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

In Re:

Petition of LCI International Telecom Corp.	)	
For Adoption of A "FastTrack" Plan to	)	
Expedite Residential Local Competition and	)	CC Docket No. 98-5
Section 271 Entry Through Establishment of	)	
Independent RBOC Wholesale and Retail	)	
Service Companies	)	

COMMENTS OF KMC TELECOM, INC.

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SUMMARY

KMC Telecom, Inc. ("KMC") is a facilities-based CLEC providing telephone services primarily in the South and Midwest. KMC agrees with LCI International Telecom, Inc. ("LCI") that the introduction of competitive services at the local level has been substantially delayed by the conflicting incentives of presently structured RBOCs (and ILECs). On the one hand, these companies are under a statutory duty under the '96 Act to open their facilities and facility-related resources to new competitors; on the other, the more they facilitate competitive entry the more business they are likely to lose from their own retail operations. LCI is also correct that the industry is currently bogged down in countless expensive confrontations over the details of competitive entry and will likely continue to be bogged down for the foreseeable future.

LCI's proposal to adopt a presumption that the RBOCs have met the statutory test for entering in-region interLATA service under section 271 of the '96 Act in exchange for a restructuring of the RBOCs into three entities is a good idea as far as it goes. Unfortunately, it does not, in KMC's opinion, go far enough. LCI's proposal to have the RBOCs maintain 100% ownership of the local access and network facilities through its so-called "NetCo" and 60% of a retail CLEC through "ServeCo" does not introduce a sufficient degree of separation between the RBOC and its wholesale and retail entities. Actually, the RBOC ownership of local facilities is at the heart of the existing problem, not ownership by the RBOC of a retail carrier. KMC therefore recommends that the remaining RBOC, or HoldCo, be limited to no more than a 25% interest in its wholesale subsidiary, and to no more than a 49% interest in its retail subsidiary. KMC also believes it would be wise to limit the RBOCs to comparable strength on the NetCo

and ServeCo boards, and that in the case of NetCo consideration should be given to the appointment of a public director similar to the public director on the Comsat Board. Finally, KMC also believes that the NetCo and ServeCo Boards should be required to provide an annual report to the FCC and to all relevant state Commissions detailing competitive issues and practices during the previous 12 months. The Commission should also carefully consider a model that has been receiving attention in the electric service industry, the Independent System Operator, ("ISO") which functions essentially as a carriers' carrier and provides facilities to all retail competitors on an equal and nondiscriminatory basis.

KMC anticipates that the further divestiture it recommends herein would not be accepted voluntarily by the RBOCs nor by independent ILECs. Nevertheless KMC urges the Commission to explore these issues and in particular whether, given the slow pace of competitive entry, the Commission has authority to mandate divestiture in the interests of facilitating such competitive entry. There is substantial authority in the Communications Act and in case law to support the proposition that the Commission possesses such authority. See e.g., sections 154(i) and (j), 214(c) and 303(r) of the Communications Act; NBC v. United States, 319 U.S., 190 (1943). To permit it to consider taking such action the Commission should issue a Notice of Proposed Rulemaking in which it seeks comment on the policy justification for such action, on its authority to order mandatory divestiture, and on other, related proposals to reform the present RBOC/ILEC structure which so fundamentally impedes fulfillment of the Congressional purposes set forth in the '96 Act.

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

In Re:

Petition of LCI International Telecom Corp. For Adoption of A "FastTrack" Plan to Expedite Residential Local Competition and Section 271 Entry Through Establishment of Independent RBOC Wholesale and Retail Service Companies	))))))	CC Docket No. 98-5

COMMENTS OF KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC") by the undersigned counsel, hereby submits its Comments in the above-captioned matter. In a Public Notice dated January 26, 1998,[1] the Commission sought comment from interested parties on a petition filed on January 22, 1998 by LCI International Telecom Corp. ("LCI") (the "Petition"). LCI's Petition seeks Commission approval of a so-called "Fast Track" plan to expedite the provision of local competition and approval for RBOC entry into in-region interLATA service pursuant to section 271 of the Communications Act of 1996.[2] LCI's proposal consists essentially of an exchange: if the RBOCs will agree to restructure their existing operations into three new entities as described in detail by LCI, the Commission can presume that such a restructuring complies with the so-called "check list" provisions of section 271 of the Act.

[1] Public Notice DA 98-130, as amended by DA 98-339.

[2] 47 U.S.C. section 271.

KMC, a facilities-based CLEC which is building facilities and offering service in a number of states, principally in the South and Midwest, has experienced virtually all of the delays and frustrations described by LCI in its Petition, and agrees with LCI that the introduction of local competition has been unduly delayed. Such delay impedes the paramount Congressional purpose in the '96 Act to encourage the introduction of competition to local telecom markets. KMC therefore believes the Commission should attach the highest priority to the issues raised in LCI's proposal. Certainly the remedy proposed by LCI is entitled to serious and careful attention. However, KMC believes that significant changes in the restructuring suggested by LCI are required before the FCC should grant presumptive approval for the RBOCs to enter their in-region interLATA markets under section 271 of the Act. In addition, KMC urges the Commission to expand the scope of its inquiry to include independent ILECs and to address the possibility of ordering mandatory divestiture in the ILEC industry including both RBOCs and independent incumbents.

I. Background

LCI's Petition is rooted in the fact that the Communications Act of 1996, legislation whose principal purpose was to stimulate new entry and competition in the local service sector of the telephone industry, has spawned thousands of controversies involving ILECs, CLECs, and State Commissions. As LCI notes, these controversies are not likely to abate any time soon. LCI concludes that the problems are not transitional because they are rooted in the conflicts of interest inherent in an incumbent carrier's dual role as both network supplier and service provider: "Any incentive the RBOC might have to sell the use of its local facilities network efficiently to CLECs is stunted by the fact that, in doing so, the RBOC's retail operations will lose customers and revenue."[3] These problems, LCI notes, will continue even after the RBOC has been granted in-region interLATA authority under section 271 of the Act. Adoption of the restructuring proposed by LCI would, it contends, substantially accelerate both the introduction of local competition and entry of the RBOCs into the interLATA market.

LCI's Petition discusses OSS, UNE and pricing issues. It recites the obstacles, lack of cooperation and lack of incentive which are endemic in the ILEC community. It notes that most of these issues do not have simple solutions in the present climate and will require continuing regulatory oversight even if the RBOCs and CLECs were somehow able to achieve some consensus. Rather than the perpetuation, perhaps indefinitely, of the present regulatory battles, LCI suggests that the root cause of the difficulties -- the incentive structure of the RBOCs -- be modified. This modification, LCI claims, will not only permit the contending parties to concentrate on their core competencies instead of battling with each other, but will also reduce the need for continuing regulatory oversight.

LCI's primary recommendation is the restructuring of the RBOCs into three elements: an RBOC holding company ("HoldCo"), a subsidiary to own and operate network facilities and to acquire the installed customer base ("NetCo"), and a subsidiary which will be a retail service company ("ServeCo"). The existing RBOC, which becomes HoldCo, will continue to own 100% of NetCo, and up to 60% of ServeCo. The 100% owned RBOC subsidiary NetCo will continue to own and operate the local exchange and network assets and will become a wholesale

[3] Pet, ¶ 2-3.

carrier's carrier, providing its facilities to the CLECs, including ServeCo, on a nondiscriminatory arms-length basis. Specifically, all NetCo offerings to ServeCo must be tariffed and available to any CLEC; pick-and-choose must be available to any CLEC. NetCo initially retains the embedded customer base subject to later balloting and allocation to the CLECs, including ServeCo, but may not accept new retail customers. NetCo will have no retail functions whatsoever after the balloting is completed, and its retail tariffs will be basically frozen in place in the meantime.

More specifically NetCo will retain all the physical elements of the existing infrastructure including interconnection, network elements, and exchange, exchange access and intraLATA toll services. It will retain all facilities and capabilities for ordering, provisioning, maintenance and repair, billing, collection, and other operations support systems. It will have customer care and associated functions. LCI anticipates that, over time, the CLECs will acquire or construct their own physical infrastructure or that balloting and allocation procedures will reduce NetCo's assets and role. NetCo will thus have the opportunity by virtue of entrepreneurial energy to continue to have a role as a wholesaler, or to disappear as unnecessary. LCI acknowledges that NetCo will need continuing regulatory oversight under sections 251 and 252 of the Act and by state commissions since, at least at the beginning, it will have monopoly control over the local plant which all CLECs need to operate. However, argues LCI, NetCo's motivations are to be CLEC-friendly and to be even-handed in providing facilities to its CLEC customers.

With up to 40% of outside capital and independent officers, directors and managers, ServeCo will have enforceable SEC reporting obligations and fiduciary obligations to its minority stockholders. LCI contends that these will assure that its operations are not oriented toward serving the interests of the RBOC. ServeCo would provide both local and interLATA services. It is important to the success of its proposal, LCI acknowledges, for the HoldCo-

ServeCo relationship to be strictly arms-length and for the NetCo-ServeCo relationship to be identical to the NetCo-CLEC relationships which will develop when the scheme is implemented. There is to be no sharing of personnel, equipment, buildings, services, or any other resources among the three entities.[4]

LCI contends that its plan comports with the Commission's establishment of various rights and obligations of an RBOC affiliate formed pursuant to section 272, as set forth in the Non-Accounting Safeguards Order[5], but notes that its plan goes beyond the section 272 model of the Act in that the RBOCs would agree that all retail services will be provided through ServeCo and because the public company status and outside management and control assures greater independence than contemplated in the separate subsidiary provisions of section 272.[6]

LCI says that its proposal would satisfy the "seven minimum elements necessary to reduce RBOC conflicts of interest."[7] These seven criteria consist of the following elements:

1. NetCo and ServeCo would not share facilities, functions, services, employees, or brand names;
2. NetCo would not engage in any retail marketing;

[4]LCI distinguishes its proposal from somewhat similar plans of a number of ILECs (*e.g.*, SNET, Rochester) on the ground that LCI's proposal goes further to separate the constituent elements of the ILEC.

[5]11 FCC Rcd 21905 at 21913-5, 22054-8 (1997).

[6]In a similar vein, LCI notes that because ServeCo is further separated from HoldCo than is contemplated in section 251(h), ServeCo should not be considered as a successor or assign for purposes of the obligations of section 251(c). NetCo, on the other hand, would be considered subject to those obligations since it will be wholly owned by HoldCo.

[7]Pet., p. 28.

3. NetCo would deal with ServeCo only on the same basis as it deals with other CLECs;

4. Substantial public ownership of ServeCo (40% or more);

5. Independent directors on the ServeCo board;

6. Compensation for ServeCo management based only on ServeCo performance; and

7. Initially no ServeCo provision of interLATA service to NetCo's customer base.[8]

LCI urges that each of these factors be considered vital and that the absence of any one would defeat the goals of the proposal.

The Petition is careful to note that state commissions would have a major role to play in implementing the "fast-track" approach. LCI also contends that its proposal is nothing more than a safe-harbor for RBOCs who seek to offer in-region interLATA services and is fully consistent with all the statutory provisions of the Communications Act. RBOCs may choose the "fast-track" but need not do so. LCI believes that they would accelerate achievement of their goal to be permitted to offer in-region interLATA service under section 271 of the Act, but stresses that it advocates only that RBOCs be given the option, not be compelled to do so.

[8]This provision, which appears to be an afterthought in the LCI Petition, is justified as a necessary measure to assure that HoldCo does not simply provide "side-by-side" local exchange service through NetCo and interLATA service through ServeCo. Once NetCo's OSS is functioning properly, state commissions could allow ServeCo to provide interLATA service to a NetCo embedded customer, who will then have a realistic option of going elsewhere for interLATA services, i.e., to another CLEC.

II. Analysis

LCI's Petition is a commendable effort to stimulate public awareness of the difficulties faced by CLECs --- difficulties that have not been significantly ameliorated by the '96 Act. The restructuring it proposes properly focuses on the fundamental issue of RBOC incentives, and would certainly improve the present climate. Unfortunately, KMC cannot support the proposal in its present formulation because the restructuring proposed by LCI does not recognize that the most critical factor is to separate the ownership and operation of network facilities from the RBOC. Nevertheless, KMC is pleased that the Commission has sought public comment on the LCI Petition and urges the Commission to give the subject matter high priority attention. Even if the RBOCs, as KMC believes will be the case, do not agree to the LCI proposal, the Commission should nevertheless give careful consideration to RBOC and indeed to ILEC restructuring, with or without the RBOCs' concurrence, and with or without the carrot of a presumptive affirmative finding under section 271 of the Act.

A) The HoldCo-NetCo Link Is The Crucial One, Not The HoldCo-ServeCo Link

LCI is correct in asserting that RBOCs have inherent conflicts of interest and the incentive to discriminate against competing carriers, although its proposal misconceives the main issue. The RBOCs' conflicts of interest stem from their simultaneous control of bottleneck facilities and their desire to compete in retail markets against CLECs who must rely upon access to those bottleneck facilities. The primary bottleneck now (and for the foreseeable future) is in the local loop network and ancillary facilities and functions such collocation and OSS for loop ordering/maintenance, etc. Switches and interoffice transport are today operationally and economically substitutable by other parties, but wide-scale duplication of the loop network is neither economically nor technically feasible for the foreseeable future. Alternatives such as wireless and cable modem technologies will not be significant competitors for local loop access for many years, even under aggressive deployment schedules. Ironically, technologies such as ISDN and xDSL, which may alleviate certain short-term problems by increasing the bandwidth and therefore the economic life of the copper loop, in the long run make the development of other technologies less economically attractive by comparison.

Therefore, KMC submits, the HoldCo-NetCo relationship is the crucial one for the promotion of CLEC competition, not the HoldCo-ServeCo relationship. The LCI proposal does not reach to the heart of the perverse incentives which currently exist, and adoption of the LCI recommendations will not cure the problem. NetCo would still have the ability and incentive to overprice or otherwise restrict access to the bottleneck loops, and to cross-subsidize the more competitive elements of its network. LCI's proposal would not reverse or even substantially ameliorate the conflicts of interest LCI identifies, because it would not affect the RBOCs' control of access to bottleneck facilities. As restructured by LCI, NetCo would still have an incentive to manage its bottleneck facilities in ways that would give an advantage to ServeCo. LCI's restructuring would merely dilute the incentive a little since HoldCo would receive at most 60% of the resulting benefit. Although overt price and service quality discrimination in favor of ServeCo may be difficult to conceal, NetCo could nonetheless manipulate its service offerings and pricing to promote the interests of ServeCo in other ways, such as accelerating or retarding the deployment of particular loop technologies (*e.g.*, xDSL) to accommodate ServeCo's marketing plans; or by maintaining geographically averaged rates that subsidize ServeCo's rural service and deter entry in urban areas.

It is therefore crucial that the HoldCo-NetCo link be restructured so that NetCo is truly free of anticompetitive incentives. KMC suggests that this could be achieved by limiting HoldCo to no more than a 25% ownership interest, limiting HoldCo to the election of no more than 25% of the NetCo Board of Directors, and requiring an annual report from the NetCo Board to the FCC and the relevant state commission(s) to cover subjects to be specified by the Commissions. The remaining 75% of NetCo's stock should be sold off to the public in a process that allows the market to value the interests to be divested. Simply put, while RBOC investors bear the risk that the value of their investment can be adversely affected by regulation, and by changes in regulation, the divestiture of all but 25% of RBOC ownership in NetCo assets can and should be effectuated consistent with applicable law concerning Fifth Amendment and due process requirements. As LCI recommends for ServeCo, NetCo directors and management should be independent and with no incentives to favor HoldCo.

B) The HoldCo-ServeCo Link Remains Too Anticompetitive

There is no question that CLECs would be better able to establish and provide competitive services if the ServeCo element of existing RBOCs, and generally of ILECs, were to be restructured as suggested by LCI. Unfortunately, KMC does not believe a 40% divestiture goes far enough to establish fully independent performance incentives or benchmarks. Even the LCI suggestions for outside directors and that managerial compensation be tied only to ServeCo performance would not provide enough distance. No doubt such arrangements would preclude the grossest or most obvious instances of self-dealing between HoldCo and ServeCo. But corporate democracy is far from perfect; where 40% of the stock is widely held and a 60%

controlling interest is held by one stockholder, officers, directors and managers have no trouble identifying where their long term interests lie, and this is true no matter how well-intentioned, competent, and honest they may be. The unavoidable fact is that in such a scenario the 60% owner is overwhelmingly in control and has countless, subtle, difficult-to-detect ways to advance its own interests. No serious student of corporate democracy would be comfortable with the conclusion that fiduciary duties, SEC reporting obligations, and ServeCo-oriented compensation plans would do much more than moderately limit HoldCo's influence.

Accordingly, more distance between HoldCo and ServeCo is required. KMC suggests that HoldCo be limited to 49% ownership and precluded from control of the ServeCo board. As in the case of NetCo, a special annual report of the Board should be a required submission to the FCC and relevant state Commissions.

C) The Presumption That A Disaggregated RBOC Is Entitled To A Favorable Section 271 Finding Must Be Carefully Circumscribed

Provided the disaggregation of RBOCs into constituent parts as outlined herein is effectuated, KMC would accept LCI's proposal that the Commission issue a rebuttable presumption that the checkpoint criteria of section 271 have been met, permitting RBOCs to offer in-region interLATA service. However, careful attention must be given to procedural issues that may arise thereafter. Specifically, once having allowed an RBOC to provide such service, the Commission should not abandon its watchdog role. It must monitor the development of local competition to assure itself that the restructuring is having the desired effect, or, if it is not, that the market failure is attributable to something other than the continuation of anticompetitive conduct on the part of the RBOC. Moreover, the Commission should establish, from the outset, clear procedural rules for CLECs wishing to challenge RBOC behavior. If the favorable section

271 ruling is based on a presumption, the criteria that govern the revocation of interLATA authority must be set forth. CLECs should not have the burden of proof in such circumstances. Although it would appear reasonable to assign the burden of going forward to CLECs, i.e. to make out a prima facie case that the RBOC in question is not entitled to continue in the in-region interLATA market because it is engaging in anticompetitive behavior in its restructured local competition roles, the ultimate burden of proof should then shift to RBOC to demonstrate that it is entitled to remain in the in-region interLATA market because it is not acting in an anticompetitive fashion in its HoldCo-NetCo-ServeCo roles, or any of them.

III. Other Approaches

The foregoing analysis demonstrates that the LCI proposal does not address the real heart of the RBOC's structural problem and does not go far enough to eliminate anticompetitive incentives. Moreover, by proposing a purely voluntary policy, the LCI Petition may prove to be a blind alley -- an approach to which many industry elements will devote resources but which ultimately fails to produce a significant restructuring if the RBOCs decline to adopt it. Even if the LCI proposal were sufficient to solve the RBOC structural problem and the RBOCs accept it, there would still be a serious gap in implementing the overall pro-competitive provisions of the '96 Act. That gap arises from the fact that non-RBOC ILECs would not be subject to the proposed restructuring even though in the vast majority of cases they have the same structural problems vis a vis CLECs as do the RBOCs. KMC has suggested above some further steps it believes are essential if the LCI approach is to be the basis of FCC policy. More generally KMC suggests that the Commission consider other approaches.

(A) Independent System Operator

One such alternative approach is that of the "Independent System Operator" ("ISO"), currently being implemented in the electric distribution industry. Under this approach, an ISO would have exclusive rights to management (but not ownership) of the loop network. ILECs' property rights would be protected by paying them regulated rates for the use of their embedded facilities. ILECs and CLECs would obtain loops from the ISO through the same OSS interfaces and at the same rates. The ISO would be a not-for-profit entity controlled by a board including representatives of ILECs, CLECs, resellers, and possibly other interest groups. Both ILECs and CLECs would have the right to overbuild the ISO loop network with their own facilities, at their stockholders' risk. The ISO would have a strong incentive to charge deaveraged, cost-based rates to deter uneconomic overbuilding (but in any event its rates would continue to be regulated).

The concept could be implemented on a voluntary basis. In addition to the interLATA incentive suggested by LCI, the Commission should condition any additional access pricing flexibility for ILECs (including independents) on participation in an ISO. Also, ILECs participating in an ISO could be given price cap relief such as, for example, a lower productivity factor.

(B) The Commission Should Consider Compulsory RestructuringTo Serve The Public Interest

The LCI Petition proposes a degree of restructuring which it believes would serve the public interest and which it proposes be voluntary on the part of the RBOCs in exchange for authority to offer in-region interLATA service. In Section II, supra, KMC has contended that the degree of separation advocated by LCI does not go far enough and has proposed a number of alternatives, one of which includes a greater degree of separation between HoldCo and its two subsidiaries. It is of course possible that the RBOCs would not agree even to the restructuring proposed by LCI, let alone that advocated by KMC. Independent ILECs are under no pressure to agree to such realignments. RBOC and ILEC reluctance, however, to accept such plans voluntarily need not be, and should not be, the end of the Commission's inquiry. Rather, the Commission should consider whether it has the authority to compel a degree of restructuring which it considers essential.

While complete divestiture of the wholesale and retail elements of an ILEC is the most desirable solution, the Commission should also consider introducing elements of independence into these components of presently structured ILECs. These elements can vary from a requirement for outside directors, officers, or managers, to publicly-appointed directors as has been required by statute for Comsat since its creation by Congress.[9] The Commission should also consider the option of requiring divestiture of a "LoopCo" by the ILECs. The "LoopCo" would be independent of the ILEC and would control access to unbundled loops (based on the Empire City Subway model for conduit access). This could entail spinning off a minority interest, as proposed by LCI for ServeCo, a majority interest, or complete divestiture. Clearly it would be desirable for all these elements of independence to be accepted voluntarily. On the other hand, other than with respect to a public director, the Commission has plenary statutory power under the Act to compel such arrangements if it finds on the basis of an adequate record that the public interest requires such steps to be taken.

[9] 47 U.S.C. sec. 733.

There is ample authority and precedent for the proposition that the Commission has full authority to compel the RBOCs and ILECs to restructure provided that the order to do so is based on a record which reasonably supports the Commission's conclusion and that the restructuring does not involve an unconstitutional or otherwise impermissible taking. The Communications Act gives the Commission very broad powers to regulate the dynamic communications industry. Sections 4(i) and 4(j), 214(c), and 303(r)[10] provide expansive authority for the Commission to do what it deems necessary and not inconsistent with law to protect the public interest. See FCC v. Pottsville Broadcasting Co., 309 U.S. 134,138 (1940) (there is a "recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors"); NBC v. U.S., 319 U.S. 190, 225 (1943) (Commission must use statutory powers to change regulations which time and changing circumstances reveal no longer serve the public interest). The Commission has ordered restructuring in the telephone industry on numerous occasions.[11] Perhaps the best known is the Commission's decision in Computer II.[12]

Section 214(c) of the Communications Act of 1934, as amended, specifies that the Commission "may attach to the issuance of the [section 214] certificate such terms and

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[10]47 U.S.C. §§ 154(i) and (j), 214(c), 303(r).

[11]These proceedings are cited at length in LCI's Petition at pp. 38-40.

[12]Final Decision, In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384 (1980) (Computer II); Report and Order, In re Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 F.C.C. 2d 1117 (1983), aff'd sub nom. Illinois Bell Tel.Co. v. FCC, 740 F.2d 465 (7th Cir. 1984).

conditions as in its judgment the public convenience and necessity may require." The Commission, in implementing the Modified Final Judgment in U.S. v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), aff'd. sub nom. Maryland v. U.S., 103 S. Ct. 1240 (1983), recognized that under this provision and the Act it could have itself ordered the divestiture of the BOCs from AT&T on the basis of a sufficient record. AT&T Divestiture, 96 FCC 2d 18, 44 (1983), recon., 98 FCC 2d 141 (1984), aff'd on oth'r grn'ds sub nom. GTE Service Corp. v. FCC, 782 F.2d 263 (D.C. Cir. 1986).

Moreover this broad power to conform the industry's obligations to the Commission's public interest determinations can involve divestiture of preexisting assets and rights without violating any duty owed to private parties. In General Telephone Co. v. United States, 449 F.2d 846 (5 Cir. 1971), the court sustained a Commission decision to force General Telephone to discontinue its provision of cable service. In doing so, it noted that "Where the on-rushing course of events have outpaced the regulatory process, the Commission should be enabled to remedy the problems of undue concentration of control over communications media by retroactive adjustments, provided they are reasonable." 449 F.2d at 863. It also observed that "the property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests." Id. at 864. See also WBEN, Inc. v. U.S., 396 F.2d 601 (2 Cir.), cert den. 393 U.S. 914 (1968) (loss of pre-sunrise operating authority by rule sustained on basis of adequate record justifying public interest gains.) These and other cases affirming the Commission's broad powers to impose obligations on industry which the

Commission has found to be in the public interest specify that such burdens must be based on an adequate record, and the burdens must be rationally related to the public interest benefits anticipated by the Commission. See, e.g., SEC v.Chenery Corp., 332 U.S. 194 (1947); Florida Cellular Mobile Communications Corp. v. FCC, 28 F.3d 19 (D.C. Cir. 1994), cert. den., 115 S.Ct. 1357 (1995).

Accordingly, KMC recommends that the Commission issue a formal Notice of Proposed Rulemaking in which it asks for comments and reply comments on the question whether the RBOCs, and other ILECs, should be compelled to divest some or all of their ownership in NetCo and ServeCo functions, and if so, what portion and under what terms and conditions. Commenters should be asked to provide specific details which in their view justify the action recommended. By issuing a formal NPRM, the Commission will assure that all parties, including the RBOCs and ILECs affected, have adequate notice of the potential scope of the new rules. Just as important, a further notice will provide additional opportunity for those seeking such divestiture to document the need for such steps.

IV. Conclusion

KMC believes that the LCI Petition is an important catalyst to focus the Commission and the industry's attention on the important problems which have existed and continue to exist in the CLEC industry. As LCI correctly notes, the problems are massive and continuing; they will require an enormous amount of industry and regulatory attention if the present incentive structure remains in place. Such attention drains resources which could be better spent in designing, marketing and providing innovative and improved services to the public. While KMC does not fully endorse the LCI Petition for the reasons set forth above, it urges the Commission to use the LCI Petition as a stepping off point for a serious and widespread review of the issues which it raises, including the alternatives set forth herein.

Respectfully submitted,

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March 23, 1998

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CERTIFICATE OF SERVICE

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