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April 23, 1999

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 BellSouth Telecommunications, Inc.'s Comments, 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,

Michael P. Goggin (KE)

Michael P. Goggin

Enclosures

AFA
APP Brown
CAF
CMU
CTR
EAG
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RRR 1
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cc: All parties of record
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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 23rd day of April, 1999 to the following:

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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
	)	Filed: April 23, 1999

COMMENTS BY BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Comments on the proposed "Fresh Look" rules.

INTRODUCTION

The Commission is considering whether to adopt rules implementing a so-called "Fresh Look" requirement. The proposed rules would allow parties that have entered into otherwise valid and binding contracts with BellSouth, despite the availability of competitive alternatives, to rescind those contracts without incurring the full termination liability to which those parties agreed. Such termination provisions form a central underpinning of the prices agreed to by the parties to the contracts.

For the reasons set forth herein, the proposed rules should be rejected and this docket closed. The Commission does not have the statutory authority to take this action. In addition, the rules proposed, even if the Commission had the statutory authority to adopt them, would be constitutionally infirm. Finally, the proposed rules are unnecessary and would embroil the Commission and local exchange carriers in a regulatory quagmire. BellSouth filed comments previously in this docket on May 19, 1998. Many of those comments are incorporated in these comments.

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

The proposed Fresh Look rules would require massive intervention by the Commission into private contracts between incumbent local exchange carriers (ILECs) and their customers. Chapter 364 of the Florida Statutes, however, 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 (Fla. 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).

To be sure, the Commission has specific statutory authority to "regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons." Fla. Stat. § 364.19. Indeed, the Commission already has approved the terms of the contracts at issue. The Commission does not, however, 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.

If the Legislature had intended for the Commission to intervene in the marketplace in the obtrusive manner envisioned by proposed rules, the Legislature would have made a specific grant of authority to the Commission.

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 proposed rules clearly would be unlawful.

Although many alternative local exchange carriers (ALECs) sing the praises of Fresh Look as an essential element of local competition, many states that have had to consider such petitions from ALECs have concluded that it would be improper to adopt such rules. For example, the North Carolina Utilities Commission recently rejected a similar demand by ALECs for a "Fresh Look" rule. Order Dismissing Fresh Look Petition on Jurisdictional Grounds, Docket No. P-100 Sub 133 (N.C.U.C. May 22, 1998). The North Carolina Commission noted that neither Congress, the Federal Communications Commission (FCC), nor the Legislature had decided to impose a "Fresh Look" requirement, although each had the opportunity to do so. Id. at 12. Finally, that Commission concluded that although it has general authority to facilitate and promote local competition, it lacked specific statutory authority to adopt a rule authorizing the abrogation of existing contracts. Id. at 13. Other states have come to similar conclusions. 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").

Moreover, the FCC has only endorsed a "fresh look" approach in other contexts, and then only in very narrow circumstances not present here. Indeed, contrary to the suggestion of Time Warner in its initial Petition, the only Fresh Look requirement adopted by the FCC in its entire 700-page Interconnection Order, was in connection with Commercial Mobile Radio Services (CMRS) providers. In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98 (rel. 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 seek to impose a Fresh Look requirement on all long-term contracts between incumbents and their customers, as these proposed rules would do. The FCC rule only applied to contracts that were in violation of the FCC's rules.

The other FCC decisions cited by Time Warner in its initial Petition in this docket 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 (rel. 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.

[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 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.

> 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 should be fatal to the proposed rules.

In short, the Commission should decline to adopt the proposed rules because they ask 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 Commission cannot assume such authority simply in the name of increased competition.

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 the proposed "Fresh Look" rules. 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 (Fla. 1932) ("authority given to regulate carriers must be considered as having been conferred to be exercised according to constitutional limitations").

The Commission is not being asked in its judicial capacity, to determine the constitutionality of an act of the Legislature. Instead, the Commission has

been asked to use its quasi-legislative power to 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 asked 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: The Commission has been asked 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. See also Fla. Const. Art. I, § 10. 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. The question, then, 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) "eligible contracts," as defined in the proposed rule, are valid, binding contracts between private parties and (2) a Fresh Look requirement would impair the obligations of these contracts. Indeed, the Commission Staff's March 4, 1999 analysis of the proposed rules state that the rules could permit a customer to "terminate a LEC contract ... subject to a termination liability less than that specified in the contract." Staff Recommendation, p. 3.

It is evident that the impairment of such contracts under the proposed rules 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 the proposed rules would amount to a total impairment of the contracts in question, which is clearly a "substantial impairment."

Since "Fresh Look" will operate as a "substantial impairment" of ILEC/customer contracts, 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 the proposed rules is absolute, the height of the hurdle such a state action must clear is high. No such significant and legitimate public purpose underlies the proposed rules, much less one that can clear the highest of hurdles.

The proponents of Fresh Look attempt to justify the need to abrogate these contracts 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 such contracts so that the competitors of ILECs can take ILECs' largest customers and commit them to extended contracts of their own. The only beneficiaries of such an action will be ALECs.

It would be laughable even to 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." Under the guise of Fresh Look, ALECs seek to have the Commission use the police power of this State to undo the results of the competitive process so that they may "cherry pick" the largest and most lucrative customers. This would not serve any public purpose, much less a significant and legitimate one.

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 contracts 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 even contract service agreements ("CSAs"), which were entered into in situations where competition already existed, and allows one party to those contracts -- the customers -- to limit the termination liability to which they freely agreed. It is neither "reasonable" nor "appropriate" to adopt regulations to interfere with or nullify competition in the cause of promoting it.

The proposed Fresh Look rules are simply a request by the ALECs for a market share handout. ILECs stand to lose their customers, lose the revenue to which the contracts entitle them, lose the contractual right to full termination liability, and other contractual rights, all of which were won fairly in the competitive arena. ILECs, along with the Commission, would also bear much of the administrative burden that these rules would create. The Commission is asked 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 only effect would be to benefit one group of competitors at the expense of another.

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

[2] This restriction is applied to the States through the Fourteenth Amendment. See, Chicago B. & O. R. Co. v. Chicago, 166 U.S. 226 (1897).

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. Ruckelshaus v. Monsanto 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, fn. 16. Accordingly, the valid contracts entered into by ILECs with their customers are property rights protected by the Taking 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 . . . ." Ruckelshaus, 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. (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 or an abstract need'." Id. (citation's omitted).

Adoption of the proposed rules would undoubtedly constitute a "taking" of ILECs' property interest in the CSAs, as the rules would allow for the total abrogation of these contracts. Fresh Look would: (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 that are unnecessary, unfair and a cost that was not contemplated at the time the contracts were negotiated and for which, therefore, no recovery can be made.

The contracts 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 use and dissemination of 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 proposed rules would frustrate this purpose. 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 ILECs without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[4]

[3] For example, there is no provision in the proposed rules for the destruction of extended contracts entered into by an ALEC in order to allow ILECs to enjoy the same benefit and to compete for the ALECs.

[4] BellSouth believes that the proposed rules suffer from other constitutional infirmities, including violating the Equal Protection clause and constituting unlawful class legislation. U.S. Const., Amendment XIV; U.S. Const. Art. I, § 10; Fla. Const. Art. I, § 10.

C. The Proposed Rules Are Unjustified.

Even if the Commission had the authority to adopt the proposed "Fresh Look" rules, they are unjustified. In Time Warner's Petition, which initiated this docket, it suggested that the proposed rules were necessary to give customers a chance to choose from competing providers, and thus should apply to "contracts with LECs entered into in a monopoly environment" in order to give customers an opportunity "to avail themselves of competitive alternatives now offered or to be offered in the future by alternative local exchange companies." Petition to Initiate Rulemaking Pursuant to § 120.54(5) F.S., by Time Warner AxS of Florida, Inc. ("Petition"), p. 1 (filed Feb. 16, 1998). The proposed rules, however, would apply to contracts entered into by customers who, as the Commission Staff explains in its recommendation, already had choices between the services offered by the ILEC, and those offered by competing providers at the time they entered into these contracts. Staff Recommendation, p. 2 ("Prior to ALEC competition, LECs entered into customer contracts covering local telecommunications services offered over the public switched network (typically in response to PBX-based competition")). Accordingly, the original purported justification for the rules--to benefit *customers* who purportedly lacked competitive alternatives at the time they entered into these contracts–is illusory.

In its recommendation, however, Staff suggests two additional justifications. First, although the customers who entered into such contracts had competitive alternatives from which to choose at the time, now they have more. Staff Recommendation, p. 2. Second, "[t]he purpose of the 'fresh look' rule is to

enable ALECs to compete for existing LEC customer contracts." Staff Recommendation, p. 3. Upon examination, neither purported justification can legitimize the proposed rules.

With respect to Staff's first purported justification, that customers did not have *enough* choices at the time they chose to enter into these contracts, the Staff states that "ALECs are now offering switched-based substitutes for local service . . . where PBXs had previously been the only alternative. For multi-line users not interested in purchasing a PBX . . . the LEC was heretofore the only option. Consequently, it is reasonable in this circumstance to give ALECs the opportunity to compete for this business . . . ." This reasoning includes a number of implicit assumptions that are not true.

For example, it would be wrong to assume, even in the case of contracts for services for which PBXs were an alternative, that they were the only alternative. As the Staff correctly points out, "ALECs are now offering switched-based substitutes for local service." The Staff apparently (and incorrectly) assumes, however, that all of the contracts to which the rule would apply were entered into prior to the time ALECs began to compete with BellSouth. It would certainly be untrue to suggest, however, that the rules, as currently proposed, would apply only to contracts entered into at a time when no ALEC competition existed.[5] ALECs have been actively competing with BellSouth since 1995. Yet,

[5] To be fair, the recommendation relates to the rules as originally proposed, which would have included only contracts entered into before 1997, a time when ALEC competition was not as robust as today.

the current proposed rules would apply to all contracts entered into by such customers four years later or up to the date that the rule becomes effective, (including those not yet entered into today) although ALEC competition exists and has for some time.

In addition, Staff's statement that for those who chose BellSouth services over PBX competition, BellSouth was the "only option," is clearly incorrect. Customers often decide to use PBX service, or services provided by an ALEC, rather than BellSouth. Each customer who does so presumably makes that choice based on its belief that the chosen alternative has some characteristic, such as price or the ability to receive interLATA service in the same bundle, that BellSouth cannot match. That does not imply that the customer had no option other than the one it chose. Moreover, most of the customers who would be affected by the rule, who are typically large, sophisticated commercial customers, entered into such contracts after the passage of Florida's price regulation statute in 1995 and the Telecommunications Act of 1996. Each of these customers likely was aware that ALEC competition existed, or would soon be available. Each had the option to choose a non-LEC alternative, to enter into contracts of shorter duration, or to purchase service month-to-month. Accordingly, it is not necessary to adopt the rules to afford these customers choice; they enjoyed the benefits of competition when they agreed to the contracts.

The second justification proffered by the Staff, "to enable ALECs to compete for existing ILEC customer contracts . . .which were entered into prior to

switch-based substitutes for local exchange telecommunications services," is also without merit. As noted above, *most* of the contracts to which the rules would apply were entered into (or will be entered into) after ALEC competition was available. *All* of the affected contracts were entered into at a time when competition existed (even if the ALECs who have requested this rule were not among the competitors at the time). The Commission should not adopt rules designed to abrogate contracts freely entered into by customers who considered an array of competitive alternatives just to boost the business of would-be competitors who have not begun to offer service in Florida or, worse, an ALEC who was already competing when the contract was signed but who simply failed to win the customer the first time. The Commission's statutory objective, as the Staff suggests, is to promote *competition*, not to promote *competitors.*[6]

More importantly, ALECs already have been "enabled" by the Commission to compete for existing LEC customer contracts. Under Commission Orders, ALECs are permitted to resell ILEC contracts. Customers who wish to transfer contracts to an ALEC in this manner face no termination

[6] Staff seems unconcerned with the impact that these rules would have on ILECs. The Staff admits that the rule would impose unrecoverable costs on an ILEC, described as "relatively minor" administrative and labor costs, which the ILEC would incur in connection with assisting customers to abrogate their agreements. Staff also recognizes that ILECs would "lose the revenues" to which the customers' freely negotiated contracts entitle them. Incredibly, the Staff then concludes that a LEC "would only experience a financial loss if its unrecovered, contract specific, nonrecurring costs exceeded the termination liability specified in the controlling contract or tariff." Lost revenues and additional labor and administrative costs clearly are financial losses to BellSouth. The Commission should see the proposed rules for what they are: an attempt by the ALECs to get the Commission to effectively transfer customers and revenues won by the ILECs through competition, to the ALECs, even though the ALECs remain free to compete for these revenues and customers. To reverse these results of the competitive process in this manner in the name of promoting competition would be tantamount to proclaiming that in order to save the free market, the Commission had to destroy it.

liability. As the telecommunications needs of these sophisticated customers expand, ALECs also can and do compete to provide service in addition to those received from ILECs. Of course, customers also have the right to honor the termination clauses in ILEC contracts and switch to a facilities-based alternative, or simply switch upon the expiration of their ILEC agreements. Thus, any claim that ALECs cannot compete, even for a customer subject to termination liability, is simply untrue.

CONCLUSION

The Commission should reject the proposed rules out of hand. First, the Commission lacks the statutory authority to abrogate contracts freely entered into by customers and carriers after they have been formed. Second, to do so would violate the United States and Florida Constitutions. Lastly, even if the Commission were able lawfully to adopt the rules, they are unjustified. The contracts in question are the product of competition. Any marginal benefits that might flow to a few, large customers from such rules are more than outweighed by the unfairness of such a rule to ILECs, who would lose the benefits of bargains freely struck in competitive circumstances. Indeed, the proposed rules would serve only to create a windfall for ALECs, who already are free to compete for such contracts. The Commission should not, in the name of promoting competition, reverse the results of the competitive process to favor a few chosen competitors. For all of these reasons, BellSouth respectfully urges the Commission to reject these proposed rules.

Respectfully submitted this 23rd day of April, 1999

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