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April 28, 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

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 Responsive 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 Responsive 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.

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Very truly yours,

Morton J. Posner
Michael R. Romano

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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

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

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Dated: April 28, 1999

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RESPONSIVE 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 Responsive Comments regarding the Commission's proposed fresh look rule. KMC asserts that the Comments and Testimony filed on behalf of BellSouth Telecommunications Inc. ("BellSouth") and GTE Florida Incorporated ("GTE") miss the mark in arguing that the Commission has neither authority nor reason to give Florida consumers a fresh look at long-term contracts with incumbent local exchange carriers ("ILECs"). BellSouth's and GTE's positions are premised upon a misreading of constitutional law and a fundamental misunderstanding of the competitive status of the Florida local exchange market.

I. THE COMMISSION HAS THE AUTHORITY TO PROVIDE FLORIDA CONSUMERS WITH A FRESH LOOK AT ILEC LONG-TERM CONTRACTS.

A. Fresh look does not violate the Contracts Clause.

BellSouth asserts that a fresh look requirement would violate the Contracts Clause of the U.S. Constitution by permitting its customers to abrogate substantial termination penalties imposed by BellSouth in its long-term contracts. BellSouth fails to take into consideration,

however, the heavily regulated nature of the telecommunications industry in Florida and the state's legitimate interest in protecting the general welfare of its consumers and its regulated industries.

Initially, BellSouth fails to view the long-term contracts in the appropriate context of the regulated Florida telecommunications industry. As the Supreme Court has stated:

> [It is a] well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory authority or constitutional authority, to modify the contract in the interest of the public welfare without constitutional impairment of the contracts.[1]

More recently, the Supreme Court has recognized the fact that the parties to a contract are operating in a heavily-regulated industry is highly significant in determining whether a state's action violates the Contracts Clause.[2] Accordingly, the more regulated the industry the more deference is due a state's action regarding contracts involving that industry. BellSouth and the other ILECs cannot contract away the Commission's jurisdiction over regulated industries. As the Supreme Court has stated "[o]ne whose rights, such as they are, are subject to state restriction cannot remove them from the power of the State by making a contract about them."[3]

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[1] *H. Miller & Sons, Inc. v. Hawkins*, 373 So.2d 913, 914 (Fla. 1979) (citations omitted); *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) (application of proper regulatory authority may not be defeated by private contractual obligations).

[2] *See Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412 (1983).

[3] *Hudson Water Co. v. McCarter*, 209 U.S. 349, 257 (1908).

BellSouth and the other ILECs obviously knew of the existence of the extensive regulation of Florida's telecommunications industry upon entering into the contracts. The ILECs also knew, or should have known, that their contractual rights were subject to alteration by present and future state regulations involving the Florida telecommunications industry.[4] Clearly, the ILECs' reasonable expectations involving their contractual rights would not be substantially impaired by the adoption of a fresh look requirement.

Since there is no substantial impairment of contractual expectations in violation of the Contracts Clause in this instance, the Commission should adopt a fresh look requirement regarding termination penalties contained in BellSouth's long-term customer contracts. If, however, the Commission should determine that a fresh look requirement would impair the contractual rights of BellSouth, the Commission should recognize the legitimate interest that it has in protecting and promoting the advancement of competition in the telecommunications marketplace.

The United States Supreme Court has recognized the legitimate interest that the states have in protecting their citizens from the escalation of prices involving regulated industries.[5] Termination penalties threatened or imposed by the ILECs are frustrating the advancement of competition in Florida's telecommunications marketplace and inhibiting the entrance of competitive alternatives to the ILECs' established monopolies in their service territories, in direct contravention to the stated purposes of the Telecommunications Act of 1996 ("1996 Act").

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[4] *See Energy Reserves*, 459 U.S. at 416.

[5] *See id.* at 416-17.

The long-term contracts are preventing the new competitors from serving those ILEC customers locked into these contracts. A fresh look requirement would benefit Florida consumers by permitting them to choose their telecommunications provider without fear of the imposition of substantial termination penalties.

The adoption of a fresh look requirement clearly would not violate the Contracts Clause due to the regulated nature of the telecommunications industry and the legitimate interest that Florida has in protecting its consumers and promoting the advancement of competition in its telecommunications markets.

B. Fresh look does not violate the Takings Clause.

Similarly, despite BellSouth's protestations, adopting a fresh look rule poses no cognizable violation of the Takings Clause of the federal Constitution. The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that "private property" may not "be taken for public use, without just compensation." BellSouth's arguments that a fresh look rule would violate this clause are inapposite. As noted above, state precedent makes clear that this Commission has the authority to regulate the provisions of BellSouth's contracts with its customers and to implement a fresh look policy:

> [It is a] well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts.[6]

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[6] *H. Miller & Sons, Inc. v. Hawkins*, 373 So.2d at 914 (citations omitted).

Furthermore, even if the Takings Clause governs BellSouth's public utility contractual rights in this case, BellSouth has not made an adequate showing that any impermissible, unconstitutional taking would arise here. Even through it is true that private contract rights can be considered a form of intangible property,[7] that is by no means the end of the inquiry. A taking of property must also result in an "impairment" that is not permitted by the Constitution.[8] Whether property has been taken by regulation such that it raises taking concerns is determined by examination of the value of the business *as a whole.* A taking cannot occur unless a rate order *taken as a whole* produces overall rates so low as to "jeopardize the financial integrity of the [regulated] companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital."[9] BellSouth does not allege, nor can it reasonably allege, that fresh look would cause any such impact.[10]

Moreover, as BellSouth readily acknowledges, a taking is permissible under the Constitution if the property in question is used for a "public purpose."[11] In fact, BellSouth concedes that "stimulating competition might constitute a 'public purpose'," but argues that the

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[7] *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n. 16 (1977).

[8] *Id.* at 21.

[9] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312 (1989); *see also Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 390-391 (1974); *FPC v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575, 607 (1942).

[10] Indeed, if the Commission is truly concerned about any adverse financial impact associated with its rule, it should take comfort in the fact that as proposed, the rule would allow an ILEC to demonstrate that there are nonrecurring costs associated with the contract that warrant recovery from the end user exercising a fresh look.

[11] *See* BellSouth Comments, at 15 (citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984)).

proposed fresh look rule would frustrate, rather than serve, this purpose.[12] BellSouth contends that the fresh look rule would not serve the public purposes of stimulating competition because it would benefit "a few large customers and competitors, who already operate in a competitive local exchange market."[13] Yet parsing each portion of this statement by BellSouth reveals the error of its analysis. As a preliminary matter, BellSouth provides no basis or statistical rationale for concluding that this rule would benefit only "a few large customers and competitors." Moreover, the latter half of BellSouth's statement – the claim that there is a "competitive local exchange market" – is not borne out by the facts. As KMC explained in its initial Comments, BellSouth continues even today to hold a monopoly-era market share in Florida. There is no reason to believe that the contracts that BellSouth seeks to protect are the product of a competitive market. It is therefore clear that BellSouth's analysis of whether a fresh look rule would serve a legitimate "public purpose" is off the mark; the Commission should instead implement a fresh look rule that would serve the valuable public purpose of stimulating competition.

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[12] BellSouth Comments, at 15.

[13] *Id.*

II. A FRESH LOOK IS NEEDED TO PROVIDE FLORIDA CONSUMERS THE FULL BENEFITS ASSOCIATED WITH NEWLY AVAILABLE COMPETITIVE OPPORTUNITIES.

Bell South and GTE assert that a fresh look is unnecessary because the market in which these contracts were formed is competitive.[14] Indeed, as noted above, this position forms the basis for BellSouth's contention that a fresh look rule would constitute a regulatory taking.[15] Yet it is clear that BellSouth and GTE mistakenly equate legislation for effective competition. The local exchange markets did not become instantaneously competitive by Florida's legislative fiat on July 1, 1995. Nor did alternative local exchange carriers ("ALECs") magically rush into the market and eviscerate BellSouth's monopoly-era market share on February 8, 1996 when the 1996 Act became law. Contracts entered into following the enactment of these market-opening federal and state statutes are not inherently "competitive," because there was no "flash-cut" to a fully competitive market on Day 1 of legal "competition."

In fact, competitors are still today just entering many local exchange markets. As KMC noted in its initial Comments, all of the ALECs combined using BellSouth's loops or resold services had a market share of approximately 1.6% for voice grade lines in BellSouth's Florida service territory as of September 30, 1998.[16] The market share figures in GTE's Florida service

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[14] BellSouth Testimony, at 4; GTE Testimony, at 11.

[15] *See* BellSouth Comments, at 15 (claiming that a fresh look rule would not serve a "public purpose" – and therefore be an unlawful taking of property – because it would operate to the benefit of a few private actors operating in "a competitive local exchange market").

[16] KMC Comments, at 4 (citing BellSouth's 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).

territory – where GTE had not provided a single line to an ALEC through the use of unbundled network elements and ALECs using resold services held a paltry 2.0% market share for voice grade lines as of September 30, 1998[17] – provide greater evidence of how more than three years after the Florida legislature invited local competition it has yet to arrive (particularly on the facilities-based side). It is therefore contrary to fact and reason for the ILECs to claim in their filings that even those contracts entered into during the past three years are somehow the fruits of a competitive market. Establishing a fresh look rule that applied solely to those customers entering into contracts before the Florida legislature or the United States Congress enacted their market-opening statutes would only lock many customers into contracts that are the remnants of a monopoly-era market structure.

BellSouth and GTE also try to sidestep the fact that their contract customers are trapped by arguing that competitors always have the ability to resell services under customer-specific contracts. Specifically, BellSouth observes that "[i]f a customer so chooses, these contracts are available for transfer to a certificated ALEC for resale."[18] Likewise, GTE states that "a competitor can take GTEFL's [customer-specific arrangement, or "CSA"] and its CSA customer, and offer the same contract to the same customer at a 13.04% discount off GTEFL's price to the

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[17] GTE's report to the FCC indicates that out of more than 2.3 million lines in its Florida service territory, it had provided no lines to competitors through the use of unbundled network elements as of September 30, 1998, and it had provisioned a total of 47,944 resold lines to competitors in Florida by the same date. *See* GTE's 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.

[18] BellSouth Testimony, at 4.

customer."[19] Of course, competition by resale is only one means of the three means of competitive entry envisioned by the 1996 Act,[20] and allowing competitors to access contract customers only through resale would foreclose the other means of entry. Moreover, resale by itself should not be mistaken for effective competition in the market. Any carrier seeking to resell BellSouth's or GTE's service under an existing contract with a customer would be stuck with the rates, terms, and conditions provided for in the ILEC's existing contract. There would be no opportunity to provide the real benefits of competition – innovative facilities-based service offerings and lower prices – to the customer. Instead, the customer would receive the same service at the same price, with the company name on the bill being the only difference.

Finally, even if a competitor were to resell one of BellSouth's or GTE's existing customer-specific contracts, the ILEC would continue to receive some revenue associated with that contract because it would be the underlying facilities-based provider of the service. Indeed, BellSouth and GTE likely offer contract resale as an alternative to the Commission in the knowledge that they will continue to accrue some financial gain from every contract customer served through resale. Allowing competitors to resell an ILEC's customer-specific contracts therefore fails to adequately ensure that customers obtain the full benefits of competition, and it serves to sustain a BellSouth or GTE interest in every contract customer in the market.

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[19] GTE Testimony, at 5.

[20] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15503 (1996).

III. NUMEROUS REGULATORS - INCLUDING THIS COMMISSION - HAVE ADOPTED A FRESH LOOK RULE AS A MARKET-OPENING MEASURE WHERE CONTRACTS ARE VIEWED AS THE PRODUCT OF A MONOPOLY-ERA ENVIRONMENT.

Although BellSouth claims that "many states" have rejected invitations to adopt fresh look rules,[21] it is also true that consumer protection considerations have prompted the Federal Communications Commission ("FCC") and a number of state commissions to grant fresh look opportunities to parties to long-term contracts upon the introduction of competition for the contract services. In particular, the FCC has concluded that long term customer contracts executed in a less than fully competitive environment raise anticompetitive concerns that are detrimental to the interests of consumers. The FCC has previously determined that customers tied to long-term contracts once telecommunications markets open to competition are "captive" and should be given the opportunity to terminate those contracts without incurring "substantial costs."[22] For example, in concluding that access markets should be opened to competition, the FCC stated:

> The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to "lock-up" the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. To address this, we conclude that certain LEC customers with long-term access arrangements will be permitted

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[21] BellSouth Comments, at 3.

[22] *Competition in the Interstate Interexchange Marketplace,* 6 FCC Rcd 5880, 5906 (1991), *order on recon.*, 7 FCC Rcd 2677 (1992).

> to take a "fresh look" to determine if they wish to avail themselves of a competitive alternative.[23]

The FCC has also expressed concern about the ability of incumbent carriers to "leverage" market power. The FCC described a variant of this problem in the context of 800 service:

> [l]everaging could occur, for example if AT&T offered a "captive" 800 service subscriber discounts on 800 service conditioned upon the customer's purchase of another service from AT&T -- for example if AT&T offered a customer a bundled contract of 800 service and WATS service, with ten percent discounts on each. In this example, assuming equal usage of 800 and WATS, an AT&T competitor would have to offer a twenty percent discount on WATS in order to win the customer's WATS business.[24]

Possible discounting of one service in connection with another "captive" service is only one example of how incumbents with captive customers can wield considerable market power to disadvantage new entrants. As a result, the FCC has frequently required the imposition of "fresh look" provisions in order to allow customers with long term contracts to avail themselves of the benefits offered by increased competition in telecommunications markets.[25]

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[23] *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-64 (1992).

[24] *Competition in the Interstate Interexchange Marketplace,* 6 FCC Rcd at 5906 n.234.

[25] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 16044-45, at ¶ 1095 (1996), *partially vacated on other grounds, Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997); *Expanded Interconnection with Local Telephone Company Facilities,* 9 FCC Rcd 5154, 5207-10 (1994) ("fresh look" available to LEC customers who wish to sign with competitive access providers); *Competition in the Interstate Interexchange Marketplace,* 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands,* 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" imposed as condition of grant of

This Commission itself has previously recognized the value of a fresh look as part of an effort to open telecommunications markets to competitive entry. In *Intermedia Communications of Florida, Inc.*, the Commission imposed a fresh look requirement, reasoning:

> [I]ntroducing competition, or extending the scope of competition, provides end users of particular services with opportunities that were not available in the past. However, these opportunities are temporarily foreclosed to end users if they are not able to choose competitive alternatives because of substantial financial penalties for termination of existing contract arrangements. A fresh look proposal will enhance an end user's ability to exercise choice to best meet its telecommunication needs."[26]

Numerous other states have also adopted fresh look requirements to facilitate the development of competition and ensure that all consumers are able to take advantage of alternative offerings. In fact, prior to passage of the federal Telecommunications Act, the states were at the forefront in developing fresh look schemes in order to ensure the development of competition in intrastate telecommunications markets. The New Jersey and California Commissions have each approved settlements which include fresh look provisions in the context of the intraLATA service market.[27]

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licenses under Title III of Communications Act).

[26] *Intermedia Communications of Florida, Inc.*, 1994 WL 118370 (Fla. P.S.C.), *reconsidered*, 1995 WL 579981 (Fla. P.S.C.); *see also Development of a Statewide Policy Regarding Local Interconnection Standards*, 1994 WL 148757 (Ill.C.C.) (providing customers with a 180 day fresh look period to terminate special access agreements of three years or more with incumbent LECs).

[27] *In re Sprint*, 1994 WL 386294 (N.J. B.P.U.) ("fresh look" imposed in a settlement related to the Board's investigation of intraLATA competition); *Re: Pacific Bell*, D.93-06-032, 49 CPUC 2d 496 (1993) (permitting "fresh look" for certain intraLATA MTS, WATS, and 800 service contract customers in the context of settlement).

In Pennsylvania, GTE proposed in early 1996 to provide discounts for customers committing to contracts for intraLATA toll service of between one and three years. The Pennsylvania Commission refused to accept GTE's proposal unless GTE offered the customers a fresh look by waiving the early termination charge for customers who chose to terminate the GTE plan within one year after the date that intraLATA presubscription was implemented within the customer's exchange.[28] The Pennsylvania Commission based its decision upon the following considerations:

> Our main concern here is that a GTE customer who locks into a one, two or three year term agreement with GTE Easy Savings Plan, before intraLATA presubscription is implemented in a particular exchange, would be required by GTE's tariffs to pay a penalty in the instance a more suitable intraLATA service became available. *As such, GTE could be viewed as cornering the market because of the early penalty charge that was established before intraLATA presubscription was implemented.*[29]

Likewise, the Ohio Commission imposed a fresh look requirement in that State's local exchange markets, noting that:

> the existence of certain long-term arrangements raise potential anticompetitive concerns since these arrangements have the effect of locking out the competition for an extended period of time and prevent consumers from obtaining the benefits of this competitive local exchange environment.[30]

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[28] 1996 WL 552841, R-00963692, R-00963692C0001 (Pa. P.U.C. Aug. 8, 1996).

[29] *Id.* at *4 (emphasis added).

[30] *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).

The Ohio Commission not only established a fresh look period for local exchange customers subject to long-term contracts, but also required the ILEC to inform its customers of this opportunity upon inquiry.[31] The Indiana and Wisconsin Commissions have also joined the growing group of state public utility commissions that have recognized the anticompetitive nature of ILEC long-term contracts. In the Indiana proceeding, Ameritech Indiana proposed a substantial increase in month-to-month rates for Centrex service, while holding constant its long-term rates for Centrex service. The Indiana Utility Regulatory Commission ("IURC") recognized that such an approach would compel consumers "to enter into the longer term arrangements with Ameritech, because of economic reasons, and thereby make these types of customers unavailable to new competitors who may later enter the market." The IURC decided not only to investigate Ameritech's practices under state law, but also concluded that it must do so under federal law:

> The federal Act gives this Commission clear directives which require us to encourage competition in the local service market and prohibits any actions which would create a barrier to entry for a new competitor. It is clear from the Conference Report attached to the Act, and the August 8, 1996 Federal Communications Commission's "First Report and Order" adopting initial rules to implement the federal Act, that the Act is designed to "remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress." FCC Docket Nos. 96-98 and 96-185, at page 7.[32]

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[31] *Id.* at Appendix A, Section VI.I.

[32] *In the Matter of an Investigation into Centrex Service Charters Offered by Indiana Bell Telephone Co., Inc., d/b/a Ameritech Indiana*, Cause No. 40612 (I.U.R.C. September 13, 1996), at 4. The Indiana Commission's investigation of the need for a fresh look in the local exchange market is ongoing. *Petition of US Xchange of Indiana, Inc. for an*

In the Wisconsin proceeding, the Public Service Commission ruled:

> a fresh-look procedure would *promote* competition in telecommunications by increasing the number of potential customers available to new entrants, and by significantly expanding the choices for customers to a larger array including, potentially, several facilities-based telecommunications network providers.[33]

The New Hampshire Commission, in an order similar to that entered by the Ohio Commission, imposed a fresh look requirement and required Bell Atlantic-New Hampshire to inform its long-term contract customers of the fresh look opportunity and of a commission-ordered modification option to the termination provisions of these contracts.[34] In its Order, at page 17, the New Hampshire Commission observed:

> Long-term contracts entered into when a monopoly is in place can have the effect of locking up a market for an extended period of time and in some cases can prevent consumers from obtaining the benefits of a competitive local exchange environment.

Investigation Regarding the Need for a "Fresh Look" Opportunity for Local Exchange Customers, Cause No. 41173 (I.U.R.C.).

[33] *Supplemental Findings of Fact, Conclusions of Law and Interim Order re Investigation of the Appropriate Standards to Promote Effective Competition in the Local Exchange Telecommunications Market in Wisconsin*, Docket No. 05-TI-138 (Wis. P.S.C. Sept. 19, 1996) (emphasis in original), at 4. The Wisconsin Commission has subsequently initiated an investigation regarding how it will implement the fresh look policies that it has concluded are in the public interest.

[34] *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).

Other states, such as Alabama[35] and Maine,[36] have ongoing proceedings to examine fresh look issues for the local exchange market.

This Commission should ensure that consumers are given similar opportunities to choose freely among competitive local exchange service providers without being subjected to substantial financial penalties imposed upon them in contracts entered into prior to the existence of competitive alternatives. Both Congress and the Florida Legislature have previously determined that competition in the local telephone market serves the public interest and that consumers will benefit from having a choice of carriers, products and services. In the absence of a fresh look, parties to long term contracts will be denied the benefits of competition for the duration of those agreements in direct contravention of the public policy favoring competitive choice. Moreover, a refusal to provide fresh look would implicitly sanction the ILECs' use of long term contracts to protect its customer base and suppress the development of competition.

IV. A FRESH LOOK RULE SHOULD BE ADOPTED AS PROPOSED BY THE COMMISSION AND AS MODIFIED IN KMC'S INITIAL COMMENTS.

KMC reiterates its support for the Commission's proposed fresh look rule, as modified by the recommendations set forth in KMC's initial Comments to address the scope of the rule, the definition of eligible contracts, and the imposition of termination liability associated with nonrecurring costs on consumers exercising a fresh look. GTE, by contrast, urges the

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[35] Docket Nos. 25703, 25704, Order Establishing Rulemaking Proceeding (Ala. P.S.C. Feb. 11, 1998).

[36] *Inquiry Into Whether Incumbent Local Exchange Carriers Should Be Required to Provide Their Customers with an Opportunity to Terminate Special Contracts, Pursuant to Request for Rulemaking by Freedom Ring Limited Liability Company,* Docket No. 96-699 (Me. P.U.C. April 23, 1997).

Commission to make several changes to the rule that would eviscerate its effectiveness. First, GTE criticizes the proposed window of two years for a fresh look as too long, giving customers the ability to reject contracts that may have been entered into even in late 1999.[37] GTE claims that the grant of over 250 ALEC certificates statewide is proof of competition in the market.[38] What GTE ignores again, however, is that there is not an immediate flash-cut to competition in each market, and certification certainly does not equal competition. The real question is not how many certificates have been issued, but rather what carriers are using those certificates in which locations. There may be many exchanges in which no facilities-based competitors are offering alternative service to consumers today. In such places, consumers continue to suffer from a lack of telecommunications service options, and therefore have little choice but to sign long-term contracts with the ILECs if they want lower monthly rates. They should not be denied the benefits of a nascent competitive market simply because the Commission has issued certificates to carriers operating in other exchanges.

GTE also criticizes the proposed rule because of concerns about the administrative costs associated with tracking termination liabilities and recovering nonrecurring costs.[39] GTE does not, however, quantify these administrative costs. Moreover, under KMC's modifications to the proposed rule, the Commission would establish an expedited dispute resolution procedure that could help keep the time and expense associated with termination liability disputes to a

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37 GTE Testimony, at 12.

38 *Id.*

39 *Id.* at 14-15.

minimum.[40] KMC therefore submits that GTE's unquantified concerns about administrative costs are not cause for declining to adopt a fresh look rule in this case.

V. CONCLUSION

In light of the foregoing, KMC respectfully requests that the Commission adopt its proposed fresh look rule, as modified by the recommendations set forth in Attachment KMC-1 to KMC's initial Comments in this docket.

Respectfully submitted,

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Counsel for
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and KMC Telecom II, Inc.

Dated: April 28, 1999

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[40] KMC Comments, at 5-6.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of RESPONSIVE 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 28nd day of April, 1999.

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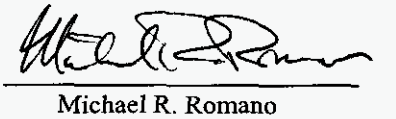

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