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

June 16, 1999

Re: Docket No. 980253-TX
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

Dear Ms. Bayo:

Please find enclosed an original and fifteen copies of GTE Florida Incorporated's Posthearing Comments for filing in the above matter. Also enclosed is a diskette with a copy of the Comments in WordPerfect 6.1 format. 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,

Kimberly Caswell

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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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: June 16, 1999

GTE FLORIDA INCORPORATED'S POSTHEARING COMMENTS

GTE Florida Incorporated (GTE) files its Posthearing Comments in this proceeding.

Executive Summary

From a policy perspective, the Commission should not adopt the proposed fresh look rule. From a legal perspective, it cannot do so.

The Commission derives its power solely from the Florida Legislature. That Legislature has not given this Commission the authority to terminate binding and lawful contracts between incumbent local exchange companies (ILECs) and their customers. On the contrary, the Legislature explicitly confirmed the ILECs' contract authority in the 1995 revisions to Chapter 364. (Fla. Stat. §364.051(6)2.) At the same time, it abolished another statute tying increased pricing and other flexibility to "effective competition" for particular ILEC services. (Former Fla. Stat. §364.338). Thus, the Legislature gave the ILECs increased ability to meet competitive offerings when the local exchange was opened. The Commission cannot alter this legislative scheme with a fresh look requirement undermining the very contract latitude the Legislature has granted the ILECs.

Even if the Commission could find some statutory authority for a fresh look rule, the proposed rule would be impermissible on constitutional grounds. Both the United States and Florida Constitutions forbid impairment of contracts in the absence of a broad public purpose. In fact, Florida Courts have tolerated almost no contract impairment, let alone the drastic disruption of contract the fresh look rule would cause. The contracts at issue were freely entered, typically by large commercial customers, to secure advantageous rates or conditions. Allowing this relatively small group of customers to escape their contract obligations will not remedy any general social or economic problem, as it must to avoid unconstitutional impairment. Even if some sufficient public purpose could be found, the proposed rule is indefensible because it is not the least restrictive means of meeting this interest.

Fresh look suffers from the additional constitutional infirmity that it works an impermissible taking under the Fifth Amendment of the U.S. Constitution. The ILECs have constitutionally protected property rights in their contracts. Fresh look would take these rights without just compensation. Moreover, as the Commission itself has held, it has no jurisdiction to determine what compensation is just.

Even if the formidable legal hurdles to a fresh look rule did not exist, the proposal would have to fail for lack of a sound policy foundation. Fresh look will benefit the very market segment that has had the most competitive options for quite some time--large business customers, mostly in metropolitan areas. These sophisticated customers are well able to protect their own financial interests. They would have been aware that local competition was expanding in 1995, when the Florida Legislature opened the local exchange, and certainly in 1996, when the federal Telecommunications Act (Act) was adopted. They could be expected to factor into their contract negotiations potential competitive changes, just as they factor in a host of other things, including possible technological changes.

The alternate local exchange carriers (ALECs) have produced no support for their premise that large business customers have not had, and still do not have, a choice of providers. There are over 270 certificated ALECs in Florida. GTE alone has signed 110 interconnection and/or resale contracts. Competition comes from both resellers and facilities-based providers. Intermedia Communications Inc., the largest facilities-based ALEC in the country, operated in GTE's area long before 1996, when it began local exchange operations. Today, ALECs own and operate a total of 20 switches in GTE's service area. Facilities-based competitors to GTE include AT&T, MCI WorldCom, ICI, Winstar, Teligent, e.spire, Time Warner, and US LEC.

The Commission's own statistics show that ALECs have made substantial gains in the business market. The national data confirm the accelerated growth in ALEC business lines. This trend should be particularly pronounced in Florida, where markets are rapidly expanding. Indeed, the ALECs here tripled their access line gains in just one year, from 1997 until 1998. The ALECs, many of which are associated with huge, well-financed corporations, have made these substantial strides in the absence of a fresh look rule. They will continue to do so without one, especially since the Commission already requires ILECs to resell their contracts to competitors at a discount.

For legal and policy reasons, fresh look has not been popular among the states. Many have rejected it for legal or policy reasons or both. To GTE's knowledge, only two states–Ohio and New Hampshire--have adopted fresh look rules in the local exchange context. These rules, adopted back in 1996 and 1997, are much more moderate than the Staff's proposal. For instance, they use a fresh look window of 180 days (as opposed to the arbitrary 2-year period afforded in the draft rule) and require repricing of the terminated contract to the shorter term (instead of payment of unrecovered nonrecurring charges). Indeed, no fresh look requirement anywhere in any context, local exchange or otherwise, is nearly as extreme as the rule proposed here. Because it is so unreasonable, the draft rule, if adopted, invites an appeal.

I. The Commission Has No Statutory Authority to Order Fresh Look.

As the Commission knows, it cannot take any action beyond the scope of authority granted by the Florida Legislature; "the commission derives its power solely from the legislature." United Tel. Co. of Fla. v. Pub. Serv. Comm'n, 496 So. 2d 116, 118 (1986), citing Fla. Bridge Co. v. Bevis, 363 So. 2d 799, 802 (1978). "Actions by an agency inconsistent with legislative purposes or beyond the scope of the agency's authority are ultra vires and without legal effect." Burris, Administrative Law, 1987 Survey of Florida Law, 12 Nova L. Rev. 299, 316 (1988). See also State Dep't of Insurance v. Ins. Svcs. Office, 434 So.2d 908 (Fla. 1st DCA 1983). "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." United Tel., supra, at 118.

The proposed fresh look rule does not satisfy this basic principle that the Commission's actions must be grounded in statutory authority. There is nothing in Chapter 364 that gives the agency the power to abrogate valid and lawful contracts. There is no indication that the Legislature disapproved the ILECs' use of long-term contracts. On the contrary, the Legislature expressly confirmed and expanded the ILECs' contract authority when it revised Chapter 364 in 1995:

> Nothing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a specific geographic market or to a *specific customer* by *deaveraging* the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.

(Fla. Stat., §364.051(6)(a)2.)

This language is part of a carefully considered telecommunications regulatory scheme in which the ILECs would lose their exclusive franchises, but would gain, in return, tools necessary to meet emerging competition. The Legislature specifically designated *individual contracts and volume and term discounts as some of these essential tools.* It did <u>not</u> condition the ILECs' use of contracts on a certain level of competition in the market. It did <u>not</u> constrain the ILECs' ability to offer volume and term discounts. And it did <u>not</u> forbid contracts exceeding a certain duration.

If the Legislature had wished to condition the ILECs' contract or other pricing flexibility, it certainly knew how to do so. Before Chapter 364 was overhauled in 1995, it contained language permitting the ILECs pricing flexibility only where the Commission had determined a particular service was "effectively competitive." (Former Fla. Stat. § 364.338.) In making this determination, the Commission was told to evaluate, among other things, the ability of consumers to obtain functionally equivalent services and the ability of competitors to make equivalent services available at competitive rates, terms, and conditions.

All of this language was eliminated in 1995. ALECs, however, urge the Commission to act as if it's still there. They argue that the local exchange market is not now and was not "effectively competitive"–whatever that is supposed to mean–when the ILECs executed contracts with large customers. (See, e.g., AT&T Comments, Apr. 29, 1999, at 2; KMC Comments, Apr. 22, 1999, at 2.) They want the Commission to perform the same kind of analysis it was charged with under the old statute and to adopt a rule based on the conclusion that long-term contracts and tariffed term plans are anticompetitive because there was and is no "effective competition."

This, the Commission cannot do. A fresh look rule will impermissibly undermine the discounting and contract flexibility the Legislature has explicitly granted to the ILECs. Under the statute, if the ILECs' actions in meeting competition are not unreasonably discriminatory or anticompetitive, then they are permissible. If the Legislature wanted the Commission to have the discretion to adjudge long-term contracts to be anticompetitive, it would not have included contracts in the list of permissible approaches to meeting competition.

The ALECs do not deny that the Commission must have the statutory authority to implement fresh look, nor do they contend that the Legislature has given the Commission authority to abrogate valid and lawful contracts. Instead, they tell the Commission that it does not need any such specific authority, but can instead rely on more general statutory provisions. In this regard, they cite language from section 364.01, the general jurisdictional recitation, reflecting the Commission's authority to "[e]ncourage competition through flexible regulatory treatment" among telecommunications providers and to "[p]romote competition by encouraging new entrants into telecommunications markets" ((See, e.g., FCCA Responsive Comments, Apr. 29, 1999 at 3-4, quoting Fla. Stat. §§364.01(4)(b) & (d).) The ALECs also rely on section 364.19, which states that the Commission "may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons."

Neither section 364.01 nor 364.19 confers upon the Commission the power to adopt a fresh look rule. Permitting termination of valid and legally enforceable contracts would be drastic action. Nothing in section 364.01's general approval of flexible regulatory treatment among providers or its encouragement of competitive market entry grants or even implies any authority for such action. These provisions are not, as the ALECs seem to believe, carte blanche to do anything, no matter how extreme or unjustified, in the name of competition.

Likewise, section 364.19 is not the specific grant of authority needed to support contract termination. The power to "regulate, by reasonable rules, the terms of telecommunications service contracts" does not include the power to sanction termination of entire contracts that already exist. Rather, the language means just what it says. Regulating contract terms necessarily means that the contract continues to exist–not that it is subject to abolition by the customer's unilateral termination. A fresh look rule doesn't "regulate" contract "terms" because it doesn't consider the terms themselves at all. The

Commission here has not been asked to review the lawfulness or reasonableness of any particular termination liability terms in any contracts. Rather, it has been asked to do away with entire contracts without regard to the specific language of those contracts.

The Commission has traditionally exercised some control over contract terms to ensure that they are consistent with the public interest and the policies and rules of the Commission. For instance, intraLATA toll contracts must embody the access charge imputation policies of this Commission. (See GTE Gen. Svcs. Tariff A5.6.1.) The rates in tariffed term plans might change if the Commission approves such a change. But this kind of prospective supervision of the reasonableness of particular contract terms is a far cry from drastic retroactive alteration of a contract, without any regard for what that contract actually says.

Even if the proposed fresh look rule could be construed as regulating contract terms under section 364.19, it nonetheless fails the provision's "reasonable rule" test. As explained below in Section II.A.3, it is not reasonable to adopt a rule which pretends, contrary to objective evidence, that contract customers did not have competitive alternatives when they executed their contracts with the ILECs. And it is obviously not reasonable to adopt a rule that is unconstitutional (see Section II). Indeed, statutory provisions are only relevant if the proposed action is constitutional.

As noted above, numerous states have rejected fresh look for legal or policy reasons or both. The North Carolina example has particular resonance for the Commission's deliberations on its authority to adopt fresh look. In May of last year, the North Carolina Utilities Commission dismissed for lack of jurisdiction the fresh look petition of KMC and

ICG Telecom Group. Like Florida, North Carolina has no statute granting the Commission authority to adopt fresh look rules. The ALECs in that case argued, as they have here, that no such specific authority is necessary; that Commission could rely on its general statutory authority to implement local competition; and that the agency's power to adjust contract rates includes the power to supersede the contracts themselves.

The North Carolina Commission rejected the ALECs' arguments, finding that "the better legal analysis is that put forth by the opponents of Fresh Look, particularly the straightforward position advocated by the Public Staff, that the Commission lacks the statutory authority necessary to adopt and implement Fresh Look rules." In re: Local Exchange and Local Exchange Access Telecomm. Competition, Order Dismissing Fresh Look Petition on Jurisdictional Grounds, Docket P-100, Sub 133 at 12 (May 22, 1998) (NCUC Order Dismissing Fresh Look Petition). The Commission agreed that the general statutes and case law cited by the CLECs "do not constitute the clear grant of authority necessary to justify and support Commission intervention into statutorily-authorized, valid, and binding contracts between ILECs and their customers." Id. It observed that Congress, the FCC, and the North Carolina Legislature had each had the opportunity to impose fresh look requirements in the local exchange market, but had not done so.

Finally, the North Carolina Commission pointed out that the Legislature there had amended the telecommunications statute to expand price-regulated ILECs' contract authority. It noted that the relevant statute requires the Commission to permit ILECs to offer competitive services pursuant to contract, and that such contracts need only be filed for information. The Commission concluded that "[t]hese are not the actions of a General

Assembly intent on conferring or mandating Fresh Look authority on the Commission." Id.

As explained, the Florida Legislature also requires the Commission to permit the ILECs to use contracts. And in Florida, those contracts need not be filed at all, not even for informational purposes. Plainly, the ILECs' explicit and expanded statutory latitude to use discounts, contracts, and other measures to meet competition does not reflect the actions of a Legislature intent on *conferring or mandating fresh look authority* on this Commission.

II. The Proposed Fresh Look Rule Is Unconstitutional.

A. The Rule Would Violate the Contract Clause.

Article I, section 10 of the United States Constitution states that: "No State shall...pass any...Law impairing the obligation of Contracts." The same prohibition appears in Article I, section 10 of the Florida Constitution: "No...law impairing the obligation of contracts shall be passed."

The U.S. Supreme Court has interpreted this prohibition to mean that states may not take action that substantially impairs a contractual obligation unless that action is justified as reasonable and necessary to achieve an important public purpose. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). The severity of the contract impairment increases the level of scrutiny to which the regulation or legislation will be subjected. Energy Reserves Group. Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S. Ct. 697, 704 (1983). *Regulation providing a benefit to special interests, rather than eliminating* a broad and general social or economic problem, will be found to violate the contract impairment clause. Id. Moreover, "[l]egislation adjusting rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241, 98 S.Ct. 2716, 2721, 57 L.Ed.2d 727 (1978).

Florida Courts construing the State constitution's contract clause are "not bound to accept as controlling" the U.S. Supreme Court's interpretation of the parallel federal constitutional provision. Pomponio et. al. v. The Claridge of Pomponio Condominium, Inc., etc., et al., 378 So. 2d 774, 779 (1979). Rather, the Florida Supreme Court considers the United States Supreme Court opinions "helpful and persuasive" and has adopted "an approach to contract clause analysis similar to that of the United States Supreme Court." Id. at 779-80. Although the Florida Supreme Court's "similar" test for constitutionality considers the same kinds of factors the U.S. Supreme Court's analysis does, there is a key distinction: "any realistic analysis of the impairment issue in Florida must logically begin...with...the well-accepted principle that virtually no degree of contract impairment is tolerable in this state." Pomponio at 780, citing Yamaha Parts Distributors Inc. v. Ehrman, 316 So.2d 557 (1975). Because the Florida analysis is suffused with this principle of intolerance for contract impairment, the constitutional barrier to action impairing contracts here is, if anything, even more formidable than it is in the federal arena.

As the Florida Supreme Court has observed, "Our conclusion in Yamaha that 'virtually' no impairment is tolerable necessarily implies that some impairment is tolerable, although perhaps not so much as would be acceptable under traditional federal contract clause analysis." Pomponio at 780. The 11th Circuit Court of Appeals confirms the difference in the state and federal analyses: "Although the wording of both contract clauses is almost identical, the interpretation of the clauses has not been identical....Although the approach is similar, Florida courts interpreting the Florida contract clause appear to tolerate less impairment than the federal courts interpreting the federal contract clause." Geary Distributing Co., Inc. v. All Brand Importers, Inc., 931 F. 2d 1431, 1434 n.4 (1991).

Indeed, Florida Courts have emphasized, time and again, the constitutional repugnance to state action adjusting contract rights in Florida. See, e.g., State Farm Mutual Auto Insurance Co. v. Hassen and Hassen, 650 So. 2d 128, 134 (1995) ("The polestar of any analysis of whether a statute constitutionally impairs an existing contract is the fundamental principle that essentially no degree of impairment will be tolerated, no matter how laudable the underlying public policy considerations of the statute may be"); Sarasota County v. Andrews et al., 573 So.2d 113, 115 (Fla. 2d DCA 1991) ("Although the court in Pomponio suggests that some impairment is tolerable, it specifies that the bedrock of its analysis is the principle that virtually no degree of impairment will be allowed and indicates that the amount of impairment that might be tolerated will probably not be as much as would be acceptable under a traditional federal analysis"); Gans v. Miller Brewing Co., 560 So. 2d 281 (Fla. 4th DCA 1990) ("virtually no degree of contract impairment has been tolerated in this state"); Advisory Op. To the Governor, 509 So. 2d 292, 314 (1987) ("Any legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution"); Park Benziger & Co., Inc. v. Southern Wines & Spirits, Inc., 391 So. 2d 681, 683 (1980) ("Exceptions have been made to the strict application of [the federal and Florida Contract Clauses] when there was an overriding necessity for the state to exercise its police powers, but virtually no degree of contract impairment has been tolerated in this state"); State of Florida, Dep't of Transp. v. Chadbourne, Inc., 382 So. 2d 293, 297 (1980) ("This Court has generally prohibited all forms of contract impairment"); Dewberry v. Auto-Owners Insurance Co., 363 So. 2d 1077, 1080 (1978) ("It is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution....Any conduct on the part of the legislature that detracts in any way from the value of the contract is inhibited by the Constitution"); United Gas Pipe Line Co. v. Bevis, 336 So. 2d 560, 564 n.18 (1976) ("We have generally prohibited all forms of contract impairment"); Yamaha, 316 So. 2d 557 at 559 ("Virtually no degree of contract impairment has been tolerated in this state").

Keeping in mind this fundamental predisposition against contract impairment, the Florida Supreme Court evaluates the permissibility of an impairment in the following manner:

> To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Pomponio at 780; see also Park Benziger, 391 So. 2d at 683.

This balancing test thus requires consideration of essentially the same questions that federal courts will ask: (1) How severe is the contract impairment?; (2) What evil does the state action seek to remedy?; and (3) Does the impairment unreasonably intrude into the parties' bargain to a degree greater than necessary to achieve its objective?

The test stated in Pomponio contemplates an additional inquiry into "the source of authority under which the state purports to alter the contractual relationship." Because GTE discussed that issue in detail, above, in section I, it will not be treated again here, except to note that it has a constitutional dimension apart from being a stand-alone factor that will prohibit adoption of fresh look. In light of the Florida Courts' fundamental aversion to contract impairment, the need for clear and express delineation of authority for the action is all the more pivotal.

As noted, U.S. Supreme Court rulings inform the Florida Courts' assessment of the factors in this test, but the Florida Courts' balancing process is more markedly tipped toward protecting the sanctity of contracts. Below, the proposed fresh look rule is considered under each of the above prongs, showing that the rule fails miserably to pass constitutional muster. There is no "evil" or "overriding interest" to justify the rule's severe contract impairment, which goes demonstrably much farther than necessary to meet even the rule's purported objective.

1. The Rule Would Severely Impair Contracts.

In conducting a contract impairment analysis under constitutional law, the first question is whether there has been any contract impairment. At this initial stage, the U.S. Supreme Court will look for "substantial impairment of a contractual relationship." Energy Reserves Group, Inc., 459 U.S. at 704. The severity of the impairment increases the level of scrutiny to which the regulation or legislation will be subjected. Id. Where impairment of contract rights is severe, a more careful examination of the nature and purpose of the State action is necessary. Allied Structural Steel, 438 U.S. at 244.

Although some Florida decisions cite the "substantial impairment" test and they agree that severe impairment compels more exacting scrutiny, United States Fidelity and Guaranty Co. v. Dep't of Insurance, 453 So. 2d 1355, 1360 (1984), they routinely dispense with any explicit finding of substantiality. Indeed, the Supreme Court has suggested that action going "beyond mere inconvenience" is an impairment that will call into question its constitutionality. Pomponio at 781. This relaxed approach is consistent with the greater predisposition toward intolerance of impairment in Florida.

In any event, there is no doubt that the impairment worked by fresh look would be substantial. Fresh look would rewrite termination liability provisions with the specific intent of allowing end users to terminate their contracts. The resulting impairment thus goes beyond substantial to total. After a customer's exercise of fresh look rights under the proposed rule, nothing would remain of the customer's contractual relationship with the ILEC. Such a drastic impairment will require particularly demanding scrutiny of the purpose and nature of the proposed rule.

This is true even though the threshold inquiry into the extent of impairment will include a consideration of whether or not the industry at issue has been regulated in the past. See, e.g., Energy Reserves, 459 U.S. at 411, 413; United States Fidelity and Guaranty Co.,453 So. 2d at 1360, citing Allied Structural Steel Co., 438 U.S. at 242 n. 13. Parties' expectations are the key to determining impairment. Courts will assess the foreseeability not of regulation in general, but of the particular kind of regulation at issue.

For example, in Energy Reserves, the Court found no significant impairment flowing from a statute regulating the price of natural gas, where the statute altered prices in contracts between a utility and energy company. In doing so, the Court noted: "Price regulation existed and was foreseeable as the type of law that would alter contract obligations." Energy Reserves at 416.

Additionally, "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." United States Trust Co. of New York v. New Jersey et al., 431 U.S. 1, 19; 97 S. Ct. 1505; 52 L. Ed. 2d (1977) (substantial and unconstitutional impairment found in law repealing covenant to bondholders, permitting diminution of pledged revenues and reserves); see also Manning v. Travelers Insurance Co., 250 So. 2d 872, 874 (1971) ("rewriting antecedent contracts" will offend constitutional impairment prohibition, but "legislative supervision of the making of contracts" will not.) Courts will further try to determine whether the abridged right was "reasonably relied" on by the complaining party, Allied Structural Steel Co., 438 U.S. at 246, or one that "substantially induced" the party to enter the contract." City of El Paso v. Simmons, 379 U.S. 497 (1965).

Because fresh look is specifically intended to adjust the express terms of the ILECs' agreements with their customers, it is the type of regulation most likely to upset the contracting parties' expectations. Moreover, fresh look is not the kind of regulation the ILECs (or their customers) could have reasonably foreseen when they signed their contracts. Foreseeable changes might have included, for example, rate adjustments based on associated tariffs, or rate adjustments based on a Commission determination that the contract did not properly cover costs. But neither the ILECs nor their customers could reasonably have expected that the Commission would rewrite contract termination liability provisions for the purpose of letting customers exit their ILEC contracts. These provisions have been included in ILEC contracts since the initiation of contract authority in the early 1980s. Indeed, they are customary features of most commercial contracts, including the ALECs' own long-term contracts with their customers. (Marek, Hearing Tr., 19-20.)

In addition, termination liability provisions are central to GTE's contracts. These provisions ensure enforcement of the contract and an appropriate measure of recovery if the customer terminates early. Fresh look is expressly directed to removing this means of enforcement so the customer feels no obligation to continue the contract. Thus, the very rationale behind fresh look proves the critical importance of termination liability provisions to the contract. Without the agreed-upon provisions, GTE can no longer enforce its contract. It is self-evident, then, that these provisions "substantially induced" GTE to execute the contracts at issue and that GTE "reasonably relied" on their continued existence.

There is no question that fresh look will cause an impairment serious enough to call into question the rule's constitutionality, particularly in consideration of Florida's high degree of intolerance for contract impairment. Thus, the inquiry moves to an assessment of the public purpose for fresh look.

2. There Is No Broad Social Evil to Be Remedied.

After finding impairment of a contract, federal courts ask whether there is a "significant and legitimate public purpose behind the regulation [citation omitted], such as the remedying of a broad and general social or economic problem." Energy Reserves, 459 U.S. at 411-12. See also Allied Structural Steel Co., 438 U.S. at 247 (if the state action disrupts contractual expectations, it must be "necessary to meet an important general social problem"). "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." Energy Reserves at 412. State action that imposes a "generally applicable rule of conduct designed to advance a broad societal interest," Exxon Corp. v. Eagerton, 462 U.S. 176, 191 (1983), is more likely to survive a constitutional challenge than a law designed to directly "adjust the rights and responsibilities of contracting parties." United States Trust Co. v. New Jersey, 431 U.S. 1.

Although the test stated in Pomponio contemplates inquiry into the "evil" the state action seeks to remedy, Pomponio, supra, at 789, Florida Courts routinely find it unnecessary to engage in this depth of analysis. The aversion to contract impairment here is so entrenched that courts will often end the constitutional analysis once any impairment is apparent, without even considering any potential countervailing interest of the state in exercising its police power. Indeed, a number of decisions suggest that no public purpose, no matter how meritorious, can justify contract impairment.

In this regard, the court in State Farm observed that: "It has...been the long established law of this state that a statute contravenes the constitutional prohibition against impairment of contracts when it has 'the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts.'" State Farm, supra, at 134, quoting Manning v. Travelers Ins. Co., 250 So. 2d 872, 874 (1971). "The polestar of any analysis of whether a statute constitutionally impairs an existing contract is the fundamental principle that essentially no degree of impairment will be tolerated, no matter how laudable the underlying public policy considerations of the statute may be." State Farm at 134, citing Pomponio and Sarasota County. In finding that application of a new statute would unconstitutionally diminish the value of an insurance contract, the Court stated: "[W]e emphasize again, the fact that the underlying purpose of the new statute may have been just and equitable does not authorize its application to a pre-existing contract when to do so would contravene the contract impairment clause of the Florida Constitution." State Farm at 138-39.

Likewise, in Chadbourne, the Florida Supreme Court considered the constitutionality of a 1976 statutory amendment which operated to alter preexisting contracts between road contractors and the Department of Transportation. The amendment was the Legislature's attempt to eliminate the substantial windfalls for contractors that it had inadvertently allowed with a 1974 statute allowing upward adjustments to materials prices in light of the OPEC oil embargo in 1973. The Court noted that the 1976 amendment "was a noble and just attempt to correct a consequence not foreseen in the 1974 Act." It went on to observe, however, that, "Unfortunately, that part of the amendment which attempted to affect existing contracts flies into the wall of absolute prohibition. The fact that a law is just and equitable does not authorize its enactment in the face of a constitutional prohibition." Id. at 297.

Thus, once the Court found contract impairment–despite the "noble and just" purpose of the impairment–it found a constitutional violation. Because of the "absolute prohibition" of the contract clause, the Court did not deem it necessary to weigh the justification for the law against its effect on contracts. It simply emphasized that it had "generally prohibited all forms of contract impairment," and concluded that the 1976 amendment was impermissible because it "clearly affected existing contractual rights" of the contractors. Id. at 297.

The Court took a similarly summary approach in advising the Governor on the constitutionality of a tax increase that would retroactively affect construction contracts, potentially making certain contracts unprofitable. The Court stated: "Unquestionably, contract rights are ordinarily subject to the state's powers of taxation. It is equally indisputable, however, that rights existing under a valid contract enjoy protection under the Florida Constitution." Advisory Opinion, supra, 509 So. 2d at 314. The Court did not factor the state's justification for exercise of its taxing power into its analysis. Rather, the Court opined that the statute at issue was facially unconstitutional because "[a]ny legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution....A statute which retroactively turns otherwise profitable contracts into losing propositions is clearly such a prohibited enactment." Id. at 314-15.

The Court in Sarasota County took the same view as to the inviolability of contracts. There, Coast Federal Savings and Loan Association, challenged the constitutionality of a county ordinance that had the effect of changing the priority of property liens. Once the ordinance took effect, Coast Federal's mortgage, a first lien, was subordinated to Sarasota County's lien for a fine. The Court did not consider at all whether the ordinance served a significant or legitimate public purpose. Rather, it explained that state action offends the contract clause when it "'has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts.'" Id., quoting Manning, 250 So. 2d at 874. The ordinance was deemed unconstitutional because it "worked an immediate impairment on Coast Federal's preexisting mortgage lien.....This immediate diminishment in the value of Coast Federal's contract is repugnant to our constitutions." Sarasota County, 573 So. 2d at 115. In focusing on the immediate impairment, the Court expressly declined to consider whether the ordinance would cause Coast Federal to suffer economic loss. Id. at 115.

When the Florida Courts do proceed beyond the impairment finding to an examination of any countervailing state interest behind the law or regulation, this interest will be very closely scrutinized. The Courts will look for an "evil" which the action seeks to remedy, Pomponio, 378 So. 2d at 780, and exceptions to the contract impairment prohibition will be made only when there is "an overriding necessity for the state to exercise its police powers." Park Benziger, 391 So. 2d at 683.

In Park Benziger, the Florida Supreme Court reviewed a statute which operated to modify existing contracts between liquor manufacturers and distributors. In that case, a liquor company, Park Benziger, had given an exclusive distributorship to Southern Wine and Spirits. Application of the statute would change the contract by making it terminable only upon a showing of good cause to an administrative agency, instead of terminable at will. The Court began its analysis with due recognition of a state's authority, guaranteed by the U.S. Constitution, to regulate the sale and distribution of liquor. It cited several examples of permissible state liquor regulations, and noted the trial court's opinion that the purpose of the statute was the prevention of "tied-house evil," or the monopolistic control of distributors by manufacturers of intoxicating liquors. Id. at 683. Nevertheless, the Court concluded, with virtually no discussion, that this objective did "not create sufficient need for the exercise of police power in conflict with the parties' constitutional rights." Id. Rather than engage in a searching inquiry of the state's purpose, the Court again relied mainly on the precept that "virtually no degree of contract impairment has been tolerated in this state." Id.

In United Gas Pipe Line, United Gas challenged a statute giving the Florida Public Service Commission authority to set rates for sales to industrial customers, which were otherwise exempt from Commission jurisdiction. Under that law, some of United's customers had asked the Commission to approve lower gas prices than those specified in their contracts with United. United claimed unconstitutional contract impairment. The Court agreed, finding no public purpose to justify the law: "no matter how beneficent the public purpose behind its enactment, the selective and unusual methodology for authorizing price-only regulation is an improper exercise of the state's police power. Any statute enacted as an exercise of sovereign policy power should, at a minimum, further a broad 'public' interest." Because the law benefitted only "a limited number of commercial enterprises," rather than "the general public," it was impermissible. United Gas, 336 So. 2d at 563-64.

In light of this precedent, it is impossible for the Commission to justify the proposed fresh look rule as a constitutional exercise of its police power. The rule would rewrite antecedent contracts for the express purpose of allowing customers to terminate those contracts. It would change the parties' substantive rights and immediately diminish the value of the ILEC's contract. These facts alone have been enough for Florida Courts to find unconstitutional impairment of contracts, even in the face of laudable state interests. The Court would likely employ the same summary analysis here, especially in light of the aggravating factors–the total impairment of contract (discussed in Section II.A.1 above) and the potential transformation of otherwise profitable contracts into "losing propositions."

Even if the inquiry progresses beyond an examination of the impairment to a deliberate assessment of the underlying state interest, that interest will surely be deemed inadequate to render the impairment permissible. Fresh look does not meet a "general social problem." There is no "overriding necessity" for fresh look, nor does it remedy any "evil." Rather, the purpose of the fresh look rule is "[t]o enable ALECs to compete for existing ILEC customer contracts covering local telecommunications services offered over the public switched network, which were entered into prior to switched-based substitutes for local exchange telecommunications services." (Notice of Development of Proposed Rule, Docket No. 980253-TX, Fla. Admin. Weekly, Vol. 25, No. 13, at 1339 (Apr. 2, 1999).) These "[e]nd-user customers should benefit from the proposed rules by having the opportunity to obtain services at lower rates with limited liability for contract termination charges." (Staff Recommendation in Docket No. 980253-TX, March 16, 1999 at 4.)

The contract customers at issue here, as Staff itself has attested, are mostly large, sophisticated businesses. (See discussion at Section III.A.) So the proposed regulation is specifically designed to benefit the relatively "limited number of commercial enterprises" which take service under contracts. The Commission expects that these customers will enjoy lower prices. This advantage, which will not inure to the general public, is precisely the sort of benefit to special interests that will be deemed an unconstitutional impairment of contract.

Plainly, there is no public interest in "protecting" large business customers from the effects of the valid and lawful contracts they entered precisely to obtain advantageous pricing and other terms not available to most other customers. No "broad and general social or economic problems" will arise if these customers are simply required to finish out the term contracts they agreed to. And just as an administrative agency cannot compel continuation of an agreement that is terminable at will, Park Benziger, supra, it cannot make a contract unilaterally terminable at will by rewriting termination liability provisions.

The proponents of fresh look argue that the rule is justified by the Commission's legitimate interest in promoting local competition. GTE does not dispute that the Commission has a valid interest in encouraging local competition. But even if one accepts the legitimacy of this general objective (leaving aside, for the moment, the lack of statutory authority for fresh look), the rule will not, and is not designed to, advance that interest. Fresh look does not purport to foster local competition in general. Instead, it is directed to encouraging competition in the very segment of the local market that is already the most competitive and to benefitting the very group of customers that already has the most competitive alternatives. This selective and unusual method of purportedly advancing competition will fail even the most lenient test for public necessity.

3. Fresh Look Is an Unreasonable Intrusion into the Parties' Bargain.

Even if we pretend, for the moment, that the purpose offered for the rule is adequate–that is, allowing contract customers to terminate contracts executed at a time when there were supposedly no alternatives to ILEC services–fresh look would fail the next test: "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 United States Trust, 431 U.S. at 22. This is because there were and are, in fact, competitive alternatives for many customers with ILEC contracts.

Aside from affecting contracts that would be signed even up until the end of this year, the draft rule will provide a fresh look window of two years from the date of enactment; it will not permit repricing of the contract to the shorter term the customer actually took; and it will force the ILEC to maintain billing records for entities that are no longer its customers. All of these aspects of the rule are unreasonable and inappropriate to the purpose offered for it.

The year 2000 cut-off for fresh look eligibility is not rationally linked to the rule's purported purpose of allowing customers to terminate contracts entered prior to ALEC competition. As explained below, in Section III.B., it is an objective fact that there is now and has been for some time competition for the services and customers at issue here. The ALECs have presented no evidence to prove their contentions to the contrary. In fact, the evidence proves just the opposite. For instance, according to the Commission's 1996 Local Competition Report, Time Warner started providing local service as of

September 1, 1996 (Hearing Tr. 16), and there was ALEC competition for BellSouth services in Orlando and Lake Mary as early as 1996. (Hearing Tr. 116). Many exchanges with a significant concentration of business customers were served by ALECs as early as 1996. (Hearing Tr. 58.) By 1998, there were at least 51 ALECs operating in Florida. (FPSC, "Competition in Telecomms. Markets in Florida," Dec. 1998 (1998 Local Competition Report), at 45.) Allowing the exercise of fresh look for contracts entered into up until 2000 thus makes no sense in terms of even the rule's purpose. The proposed eligibility date will give ALECs a second chance to take customers they have unsuccessfully solicited in the past.

For example, GTE has been competing with facilities-based ICI since 1996. ICI wins some business customers; GTE wins others. That's how a competitive marketplace works. The rule, however, will disrupt this fair and efficient competition by allowing ICI to market to these customers, this time armed with the knowledge of the terms in the customer's contract with GTE. Even though the customer chose GTE over ICI--and so had a competitive alternative when it signed the GTE contract--the proposed fresh look rule would allow termination of that contract .

As noted below in Section III, Staff originally recommended denial of the ALECs' fresh look petition. When it later proposed a rule at the Commission's suggestion, that rule was limited to contracts that had been entered into prior to January 1, 1997. Staff chose this date based on the rationale that "the numerous interconnection agreements entered into during 1996 marked a competitive milestone in Florida's telecommunications environment." (Staff Recommendation in this Docket, March 4, 1999, at 15.) It specifically rejected ALEC arguments that the date should be January 1, 1999. Staff relied on statistics about the ILECs' use of CSAs to show that the ILECs were responding to the competitive environment. Id. at 15-16.

The proposed date was changed to 2000 upon a suggestion made at the March 16, 1999 agenda (Ag. Conf. Tr., Item 4, at 32.) The modification date appears to be motivated by the objective of including more contracts within the scope of the rule. This is inappropriate to the rule's purpose and thus offensive to the Florida and federal Constitutions. The Commission might just as well choose 2005 or 2020 as 2000. All of these dates are arbitrary; none is linked to an assessment of the availability of competitive alternatives, which is supposed to be the reason for allowing the fresh look opportunity.

The proposed two-year fresh look window (let alone some ALECs' proposed four-year window) is just as unreasonable and inappropriate. Sprint, an ALEC, testified to how long it would take competitors to take advantage of fresh look: "From a competitive entrant standpoint, we recognize that six months is adequate time for customers who want to change carriers or respond to competitive solicitations and take action to cancel contracts pursuant to the rule....Most likely candidates for Fresh Look would be targeted within the first few months of the window opening." (Poag Comments at 4.) Yet the rule assumes, with no factual basis, that it will take four times that long for ALECs to market to existing ILEC customers.

It is helpful also to assess reasonableness of the two-year window from the perspective of other fresh look rules. As explained below, only two other states, Ohio and New Hampshire, have adopted fresh look rules in the local exchange context. The fresh look windows there are 180 days long. Indeed, all of the fresh look rules that GTE has found in other, more limited contexts (e.g., interconnection, intraLATA plans) are measured in days, not years. They generally range from 60 to 180 days. To GTE's knowledge, no Commission anywhere in any context has considered a two-year fresh look window to be reasonable or appropriate.

Likewise, no Commission has used the termination liability measure proposed here–that is, recovery of unrecovered, nonrecurring charges, not to exceed the termination liability specified in the contract. Every fresh look ruling GTE has seen allows repricing of the contract to the term actually used. Therefore, if the ILEC provided 2 years of service under a 4-year contract, it will get the full amount it is due for the 2-year contract. This measure recognizes, to the extent possible, that the customer should pay for the proper amount for the benefits he has already received under the contract. Aside from being relatively more reasonable and appropriate, contract repricing will be easier, less costly, and less contentious to administer than the nonrecurring cost recovery scheme in the draft rule. For instance, the question of identifying and recovering certain nonrecurring charges, which would obviously differ for each contract and customer, would not be an issue with term plan repricing. (Robinson, Hearing Tr. 89-90.)

Finally, there appears to have been no consideration of the increased costs and administrative burdens the ILEC will be forced to bear if it must spread out payment of nonrecurring charges over the life of the original contract. The rule, as proposed, allows the customer to pay the adjusted termination liability either in a lump sum or in monthly installments over the remainder of the term. (Proposed Rule 25-4.302(5).) Most rational businesses will prefer to keep their money for as long as possible, and will thus choose the monthly payment plan. Thus, the ILEC will be forced to retain in its system billing records for an entity that is no longer its customer and it will need to issue monthly bills to this former customer. In this situation, the ILEC, which is no longer providing service to the customer, loses its leverage to enforce any payments. Thus, the ILEC faces a greater risk of nonpayment of even its nonrecurring charges, yielding a contract that is impermissibly priced below cost. If the ILEC itself had proposed such a below-cost contract, the Commission would have be obligated to disallow it.

Even if the customer does pay each installment of the reduced termination liability, the ILEC is still left with expenses and administrative burdens for a customer that belongs to another company. This is not reasonable or appropriate to the purpose of the rule. Customers can certainly take advantage of competitive alternatives without enjoying the option of a monthly payment plan.

In short, even assuming the sufficiency of the public purpose offered for the rule, its terms are much broader than necessary to meet the stated objective of allowing customers a choice of providers they purportedly did not have before. Certainly, none of the proposed measures here meets the constitutional standard that impairment may be permissible only where the police power has been exerted in "the least restrictive means possible." Pomponio, 378 So. 2d at 782, citing City of El Paso v. Simmons, 379 U.S. 497, 516-17, 85 S. Ct. 577, 13 L.Ed. 2d 446 (1965). If the public purpose of the proposed rule were constitutionally acceptable (which it is not), it would need to be modified to meet the least restrictive means test by: limiting fresh look to contracts entered into no later than the Staff's original date of January 1, 1997; setting the fresh look window at no longer than 6 months; allowing contract repricing; and omitting the monthly payment option for payment of the reduced termination liability.[1]

B. Fresh Look Would Work an Unconstitutional Taking.

Aside from being an unconstitutional impairment of contracts, the fresh look requirement would work an unconstitutional taking of the ILECs' property without just compensation. In its Comments submitted earlier in this proceeding, BellSouth comprehensively treated this matter. GTE concurs in BellSouth's analysis. (BellSouth Comments, May 19, 1998 at 12-16; BellSouth Comments, April 23, 1999 at 12-15.) Rather than duplicate BellSouth's argument here, GTE will just review its contours.

The Fifth Amendment to the U.S. Constitution (applied to the States through the Fourteenth Amendment) states that "private property [shall not] be taken for public use, without just compensation." Thus, private property cannot be taken except for a public purpose, and except upon payment of just compensation. Contract rights are deemed to be an intangible property interest, such that the ILECs' rights in their contracts with their customers are protected by the Fifth Amendment. See Ruckelhaus v. Monsanto, 467

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[1] The procedures applied in this case will make it doubly difficult for the Commission to satisfy the constitutional requisites of public purpose and least restrictive means. In any challenge to the rule, the reviewing court will test the sufficiency of the evidence. Exercise of the police power must be based on competent and substantial evidence. See, e.g., Miller, 373 So.2d at 916. The record must show that the impairment was necessary to meet an important general social problem. Allied Structural Steel, 438 U.S. at 247. Despite the constitutional implications of the fresh look rule and its potentially major impact on ILEC revenues, there was but a half-day hearing with time-limited presentations, no sworn testimony and no cross-examination.

U.S. 986, 1003-04 (1984).

Under applicable precedent, fresh look would constitute a taking of the ILECs' property rights in their contracts because it will: "(1) deprive ILECs of the benefit of their bargain; (2) inflict additional economic losses in the future as valuable customers are allowed to enter extended contracts with competitors; and (3) impose additional regulatory burdens and expenses on ILECs which are unnecessary, unfair and a cost which was not contemplated at the time the CSAs were negotiated and for which, therefore, no recovery can be made." (BellSouth May 19 Comments at 14-15, citing Ruckelhaus, 467 U.S. at 1004 and United States v. General Motors Corp., 323 U.S. 373, 378 (1945).)

The proposed fresh look rule does not meet the public purpose requirement for a permissible taking. As explained above, the fresh look rule will benefit only the relatively small group of customers which already operate in the most competitive market segment. Fresh look would confer only a private, rather than a public, benefit. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984); Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 503 (1987).

Even if a public benefit existed to justify the fresh look rule, the ILECs bear the entire burden of the rule and receive no advantage that compensates them for the taking. This failure of compensation renders the rule constitutionally impermissible. (See BellSouth Comments at 15-16.) Furthermore, even if the Commission were to attempt to justify the rule by offering some measure of compensation, it could not do so. The Commission itself has found that it has no authority to determine compensation for a taking: "We agree that the authority to determine the appropriate compensation for a taking rests with the judiciary." Petition for Expanded Interconnection for Alternate Access Vendors Within Local Exchange Co. Central Offices by Intermedia Comm. of Florida, Inc., 94 FPSC 3:399, 405 (1994). Thus, if Commission action works a taking–as fresh look does–it is, in practical terms, impermissible because the Commission cannot decide on the appropriate compensation.

As GTE notes below (in Section IV), other states have aptly cited constitutional problems with fresh look rules. Even in the limited instances where states support such rules, constitutional concerns have shaped their thinking. For instance, Wisconsin has noted that any fresh look rule adopted there would need to include contract repricing to avoid a taking. GTE does not agree that this measure would cure the problems with fresh look, but it does highlight the patent unreasonableness of the proposed rule's lack of a repricing requirement.

C. The ALECs Incorrectly Believe that the ILECs' Contracts Are Not Constitutionally Protected.

In Section II.A.1, GTE discussed how the ILECs' operation in a regulated industry will factor into the constitutional impairment analysis. That is, it will be considered in the threshold inquiry into the extent of impairment.

The ALECs, however, wave away fresh look's constitutional infirmities by emphasizing the Commission's authority to regulate in the public interest. (See, e.g., FCCA Responsive Comments at 5-6.) Time Warner goes so far as to claim that "the contracts in question are simply not the type of private commercial contracts envisioned to be protected by the Contract Clause." (*Time Warner* Response to Comments by BellSouth, Apr. 29, 1999, at 7.)

While GTE has recognized that the regulated nature of the telecommunications industry may factor into the impairment analysis, it is wrong, as a matter of law, that contracts in such industries are undeserving of constitutional protection.

GTE has cited above a number of cases in which unconstitutional impairment was found, despite the heavily regulated nature of the industry. See, e.g., Geary, 931 F. 2d 1431; Miller Brewing, 560 So. 2d 281; and Park Benziger, 391 So. 2d 681 (liquor industry); Chadbourne, 382 So. 2d 293;and Dewberry, 363 So. 2d 1077 (insurance industry). The Florida Supreme Court has confirmed the U.S. Supreme Court's observation that "a state regulatory agency could not modify or abrogate private contracts unless such action was necessary to protect the public interest. To modify private contracts in the absence of such public necessity constitutes a violation of the impairment of contracts clause of the United States Constitution." United Telephone Co., 496 So. 2d 116 (1986), citing Arkansas Natural Gas Co. v. Arkansas Railroad Comm'n, 261 U.S. 379, 43 S. Ct. 387, 67 L. Ed. 705 (1923).

For instance, the ruling in the relatively recent case of Brevard County, Florida v. Florida Power & Light Co., 693 So. 2d 77 (Fla. 5th DCA 1997), explicitly affirmed a utility's "right to be protected against the impairment of contracts." The Court there reviewed a county ordinance governing the construction, operation, and maintenance of electrical transmission lines. The ordinance operated to alter the terms of Florida Power & Light's franchise agreement with the county. The Court did not hesitate to apply the Pomponio impairment criteria (discussed earlier) in assessing the constitutionality of the ordinance. It recognized that state actions which are "reasonable and necessary to secure the public's health, safety, and general welfare are constitutional even if the laws impair the obligations of a private contract." Id. at 81. But it rejected the County's claim–that is much like the ALECs' claim here–that the government had unrestrained authority in this regard. Id. The government's stated interest was protecting county residents from diminishment of property values, aesthetic blight, and adverse health effects. Without much discussion of the significance of this interest, the Court affirmed the lower court's conclusion, based on Pomponio, that the ordinance "unreasonably intrude[d] into FPL's contractual rights to a degree greater than was necessary to achieve this stated purpose." Id. at 82.

Thus, factoring the regulated nature of the telecommunications industry into the assessment of degree of impairment does not change the constitutional analysis performed in the previous sections. Once again, after impairment is found–and it certainly would be in the case of fresh look–the inquiry moves to the purpose of the state action and the means used to achieve it. As detailed at length above, the fresh look rule cannot clear these hurdles.

GTE does not dispute the holdings in the cases the ALECs cite–some of which GTE itself has cited in support of its own position. What GTE disagrees with is the ALECs' interpretation of how that law applies to the proposed rule here. For example, they rely heavily on H. Miller and Sons, Inc. v. Hawkins, 373 So. 2d 913 (1979) (FCCA Responsive Comments at 5), where the Florida Supreme Court upheld this Commission's decision to require a developer to pay a higher service availability fee than that specified in its contract with a water and sewer utility. FCCA highlights the following passage from that case:

> The Commission's decision was based upon the 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.

Miller, 373 So. 2d at 914 [emphasis added].

Relying on this language, FCCA concludes that the proposed rule "is in the public interest, as evidenced by both state and federal legislation," so there is no unconstitutional abrogation. (FCCA Responsive Comments at 5-6.)

FCCA's conclusion is, of course, wrong, and Miller only proves it. The Miller Court approved the Commission's exercise of police power precisely because of elements that are absent here. As GTE explained at length in Section II.A.2, there is no "interest of the public welfare"–only a narrow private interest in benefitting the customers which already have the most competitive alternatives. There is no "express statutory or constitutional authority" for the proposed fresh look rule, and there is no finding that the contracts at issue are at odds with that authority. In authorizing the rate increase in Miller, the Commission relied on its explicit responsibility to "investigate agreements...for charges and conditions to be made by a utility for service availability. The commission shall...set just and reasonable charges and conditions for service availability." H. Miller and Sons, Inc. v. Cooper City Utils., Inc., Order No. 7851 (1977) (citing Fla. Stat. Sec. 367.101). The Commission found that the discriminatory rates the developer sought were not just and reasonable under the statute. Id. The Court agreed that excluding the developer from the rate increase would be unjustly discriminatory and would "allow a private party to circumvent by contract the police power of the state." Id. at 914.

This language about circumvention of the police power by contract deserves particular attention, because it has been central to Courts' analysis of impairment in the utility context. Where impairment has been deemed permissible, it is because the contract attempted to supplant a power–typically, ratemaking–that was expressly vested in the regulatory authority. See, e.g., Energy Reserves, 459 U.S. at 411 ("'One whose rights...are subject to state restriction, cannot remove them from the power of the State by making a contract about them,'" quoting Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908); Miami Bridge Co. v. Railroad Comm'n of the State of Florida, 155 Fla. 366, 20 So. 2d 356, 376 (1944) ("The governmental powers cannot be contracted away"); City of Plantation v. Utilities Operating Co., 156 So. 2d 842, 843 (1963) (holding that a contract cannot "foreclose" exercise of the State's police power: "by conveying to the state Utilities Commission the power to regulate rates, the Legislature pre-empted the pre-existing authority which the City had reserved by the franchise agreement"); Hampton Util. Co., Inc. v. Hampton Homeowners Ass'n, Inc., 252 So. 2d 286, 288 (1971) (noting that Plantation "made it clear that action by the legislature vesting rate fixing power in a particular body necessarily supersedes all contracts or other agreements purporting to vest such power elsewhere.")

Unlike the contracts in those cases, the contracts and tariffed plans here do not by any means attempt to circumvent or foreclose the exercise of any expressly granted

Commission power. They do not divest the Commission of any ratemaking or other authority the Legislature has granted to it. Indeed, the Commission itself was the initial source of the contract authority that has now been codified by statute.

In sum, the fact that ILECs may be characterized as public utilities does not justify denying them due constitutional protection of their contract rights, as the ALECs argue. The regulated nature of the telecommunications industry fits into the impairment analysis at the initial stage of determining the level of impairment. Fresh look not only disrupts, but destroys, contractual relationships between ILECs and their customers. The ILECs' operation in a regulated industry cannot mitigate away such a plain and severe impairment. Once fresh look is deemed to impair contracts, the remaining aspects of the constitutional analysis–evaluation of asserted public purpose and the reasonableness of the means used to serve this objective–lead inexorably to the conclusion that fresh look is unconstitutional.

III. There Is No Need For a Fresh Look Rule.

Aside from being unconstitutional, a fresh look rule would be bad policy because it unnecessarily intrudes into the local market segment that is already the most competitive.

The ALECs complain that a fresh look rule is justified because of the persistent "monopoly environment", in which the ILEC was "the only option for captive customers." (FCCA Comments at 1; FCCA Responsive Comments at 1; AT&T Comments at 1; see also KMC II Comments at 3; e.spire Comments at 1; Supra Comments at 3.) As GTE witness Robinson explained in his prefiled testimony, (Robinson Rebuttal Testimony at 2-11), there are at least two problems with this rationale. First, the key question in considering a fresh look rule is not how much competition there may have been in particular areas at various points in time, but rather whether large contract customers should reasonably have known about the advent of competition. Second, in any event, the ALECs's premise is incorrect; there is, in fact, meaningful competition for the services at issue in this docket.

A. Contract Customers Were Aware of Competitive Industry Changes.

With regard to the first point, GTE recognizes that markets did not necessarily become fully competitive immediately after they were opened by statute. But this factor does not compel the conclusion that the proposed fresh look rule is warranted.

The more relevant point for purposes of this proceeding is that, whether or not there was significant competition for local service in particular markets in 1995 or 1996 or later, customers knew or should reasonably have known that competitive alternatives were coming. Because they entered contracts with such knowledge, there is no reason to permit them to terminate those valid and lawful agreements.

The Commission's own Staff explained this point best:

> LECs typically offer CSAs to large business and government customers, and these customers usually have knowledgeable telecommunications managers who are involved in the contract negotiations. For contracts entered into after the 1995 rewrite of Chapter 364, Florida Statutes, Staff believes that it is reasonable to expect that these telecommunications managers would have considered the possibility of future alternatives for local switched services and would have considered this factor when

> agreeing to the term of the contract. Consequently, staff questions the basic premise that CSAs are a barrier to competition.

(Staff's Feb. 26, 1998, Recommendation in this Docket, at 3.)

Likewise, Mr. D'Haeseleer, the Commission's Communications Division Director emphasized, "these are big commercial users, these are sophisticated users, these are not mom and pop operations." (March 10, 1998, Agenda Tr., Item 11, at 23.)

Significantly, Staff did not change its view after it was asked to draft a fresh look rule. At the agenda session where that rule was proposed (with a January 1997 cut-off for the fresh look opportunity), Staff made clear that the level of competition in the market should not be the focus of the Commission's fresh look inquiry. Staff member Simmons stated:

> Let me just mention that competitiveness of the market really isn't the key issue in my mind. It is we are dealing with end users that tend to be large and knowledgeable, and the question in my mind is when would those types of customers become--when would they reasonably have become knowledgeable of the prospects, perhaps not the actuality, but the prospect of options being available. And that is the key factor in my mind.

(March 16, 1999, Agenda Conf. Tr., Item 4, at 10.)

As Mr. Robinson pointed out in his Direct Testimony, the customers at issue "would reasonably have become knowledgeable" about the prospect of greater local exchange competition a number of years ago. The Florida Legislature's 1995 revisions were well covered in both the popular media and trade press. In addition, the Legislature directed the Commission to ensure that all customers were aware of the newly competitive environment. By January 1, 1996 (the date the local exchange was opened to competition in Florida), the Commission was required to implement a customer information program to tell subscribers about the possibility under the law of competitive providers of local exchange services. (Fla. Stat. §364.0251.) Under this program, GTE sent two different, successive inserts to all customers in the late 1995-early 1996 time frame telling them about the industry changes.

Even if large companies' telecommunications managers somehow missed the media coverage and bill inserts about the competitive changes at the State level, they certainly could not have remained ignorant of the 1996 federal Act. The Act was the focus of countless media stories in local and national newspapers and broadcasts, popular business magazines, and telecommunications trade journal articles, well before the law was passed and continuing today.

Perhaps most importantly, ALECs solicited business customers even before they were operational, as Time Warner's witness Marek admitted. (Hearing Tr. 19; see also Johnston, Hearing Tr. 72 ("marketing efforts for the ALECs started way before the physical plant efforts in some cases, and therefore, customers were receiving proposals prior to the fact that the plant may have been deployed").)

Given all of this information from all of these sources, including the ALECs themselves, no reasonably aware person–let alone an individual with a telecommunications-related job–could have failed to recognize the competitive changes in local markets. Telecommunications managers could and presumably did consider these market changes in their contract negotiations, just as they could be expected to factor in a number of other possibilities, like future technological changes. Managers make these kinds of judgments every day during contract negotiations. They will choose a contract term that accommodates their degree of concern about these and other potential changes.

The Commission heard from only one customer during the proceedings in this docket over the past year and his testimony proved the soundness of GTE's rationale. Mr. Perrine is the Chief Operating Officer of Network Tallahassee, a large user. He admitted that he knew about local competition when he signed a three-year contract with Sprint: "I'm not an idiot. I knew that competition was coming. In fact, I knew that KMC was coming." (Mar. 16, 1999 Agenda Tr., Item 4, at 15.) Nevertheless, Mr. Perrine decided the contract terms Sprint offered were too good to pass up. Mr. Perrine was not forced to take a long-term contract with the specified termination liability; he "knowingly" chose to do so. (Id. at 17, 18.) As Commissioner Deason interpreted Mr. Perrine's remarks, "you are basically indicating that the upfront benefits were too great to walk away from and that you were willing to accept the termination clause." (Mar. 16, 1999 Ag. Conf. Tr., Item 4, at 22-23.)

Mr. Perrine could have decided that a shorter contract, with possibly less favorable terms, was a better option in anticipation (if not receipt) of offers from competitors, but he did not. He made an informed decision that he perceived to be in the best financial interests of his company, just as businesses do every day. Every time a business signs a contract with a telecommunications (or other) vendor, it takes the risk that a competitor will come along later and offer a better deal. The Commission has no obligation to shield these customers from this risk by allowing them to escape contracts they entered precisely because of their favorable terms, and with the knowledge of at least impending, if not already existing, competition. Surely the Commission has better uses for its resources than ensuring that large business customers get the best possible deal for their telecommunications services.

B. There Is and Has Been Competition for Contract Customers.

The ALECs depict a monopoly local exchange market that is just now experiencing competitive entry. Indeed, they would like the Commission to believe that the market at issue is so embryonic that we need a fresh look window four years long. They complain about the use of long-term contracts in the absence of "effective competition," (see, e.g., AT&T Comments, Apr. 29, 1999, at 2; KMC Comments, Apr. 22, 1999, at 2.), and argue that fresh look will correct this situation.

The ALECs' arguments do not comport with the facts, borne out by their own sworn statements elsewhere. With regard to the latter, Mr. Joseph Gillan, FCCA's Executive Director, testified in Ohio and Indiana that from the consumer's perspective, competition can be defined as a meaningful choice between two providers. (Gillan, testifying for AT&T, SBC/Ameritech merger hearing, Jan. 28, 1999, Tr. 1339; Gillan, testifying for AT&T, GTE/Bell Atlantic merger hearing, Apr. 16, 1999, Tr. Vol. IV, at 49-52.) A customer who has such a choice is not a "captive customer," in Mr. Gillan's view. (GTE/Bell Atlantic Tr. Vol. IV, at 83-84.) So, even under the ALECs' own definition, effective competition in the local business market arose when competitors began to serve customers in 1996.

Despite the ALECs' continued citation of statistics for the local exchange market in general, this docket does not concern that market. (Johnston, Tr. 63.) Rather, it only addresses the contract sector of the business market. In Florida, as in all other states, this big business market segment has experienced the most competition. ALECs will typically enter the market to serve business customers because that is where the money is. In this regard, they have been–and continue to be–quite successful.

ALECs started to be certificated here as early as 1995, even before the January 1996 opening of the local exchange. As noted above, the ALECs began marketing efforts even before they were operational. Today, there are over 270 certificated local carriers in Florida. In 1998, there were at least 51 ALECs operating statewide (*1998 Local* Competition Report.) That number is sure to be quite a bit larger today. GTE alone has signed 110 interconnection and/or resale agreements with ALECs. (Robinson, Hearing Tr. 85-86.)

ALECs have made significant inroads into the business market. The Commission's latest report on local competition, for instance, shows that they tripled their share of business lines in just one year, from 1997 to 1998. (1998 Local Competition Report at 46.) In certain metropolitan areas, ALECs have captured a substantial portion of the total of business access lines–for example, 10-13.99% in Orlando and 14-17.99% in nearby West Kissimmee; 10-13.99% in Melbourne; 5-6.99% in Miami and Jacksonville; and 7-9.99% in Ft. Lauderdale. Even in Reedy Creek, a population center that is much smaller but relatively near Disney World, ALECs have obtained between 5 and 6.99% of business lines. (Id. at Table 3-4.)

These numbers are significant, especially when one considers the raw line counts involved in the largest areas like Miami. Furthermore, these statistics don't tell us anything about revenues. In GTE's experience, a small portion of business customers accounts for a disproportionately large share of the Company's revenues. Because the the ALECs are capturing many of these most lucrative customers, line counts alone don't tell the whole story of relative success in the market.

ALEC competition comes from both resellers and facilities-based providers. Like BellSouth (Johnston Direct Testimony at 4-6), GTE has been competing against facilities-based ALECs since they were first certificated in Florida. For example, ICI is the nation's largest, independent facilities-based ALEC and it is headquartered in GTE's Tampa Bay area. ICI began as an alternative access vendor (AAV), in competition with GTE. In fact, a case involving ICI was the impetus for the Commission to find that certification of AAVs was in the public interest. ICI's AAV certification was expanded to ALEC certification just two months after the 1995 legislative revisions, so that it was ready to begin operation as an ALEC as soon as the local exchange was opened in January of 1996. The large business community is very familiar with ICI; because of its pioneering AAV activities, it has been the subject of intense publicity for years, both in Florida and at the national level.

Aside from ICI, GTE's facilities-based competitors today include AT&T, MCI WorldCom, Winstar, Teligent, e.spire, Time Warner and USLEC. (PNR & Assoc., Inc., "Competitive Network Alternatives in Eight Typical GTE Franchise Areas," App. D to Comments of GTE Service Corp. and Its Affiliated Domestic Tel. Operating Cos. in Response to Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, CC Dkt. No. 96-98, May 26, 1999, at 22.) ALECs in GTE's serving area own and operate a total of 20 switches. Id. at IV-1. The quantity of CLEC bypass lines in GTE's area has grown nearly threefold from an estimated 6,600 in December 1998 to 16,000 lines by April 1999. Id. at 14.

It is also useful to consider the growth in ALEC business lines from the comparative perspective of the interLATA market after divestiture. Solomon Smith Barney reports that, in 1998, competitive local carriers had "more net business line additions than the Bells as a group." It observed that the combination of low cost capital and the public policy initiative to open local markets "has allowed the ALECs as a group to achieve in less than 2 years after the Telecom Act, what it took MCI and other alternative long distance carriers over 10 years to achieve during the 1970s and 1980s. If one takes the obvious logical extension of this, this means that the 50% loss of market share that AT&T saw from 1986 through 1996 could be replicated in the local market in a much quicker time period." (Solomon Smith Barney, "CLECs Surpass Bells in Net Business Line Additions for First Time," May 6, 1998.)

Earlier this year, the Council of Economic Advisors reported that, at the rate ALECs are gaining customer lines, they will capture half of the business lines now in service within 10 years. By contrast, it took more than a dozen years after divestiture for long distance competitors to gain a 50% share of market revenues, and they still do not have that share of pre-subscribed lines or long distance minutes. (Progress Report: Growth and Competition in U.S. Telecommunications 1993-1998, The Council of Economic Advisers (Feb. 8, 1999).)

The growth trend in ALEC business lines will likely continue with particular strength in Florida, which has a large and ever-expanding business base in numerous metropolitan markets, as well as over 270 certificated ALECs. ALECs have and will continue to target these metropolitan markets because that's where lucrative business is likely to be. In this regard, the Commission should be wary of ALEC claims that fresh look will enhance competition statewide. A fresh look requirement is not likely to prompt an ALEC to build facilities to serve a geographic market it otherwise would not have. Fresh will, rather, will benefit the most sought-after customers in the most-served metropolitan areas, because that's where existing contract customers are.

The data showing the ALECs' relatively rapid gains in business lines contravenes the ALECs' account of a market where regulatory intervention is necessary for competitors to succeed. The ALECs have achieved these advances without any fresh look rule, and will continue to do so in the absence of such a rule. This is particularly so because of the other artificial advantages ALECs enjoy. For purposes of this docket, the most extraordinary is the contract resale requirement. This requirement, compels GTE to sell its contracts at a 13.04% discount to its competitors. So the competitor can already take GTE's contract (and the associated customer) today. This is, in effect, a fresh look requirement; resellers will get no additional benefit from another such rule in this proceeding. As Staff has explained, the resale requirement "affords CLECs another entry strategy, which staff believes further mitigates the need for 'fresh look.' (Staff Rec. in this Docket, Feb. 26, 1998.)

The Commission should, like its Staff, reject ALECs' argument that resale is not an effective form of competition. Resale competition, as Congress envisioned, is the springboard to facilities-based entry. Among other things, resale allows an ALEC to develop a relationship with a customer and to identify, during the contract term, the customer's needs and to serve those needs. (Goggin, Tr. 59-60.)

Although the Commission may have felt legally compelled to adopt the contract resale requirement, it should feel no such compulsion, on either law or policy grounds, to expand fresh look opportunities to facilities-based providers. They have shown themselves to be very capable of obtaining customers without a fresh look advantage.

IV. Fresh Look Rules Are Not Popular Among the States.

A number of states have rejected fresh look for local exchange services for legal or policy reasons or both. As noted above, North Carolina dismissed the ALECs' fresh look petition at the initial, statutory stage of the legal inquiry. It also cited constitutional concerns and policy misgivings. (NCUC Order Dismissing Fresh Look Petition at 12-13.)

The Michigan Public Service Commission, likewise, rejected fresh look as poor public policy, which presented, in addition, "serious concerns regarding the abrogation of existing contracts." (Application of City Signal, Inc. for an Order Establishing and Approving Interconnection Arrangements with Ameritech Michigan, Case No. U-10647 (Feb. 23, 1995).

The New York Public Service Commission held that "MFS' suggestion that customers should be given a 'fresh look' (i.e., a waiver of NYT termination charges for Centrex or Flexpath Services when considering an alternative company for local usage) is without merit. These contracts were entered into in a competitive environment (i.e., Centrex Service and PBX vendors). There is insufficient justification for a fresh look just because MFS is now in the market." Ordinary Tariff Filing of New York Tel. Co. to Introduce the NYNEX Local Usage Discount Plan, Order Approving New York Tel. Co.'s Local Usage Discount Plan, Case 94-C-0816 at 9, (Mar. 31, 1995).

Other states have disapproved of fresh look for local and other services. See, e.g., In re: Illinois Bell Tel. Co., Case Nos. 94-0096, etc. (Ill. Commerce Comm'n Apr. 7, 1995) (rejecting fresh look proposal for local services, 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 Comm. Co., Inc., PUC Docket No. 16189 (Tex. Pub. Util. Comm'n Nov. 7, 1996) (holding that "SWBT is not required to provide a fresh look opportunity for its customers currently under long term plans" for local services); In re: New England Tel. & Tel. Co., Docket 5713 (Vt. Pub. Serv. Bd. Aug. 20, 1997) (holding that "NYNEX should not be required to give its customers a 'fresh look' for toll contracts because there was no reason to free these customers from the obligations that they knowingly took on") In re: Northwest Payphone Ass'n v. U.S. West, Docket No. UT-920174 (Wash. Util. & Transp. Comm'n Mar. 17, 1995) (rejecting fresh look proposal in the payphone context, because "the Commission ordinarily refrains from interfering in contracts between U.S. West and its customers").

GTE knows of only two states–Ohio and New Hampshire--that have adopted fresh look rules for local exchange contracts. New Hampshire PUC Press Release, May 4, 1998 (NHPUC Release) (citing rule adopted December 8, 1997); Finding and Order in Case No. 95-845-TP-COI (June 12, 1996); see also In re: Comm'n Approval of Fresh

Look Notification, etc., Case Nos. 97-717-TP-UNC, et al., 1997 Ohio PUC Lexis 537 (July 17, 1997). These rules are not nearly as extreme as the proposed rule here–let alone the ALECs' recommended version. Ohio's rule was adopted in 1996, not long after the federal Act was passed; New Hampshire's rule took effect in 1997. In both cases, the fresh look window was only 180 days long, and the fresh look opportunity was specifically tied to competition in particular exchanges (triggered when an interconnector became operational.) Under both states' rules, end users must have two years remaining on their contracts to exercise fresh look. And in both cases, the Commission used contract repricing to assess the reduced termination liability: "the difference between the amount the customer has already paid versus the amount the customer would have paid had the customer taken the contract for the shorter term actually used." (In re: Commission Approval of Fresh Look Notification, Case Nos. 97-717-TP-UNC et al., 1997 Ohio PUC Lexis 537, at 18-19 (July 17, 1997). This measure, they found, puts the ILEC "back in the position it would have been in if the original contract had been planned for a shorter period." (NHPUC Press Release.)

Although the Ohio and New Hampshire fresh look rules are legally suspect, those Commissions at least attempted to give some weight to the "public interest in the integrity of contractual obligations." (NH Press Release, quoting Thomas .B. Getz, Executive Director of the PUC.) The rule proposed here evidences no such regard for contracts. As discussed, it would allow the exercise of fresh look years after a competitor enters a market; the inordinate length of the fresh look window has nothing to do with how long it will take ALECs to market their services; and there is no attempt to ensure that the ILEC will be placed in the position it would have been in if the customer originally took a shorter contract.

The Commission should very carefully read the ALECs' accounts of fresh look proceedings in other states. GTE believes certain aspects of these claims may be misleading. For example, Time Warner's witness Marek seems to indicate that the Wisconsin Public Service Commission abolished termination penalties. (Marek DT at 4.) FCCA counts Wisconsin in with Ohio and New Hampshire as states that have adopted fresh look "policies," (Responsive Comments at 4), and KMC also cites approvingly to Wisconsin. (KMC Responsive Comments at 14.)

The fact is that Wisconsin has not adopted any fresh look rule. In a 1997 Order, it made a preliminary finding that the "FCC-style of fresh-look procedure" should be used, but it never completed the rulemaking necessary to implement its findings. That Commission's investigation revealed that the "'FCC-style' of fresh-look entails a re-pricing of a long-term contract to the term of performance that a terminating customer would actually receive. With a shorter-term contract, a customer will most likely be obliged to pay a higher price. The terminating customer would pay the ILEC the price difference, with interest. The intent is to prevent a windfall to the customer and assure that the ILEC is kept whole as to the basic economic bargain, thereby avoiding a 'taking.'" Investigation into the Appropriate Standards to Promote Effective Competition in the Local Telecomms. Market in Wisconsin, Supplemental Findings of Fact, Conclusions of Law and Second Final Order, Case 05.TI-138, at 3 (Mar. 27, 1997). The Wisconsin Commission noted that none of the commentors–which included Time Warner and MCI–appeared to suggest any fresh look procedure other than that used by the FCC in other contexts. (Id. at 3.)

Many of the other state decisions the ALECs cite in purported support for a fresh look rule here were not in the local exchange context. Whatever the context, their more limited scope and moderate terms provide no support for the ALECs' extreme proposals here.

For example, two of the fresh look decisions KMC cites, from California and New Jersey, (KMC Responsive Comments at 12). were not Commission-imposed rules, but terms of negotiated settlements regarding intraLATA toll services of specific carriers. The California Commission emphasized that the settlement was an interim measure only and "not a precedent to be used in any current or future proceeding." The parties to the settlement agreed that it was "not to be construed as a precedent or policy statement for or against any of the parties on any issues addressed herein in any current or future proceeding before this or any commission or court." (In re: Application of Pacific Bell for Limited Authority to Provide MTS/WATS/800 Contracts, 49 CPUC 2d 486, 1993 Cal. PUC Lexis 472, at App. A.) The New Jersey settlement contained similar language. (Re: Sprint Comm. Co., Docket Nos. TX90050349, etc., slip op. (July 6, 1994).

Furthermore, the fresh look opportunities stipulated in those cases were much narrower than any of the proposals here. In both cases, fresh look provisions were voluntarily incorporated into the contracts themselves. The fresh look periods granted were 120 days for Pacific Bell's MTS/WATS/800 contract services in the California settlement; and 60 days for the Bell Atlantic intraLATA services in the New Jersey settlement.

More importantly, the California Commission has expressly declined to rely on the earlier settlement agreement as any kind of precedent for broader fresh look rules. It was, for example, urged to institute a fresh look policy allowing customers to benefit from the rate changes resulting from its generic alternative regulatory framework proceeding. It refused, stating that, although it had allowed "fresh look contracts" in the MTS/WATS/800 settlement:

> [W]e find no compelling reason to excuse other customers who negotiated contracts from abiding by the terms of their contracts. These contracts were freely negotiated by commercially sophisticated parties, usually for the sole purpose of obtaining service at less than the tariff rate that would otherwise apply. These parties could have reduced the risk that tariff rates would later be lower than the contract rate by negotiating a short contract term or by including explicit renegotiation or termination provisions. They entered into these contracts on the basis of their business judgment that they would receive lower rates overall under the contract. The fact that the judgment may turn out to be wrong is an ordinary risk inherent to business or any other human endeavor.

(In re: Alternative Regulatory Frameworks for Local Exchange Carriers and Related Matters, 56 CPUC 2d 117 (Sept. 15, 1994).

This is exactly GTE's point in this case.

As to other states, the Indiana decision cited by KMC (Responsive Comments at 14), did not implement or even address a fresh look policy. KMC also notes that Alabama and Maine have "ongoing proceedings" to examine fresh look in the local exchange market. (KMC Responsive Comments at 16.) First, it is not clear whether Maine's proceeding is "ongoing." In November of 1996, a ALEC petitioned the Commission to initiate a fresh look rulemaking. The Commission did not grant the petition, but instead opened an inquiry to gather information about existing ILEC contracts and their customers and to receive preliminary comments, so that it might better decide if a rulemaking was warranted. That was over two years ago, and GTE is unaware of any rulemaking proceeding underway.

Second, the fact that ALECs have filed petitions initiating fresh look proceedings can in no way be construed as indicating any Commission's support for fresh look rule.

Finally, the FCC, which some of the ALECs also discuss, has not ordered fresh look for local exchange service contracts or indicated any general disapproval of long-term contracts. Rather, it has used fresh look requirements mostly as a means of addressing unreasonable contract provisions. See, e.g., Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677 (Apr. 16, 1992). In his testimony, Mr. Robinson discussed the FCC's application of fresh look to long-term special access arrangements. This example demonstrates the limited nature of the FCC-style fresh look. The fresh look window was open for only 180 days, and was triggered by the availability of the expanded interconnection arrangements the FCC had ordered. The agency did not eliminate all termination liability, but rather required contract repricing, plus interest. This method was intended to ensure that the LECs "will obtain the compensation appropriate for the term actually taken by the customer." Expanded Interconnection with Local Tel. Co. Facilities, Second Memo. Op. And Order on Recon., 8 FCC Rcd 7341 at para. 41 (1993) (original order issued in 1992).[2]

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[2] Like many Commissions around the country, the Florida Commission was constrained to adopt a fresh look policy when intrastate expanded interconnection was implemented; the same facilities were used for both interstate and intrastate services. In any event, the Florida Commission, even in that limited context, used the FCC's contract repricing approach and a 90-day fresh look window, which opened after expanded interconnection arrangements were first available in a given central office.

Petition for Expanded Interconnection for Alternate Access Vendors Within Local Exchange Co. Central Offices by Intermedia Comm. of Florida, Inc., 94 FPSC 3:399, 420 (1994).

In any event, it bears note that the FCC is not deemed subject to the contract clause that the U.S. Constitution applied to the states, so the impairment concerns that are central to the analysis here have not been relevant there.

In short, neither the FCC nor other states support the proposed rule or the ALEC's more radical positions here. Fresh look provisions for local exchange services are not popular among the states. Where they do exist, they are very narrowly tailored, with fresh look windows no longer than a few months, more reasonable termination liability measures, and a fresh look cut-off date that is more closely linked to the advent of competition.

* * *

For all the foregoing reasons, GTE urges the Commission not to adopt any fresh look rule.

Respectfully submitted on June 16, 1999.

By: ______________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Posthearing Comments in Docket No. 980253-TX were sent via U. S. mail on June 16, 1999 to the parties on the attached list.

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