Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Section 63.71 Application of	)	
KMC Telecom V, Inc. and	)	WC Docket No. 05-309
KMC Telecom of Virginia, Inc.	)	Comp. Pol. File No. 729
To Discontinue Domestic Telecommunications	)	
Services	)	

To: The Wireline Competition Bureau

OPPOSITION OF INSIGHT MIDWEST HOLDINGS, LLC

INSIGHT MIDWEST HOLDINGS, LLC

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OPPOSITION OF INSIGHT MIDWEST HOLDINGS, LLC

Pursuant to Section 63.71 of the Commission's rules,[1] Insight Midwest Holdings, LLC ("Insight") hereby submits these comments opposing the application of KMC Telecom V, Inc. and KMC Telecom of Virginia, Inc., wholly-owned subsidiaries of KMC Telecom Holdings, Inc. (collectively, "KMC") to discontinue provision of domestic interstate telecommunications service, including enhanced termination service, enhanced origination service, dial access service, and Primary-Rate Interface service, as of December 5, 2005 (the "Discontinuance Application").[2] The Commission should not allow KMC to discontinue service to Insight within that timeframe, because the services that KMC provides are essential to Insight's ability to continue providing local telephone service to its customers, and KMC failed to give Insight

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[1] 47 C.F.R. § 63.71.

[2] KMC indicates in its letter to Insight dated October 26, 2005 (the "Discontinuance Letter") that it intends to discontinue service as of November 25, 2005. The Discontinuance Letter is attached hereto as Exhibit 1. Under the Commission's rules, KMC's application cannot be granted until, at the earliest, the 31st day after filing. The application is deemed filed on the date the Commission places it on public notice, which was November 4, 2005. *See* 47 C.F.R. § 63.71; Comments Invited on Application of KMC Telecom V, Inc. and KMC Telecom Virginia, Inc. to Discontinue Domestic Telecommunications Services, *Public Notice*, WC Docket No. 05-309, Comp. Pol. File. No. 729, DA 05-2927 (released November 4, 2005) (the

sufficient notice of its intent to discontinue service to allow Insight to secure alternative services by December 5, 2005. If KMC discontinues service to Insight on that date, approximately five hundred consumers using Insight local telephone service in Anderson, Indiana could be left without service, including access to emergency 911 and enhanced 911 services.

I. INTRODUCTION AND SUMMARY

KMC's perfunctory Discontinuance Application fails to satisfy any of the tests the Commission applies to applications to discontinue service, stating only that "KMC simply cannot pay its underlying network expenses."[3] This unsubstantiated justification for discontinuing service is overwhelmed by the danger that KMC's quick exit poses to existing customers' services. KMC fails to disclose that (according to recent communications from KMC to Insight) KMC had sent notices to its underlying carriers on September 1, 2005, to inform them that KMC intended to discontinue service, disconnect its lines and immediately cease payment to its vendors – *yet KMC provided no such notice to Insight and KMC's 24 other carrier customers to allow them sufficient time to plan an orderly transition from KMC service.* The risk that Insight and its consumer customers now face is entirely of KMC's making. The Commission should not force Insight and its customers to bear the risk and damaging consequences of KMC's cavalier actions by approving KMC's precipitous discontinuance of service on December 5.

Aggressive Commission supervision of KMC's withdrawal from the market will be critical to ensure that Insight and its customers do not lose service prematurely. KMC's October 26 Discontinuance Letter told Insight that KMC's service could terminate at anytime

"*Public Notice*"). Therefore, the earliest date for grant of KMC's application would be December 5, 2005.

[3] Discontinuance Application at 1.

even within the thirty day period "for reasons beyond our control" due to lack of service from underlying network vendors (who presumably could cease providing critical services because KMC stopped paying them over two months ago). Moreover, KMC has not waited for Commission approval to wind down its services to Insight. The result has been delays and failures in critical services to Insight and its consumer customers including, for example, the complete loss of service for a period in October for consumers participating in Insight's telephony trials in Illinois.

Finally, KMC has indicated that, following KMC Telecom Holdings, Inc.'s current spin-off and restructuring of its subsidiaries, certain assets (such as the switch(es) providing service to Insight and its customers) might be shifted and become unavailable to the KMC Telecom Solutions entity that had contracted to provide service to Insight.[4] KMC cannot be allowed to circumvent its obligation to provide service by denying responsibility for the loss of critical underlying services and facilities that KMC causes – either directly or indirectly through its related entities. The Commission thus should intervene definitively to require that all the relevant KMC entities take all actions necessary to continue to provide existing services and facilities to Insight and its customers until the day that the Commission approves KMC's discontinuance of service.

As a result of KMC's actions, Insight already has suffered substantial business damage and set-back to its launch as a competitive local telephone service provider. But Insight's focus now is simply to secure an alternative to KMC that would ensure an effective transition and reliable service for a core group of approximately 500 consumers in Anderson, Indiana, who

[4] One or more KMC subsidiary and/or spin-off apparently will use these assets to continue providing telecommunications services in the future, including toll-free origination services.

currently depend on Insight's local telephone service. As described below, Insight has examined thoroughly the available options for accomplishing this goal and found that none could be accomplished within less than thirty (30) to sixty (60) days after December 5. The most efficient, cost-effective and timely option for providing Insight's customers with long-term, reliable service on reasonable terms is for Insight to self-provision the services that KMC currently provides. Once this build-out is complete, Insight will be a fully facilities-based competitive telephony provider. Given KMC's conduct in this matter, it is entirely reasonable to require KMC to continue to provide service to Insight for an additional thirty (30) to sixty (60) days after December 5, 2005, to accomplish this solution.

For these reasons, Insight requests that the Commission find and formally notify KMC that: (1) Section 214 requires KMC to make all arrangements necessary to continue providing service to Insight until its Discontinuance Application is granted; (2) the Application will not be granted automatically as of December 5, 2005, but will be subject to further review; and (3) KMC must continue to provide service at least through February 2, 2006, or until Insight is able to secure adequate replacement services.

II. BACKGROUND

Insight is the nation's ninth largest cable operator, providing service to 1.3 million customers living in mid-sized communities within the states of Illinois, Indiana, Kentucky and Ohio. Insight's broadband network supports numerous advanced digital television, high-speed data, and voice telephony services. To provide the full bundle of voice, video, and data services that customers have come to expect, Insight is aggressively rolling out telephony services across its markets, including Anderson, Indiana. Insight has invested significant funds in developing and marketing its voice offerings as a substitute to the incumbent's telephone service.

Telephony is the next great business opportunity for Insight. And KMC's services form a critical component of those plans. KMC's abrupt wind-down and termination of critical services will have a devastating impact on Insight's telephony plans, not just in Anderson, Indiana, but company-wide.

To provide local telephone service to consumers, Insight provisions last-mile facilities to the home using its broadband cable network, augmented with the necessary headend and routing equipment. Pursuant to a Master Services Agreement dated May 12, 2005 (the "Agreement"), KMC agreed to provide Insight with the remainder of its service infrastructure. KMC also committed to continue transition services to Insight for up to six (6) months if the Agreement is terminated. Under the Agreement, KMC agreed to provide services that include origination and termination of traffic sent by Insight to KMC's network, 911 and E911 call set-up, SS7-related services, basic and direct-inward-dialing numbering resources, and service provider number portability. This arrangement allows Insight to use its own facilities to provide customers with last-mile connectivity while relying on KMC to provide the connection between KMC's network and the public switched telephone network. Without the facilities and services that KMC provides, Insight's customers would lose their local telephone service, including 911 and E911 services.

Less than four months after entering the Agreement with Insight, KMC apparently decided that it would cease this line of business. KMC recently revealed that it sent notices to its underlying network vendors on September 1, 2005, to inform them that KMC intended to discontinue service, disconnect its lines and immediately cease payment to vendors. Had KMC notified Insight at that time, Insight would have been able to plan and implement an orderly transition from KMC services before the holiday season without causing disruption to its consumer customers. Instead, KMC concealed its discontinuance plans from Insight.

Insight learned that KMC intended to discontinue service only in October when it contacted KMC to continue negotiations for the *expansion* of the services that KMC had agreed to provide under the Agreement. Insight and KMC previously had discussed a more wide-ranging relationship covering additional Insight markets. On October 17, 2005, KMC finally responded to Insight's repeated telephone calls and messages. Instead of continuing talks for a service expansion, however, KMC informed Insight that KMC was terminating the Agreement unilaterally, that it had ceased providing some services three days earlier on October 14, 2005, and that it intended immediately to cease providing service altogether. KMC stopped processing pending service orders and refused new service orders from Insight that same day. KMC's discontinuance of much of its service to Insight (without any attempt to provide the customer notification and obtain the FCC approval required by Section 214) forced Insight to turn away all new telephony customers in the KMC markets and inform consumers who had ordered Insight telephone service that Insight could not fulfill their service requests.

Insight objected to KMC's plans, explaining that KMC's precipitous termination of service constituted a breach of the Agreement and that it put Insight's existing customers at risk of losing local telephone service, including the capacity for emergency communications. Moreover, Insight emphasized that KMC's termination of service without the Commission's approval violated Section 214 of the Act and the Commission's rules, as well as applicable Indiana laws.[5] To stave off consumer customers' loss of service, Insight further offered to

[5] *See* Exhibit 2 (Letter from David E. Mills, counsel for Insight to Mikhael Vitenson, General Counsel, KMC Telecom Solutions LLC, dated October 18, 2005) and Exhibit 3 (Letter from

discuss purchasing the facilities used by KMC to provide service to Insight under the Agreement.[6] Despite these discussions, Insight remained uncertain and exposed to the threat that KMC might terminate all services to Insight at any time. Approximately 500 current Insight customers in Anderson, Indiana, stand at risk of losing their local telephone service, including access to emergency 911 and enhanced 911 services.

On October 26, 2005, after repeated reminders of its obligations under Section 63.71 of the Commission's rules, KMC for the first time provided written notice to Insight that it would discontinue service as soon as it receives the necessary regulatory approvals.[7] Even in that letter, KMC stated that its service could terminate even before the thirty (30) day period expires because "certain underlying vendors of critical services have threatened to cease providing service to KMC," presumably due to KMC's earlier cessation of payment and service discontinuance notification to them.[8]

On October 27, 2005, KMC filed its Discontinuance Application with the Commission. The only justification that KMC provided for terminating service to its twenty-four (24) carrier customers is a bare assertion that it allegedly cannot afford to pay its vendors for facilities and services KMC utilizes to provide service. KMC also contends, without any support, that sufficient alternatives exist for its customers to obtain substitute services within the next month. In reality, Insight cannot establish a replacement to KMC and implement a reliable transition for

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John Abbot, Chief Financial Officer of Insight, to Mr. Roscoe Young, Chief Executive Officer and Chief Operating Officer of KMC Telecom, dated October 18, 2005).

[6] *See id.*

[7] *See* Exhibit 1.

[8] *See id.*

the approximately 500 consumers relying on Insight local telephone service in Anderson, Indiana, in less than thirty (30) to sixty (60) days from December 5, 2005.

III. DISCUSSION

An examination of the five factors the Commission considers in evaluating Section 214 discontinuance applications shows that the public interest strongly supports requiring KMC to continue providing service for thirty (30) to sixty (60) days after December 5, 2005. Section 214 of the Communications Act provides that "no carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor the future public convenience and necessity will be adversely affected thereby . . ."[9]

In evaluating applications to discontinue service, the Commission analyzes five factors: (1) the need for the particular facilities taken out of service; (2) the existence, availability, and adequacy of alternatives; (3) the relative cost of substitute service for carriers that must find alternative providers; (4) the general need for the service being discontinued; and (5) the financial impact of continuing to provide service on the carrier seeking discontinuance.[10] Under the circumstances of this case, KMC cannot meet its burden of demonstrating under the five-factor test that discontinuance of service on December 5, 2005, would not damage its customers and the public convenience and necessity.[11]

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[9] 47 U.S.C. § 214(a).

[10] *See, e.g.*, Touch America, *Order*, 19 FCC Rcd 3880, 3884 ¶ 6 (2004); AT&T Communications, *Memorandum Opinion and Order*, 18 FCC Rcd 24376, 24379 ¶ 6 (2003) ("*AT&T*").

[11] Southwestern Bell Telephone Company, *et al.*, *Order*, 8 FCC Rcd 2589, 2599 ¶ 51 (1993), *remanded on other grounds*, *Southwestern Bell v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) ("*Southwestern Bell Telephone*").

The Commission has recognized that automatic grant thirty-one (31) days after the discontinuance application is inappropriate if "customers or other end users would be unable to receive service or a reasonable substitute from another carrier, or that the public convenience and necessity would be otherwise adversely affected."[12] Indeed, unless a carrier demonstrates exigent circumstances, the Commission typically denies discontinuance applications when the carrier's customers are unable to obtain substitute services within the timeframe for grant requested by the discontinuing carrier.[13] The Commission has required carriers to continue providing service for up to an additional one hundred and twenty (120) days beyond the carrier's requested date to ensure customers' smooth transition to alternative services.[14] Accordingly, Commission precedent and each of the five factors the Commission considers in evaluating discontinuance applications strongly support requiring KMC to provide service for thirty (30) to sixty (60) days after December 5, 2005, for Insight to effectuate the transition.

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[12] Application of Touch America, Inc. (Debtor-in-Possession) to Discontinue Domestic Telecommunications Services Not Automatically Granted, Further Public Comment Requested, *Public Notice*, WC Docket No. 03-259, Comp. Pol. File No. 667, DA 04-126 (rel. Jan. 20, 2004); AT&T Communications Application to Discontinue Domestic Telecommunications Services Not Automatically Granted, *Public Notice*, Comp. Pol. File No. 645, DA 03-2623 (released August 8, 2003); AT&T Application to Discontinue Interstate Sent-Paid Coin Service Not Automatically Granted, *Public Notice*, NSD File No. W-P-D-497, DA 01-1870 (released August 3, 2001).

[13] Corban Telecommunications Inc.'s Application to Discontinue Domestic Telecommunications Services, *Memorandum Opinion and Order*, 17 FCC Rcd 18392 (2002) (delaying discontinuance by 120 days) ("*Corban Telecommunications*"); *AT&T*, 18 FCC Rcd 24376 (delaying discontinuance by 45 days in addition to the nine month notice that AT&T provided to accommodate customers unable to find alternative services); e.spire Application to Discontinue Domestic and International Telecommunications Services, *Order*, 17 FCC Rcd 14785 (2002) (denying in part discontinuance and requiring e.spire to provide service for additional 30 days) ("*e-spire*").

[14] *See id.*

1. The Services KMC Provides Are Essential to Insight's Local Telephone Service.

The services that KMC provides under the Agreement are essential to Insight's continued service to its end-user telephony customers. KMC provides Insight with, among other things, interconnection of Insight's facilities with the public switched telephone network, access to basic 911 and enhanced 911 functionality, and number porting capability. With its current facilities, Insight simply cannot provide its customers with voice telecommunications services without the services KMC agreed less than six months ago to provide.

The Commission has recognized that delaying discontinuance is appropriate where the discontinuing carrier provides services that are integral to its customers' offering of telephone services to consumer end-users. For example, in *Corban Communications*, the FCC required a provider of microwave services to continue providing service, for an additional one hundred and twenty (120) days from issuance of the Commission's order, to Verizon Wireless, which used the microwave services to transport traffic to and from its customers.[15] Similarly, in *AT&T*, the Commission ordered a forty-five (45) day delay of discontinuance beyond AT&T's planned termination date where the complaining parties used AT&T's Multiquest 900 services to provide various services for end-users.[16]

Like the customers in the *Corban* and *AT&T* cases, Insight relies on KMC for services and facilities that are essential to Insight's continued provision of telephone service. Permitting

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[15] *Corban Telecommunications*, 17 FCC Rcd at 18393 ¶ 5. In that case, Corban had provided discontinuance notice in August 2002 and requested approval to discontinue in October. The FCC required it to continue service for 120 days from the Commission's September 27, 2002, order.

[16] *AT&T*, 18 FCC Rcd at 24380 ¶ 8. AT&T had provided notice in April 2003 of its intent to discontinue service in December. The Commission required it to continue service until February 14, 2004.

KMC to discontinue these essential services prematurely would risk loss of telephone service for more than 500 existing Insight customers. Insight seeks only a reasonable thirty (30) to sixty (60) day after December 5, 2005, to conduct an orderly transition for these consumers.

2. No Adequate Substitute for KMC Service Can Be Established By December 5, 2005.

Insight is aggressively pursuing alternatives to KMC services. However, KMC's delay in notifying and applying for discontinuance of service is forcing Insight to effectuate the transition (which requires cooperation from numerous other parties) during the holiday season and thus substantially increases the time needed for implementation. In the *AT&T* case, the Commission apparently extended the time period for approval of discontinuation to accommodate the predictable and unquestionable delays caused by attempting to accomplish service migrations in the months of November and December.[17] Similarly, in *Corban Communications*, the Commission's determination of the carrier's discontinuation timeline took due regard for delays caused by winter weather.[18] The Commission likewise should consider the time delay involved in establishing substitutes to KMC service over the holiday season in this case.

To continue providing telephone service to its current customers, Insight must either: (a) establish its own facilities through which Insight can self-provision these services; (b) contract for interconnection and related services from another competitive LEC currently operating in the local market; or (c) arrange for resale of the services of incumbent LEC SBC. None of these alternative arrangements realistically can be accomplished by December 5, 2005.

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[17] *See id.*, 18 FCC Rcd at 24383 n. 55.

[18] *Corban Communications*, 17 FCC Rcd at 18394 ¶ 7.

Implementation of any of these options will require between thirty (30) to sixty (60) days after December 5, 2005.

(a) Self-Provisioning, Insight's Most Effective and Cost-Efficient Option for Replacing KMC's Discontinued Services, Will Take Thirty to Sixty Days After December 5, 2005.

After examining each of the alternatives for continuing service to its Anderson, Indiana customers, Insight has determined that its best option – and no more time consuming than any other – is to self-provision the services and facilities KMC currently provides. Insight has mentioned to KMC its interest in the facilities, particularly the switch(es), that KMC uses to provide service to Insight. Notwithstanding its claims of financial hardship requiring it to cease service to Insight, however, KMC has indicated that it intends to keep these facilities for the provision of telecommunications services, including toll-free origination services, in the future. Insight thus is exploring other sources for the necessary facilities and services. Following Insight's disastrous experience with KMC, it is apparent that Insight self-provisioning would give Insight's customers the highest degree of reliability in their service. Moreover, securing its own facilities would transform Insight into a fully facilities-based competitor, consistent with congressional and Commission policy to encourage facilities-based competition.[19]

As the Commission is well aware, self-provisioning requires substantial resources and time. Among other tasks, Insight must purchase, install and activate additional switching facilities; negotiate and implement the necessary arrangements for transport facilities and services; obtain numbering resources; acquire access to public service answering points (PSAPs); establish interconnection, complete customer profile set-up, and institute other system

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[19] *See*, *e.g.*, Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, 18 FCC Rcd 2533, 2535 ¶ 2 (2005).

processes with the local incumbent LEC; complete the necessary porting processes for customers; and conduct test processes to ensure proper system set-up. Accomplishing the transition to self-provisioned services, even within thirty (30) to sixty (60) days from December 5, 2005, will be challenging, particularly given that much of this work will need to be completed during the holiday season and will require the cooperation of other parties including the incumbent LEC, which has little incentive to smooth and expedite the process for a competitor.

(b) Insight Cannot Obtain Reliable Service from an Alternative Competitive LEC Any Faster Than It Can Move to Self-Provisioning.

Insight also has explored the offerings of other competitive LECs and has found that no substitute for KMC could be secured by December 5, 2005. Among other tasks necessary to transition to an alternative competitive LEC, Insight would have to negotiate a service agreement and perform due diligence; order circuits and cross-connect its facilities to those of the new competitive LEC; port customers into the new carriers' switch following cross-connection; and then conduct all necessary testing of the new facilities configuration. These negotiations and processes will require approximately the same amount of time as a transition to self-provisioning, particularly because Insight would be reliant on the other carrier to conduct a large share of the transition tasks and services.

KMC's delay in notifying Insight of its impending service discontinuance should not now force Insight to enter into a contract with another carrier on unreasonable terms or to expose its customers to substandard service due to an accelerated cutover. Insight has identified three competitive LECs that potentially could offer services similar to those of KMC in the Anderson, Indiana market: McLeodUSA, Choice One, and Level 3 Communications. These carriers have had some financial and reliability issues over the past several years. Based on the response Insight has received thus far, the competitive LEC option does not present a reasonable substitute for KMC services because, under its current situation and short timetable, the rates Insight would have to accept would be two and one-half to three times higher than those under Insight's contract with KMC. As the Commission has recognized in past cases, the cost of alternative services is relevant to whether those services provide an adequate replacement.[20] Instead of forcing Insight to rush to an alternative that would deny it any return on its telephony service and indeed likely would entail a significant loss, therefore, the Commission should require KMC to continue providing service until February 2, 2006, or until Insight secures a reasonable alternative to KMC service.

(c) Establishing Arrangements for Resale of Incumbent LEC Services Will Take the Same Amount of Time or Longer Than Self-Provisioning.

Insight also has examined the possibility of continuing its customers' services by reselling SBC telephone services. Like the alternative competitive LEC option, Insight could not transition to resale any more quickly than it could to self-provisioned services. This solution also would be unreasonable from an economic, customer service, and competitive standpoint.

Although Insight and SBC already have resale provisions written into their interconnection agreement, switching from KMC service to reselling SBC service still would take sixty (60) to ninety (90) days. Among other tasks, it would take approximately thirty days to establish a customer profile with SBC and prepare customer orders to be ported. Due to anti-slamming and cramming requirements under FCC and state rules, one-to-one mapping in service feature functionality would be necessary to match SBC with current Insight service. After that,

[20] See *AT&T*, 18 FCC Rcd at 24382 ¶ 13.

Insight would have to check for PIC freezes and file to get exemptions or to get the PIC freezes lifted. Next, under Insight's telephone network and equipment configuration (as with most other cable operators' telephone services), the switch to SBC resale service would require a truck roll to every customer premises to disconnect the customer's equipment from Insight's network and connect the customer to SBC's network. Because SBC's time schedule might largely dictate the timetable for these truck rolls, this process could take as much as thirty (30) to sixty (60) days. Other technical and customer service steps like preparing port orders, communicating changes to Insight customers, and porting customer numbers into SBC's switch – as well as SBC's lack of incentive to accommodate Insight – ultimately could make an Insight transition to resale even longer than the move to self-provision.

Resale of SBC services also would not be an economical solution for Insight because the company already has invested a substantial sum in the facilities necessary to provide phone service to its customers. That investment would be stranded if Insight moved to rely exclusively on SBC's facilities to provide service. Moreover, the cost of provisioning resold services would be three to three and one-half times the cost of providing service under Insight's current arrangement with KMC. Indeed, Insight could not resell SBC's services at the rates Insight intends to charge for telephone service without suffering considerable losses. This arrangement therefore would lead to much higher prices for both existing and future customers.

In addition, a resale solution would compromise Insight's ability to offer a differentiated telephony product from that offered by SBC. Customers would lose out from the lack of choice. And, to the extent that SBC does not allow Insight to offer customers the same functionalities as the arrangement with KMC, Insight will be required to notify customers of service changes. The competitive effect of these changes likely would be to drive customers away and severely impair

Insight's ability to compete. More important, the transition to resale would be disruptive to customers and run substantial risk of denying them advantageous service functionalities and pricing terms that they currently enjoy with Insight service. In short, the resale option offers no advantages and many disadvantages to Insight and its customers.[21]

3. Insight Will Bear Tremendous Costs in Switching from KMC Service.

As noted above, the Commission has recognized that the costs of securing alternative services are a relevant factor in evaluating a discontinuance request.[22] Regardless of the time frame involved, Insight will bear significant costs to switch from KMC service. As described above, the costs of providing service through an alternative competitive LEC would be two and one-half to three times the cost of providing service under Insight's contract with KMC. Transitioning to a resale arrangement would be three to three and one-half times more expensive, after factoring in both Insight's costs and the considerable charges that SBC would levy for the various transition tasks. And Insight's costs to establish a whole new set of facilities and services for self-provisioning obviously will be great. Under every scenario, allowing KMC to discontinue service within less than thirty (30) to sixty (60) days of December 5, 2005, will increase the costs to Insight and its customers – both financial and non-financial – as Insight would be forced to accept unreasonable contract terms and to cut corners in investigating

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[21] Insight also has evaluated the timetable for mass migration of customers to SBC service and found that it would take the same or a longer period than a move to resale. This is particularly true because the Indiana Utility Regulatory Commission has not yet adopted mass migration guidelines. Of course, mass migration does not qualify as an alternative to KMC service because, aside from the large immediate costs of this migration process, it would force Insight to stop providing telephone service to current customers and suffer a permanent blow to its viability in consumers' minds as a future competitive provider of telephone and bundled services. In addition, Insight customers would suffer direct damage in time, inconvenience, disruption and loss of any service and service features beyond basic dial-tone.

[22] *AT&T*, 18 FCC Rcd at 24382 ¶ 13.

potential facilities and service vendors, implementing the cut-over process, and conducting test processes to ensure proper system set-up.

4. The Services KMC Provides Are Important to Facilitating Competitive Entry Into Local Telephone Markets.

In reviewing KMC's Discontinuance Application, the Commission also must evaluate the general need for KMC's services.[23] Typically, the Commission views this inquiry as a combination of the demand for and the uniqueness of a service proposed for discontinuance.[24] In this case, the need for KMC's services springs from the importance of giving new service providers like Insight multiple competing options for instituting service to end users. KMC's services are uniquely tailored to cable-based and IP-based telephony providers, which allowed competitors like Insight to bring their services to market quickly and efficiently. Other service providers potentially could offer services that will make Insight's telephony plans functional and Insight could move to self-provisioning. However, the loss of KMC services without an adequate transition period would make it unlikely that these services could be replaced in an efficient, cost-effective manner and without jeopardizing the quality and reliability of consumers' telephone services, including their access to emergency services.

As the Commission has recognized in other cases, a prime goal of the Section 214 discontinuance process is to ensure that carriers like KMC are not permitted to terminate service in a way that harms other competitors that entered the market in reliance on the discontinuing carrier's services.[25] Indeed, the Commission routinely has exercised its discretion to lengthen

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[23] *Id.*, 18 FCC Rcd 24380 ¶ 8.

[24] *Id.*; *Southwestern Bell Telephone*, 8 FCC Rcd at 2602 ¶¶ 63-64.

[25] *See* e.spire Application to Discontinue Domestic and International Telecommunications Services, *Order*, 17 FCC Rcd 14785, 14787 ¶ 6 (2002) (extending discontinuation date for certain small business and heavily affected customers for 30 days and requiring petitioner to take

the time period an exiting carrier is required to provide service to ensure that competitive providers' services are not compromised by the exiting carrier's discontinuance.[26] The Commission should reach the same result here by requiring KMC to provide service until February 2006 or until Insight completes the transition to self-provisioning or another reasonable service alternative.

5. The Financial Impact on KMC of Continuing to Provide Service Should Be Discounted Because KMC Chose to Delay Providing Notice to Insight and Filing for Commission Approval to Discontinue Service.

Finally, the Commission considers the financial impact on the terminating carrier of continuing service.[27] In this case, the Commission should not place great weight on the financial impact on KMC of continuing to provide service beyond December 5, 2005. KMC cannot rest on its bare assertion that it has insufficient funds to pay its underlying network providers. KMC's claims ring especially hollow given its plans to continue providing telecommunications services, including toll-free termination services, following the shuffling of its corporate entities, spin-offs and assets. The Commission should not allow KMC to precipitously and unilaterally terminate service to Insight while KMC continues to operate its other, presumably more profitable lines of business.

The Commission also must weigh KMC's alleged financial difficulties against its conduct in disregarding the needs of its customers and the Commission's rules. KMC ceased

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necessary steps to facilitate customers' migration to other carriers); Application of Touch America, Inc. for Authority to Discontinue Domestic Telecommunications Services, *Order*, 19 FCC Rcd 3880, 3885 ¶ 8 (granting petition based on petitioner's voluntary agreement to continue to provide service for 30 days past its proposed discontinuance date despite bankrupt status).

[26] *See id.*

[27] *See, e.g.*, Rhythms Links Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services, *Order*, 16 FCC Rcd 17024 (2001).

paying its vendors and decided to exit the market for telephone service without prompt warning to its customers. According to recent communications from KMC to Insight, KMC notified its vendors on September 1, 2005, of its intent. Yet Insight learned of KMC's plans only in October, after considerable probing by Insight and after KMC indicated that it *already had* discontinued a substantial portion of Insight's service on October 14, 2005. Had KMC notified Insight of its intention to terminate service when KMC actually made that decision, Insight would have had time to develop and execute a smooth transition for its customers.

In its May 2005 Agreement with Insight, KMC committed to provide transition services to Insight for up to six (6) months even if it was Insight that decided to discontinue KMC services, so long as Insight paid for those services. That commitment demonstrates KMC's prior recognition that thirty (30) days is totally inadequate for Insight to effectuate a transition from the critical services and facilities that KMC provides; that KMC would not be unduly burdened by a requirement to provide transition services for thirty (30) to sixty (60) more days (because this is far less than KMC's own contractual obligation); and that KMC has a legal duty to mitigate the damages, including the devastating impact on Insight's company-wide telephony plans, from KMC's unilateral termination of the Agreement and abrupt discontinuance of service.

The Commission should not allow KMC to escape the consequences of its own cavalier actions to the detriment of Insight and its consumer customers. If the Commission allows KMC to terminate service on December 5, 2005, it will not only impose tremendous costs on Insight and jeopardize its future as a viable competitive local telephone service provider, but also risk the disruption and loss of local telephone service for over 500 consumers who currently rely on Insight service.

IV. Conclusion

For the foregoing reasons, Insight respectfully requests that the Commission find and formally notify KMC that: (1) Section 214 requires KMC to make all arrangements necessary to continue providing service to Insight until its Discontinuance Application is granted; (2) the Application will not be granted automatically as of December 5, 2005, but will be subject to further review; and (3) KMC must continue to provide service at least through February 2, 2006 or until Insight is able to secure adequate replacement services.

Respectfully submitted,

INSIGHT MIDWEST HOLDINGS, LLC

To-Quyen T. Truong
David E. Mills
Jason E. Rademacher

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 776-2000 (phone)
(202) 776-2222 (fax)

November 10, 2005

CERTIFICATE OF SERVICE

I, Cynthia M. Forrester, a secretary at the law firm of Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 10th day of November, 2005, caused a copy of the foregoing Opposition of Insight Midwest Holdings, LLC. to be served on the following via First Class U.S. mail, and where noted with an asterisk, via fax:

Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C327
Washington, DC 20554
Attention: Carmell Weathers*
Fax: (202) 418-2345

Mikhael Vitenson
Associate General Counsel
KMC Telecom Holdings, Inc.
1545 Route 206, Suite 300
Bedminster, NJ 07921

Cynthia M. Forrester

Cynthia M. Forrester

EXHIBIT 1

Discontinuance Letter

KMC Telecom
PHONE • DATA • INTERNET

Corporate Office
1545 Route 206, Suite 300
Bedminster, NJ 07921
Tel 908.470.2100
Fax 908.719.8774
www.kmctelecom.com

October 26, 2005

Insight Midwest Holdings, LLC
10200 Lynn Station Road, Suite 1B
Louisville, KY 40299
Attn: Mike Page, SVP

IMPORTANT NOTIFICATION

Dear Valued Customer:

As you may already know, effective thirty (30) days after the date of this letter, or as soon thereafter as the necessary regulatory approvals are obtained, KMC Telecom V, Inc. and KMC Telecom of Virginia, Inc. ("KMC")[1] will be discontinuing your telephone service (including enhanced termination service, enhanced origination service, dial access service and PRI services). This discontinuance affects service in all states where KMC is authorized to provide telecommunications service. This notice clarifies and supercedes any previous communications on this issue.

Your action is required! You must subscribe to a telephone service provider other than KMC prior to the end of the thirty (30) day period referenced above or you will not have access to the services currently available to you through KMC.

KMC will cooperate with you through the date of discontinuance concerning the transition of your telephone service to an alternative carrier of your choice and will assist you in transitioning your existing local telephone number(s) where permitted. Please consult your local telephone directory or the incumbent local exchange carrier(s) in your area for a list of other possible providers. Should you need KMC's assistance, please contact Sharon Schaub at (785) 290-9019. We regret to inform you that certain underlying vendors of critical services have threatened to cease providing service to KMC. If any such vendor stops providing service to KMC, the effect could be to render us unable to provide service to you for reasons beyond our control even before the thirty (30) day period has expired. Thus, it is vital that you obtain service from a substitute provider immediately.

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1 Please note that you may have a contract with an affiliate of KMC, including, without limitation, KMC Telecom Solutions, LLC, KMC Telecom III LLC or KMC Telecom LLC.

The FCC will normally authorize this proposed discontinuance of service unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected. If you wish to object, you should file your comments within fifteen (15) days after receipt of this notification. Address them to the Federal Communications Commission, Washington, DC 20554, referencing the §63.71 Application of KMC Telecom V, Inc. and KMC Telecom of Virginia, Inc. Comments should include specific information about the impact of this proposed discontinuance upon you or your company, including any inability to acquire reasonable substitute service.

KMC appreciates your business, and we regret that we will no longer be providing your telephone services. It has been our pleasure serving you.

KMC Telecom V, Inc.
KMC Telecom of Virginia, Inc.

EXHIBIT 2

Letter from David E. Mills, counsel for Insight to Mikhael Vitenson, General Counsel, KMC Telecom Solutions LLC, dated October 18, 2005

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

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TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

October 18, 2005

VIA FAX AND UPS OVERNIGHT

Mikhael Vitenson, Esq.
General Counsel
KMC Telecom Solutions LLC
1545 Route 206, Suite 300
Bedminster, NJ 07921
Fax: (908) 470-3607

Re: KMC's Termination of Voice Services to Insight

Dear Mr. Vitenson:

I am writing on behalf of Insight Midwest Holdings, LLC ("Insight") to provide notice that KMC Telecom Solutions LLC ("KMC") is in breach of the KMC Telecom Solutions Master Services Agreement, dated as of May 12, 2005 (the "Agreement"), including the Cable Wholesale Voice Services Attachment (together with exhibits and schedules, the "Attachment").

Under the Agreement, KMC is obligated to provide the telephony and related services described in Schedule 4 of the Attachment ("Services") through May 12, 2008. KMC informed Insight yesterday by phone that KMC had ceased performing Services under the Agreement as of last Friday, October 14, 2005. This *ex post facto* notice was the first Insight had heard that KMC was terminating Services, and the termination was entirely unexpected. Apparently, it came up yesterday only because Insight officers had contacted Ron Beaumont concerning on-going discussions with KMC on the *expansion* of KMC's provision of services to Insight (which raises the troubling questions of when KMC made the decision and why it failed to warn Insight).

KMC's failure to provide the Services constitutes a breach of its obligations under the Agreement. The stated reason for the termination is KMC's own financial situation: KMC's lenders asked KMC to terminate less profitable operations, and KMC's voice service is less profitable than its other lines of business. Insight was informed that KMC already had fired employees and is simply shutting down this side of its business. There has been no suggestion (nor could there be) that Insight has failed to perform any of its obligations under the Agreement. Plainly, KMC's termination constitutes a unilateral and unjustified breach of contract.

Of more immediate concern, however, is that KMC's unilateral termination causes several obvious problems for Insight and its customers. First and foremost, Insight is concerned that KMC's decision endangers continuous telephony service (including emergency voice service) for over 500 households in Anderson, Indiana. Termination of the Services with no prior notice has prevented Insight from undertaking measures that might have minimized disruption to customers and potential customers. We understand that KMC has committed to cooperate with Insight to ensure that no customer service is interrupted while alternative arrangements are made to replace KMC's Services. Please note that KMC is contractually obligated during this period "to use commercially reasonable efforts to work cooperatively to minimize any potential interruptions of service to Insight or its End Users." Attachment, ¶ 6.C. Insight expects KMC to honor its commitment to cooperate in the coming weeks and months. At a minimum, KMC must make appropriate personnel available to work with Insight to address the service issues and minimize disruption during a transition to an alternative provider.

Insight is now examining its options under the Agreement to determine the best way to protect customers and Insight's business as a result of KMC's decision to terminate the Services. This might include establishing a transition schedule under the Agreement (Attachment ¶ 6.C.) or some other appropriate response, and Insight's business people will contact their counterparts at KMC to discuss an interim solution. However, for Insight to formulate an appropriate plan, it is critical that KMC inform Insight immediately of any issues or plans concerning KMC's existing network or services that might hinder Insight's ability to affect a transition or maintain continuous, full service to subscribers. This would include the receipt of any notices of disconnection from any third party that might jeopardize continued dial-tone service; any KMC decision to turn down or disconnect any services used to support the Agreement; or any reason to believe E911 service provided to Insight's end users might become impaired as a result of KMC's actions or plans. Insight also has a number of installed customers for whom work remains to be completed, and Insight requires assurances that KMC will complete that work immediately.

Second, as KMC knows, Insight has invested substantial time and resources in reliance on KMC's commitment to provide Services under the Agreement, including substantial marketing to customers and potential customers. As it appears that KMC will not provide the Services needed to provision any *new* customers, Insight will lose these potential customers for the foreseeable future, and its marketing dollars will have gone to waste. Worse, Insight will lose goodwill in the marketplace where it has worked hard to compete as a reliable alternative common carrier, because customers will be turned away.

Third, KMC's decision has put Insight in a potentially untenable regulatory position. KMC is well aware that Insight is certified as a Competitive Local Exchange Carrier ("CLEC") and has regulatory obligations under federal and state telecommunications statutes and FCC regulations. By way of example, if KMC's actions result in the discontinuance or impairment of telephone service to Insight's customers, KMC would put Insight at risk of violating both federal and state requirements to provide adequate and timely notice to its customers and to obtain federal and state authorization to discontinue service under Section 214 of the Communications Act and applicable state laws. Indeed, KMC itself may violate these rules to the extent that it discontinues or impairs the quality of its services to Insight without satisfying these requirements.

Frankly, although this letter is intended to put you on notice of the breach and alert you to related issues, we have only begun to examine the Agreement and its related components to determine the panoply of rights and remedies available to Insight in light of KMC's sudden and unjustified termination. Insight reserves all of its contractual, statutory and common law claims, rights and remedies against KMC, notwithstanding Insight's willingness to work with KMC to mitigate the disruption and damages the termination will cause, and nothing in this letter or in Insight's subsequent efforts to mitigate the harm shall constitute a waiver or release of Insight's claims, rights or remedies.

Please let me know if you prefer that Insight personnel work through you as they attempt to address the situation or whether they may contact their counterparts at KMC directly to work more rapidly. I look forward to hearing from you promptly.

Sincerely,

David E. Mills

DEM/ldi

cc: KMC Telcom Solutions LLC
1545 Route 206, Suite 300
Bedminster, NJ 07921
Attention: Contract Department

Elliot Brecher, Esq.

Mr. John Abbot

EXHIBIT 3

Letter from John Abbot, Chief Financial Officer of Insight, to Mr. Roscoe Young, Chief Executive Officer and COO of KMC Telecom, dated October 18, 2005

October 18, 2005

Mr. Roscoe Young
Chief Executive Officer and COO
KMC Telecom
1545 Route 206
Bedminster, NJ 07921

Dear Mr. Young:

We are deeply concerned about KMC's decision to suspend enhanced termination operations as of 10/14/05. Aside from any contractual implications, we are primarily focused on any negative impacts to our existing customers, most importantly, as they pertain to providing continued dial-tone service and E911.

Please provide us with the following information about the status of and plans for the existing network services provided to Insight under the contract:

1. Has KMC received any notices of disconnection from any third party that would suggest continued dial-tone service would be jeopardized over the next 60 days?
2. Has KMC management ordered the turn-down or disconnection of any services used to support our current contract?
3. Does KMC's management have any reason to believe that E911 service will be in any way impaired as a result of actions taken up to this point or contemplated?

We will certainly need much more information from you as we attempt to recover from this significant setback in our business, but if there is information additional to that requested above that you believe is relevant to the near-term critical issue of providing service to our existing customers, please provide that to us as well.

Further, per my voice mail yesterday, it is critical that we meet with you and/or any other members of senior management and equity sponsors and/or creditors to discuss ways to mitigate any near-term risks to our business. Specifically, together we need to very quickly develop a plan to ensure dial-tone and E911 service will continue to be provided to our existing customers as we evaluate alternatives to KMC for providing service to our existing and new customers. We are also interested in discussing the possibility of using or acquiring the assets currently providing services to Insight.

I will attempt to call you again today and would appreciate a prompt response.

Sincerely,

John Abbot