Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
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In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A)	)	**CC Docket No. 96-187**
of the Telecommunications Act of 1996	)	

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REPLY COMMENTS OF
KMC TELECOM, INC.

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KMC Telecom, Inc. ("KMC"), by its undersigned counsel, respectfully submits the following reply comments in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

The incumbent local exchange carriers' ("ILECs") comments filed in this proceeding misconstrue both the text of Section 204(a)(3) and Congress' intent to meet their own purposes. KMC emphasizes once again that the competitive goals of the Telecommunications Act of 1996[2] have not yet been realized and urges the Federal Communications Commission ("FCC" or "Commission") to proceed with caution in implementing the streamlining provisions of Section 204(a)(3).

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[1] *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, FCC 96-367, CC Docket No. 96-187 (rel. Sept. 6, 1996)("Notice" or "NPRM").

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996)("1996 Act" or "Act").

The Commission should recognize, first and foremost, that the 1996 Act made **procedural**, not substantive, changes to the existing statutory and regulatory tariff filing and review process.[3] Secondly, the Commission should recall the many abuses which were attempted in the early years of interexchange competition and which were prevented by its careful scrutiny of tariffs.[4] Given the incumbents' entrenched monopoly position, there is even greater reason to fear abuses of tariff streamlining in the instant case. Implementation of sweeping tariff streamlining will only strengthen ILECs' monopoly power and make it even more difficult for competitive providers to enter the local exchange market.

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[3]MCI Telecommunications Corp. ("MCI") Comments at 5 (the Joint Explanatory Statement of the Committee on Conference states that Section 204(a)(3) "streamlines the procedures for revision" of LEC tariffs, strongly indicating that Congress was concerned primarily with reducing **procedural** barriers to LEC tariff changes.)

[4]*See, e.g, In the Matter of American Telephone and Telegraph Company, Investigation into the Lawfulness of Tariff F.C.C. No. 267, Offering a Dataphone Digital Service Between Five Cities, Final Decision and Order,* 62 F.C.C.2d 774 (Jan. 17, 1977)(rejected tariff as unjust and unreasonable); *In the Matter of AT&T Communications Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order*, 4 FCC Rcd 4932 (1989)(rejected revisions as unlawful because certain geographic restrictions unreasonably limited availability of the package tariff), *recon. denied*, 4 FCC Rcd 7928 (1989), *rev'd and remanded, MCI v. FCC*, 917 F.2d 30, 37 (D.C. Cir. 1990); *In the Matter of AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plans - Holiday Rate Plan, Memorandum Opinion and Order*, 4 FCC Rcd 7933 (1989)(found Holiday Rate Plan unlawfully discriminatory under Section 202(a)); *In the Matter of AT&T Communications Revisions to Tariff F.C.C. No. 16, Memorandum Opinion and Order*, 5 FCC Rcd 700 (1990)(rejected tariff offering to University of Texas as patently unlawful in violation of Section 202(a)); *In the Matter of AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International, Memorandum Opinion and Order*, 6 FCC Rcd 5648 (1991)(rejected Resort Condominiums plan as unreasonably discriminatory under Section 202(a)).

For these and other reasons, KMC continues to urge the Commission to consider carefully the adverse impact an expansive reading of Section 204(a)(3)'s terms will have on competition in the local exchange market. Section 204(a)(3) should be narrowly construed, and the Commission should adopt appropriate safeguards and consumer protections, to ensure that local exchange markets are truly opened to competition.

I. The FCC Must Not Interpret "Deemed Lawful" to Limit Customer Remedies

Congress left in place the key components of the tariff procedures of the Communications Act of 1934: local exchange carriers ("LECs") must still file tariffs; the FCC may exercise pre-effective review to suspend and investigate tariffs; the FCC may prescribe rates; and customers may obtain damages under the Section 206-209 complaint process.[5] Arguments that ILEC tariffs should be "deemed lawful" on the date they are filed[6] should be flatly rejected. By using the term "deemed lawful," Congress merely conformed the law to current practice in which tariffs become the legal rate after they become effective.[7] To interpret Section 204(a)(3) otherwise would be a significant substantive change in the law of tariffs.[8]

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[5]Association for Local Telecommunications Services ("ALTS") Comments at 2, MCI Comments at 5.

[6]GTE Service Corporation ("GTE") Comments at iv, 10; Pacific Telesis Group ("PacTel") Comments at 2-3; United States Telephone Association ("USTA") Comments at 3; US West, Inc. ("US West") Comments at 7.

[7]Ad Hoc Telecommunications Users Committee ("Ad Hoc Committee") at i.

[8]Time Warner Communications Holdings, Inc. ("Time Warner") Comments at 4.

Congress did not prohibit the Commission from investigating tariffs filed under Section 204(a)(3). In fact, Congress explicitly stated that a tariff filed on 7 or 15 days notice is deemed lawful and becomes effective only if the Commission does not take action under Section 204(a)(1) within that 7 or 15 day period.

The Commission must therefore adopt its second interpretation of "deemed lawful" and establish a rebuttable presumption that LEC tariff filings are lawful. The FCC should adopt a "presumption" of lawfulness that can be rebutted by a showing that it is more likely than not that the LEC tariff will be suspended.[9] The FCC should also allow petitioners to rebut the presumption of lawfulness by showing *prima facie* noncompliance with the statute or FCC Rules or Orders.[10] This approach is the only way to ensure that the pre-effective tariff petition process, which Congress did not abrogate, continues to be a viable and meaningful method for consumers and competitors to seek relief from unlawful ILEC rates.

II. New Services Are Not Eligible for Streamlined 7 or 15 Day Filing

KMC continues to support the Commission's conclusion that only tariff filings regarding existing service offerings are eligible for streamlined treatment.[11] The Bell Atlantic Telephone

[9]AT&T Corp. ("AT&T") Comments at 8, KMC Comments at 7, McLeod Telemangement, Inc. ("McLeod") Comments at 4, MFS Communications Company, Inc. ("MFS") Comments at 8.

[10]KMC Comments at 7. KMC concurs with McLeod's suggestion that ILECs be required to disclose previous Commission decisions or pending Commission proceedings that call into question the legality of the LEC's tariff. McLeod Comments at 5-6.

[11]Notice at para. 18.

Companies ("Bell Atlantic") go so far as to argue that new services tariffs should be filed on one day's notice with no cost support.[12] Bell Atlantic argues that because customers do not have to buy new services offered by ILECs, ILECs have no undue market power to force customers to pay more for the service.[13] The argument that ILECs hold no market power in the market for new services stretches credulity and wholly ignores the current state of the local exchange market. While consumers may soon be able to purchase "new services" from other providers, until new entrants conclude interconnection negotiations with incumbents and begin offering local services, the consumer that wishes to purchase the new service has only one provider from which to choose. KMC also respectfully submits that the exercise of market power is not dependent on whether or not an item is a "necessity." The exercise of market power is dependent on the seller's share of the relevant market. Until ILECs provide nondiscriminatory interconnection and access to unbundled network elements, new entrants will not be able to garner any significant market share. Therefore, without effective competition, ILECs will continue to exercise market power over basic services and new services alike.

[12]Bell Atlantic Comments at 3.

[13]*Id.* The Ameritech Operating Companies ("Ameritech") use a similar argument. Ameritech Comments at 12-13.

III. The FCC Should Construe Section 204(a)(3) to Limit Strictly ILEC Tariffs that Are Eligible for Streamlined 7 and 15 Day Filing

KMC reiterates its argument that it is premature and inappropriate to provide tariff relief to ILECs before they face effective competition. The FCC should limit ILEC tariff filings that are eligible for 7 and 15 day notice periods to rate decreases and increases, as specifically stated in the Act.

Although the Commission should strictly limit the types of ILEC tariff filings that are eligible for shortened notice periods, it does not necessarily follow that it must similarly limit new entrants' filings.[14] It is illogical and counterintuitive to argue that Congress, aware of the FCC's streamlined regulation of nondominant carriers' tariffs, intended to increase regulation of nondominant carriers and undo the FCC's prior streamlining efforts. Although Section 204(a)(3) applies to all LECs, the use of the permissive "may" file on 7 or 15 days notice allows the FCC to continue its shorter notice periods for nondominant carriers. KMC submits that there is ample justification for treating ILECs and new entrants dissimilarly. The Commission itself has found that "historically, the ILECs have had strong incentives to resist, and have actively resisted, efforts to open up their networks to users, competitors, or new technology-driven applications of network

[14]Cincinnati Bell Telephone Company ("Cincinnati Bell") and PacTel urge the Commission to treat ILECs and new entrants similarly. Cincinnati Bell Comments at 5, PacTel Comments at 15.

technology."[15] There is no reason to believe that this historical resistance has been wiped away by the 1996 Act.

IV. Timely Public Notice of ILEC Tariff Filings and Public Participation in the Review Process is Essential

Many parties agree that public notice of and participation in the tariff review process is essential. KMC, MCI, and MFS all advocate requiring advance notice of LEC tariff filings.[16] Many parties also advocate same-day notice of LEC tariff filings to interested parties, with the Ad Hoc Committee and McLeod suggesting public availability deadlines of 10 a.m. and noon, respectively.[17] KMC reiterates that immediate public access to ILEC streamlined tariff filings is essential if customers and competitors are to exercise their rights to petition for suspension or investigation under Section 204(a)(1).

CONCLUSION

In summary, KMC once again submits that until ILECs have met their obligations under the 1996 Act to provide nondiscriminatory interconnection and access to unbundled network elements, the Commission must strictly limit and carefully police ILECs' Section 204(a)(3) streamlined tariff filings.

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[15] *In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, FCC 96-325, CC Docket No. 96-98, para. 241 (rel. Aug. 8, 1996)("Interconnection Order").

[16] KMC Comments at 8, MCI Comments at 21, MFS Comments at 10.

[17] Ad Hoc Committee Comments at 6, McLeod Comments at 7.

Respectfully submitted,

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Dated October 24, 1996

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October 1996, copies of Reply Comments of KMC Telecom, Inc. were served by first class mail, postage prepaid, on the following:

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