ORIGINAL

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

In the Matter of	)	
	)	**DOCKET FILE COPY ORIGINAL**
The 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	)))))))	CC Docket No. 99-142

RECEIVED
JUN 3 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

Robert Berger
Russell Merbeth
WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W.
Washington, D.C. 20036

Jonathan E. Canis
Ross A. Buntrock
Michael B. Hazzard
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW
Fifth Floor
Washington, D.C. 20036
(202) 955-9600

Counsel for
WINSTAR COMMUNICATIONS, INC.

JUNE 3, 1999

No. of Copies rec'd 0+7
List A B C D E

RECEIVED
JUN 3 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

Pursuant to the Commission's Public Notice[1] issued May 4, 1999 WinStar Communications, Inc. ("WinStar"), through counsel, respectfully submits the following comments in support of KMC Telecom Inc.'s ("KMC") Petition for Declaratory Ruling.

WinStar supports KMC's request that the Commission declare unlawful termination penalties imposed by incumbent local exchange carriers (ILECs), to prohibit enforcement of these ILEC termination penalties, and to require the removal of ILEC termination penalties from ILEC state tariffs. As WinStar further explains below, such termination penalties are dramatically curtailing competition by denying consumers a true choice in the local exchange marketplace. For competition to flourish, competitors must be allowed a reasonable opportunity to compete. Yet a robust marketplace result will be unobtainable as mass numbers of consumers are effectively denied the ability to exercise choice by virtue of draconian termination penalties.

---

[1] Pleading Cycle Established for Comments on KMC Telecom Inc. Petition for Declaratory Ruling, Public Notice, DA 99-836, CC Docket No. 99-142 (May 4, 1999). ("KMC Petition").

I. INTRODUCTION AND SUMMARY

WinStar is a competitive local exchange carrier ("CLEC") offering facilities-based local, long distance, data, and Internet services to small and mid-sized business customers throughout the United States. WinStar, the first fixed wireless CLEC to enter the local marketplace, began deploying its integrated switched network in the Fall of 1996 and currently serves approximately 35 markets nationally over its own facilities. WinStar's highly efficient network provides telecommunications services over a new network that is not subject to the many limitations of the incumbent local exchange carrier ("ILEC") network. Since it began deploying its state-of-the-art network, WinStar has encountered ILEC erected obstacles that have, in some instances, hindered its ability to serve customers that desired WinStar service. In most cases, the principle obstacles have been physical ones, such as denial of access to house and riser facilities and the inability to place equipment on the roofs of multiple dwelling units ("MDUs"). However, the termination penalties imposed by ILECs have the same anti-competitive effect as any physical barrier. Namely, potential WinStar customers are locked into disadvantageous service arrangements that are specifically aimed at thwarting competition. Therefore, the Commission must exercise its power under the Act to remove this barrier to entry and allow consumers to realize the benefits of competition contemplated by the Act.

II. TERMINATION PENALTIES ARE STUNTING COMPETITION IN THE LOCAL MARKETPLACE

There is little disagreement that ILECs continue their strangle-hold on the local telecommunications market.[2] Three years after passage of the Act, ILECs continue their unabated their assault on the Act in an attempt to hold on to their monopolies. The tactics used by ILECs run counter to both the letter and spirit of the Act. As Chairman Kennard recently stated, the goal of the Telecommunications Act was to provide a real choice, and the associated benefits, to the American people. Chairman Kennard noted that:

> In drafting the Telecom Act, Congress reached back to values as old as America itself. One of these was choice – the belief that given an array of options, individuals can best decide what is best for them. Another was equality of opportunity – that every American no matter where they live in our vast country should have a chance to live up to their full promise.[3]

Today, however, American consumers are being denied both a choice of options and the opportunity to decide what is best for them by the draconian termination penalties imposed by ILECs upon consumers who seek to exercise a choice in their provider of local exchange service. As KMC points out in their Petition, ILECs use excessive termination penalties to lock customers into tariff term plans and contract service arrangements and prevent them from exercising the competitive choice that

---

2 *See* Responses to Fourth Common Carrier Bureau Survey on State of Local Competition (June 2, 1999) available at http://www.fcc.gov/ccb/local_competition/survey4/responses/lec98-4.pdf.

3 Testimony of William E. Kennard, Chairman Federal Communications Commission before Senate Commerce Committee (May 26, 1999).

Congress sought to make available when it passed the Act. The anti-competitive behavior of ILECs results in the undermining of the Act by delaying, or in some cases denying, competition in the local exchange market.

As the KMC Petition described in detail, the tariffs filed by the ILECs in state after state are loaded with provisions that force customers to accept massive termination penalties in order to take advantage of particular new competitive service arrangements.[4] In the vast majority of these markets, no competitive alternative to ILEC services existed at the time the contracts were entered into, and termination penalties were designed with the goal of thwarting competitive entry. The Commission should follow the lead of a number states, such as Ohio and Michigan, and allow consumers who have been locked into anti-competitive long term contracts a meaningful fresh look. Further, the Commission should invalidate ILEC termination penalties as anti-competitive adhesion contracts that violate the public policy embodied by the Act.

II. STATES HAVE RECOGNIZED THE NEED FOR "FRESH LOOK"

As the KMC Petition notes, some states have required that fresh look opportunities be made available.[5] For example, the Ohio PUC determined that customers should be afforded a fresh look opportunity for local exchange services that were not

---

4 *See KMC Petition* at 3-6.

5 *See* KMC Petition at 16.

subject to effective competition at the time the long-term contract was executed.[6] The Ohio PUC stated that:

> Our primary motivation in adopting fresh look has been and continues to be our desire to spur the development of a competitive market in Ohio. Fresh look is intended to provide an incentive for new entrants to invest in a market which would otherwise be very difficult to enter given that the incumbent local telephone company holds 100 percent of the market share, and, in light of the fact that many of the most lucrative customers are locked into long-term contracts. Fresh look is also intended to give end user customers the opportunity to take advantage of competitive alternatives at the very inception of competition.[7]

Similarly, the Michigan P.S.C., held that Ameritech Michigan's tariffed termination penalty provisions for customers who exercised their right to switch local service providers were illegal.[8] The Michigan P.S.C. stated that "to impose substantial penalties on a customer because that customer chose to use a different basic local exchange service provider cannot be justified under Ameritech Michigan's tariffs."[9]

A crazy quilt of state rulings is not enough to uniformly protect consumers nationwide from the anti-competitive effects of ILEC termination penalties. The Commission has adopted a framework of nationwide rules in the implementation of the local competition provisions of the Act; a nationwide rule is appropriate in the present

---

6 *See In the Matter of the Commission Approval of Fresh Look Notification*, Case No. 97-717-TP-UNC, Finding and Order (July 17, 1997) ("*Ohio Fresh Look Order*").

7 *Ohio Fresh Look Order* at 2.

8 *See In the Matter of Ameritech Michigan's Provision of intraLATA Toll Service to Customers of Competing Basic Local Exchange Service Providers*, Case No. U-11525, Opinion and Order (Nov. 5, 1998) ("*Michigan Fresh Look Order*").

9 *See Michigan Fresh Look Order* at 19.

case as well. A nationwide rule must be adopted so that customers in states that have not opened fresh look dockets do not stand at a competitive disadvantage relative to customers in states that have adopted such rules, and are therefore not hamstrung by long-term contracts with ILECs.

III. THE COMMISSION SHOULD DECLARE TERMINATION PENALTIES UNLAWFUL, PROHIBIT EXCESSIVE TERMINATION PENALTIES IN FUTURE CONTRACTS AND REQUIRE THEIR REMOVAL FROM STATE TARIFFS

WinStar generally agrees with KMC that the Commission should grant customers with existing contractual termination penalties the ability to opt out of those provisions provided that contracts were executed prior to the effective entry of competitive carriers. Allowing a nationwide fresh look will provide consumers with a real opportunity to assess all available choices for local exchange service and make decisions based on the new realities of a competitive marketplace.

A. The Commission Is Empowered to Invalidate Termination Penalties That Are Anti-Competitive

Congress's fundamental goal in passing the 1996 amendments to the Act was to open all telecommunications markets – especially local markets – to robust competition. Indeed, the Commission has consistently stated that the Act directs the Commission to open local exchange and exchange access markets to competitive entry and promote increased competition in telecommunications markets already open to competition, such as long distance.[10] To achieve these goals, "[t]he Act directs [the Commission] and ... state [commissions] to remove not only statutory and regulatory impediments to competition, but economic and operation impediments as well."[11] Winstar agrees with KMC that the Commission should use its section 253(d) preemption authority or its general authority to implement the Act to prevent long term contracts with draconian termination penalties, including but not limited to 100% termination penalties,[12] from economically and operationally foreclosing the development of competition in local markets.

B. *AT&T v. Iowa Util. Bd.* Reaffirmed the Commission's Broad authority to Implement the Local Competition Provisions of the Act

In addition to its section 253(d) preemption authority, the Commission has broad authority to implement the local competition provisions of the Act, including authority to eliminate ILEC termination penalties, which have had the result of thwarting local competition. Section 201(b) of the Act provides, in relevant part, that

> [a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful... The Commission[] may prescribe such rules and

10 *See, e.g., Implementation of the Local Telecommunications Provisions in the 1996 Act,* CC Docket No. 96-98, *First Report and Order,* 11 FCC Rcd 15499, ¶ 3 (1996) (*"Local Competition First Report and Order"*).

11 *Id.*

12 A "100 percent termination penalty" requires a customer to pay the entire revenue commitment remaining on the contract. For example, if a customer terminated an agreement with a revenue commitment of $100 per month with 12 months remaining, the customer would incur a $1200 early termination penalty.

> regulations as may be necessary in the public interest to carry out the provisions of this Act.[13]

Because long term contracts with 100 percent termination liability foreclose competition in local exchange markets, such practices are unreasonable and contrary to the public interest. Accordingly, the Commission has authority to prescribe rules that would eliminate such unjust ILEC practices.

The Supreme Court has upheld Commission use of its section 201(b) authority to implement the local competition provisions of the Act, even with regard to intrastate services.[14] As the Court noted in *AT&T*, "the grant in [section] 201(b) means what its says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include [provisions] added by the Telecommunications Act of 1996."[15] Moreover, "the 1996 amendments clearly 'apply' to intrastate service."[16] Thus pursuant to its section 201(b) authority, the Commission has express power to eliminate anti-competitive charges, including 100 percent termination penalties, to further the procompetitive goals of the 1996 amendments to the Act.

---

13 47 U.S.C. §201(b).

14 *AT&T Corp. v. Iowa Util. Bd.,* 119 S.Ct. 721 (1999) (*"AT&T"*).

15 *Id.*

16 *Id.*

IV. CONCLUSION

For the foregoing reasons, WinStar urges the Commission to grant the KMC Petition and issue a declaratory ruling that termination penalties imposed by ILECs are unlawful and requiring the removal of such penalties from ILEC state tariffs until such time as competition is more fully developed.

Respectfully submitted,

Robert Berger
Russell Merbeth
WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W.
Washington, D.C. 20036

Jonathan E. Canis
Ross A. Buntrock
Michael B. Hazzard
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW
Fifth Floor
Washington, D.C. 20036
(202) 955-9600

Counsel for
WINSTAR COMMUNICATIONS, INC.

JUNE 3, 1999