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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 12th St., SW, TWA-325
Washington, DC 20554

Re: Comments of Qwest Communications Corporation in Support of KMC Telecom Inc.'s Petition for Declaratory Ruling In the Matter of 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.

Dear Ms. Salas:

Attached for filing in the referenced docket, and on behalf of Qwest Communications Corporation ("Qwest"), are the original and seven copies of Qwest's comments.

We also have forwarded a paper copy to International Transcription Services.

Kindly date-stamp the additional copy of this letter and return it to the awaiting messenger. If you have any questions, please contact me.

Respectfully submitted,

TK Gaugler

Tiki Gaugler
Federal Regulatory Attorney

Enclosures

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

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

COMMENTS OF QWEST COMMUNICATIONS CORPORATION

Tiki Gaugler
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June 3, 1999

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

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INTRODUCTION

Qwest Communications Corporation ("Qwest") hereby submits its comments on KMC Telecom Inc.'s ("KMC") Petition for Declaratory Ruling in the above-referenced proceeding.[1]

The Federal Communications Commission ("FCC" or "Commission") should grant KMC's Petition and issue an order (1) declaring excessive termination penalties imposed by incumbent local exchange carriers (ILECs) to be unlawful; (2) establishing guidelines that state commissions can use to address the problem of excessive termination penalties; and (3) explicitly stating that the Commission is prepared to act expeditiously on petitions for preemption in instances where the state commission lacks legal authority to resolve these matters. The imposition of such penalties eliminates a customer's

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1 KMC Telecom Inc. Petition for Declaratory Ruling, filed April 26, 1999 in *In the Matter of the Establishment of Rules to Prohibit the Imposition of Unjust, Onerous*

opportunity to select a competitive carrier, thereby preventing CLECs from entering the market. Such penalties must therefore be prohibited.

Qwest is a global multimedia communications company. Qwest is close to completing the construction of a $2.5 billion state-of-the-art, high-capacity nationwide advanced fiber optic network that will enable its customers to seamlessly exchange multimedia content – including images, data and voice. Through its merger with LCI International last year, Qwest now provides local service to customers in seventeen states. Furthermore, Qwest is in the process of becoming a CLEC elsewhere, jointly providing both voice and data services. For companies like Qwest that are not fully operational in the local market but are putting the processes into place to offer local services, excessive termination penalties are particularly problematic because they lock-in customers with the ILEC before Qwest has an opportunity to compete for their business.

DISCUSSION

I. Excessive Termination Penalties Imposed By ILECs With Monopoly Power Are Anti-Competitive and Should Be Declared Unlawful.

Qwest supports KMC's petition and agrees that excessive termination penalties inhibit CLEC entry because they prevent customers from switching carriers once competitors enter the market. ILECs will argue that many of the contract and tariff provisions at issue were implemented after passage of the Telecommunications Act of 1996, and therefore customers were free to choose among competing carriers. Although CLECs could not be prohibited from providing service under the 1996 Act, there was little or no meaningful local exchange competition following the 1996 Act when many of

Termination Penalties on Customers Choosing to Partake of the Benefits of Local these contract and tariff provisions were executed. Accordingly, ILECs were able to use their market power to coerce customers into accepting burdensome termination penalties because the ILECs were effectively the only carrier offering local service in their regions. Customers would not likely have agreed to such penalties if they believed they had competitive options at the time they signed the contract. However, where no other options existed, customers had no leverage to negotiate the terms with the ILEC. They were forced to accept the terms as presented in order to receive the long-term discounts provided for by the ILEC.

Termination penalties alone may not be anti-competitive; however, the ILECs' use of termination penalties for the purpose of blocking competitive entry into the local market is anti-competitive. In reviewing BellSouth's Resale Tariff where it proposed to assess termination penalties on its customers when they switched to a Reseller, the Louisiana Public Service Commission (Louisiana PSC) ruled that "termination penalties deter competition and encourage anticompetitive behavior."[2] The Louisiana PSC ordered BellSouth to remove the penalties from its tariff, finding they are "an unreasonable condition on the end user's ability to switch from BellSouth, and on the Reseller's ability to compete effectively with BellSouth."[3]

Exchange Telecommunications Competition ("KMC Petition").

[2] Ex Parte, *Review ad Consideration of BellSouth Telecommunications' Resale Tariff Filing of April 15, 1996, Filed Pursuant to Section 1101 in the Regulations for Competition in the Local Telecommunications Market*, Docket No. U-22091, at 19 (La. PSC March 18, 1998).

[3] *Id.*

In its petition, KMC detailed how the ILECs have included excessive termination penalties in their state tariffs and long-term contract arrangements.[4] Moreover, these penalties do not appear to compensate the ILEC for unrecovered costs or lost profits.[5] Rather than simply providing a mild deterrent to customers who might decide to terminate the contract, these penalties are so high that they prevent customers from even considering termination. When the ILECs can so easily maintain their market share through these coercive tactics, there is no opportunity for competing carriers to provide competitive service to these customers. Thus, the Commission should declare use of such excessive termination penalties to be anti-competitive and unlawful.

II. The Commission Should Order a Fresh Look Opportunity For Customers To Select A Competitive Carrier Without Incurring Excessive Penalties.

The Commission should provide an opportunity for customers to opt-out of long-term contracts that were executed in an ILEC monopoly environment. Today, competition is emerging, and competitive carriers do exist in many areas; therefore, customers should have the opportunity to take a fresh look and select a competitive carrier without incurring unreasonable termination penalties. In some cases, the effect of these penalties is to require a customer to pay the entire contract. With that choice, it is no surprise that customers will not switch to a competitive carrier, even though that carrier may provide better service at lower rates. If customers must continue to pay through their

4 KMC Petition at 3-6.

5 *Id.* at 4.

contract with the ILEC in full, they will not choose to also pay a competitive carrier, no matter how competitive its rates are.

As highlighted by KMC, the Commission has previously provided a fresh look opportunity in situations where it concluded that customers were locked into contracts even after competitive carriers had entered the market.[6] Providing a fresh look in this context conforms with the Commission's precedent and enhances the competitive opportunities for CLECs. Furthermore, at least one state regulator has issued fresh look rules to provide customers with competitive choices.

For example, the Public Utilities Commission of Ohio (PUCO) determined that a fresh look opportunity was necessary as competitive carriers became available in each telephone exchange.[7] Specifically, the PUCO found that "The purpose of fresh look is to spur the development of a competitive market [], by giving new local service providers and end user customers the ability to enter into service arrangements which otherwise might have been precluded."[8] Furthermore, PUCO explained that a fresh look

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6 *Id.* at 13-14, n.20. *See, e.g., Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880 (1991), *Order on Recon.* 7 FCC Rcd 2677 (1992); *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (1992).

7 Fresh Look letter from the Public Utilities Commission of Ohio to Telecommunications Professional ("PUCO Fresh Look Letter"). PUCO determined that customers with more than two years remaining in their contract with the ILEC should have an opportunity to change carriers during a 120-day window after a competitive carrier began providing service. PUCO limited the liability customers would incur for terminating the contract before its term expired. The customers would not pay any more than the difference in what they had already paid for services and what they would have paid for those services had the contract been available for the term actually used. In other words, the customers would pay no more than they would had they not entered into a long-term contract.

8 PUCO Fresh Look Letter.

opportunity "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."[9]

In addition, the Commission should issue guidelines regarding termination penalties because it appears that some state regulators have failed to act when presented with complaints on this matter from CLECs. Those guidelines should encourage states to permit customers to have a "fresh look" for obtaining local service when the customer signed the contract in an environment of less than full competition, and when the contract contains excessive termination penalties. The Commission need not find a particular dollar amount to be per se excessive, but it should, at a minimum, set outer boundaries for reasonableness. For instance, penalties that require full payment of the remainder of the contract upon termination should be per se unreasonable.

In addition, the Commission should encourage state regulators to expeditiously provide a fresh look opportunity for customers once competition is available and should provide guidelines for the states to follow in addressing these cases individually. The North Carolina Commission, for instance, appears to have interpreted the Commission's silence on the matter of termination penalties as acceptance of all termination penalties. [1]
Thus, the Commission should expeditiously act in this proceeding to ensure that state

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[9] Finding And Order, *In the Matter of the Commission Approval of Fresh Look Notification*, Case No. 97-717-TP-UNC ¶ (5) (PUCO July 17, 1997).

regulators do not assume that the Commission's inaction constitutes tacit approval of these excessive termination penalties by the ILECs.[10]

For those states that lack the jurisdiction to adopt fresh look rules,[11] the Commission should announce that it is prepared to consider expeditiously any preemption petition filed under section 253 regarding unreasonable termination penalties.

CONCLUSION

For the reasons stated above, the Commission should grant KMC's petition and declare that the excessive termination penalties imposed by the ILECs are unlawful. Furthermore, the Commission should provide customers with a fresh look opportunity to select a competitive carrier.

Respectfully submitted,

QWEST COMMUNICATIONS CORPORATION

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June 3, 1999

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[11] The North Carolina Utilities Commission (NCUC) determined it did not have statutory authority to adopt fresh look rules. *See* Order Dismissing Fresh Look Petition on Jurisdictional Grounds, *In the Matter of Local Exchange and Local Exchange Access Telecommunications Competition*, Docket No. P-100 SUB 133 (NCUC May 22, 1998).

CERTIFICATE OF SERVICE

I, Douglas C. Nelson, do hereby certify that on this third day of June, 1999, a copy of the foregoing Comments of Qwest Communications Corporation in Support of KMC Telecom Inc.'s Petition for Declaratory Ruling In the Matter of 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 was served on the parties listed below via hand delivery (indicated by "*") or first-class mail, postage pre-paid.

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