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

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
	)	
	)	RM-9210

COMMENTS OF KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC"), respectfully submits the following comments in response to the October 5, 1998 Public Notice requesting comments in the above-captioned proceedings.[3]

KMC Telecom, Inc. is authorized to provide, through its subsidiaries, competitive local and long distance services in 17 states, and Puerto Rico, and is operational in eight states (Alabama, Florida, Georgia, Louisiana, North Carolina, Texas, Virginia, and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Melbourne, Florida; Savannah and Augusta, Georgia; Baton Rouge and Shreveport, Louisiana; Greensboro and Winston-Salem,

[3] *Commission Asks Parties to Update and Refresh Record For Access Charge Reform and Seeks Comment on Proposals For Access Charge Reform Pricing Flexibility*, Public Notice, FCC 98-256, released October 5, 1998.

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North Carolina; Corpus Christi, Texas; Roanoke, Virginia; and Madison, Wisconsin, and will soon build similar networks in several other cities in the Southeast and Midwest.

I. Consideration of Pricing Flexibility Is Premature

KMC submits that it is grossly premature at this point to consider establishing pricing flexibility for incumbent LECs. By any measure, competitive LECs have only a very small percentage of the local market.[4]

Moreover, the regulatory assumptions underpinning pricing flexibility have been invalidated. In the *Access Charge Reform Order,* [5] the Commission assumed that its pricing guidelines and other determinations in the *Local Competition Order*[6] implementing the key market-opening provisions of the 1996 Act[7] would set the stage for competition in provision of interstate access services. It therefore adopted the "market based" approach to achieve its goals for access reform that would rely on the development of competition to force access rates toward

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[4] Collectively, CLECs captured 5.1% of the business market for local telecommunications services in 1997. *United States Competitive Local Markets*, Strategis Group (1998). In 1996 the CAP/CLEC share of nationwide local service revenues, including local exchange and access services, was 1%. Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data (rel. Nov. 1997).

[5] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, Report and Order, CC Docket Nos 96-262, 94-1, 91-213, and 95-72, 12 FCC Rcd 15982 (1997) ("*Access Reform Report and Order*")

[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15805-15806, paras. 694-606 (1996) (*Local Competition Order*), *vacated in part, aff'd in part*, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 879 (1998).

[7] Pub.L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. Sec. 157.

levels based on forward looking economic costs.[8] However, the Commission's assumption has been invalidated by the decision of the 8th Circuit in *Iowa Utilities Board* vacating the Commission's pricing guidelines for unbundled network elements ("UNEs") and its requirement that incumbent local exchange carriers provide combined UNEs. KMC submits that *Iowa Utilities Board* and the very small competitive presence of competitive LECs eliminate any rational basis for proceeding with pricing flexibility.

Instead, KMC urges the Commission to seek to establish a more thorough implementation and enforcement of the key interconnection, unbundling, and resale obligations of Section 251(c) of the Act.[9] This would be most consistent with the goals of the 1996 Act and could provide the foundation for eventual consideration of pricing flexibility.

II. The Bell Atlantic and Ameritech Proposals Do Not Provide a Basis for Establishing Pricing Flexibility

The Bell Atlantic and Ameritech pricing flexibility proposals would significantly depart from the Commission's conception of the basis for granting pricing flexibility. They would also establish sweeping pricing flexibility based on extremely modest levels of competition. Accordingly, the Commission should reject these proposals.

The Ameritech and Bell Atlantic Proposals Would Not Establish the Pre-Conditions For Competition. In the *Access Reform NPRM*,[10] the Commission proposed that the initial stages of

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8 *Access Charge Reform Report and Order* at para 264.

9 47 U.S.C. Section 251(c).

10 *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, Notice of Proposed Rulemaking, CC Docket Nos 96-262, 94-1, 91-213, and 95-72, 11 FCC Rcd 21354, para. 161 (1996)("*Access Reform NPRM*").

pricing flexibility would be premised on incumbent LECs having complied with key market opening requirements so that barriers to competition would have been removed.[11] However, the Bell Atlantic and Ameritech proposals essentially abandon the concept that initial pricing flexibility should be based on removing barriers to entry. Thus, they do not propose that the first stage of pricing flexibility be premised on a careful evaluation of compliance with the key market opening provisions of the Act or of those proposed by the Commission in the *Access Reform NPRM*. Instead, initial pricing flexibility would be based on criteria that do not show that the preconditions of competition are in place and/or the existence of only a very small amount of competition.

Bell Atlantic and Ameritech apparently are proposing that pricing flexibility for transport services be based on the existence of 100 DS1 connections somewhere in the state or LATA and that switched access pricing flexibility be based on the existence in a state of a negotiated interconnection agreement or a statement of generally available terms ("SGAT"). Bell Atlantic would add the availability of interim number portability and 100 UNE loops being in service for switched access pricing flexibility. These "conditions" are so minimal that they could probably be met today in almost every state despite the near absence of any meaningful local competition.

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[11] KMC does not believe that any flexibility should be granted merely because the pre-conditions of competition are in place. Rather, there should additionally be widespread vigorous actual competition occurring in the marketplace before any pricing flexibility is granted. Moreover, it is evident that the Bell Operating Companies have not removed barriers to entry in that none of them has been willing to comply with the key competitive requirements of Section 271 of the Act in the estimation of the Commission. Thus, there is no basis for determining that pricing flexibility is justified at this time due to removal of barriers to entry, or that removal of barriers to entry without widespread competition would justify pricing flexibility.

These proposals sidestep carriers' obligations to take the key steps envisioned under the Act that would genuinely make widespread competition possible. Thus, other than number portability, there is no specific reference to any of the key obligations that the Act envisions could set the stage for competition, such as the competitive checklist in Section 271. Nor is there any proposal for a thorough examination by the Commission of compliance with a suitable competitive checklist. The existence of a single negotiated or state approved interconnection agreement or an SGAT would be a pale substitute for an actual demonstration of compliance with key market opening requirements. Simply stated, interconnection agreements and SGATs can be very narrow and do not show a full compliance with the key market opening requirements of the Act. Therefore, they do not show that the preconditions of competition are in place.

Moreover, the degree of competition envisioned by Bell Atlantic and Ameritech as triggers for Phase I pricing flexibility is so small that it should not be given any regulatory significance. The existence of 100 DS1 equivalent cross connects somewhere in the state is not a reasonable basis for assuming there is any significant degree of competition in a state or LATA. Similarly, the existence of SGATs or a negotiated agreement does not show that any competitive services are actually being provided. Bell Atlantic's 100 UNE loops in service somewhere in the state or LATA is absurd if intended to show that a significant degree of competition exists.[12] Nor does the existence of 100 DS1 cross-connects or 100 UNE loops in

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[12] The Commission should not follow its misguided test for de-averaging special access and switched transport services under which de-averaging is permitted if one cross-connect has been taken in a study area. *Special Transport Expanded Interconnection Order*, 7 FCC Rcd at 7454 -55; *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7426 n. 230. This test does not show any significant degree of competition or compliance with the Act. KMC submits that this test has been superseded by, and is not the best way to achieve, the goals of the 1996 Act.

service somewhere in a state or LATA show significant compliance with the Act. The proposed trigger for Phase II pricing flexibility additionally makes no mention of establishing the preconditions of competition.

KMC submits that the approach to pricing flexibility reflected in these proposals would preserve carriers' ability to control the pace of competition by rewarding less than full compliance with the Act. KMC submits that this would be a very bad bargain for the Commission to accept. Instead, if the Commission proceeds with a pricing flexibility approach to access reform, it should require that incumbent LECs demonstrate full compliance with a suitable competitive checklist. A far greater degree of actual competition should also be required before any pricing flexibility is granted.

The Proposed Deaveraging Is Too Broad. Bell Atlantic and Ameritech apparently envision under their proposals that once the meager triggers they set forth are met anywhere in a LATA or state they would be granted pricing flexibility throughout the LATA or state. These triggers, such as 100 DS1 cross connects or 100 UNE loops, could be met in one or a few central offices, or a single office building, respectively. Thus, the geographic de-averaging contemplated in Phase I would apparently permit incumbent LECs to de-average prices in all density zones throughout a state even though there would be competition in only a tiny portion of the state. Similarly, these proposals would permit complete de-averaging of transport and switched access rates throughout a state or LATA even if virtually all competition is occurring in a very small area of the state. KMC submits that it would not promote the Commission's goals to grant the sweeping relief sought on the basis of the limited competition envisioned in Ameritech's and Bell Atlantic's proposals. Thus, in the *Access Reform NPRM* the Commission

proposed not to rely on a statewide analysis of competition.[13] The Commission should reject these proposals because they do not sufficiently link the relief sought to the areas where the proposed triggers for de-averaging are occurring.[14] Absent this linkage, carriers will merely raise rates in areas where there is limited competition to make up for reductions in areas where there is some competition.

Volume and Term Discounts. As with proposed deaveraging, KMC believes that the Ameritech and Bell Atlantic proposals to permit volume and term discounts, competitive responses to RFPs, and contract tariffs are not justified by the meager showings of evidence of compliance with the Act or of actual competition proposed by these carriers. Thus, it would not be appropriate to permit carriers to establish these discounted offerings throughout a state or LATA based on a showing of competition in a narrow area.

Moreover, the carriers' proposals omit key safeguards. Ameritech and Bell Atlantic do not address whether they plan to use discounts, RFPs, and contract tariffs to create head room under price caps so that they could raise rates for customers that do not receive discounts. Moreover, they do not address the extent to which these discounted offerings would be available to other customers. Nor do Ameritech and Bell Atlantic address what time limits would be placed on these discounted offerings. Incumbent LECs will use these offerings to "lock-up" customers absent time limits on the terms of these contracts. Accordingly, the Commission should limit the time period of any discounts or contract tariffs.

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[13] *Access Reform NPRM* para. 155.

[14] Bell Atlantic's proposal does apparently have some limits on pricing flexibility for transport based on wire centers.

Ameritech and Bell Atlantic have additionally not adequately justified growth discounts. KMC believes that these would primarily benefit BOC long distance affiliates who, once authorized under Section 271, could have significant growth. Ameritech and Bell Atlantic have also not addressed the extent to which they should be required to publish the terms and conditions of service they intend to propose in response to an RFP. This should be required by the Commission because it could significantly promote competition by permitting other carriers to offer customers a more desirable offering.

III. CONCLUSION

For these reasons, KMC requests that the Commission not adopt pricing flexibility at this time. Instead, the Commission should take steps to establish a more complete implementation and enforcement of the key market opening provisions of the 1996 Act.

Respectfully submitted,

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Dated: October 26, 1998

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October 1998, copies of the foregoing Comments of KMC Telecom, Inc. were served by hand delivery to the parties on the attached service list:

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