



GTE SERVICE CORPORATION

One Tampa City Center  
201 North Franklin Street (33602)  
Post Office B: 110, FLTC0007  
Tampa, Florida 33601-0110  
813-483-2606  
813-204-8870 (Facsimile)

Marceil Morrell\*  
Assistant Vice President &-  
Associate General Counsel-East Area

Anthony P. Gillman\*  
Assistant General Counsel

Florida Region Counsel\*\*  
Kimberly Caswell  
M. Eric Edgington  
Ernesto Mayor, Jr.  
Elizabeth Biemer Sanchez

\* Certified in Florida as Authorized House Counsel  
\*\* Licensed in Florida

Ms. Blanca S. Bayo, Director  
Division of Records & Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

April 2, 1999

Re: Docket No. 990339-TP  
KMC Telecom III, Inc.'s Petition for Relief To Opt Into An Approved  
Interconnection Agreement with GTE Florida Incorporated

Dear Ms. Bayo:

Please find enclosed an original and fifteen copies of GTE Florida Incorporated's Response for filing in the above matter. GTE believes that KMC III is not yet certificated in Florida. However, according to the Commission's case schedule in Docket No. 990212-TX, this matter is scheduled for agenda on June 29, 1999. Therefore, KMC's opt-in petition appears premature, as GTE understands that no interconnection agreement can take effect, in any event, until a carrier is certificated.

Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at 813-483-2617.

Sincerely,

*Anthony P. Gillman*

Kimberly Caswell

KC:tas

Enclosures

A part of GTE Corporation

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: KMC Telecom III, Inc. ) Docket No. 990339-TP  
Petition for Relief to Opt Into an ) Filed: April 2, 1999  
Approved Interconnection Agreement )  
with GTE Florida Inc. )  
\_\_\_\_\_ )

**GTE FLORIDA INCORPORATED'S RESPONSE TO PETITION  
TO OPT INTO AN APPROVED INTERCONNECTION AGREEMENT**

GTE Florida Incorporated (GTE) responds to the Petition of KMC Telecom III, Inc. to Opt into an Approved Interconnection Agreement (KMC Petition), filed on March 16, 1999. GTE agrees to allow KMC III to opt into the KMC II Agreement with certain conditions grounded in FCC rulings and the United States Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board, No. 97-826, 1999 U.S. Lexis 903 (1999).

Below, GTE discusses the facts relevant to this dispute and then explains why its position is justified.

**Facts**

KMC Telecom III, Inc. (KMC III) seeks to adopt the existing Interconnection Agreement between GTE and KMC Telecom II, Inc. (KMCII) in its entirety. The Commission approved the KMC II agreement on September 22, 1998, in Docket Number 980892-TP.

On January 25, 1999, the United States Supreme Court issued its Iowa Utilities Board ruling. That decision vacated the FCC's rule 319, which listed the unbundled network elements (UNEs) incumbent local exchange carriers (ILECs) are required to provide. The FCC will now have to devise new UNE rules to comply with the Act. While the Court upheld the FCC rule forbidding ILECs from separating elements that are already

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combined, it observed that the ILECs' concerns about sham unbundling may be rendered academic if the FCC ultimately makes fewer UNEs unconditionally available through the unbundling requirement.

The Court also upheld the FCC's jurisdiction to establish rules implementing the pricing provisions of the Telecommunications Act of 1996. It did not, however, address the substantive validity of the FCC's pricing rules. That task now falls to the Eighth Circuit Court of Appeals on remand.

The KMC II Agreement does not reflect the Court's decision, and any provision in that agreement that is inconsistent with the decision is nullified. Nevertheless, GTE would prefer not to have to reform its existing agreements, including the KMC II contract, to conform to the current status of the law, only to repeat that process again once the FCC issues new rules. As such, on February 25, 1999, GTE informed KMC III it would, without waiving any of its rights, permit KMC III to adopt the KMC II Agreement in accordance with five conditions. (Letter from Connie Nicholas, Assistant Vice President, GTE, to Michael Sternberg, President and CEO, KMC Telecom III, Feb. 25, 1999 (Feb. 25 Letter) (attached as Ex. 2 to KMC III's Petition).)

GTE believes that four of the five conditions were acceptable to KMC III. KMC III's Petition disputes only the condition relating to reciprocal compensation. That item states: "The provisions of this contract that might be interpreted to require reciprocal compensation from GTE to the CLEC for the delivery of traffic to the Internet are not available for adoption and are not a part of the 252(i) agreement pursuant to the FCC rule 809 and paragraphs 1317 and 1318 of the First Report and Order" [in the FCC's

Implementation of the Local Competition Provisions in the Telecom. Act. of 1996, FCC 96-325 (Aug. 8, 1996)] (Feb. 25 Letter at 3.)

The following provisions in the KMC II Agreement are potentially relevant to this condition. They are, in relevant part:

1.38 (and 1.41) "Local Traffic" means traffic that is originated by an end user of one Party and terminates to the end user of the other Party within GTE's then current serving area, including mandatory local calling scope arrangements.

3.3.1 Mutual Compensation. With respect to transport and termination, the Parties shall compensate each other for the exchange of Local Traffic in accordance with Section 3.3.2 of this Article. Charges for the transport and termination of intraLATA toll and interexchange traffic shall be in accordance with the Parties' respective intrastate or interstate access tariffs, as appropriate.

3.3.2 Bill-and-Keep. The Parties shall assume that Local Traffic is roughly balanced between the parties unless traffic studies indicate otherwise. Accordingly, the Parties agree to use a Bill-and-Keep Arrangement with respect to termination of Local Traffic only. Either Party may request that a traffic study be performed no more frequently than once a quarter. Should such traffic study indicate, in the aggregate, that either Party is terminating more than 60 percent of the Parties' total terminated minutes for Local Traffic, either Party may notify the other that mutual compensation will commence pursuant to the rates set forth in Appendix C of this Agreement and following such notice it shall begin and continue for the duration of the Term of this Agreement unless otherwise agreed. Nothing in this Section 3.3.2 shall be interpreted to (i) change compensation set forth in this Agreement for traffic or services other than Local Traffic, including but not limited to internetwork facilities, access traffic or wireless traffic, or (ii) allow either Party to aggregate traffic other than Local Traffic for the purpose of compensation under the Bill-and-Keep Arrangement described in this Section 3.3.2, except as set forth in Section 3.1 above.

The per-minute mutual compensation rates set forth in the KMC II Agreement were adopted from GTE's interconnection agreement with AT&T. Those rates were, in turn, set by this Commission in GTE's arbitration with AT&T. Petitions by AT&T Comm. of the Southern States, Inc., MCI Telecom. Corp. and MCI Metro Access Trans. Services, Inc.

for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Inc. Concerning Interconnection and Resale Under the Telecom. Act of 1996, Order PSC-97-0064-FOF-TP (Jan. 17, 1997).

**I. KMC III Cannot Adopt Provisions that May Be Deemed Inconsistent with the FCC's Decision that ISP Traffic Is Jurisdictionally Interstate.**

This Commission has never ruled that GTE's contract with KMC II (or, for that matter, any of GTE's interconnection contracts) require payment of reciprocal compensation for Internet-bound (ISP) traffic. GTE never intended for the reciprocal compensation obligations in the KMC II contract (or any other interconnection contract) to apply to ISP traffic. Consistent with GTE's longstanding public position, the FCC has determined that such traffic is largely interstate in nature (Implementation of the Local Competition provisions in the Telecom. Act of 1996, Declaratory Ruling in CC Dkt. No. 96-98 and Notice of Proposed Rulemaking in CC Dkt. No. 99-68 (ISP Order) (Feb. 26, 1999)), so it is conclusively outside the scope of GTE's local interconnection agreements, including the KMC II agreement.

Given the FCC's ruling, GTE does not believe the reciprocal compensation provisions in the KMC II local interconnection contract could lawfully be interpreted to apply to non-local ISP traffic. Nevertheless, GTE must refuse to allow KMC III to adopt those provisions because of past rulings this Commission has made on complaints against BellSouth by a number of alternative local exchange carriers (ALECs). In those cases, the Commission interpreted a number of different local traffic definitions and reciprocal

compensation provisions in light of FCC precedent. Complaint of WorldCom Tech., Inc. Against BellSouth Telecom., Inc. for Breach of Terms of Fla. Partial Interconnection Agreement Under Sections 251 and 252 of the Telecom. Act of 1996 and Request for Relief, etc., Docket Nos. 971478-TP, 980184-TP, 980495-TP, 980499-TP, Order PSC-98-1216-FOF-TP (BellSouth Order) (Sept. 15, 1998); Request for Arbitration Concerning Complaint of American Comm. Services of Jacksonville, Inc. d/b/a e.spire Comm., Inc. Against BellSouth Telecom., Inc., Staff Rec., Docket No. 981008-TP (voted on March 16, 1999; no order issued yet). The Commission concluded that BellSouth owed the respective ALECs compensation for termination of ISP traffic. Although the Commission's interpretation of FCC precedent in the BellSouth Order was invalidated by the FCC's February 26 Order, GTE cannot be sure that this Commission will reconsider its findings in the BellSouth cases. Under the circumstances, GTE believes the only way to prevent the potential for later misconstruction of the above-cited provisions in the KMC II contract is to refuse to offer them, as currently written, to KMC III. Specifically, the "Local Traffic" definition should be amended to expressly exclude ISP traffic. This will prevent any potential disputes later about whether GTE intended for the reciprocal compensation provisions to apply to ISP traffic under the contract to be executed with KMC III.

## **II. The Rates KMC III Seeks Violate the Act's Cost-Based Pricing Mandate.**

An ALEC's right to adopt another interconnection agreement under the Act's section 252(i) is not unconditional. As GTE told KMC III in its February 25 Letter, the FCC has

given the ILECs the ability to except 252(i) adoptions where the cost of providing the service to the requesting carrier is higher than that incurred to serve the initial carrier or there is a technical incompatibility issue. 47 C.F.R. sec.51.809; Implementation of the Local Competition Provisions in the Telecom. Act of 1996, First Report and Order, FCC 96-525 (Aug. 8, 1996) (First Report and Order) at paras.1317, 1318.

As noted, GTE never intended for Internet traffic transiting an ALEC to be included within the definition of local traffic and thus subjected to corresponding reciprocal compensation obligations. While ISPs do not generally make calls, they generate a huge volume of inbound calls. In addition, these calls typically last much longer than the average voice call. The aberrant result of applying reciprocal compensation to such calls is that the ILEC stands to pay more to the ALEC that services a subscriber's ISP than it receives from providing local telephone service to that subscriber. This is not the "just and reasonable" cost-based pricing outcome the Act requires (sec. 252(d)), and it certainly does not allow the ILEC the "reasonable profit" the Act contemplates (sec. 252(d).) On the contrary, ALECs are able to reap substantial profits not through any cost-based efficiencies, but through exploitation of a windfall opportunity made possible through regulatory fiat.

The Act's reciprocal compensation obligation (47 U.S.C. sec. 251(b)(5)) is intended to ensure that a LEC is able to recover its actual costs of terminating local traffic originating on another LEC's network (47 U.S.C. sec. 252(d)(2)(A)(i)). It is not designed to create a system of direct wealth transfers from ILECs to ALECs. But the minute-of-use pricing structure in the KMC II contract, if interpreted to apply to ISP traffic, would produce

just this kind of non-cost-based result. If the KMC II reciprocal compensation provisions are applied to non-local ISP traffic, the result will not be cost-based. Thus, these provisions are not subject to KMC III's adoption.

The reciprocal compensation provisions are impermissibly non-cost-based in another regard. The rates reflected in the KMC II contract which KMC III seeks to adopt are not based on KMC III's costs (let alone KMC II's costs). Neither KMC II nor KMC III ever produced a cost study to show their costs of terminating calls originating on GTE's network. The costs reflected in the KMC II contract are GTE's costs, not KMC III's. It would be a mistake to assume that GTE's and KMC III's costs are the same. In fact, an ALEC's costs per unit of traffic will likely be lower than GTE's for several reasons (e.g., the total capacity of an ALEC's network tends to be more fully utilized than an ILEC's network capacity; an ALEC's equipment will likely be newer than the equipment already in an ILEC's network; GTE's traffic is dispersed throughout a network of end offices and tandem switches serving a relatively large number of low volume residential customers, while an ALEC will have relatively few end office switches serving a relatively larger number of high volume business customers.) Symmetrical rates based on GTE's costs are thus likely to subsidize KMC III. This effect becomes even more extreme—and even more discordant with the Act's cost-based pricing directive—when reciprocal compensation provisions for local traffic are applied non-local ISP traffic. So GTE is well within its rights to refuse to extend these provisions to KMC III.

Indeed, while GTE recognizes that section 252(i) allows one ALEC to opt into another ALEC's contract terms, GTE contends that this right does not extend to other



carriers' rates. All of the rates in GTE's interconnection contracts are not rates to be paid to GTE. In the case of local call termination, GTE must pay the ALEC. As explained above, the end office and tandem switching rates for termination of local traffic are properly based on the respective carriers' costs of doing the call termination. The adopting ALEC may not, in many cases, have the same costs as the ALEC whose contract it seeks to adopt. So even if the KMC II rate were based on KMC II's costs (and it is not), it would be improper to allow KMC III to adopt that rate without a showing that its costs are the same as KMC II's.

### **III. Previously Established Rates and Terms Are Available Only for a Reasonable Time.**

Even aside from the dissonance between call termination costs and rates, KMC III's opt-in request raises a question about the time limit for section 252(i) adoption of an earlier contract. Opt-in rights are not temporally unlimited. Interconnection agreements (or particular terms within those agreements) are "available for use by requesting carriers for a reasonable amount of time." This rule provides requesting carriers "with a reasonable time during which they may benefit from previously negotiated agreements." (First Report and Order at para. 1319.) The FCC recently expressed concern about state regulators allowing successive adoptions of agreements, thus subjecting ILECs to the same contract obligations for an indeterminate time. (ISP Order at para. 35.) The FCC has thus sought comment on how section 252(i) rights "affect parties' ability to negotiate or renegotiate terms of their interconnection agreements." (*Id.*)

The reciprocal compensation rates KMC III seeks to adopt were, in turn, adopted

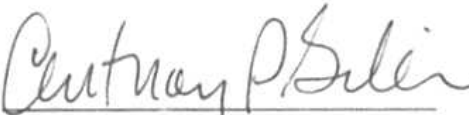
by KMC II from the GTE/AT&T interconnection agreement executed almost two years ago. Given the ever-accelerating technological and market changes in the telecommunications industry, GTE believes a two-year old agreement (or rate or term from that agreement) should be considered outdated and unavailable for adoption. In light of the Commission's rulings in the BellSouth Order, GTE believes it is critical to retain the ability to renegotiate reciprocal compensation provisions. However, allowing unceasing, successive adoptions of the same rates and terms will effectively eliminate this ability. As the FCC has indicated, this was not the intent of section 252(i); Therefore, GTE is justified in refusing to allow KMC III's adoption of the AT&T reciprocal compensation rates.

\* \* \*

For all the foregoing reasons, GTE urges the Commission to deny KMC III's petition to opt into the KMC II agreement in its entirety. Instead, GTE asks the Commission to recognize that KMC III may opt into the KMC II Agreement under the conditions specified in GTE's February 25 Letter.

GTE cannot agree at this time to KMC III's request to conduct this proceeding under Section 128.57(2) of the Florida Statutes. It is not clear from KMC III's Petition whether KMC III's understanding of the facts comports with GTE's.

Respectfully submitted on April 2, 1999.

By:   
for Kimberly Caswell  
P. O. Box 110, FLTC0007  
Tampa, Florida 33601-0110  
Telephone No. (813) 483-2617

Attorney for GTE Florida Incorporated

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Response in Docket No. 990339-TP were sent via overnight delivery on April 1, 1999 to:

Staff Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Eric J. Branfman  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W., Suite 300  
Washington, DC 20007-5116

Tricia Breckenridge  
KMC Telecom III, Inc.  
3025 Breckinridge Blvd., Suite 170  
Duluth, GA 30096

  
Kimberly Caswell