

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

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| In the Matter of |) | |
| |) | |
| The Establishment of Rules to Prohibit |) | |
| the Imposition of Unjust, Onerous |) | CC Docket No. 99-142 |
| Termination Penalties on Customers |) | |
| Choosing to Partake of the Benefits |) | |
| of Local Exchange Telecommunications |) | |
| Competition |) | |

JOINT COMMENTS OF CTSI, INC. AND RCN TELECOM SERVICES, INC.

CTSI, Inc. and RCN Telecom Services, Inc. (AJoint Commenters≅) respectfully submit these comments in support of the Petition of KMC Telecom Inc. filed on April 26, 1999.¹ KMC requests that the Commission declare unlawful termination penalties imposed by incumbent local exchange carriers (AILECs≅), prohibit the enforcement of these ILEC termination penalties, and require the removal of ILEC termination penalties from ILEC state tariffs until such time as customers have a genuine and realistic competitive choice. Joint Commenters attest to the validity of KMC=s position that termination penalties present an insurmountable barrier to competitive entry in many local exchange markets and, as such, fall within the jurisdiction of the Commission under Section 253(d) of the Act.

¹*Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition*, KMC Telecom Inc. Petition for Declaratory Ruling, Dkt. No. 99-142 (filed April 26, 1999) (AKMC Petition≅).

I. ILEC TERMINATION PENALTIES ARE A BARRIER TO ENTRY

Joint Commenters affirm KMC's claim that ILEC termination penalties are a barrier to entry into local exchange markets.² KMC accurately describes the current gridlock plaguing many local markets. As reported by KMC, a substantial portion of the telecommunications consumer market is locked into long term service arrangements with excessive termination penalties.³ CTSI and RCN have encountered the same gridlock, especially in the areas outside metropolitan cities.

Although CLEC certification, interconnection, and deployment of a network are major steps toward the goal of creating opportunities for customers to choose among various local service alternatives, that choice is illusory for those customers that are already locked into long term contracts by termination penalties B termination penalties forced on customers with no competitive alternative. In seeking to provide services to customers in areas that have not experienced any significant level of competitive entry to date, CTSI and RCN encounter many customers who are locked into these service arrangements with termination penalties. While termination penalties are not per se unlawful, the termination penalties at issue in this proceeding were designed to prevent competition, were forced on customers with no bargaining power, and represent a significant barrier to competitive entry by CLECs.

²KMC Petition at 2.

³*Id.*

A. ILEC Termination Penalties Are Designed To Circumvent Competition

KMC asserts that ILECs impose termination penalties to maintain market dominance and to forestall competition.⁴ Joint Commenters agree. ILECs saw the Awriting on the wall \cong signaling the end of their monopoly even before enactment of the 1996 Act. In an effort to maximize and extend the benefits of their monopoly in anticipation of upcoming change, ILECs created termination penalty clauses that would lock-in customers for years, thereby, preventing those consumers from choosing competitive carriers. As noted by KMC, ILECs introduced termination penalties in their tariff in the latter part of 1996 or early 1997.⁵ Since competition had not yet taken a foothold in local exchange markets, ILECs still had an opportunity to use termination penalties to lock-in customers, thereby, removing the threat that those customers might turn to competitors for service.

Since customers had no realistic competitive options, the ILEC had no problem imposing termination penalties on customers. ILECs continue to impose these termination penalties on customers while no competitive alternative exists and only one service provider is available to the end user.

⁴KMC Petition at 3.

⁵KMC Petition at 6.

The nature of the ILEC termination penalty is designed specifically to forestall the customer's movement to a competitor. The ILEC termination charges appear to have no relationship to unrecovered costs or lost investment, but rather serve to burden the customer in such a way that the customer would have to pay double for the same service. KMC provided several examples of ILEC termination penalties found in ILEC state tariffs.⁶ One notable characteristic of the termination penalties stipulated in KMC's Petition is that the customer pays the ILEC for the term of the agreement regardless of whether the customer receives service. The penalty is equal to the *number of months remaining in the contract* times the monthly rate or some other predetermined rate.⁷ Basically, to the ILEC, there is no difference if the customer remains in the service arrangement or breaks the arrangement. The ILEC still gets the same amount of money, if not more. Obviously, these termination penalties are not designed to recoup investment or the cost of providing service. Rather, the penalty is designed to lock-in the customer. The customer cannot switch carriers because then the customer would have to effectively pay two service providers for the same service over the same period of time.

B. A Fair and True Contractual Arrangement Cannot Be Formed In A Monopolistic Market

Termination liability provisions are not new to contract arrangements, and are not unique to the telecommunications paradigm. Joint Commenters do not contest this common contractual

⁶KMC Petition at 4-6.

⁷*Id.*

practice. However, when entering into an agreement with a entity that for all practical purposes is a monopoly, a customer has little or no bargaining power or choice.

ILECs must not be allowed to use contract law to sustain the results of their abuse of market power and harm customers, when the very goal of the Act was to protect consumers from the exploitive behavior of the monopolist and to provide the consumer with the power of real alternatives when negotiating service contracts. Instead, as discussed below, the Commission can and should use its authority under Section 253 to preempt state enforcement of these contracts.

Joint Petitioners do not object to the practice of including termination liability provisions in contracts for services, but believe that such provisions are only acceptable when the consumer has competitive options, and can effectively negotiate to receive a benefit commensurate with the liability imposed. If a consumer decides to sign a contract with the ILEC when competitive options are available, then there is reasonable assurance that the consumer has actually determined that subjecting himself to such liabilities is economically rational and that the contract is sound and not the product of a monopoly.

Many consumers, however, have entered into such contract with ILECs without the benefit of real competitive offers. Laws designed to protect the incumbent monopoly prevented competitors from entering the market. Consumers have been effectively forced to accept such harsh contract clauses without any real consideration. ILECs have exploited their market power by imposing these penalties.

C. Until a Competitor Effectively Enters a Market, the ILEC has a Window of Opportunity to Impose Its Termination Penalties, Lock-Up the Market and Prevent the Birth of Competition

Until the 1996 Act, a local telecommunications monopoly had been authorized by law and consumers accepted the monopolistic local telecommunications regime. With the Telecommunications Act of 1996, the authorized monopoly ended. But what did this mean to consumers? In practical terms, for most consumers, especially those outside the large metropolitan markets, the 1996 Act changed nothing about their local telecommunications service. Recognizing the reality that it would be some time before competition came to their back door, it is not surprising that consumers continued to act in a manner consistent with a monopoly telecommunications environment, despite enactment of the 1996 Act.

When a consumer requires local service, the consumer subscribes to ILEC services. No alternative exists. The consumer accepts all terms and conditions of service imposed by the ILEC. What other choice does the consumer have? As KMC accurately pointed out, Aif a customer had alternatives in service providers, the customer would most likely not have agreed to such excessive, punitive termination penalties.⁸ Should the Commission have expected consumers to wait for competition before entering into service arrangements? If they had, they would still be waiting to initiate service.

Since competition could not exist automatically upon enactment of the 1996 Act, the Commission should recognize that consumers continued to transact business in the monopoly ILEC world even after February 1996, and were forced to act to their detriment in order to continue to receive local service. Some customers were unaware of the termination penalties and, those customers that were aware of the penalties, had no choice but to accept the terms since no alternative

⁸KMC Petition at 4.

existed. This environment continues to exist and, therefore, ILECs continue to be in a position to impose termination penalties on customers. Once competition exists, customers can choose whether to accept these ILEC termination penalties, which will likely disappear from ILEC service arrangements since customers will be able to turn to an alternative carrier.

Until a competitor effectively enters the market, the ILEC will continue to impose its termination penalties designed solely to thwart competition by locking in customers. Termination penalties imposed in such an environment should not be enforced and the Commission should act to declare them ineffective.

II. SECTION 253 OF THE ACT REQUIRES REMOVAL OF BARRIERS TO ENTRY

In many markets, customers cannot subscribe to local exchange services of a telecommunications provider other than the ILEC. Until this reality changes and consumers have a real choice, the Commission's obligation to open local exchange markets continues.

Over three years have passed since enactment of the 1996 Act and most local exchange markets remain closed to real competition. CLEC attempts to reach customers are being thwarted by ILEC created barriers including ILEC termination penalties. Congress provided the Commission with several tools to remove barriers to entry, even local barriers. Section 253 of the Act empowers the Commission to eliminate barriers created or permitted by state commissions. Recognizing the dual jurisdiction over many aspects of telecommunications, Congress adopted Section 253 to give the Commission direct authority over local barriers to competitive entry.

A. ILEC Termination Penalties Violate Section 253(a) of the Act

As demonstrated herein, ILEC termination penalties are a local barrier to CLEC entry in many markets. This local barrier exists in part due to state commission enforcement of ILEC state tariffs.

As described by KMC, state commissions reviewed ILEC tariffs to protect the public interest since ILECs maintained a monopoly in their state and competition did not exist to keep ILEC rates, terms and conditions fair.⁹ ILECs were able to legally impose termination penalties once the state commission accepted or approved the tariff term. Most ILEC termination penalties were imposed via state ILEC tariffs.

Section 253(a) of the Act prohibits state requirements that *Amay prohibit or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service.≡ (emphasis added). KMC demonstrated clearly that state commission actions with regard to ILEC tariffs enable the imposition of these termination penalties on customers and allowed the continued enforcement on customers, which serves to deter customers from challenging ILECs.¹⁰ State commission acceptance of ILEC tariffs with termination clauses made ILEC termination penalties binding on parties who subscribed to ILEC term services. Joint Commenters submit that state commission action is likely not intended to create a barrier to competitive entry by CLECs; however, state commission action in this regard created a *de facto* barrier and, therefore, violates Section 253(a) of the Act. While a few state commissions have now acted to eliminate ILEC

⁹KMC Petition at 9.

¹⁰KMC Petition at 8-10.

termination penalties upon finding them anti-competitive, many state commissions have not acted to remove the barrier.¹¹

¹¹See KMC Petition at 16-17.

Joint Commenters support KMC's position that Section 253(a) does not merely address state actions that actually prohibit competitive entry, but also statutes, rules, or orders that, as a practical matter, prevent any CLEC from providing service in the market. KMC Petition at 10. The Commission itself concluded in the *Texas Preemption Order* that Sections 253 requires [the Commission] to preempt not only express restrictions on entry, but also restrictions that indirectly produce that result.¹² State commission acceptance and enforcement of ILEC termination penalties represent an indirect restriction on entry. Furthermore, state commission refusal to remove the barrier represents yet another indirect restriction on entry. Barriers that effectively prevent CLECs from entering the market should be eliminated by the Commission if the state commission fails to act. In this case, many state commissions accepted the barrier and now refuses to remove it. **B.**

Pursuant to Section 253(d), the Commission Should Preempt State Action

Since these state commissions have failed to remove this significant barrier, the Section 253(d) of the Act requires this Commission to remove the barrier. Section 253(d) specifically states that A[i]f . . . the Commission determines that a state or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission *shall* preempt the enforcement of such statute, regulation, or legal requirement¹³ By accepting ILEC tariffs with termination penalties and allowing the continued effectiveness of such terms, state commissions are in fact Apermitt[ing] a legal requirement that violates Section 253(a). Thus, if a

¹²*Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCB Pol. 96-13, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3497, at para. 41 (1997); *see also* KMC Petition at 11.

¹³47 U.S.C. §253(d) (emphasis added).

state commission refuses to invalidate and require the removal of ILEC termination penalties from ILEC tariffs, the Commission should preempt state commission enforcement of such termination penalties.

III. CONCLUSION

For the foregoing reasons, CTSI, Inc. and RCN Telecom Services, Inc. support the Petition of KMC Telecom, Inc. and respectfully request the Commission to declare ILEC termination penalties unlawful when imposed on consumers without bargaining power or alternatives, and require the removal of such termination penalties from ILEC tariffs until such time that there exists a true competitive alternative for consumers.

Respectfully submitted,

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