108 pages.

ORIGINAL

Legal Department

MICHAEL P. GOGGIN
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BellSouth Telecommunications, Inc.
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980253

December 23, 1999

Via Hand Delivery

Sharyn L. Smith, Chief Judge
State of Florida
Division of Administrative Hearings
DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Re: Petition forAdministrative Determination of the Invalidity of Proposed "Fresh Look" Rules

Dear Ms. Smith:

Enclosed is an original and one copy of BellSouth Telecommunications, Inc.'s Petition for Administrative Determination of the Invalidity of Proposed "Fresh Look" Rules.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin /V.F.

Michael P. Goggin

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

cc: Marshall M. Criser III
R. Douglas Lackey
Nancy B. White
Martha Carter Brown

DOCUMENT NUMBER-DATE
15708 DEC 23 99
FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Petition for Administrative Determination
of the Invalidity of Proposed "Fresh Look" Rules

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand Delivery this 23rd day of December, 1999 to the following:

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

John Rosner, Staff Attorney
The Florida Legislature Joint
Administrative Procedures Committee
600 South Calhoun Street
Room 120, Holland Building
Tallahassee, FL 32399-1300

Michael P. Goggin

BEFORE THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. ___________
	)	
FLORIDA PUBLIC SERVICE COMMISSION	)	
	)	
Respondent.	)	
_______________________________	)	

PETITION FOR ADMINISTRATIVE DETERMINATION OF THE INVALIDITY OF PROPOSED "FRESH LOOK" RULES

BellSouth Telecommunications, Inc. ("BellSouth" or "petitioner"), pursuant to Section 120.56(2), Florida Statutes, hereby petitions for an administrative determination of the invalidity of Proposed Rules 25-4.300; 25-4.301; and 25-4.302 of the Florida Public Service Commission (the "Commission"). In support of its petition, BellSouth states:

Parties

1. Petitioner BellSouth is a Georgia corporation authorized to do business in Florida. BellSouth's address is 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375. BellSouth is certificated by the Commission to offer, *inter alia*, local exchange service in Florida.

2. The affected agency is the Florida Public Service Commission. The Commission's address is 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850. The Commission has general responsibility for the administration of Chapter

364, Florida Statutes. The rulemaking proceedings before the Commission were conducted in Docket No. 980253-TX.

Identification of Challenged Rules

3. The proposed rules BellSouth challenges in this Petition are Proposed Rules 25-4.300, 25-4.301 and 25-4.302 (the "Fresh Look" rules), published by the Commission pursuant to Section 120.54(3)(d), Florida Statutes, in the *Florida Administrative Weekly* on December 3, 1999. Copies of the Proposed Rules, as published, are attached as Exhibit A and incorporated by reference.

4. The proposed "Fresh Look" rules would give certain telecommunications customers who entered into agreements with BellSouth with a term of more than one year the right to unilaterally rescind those agreements without having to pay the full termination liability to which they freely agreed. The rules are designed to remove an alleged disincentive for those customers to agree to purchase telecommunications services from companies that compete with BellSouth. The purported purpose of the rules is to promote competition.

5. As will be discussed in more detail below, the proposed "Fresh Look" rules should be declared invalid because in approving them the Commission has exceeded the powers, functions and duties delegated to it by the Legislature. In addition the proposed rules: (i) improperly enlarge, modify or contravene the specific provisions of the laws being implemented; (ii) are not supported by competent substantial evidence; (iii) are arbitrary and capricious; (iv) do not represent the least cost regulatory alternative; and (v) were approved in a proceeding in which applicable

rulemaking procedures were not followed. The proposed "Fresh Look" rules would be entirely new rules. BellSouth challenges them in their entirety.

Procedural History

6. On February 17, 1998, Time Warner AxS of Florida, L.P. ("Time Warner"), filed a Petition to Initiate Rulemaking. In its petition, Time Warner requested that the Florida Public Service Commission (the "Commission") adopt what it described as a "Fresh Look" rule, under which a customer of an Incumbent Local Exchange Carrier ("ILEC") who had agreed to a long term, discounted contract would have an opportunity to abrogate that contract without incurring the termination liability to which it had agreed, in order to contract with an Alternative Local Exchange Carrier ("ALEC"). The Commission granted the Petition, and a Notice of Rule Development was published in the Florida Administrative Weekly on April 10, 1998. A workshop was held on April 22, 1998. Interested persons were afforded an opportunity to file comments and testimony.

7. Based on information received from carriers in response to staff data requests, the proposed rules were revised. On March 4, 1999, the staff recommended that the rules, as revised, be adopted by the Commission. At its Agenda Conference on March 19, 1999, the Commission set the rulemaking for hearing. On March 24, 1999, the Commission issued a Notice of Rulemaking, which included further revisions to the proposed rules.

8. Interested parties filed comments and testimony. A hearing on the proposed rules was held before the Commission on May 12, 1999. On November 4, 1999, the Commission staff issued yet another recommendation that the Commission approve the rules, which had been further revised after the May 12, 1999 hearing. The

November 4 recommendation attached a Statement of Estimated Regulatory Cost ("SERC") dated September 13, 1999. The November 4 recommendation together with the September 13 SERC (collectively the "Staff Rec.") are attached as Exhibit B.

9. At its November 16, 1999 agenda conference, the Commission decided to revise the rules further and voted to approve the proposed rules as revised. The revised proposed rules were published in the *Florida Administrative Weekly* on December 3, 1999 pursuant to 120.54(3)(d), Florida Statutes.

Burden of Proof

10. The Commission has the burden to prove that the proposed "Fresh Look" rules would not be an invalid exercise of delegated legislative authority. § 120.56(2)(a), Fla. Stat. (1997).

Jurisdiction

11. Under Section 120.56, Florida Statutes, the Division of Administrative Hearings (the "Division") has jurisdiction to hear and decide petitions requesting a determination that a proposed rule would be invalid. Any person who would be substantially affected by the proposed rule may seek a determination of the invalidity of the proposed rule by filing a petition within 20 days after the publication of the notice required pursuant to Section 120.54(3)(d), Florida Statutes. This petition is filed within 20 days after December 3, 1999, the date that the notice of the proposed "Fresh Look" rules was published pursuant to Section 120.54(3)(d), Florida Statutes.

BellSouth would be "Substantially Affected" by the Proposed Rules

12. The proposed "Fresh Look" rules would give certain BellSouth customers the right to abrogate agreements they entered into with BellSouth without paying the full

termination liability to which they freely agreed. BellSouth likely has more than 1,000 agreements with customers that would be subject to unilateral abrogation under the proposed rules. As a result, BellSouth risks millions of dollars of revenues it bargained for and won in the competitive arena.

Grounds for a Determination that the Proposed "Fresh Look" Rules are Invalid

13. The adoption of the proposed "Fresh Look" rules would be an invalid exercise of delegated legislative authority for the reasons stated below.

14. The adoption of the proposed "Fresh Look" rules would exceed the powers, functions and duties delegated to the Commission by the Legislature. § 120.52(8) Fla. Stat. In fact, the Commission's approval of the proposed rules would exceed the Commission's rulemaking authority and would be unconstitutional.

a) The Commission lacks the statutory authority to authorize the abrogation of the contracts between telecommunication carriers and their customers. The proposed Fresh Look rules would require massive intervention by the Commission into private contracts between ILECs and their customers. Chapter 364 of the Florida Statutes, however, does not confer such authority upon the Commission. Because the Commission is a statutory creation and is granted authority in derogation of common law rights, it has only such authority as is clearly granted to it upon a strict construction of the statutes. See Florida Bridge Co. v. Bevis, 363 So. 2d 799 (Fla. 1978) (Commission's powers are only those that are conferred expressly or impliedly by statute; a reasonable doubt as to the

lawful existence of a particular power exercised by the Commission must be resolved against exercise thereof).

b) The Commission cites two bases of rulemaking authority that it contends would authorize it to adopt the proposed rules, Section 350.127(2) and Section 364.19, Florida Statutes. Section 350.127(2) is a general grant of rulemaking authority. Section 364.19 authorizes the Commission to regulate the terms of contracts between telecommunications providers and their customers.

c) To be sure, the Commission has specific statutory authority to "regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons." Fla. Stat. § 364.19. Indeed, the Commission already has approved the terms of the contracts at issue. The Commission does not, however, have the statutory authority to abrogate such agreements after the parties have entered into them, and have begun to perform in reliance on the promises they have exchanged.

d) If the Legislature had intended for the Commission to intervene in the marketplace in the obtrusive manner envisioned by proposed rules, the Legislature would have made a specific grant of authority to the Commission. The Florida Statutes grant no authority, whether express or implied, to the Commission to abrogate private

contracts between telecommunications carriers and their customers through its rules.

e) To the contrary, the legislature has encouraged the formation of such contracts by doing away with rate of return regulation and removing regulatory barriers to entry by competing providers. The legislature recognized that in order for a competitive market to flourish, telecommunications carriers and their customers need to have the freedom to enter into contracts where the terms, including price, are determined by bargaining between them, rather than regulatory fiat. Indeed, the legislature specifically recognized in the 1995 legislation that discount contracts designed to meet competitive alternatives were in use and should be encouraged:

> 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, non-basic services in a specific geographic market or to a specific customer by deaveraging the price of any non-basic service, packaging non-basic services together or with basic services, using volume discounts and term discounts, and offering individual contracts.

Florida Statutes Section 364.051(6)(a).

f) The Commission has not identified any express provision that would authorize the Commission to adopt a rule that would allow the abrogation of such contracts. Because the Commission is not empowered to abrogate existing contracts between a

telecommunications carrier and its customers, adopting the proposed rules clearly would be unlawful.

g) Moreover, the Legislature could not have granted such express authority to the Commission, for to do so would violate the Florida and United States Constitutions. The constitutional infirmities of the proposed rules are detailed in BellSouth's June 16, 1999 Brief of the Evidence in this matter, a copy of which is attached as Exhibit C and incorporated by reference.

15. The adoption of the proposed "Fresh Look" rules also would enlarge, modify or contravene the specific portions of the law purported to be implemented.

a) Section 120.536 limits the Commission's discretion to adopt rules:

> . . . An agency may only adopt rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary or capricious, nor shall an agency have the authority to implement the statutory provisions setting forth general legislative intent or policy. Statutory authority granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by statute.

b) The Commission cites both Sections 364.01 and 364.19, Florida Statutes, as the laws to be implemented by the proposed "Fresh Look" rules. The proposed rules would go far beyond the bounds

of either of them. Section 364.01 sets forth the general powers of the Commission and the intent of the Legislature. In its November 4, 1999 recommendation, the Commission staff suggests that general statements in Section 364.01 that the Commission should "promote competition by encouraging new entrants" and "[e]ncourage competition through flexible regulatory treatment among providers of telecommunications services" are among the "regulatory mandates" to be implemented by the proposed rules. Staff Rec. at 6-7. This is precisely the sort of rulemaking abuse the Legislature prohibits in Section 120.536. The provisions of Section 364.01 describe guidelines for the Commission to follow in exercising its jurisdiction – they do not provide specific statutory mandates which the Commission must implement through rulemaking.

c) Similarly, the Commission's proposed rules would go well beyond the scope of Section 364.19, which states, in its entirety, that "[t]he Commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons." This provision permits the Commission to review and approve the terms of a contract to which a telecommunications company and its customer wish to agree. Indeed, the terms of the contracts at issue in this matter were approved by the Commission prior to being formed. It is another

matter entirely, however, for the Commission to claim that this provision gives it the authority to abrogate these agreements after the parties have entered into them. Section 364.19 simply cannot be stretched so far. To do so would amount to retroactive rulemaking.

16. The proposed "Fresh Look" rules are not supported by competent substantial evidence.

a) The Commission Staff's recommendation indicates that the proposed rules were designed to give customers who entered into long-term contracts with ILECs like BellSouth a chance to terminate those agreements to allow them to choose services from alternative local exchange carriers ("ALECs"). Staff Rec. at 1-3. The staff admitted that the contracts to be abrogated under the proposed rules were offered as a competitive response to alternative access vendors, interexchange carriers and providers of private branch exchange services that competed with services provided by the ILECs. *Id.* at 2. The Staff concluded, however, that competitive offerings from ALECs were not available, and for multi-line customers not interested in private branch exchange service, the ILECs had been "the only option." *Id.*

b) These assertions are unsupported. Through two workshops and a hearing, proponents of the rule did not produce any testimony from customers who had contracts that would be affected by the rules

and who claimed not to have had competing alternatives from which to choose at the time they decided to choose BellSouth. By contrast, BellSouth and GTE submitted testimony regarding the competition they faced at the time they entered into the agreements that the rules would abrogate.

c) The basis for the Commission's conclusion that the contracts to be abrogated by the proposed rules were entered into at a time when insufficient competition existed is the relatively small market shares of ALECs when compared with ILECs. Staff Rec. at 10-12. This data does not support the Commission's conclusion, however. First, as the Commission noted, the contracts to be affected by the rules were offered in response to competition. *Id.* at 10. Second, beginning in 1995, ALECs entered this already competitive market segment, and by July of 1998, there were 51 ALECs providing services in competition with the ILECs, alternative access vendors, interexchange carriers and private branch exchange providers, providing a multiplicity of choices to users of these services. *Id.* Accordingly, the market share data cited by the Commission (which apparently excludes all providers except ILECs and ALECs) does not indicate that choices were not available. Instead, the data shows only that, faced with competing alternatives, a large, but rapidly declining percentage of customers chose ILECs. Such data is not the sort of "competent substantial evidence" necessary to

support the retroactive reversal of the results of the competitive market that these rules would effect.

17, The proposed "Fresh Look" rules are arbitrary and capricious.

a) As noted above, the Commission had ample evidence to demonstrate that the customers who entered into the contracts to be abrogated by these rules had competing alternatives from which to choose at the time the contracts were entered, yet concluded without justification that "without fresh look, customers who are subject to long-term contracts will receive no benefit from competition for many years to come." Staff Rec. at 11-12. In addition, the record does not establish that the proposed rules are needed to serve their second purported purpose--to "enable ALECs to compete for existing LEC customer contracts." Staff Rec. at 3. The evidence produced at the hearing showed that, as a group, ALEC market shares for this segment of the market are increasing at a rate of over 300 percent per year. Exhibit C at 8-9. Moreover, the Staff noted that more than half of the contracts at issue that were entered into prior to June 30, 1999 would expire in 2000. Staff Rec. at 12. Accordingly, the evidence indicated that ALECs were not foreclosed in any way from entering the market or from competing for the business of customers currently under contract to an ILEC.

b) In the face of this evidence, it was arbitrary and capricious for the Commission to approve the rules.

c) At the November 16, 1999 agenda conference when the Commission approved the rules, it changed the scope of the proposed rules to include only those contracts entered into prior to June 30, 1999 (rather than including all contracts entered into up to the effective date of the rule). Transcript of November 16, 1999 Agenda Conference at 13-31 (Attached hereto as Exhibit D). Apparently, the Commission concluded that there was no substantial evidence to show that contracts entered after June 30, 1999 were signed at a time when no competitive alternatives existed. *Id.* at 30. The Staff and the Commissioners explained that they could not identify a date before which insufficient competition existed, but after which, customers had sufficient choice. They settled on June 30, 1999 because it was the end of the time period for which they had data on how many contracts would be affected. *Id.* at 27-31. This highlights the arbitrary and capricious nature of the manner in which these proposed rules were structured and approved.

18. The proposed rules impose regulatory costs on BellSouth that could be reduced by the adoption of a less costly alternative that would accomplish the same objectives. In the SERC, the Staff recognized that the rules would impose administrative costs on BellSouth and would cause the loss of a portion of the

termination liabilities that customers had freely obligated themselves to pay. Staff Rec at 26-27. The Staff completely ignored, however, the substantial costs that would be imposed in the form of lost revenues from the abrogated agreements. More importantly, as stated above, there was no competent substantial evidence to suggest that the purported purposes for the rules--to enable customers to choose from competing providers and to enable ALECs to compete—were not best served by allowing the market to continue to operate. In short, the same objectives the Commission stated that it hopes to serve would be best served (and at the least cost) by not adopting the proposed rules.

19. The Commission materially failed to follow applicable rulemaking procedures.

a) On April 28, 1999, the Joint Administrative Procedures Committee notified the Commission that the proposed rules would amount to prohibited retroactive rulemaking and likely would violate the contracts clause of the Florida Constitution. Letter of John Rosner to Public Service Commission dated April 28, 1999 (Attached as Exhibit E). The Commission apparently did not respond to this letter. This failure to respond is inconsistent with the requirements of Section 120.545, Florida Statutes.

b) In addition, the Commission did not make available a copy of the September 13, 1999 SERC until November 4, 1999, when the Staff's recommendation was released. The Staff explained that the SERC had been "noticed orally" at the May 12 hearing. Staff Rec

at 2. This practice is inconsistent with Section 120.55, Florida Statutes.

Disputed Issues of Fact and Law

20. The disputed issues of material fact and of law raised in this petition are:

a) Whether the Commission exceeded the powers functions and duties delegated to it by the Legislature by approving the proposed rules;

b) Whether the Commission, in approving the proposed rules, has exceeded its grant of rulemaking authority;

c) Whether the proposed rules would be unconstitutional;

d) Whether the proposed rules would be an invalid exercise of delegated authority;

e) Whether the proposed rules would enlarge, modify or contravene the specific provisions of law implemented;

f) Whether the Commission's decision to adopt the proposed rules is supported by competent substantial evidence;

g) Whether the proposed rules are arbitrary or capricious;

h) Whether the proposed rules impose costs on BellSouth which could be reduced by the adoption of a less costly alternative that would substantially accomplish the same objectives;

i) Whether, in approving the proposed rules, the Commission materially failed to follow applicable rulemaking procedures or requirements.

For the reasons stated above, BellSouth respectfully requests that its Petition be assigned by the Division to an Administrative Law Judge; that a formal hearing be granted on this petition in accordance with Sections 120.56, 120.569 and 120.57, Florida Statutes; and that an order be entered declaring the proposed rules an invalid exercise of delegated legislative authority.

Respectfully submitted this 23rd day of December, 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

NANCY B. WHITE
MICHAEL P. GOGGIN
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190628

The entire Chapter has been renumbered from 5-1 to 5L-2. Affected rules are:

Old Number	New Number
5-1.001	5L-2.001
5-1.002	5L-2.002
5-1.003	5L-2.003
5-1.004	5L-2.004
5-1.005	5L-2.005
5-1.006	5L-2.006
5-1.007	5L-2.007
5-1.008	5L-2.008

PUBLIC SERVICE COMMISSION

DOCKET NO. 980253-TX

RULE NOS:	RULE TITLES:
25-4.300	Scope and Definitions
25-4.301	Applicability of Fresh Look
25-4.302	Termination of LEC Contracts

NOTICE OF CHANGE

Notice is hereby given that the following changes have been made to the proposed rules in accordance with subparagraph 120.54(3)(d)1., F.S., published in Vol. 25, No. 14, April 9, 1999, issue of the Florida Administrative Weekly:

PART XII – FRESH LOOK

25-4.300 Scope and Definitions.

(1) Scope. For the purposes of this Part, all contracts that include local telecommunications services offered over the public switched network, between LECs and end users, which were entered into prior to June 30, 1999 ~~the effective date of this rule~~, that are in effect as of the effective date of this rule, and are scheduled to remain in effect for at least one year ~~six months~~ after the effective date of this rule will be contracts eligible for Fresh Look. Local telecommunications services offered over the public switched network are defined as those services which include provision of dial tone and flat-rated or message-rated usage. If an end user exercises an option to renew or a provision for automatic renewal, this constitutes a new contract for purposes of this Part, unless penalties apply if the end user elects not to exercise such option or provision. This Part does not apply to LECs which had fewer than 100,000 access lines as of July 1, 1995, and have not elected price-cap regulation. Eligible contracts include, but are not limited to, Contract Service Arrangements (CSAs) and tariffed term plans in which the rate varies according to the end user's term commitment. The end user may exercise this provision solely for the purpose of obtaining a new contract.

(2) For the purposes of this Part, the definitions to the following terms apply:

(a) "Fresh Look Window" – The period of time during which LEC end users may terminate eligible contracts under the limited liability provision specified in Rule 25-4.302(3).

(b) "Notice of Intent to Terminate" – The written notice by an end user of the end user's intent to terminate an eligible contract pursuant to this rule.

(c) "Notice of Termination" – The written notice by an end user to terminate an eligible contract pursuant to this rule.

(d) "Statement of Termination Liability" – The written statement by a LEC detailing the liability pursuant to 25-4.302(3), if any, for an end user to terminate an eligible contract.

Specific Authority 350.127(2), 364.19 FS. Law Implemented 364.19, 364.01 FS. History–New ________.

25-4.301 Applicability of Fresh Look.

(1) The Fresh Look Window shall apply to all eligible contracts.

(2) The Fresh Look Window shall begin 60 days after the effective date of this rule.

(3) The Fresh Look Window shall remain open for one year ~~two years~~ from the starting date of the Fresh Look Window.

(4) An end user may only issue one Notice of Intent to Terminate during the Fresh Look Window for each eligible contract.

Specific Authority 350.127(2), 364.19 FS. Law Implemented 364.19, 364.01 FS. History–New ________.

25-4.302 Termination of LEC Contracts.

(1) Each LEC shall respond to all Fresh Look inquiries and shall designate a contact within its company to which all Fresh Look inquiries and requests should be directed.

(2) An end user may provide a written Notice of Intent to Terminate an eligible contract to the LEC during the Fresh Look Window.

(3) Within ten business days of receiving the Notice of Intent to Terminate, the LEC shall provide a written Statement of Termination Liability. The termination liability shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract. The termination liability shall be calculated as follows:

(a) For tariffed term plans, the payments shall be recalculated based on the amount that would have been paid under a tariffed term plan that corresponds to the actual time the service has been subscribed to.

(b) For CSAs, the termination liability shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract. The termination liability shall be calculated from the information contained in the contract or the workpapers supporting the contract. If a discrepancy arises between the contract and the workpapers, the contract shall be controlling. In the Statement of Termination Liability, the LEC shall specify if and how the termination liability will vary

EXHIBIT A

depending on the date services are disconnected pursuant to subsections (4) and (6) ~~and on the payment method selected in subsection (5)~~.

(4) From the date the end user receives the Statement of Termination Liability from the LEC, the end user shall have 30 days to provide a Notice of Termination. If the end user does not provide a Notice of Termination within 30 days, the eligible contract shall remain in effect.

(5) If the end user provides the Notice of Termination, the end user will ~~choose and~~ pay any termination liability in a one-time payment. ~~according to one of the following payment options:~~

~~(a) One-time payment of the unrecovered nonrecurring cost, as calculated from the contract or the work papers supporting the contract, at the time of service termination; or~~

~~(b) Monthly payments, over the remainder of the term specified in the now terminated contract, equal to that portion of the recurring rate which recovers the nonrecurring cost, as calculated from the contract or the work papers supporting the contract.~~

(6) The LEC shall have 30 days to terminate the subject services from the date the LEC receives the Notice of Termination.

Specific Authority 350.127(2), 364.19 FS. Law Implemented 364.19, 364.01 FS. History–New ________.

DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY

Division of Workers' Compensation

RULE NOS.:	RULE TITLES:
38F-6.007	Compensation Notice
38F-6.008	Termination of Workers' Compensation Insurance
38F-6.009	Forms and Instructions
38F-6.012	Notice of Election to be Exempt and Revocation of Election to be Exempt by Sole Proprietors, Partners or Corporate Officers
38F-6.014	Filing Documents and Penalty Assessments
38F-6.015	Employer Record Keeping Requirements

NOTICE OF CHANGE

NOTICE IS HEREBY GIVEN, in accordance with subparagraph 120.54(3)(d)1., F.S., that the following changes have been made to the above-referenced proposed rules since the first Notice of Change was published in the January 29, 1999 issue of the Florida Administrative Weekly (Vol. 25, No. 4). NOTE: The time period within which these rules were to be filed for adoption has been tolled since March 2, 1999, due to JAPC comments.

38F-6.007 Compensation Notice.

No change.

38F-6.008 Cancellation of Workers' Compensation Insurance by an Insurer.

(1) Except as hereinafter provided, a workers' compensation insurance policy shall not be cancelled by an insurer until and unless 30 days have elapsed after the insurer has filed with the Division a Notice of Cancellation or Reinstatement (LES Form BCM-242). When an insurer sends a Notice of Cancellation or Reinstatement (LES Form BCM-242) to the Division by U.S. mail, the 30 days' deadline shall ~~will~~ be calculated from the first day following the date of mailing as evidenced by postmark; or in the event the postmark is missing or illegible, or the form is delivered to the Division by other than U. S. mail, the first day following the date such form is received by the Division.

(2) through (4) No change.

Specific Authority 440.42(3), 440.185(7) FS. Law Implemented 440.42(3), 440.185(7) FS. History–New 11-20-79, Amended 4-15-81, 1-2-86, Formerly 38F-6.08, Amended 12-28-97, ________.

38F-6.009 Forms and Instructions.

(1) The following forms are hereby adopted for use in connection with these rules:

(a) LES Form BCM-240 Proof of Coverage, revised 2/00 ~~1/99~~

(b) LES Form BCM-240-A Proof of Coverage Attachment, revised 2/00 ~~1/99~~

(c) LES Form BCM-241 ~~Notice of~~ Endorsement, revised 2/00 ~~1/99~~

(d) LES Form BCM-241A ~~Notice of~~ Endorsement Attachment, revised 2/00 ~~1/99~~

(e) LES Form BCM-242 Notice of Cancellation or Reinstatement, revised 2/00 ~~1/99~~

(f) LES Form BCM-250 Notice of Election to be Exempt, revised 2/00 ~~1/99~~; and instructions for same (Construction Industry Instructions for LES Form BCM-250 and Non-Construction Industry Instructions for LES Form BCM-250, dated 2/00)

(g) LES Form BCM-250-R ~~Notice of~~ Revocation of Election to be Exempt, revised 2/00 ~~1/99~~

~~(h) LES Form BCM-250-D Notice of Election to be Exempt, Request for Duplicate Copy, revised 1/99~~

(h)~~(i)~~ LES Form BCM-251 Notice of Election of Coverage, revised 2/00 ~~1/99~~

(i)~~(j)~~ LES Form BCM-251-R ~~Notice of~~ Revocation of Election of Coverage, revised 2/00 ~~1/99~~

(2) The following forms may be obtained from any field office of the Division of Workers' Compensation, Bureau of Compliance: Notice of Election to be Exempt (LES Form BCM-250) and ~~Notice of~~ Revocation of Election to be Exempt (LES Form BCM-250~~1~~-R). All other forms may be obtained from an insurer or from private suppliers as approved by the

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: NOVEMBER 4, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF APPEALS (BROWN)
DIVISION OF COMMUNICATIONS (MARSH)
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (HEWITT)

RE: DOCKET NO. 980253-TX - PETITION TO INITIATE RULEMAKING, PURSUANT TO SECTION 120.54(7), F.S., TO INCORPORATE "FRESH LOOK" REQUIREMENTS IN ALL INCUMBENT LOCAL EXCHANGE COMPANY CONTRACTS, BY TIME WARNER AXS OF FLORIDA, L.P. D/B/A TIME WARNER COMMUNICATIONS

AGENDA: November 16, 1999 - REGULAR AGENDA - POST HEARING RULE ADOPTION - PARTIES MAY PARTICIPATE FOR THE LIMITED PURPOSE OF ADDRESSING THE STATEMENT OF REGULATORY COSTS ISSUED SEPTEMBER 13, 1999.

RULE STATUS: ADOPTION MAY NOT BE DEFERRED

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\APP\WP\980253#3.RCM

CASE BACKGROUND

On February 17, 1998, Time Warner AxS of Florida, L.P. (Time Warner), filed a Petition to Initiate Rulemaking. Time Warner petitioned the Commission to include "fresh look" requirements in its rules. Fresh look provides customers of incumbent local exchange companies (LECs or ILECs) a one-time opportunity to opt out of existing contracts with LECs so as to avail themselves of competitive alternatives now offered or to be offered in the future by alternative local exchange companies (ALECs). The Commission currently does not have any rules or established policy related to fresh look.

EXHIBIT B

DOCUMENT NUMBER-DATE
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FPSC-RECORDS/REPORTING

The Commission granted the petition to initiate rulemaking. A Notice of Rule Development was published in the April 10, 1998, Florida Administrative Weekly (FAW) and a workshop was held April 22, 1998. Interested persons filed comments after the workshop, and a draft rule and request for rulemaking was prepared by staff. The Statement of Estimated Regulatory Cost (SERC) was requested and due to the Division of Appeals on September 30, 1998. Staff filed a recommendation on November 19, 1998. However, that recommendation was deferred from the December 1, 1998 Agenda Conference. A new recommendation was considered at the March 3, 1999 Agenda Conference. The Commission voted to set the matter for hearing.

A Notice of Rulemaking was published in the FAW on April 2, and April 23, 1999. Supra, GTEFL, BellSouth, and Time Warner filed direct and rebuttal testimony. FCCA, BellSouth, e.spire, Sprint and KMC filed comments. FCCA, KMC, AT&T, Time Warner, BellSouth filed responsive comments. The Commission conducted a rulemaking hearing on May 12, 1999. On June 16, 1999, GTEFL, KMC, Supra, Sprint, and e.spire filed posthearing comments. FCCA and AT&T, Time Warner, and BellSouth filed posthearing briefs.

As noticed orally at the hearing, a revised SERC was issued September 13, 1999, based upon the evidence of the hearing. A Notice of Rule Hearing at the November 16, 1999, Agenda Conference was published in the September 24, 1999, Florida Administrative Weekly.

As previously noted, fresh look provides customers of LECs a one-time opportunity to opt out of existing contracts. Prior to ALEC competition, LECs entered into customer contracts covering local telecommunications services offered over the public switched network (typically in response to PBX-based competition). In addition, the LECs entered into customer contracts covering dedicated services and long distance services due to competition from AAVs and IXCs, respectively. However, the regulatory environment has changed due to the 1995 rewrite of Chapter 364, Florida Statutes, and the Telecommunications Act of 1996. ALECs are now offering switched-based substitutes for local service, either through use of their own facilities, unbundled network elements, or resale, where PBXs had previously been the only alternative. For multi-line users not interested in purchasing a PBX (due to financing, maintenance needs, constraints on upgrades, air conditioning, space limitations, or whatever reason), the LEC was heretofore the only option.

The purpose of the proposed fresh look rule is to allow customers to take advantage of competitive offers for service. It

will also enable ALECs to compete for existing LEC customer contracts covering local telecommunications services offered over the public switched network. The rules describe those limited circumstances under which a customer may terminate a LEC contract service arrangement or tariffed term plan (collectively, contracts) subject to a termination liability less than that specified in the contract. Those limited circumstances are for customer contracts covering local telecommunications services offered over the public switched network, which were entered into prior to the effective date of this rule, and that are still in effect and will remain in effect for at least one year after the effective date of the rule. A customer may terminate the contract during the fresh look window by paying a certain amount to terminate the contract as outlined in the rule. The fresh look window will begin 60 days following the effective date of this rule and end one year later. The 60 days will allow the LECs time to set up procedures to implement this rule.

The following is a rule-by-rule summary and analysis of the proposed rules:

25-4.300, Scope and Definitions: The Scope explains what contracts are eligible for a fresh look and to which LECs the rules apply. The following terms are defined: "Fresh Look Window;" "Notice of Intent to Terminate;" "Notice of Termination;" and "Statement of Termination Liability."

25-4.301, Applicability of Fresh Look: This rule provides that the fresh look applies to all eligible contracts and specifies that the window of opportunity to exit an eligible contract will begin 60 days after the effective date of the rule and remain open for one year. It contemplates an end user and LEC going through this process only once during the fresh look window for each eligible contract.

25-4.302, Termination of LEC Contracts: This rule provides for the process under which eligible contracts may be terminated. The LEC must designate a contact to whom inquiries must be addressed. The rule provides for notice and procedure. The end user sends the LEC contact a Notice of Intent to Terminate. The LEC has ten business days to provide the end user with a written Statement of Termination Liability. The rule specifies that for contract service arrangements the Termination Liability is limited to any unrecovered, contract-specific nonrecurring costs and may not exceed the termination liability specified by the terms of the contract. The contract itself or the working papers used to

support the contract may be used for the calculation. Tariffed Term Plans will be repriced to the applicable shorter period.

Once the end user receives the Statement of Termination Liability, he has 30 days to provide a Notice of Termination to the LEC. If no notice is sent, the contract remains in effect. If notice is sent, the end user will pay the termination liability by a one-time, lump-sum payment.

Finally, the LEC has 30 days to terminate the service from the date it receives the Notice of Termination.

Issue 1 of this recommendation deals with legal issues that arose in the course of the proceeding, including whether the Commission has authority to promulgate fresh look rules. Issue 2 discusses the provisions of the rules. Issue 3 recommends closure of the docket.

The rules as originally proposed by the Commission are shown in Attachment 1, with the changes recommended by the staff shaded. For purposes of this recommendation, recommended additions to the rules are shown as shaded and underlined. Recommended deletions are shown as shaded and stricken through.

DISCUSSION OF ISSUES

ISSUE 1: Does the Commission have the authority to promulgate fresh look rules?

RECOMMENDATION: Yes, the Commission has the authority to promulgate fresh look rules. (BROWN)

STAFF ANALYSIS: BellSouth and GTEFL contend that the Commission lacks the statutory authority to adopt the fresh look rules proposed in this docket. They argue that the rules would infringe upon constitutional sanctity of contract guarantees, and effect an unconstitutional taking of their property. They contend that the Commission's proposed rules would "abrogate" or "drastically disrupt" existing contracts between them and their customers, and therefore, the Commission should not adopt the rules in any form. The Joint Administrative Procedures Committee also questions the constitutionality of the proposed rules and asks whether the

proposed rules would retroactively interfere with existing contracts, contrary to Section 120.54(f), Florida Statutes. Time Warner, the Florida Competitive Carriers Association (FCCA), AT&T, SUPRA, e.spire, KMC, and Sprint all assert that BellSouth's and GTEFL's legal objections to the proposed rules are unfounded. They argue that the Commission clearly has the statutory authority to adopt these rules, which, they also argue, do not unconstitutionally interfere with existing contracts or take the incumbent carriers' property without just compensation.

As described above, fresh look provides customers of incumbent local exchange companies a one-time opportunity of limited duration to opt out of their existing contracts without incurring high termination liability charges in order to avail themselves of competitive alternatives that did not exist at the time the existing contracts were entered into. The proposed rule operates on a going-forward basis, and does not retroactively affect the contracts. It only modifies the termination liability provisions of the contracts from the date of adoption of the rules to further the development of competition, and it provides that the ILECs will receive the compensation they would have received if the contracts had been made for a shorter term.

The concept of fresh Look is not a new one in regulatory policy. Other states have adopted it to encourage competition in local telecommunications markets.[1] Both the FCC and the Florida Commission employed the policy in expanded interconnection dockets in the early 90's.[2] In Order No. PSC-94-0285-FOF-TP, issued March

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[1] Ohio, <u>In the Matter of the Commission Investigation relative to the establishment of Local Exchange and Other Competitive Issues, Case No. 95-845-TP-COI (P.U.C.O. June 12, 1996)</u>; Wisconsin, <u>Supplemental Findings of Fact, Conclusions of Law and Interim Order re Investigation of the Appropriate Standards to Promote Effective Competition in the local Exchange Telecommunications Market in Wisconsin</u>, Docket No. 05-TI-138 (Wic.P.S.C., September 19, 1996); New Hampshire, <u>In the Matter of the Petition of Freedom Ring Communications, L.L.C. Requesting that the Commission Require that Incumbent LECs Provide Customers with a Fresh Look Opportunity</u>, Docket No. DR96-420, Order No. 22, 798 (N.H.P.U.C., December 8, 1977). It should be noted as well that some states have refused to adopt fresh look rules, and many states have not considered the matter at all.

[2] <u>See</u>, <u>In re: Competition in the Interstate Interexchange Marketplace</u>, 7 FCC Rcd 2677 (1992).

3, 1994, in Docket No. 921074-TP, the Commission adopted a fresh look provision for customers of LEC private line and special access services with terms equal to or greater than three years. Customers were permitted a limited time to terminate their existing contracts with LECs to take advantage of emerging competitive alternatives. The Commission limited the customers' termination liability to the amount the customer would have paid for the services actually used.[3] The Commission reasoned:

> [W]e find that introducing competition, or extending the scope of competition, provides end users of particular services with opportunities that were not available in the past. However, these opportunities are temporarily foreclosed to end users if they are not able to choose competitive alternatives because of substantial financial penalties for termination of existing contract arrangements. A fresh look proposal will enhance an end user's ability to exercise choice to best meet its telecommunications needs. Order No. PSC-94-0285, p. 28.

Staff believes that the Commission clearly has the statutory authority to adopt these rules. That authority is found expressly and specifically in section 364.19, Florida Statutes, which provides:

> The Commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.

Chapter 364, Florida Statutes, directs the Commission to encourage the development of competition in local telecommunications markets. See, for instance, section 364.01(4), Florida Statutes, which specifically states that:

> The commission shall exercise its exclusive jurisdiction in order to . . .
>
> (b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest range of

[3] "For example, if an end user has a five-year contract but terminates the contract after three years, the termination liability equals the difference between what the end user would have paid if the contract were three years and the amount it actually paid..." Order no. PSC-94-0285, p. 28.

> consumer choice in the provision of all telecommunications services. . .

See also, section 364.01(4)(d), which gives the Commission the power to "[p]romote competition by encouraging new entrants into telecommunications markets. . . ." The fresh look rules proposed here are reasonable, limited in scope and duration, and designed to further the development of competition in local telecommunications markets. As such they are consistent with the Commission's regulatory mandate and within the scope of its authority.

It has long been established that public utility companies are considered "businesses imbued with a public interest," which operate always subject to the legitimate police power of the state. Contracts for telecommunications service are not purely private contracts. "Contracts by public service corporations for their services or products, because of the interest of the public therein, are not to be classed with personal and private contracts, the impairment of which is forbidden by constitutional provisions." Miami Bridge Co. v. Railroad Commn. Of Florida, 20 So.2d 356, 377 (Fla. 1944). One who conducts business in this arena does so with the " full knowledge of the existence of the police power which authorizes regulations in behalf of the public." Id. In H. Miller & Sons v. Hawkins, 373 So. 2d. 913 (Fla. 1979), where a developer with an existing contract with a water utility appealed the Commission's decision to increase the utility's service availability charges and modify the developer's existing contract accordingly, the Court stated:

> 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 constitutional impairment of contracts. . . . [T]the effect of ruling in favor of Miller would have been to allow a private party to circumvent by contract the police power of the state, which is impermissible.

If the Commission may alter the rights of private parties who contract with public utilities for a reasonable and valid public purpose without violating constitutional principles, certainly the Commission may alter the contract rights of the public utilities themselves. See also, Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983). Similarly, if the exercise of regulatory authority here is reasonably designed to further a valid

public interest, staff does not believe that it can be said to unconstitutionally take the ILEC's property without just compensation. See, U.S. Trust Co. Of New York v. New Jersey, 431 U.S. 1 (1977) While GTEFL argues that the Fresh Look rules will confer only a private benefit on a small group of customers, the clear purpose of the rules is to encourage the development of competition for the long-run benefit of all consumers.

> There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. Chicago, Burlington & Quincy R.R. Co. V. McGuire, 219 U.S. 549, 567 (1911).

For these reasons, staff recommends that the proposed fresh look rules are constitutionally sound, and the Commission has the statutory authority to adopt them.

ISSUE 2: Should the Commission adopt 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, with changes?

RECOMMENDATION: Yes, the Commission should adopt the new rules with changes as recommended in the body of this recommendation. (MARSH)

STAFF ANALYSIS: The fresh look rules "give the consumer the opportunity to consider competitive alternatives not previously available to them and allows the consumer to realize the benefits of competition now instead of waiting for these less competitive contracts to expire." (Marek TR 13) The table below and the ensuing discussion will give a flavor for the numbers of customers that are likely to benefit from a fresh look. It is impossible to know with certainty exactly how many customers will have an opportunity to utilize a fresh look.

Eligible contracts include CSAs and tariffed term plans. A CSA is a contract service agreement. It is a private arrangement not subject to a tariff. A tariffed term plan is a long-term plan that is contained in the company's tariff. A customer who subscribes to the tariffed term plan will receive a discount from the monthly tariffed rate. The longer the contract, the greater the discount.

Although there has been a dramatic increase in CSAs and tariffed term plans since 1997 (TR 77), the evidence shows that most of these contracts are for periods of two or three years. As shown in Table 1, many of them will expire in 2000, thus negating the need for a fresh look. However, other customers could benefit from the rule. For example, BellSouth has 166 7-year tariffed term plans that will expire after 2000, some in 2004 and beyond. These customers truly are locked into long-term contracts without hope of taking advantage of competitive opportunities. There are many more customers who could benefit besides the 166 mentioned here. It appears reasonable to give ALECs the opportunity to compete for this business without having to overcome the significant termination liability inherent in many LEC contracts. Nevertheless, it should be noted that the picture painted by the ALECs of increasing numbers of customers locked in for long periods of time is not as dire as it would seem.

Table 1
Contracts Expiring by Year*

Year	2000	2001	2002	2003	2004	Post 2004
GTEFL Tariffed Term Plans	3834	1868	280	21	7	4
GTEFL CSAs	28	12	4	0	0	0
BellSouth Tariffed Term Plans	1636	715	527	289	85	53
BellSouth CSAs	64	26	20	32	2	0
Total	5562	2621	831	342	94	57
Percent	58.5%	27.6%	8.7%	3.6%	1.0%	0.6%

*Contracts executed through second quarter, 1999
Source: Staff Composite Exhibit

BellSouth alleged that competitive alternatives have existed for the services covered by these contracts for many years. (BellSouth Response Comments, pp. 1-2) Referring to CSAs, BellSouth noted that "[t]he Commission has permitted BellSouth to enter into such contracts since the 1980's in order to meet competition." (BellSouth Response Comments, p. 2) However, CSAs make up only a small portion of the contracts in question.

While competition may have existed in very limited situations, the local market for basic, switched telephony has not been open to competition since the 1980s. In the short period of time that competitive entry has been permitted, only modest inroads have been made by ALECs. As noted by KMC, "the Florida legislature's decision to open the local exchange market to competition on July 1, 1995 did not mean that the market became instantaneously competitive on that date." (KMC, post-hearing comments, p. 6)

Supra noted in its discussion of the Commission's December 1998 Report to the Legislature, *Competition in Telecommunications Markets in Florida*, "that as of July 10, 1998, only 51 Alternative Local Exchange (ALECs) were actually providing service in Florida.

The report also states that the competitors' share of the total access lines served in 1998 was approximately 1.8 percent." (Supra, post-hearing comments, p. 2) KMC explained that ". . . as of September 30, 1998. . . ALECs were serving only 1.6% of the customers in BellSouth's Florida service territory through unbundled loops or resold lines. Likewise, in GTEFL's service territory, ALECs had a 2.0% market share through resale, and no customers were being served through unbundled loops as of September 30, 1998." (KMC, post-hearing comments, p. 7)

GTEFL also discussed the extent of competition in Florida.

> In certain metropolitan areas, ALECs have captured a substantial portion of the total 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 (1998 Local Competition Report at 46, Table 3.4) (GTEFL post-hearing comments, p. 44)

The percentages provided by GTEFL hardly equate to widespread competition. Many customers entered into long-term contracts at a time when there were no other alternatives. The cost to terminate the contracts, absent a fresh look, may be prohibitive. Sprint agreed that contract termination penalties impose impediments "on customers who want new products and services from facilities based competitors that did not exist at the time contracts were signed." (Sprint post-hearing comments, p. 2) Although the LECs argued that the ALECs could always resell existing contracts, this avenue would not provide any benefit to the customer. KMC witness Duke argued that

> . . . the ILEC's assertions that we could always resell their long-term contracts also missed the mark. Even if we do resell a BellSouth customer's contract, for example, the customer really doesn't see the benefit of competition, because he's still locked into the same terms, conditions, and services for the duration of the contract just as if he never switched from BellSouth at all. (Duke, TR 31)

Thus, without fresh look, customers who are subject to long-term contracts will receive no benefit from competition for many years

to come. The adoption of a fresh look rule would help mitigate the impediment of termination liabilities for these customers.

The changes below are recommended to help ensure that fresh look is targeted to those customers who will benefit most from it, and to implement fresh look in a way that is not unduly burdensome when weighed against the potential benefits to be received. The rules as originally proposed by the Commission are shown in Attachment 1, with the changes recommended by the staff shaded. For purposes of this recommendation, additions to the rules are shown as shaded and underlined. Recommended deletions are shown as shaded and stricken through.

Recommended Changes to the Rule

> 1) . . .[Contracts] that are scheduled to remain in effect for at least ~~six months~~ <u>one year</u> after the effective date of this rule will be contracts eligible for fresh look.

Discussion

As shown in Table 1, some 58.5% of all contracts will expire in 2000. Further, an analysis of data provided by GTEFL and BellSouth shows that a large percentage of contracts are two-year contracts. For example, of the BellSouth contracts expiring in 2000, 75% are two-year contracts. (Staff Composite Exhibit) Parties could not agree on what constitutes a long-term contract. Opinions ranged from six months to two years. (TR 18, 765, 101) Even though most of the contracts are for two years or more, and would fit even the most lengthy definition of long term, there seems little benefit to be derived from a fresh look for contracts that will expire during the one year fresh look window during which contracts are eligible for termination. As discussed below, a one-year window is recommended. Given that 5562 contracts will expire in 2000, repricing of so many contracts appears unduly burdensome.

> 2) Eligible contracts include~~, but are not limited to,~~ Contract Service Arrangements (CSAs) and tariffed term plans in which the rate varies according to the end user's term commitment.

Discussion

Questions arose at the hearing as to whether some contracts were being excluded from fresh look because they are titled

differently from CSAs and Tariffed Term Plans. KMC witness Duke remarked

> It's not clear to me in my review of what the ILECs have filed that all eligible contracts are being captured or identified by the incumbent local exchange companies. It appears that some of the participants in this docket are being very literal with their definitions, and when terms are used such as contract service arrangement, they are identifying documents that have this on the title, that say "contract service arrangement." (Duke TR 38)

Any contract that serves the same purpose as CSAs, but which has a slightly different title, should nevertheless be afforded the same treatment as other contracts that are subject to a fresh look.

> 3) The end user may exercise this provision solely for the purpose of contracting for obtaining a new contract.

The purpose of this provision is to ensure that fresh look is not used simply as a way to avoid a contract commitment. Sprint urged that "customers not have the option to artificially avoid termination liability." (Sprint posthearing comments, p. 1) Witness Poag stated that it was Sprint's intent in proposing this restriction to "avoid having current ILEC customers who do not intend to switch services, but merely intend to stop taking services, to be able to use this rule to terminate the service." (TR 119) Witness Poag further argued that there was no intent to "prohibit ILECs from competing for the business of a customer who sends a termination liability notice." (TR 119) Accordingly, a customer may use the fresh look provision to obtain service from a new provider, or to accept a better offer from the current provider.

> 4) The Fresh Look Window shall remain open for ~~two years~~ one year from the starting date of the Fresh Look Window.

Discussion

The choice of a one-year window is a compromise position suggested by Sprint. The range of choices advocated by the parties was from six months to four years. (Sprint posthearing comments, p. 3)

Parties advocating a four-year window believe it would help to ensure that competition reaches various areas, since all parts of the state will not have competitive entry at the same time. (Marek,

TR 23) Sprint argued that "a four year window is unreasonable in that it would introduce unnecessary cost and uncertainty into the business operations while not providing any competitive benefits beyond a one year window." (Sprint posthearing comments, p. 1)

As previously discussed, an examination of the affected contracts as shown in Table 1 shows that 58.5% of all contracts will expire in the year 2000. An additional 27.6% will expire in 2001, leaving only 13.9% of the contracts in existence prior to the implementation of fresh look. Additionally, responses to a staff data request showed that many of the contracts were only two-year contracts. For example, 75% of BellSouth contracts that will expire in 2000 are two-year contracts. Such contracts are not of sufficient duration to warrant a four-year window. There was no evidence to show that two-year contracts will be replaced by longer contracts. Thus, all contracts expiring in 2000 and 2001, if replaced with new two-year contracts, will again expire before a four-year window closes. It appears that there will be sufficient marketing opportunities for ALECs without extending the window to four years.

One consequence of this action is that customers in areas that as yet have no competition may not have an opportunity to use fresh look. However, there is no way to predict when all areas of the state will have competitive entry. The business uncertainty spoken of by Sprint is an important factor to consider. Keeping a window open just in case competition reaches new areas will inject uncertainty into the contract process. Some customers will no doubt benefit in being allowed to opt out of contracts that were entered into when there were no other choices. However, given that most contracts will expire soon without a fresh look, the additional benefits to be derived through a longer window do not seem sufficient to warrant the uncertainty in the market that would result from a longer window.

5) The termination liability shall be calculated as follows:

[illegible] tariffed term plans, the payments shall be rec[illegible] based on the amount that would have been paid [illegible] tariffed term plan that corresponds to the actua[illegible] the service has been subscribed to.

(b) For CSAs, the termination liability shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the

> contract. The termination liability shall be calculated from the information contained in the contract or the workpapers supporting the contract. If a discrepancy arises between the contract and the workpapers, the contract shall be controlling. In the Statement of Termination Liability, the LEC shall specify if and how the termination liability will vary depending on the date services are disconnected pursuant to subsections (4) and (6)~~ and on the payment method selected in subsection (5)~~.

Discussion

One area of the proposed rule that could give rise to difficulties in administration is the manner in which termination charges are recalculated. FCCA proposed that there be no termination liability. FCCA witness Marek argued that such a liability "is going to be a barrier to customers who want to switch carriers, to become involved in a dispute over what is the termination liability, to have to go through a proceeding in order to figure that out." (Marek, TR 23) KMC witness Duke opined that "customers facing termination liability or disputes over how much a termination penalty they owe are going to be deterred from taking advantage of a fresh look." (TR 32)

However, allowing customers to opt out of a contract without paying anything would have an adverse impact on the ILECs. Although the ILECs have not been able to determine what the financial impact would be, nevertheless it is clear that there would be an impact, as discussed in the SERC. Certain negative aspects of calculating the termination liability could be mitigated by simplifying the mechanism through which the liability is calculated.

GTEFL pointed out that other states have adopted fresh look rules that "require repricing of the terminated contract to the shorter term (instead of payment of unrecovered nonrecurring charges.)" (GTEFL post-hearing comments, p. 4) GTEFL suggested that,

> [a]side 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. (GTEFL post-hearing comments, p. 28; Robinson, TR 89-90)

Contract repricing would put all parties in the same position as if the customer had originally selected a shorter term contract period. (TR 89) As shown in Table 1, the majority of contracts in question are tariffed term plans which easily lend themselves to repricing. Staff believes it is appropriate to change the rule to allow for repricing of tariffed term plans, while retaining a calculation of termination charges for CSAs which would be more difficult to reprice.

6) If the end user provides the Notice of Termination, the end user will ~~choose and~~ pay any termination liability in a one-time payment. ~~according to one of the following payment options:~~

~~(a) One-time payment of the unrecovered nonrecurring cost, as calculated from the contract or the work papers supporting the contract, at the time of service termination; or~~
~~(b) Monthly payments, over the remainder of the term specified in the now terminated contract, equal to that portion of the recurring rate which recovers the nonrecurring cost, as calculated from the contract or the work papers supporting the contract.~~

Discussion

Rule 25-4.302(5), as previously proposed, would allow the customer to pay the adjusted termination liability either in a lump sum or in monthly installments over the remainder of the term. GTEFL noted that "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." (GTEFL post-hearing comments, pp. 22-29) Additionally, payment in a lump sum would be in keeping with the typical practice for such payments.

As with the calculation of termination liability, a method that puts all parties in the same position that they would have been in under a shorter contract period seems preferable to allowing payments to continue over an extended period of time which the payor is no longer a customer. For example, for a three-year contract that is being repriced to a one-year contract, the customer would have paid the amount in question already, had he

opted for a one-year contract in the first place. Thus, there would be no reason to extend payment over a three-year period.

Statement of Estimated Regulatory Cost: While a new SERC was completed after the hearing, the conclusions remain the same as in the earlier SERC. With no fresh look rule in place, a LEC is entitled to collect the contract termination charges reflected in the contract or tariff when a customer chooses early termination. If the proposed fresh look rule becomes effective, a LEC will lose the revenues it would have earned from a customer who terminates early, except for the portion of those revenues associated with unrecovered nonrecurring costs. A LEC would only experience a financial loss if its unrecovered, contract-specific nonrecurring costs exceeded the termination liability specified in the controlling contract or tariff. LECs were generally unable to estimate the amount of costs, if any, they would be unable to recover since it is unknown which contracts might be terminated.

LECs would incur relatively minor administrative and labor costs to provide the Statement of Termination Liability to customers. Transactional costs for ALECs should be limited to the administrative cost of setting up new customer accounts. End-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.

Conclusion

There is a sufficient number of customers who could benefit from a fresh look that the adoption of a rule is warranted. However, that rule should not impose an undue burden on the ILECs to administer. The recommended changes are designed to mitigate that burden concerning contracts that will expire soon without a fresh look. Accordingly, staff recommends that the Commission adopt the new rules, with the changes recommended in the body of this recommendation.

ISSUE 3: Should the rules as adopted be filed with the Secretary of State and the docket be closed?

RECOMMENDATION: Yes. (BROWN, MARSH)

STAFF ANALYSIS: If there is no challenge to the rules within 21 days after a notice of change is published in the Florida Administrative Weekly, the rules as approved may be filed for adoption with the Secretary of State without further Commission action. The docket may then be closed.

MCB
Attachments

1

2 PART XII - FRESH LOOK

3 25-4.300 Scope and Definitions

4 25-4.301 Applicability of Fresh Look

5 25-4.302 Termination of LEC Contracts

6 **25-4.300 Scope and Definitions.**

7 (1) Scope. For the purposes of this Part, all contracts that
8 include local telecommunications services offered over the public
9 switched network, between LECs and end users, which were entered
10 into prior to the effective date of this rule, that are in effect
11 as of the effective date of this rule, and are scheduled to remain
12 in effect for at least ~~six months~~ one year after the effective date
13 of this rule will be contracts eligible for Fresh Look. Local
14 telecommunications services offered over the public switched
15 network are defined as those services which include provision of
16 dial tone and flat-rated or message-rated usage. If an end user
17 exercises an option to renew or a provision for automatic renewal,
18 this constitutes a new contract for purposes of this Part, unless
19 penalties apply if the end user elects not to exercise such option
20 or provision. This Part does not apply to LECs which had fewer than
21 100,000 access lines as of July 1, 1995, and have not elected
22 price-cap regulation. Eligible contracts include, but are not
23 limited to: Contract Service Arrangements (CSAs) and tariffed term
24 plans in which the rate varies according to the end user's term

25

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from existing law.

1
2 commitment. The end user may exercise this provision solely for
3 the purpose of obtaining a new contract.
4 (2) For the purposes of this Part, the definitions to the
5 following terms apply:
6 (a) "Fresh Look Window"- The period of time during which LEC
7 end users may terminate eligible contracts under the limited
8 liability provision specified in Rule 25-4.302(3).
9 (b) "Notice of Intent to Terminate"- The written notice by an
10 end user of the end user's intent to terminate an eligible contract
11 pursuant to this rule.
12 (c) "Notice of Termination"- The written notice by an end user
13 to terminate an eligible contract pursuant to this rule.
14 (d) "Statement of Termination Liability"- The written
15 statement by a LEC detailing the liability pursuant to 25-4.302(3),
16 if any, for an end user to terminate an eligible contract.
17 Specific Authority: 350.127(2), FS; 364.19,FS.
18 Law Implemented: 364.19, FS, 364.01,FS.
19 History: New XX-XX-XX.
20 **25-4.301 Applicability of Fresh Look.**
21 (1) The Fresh Look Window shall apply to all eligible
22 contracts.
23 (2) The Fresh Look Window shall begin 60 days after the
24 effective date of this rule.
25

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from existing law.

(3) The Fresh Look Window shall remain open for ~~two years~~ one year from the starting date of the Fresh Look Window.

(4) An end user may only issue one Notice of Intent to Terminate during the Fresh Look Window for each eligible contract.

Specific Authority: 350.127(2), FS; 364.19,FS.

Law Implemented: 364.19, FS; 364.01,FS.

History: New XX-XX-XX.

25-4.302 Termination of LEC Contracts.

(1) Each LEC shall respond to all Fresh Look inquiries and shall designate a contact within its company to which all Fresh Look inquiries and requests should be directed.

(2) An end user may provide a written Notice of Intent to Terminate an eligible contract to the LEC during the Fresh Look Window.

(3) Within ten business days of receiving the Notice of Intent to Terminate, the LEC shall provide a written Statement of Termination Liability. The termination liability shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract. The termination liability shall be calculated as follows:

(a) For tariffed term plans, the payments shall be recalculated based on the amount that would have been paid under a

tariffed term plan that corresponds to the actual time the service has been subscribed to.

(b) For CSAs, the termination liability shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract. The termination liability shall be calculated from the information contained in the contract or the workpapers supporting the contract. If a discrepancy arises between the contract and the workpapers, the contract shall be controlling. In the Statement of Termination Liability, the LEC shall specify if and how the termination liability will vary depending on the date services are disconnected pursuant to subsections (4) and (6) and on the payment method selected in subsection (5).

(4) From the date the end user receives the Statement of Termination Liability from the LEC, the end user shall have 30 days to provide a Notice of Termination. If the end user does not provide a Notice of Termination within 30 days, the eligible contract shall remain in effect.

(5) If the end user provides the Notice of Termination, the end user will choose and pay any termination liability in a one-time payment, according to one of the following payment options:

(a) One-time payment of the unrecovered nonrecurring cost, as calculated from the contract or the work papers supporting the contract, at the time of service termination; or

CODING: Words underlined are additions; words in struck through type are deletions from existing law.

1

2 ~~(b) Monthly payments, over the remainder of the term specified~~
3 ~~in the now terminated contract, equal to that portion of the~~
4 ~~recurring rate which recovers the nonrecurring cost, as calculated~~
5 ~~from the contract or the work papers supporting the contract.~~

6 (6) The LEC shall have 30 days to terminate the subject
7 services from the date the LEC receives the Notice of Termination.

8 Specific Authority: 350.127(2), FS; 364.19, FS.

9 Law Implemented: 364.19, FS; 364.01,FS.

10 History: New XX-XX-XX.

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MEMORANDUM

September 13, 1999

99 SEP 13 [illegible]

TO: DIVISION OF APPEALS (BROWN)

FROM: DIVISION OF AUDITING AND FINANCIAL ANALYSIS (HEWITT)

SUBJECT: REVISED STATEMENT OF ESTIMATED REGULATORY COST FOR PROPOSED RULES: 25-4.300, F.A.C., SCOPE AND DEFINITIONS; 25-4.301, F.A.C., APPLICABILITY OF FRESH LOOK; 25-4.302, F.A.C., TERMINATION OF LEC CONTRACTS. DOCKET NO. 980253-TX.

SUMMARY OF THE RULES

There are no existing Commission rules governing contract service arrangements (CSAs), tariffed term plans, or "Fresh Look." Presently, Commission Orders permit incumbent local exchange companies (ILECs) to offer special contract service arrangements for those services which are susceptible to uneconomic bypass by competitors. That is, when a competitor is able to offer the service at a price lower than the ILEC's tariffed rates, but above the ILEC's incremental costs, the ILEC may provide the customer with a CSA. A customer who enters into a CSA may be required to pay a termination charge if he terminates the contract prior to the date the contract is scheduled to expire. Termination charges vary according to each contract. Tariffed term plans, in which the rate varies according to the term of commitment, also typically include termination charges. The initial proposed rules went to a hearing by the Commission and the latest version of the proposed rules reflect consideration of that input and of post-hearing filings.

The proposed rules would provide a "Fresh Look Window" or period of time during which ILEC customers may terminate a tariffed term plan or CSA with limited liability. The customer's termination liability would be limited to any unrecovered, contract-specific, nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract. The Fresh Look Window would begin 60 days after the effective date of the proposed rule and remain open for one year from the effective date of the rule. All contracts between ILECs and end users that include local telecommunications services offered over the public switched network would be eligible for early termination (provided such contracts were entered into prior to the effective date, are in effect as of the effective date of the proposed rule, and are scheduled to remain in effect for at least one year after the effective date of the proposed rule).

ESTIMATED NUMBER OF ENTITIES REQUIRED TO COMPLY AND GENERAL DESCRIPTION OF INDIVIDUALS AFFECTED

ILECs with 100,000 or more access lines or under price-cap regulation would be required to comply with the proposed rules. All but two of the ten ILECs operating in Florida meet this definition. The proposed rules do not apply to ILECs which had fewer than 100,000 access lines as of July 1, 1995 and have not elected price-cap regulation.

Over 200 ALECs are certified to operate in Florida. About 40 of those ALECs are known to provide the type of service (dial tone and flat-rated or message-rated usage) that could be competitive with ILEC contract service arrangements or tariffed term plans. However, if the proposed rules become effective, it would make a new pool of potential customers available to competitive providers, possibly resulting in an increase in the number of ALECs providing such services.

Customers with accounts which are priced under a CSA or tariffed term plan would be directly affected by the proposed rule, provided they entered into the contract prior to the effective date of the rule, and the contract does not expire for at least one year after the rule becomes effective. There were approximately 7,199 accounts eligible under the original proposed rules (published in FAW, April 2, 1999), according to information staff received from the three large ILECs. BellSouth reported 1,640 accounts, GTE reported 2,759, and Sprint reported 2,800 (approximately 40% of Sprint's accounts are with governmental agencies).

RULE IMPLEMENTATION AND ENFORCEMENT COST AND IMPACT ON REVENUES FOR THE AGENCY AND OTHER STATE AND LOCAL GOVERNMENT ENTITIES

The Public Service Commission and other local government entities are not expected to experience implementation costs other than the costs associated with promulgating a proposed rule. The Commission should experience little direct cost for publicizing the proposed rule, because it is expected that customers will learn about the "Fresh Look" opportunity through the marketing efforts of ALECs. Commission staff may be called upon to resolve disputes over contract eligibility, the amount of the termination liability, and other related matters, but these should be able to be handled with existing staff.

Enforcement costs for the Commission could vary, depending upon whether a complaint is handled formally or informally (undocketed). Undocketed complaints generally consume fewer Commission resources than formal docketed complaints. The Division of Communications has resolved similar complaints informally in the past. However, it is not currently known how many, if any, Fresh Look complaints the Commission may receive, nor how many would require resolution through formal proceedings.

The proposed rule may benefit the Commission and other state and local government entities if it results in their being able to renegotiate existing telecommunications contracts at lower rates. Local governments holding ALEC certificates are expected to face compliance costs that are similar to those reported by other ALECs (negligible). They could also be expected to gain the same type of benefits (competitive opportunities) as other ALECs.

ESTIMATED TRANSACTIONAL COSTS
TO INDIVIDUALS AND ENTITIES

Contract Termination

Staff asked the three large ILECs to estimate the amount of contract termination charges that would not be recoverable under the proposed rule if all eligible contracts were terminated on December 31, 1998. The purpose of this question was to determine transactional costs under a "worst-case" scenario. Certainly, there is no expectation that all eligible contracts would be terminated, much less, that they would all be terminated on a given day. Also, it is likely that another year will have passed before the effective date of the rule.

BellSouth currently serves approximately 1,640 eligible contracts (primarily ESSX) whose average contract termination charges are $10,000 per system. This would result in a maximum of $16,400,000 being potentially unrecoverable, according to BellSouth, assuming that no unrecovered, nonrecurring costs exist. It is staff's understanding that BellSouth is unsure at this time what part of the $16.4 million (if any) it could recover under the proposed rule.

GTEFL serves approximately 2,759 eligible contracts (primarily Centranet). Using staff's worst-case scenario, GTEFL estimates that approximately $3,674,000 in termination charges would potentially not be recoverable under the proposed rule. The $3,674,000 figure provided by GTEFL

assumes that GTEFL would not be able to recover any of the termination charges on any of the accounts.

Sprint-Florida serves approximately 2,800 eligible contracts (primarily Centrex). About 40% of those contracts are government accounts. Sprint-Florida estimates that in excess of $4,000,000 would not be recoverable if all contract holders terminated their contracts on a given day.

If a customer chooses to terminate a contract under the proposed rule, an ILEC would certainly lose the revenues it would have earned from that customer had he not terminated his contract. However, the ILEC's unrecovered, nonrecurring costs would be covered, assuming that the ILEC has designed its contracts to recover any nonrecurring costs it incurred to serve the customer. The nonrecurring costs may be recovered through installation charges that were required to be paid in advance, a portion of the monthly charges already collected, termination charges, or a combination of the three methods. The proposed rule requires the customer to pay the ILEC an amount equal to any unrecovered, contract-specific, nonrecurring costs that do not exceed the termination liability specified in the contract being terminated. Therefore, if the proposed rule becomes effective and a customer chooses to terminate an eligible contract, the ILEC will be able to recover any outstanding nonrecurring costs of providing service.

Implementation

ILECs would incur administrative costs to provide the Statement of Termination Liability to customers. Sprint-Florida does not believe such costs would be significant. GTEFL also stated compliance costs would be relatively minor. However, GTEFL pointed out that additional labor costs could be incurred to determine the unrecovered, nonrecurring costs. BellSouth estimates labor and equipment cost totaling $239,247 to implement the proposed rule.

Transactional costs for ALECs should be limited to the administrative cost of setting up new customer accounts, which should be offset by new revenues. End-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.

IMPACT ON SMALL BUSINESSES, SMALL CITIES, OR SMALL COUNTIES

ALECS that are small businesses could benefit from the proposed rules by having the opportunity to increase their customer base. Small businesses, small cities, and small counties could benefit from the proposed rules by having the opportunity to obtain service which is more attractive in terms of functionality, features, or price than would otherwise be available under their current ILEC contract or tariffed term plan.

REASONABLE ALTERNATIVE METHODS

No Rule

The alternative of no rule is advocated by BellSouth and GTEFL. Both companies believe no rule is necessary, as the marketplace is effectively competitive. However, no evidence was provided to substantiate this. Collectively, ALECs serve only 1.8% of the total access lines in Florida, according to the most recent survey conducted by the Division of Communications staff in its 1998 report on competition.

When to Open and Close Window

According to the proposed rule, the Fresh Look Window (window) would begin 60 days after the effective date of the rule and remain open for one year. Several respondents stated opinions about how long the window should remain open. BellSouth believes the window should only remain open for three to six months. However, three to six months may not provide a sufficient opportunity for competitors to educate customers. Customers need a sufficient amount of time to evaluate their options, make choices, and have the changes implemented. In addition, three to six months may not be long enough for the market to experience lasting competitive benefits.

MCI, Intermedia, Florida Competitive Carriers Association (FCCA), and Time Warner, all believe the window should be open longer. Several respondents suggested the fresh look window should not open until there is some proof that customers will actually have choices. Sprint Communications Company Limited Partnership (Sprint) suggested the window be opened on the date the Federal Communications Commission (FCC) or the courts authorize BellSouth to provide interLATA services, and that the window remain open for six months. MCI suggested opening the window concurrent with the date long-term local number portability is implemented, and leaving

the window open for three years. There are some benefits to opening the window later or tying the opening of the window to a date that marks a change in the competitive environment. More providers would be available to compete for customers in a wider area. On the other hand, opening the window later would mean customers committed to long term contracts would be delayed in receiving benefits they could otherwise gain by terminating their contracts earlier.

Setting a fixed, one-year period as the length of time the window should remain open may mean lower administrative and implementation costs to both the Commission and ILECs, as these costs would be confined to a finite time period. If the window were permitted to open at different times for different customers, depending upon factors in a particular service area, the period of time during which the Commission must monitor these events and resolve any disputes is lengthened and costs for both the Commission and ILECs may increase as a result. Those who believe the opening of the window should be tied to demonstrated competition in a specific area would argue that there is no point in having a Fresh Look window if no competitive alternatives exist. On the other hand, the opening of the Fresh Look window itself may bring competition to the area.

Eligible Contracts

The proposed rule would limit eligible contracts to those which were entered into prior to the effective date of the rule, and are scheduled to remain in effect one year after the rule's effective date.

Alternatives to the effective date were suggested by several parties. Sprint suggested that contracts entered into from August 8, 1996, through the date of effective competition (date BellSouth is authorized to provide interLATA services) be termed eligible. FCCA, Intermedia, and MCI believe contracts entered into prior to January 1, 1999, should be eligible. The difficulty is establishing when, and to what degree, competition exists.

Tariffed services are often substantially discounted when individually priced under a CSA. Due, in part, to concerns about anti-competitive behavior, ILECs are required to file quarterly reports with the Commission reflecting the number of new contract service arrangements provided.[1] A brief review of these reports shows the number of new CSAs provided annually more than quadrupled for BellSouth from 1994 to 1997. For Sprint, the number of new CSAs provided

[1]Not all the CSAs contained in these reports would be eligible contracts under the proposed rule.

annually also increased, doubling from 1994 to 1997 (combined quarterly reports of Centel and United). For GTE, the number of new CSAs provided annually increased from 1994 to 1995, but by 1997 showed a 77% decrease from 1994 levels. The following table lists the number of new CSAs provided by each of the large LECs each year from 1984 through the second quarter of 1998.

New Contract Service Arrangements Provided															
	84	*85*	*86*	*87*	*88*	*89*	*90*	*91*	*92*	*93*	*94*	*95*	*96*	*97*	*2/98*
GTE	0	0	0	1	3	2	1	4	3	8	13	16	14	3	*
SBT	0	7	6	18	43	15	27	15	17	47	41	12	79	238	135
SPRINT	0	0	0	0	0	0	0	0	40	17	5	1	1	10	*

**unavailable*

Source: Numbers for 1984-1994 from Order No. PSC-95-0926-FOF-TL, remaining numbers from CSA Quarterly Reports. Numbers for United Telephone Company and Centel Telephone Company have been combined under Sprint.

One reason for the increase in the number of new CSAs could be that more customers are receiving offers from competitors. Therefore, rather than lose these customers, the ILEC responds by offering to meet the customer's needs through a contract service arrangement. Another reason more new CSAs are offered each year may be that the number of tariffed services for which the Commission has granted CSA authority has increased over the past fourteen years.

Termination Liability

The proposed rule limits the customer's termination liability to unrecovered, nonrecurring costs which do not exceed the termination liability specified in the terms of the contract. The FCCA suggests ILECs should only be allowed to recover the costs of any special construction arrangements that were additional or unplanned construction specifically to serve a user. However, limiting cost recovery to additional or unplanned construction would not permit ILECs to recover the legitimate, nonrecurring costs reflected in the work papers supporting the contract.

Time Warner expressed concern that some customers would be discouraged from taking advantage of the Fresh Look Window if they were required to make a large lump-sum payment in order to terminate a contract. Time Warner suggested permitting customers to pay the unrecovered, nonrecurring costs over time, as ILECs presently recover such costs over the term of the contract. This alternative was considered, but since the contractual time would be shortened, the ILECs

should be able to recover their already incurred, unrecovered, unrecurring costs with termination of the contract.

cc: Sally Simmons, CMU
Frlok3.cbh

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June 16, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: 980253-TX ("Fresh Look") Docket

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of Law and the Evidence, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin

Enclosures

cc: All parties of record
Marshall M. Criser III
William J. Ellenberg II
Nancy B. White

CERTIFICATE OF SERVICE
Docket No. 980253-TX

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 16th day of June, 1999 to the following:

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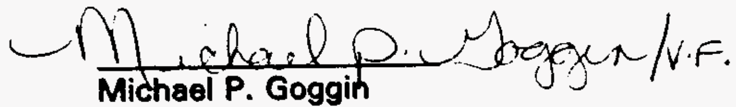

Michael P. Goggin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Rules 25-4.300, F.A.C.,)	Docket No. 980253-TX
Scope and Definitions; 25-4.301, F.A.C.,)	
Applicability of Fresh Look; and 25-4.302,)	
F.A.C., Termination of LEC Contracts.)	
____________________________________)	June 16, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.
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Should the Commission propose new 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?

CONCLUSION.................... 32

STATEMENT OF THE CASE

On February 17, 1998, Time Warner AxS of Florida, L.P. ("Time Warner"), filed a Petition to Initiate Rulemaking. In its petition, Time Warner requested that the Florida Public Service Commission (the "Commission") adopt what it described as a "Fresh Look" rule, under which a customer of an Incumbent Local Exchange Carriers ("ILEC") who had agreed to a long term, discounted contract would have an opportunity to abrogate that contract without incurring the termination liability to which it had agreed, in order to contract with an Alternative Local Exchange Carrier ("ALEC"). The Commission granted the Petition, and a Notice of Rule Development was published in the Florida Administrative Weekly on April 10, 1998. A workshop was held on April 22, 1998. Interested persons were afforded an opportunity to file comments and testimony.

Based on information received from carriers in response to staff data requests, the proposed rules were revised. On March 4, 1999, the staff recommended that the rules, as revised, be adopted by the Commission. At its Agenda Conference on March 19, 1999, the Commission set the rulemaking for hearing. On March 24, 1999, the Commission issued a Notice of Rulemaking, which included further revisions to the proposed rules.

Interested parties filed comments and testimony. A hearing on the proposed rules was held before the Commission on May 12, 1999.

STATEMENT OF BASIC POSITION

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

For the reasons set forth herein, the proposed rules should be rejected and this docket closed. The purported justification for the proposed rules is that certain customers of BellSouth and other ILECs entered into long term contracts with the ILECs at a time when these customers had no competitive alternatives, and that these contracts constitute a barrier to market entry for ALECs who subsequently have begun to compete with the ILECs. Despite three opportunities to submit testimony and comments and a hearing before the Commission, none of the rules' proponents has provided evidence to demonstrate that these purported justifications exist. Indeed, the record in this matter tends to show the opposite is true. Accordingly, the adoption of the proposed rules is unjustified. Moreover, even if it could be shown that the proposed rules would benefit competition, the Commission does not have the statutory authority to take this action. In addition, the rules proposed, even if the Commission had the statutory authority to adopt them, would be constitutionally infirm. For all of these reasons, the proposed rules should be rejected.

STATEMENT OF POSITION ON THE ISSUES

Issue 1: Should the Commission propose new 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?

**Position: No. The Commission lacks the statutory authority to authorize the abrogation of the contracts at issue, such rule would violate the contracts and takings clauses of the United States and Florida Constitutions, and there is no evidence that the adoption of the proposed rules is justified or would benefit competition.

A. The Proposed Rules Are Unjustified.

Even if the Commission had the authority to adopt the proposed "Fresh Look" rules, they are unjustified. The rules' proponents suggest that these rules are justified because the contracts at issue were entered into at a time when no competitive alternatives to ILEC services was available. See, e.g. The Florida Competitive Carriers Association's Responsive Comments on Proposed Fresh Look Rule ("FCCA") at 1; and Responsive Comments of KMC Telecom Inc. ("KMC") at 16. Moreover, they contend that these agreements constitute barriers to their entry into the market. See, e.g. Comments of AT&T Communications of the Southern States, Inc. on the Proposed Fresh Look Rule ("AT&T") at 1; FCCA at 1. Neither of these purported justifications is true.

1. The contracts to be abrogated under the proposed rules were freely bargained for by customers with competitive alternatives.

In Time Warner's Petition, which initiated this docket, it suggested that the proposed rules were necessary to give customers a chance to choose from competing providers, and thus should apply to "contracts with LECs entered into in a monopoly environment" in order to give customers an opportunity "to avail themselves of

competitive alternatives now offered or to be offered in the future by alternative local exchange companies." Petition to Initiate Rulemaking Pursuant to § 120.54(5) F.S., by Time Warner AxS of Florida, Inc. ("Petition"), p. 1 (filed Feb. 16, 1998). The proposed rules, however, would apply to contracts entered into by customers who, as the Commission Staff explains in its recommendation, already had choices between the services offered by the ILEC, and those offered by competing providers at the time they entered into these contracts. March 4, 1999 Staff Recommendation, p. 2 ("Prior to ALEC competition, LECs entered into customer contracts covering local telecommunications services offered over the public switched network (typically in response to PBX-based competition")). Accordingly, the original purported *justification* for the rules--to benefit *customers* who purportedly *lacked competitive alternatives* at the time they *entered into these contracts*--is illusory.

In its recommendation, however, Staff suggests two additional justifications. First, although the customers who entered into such contracts had competitive alternatives from which to choose at the time, now they have more. Staff Recommendation, p. 2. Second, "[t]he purpose of the 'fresh look' rule is to enable ALECs to compete for existing LEC customer contracts." Staff Recommendation, p. 3. Upon examination, neither purported justification can legitimize the proposed rules.

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

reasonable in this circumstance to give ALECs the opportunity to compete for this business . . . ." Staff Recommendation at 2. This reasoning includes a number of implicit assumptions that are not true.

For example, it would be wrong to assume, even in the case of contracts for services for which PBXs were an alternative, that they were the only alternative. As the Staff correctly points out, "ALECs are now offering switched-based substitutes for local service." Staff Recommendation at 2. The Staff apparently (and incorrectly) assumes, however, that all of the contracts to which the rule would apply were entered into prior to the time ALECs began to compete with BellSouth. It would certainly be untrue to suggest, however, that the rules, as currently proposed, would apply only to contracts entered into at a time when no ALEC competition existed.[1] ALECs have been actively competing with BellSouth since 1995. Direct Testimony of C. Ned Johnston at 4. Yet, the current proposed rules would apply to all contracts entered into by such customers up to the date that the rule becomes effective, (including those not yet entered into today) although ALEC competition exists and has for some time.

In addition, Staff's statement that for those who chose BellSouth services over PBX competition, BellSouth was the "only option," is clearly incorrect. Customers often decide to use PBX service, or services provided by an ALEC, rather than BellSouth. Each customer who does so presumably makes that choice based on its belief that the chosen alternative has some characteristic, such as price or the ability to receive interLATA service in the same bundle, that BellSouth cannot match. That does not

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

imply that the customer had no option other than the one it chose. Moreover, most of the customers who would be affected by the rule (typically large, sophisticated commercial customers) entered into such contracts after the passage of Florida's price regulation statute in 1995 and the Telecommunications Act of 1996. Each of these customers likely was aware that ALEC competition existed, or would soon be available. Each had the option to choose a non-LEC alternative, to enter into contracts of shorter duration, or to purchase service month-to-month. Moreover, the bulk of the contracts that would be affected by these rules were entered into after January 1, 1997. By this time, BellSouth faced facilities based ALEC competition, and the number of such competitors has multiplied since that time. Direct Testimony of C. Ned Johnston at 4-5. Accordingly, it is not necessary to adopt the rules to afford these customers choice; they enjoyed the benefits of competition when they agreed to the contracts.

The second justification proffered by the Staff, "to enable ALECs to compete for existing ILEC customer contracts . . .which were entered into prior to switch-based substitutes for local exchange telecommunications services," Staff Recommendation at 3, is also without merit. As noted above, *most* of the contracts to which the rules would apply were entered into (or will be entered into) after ALEC competition was available. *All* of the affected contracts were entered into at a time when competition existed (even if the ALECs who have requested this rule were not among the competitors at the time). The Commission should not adopt rules designed to abrogate contracts freely entered into by customers who considered an array of competitive alternatives just to boost the business of would-be competitors who have not begun to offer service in Florida or, worse, an ALEC who was already competing when the contract was signed but who

simply failed to win the customer the first time. The Commission's statutory objective, as the Staff suggests, is to promote *competition*, not to promote *competitors.*[2]

The proponents of the proposed "Fresh Look" rules have had multiple opportunities in this docket to file testimony or other evidence that might lend some credence to their assertion that BellSouth was the only alternative available to the customers who would be affected by the proposed rules, yet none has done so. Each claims that the proposed rules are needed because BellSouth's customers purportedly entered into long term agreements "in a monopoly environment," when BellSouth was the only available alternative. *See, e.g.* FCCA at 1; AT&T at 1; and Responsive Comments of KMC Telecom Inc. ("KMC") at 16. In spite of prior Commission findings that competition, including switched-based competition from ALECs, has existed for some time in BellSouth's territory, none of the rules' proponents provides any evidence to suggest that the customers whose contracts would be affected by the proposed rules did not have competitive alternatives available to them when they selected BellSouth Instead, they offer market share statistics and claim that BellSouth's share

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

demonstrates the lack of competing alternatives. FCCA at 2; KMC at 6, 7-8.[3] In fact, the opposite is true.

While it is clear that competitive alternatives were available prior to 1996, it is also clear that the number of competitive alternatives has grown at an explosive rate. Within months of the 1996 Act's passage, six carriers of local exchange service were actively competing with BellSouth.[4] By mid-1998, the number of local exchange carriers had increased over 800 percent to 51.[5] Indeed, as the Commission found in BellSouth's proceeding under Section 271, by 1997, BellSouth faced competition for business customers from competing providers of local exchange service throughout its territory. *See,* Response Comments of BellSouth Telecommunications Inc., at 2. This is all, of course, in addition to providers of Shared Tenant Services, PBX vendors and others who had been competing for these customers long before the passage of Florida's price regulation statute or the Telecommunications Act.

More importantly, the number of access lines provided to business customers by these carriers is growing at a rate of over 300 percent annually and their share of the business market is increasing at a like rate.[6] These plain facts, which the rules'

[3] It should be noted that the market shares cited by the rules' proponents are misleading to say the least. The figures include both business and residential access lines. Moreover, none of the figures attempt to gauge competition from local access line substitutes, such as PBXs, and KMC's figures fail to include data lines. Moreover, as BellSouth noted in its response comments in this docket, high market shares do not, as KMC suggests, equate to market power. Economists and the courts generally agree that to prove market power, it must be shown that a seller in a defined market has the power to raise prices and restrict output. *See e.g., Eastman Kodak Co. v. Technical Servs., Inc.*, 112 S. Ct. 2072, 2080-81 (1992). KMC has not attempted to even define a relevant market, much less offer proof of market power.

[4] Florida Public Service Commission, *Competition in Telecommunications Markets in Florida (1996 FPSC Report)* at 40-43. (Dec. 1996).

[5] Florida Public Service Commission, *Competition in Telecommunications Markets in Florida (1998 FPSC Report)* at 36-47. (Dec. 1998).

[6] *Id.* at 46-47. *Compare,* Florida Public Service Commission, *Competition in Telecommunications Markets in Florida (1997 FPSC Report)* at 66-73 (Dec. 1997).

proponents conveniently ignore, demonstrate that business customers have enjoyed competitive alternatives to BellSouth for years, and have seen their options multiply in the last three years at a dizzying rate.

Against these undeniable facts, the only purported "fact" offered by the rules' proponents to show that no competitive alternatives were available are misleading market share statistics. Even if the market shares offered related to the segment of the market in which the proposed rules are designed to intervene, they would not show a lack of competitive alternatives existed at any time. All they would indicate is that, given a plethora of competitors, a steadily decreasing majority of customers chose BellSouth.

In view of past Commission findings that business customers have had competitive alternatives to BellSouth for years, the rules' proponents had the burden to prove that the contracts to be abrogated under the proposed rules were signed at a time when no competitive alternatives to BellSouth existed. Merely repeating the assertion will not make it true. No party has produced evidence to support this assertion. Accordingly, the Commission should disregard any argument that it justifies the adoption of these rules.

2. The contracts to be abrogated under the proposed rules do not constitute a "barrier to entry" to any relevant market.

The rules' proponents also attempt to justify the abrogation of ILEC contracts by arguing that they constitute barriers to entry. The record in this proceeding proves otherwise. No party to this proceeding has argued, much less proven, that such contracts are barriers to entry in and of themselves. Indeed, Time Warner admits that it also signs long term contracts with customers that are subject to termination penalties,

Transcript of Hearing ("Tr.") at 19-20. KMC and AT&T have pointed out that they generally consider such contracts to be procompetitive, except, apparently when entered into by an ILEC. Comments of KMC Telecom Inc. and KMC Telecom II, Inc in Support of Adoption of a Fresh Look Rule at 2; AT&T at 3. Moreover, Time Warner maintains that a long term contract between, for example, Time Warner and a customer, would not be a barrier to entry for an ALEC. Tr. at 20. Accordingly, the rules' proponents would have to give some justification, apart from the structure of the contracts themselves, for their assertion that BellSouth's contracts constitute barriers to entry.

A good place to start would be to define a relevant market from which ALECs allegedly are barred. Not surprisingly, no party to this proceeding has been able to do so. Instead, KMC, for example, cites some market share statistics to allegedly demonstrate that the contracts in question constitute barriers to entry by ALECs. KMC at 6, 7-8. The market share statistics are misleading, however, for a number of reasons. When properly analyzed, these statistics tend to undermine the ALECs' assertions. For example, the share data cited by KMC purports to be for voice-grade access lines in the areas of Florida in which BellSouth is considered to be the incumbent provider. This data does not relate to any properly defined market. Data access lines, and access line substitutes, such as PBX systems, apparently are not included in the data, for example.

Moreover, even if a relevant market could properly be defined as access lines in the areas of Florida served by BellSouth, the contracts at issue could not reasonably be considered barriers to ALEC entry. As Mr. Johnston stated in his testimony, the

contracts at issue largely pertain to medium to large business customers. Tr. at 63. Business lines, of which the lines served under the contracts at issue are merely a subset, account for less than 30 percent of the access lines in provided by switch-based carriers in Florida. 1998 FPSC Report at 46. Accordingly, even if the contracts foreclosed ALECs from competing for the business of medium to large business customers (and they do not), they could not be considered "barriers to entry," as ALECs would remain free to compete for over 70 percent of the remaining access lines.

More importantly, there is no evidence in the record to suggest that the contracts at issue would bar entry into a market comprised only of medium to large business customers, if in fact such a relevant market could be defined. Indeed, there are a number of ways that ALECs can and do sell to such customers. The rules proponents provide no evidence as to what percentage of such customers are subject to long term contracts. It is reasonable to assume, however, that there are medium and large business customers who are in the market for telecommunications services, notwithstanding the existence of these contracts.

First, there are medium and large business customers who do not have long term agreements with BellSouth. In addition, there are new business customers being created in or moving to Florida every day with whom BellSouth has no prior relationship to whom ALECs may sell services. Also, complex business customers usually have changing needs for telecommunications services and often purchase telecommunications services from more than one provider, so the existence of a contract with BellSouth would not necessarily preclude an ALEC from also selling services to such a customer. Direct Testimony of C. Ned Johnston at 7.

Furthermore, even if a medium or large business customer has contracted with BellSouth for all the services it requires, this does not preclude an ALEC from selling to such a customer. The average duration of BellSouth's long term contracts is three years, so approximately one third of these contracts expire in any given year. Responsive Testimony of C. Ned Johnston at 4. Accordingly, at any given time there are many current BellSouth customers who are in the market for telecommunications services. Of course, faced with an attractive offer from an ALEC, a customer can always terminate its contract with BellSouth and pay the termination penalty.

In addition, pursuant to prior Commission rulings, ALECs are permitted to resell BellSouth's contracts. Although the rules' proponents have insinuated that resale of ILEC contracts is not "real" competition, it provides a means for an aggressive competitor to win a customer. Customers who wish to transfer contracts to an ALEC in this manner face no termination liability. In addition, while a reselling ALEC cannot offer a different package of service for the remaining term of the CSA, it can offer a better price, promise better customer service, and develop an ongoing relationship with the customer to better understand its telecommunications needs and, perhaps, earn the customer's loyalty.

The Commission should dismiss any suggestion that BellSouth's term contracts constitute barriers to entry. As detailed above, the explosive growth of ALEC business is enough to disprove this assertion. Indeed, the customers among whom ALECs have had the greatest success in penetrating the local exchange market are businesses, the

very customers ALECs claim are foreclosed to them.[7] More telling, however, is the fact that the rules' proponents recognize that long-term contracts are not barriers to entry. See, e.g. AT&T at 3. They argue that only long-term contracts entered into before the availability of competitive alternatives should be abrogated. Id. In view of the evidence of competitive alternatives and the absolute lack of any proof to the contrary, then according to AT&T's logic, there is no reason to assume that BellSouth's contracts are barriers to entry, any more than one would assume so of Time Warner's or the contracts of any other ALEC.

The proposed rules simply cannot be justified given the record evidence. ALECs have entered the market, despite their claims that ILEC contracts bar their entry. Indeed, their businesses are growing at an explosive rate and primarily among the very business customers they claim are foreclosed to them. In fact, in national terms, ALECs are gaining market share at a much more rapid rate than did interexchange competitors after that market was opened to competition. Rebuttal Testimony of David E. Robinson at 7-8. In response to the facts, all the proponents of these proposed rules can offer is rhetoric. The Commission should dismiss the rhetoric and reject the rules.

[7] It should be noted that the numerous cases before the Commission involving disputes over reciprocal compensation likely would not have arisen if ALECs faced the barrier to entry that they allege in this docket.

B. The Commission Lacks the Statutory Authority to Authorize the Abrogation of Contracts Between Telecommunications Carriers and Their Customers.

The proposed Fresh Look rules would require massive intervention by the Commission into private contracts between ILECs and their customers. Chapter 364 of the Florida Statutes, however, does not confer such authority upon the Commission. Because the Commission is a statutory creation and is granted authority in derogation of common law rights, it has only such authority as is clearly granted to it upon a strict construction of the statutes. See Florida Bridge Co. v. Bevis, 363 So. 2d 799 (Fla. 1978) (Commission's powers are only those that are conferred expressly or impliedly by statute; a reasonable doubt as to the lawful existence of a particular power exercised by the Commission must be resolved against exercise thereof).

To be sure, the Commission has specific statutory authority to "regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons." Fla. Stat. § 364.19. Indeed, the Commission already has approved the terms of the contracts at issue. The Commission does not, however, have the statutory authority to authorize the abrogation of such agreements after the parties have entered into them, and have begun to perform in reliance on the promises they have exchanged.

If the Legislature had intended for the Commission to intervene in the marketplace in the obtrusive manner envisioned by proposed rules, the Legislature would have made a specific grant of authority to the Commission. The Florida Statutes grant no authority, whether express or implied, to the Commission to abrogate

private contracts between telecommunications carriers and their customers through its rules.

To the contrary, the legislature has encouraged the formation of such contracts by doing away with rate of return regulation and removing regulatory barriers to entry by competing providers. The legislature apparently recognized that in order for a competitive market to flourish, telecommunications carriers and their customers need to have the freedom to enter into contracts where the terms, including price, are determined by bargaining between them, rather than regulatory fiat. Indeed, the legislature specifically recognized in the 1995 legislation that discount contracts designed to meet competitive alternatives were in use and should be encouraged:

> 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, non-basic services in a specific geographic market or to a specific customer by deaveraging the price of any non-basic service, packaging non-basic services together or with basic services, using volume discounts and term discounts, and offering individual contracts.

Florida Statutes Section 364.051(6)(a).

The proponents of the rule have not identified any express provision that would authorize the Commission to adopt a rule that would allow the abrogation of such contracts. Because the Commission is not empowered to abrogate existing contracts between a telecommunications carrier and its customers, promulgating the proposed rules clearly would be unlawful.

Although many alternative local exchange carriers (ALECs) sing the praises of Fresh Look as an essential element of local competition, many states that have

considered such petitions from ALECs have concluded that it would be improper to adopt such rules. For example, the North Carolina Utilities Commission recently rejected a similar demand by ALECs for a "Fresh Look" rule. Order Dismissing Fresh Look Petition on Jurisdictional Grounds, Docket No. P-100 Sub 133 (N.C.U.C. May 22, 1998). The North Carolina Commission noted that neither Congress, the Federal Communications Commission (FCC), nor the Legislature had decided to impose a "Fresh Look" requirement, although each had the opportunity to do so. Id. at 12. That Commission concluded that, although it has general authority to facilitate and promote local competition, it lacked specific statutory authority to adopt a rule authorizing the abrogation of existing contracts. Id. at 13. Other states have come to similar conclusions. See In re: New England Tel. & Tel. Co., Docket 5713 (Vt. Public Serv. Bd. Aug. 20, 1997) (holding that "NYNEX should not be required to give its customers a 'fresh look' because there was "no reason to free these customers from the obligations that they knowingly took on"); In re: City Signal, Inc., Case No. U-10647 (Mich. Public Serv. Comm'n Feb. 23, 1995) (rejecting "fresh look" proposal, noting that "customers should be aware of the risk involved in entering into long-term contracts" in an increasingly competitive marketplace); In re: Illinois Bell Tel. Co., Case No. 94-0096, 94-0117, 94-0146 (Illinois Commerce Comm'n April 7, 1995) (rejecting "fresh look" proposal and holding that, "[i]n the absence of evidence that the contracts were entered into for anti-competitive purposes, we will not disturb them"); In re: MFS Communications Co. Inc, PUC Docket No. 16189 (Texas Public Utility Comm'n November 7, 1996) (holding that "SWBT is not required to provide a fresh look opportunity for its customers currently under long term plans"); In re: Northwest

Payphone Association v. U.S. West, Docket No. UT-920174 (Wash. Utilities & Trans. Comm'n March 17, 1995) (rejecting "fresh look" proposal, noting that "the Commission ordinarily refrains from interfering in contracts between U.S. West and its customers").

Moreover, the FCC has only endorsed a "fresh look" approach in other contexts, and then only in very narrow circumstances not present here. Indeed, contrary to the suggestion of Time Warner in its initial Petition, the only Fresh Look requirement adopted by the FCC in its entire 700-page Interconnection Order, was in connection with Commercial Mobile Radio Services (CMRS) providers. In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98 (rel. Aug. 8, 1996). The FCC had adopted rules requiring that interconnection agreements with CMRS providers comply with principles of mutual compensation and that each carrier pay reasonable compensation for transport and termination of the other carrier's calls. Concluding that many such agreements provided for little or no compensation, in violation of the Commission's rules, the FCC ordered that CMRS providers that were party to pre-existing agreements that provide for non-mutual compensation "have the option to renegotiate these agreements with no termination liabilities or other contract penalties." Id. ¶ 1094. The FCC did not seek to impose a Fresh Look requirement on all long-term contracts between incumbents and their customers, as these proposed rules would do. The FCC rule only applied to contracts that were in violation of the FCC's rules.

The other FCC decisions cited by Time Warner in its initial Petition in this docket illustrate that the FCC generally has limited its use of a Fresh Look requirement as a

means to remedy a contract containing legally questionable provisions.[8] The FCC has not endorsed a sweeping application of Fresh Look requirements as a means of promoting competition, notwithstanding any suggestion by Time Warner to the contrary.

Indeed, in In re: Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (rel. May 8, 1997), the FCC expressly rejected a Fresh Look requirement for schools and libraries subject to long-term contracts, which Petitioners have proposed here. As the FCC reasoned:

> We find that these proposals would be administratively burdensome, would create uncertainty for those service providers that had previously entered into contracts, and would delay delivery of services to those schools and libraries that took the initiative to enter into such contracts. In addition, we have no reason to believe that the terms of these contracts are unreasonable. Indeed, abrogating these contracts or adopting these other proposals would not necessarily lead to lower pre-discount prices, due to the incentives the states, schools, and libraries had when negotiating the contracts to minimize costs. Finally, we note there is no suggestion in the statute or legislative history that Congress anticipated abrogation of existing contracts in this context.

Id. ¶ 547. Such reasoning is equally applicable here, and should be fatal to the proposed rules.

In short, the Commission should decline to adopt the proposed rules because they ask for something that the Commission lacks the statutory authority to do --namely, promulgate regulations that abrogate existing contracts between telecommunications carriers and their customers. The Commission cannot assume such authority simply in the name of increased competition.

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[8] For example, in In re: Amendment of the Commission's Rules Relative To Allocation of the 849-851/894-896 MHZ Bands, 6 FCC Rcd 4582 (July 11, 1991), the FCC held that airlines could terminate long-term contracts entered into with GTE for the provision of air-ground radiotelephone service without regard to the termination provisions in the contract. In reaching this holding, the FCC found that GTE had entered into contracts that bound airlines exclusively to GTE for periods exceeding the term of GTE's license,

C. The Proposed Rules Are Unconstitutional, Even Assuming The Commission Had the Statutory Authority to Promulgate Them

BellSouth also submits that there are significant constitutional problems with the proposed "Fresh Look" rules. The Commission is an administrative agency of the State whose statutory powers are dual in nature: legislative and quasi-judicial. Rulemaking by the Commission is an exercise of its delegated legislative, not judicial, authority. It is undisputed that, in exercising its legislative authority, the Commission may not exceed the limitations imposed upon the Legislature by the State and Federal Constitutions. See Riley v. Lawson, 143 So. 619 (Fla. 1932) ("authority given to regulate carriers must be considered as having been conferred to be exercised according to constitutional limitations").

The Commission is not being asked in its judicial capacity, to determine the constitutionality of an act of the Legislature. Instead, the Commission has been asked to use its quasi-legislative power to adopt a rule which will abrogate existing contracts, which BellSouth submits would be unconstitutional. BellSouth, recognizing the rulemaking authority of the Commission, is informing the Commission of the constitutional impact of the act which it has been asked to take. In so doing, BellSouth is ensuring that the Commission understands that its rulemaking authority is not unfettered, but is subject to, and constrained by, both the State and Federal Constitutions. BellSouth's position is simple: The Commission has been asked to make a rule which violates the constitutional protections afforded all citizens of this State and Nation, and the Commission cannot do that.

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which, according to the FCC, "was contrary to the public interest ...." Id. ¶ 8. No similar concern is present here.

1. The adoption of a fresh look requirement would violate the Contract Clause of the Federal and State Constitutions.

The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " U.S. Const. Art. I, § 10. See also Fla. Const. Art. I, § 10. When applied to state actions that have the effect of impairing the obligations of one or more private parties under contracts, this prohibition has been interpreted to mean that no state may take legislative or administrative action that substantially impairs a contractual obligation, unless such action is justified as reasonable and necessary to achieve an important public purpose. United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977).

The United States Supreme Court has noted that any action adjusting the rights of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. Id. at 22. For cases of severe impairment of contractual rights, a careful examination of the nature and purpose of the State action is necessary. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978). State action is especially egregious - in a constitutional sense - where, as here, it impairs the contracts of a narrow class of persons in order to meet its desired purpose. Id. at 248.

While telecommunications carriers are subject to the "police power" of the State, such "police power" does not give the State, or the Commission, the right to do as it pleases without regard for the rights of its citizens, including telecommunications carriers. Id. at 241. The State and Federal Constitutions place limits on the exercise by the States of this power. "If the Contract Clause is to retain any meaning at all,

however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." Id. at 242. The question, then, is not whether the State's "police power" is greater than the right of the private parties to enter into valid, binding contracts--it is. The question is whether an action of the State, or the Commission, pursuant to this police power is within the constitutional limits which are placed upon the States.

Resolution of this question involves a tripartite analysis. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410-13 (1983). The initial inquiry is whether the state action has, in fact, operated as a "substantial impairment" of a contractual relationship. If a substantial impairment is found, the State, in justification, must have a significant and legitimate public purpose behind the regulation. If such a public purpose can be identified, the adjustment of the rights and responsibilities of the contracting parties must be based upon reasonable conditions and must be of a character appropriate to the public purpose justifying the state action. Id.

The threshold inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). In this present case, there is no question that (1) "eligible contracts," as defined in the proposed rule, are valid, binding contracts between private parties and (2) a Fresh Look requirement would impair the obligations of these contracts. Indeed, the Staff's March 4, 1999 analysis of the proposed rules state that the rules could permit a

customer to "terminate a LEC contract ... subject to a termination liability less than that specified in the contract." Staff Recommendation, p. 3.

It is evident that the impairment of such contracts under the proposed rules would be "substantial." This inquiry is crucial because "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." Spannaus, 438 U.S. at 244. The United States Supreme Court has explained that:

> Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245. While the United States Supreme Court has provided some guidance as to what constitutes a "substantial impairment" in cases where state action amounts to less than a total destruction of contractual expectations, such an inquiry is unnecessary in this case since the proposed rules would amount to a total impairment of the contracts in question, which is clearly a "substantial impairment."

Since "Fresh Look" will operate as a "substantial impairment" of ILEC/customer contracts, the Commission must have a significant and legitimate public purpose, "such as the remedying of a broad and general social and economical problem," behind the adoption of the requested amendment to the Commission's rules. Energy Reserves, 459 U.S. at 411-12. "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." Id. at 412. Because the impairment caused by the proposed rules is

absolute, the height of the hurdle such a state action must clear is high. No such significant and legitimate public purpose underlies the proposed rules, much less one that can clear the highest of hurdles.

The proponents of Fresh Look attempt to justify the need to abrogate these contracts on the basis of a need to stimulate competition in the local exchange market. Even assuming that this were a sufficiently "significant and legitimate public purpose," or that such a public purpose were not already being satisfied by Florida's existing statutory and regulatory provisions, a close examination of Fresh Look reveals that its purpose is not public, but rather is private. The sole purpose behind Fresh Look is a one-time destruction of such contracts so that the competitors of ILECs can take ILECs' largest customers and commit them to extended contracts of their own. The only beneficiaries of such an action will be ALECs.

It would be inaccurate, based on the record in this proceeding, to suggest that the largest customers of the ILECs had no competitive alternatives when the contracts at issue were made, or that this imagined dearth of competitive alternatives is a "general social or economic problem." Under the guise of Fresh Look, ALECs seek to have the Commission use the police power of this State to undo the results of the competitive process so that they may "cherry pick" the largest and most lucrative business customers. This would not serve any public purpose, much less a significant and legitimate one.

Finally, and assuming some significant and legitimate public purpose could be found to justify a Fresh Look requirement, and it cannot, "the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon

reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Energy Reserves, 459 U.S. at 412 (quoting U.S. Trust, 431 U.S. at 22). The proposed Fresh Look requirement cannot be characterized as either "reasonable" or "appropriate." It seeks to destroy contracts which are prima facie just and reasonable in order to stimulate competition in what is already the most competitive segment of the local exchange market. It seeks to destroy contracts which were entered into in situations where competition already existed, and allows one party to those contracts -- the customers -- to limit the termination liability to which they freely agreed. It is neither "reasonable" nor "appropriate" to adopt regulations to interfere with or nullify competition in the cause of promoting it.

The proposed Fresh Look rules are simply a request by the ALECs for a market share handout. ILECs stand to lose their customers, lose the revenue to which the contracts entitle them, lose the contractual right to full termination liability, and other contractual rights, all of which were won fairly in the competitive arena. ILECs, along with the Commission, would also bear much of the administrative burden that these rules would create. The Commission is asked to take these actions despite the fact that no express legal authority exists for the Commission to abrogate these contracts. There simply is nothing "reasonable" or "appropriate" about such a process, especially when its only effect would be to benefit one group of competitors at the expense of another.

The proponents' contention that the proposed rules would be constitutional is somewhat hollow. Their analysis suffers from a misreading of the key precedents.

Their arguments ultimately fail, however, because of their utter lack of any factual justification for the rules.

In a nutshell, KMC, FCCA and Time Warner all contend that because telecommunications is a regulated industry, BellSouth could not reasonably expect that it has any constitutionally recognized rights in its contracts. This surprising assertion is based on a misreading of the decision in Energy Reserves. In that case, a contract for the purchase of wellhead gas by a utility was found not to have been substantially impaired by a Kansas Statute that imposed price ceilings on the sale of wellhead gas, frustrating the price escalator clause in the producer's agreement. Id. at 410-420. The reasons for the Court's holding were that the parties' contract expressly recognized that gas prices were fixed by regulation; indeed the governmental price escalation clause would only operate in the event that Kansas or the federal government acted to raise prices. The court found that "at the time of the execution of the contracts, ERG [the producer] did not expect to receive deregulated prices. The very existence of the governmental price escalator clause indicates that the contracts were structured against the background of regulated gas prices." Id. at 415. The fact that the gas producer's stated expectation was that the contract price would be fixed under federal or state law meant that its reasonable expectations were not substantially impaired when Kansas adopted a price for intrastate gas sales that was lower than the rates adopted by the federal government for interstate sales. Id. at 416.

The fresh look proponents misinterpret the fact-specific holding in Energy Reserves as a broad statement that no participant in an industry regulated by a state can have any reasonable expectation that its contracts will not be substantially impaired

by the state. Time Warner, for example, says that such contracts "are simply not the type of private commercial contracts envisioned to be protected by the Contract Clause." Petitioner's Response to Comments by BellSouth Telecommunications, Inc. and in Support of the Proposed Rules ("Time Warner") at 7. If the Supreme Court had believed this to be true, its opinion in Energy Reserves would have been a great deal shorter. Contrary to Time Warner's assertion, the Commission must examine the proposed exercise of the State's police power to see if it violates the Contract Clause, not the other way around.[9]

As stated above, the first step in the analysis of a state regulation like the proposed rules is whether it would substantially impair a contract relationship. Id. at 411. Whether the industry to which the contract relates is regulated is a factor to be considered, but so is the degree to which the contract would be impaired. Id. The fact that an industry is regulated does not end the inquiry.

In this case, the degree and direction of regulation are substantially different than in Energy Reserves. BellSouth is not subject to rate of return regulation. The prices in the contracts at issue are not fixed by the

[9] Similarly, the other authorities cited by the proponents do not stand for the proposition that the fact of regulation alone negates constitutional protections. Rather, these cases recognize that a state's exercise of its police power must serve a significant and legitimate public purpose. *See, e.g., H. Miller & Sons v. Hawkins*, 373 So.2d 913, 914 (Fla. 1979) ("[C]ontracts with public utilities are made subject to the reserved authority of the state, under the police power on express authority or constitutional authority, to modify the contract *in the interest of the public welfare* without unconstitutional impairment of contracts.") (emphasis added).

Commission[10] and, unlike the parties in Energy Reserves, BellSouth and its customers have no reasonable expectation that they will be. That case concerned the gas industry at a time when regulators believed that regulation was a better governor of industries than free markets would be. The case also arose during the height of the energy crisis. The parties knew that the price provisions in their contracts would be determined by regulators and memorialized this fact in their agreement. By contrast, these contracts concern the sale of services in a deregulated telecommunications market. The legislature has encouraged the formation of such contracts by doing away with rate of return regulation and removing regulatory barriers to entry by competing providers. Indeed, the legislature specifically recognized in the 1995 legislation that discount contracts designed to meet competitive alternatives were in use and should be encouraged. *Florida Statutes Section 364.051(6)(a).*

Given the clear intent of the state to deregulate telecommunications markets and the clear statutory recognition and encc:uragement of precisely the sort of contracts at issue, no reasonable business would expect that the state intended to somehow override the constitutional protections that attach to all contracts.[11] Accordingly, it would be unreasonable to state that BellSouth has no contractual rights to impair.

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[10] Indeed, contrary to Time Warner's belief, the Commission lacks the statutory authority to determine just and reasonable rates for these contracts under Florida Statutes Section 364.14. *See* Florida Statutes Section 364.051(1)(c).

[11] It bears repeating that there is no express authority given to the Commission , in this section or elsewhere, that would permit rules to be adopted abrogating such contracts after they have been formed, nor do any of the rules' proponents cite any.

As stated above, the impairment of BellSouth's rights would be total – the proposed rules authorize the abrogation of BellSouth's agreements with its business customers. Accordingly, the analysis must be focused on whether a significant and legitimate public purpose would be served by the adoption of the rules. Energy Reserves, 459 U.S. at 410-14. The purpose of this requirement is to be certain that the state's police power is not merely being used to provide a benefit to special interests. Id. at 412.

The purported justification for the rule is to promote competition. Leaving aside for the moment the irony of asking regulators to pass additional regulation to make a deregulated market more competitive, the rules' proponents have not demonstrated how competition would benefit from the rule. The affected contracts were made by customers with a range of competitive alternatives. Moreover, most of the agreements were signed at a time when rule proponents like Time Warner and KMC were themselves actively competing against BellSouth. In short, the proponents have identified no category of contracts that were signed "in a monopoly environment" or when BellSouth was the "only alternative." The failure of the rules' proponents to put evidence into the record in this matter that would justify the rules demonstrates that they are not reasonably related to any significant or legitimate *public* purpose. The rules undoubtedly would benefit some competitors, but this is not the same thing as to benefit competition.

2. The adoption of a fresh look requirement would constitute an unconstitutional taking of property without just compensation.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend V.[12] Like the Contract Clause, the Taking Provision operates as a limit upon the State's inherent police power. The United States Supreme Court has explained that:

> [S]ome [values incident to property] are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). This limitation on the police power prohibits the taking of private property except for a public, rather than private, purpose and without the payment of just compensation.

A taking can occur as to an intangible property interest. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984). Contract rights are a form of property and as such may be taken for a public purpose only if just compensation is paid. U.S.

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

Trust, 431 U.S. at 19, fn. 16. Accordingly, the valid contracts entered into by ILECs with their customers are property rights protected by the Taking Clause of the Fifth Amendment.

"It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking . . . ." Ruckelshaus, 467 U.S. at 1004. Instead, "'[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to taking.'" Id. (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)). While no "set formula" has been developed for determining when a "taking" has occurred, the Supreme Court has identified several factors that should be considered. These include "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." Id. at 1005. A "reasonable investment-backed expectation" has been defined as "more than a 'unilateral expectation or an abstract need'." Id. (citation's omitted).

Adoption of the proposed rules would undoubtedly constitute a "taking" of ILECs' property interest in the contracts at issue, as the rules would allow for the total abrogation of these contracts. Fresh Look would: (1) deprive ILECs of the benefit of their bargain, (2) inflict additional economic losses in the future as valuable customers are allowed to enter extended contracts with competitors, and (3) impose additional regulatory burdens and expenses on ILECs that are unnecessary, unfair and a cost that was not contemplated at the time the contracts were negotiated and for which, therefore, no recovery can be made.

The contracts are the embodiment of ILECs' "investment-backed expectations"; they are the bargained-for rights and obligations of ILECs with respect to their customers. They are also the means by which ILECs can protect their relationship with these customers, which represents a "property interest" that is constitutionally protected. Id. at 1011 (holding that a corporation had a reasonable investment-backed expectation with respect to its control over the use and dissemination of its trade secrets, and once same are disclosed to others the corporation has lost its property interest in the data.)

The "taking" of ILECs' property is impermissible unless the confiscated property is used for a "public purpose." The "public use" requirement of the Taking Clause is "coterminous with the scope of a sovereign's police power." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984). The requisite "public purpose" exists where the government acts "to protect the lives, health, morals, comfort and general welfare of the people. . . ." Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 503 (1987).

Although stimulating competition might constitute a valid "public purpose," as described above, the proposed rules would frustrate this purpose. The taking of ILECs' property solely for the benefit of a few large customers and competitors, who already operate in a competitive local exchange market, produces a private, rather than a public, benefit. Even if such a public benefit were to exist, ILECs bear the entire burden and receive no advantage from this process which in any way compensates them for

the "taking" of their property.[13] Thus, a Fresh Look requirement would take the private property of ILECs without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[14]

CONCLUSION

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

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

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

Respectfully submitted this 16th day of June, 1999.

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166661

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

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

COPY

BEFORE:	CHAIRMAN JOE GARCIA COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER E. LEON JACOBS
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	3
DATE:	November 16, 1999
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida
REPORTED BY:	Jane Faurot Registered Professional Reporter

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EXHIBIT D

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APPEARANCES:

Peter Dunbar, Esquire, representing Time Warner
Michael Goggin, Esquire, representing BellSouth
Eric Lawson, representing Internet Services Tallahassee

STAFF RECOMMENDATION

Issue 1: Does the Commission have the authority to promulgate fresh look rules?
Recommendation: Yes, the Commission has the authority to promulgate fresh look rules.
Issue 2: Should the Commission adopt 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, with changes?
Recommendation: Yes, the Commission should adopt the new rules with changes as recommended in the body of staff's memorandum.
Issue 3: Should the rules as adopted be filed with the Secretary of State and the docket be closed?
Recommendation: Yes.
(FULL RECOMMENDATION WILL BE FILED ON MONDAY, NOVEMBER 8, 1999.)

1 P R O C E E D I N G S

2 CHAIRMAN GARCIA: Item Number 3.

3 MS. MARSH: Commissioners, Item 3 is staff's
4 recommendation to adopt fresh look rules. We believe
5 the Commission does have statutory authority as
6 discussed in the recommendation and that the rules are
7 in the public interest. It is our recommendation that
8 the fresh look window be changed to one year, which is
9 a change from the previous proposed rules, and that a
10 repricing of tariff terms plans be adopted to
11 alleviate some of the difficulty and administrative
12 burden of determining the termination liability.

13 For the most part the rules are essentially as
14 they were proposed. We are prepared to discuss each
15 issue or answer questions, and we do believe there are
16 parties available to address the SERC, and they are
17 limited the addressing the SERC only.

18 CHAIRMAN GARCIA: Okay. Why don't we hear from
19 the parties. Do you have a suggested time to limit
20 them to?

21 MS. BROWN: A short period of time.

22 COMMISSIONER GARCIA: All right. Good. Martha
23 says two minutes, so we'll give you two minutes to
24 address your issue.

25 MR. DUNBAR: Mr. Chairman, I will be very brief.

1 I am Peter Dunbar of the Pennington firm, representing
2 the Time Warner. To my right is -- to my left is
3 Caroline Merrick, the Regional Vice President of
4 Regulatory Affairs for Time Warner. Also joining us
5 today are Karen Kamechus (phonetic) from the
6 Pennington firm and Laura Gallagher representing Time
7 Warner.
8 We support the rule. We think that the staff and
9 the Commission has done a good job. We are prepared
10 to answer any questions or address any of the issues
11 that might come up, but otherwise we think the rule
12 should be adopted.
13 CHAIRMAN GARCIA: Very good.
14 MR. GOGGIN: Commissioners, I'm Michael Goggin
15 (phonetic), I represent BellSouth. And from the
16 record it's obvious that we have objections to the
17 rules on the merits. We and GTE and the Joint
18 Administrative Committee have expressed some
19 constitutional concerns, but we understand that we are
20 limited to discussing the SERC today. So I will limit
21 my remarks to the SERC.
22 We have two areas of concern with respect to the
23 Statement of Estimated Regulatory Costs. One is that
24 it fails to take into account the bulk of the direct
25 costs that the rule would impose on incumbent local

1 exchange carriers. First, the data that it is based
2 on does not include contracts entered into after
3 December 31, 1998, yet the proposed rule would permit
4 the abrogation of contracts up to the date the rules
5 become effective. More importantly, the statement
6 fails to account for the direct costs of the ILECs in
7 the form of lost revenues. In the statement the
8 division notes that if all the contracts subject to
9 the rules and entered into prior to 1999 were
10 terminated, BellSouth might potentially lose 16.4
11 million in termination costs. But the rules
12 completely fail to discuss the potential loss of
13 revenues to BellSouth.
14 Now, granted it is unlikely that all of the
15 contracts would be terminated by customers, but
16 certainly a substantial portion of the estimated 16.4
17 million might be lost in termination charges, and the
18 amount in lost revenues might easily be a figure ten
19 times as large. This data was completely left out of
20 the statement of estimated regulatory costs. Ned
21 Johnston is here with me today, who is our witness in
22 this matter, and he is prepared to discuss this at
23 length if there are any questions.
24 The second issue with the statement of estimated
25 regulatory costs --

1 COMMISSIONER JACOBS: Mr. Goggin, can I ask you a
2 question real quick? Do you have the number of
3 contracts that are assumed could be terminated to come
4 up with that figure?
5 MR. GOGGIN: We could come up with that figure.
6 I'm not sure that we have it with us today. Obviously
7 some of the contracts that were included in the
8 earlier figure have expired. And there are many other
9 contracts that have been entered into since the data
10 was --
11 COMMISSIONER JACOBS: Right. It's my
12 understanding that the rule as presently drafted would
13 only extend to those contracts that extend after the
14 year 2000. That terminate after year 2000. And then
15 for some reason I thought I read somewhere that of
16 BellSouth there were only like 166 contracts that
17 were --
18 COMMISSION STAFF: No, there would be more than
19 166, that was just one particular example. Over 58
20 percent do expire during the year --
21 COMMISSIONER JACOBS: That's right. There were
22 other numbers in 2000.
23 MR. GOGGIN: And those figures only included
24 contracts entered into prior to 1999, so there are a
25 number of other contracts that have obviously been

1 entered into during 1999 and probably more contracts
2 that will be entered into after the date of this
3 hearing, but before the rules go into effect, all of
4 which would be subject to this rule.
5 COMMISSIONER JACOBS: Thank you.
6 MR. GOGGIN: The second issue that we have with
7 the statement of estimated regulatory costs is that
8 the division fails to properly evaluate lower cost
9 alternatives. BellSouth and GTE argued at the hearing
10 and submitted testimony and comments that the rule was
11 unnecessary as the contracts to be abrogated under the
12 proposed rules were entered into at a time when
13 customers had competitive alternatives. Yet, the
14 division in evaluating the lower cost alternatives
15 concludes that no evidence was produced to
16 substantiate this.
17 Yet on Page 1 of the statement of estimated
18 regulatory costs the division explains that CSAs, one
19 type of contract covered by the rules, are permitted
20 to be offered by ILECs because the customer is able to
21 obtain the service from a competitor at prices below
22 the ILEC's tariffed rates. Similarly, on Page 7, the
23 division notes that the dramatic increase in the
24 number of CSAs offered by ILECs in the last few years
25 is likely due to the increase in competition.

1 In addition, on Page 2 of the staff's March 1999
2 recommendation in this matter, staff stated that as of
3 that time ALECs were offering switched based services
4 in competition with the ILECs to these customers.
5 More importantly, both BellSouth and GTE filed
6 testimony that demonstrated that the contracts to be
7 abrogated under the proposed rules were entered into
8 with customers who had competitive alternatives from
9 which to choose.
10 Against this record there was no evidence to
11 support the repeated assertion that these contracts
12 were entered into at a time when customers lacked
13 competitive alternatives. No customers came forward
14 to provide any statements that they signed contracts
15 at times when no competitive alternatives existed.
16 Accordingly, the division's conclusion that there is
17 no evidence to support the fact that contracts to be
18 abrogated by these rules were the product of
19 competition is simply unsupported.
20 In addition, the division failed to consider
21 whether the rule as originally proposed, which would
22 cover only contracts entered into prior to January 1,
23 1998, would be an appropriate lower cost alternative.
24 Staff's March 1999 statement that ALECs have been
25 providing switched based substitute to ILEC services

1 suggests at the very least that the rule could be
2 modified to eliminate contracts entered into in 1999
3 when competition clearly existed. This would
4 undoubtedly reduce the costs imposed on the ILECs. For
5 these reasons BellSouth contends the statement as
6 written is insufficient and should be revised.
7 CHAIRMAN GARCIA: Commissioners. You know what,
8 I would like staff to respond to some of these things.
9 Comments?
10 COMMISSION STAFF: Commissioners, I would just
11 like to state that this rule, of course, has been in
12 development a long time, and I inherited this SERC due
13 to the reorganization. And basically what I tried to
14 do was incorporate the data that had been presented by
15 the companies and make it reflect the changes to the
16 rule as it progressed.
17 Certainly there could possibly be lost revenues
18 depending on how many contracts were terminated, how
19 soon this rule becomes effective. I think that is
20 implicit in the SERC. Certainly the termination
21 charges could be very high at 16.4 million in one
22 instance if all the contracts were terminated and the
23 termination fees were paid. We just don't know. We
24 would be speculating to try to determine what the
25 total costs would be and the total lost revenues since

1 we have no idea how many contracts will be terminated.
2 We could speculate all day long and it wouldn't get us
3 to any definitive figure. We know it's going to be in
4 the millions of dollars in lost revenues, that's in
5 there.
6 As far as the lower cost alternative of no rule,
7 we believe that that would not get us to the
8 competitive situation we are trying to achieve with
9 this rule. There is going to be a cost to the
10 companies of lost revenues, we recognize that, and
11 it's up to the Commission to decide whether those lost
12 revenues to the incumbents are going to be worth
13 moving to competition. And we can revise the SERC as
14 we go along if we have to, but I think it covers
15 basically the estimated regulatory costs in general.
16 Thank you.
17 COMMISSION STAFF: I have one comment that I wish
18 to make.
19 COMMISSIONER DEASON: Let me ask a question
20 before -- the concern of lower cost alternatives, can
21 you expand on that? First of all, what you understand
22 the criticism to be and how you address the potential
23 for lower cost alternatives?
24 COMMISSION STAFF: Well, I didn't catch every
25 point that the speaker was making, he went real fast.

1 But basically they want no rule. They don't want to
2 have to open up their contracts for termination. But
3 the no rule would not move us towards competition,
4 which is the whole point of the rule. And so the
5 Commission can consider that. We don't have to adopt
6 the lowest cost alternatives, it's up to you under the
7 statute. So, sure, if we don't go forward with the
8 rule there is no cost to these companies, but there is
9 a cost to the competitors. They are not going to be
10 able to come in there and compete.
11 COMMISSIONER DEASON: Well, how is it they are
12 not going to be able to compete? Compete for those
13 customers that have signed a contract?
14 COMMISSION STAFF: The ones that are locked into
15 up to seven year contracts. They are stuck with those
16 contractual prices. Now, those contractual prices may
17 be below the current market price, I don't know. But
18 if the company -- I mean, if the companies that are
19 locked into their current contracts can find a better
20 deal under the competitive market, then this rule
21 would allow them to do that.
22 COMMISSIONER DEASON: But weren't those contracts
23 entered into because there was competitive threats out
24 there?
25 COMMISSION STAFF: I believe some of them were --

1 there was some indication that some of them were, I
2 don't know how many. But as time goes on the
3 marketplace changes, more competition comes in.
4 COMMISSIONER DEASON: What would have been the
5 motivation for any incumbent LEC to have signed a
6 customer up under a contract at a lesser than going
7 tariff rates unless they were concerned about the
8 competitive threats of losing them?
9 COMMISSION STAFF: I think that's exactly why
10 they would do it for less than the market rate, or the
11 tariff rates, excuse me.
12 COMMISSIONER JACOBS: It strikes me that we are
13 in a box, then. It appears that there is a trend
14 where these CSAs in the tariff plans are going to
15 increase and so if we don't do a rule now or if we
16 never do a rule, the potential cost of trying to let
17 those customers opt out of those plans is going to
18 increase irrespective.
19 MS. MARSH: Possibly. There is one thing I do
20 want to point out, though, before we go any further
21 with this, because the comment I was going to make I
22 think goes to Commissioner Deason's question. And if
23 you would refer to Page 10 of the recommendation to
24 the table there, when the parties were speaking about
25 lower cost alternatives, they were referring to

1 competitive alternatives that would have existed for
2 CSAs. That was the basis for a company being allowed
3 to enter into a CSA, is because they had competitive
4 threats.
5 And if you look at that table it shows that those
6 are a very minute part of the contracts that are at
7 issue here. The overwhelming majority are tariff term
8 plans which don't require any competition at all, they
9 are simply a tariffed rate. And the customer gets a
10 better rate for signing up for a longer term. So I
11 just wanted to clarify that one thing before we went
12 any further with that particular issue.
13 COMMISSIONER JACOBS: Is seven years the standard
14 length of those tariffed term plans?
15 MS. BROWN: The majority of those term plans are
16 two to three years, the overwhelming majority. Five
17 to seven years are a very small percentage.
18 COMMISSIONER JACOBS: Okay.
19 COMMISSIONER CLARK: Would you clarify for me the
20 contracts that are going to be covered? As I
21 understood the comments today that originally the rule
22 was designed to address contracts entered into prior
23 to 1998, and now it will be any contracts entered into
24 prior to the effective date of the rule?
25 MS. MARSH: I don't recall that specific part of

1 how it evolved. I know this rule has evolved over a
2 period of time. At this point it would address any
3 that were entered into before the rule. There may
4 have been some other restriction earlier in the
5 evolvement of it, I simply don't recall what that
6 might have been.
7 COMMISSIONER CLARK: Was the 1998 date picked as
8 being the date before which that there was significant
9 competition? And if that is true, why has the date
10 been moved to the time these rules are effective?
11 MS. SIMMONS: Commissioners, I will attempt to
12 address this. My memory on this isn't completely
13 crystal clear, but I know I presented one or more
14 earlier recommendations on this rule proposal, and at
15 the time I was advocating that the rule should govern
16 contracts that were entered into prior to 1/1/97. And
17 the basis for that was that the Commission made its
18 first major decisions under the telecommunication act
19 at the end of '96.
20 What I can't quite remember is at some point, and
21 I believe one or more of the Commissioners suggested
22 this, but I can't be certain, I believe the suggestion
23 was made that we should pull a date from the rule and
24 that the date that the contract was entered into
25 shouldn't be a consideration. I just cannot

1 completely remember the evolution.

2 COMMISSIONER CLARK: I think the date being

3 considered was one that you would -- how should I put

4 this -- when you were concerned about when the rules

5 go into effect, you wouldn't want -- you would not

6 want to have a date sooner. But I don't think there

7 is any problem with saying it applies to contracts

8 entered prior to a certain date and not after them.

9 If, in fact, your objective is to address only those

10 that were entered into prior to a time that there were

11 choices.

12 MS. MARSH: I think perhaps that the reason for

13 all of this moving the date forward really speaks to

14 the fact that there has not been widespread

15 competition. Competition was a possibility, but

16 nowhere in the hearing was there any date certain

17 determined that this is where competition really

13 started. It still isn't out there to any great

19 extent. So choosing a date is somewhat arbitrary, I

20 think, in that regard. It's hard to say competition

21 really was out there at this point. There's still

22 some places where there is none, but there is more and

23 more of it, and this would give competitors an

24 opportunity to come in at this point.

25 MS. SIMMONS: Yes, I would agree with Ms. Marsh.

1 I mean, this has been an on-going issue because you
2 have had competition authorized for some time, but the
3 question is, you know, when was meaningful competition
4 possible. That is really a judgment call.
5 MR. DUNBAR: Mr. Chairman, I think that in
6 following up the recollection, it was ours that this
7 was observed by Commissioner Johnson at one point in
8 reality if you make this move in the dates you end up
9 with a rule on paper that really has no meaning.
10 CHAIRMAN GARCIA: Do you have anything, staff?
11 COMMISSION STAFF: No, I do not.
12 COMMISSIONER CLARK: If you move it back to, say,
13 1996, then you would have no contracts to which this
14 rule would apply.
15 MS. MARSH: The further back you move it, yes.
16 Or, on the other hand, the further out in the future
17 you delay it, it has no meaning either because the
18 contracts will all have expired.
19 MR. GOGGIN: That would be BellSouth's point.
20 That because the contracts have expired, the newer
21 contracts that are being pulled into this are being
22 entèred into at a time when there is competition. And
23 that time will take care of this issue to the extent
24 that there is one.
25 MR. LARSON: Can I make one point? Usually these

1 contracts --

2 CHAIRMAN GARCIA: Why don't you identify

3 yourself.

4 MR. LARSON: I'm Eric Larson. I'm with Internet

5 Service Tallahassee. I'm an internet provider. And

6 from my perspective a lot of these contracts are in

7 blocks. You enter into contracts for as long as you

8 need them. When you have a block of contracts, some

9 of them expire and some of them become new, but you

10 have to treat them as a block of contracts.

11 They are all part of a hunt group, you can't get

12 rid of one contract without getting rid of all of

13 them. So if you have expiration dates, it's only the

14 last one you entered in that mattered for that whole

15 block and they keep on perpetuating themselves. The

16 only way to alleviate these and have a chance to jump

17 into another provider is to go ahead and have this

18 rule adopted where you can get out of all these

19 contracts at once.

20 CHAIRMAN GARCIA: Isn't that a decision, though,

21 you make as opposed to us making it for you?

22 MR. LARSON: Well, the lease costs are

23 prohibitive, to pick up the lease costs of all those

24 contracts, because they extend out a number of years.

25 So it would be prohibitive for you to get out of them

1 and pay twice on the cost of the connection.

2 MS. BROWN: Commissioners, if I might interrupt.

3 You all held a hearing on this and we have an

4 evidentiary record.

5 CHAIRMAN GARCIA: I'm sorry, Martha.

6 MR. DUNBAR: The issue was costs, and I think the

7 point is well made and it's this. There has been some

8 discussion about lost revenues, there is no lost

9 revenues unless the ILEC is not competitive. And this

10 is a choice to be made by the customer. I mean,

11 that's the whole purpose of the rule.

12 CHAIRMAN GARCIA: And it does go back to costs,

13 but we really are getting a little bit off. Thank

14 you, Mr. Dunbar. Commissioners, is there a motion? I

15 will make one, but I don't think it makes any

16 difference.

17 COMMISSIONER CLARK: Let me just ask a question.

18 Your chart on Page 10, as I read the recommendation it

19 is likely that none of the contracts that will expire

20 in the year 2000 would be -- you would exercise that

21 option, because they are going to expire anyway?

22 MS. MARSH: That is correct.

23 COMMISSIONER JACOBS: They are not eligible under

24 the rule.

25 MS. MARSH: That's correct. They would not be

1 eligible.

2 COMMISSION STAFF: I might add that there is

3 another year --

4 COMMISSIONER CLARK: Because they have to have

5 more than a year.

6 MS. MARSH: Yes. So it really is attempting to

7 limit the rule to those contracts that really are

8 locked in for a longer period of time.

9 CHAIRMAN GARCIA: This would be it, though,

10 right? The only problem I have with this rule is that

11 does Mr. Dunbar get to come in and say, hey, we need

12 fresh look because you heard Ann Marsh at the agenda,

13 there really isn't any meaningful competition. We get

14 to start this all over, say, a year from now and so

15 they get another shot. So BellSouth is in the

16 position where --

17 MS. MARSH: They could ask. This would not stop

18 them from asking to do that. However, we have

19 addressed not that specifically, but the fact that to

20 continue with a longer window, for example, injects so

21 much uncertainty into the market that you need to

22 strike a balance somewhere. If you had --

23 CHAIRMAN GARCIA: It almost makes it purposeless

24 for BellSouth to engage in entering the contract.

25 MS. MARSH: If it were to continue for a long

1 period of time, yes. The way it is it's a one-shot
2 deal, it's a year, it's finished, and the market goes
3 forward from there. But if, for example, we address
4 a --
5 CHAIRMAN GARCIA: Shouldn't we put a limit on
6 that in the sense of saying and we won't do this
7 again?
8 MS. MARSH: We could do that.
9 COMMISSIONER CLARK: But that is meaningless
10 because we could do it again. I think -- you know, I
11 don't think it should be the date the rule becomes
12 effective for one thing. Then you have to sort of
13 research the history to determine when that has
14 happened. But I don't think it should go as far back
15 as the rule was originally proposed.
16 MS. MARSH: I'm open to suggestion on that. You
17 know, it's a judgment call.
18 COMMISSIONER JACOBS: The concern comes with how
19 do you measure what the terminating point should be.
20 What I've heard and what I think is reasonable is that
21 when a customer has reasonable competitive options.
22 You wouldn't want to have this out there if there are
23 competitive options. But who gets to make that call?
24 CHAIRMAN GARCIA: We do.
25 COMMISSIONER JACOBS: Then maybe we should give a

1 time certain when we will make that call.

2 COMMISSIONER CLARK: Well, I guess the staff by

3 the recommendation is saying it's on the effective

4 date of this rule. That anything beyond that we are

5 going to presume that they have an opportunity to

6 choose, there is effective competition.

7 MS. MARSH: I don't think we're so much saying

8 that as we're putting people on notice that

9 competition may be coming and they need to make their

10 choices accordingly. There is no way to --

11 CHAIRMAN GARCIA: I understand that. The worry I

12 have, and I don't disagree, in fact, just so we can

13 get a feel for where everyone is, I will move staff.

14 I mean, I feel comfortable with staff's

15 recommendation.

16 However, I don't want to create for BellSouth an

17 untenable situation. We are basically rendering their

18 contracts meaningless. And you are sort of saying

19 that in the future they will be meaningless, too,

20 because we may decide to go back and say, by the way,

21 now is the cut-off date.

22 And I think it does -- the only worry I have is

23 that we should do this and then we should move on.

24 Clearly if we find that there is a problem in the

25 market we always correct it, but we shouldn't leave

1 this pall over them entering contracts, because it
2 makes their whole business practices absurd.
3 Why makes clients sign? A contract is an
4 uncomfortable thing. How do they finance these
5 things? They are very expensive for them, and we are
6 about to cost them some more money because we are
7 opening up that market. And what worries me is that
8 we create a certain uncertainty in the market for
9 them.
10 COMMISSIONER JACOBS: What happens if we give the
11 future impact of this to contracts that are beyond the
12 two-year time line?
13 MS. MARSH: I'm sorry, I'm not following the
14 question.
15 COMMISSIONER JACOBS: As to contracts entered
16 into after the effective date of the rule, what
17 happens if we say that their window of time is one
18 year to look at?
19 MS. MARSH: If they are entered into after the
20 effective date, then it doesn't apply. So basically
21 the public is on notice or, you know, the customers
22 are on notice that here is the window for those you
23 who have already gotten into, but if you are getting
24 into them now consider the future and make your
25 decision.

1 COMMISSIONER JACOBS: That wasn't the group. The
2 group I'm looking at is those that would be eligible
3 but are for the two-year term.
4 MS. BROWN: They could opt out. If they meet the
5 criteria, they can opt out if they have already been
6 entered into. But it's a one time deal.
7 COMMISSIONER JACOBS: Okay.
8 MS. MARSH: Is that answering your question? I'm
9 not sure if we were going the same place.
10 COMMISSIONER JACOBS: What I want -- here is the
11 concept. If there are folks out there who entered
12 into a contract for two years, I don't think it is
13 unreasonable that we narrow this rule so in my mind
14 they are not going to be hurt if at the end of two
15 years they can come back and review the marketplace
16 and make a determination of whether or not they want
17 to -- there are options for them to go to another
18 provider or to stay with BellSouth. What if we limit
19 their options by the rule?
20 MS. BROWN: You mean you are saying that you want
21 this -- perhaps this rule should apply only to
22 contracts for a longer -- that were entered into for a
23 longer period?
24 COMMISSIONER JACOBS: Yes.
25 COMMISSIONER CLARK: I think it would change --

1 what you would do is say this is available to people
2 who have, say, two years remaining on their contract
3 as opposed to one year.
4 COMMISSIONER JACOBS: Two years or longer
5 remaining on their contract.
6 MS. MARSH: That would eliminate over 80 percent
7 of the contracts, about 86 percent. And as I say,
8 that's a judgment call if you want to do that. This
9 is really all a judgment call as to which is the right
10 number. But that is what the numbers would be, it
11 would eliminate about 86 percent.
12 MS. BROWN: If I can --
13 COMMISSIONER JACOBS: Now, let's go -- if that is
14 the case, if 80 percent of these contracts are going
15 to be terminating within two years, then how do we get
16 to those kind of numbers? It shouldn't seem like they
17 are going to lose that kind of revenue.
18 MR. GOGGIN: Excuse me, Commissioner, I may be
19 able to help you with this. It's because the table on
20 Page 10 does not include any contracts entered into
21 after December 31, 1998. There is a whole other year
22 of contracts there. And to address Mr. Dunbar's
23 point, if we enter into a three-year contract today
24 and a customer abrogates it in a month, there is a
25 reasonable expectation when the contract is signed

1 that we will provide service for three years and that
2 we will receive revenue for three years. If the
3 contract is abrogated after a month, that revenue that
4 we would have received for the remaining two years and
5 eleven months of the contract is lost to us. So for
6 him to say that we would not lose revenue is simply
7 false.
8 MR. DUNBAR: But you misunderstood my point. You
9 would you not lose that and they would not abrogate it
10 if you were competitive. That was the point I was
11 making.
12 COMMISSIONER CLARK: Well, yes, they would.
13 Because they would have to -- if they had to
14 renegotiate at a lower price they forego some revenue.
15 MR. GOGGIN: In fact, many of the contracts that
16 are subject to this rule were the product of a
17 competitive bidding process in the first place.
18 CHAIRMAN GARCIA: Mr. Dunbar, makes a good point.
19 Why would you renegotiate a contract if you didn't get
20 the right price?
21 MR. DUNBAR: Exactly.
22 MR. GOGGIN: I am quite certain that Mr. Dunbar
23 has contracts that were entered into last year for
24 which we could offer a better price today. The
25 question is, was there competition when the contract

1 was entered into.

2 CHAIRMAN GARCIA: Let me ask staff this question,

3 because they can answer it. What if we just abrogated

4 all contracts and started from zero. Do we have the

5 authority to do that? You know, if Mr. Dunbar is

6 willing to throw his dice on the table, what if we did

7 that? If we said all contracts that are entered into

8 private service, do we have the authority to do that

9 and then that way we are at point zero and they can

10 offer that.

11 MS. BROWN: Under the --

12 COMMISSIONER CLARK: What's good for the goose is

13 good for the gander.

14 MS. BROWN: Was that a rhetorical question or do

15 you really want an answer?

16 CHAIRMAN GARCIA: No, I'm asking it. Answer it

17 for me.

18 MS. BROWN: Any decision that you make has to be

19 a reasonable one. And based on the record of the

20 hearing you would have to explain why you wanted to do

21 that. If you did that, if you could base your reasons

22 for abrogating all contracts on the record before you

23 in the hearing, the statute that gives you the

24 authority to make rules with respect to contracts

25 between telecommunications companies and their

1 customers is a I very broad one and gives you
2 considerable discretion.
3 COMMISSIONER JACOBS: Otherwise known as the
4 goose and the gander rationale.
5 COMMISSIONER CLARK: Right. I have a question.
6 Mr. Goggin indicated that the chart on Page 10 is
7 contracts through 1998, yet I think the way it's noted
8 it's through the second quarter of 1999.
9 MS. MARSH: It is through the second quarter of
10 1999. We had some later information that I updated on
11 there.
12 MR. GOGGIN: I am mistaken, I apologize.
13 CHAIRMAN GARCIA: Commissioners --
14 MS. BROWN: Commissioners, it looks like there
15 are two issues that you are dealing with here. The
16 one that Commissioner Jacobs brought up, that was
17 addressed in the hearing fairly extensively. It had
18 to do with the question of what a long-term contract
19 should be with respect to the rule. There were lots
20 of differing opinions. Some companies said long-term
21 would be five years, some said twelve months. We
22 settled on -- we never really defined what was
23 long-term, but we took the middle ground in the rule.
24 And the other question is, when the date should
25 be to include contracts. I mean, what I'm trying to

1 say is what contracts should be subject to the fresh
2 look on the basis of when they were entered into. And
3 you seem to have been indicating that you would want
4 to push back -- yeah, back the date of the contracts,
5 the effective date of the contracts that you addressed
6 by this rule.
7 Now, I don't really have a suggestion on what an
8 earlier date would be, but I think as staff has said,
9 you have the discretion to do that. We thought that
10 the effective -- the most reasonable effective date
11 would be for the contracts entered into before the
12 rule became effective, but you could make it earlier.
13 You could make it the second half of '99, or January
14 1st, '99, but I can't come up with something that
15 would really --
16 CHAIRMAN GARCIA: What does the SERC go to? Mr.
17 Goggin, what was the date you said the SERC went to?
18 MR. GOGGIN: The rules as drafted currently say
19 that the contracts to be covered are contracts entered
20 into up to the effective date of the rule. As
21 originally drafted, it was contracts entered into
22 before January 1, 1997. But the SERC -- our point was
23 that in the portion of the --
24 CHAIRMAN GARCIA: I don't want to know about your
25 point, I'm asking you a specific question to what you

1 believe the staff didn't calculate your losses at.
2 And you stated that it goes up to a certain date and
3 staff is missing certain information.
4 MR. GOGGIN: Right. We provided information, and
5 I am mistaken, that apparently went through the second
6 quarter of 1999.
7 CHAIRMAN GARCIA: Second quarter of '99.
8 MR. GOGGIN: Right. And the narrow point there
9 was simply that they had failed to take into account
10 any of the lost revenues.
11 CHAIRMAN GARCIA: Okay.
12 MR. GOGGIN: But to address the question that she
13 was talking about, the other point was that in
14 evaluating lower cost alternatives they failed to
15 consider completely whether moving the date back from
16 the date that the rules would become effective to some
17 earlier date, and considering which contracts would be
18 eligible for fresh look.
19 COMMISSIONER GARCIA: I understand.
20 MR. GOGGIN: Whether that would be lower cost.
21 COMMISSIONER JACOBS: You moved staff?
22 CHAIRMAN GARCIA: Well, I can't and continue
23 leading the discussion. I said I would be willing to
24 do it. If you want to do it --
25 COMMISSIONER JACOBS: I move staff.

1 COMMISSIONER CLARK: Let me ask a question. I
2 think that perhaps -- I don't think it should go until
3 when these rules take effect. I certainly think that
4 there has developed recently sufficient competition or
5 awareness of competition that I don't think fresh look
6 needs to apply to contracts entered into currently. I
7 would be willing to accept a date of June 30, 1999,
8 which is covered in the recommendation, and that
9 indicates roughly 40 percent of what is out there
10 would be available for renegotiation.
11 COMMISSIONER JACOBS: I think I'm willing to
12 accept that. The concern I have is two-fold. The
13 numbers on percentage of competition that is out there
14 are fairly recent, and I think the indication from
15 BellSouth today is that perhaps there is even an
16 increased trend to enter into CSAs, or I guess
17 primarily the tariff plans, i.e., that there is more
18 of a tendency to kind of go in and invoke these kind
19 of plans.
20 COMMISSIONER CLARK: I understand that, but the
21 point is that they would have the opportunity to find
22 another vendor if they don't want to enter into a
23 contract of that length.
24 COMMISSIONER JACOBS: Because of the present
25 situation? Because of the present options that are

1 available?

2 COMMISSIONER CLARK: Right.

3 CHAIRMAN GARCIA: If you will accept that, we

4 have got a motion and a second. If you will accept

5 that as a friendly amendment?

6 COMMISSIONER JACOBS: I will accept that.

7 CHAIRMAN GARCIA: All right. Terry.

8 COMMISSIONER DEASON: Well, I'm not going to

9 support the motion as originally made or as amended.

10 I just want to be clear that I do not think that we

11 should have the fresh look rule, and I would be voting

12 against it.

13 CHAIRMAN GARCIA: Okay. All right, there is a

14 motion and a second. All those in favor signify by

15 saying aye.

16 COMMISSIONER CLARK: Aye.

17 COMMISSIONER JACOBS: Aye.

18 CHAIRMAN GARCIA: Aye. Opposed?

19 COMMISSIONER DEASON: Nay.

20 CHAIRMAN GARCIA: Thank you, staff. Thank you.

21 * * * * * * * * * *

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2 CERTIFICATE OF REPORTER

3

4 STATE OF FLORIDA)

5 COUNTY OF LEON)

6

7 I, JANE FAUROT, RPR, do hereby certify that the

8 foregoing proceedings was taken before me at the time and

9 place therein designated; that my shorthand notes were

10 thereafter translated under my supervision; and the

11 foregoing pages number 1 through 31 are a true and correct

12 record of the proceedings.

13 I FURTHER CERTIFY that I am not a relative, employee,

14 attorney or counsel of any of the parties, nor relative or

15 employee of such attorney or counsel, or financially

16 interested in the foregoing action.

17 DATED THIS 29th day of November, 1999.

18

19

20 Jane Faurot

21 JANE FAUROT, RPR

22 ACCURATE STENOTYPE REPORTERS
100 Salem Court

23 Tallahassee, Florida

24

25

TONI JENNINGS
President

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April 28, 1999

Ms. Diana W. Caldwell
Division of Appeals
Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0862

Re: Public Service Commission Rules 25-4.300-.302

Dear Ms. Caldwell:

I have completed a review of proposed rules 25-4.300-.302, and prepared the following comments for your consideration and response.

The rules allow customers to opt-out of existing contracts with certain conditions. Two questions are apparent. First, the rules appear to operate retroactively by changing the terms of existing contracts. Although section 364.19, F.S., authorizes the Commission to regulate "the terms of telecommunications service contracts between telecommunications companies and their patrons," it does not provide authority for retroactive rulemaking. The courts have held that administrative rules generally have only prospective application. See, e.g., The Environmental Trust and Sarasota Environmental Investors, Inc. v. State of Florida, Department of Environmental Protection, 714 So. 2d 493 (Fla. 1st DCA 1998). Therefore, please explicate the statutory authority which empowers the Commission to promulgate rules with retroactive application.

In addition, Article 1, Section 10 of the Florida Constitution prohibits the passage of laws impairing the obligation of contracts. Inasmuch as the rules effectively amend the terms of existing contracts, please reconcile the rules with the Constitution.

Sincerely,

John Rosner
Staff Attorney

#118863
JR:CW S:\ATTY\25-4.JR

EXHIBIT E