief,
and Bakas, PA
117 S. Gadsden Street
Talahassee, FL 32301

Marsha Rule, Esq.
AT&T Telecommunications of
the Southern States
101 N. Monroe Street
Suite 7000
Tallahassee, FL 32301

Robert Scheffel Wright, Esq.
Landers and Parsons
Post Office Box 271
Tallahassee, FL 32302

Kenneth A. Hoffman, Esq.
Rutledge, Ecenia, Underwood,
Purnell and Hoffman, PA
Post Office Box 551
Tallahassee, FL 32302-0551

Rick Melson, Esq.
Hopping, Green, Sams
and Smith
Post Office Box 6526
Tallahassee, FL 32314

Lynn B. Hall
Vista-United Telephone Co.
3100 Bonnet Creek Road
Lake Buena Vista, FL 32830

Tom McCabe
Quincy Telephone Co.
107 W. Franklin Street
Quincy, FL 32351

Bill Thomas
Gulf Telephone Company
115 West Drew Street
Perry, FL 32347

Robert M. Post, Jr.
Indiantown Telephone
Systems, Inc.
15925 S.W. Warfield Blvd.
Indiantown, FL 34956

John M. Vaughn
St. Joseph Telephone and
Telegraph Co.
502 Fifth Street
Port St. Joe, FL 32456

Jeffry Whalen, Esq.
Ausley Law Firm
227 South Calhoun Street
Tallahassee, FL 32301

Michael McRae, Esquire
TCG - Washington
2 Lafayette Centre
1133 Twenty-First Street, N.W.
Suite 400
Washington, D.C. 20036

Martha Carter Brown*
Florida Public Service
Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0862

Norman H. Horton, Jr.
Messer, Caparello & Self, PA
215 S. Monroe St., Ste. 701
P.O. Box 1876
Tallahassee, FL 32302-1876

James C. Falvey
American Communication
Services, Inc.
133 National Business
Parkway, Ste. 200
Annapolis Junction, MD 20701

Jill Butler, Director
Regulatory Affairs, Eastern
Division
Cox Communication
4585 Village Avenue
Norfolk, VA 23502

Michael A. Gross
VP, Regulatory Affairs and
Regulatory Counsel
Florida Cable Telecom. Assoc.,
Inc.
310 North Monroe Street
Tallahassee, FL 32301

David V. Dimlich
2620 Southwest 27th Avenue,
Miami, Florida 33601

Carolyn Marek
Time Warner Telecom, Inc.
233 Bramerton Court
Franklin, Tennessee 37069

Michael Goggin
150 West Flagler Street
Miami, Florida 33130

Angela B. Green
125 South Gadsden Street
Tallahassee, Florida 32301

Charles J. Rehwinkel
1313 Blair Stone Road
Tallahassee, Florida 32301

Michael R. Romano