

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
The Development of a National Framework to)
Detect and Deter Backsliding to Ensure)
Continued Bell Operating Company Compliance)
with Section 271 of the Communications Act)
Once In-Region InterLATA Relief is Obtained)

RM 9474

STATEMENT OF
HYPERION TELECOMMUNICATIONS, INC. SUPPORTING
PETITION FOR EXPEDITED RULEMAKING

Hyperion Telecommunications, Inc. ("Hyperion"), by undersigned counsel and pursuant to the Commission's February 5, 1999 Public Notice, hereby submits its Statement in support of the Petition for Expedited Rulemaking ("Petition") filed by Allegiance Telecom, Inc. ("Allegiance") on February 1, 1999. As a competitive local exchange carrier ("CLEC") active in New York and in other states in which Bell Operating Companies ("BOCs") may soon seek interLATA relief pursuant to section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), Hyperion has a great interest in ensuring that any BOC that is ultimately granted interLATA relief will sustain its efforts to open its local exchange markets following this grant of authority.

Although section 271(d)(6) of the Act authorizes the Commission to address section 271 "backsliding," the Allegiance Petition provides the Commission with the opportunity to take steps to protect against it. Accordingly, Hyperion recommends that the Commission initiate a rulemaking proceeding as proposed by Allegiance, and suggests that the Commission should consider additional measures in the Notice of Proposed Rulemaking ("NPRM") as described below.

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List A B C D E

I. THE ACT CLEARLY ENVISIONS FEDERAL ENFORCEMENT FOLLOWING A GRANT OF SECTION 271 AUTHORITY.

A. Section 271(d)(6) Expressly Provides that the Commission Shall Have the Authority to Address and Resolve Backsliding Complaints.

The Commission has express authority under the Act to address backsliding by a BOC that has previously obtained the ability to provide in-region, interLATA services pursuant to section 271. Specifically, section 271(d)(6) provides that if at any time after the approval of a BOC's application, the Commission determines that the BOC is no longer meeting any of the conditions required for approval, it may, after notice and opportunity for a hearing, "(i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company pursuant to title V; or (iii) suspend or revoke such approval."¹ Hyperion submits that the action sought by Allegiance falls within the scope of section 271(d)(6), nor would it exceed the Commission's authority under the Act to monitor and enforce section 271 compliance by a BOC. The Allegiance Petition merely asks the Commission to fill in what is a clear "enforcement gap" in the current section 271 process – while it is clear that BOCs must meet the standards of the competitive checklist in section 271(c) to obtain interLATA authority, it remains uncertain as to what steps the Commission will in fact take following a grant of section 271 authority if it appears that a BOC is seeking to retrench in the local exchange market.

It is possible that the Commission could proceed on an *ad hoc* basis under section 271(d)(6), leaving the question of how it will address backsliding and what kinds of specific penalties it might impose for determination on a case-by-case basis. Hyperion submits, however, that establishing a

¹ 47 U.S.C. § 271(d)(6)(A) (1996).

process to address section 271 backsliding would serve the procompetitive goals of the Act and provide regulatory certainty to both CLECs and BOCs. For CLECs, the knowledge that a nationally uniform process is in place to entertain complaints with respect to backsliding would make clear that the Commission stands ready to review and resolve concerns that a BOC is impeding competitive entry. The CLECs could better focus their efforts on bringing the benefits of competition to consumers, knowing that the establishment of specified penalties for backsliding would serve as a deterrent to misbehavior by the BOCs. On the other hand, BOCs too may benefit from the certainty associated with an established process and clearly specified penalties for backsliding. Indeed, Congress appears to have recognized the overall benefits of such a defined process, as the Act provides that "[t]he Commission *shall establish procedures* for the review of complaints concerning failures by Bell operating companies to meet conditions required [to obtain interLATA authority]."² Defining the process and penalties that would apply in the consideration of any backsliding by a BOC is therefore competitively desirable, in the public interest, and consistent with the plain language of section 271(d)(6)(B).

B. The Commission Should Not Leave Backsliding to be Addressed by State Efforts, As There is a Need for a Strong National Framework to Address Backsliding.

Hyperion is concerned that the BOCs may argue that there is no need for federal backsliding measures because the states may address backsliding in the context of their own section 271 compliance verification proceedings.³ It is true that states such as New York and Texas have already

² *Id.* at § 271(d)(6)(B) (emphasis added).

³ *See id.* at § 271(d)(2)(B) (reserving a consultative role for state commissions to verify a BOC's compliance with section 271(c)).

addressed BOC backsliding as part of their own considerations of BOC applications for interLATA authority in those jurisdictions. Indeed, the states have played a valuable role in defining backsliding measures to date, as the Allegiance Petition demonstrates through its reliance on the New York and Texas measures. The Commission should not, however, decline to establish procedures and penalties for backsliding simply because two progressive, active state commissions have attempted to do so. In fact, adopting a national default regime to govern backsliding would be of benefit in those jurisdictions that do not feel compelled to address backsliding on their own. Furthermore, the establishment of national default standards would leave states free to experiment with more stringent backsliding measures, while ensuring that parties will not need to engage in repetitive discourse and litigation in state after state to arrive at acceptable backsliding safeguards. Finally, national default standards would protect against the possibility that certain states may not have the resources to develop appropriate backsliding safeguards or to deter effectively backsliding conduct.

Moreover, the Act does not provide expressly for a state role in enforcing section 271 conditions – it is the Commission that is directed to address these concerns in section 271(d)(6). In fact, section 271(d)(6)(B) *mandates* that the Commission "*shall*" establish procedures to consider backsliding complaints. Leaving the consideration of backsliding procedures and penalties exclusively to the state commissions would be contrary to the Congressional intent expressed in section 271(d)(6). This is not to say, however, that the FCC should preempt any state action with respect to backsliding. Instead, the principles of federalism should prevail in this context. There is no need to halt valid and valuable state efforts to develop new means of deterring and remedying backsliding by BOCs. The state commissions can provide useful insight to the Commission and to one another as they continue to verify compliance with section 271. Rather, the Commission should

seek to establish national default backsliding standards as Allegiance suggests, so that the statutory obligation to enforce section 271 following a grant of in-region, interLATA authority is satisfied even where a particular state commission may fail to establish any measures to address backsliding as part of its recommendation to the Commission. Hyperion therefore submits that there is a need for a strong uniform national backsliding framework that could work in tandem with separately determined state requirements to deter backsliding and to address such action as it occurs.

II. THE COMMISSION SHOULD CONSIDER ESTABLISHING A SEPARATE DISPUTE RESOLUTION PROCESS TO ADDRESS BACKSLIDING COMPLAINTS.

As noted above, section 271(d)(6) requires the Commission to establish procedures for the review of complaints alleging that backsliding by a BOC has occurred. This section of the Act further states that "[u]nless the parties agree otherwise, the Commission *shall* act on such complaint within 90 days."⁴ In light of the short time frame in which such disputes are to be resolved, and the likely severity of such disputes, the Commission and the industry would likely be well served by establishing the parameters of such a dispute resolution process now rather than waiting until a complaint is pending.

Hyperion concurs with Allegiance's assertion that the Commission should "establish a forum akin to its 'Rocket Docket' expedited complaint process" to resolve backsliding complaints.⁵ Hyperion believes that the Accelerated Docket is a necessary and useful mechanism that offers the promise of quickly resolving the kinds of concerns that could otherwise cause competitive entry into

⁴ *Id.* at § 271(d)(6)(B) (emphasis added).

⁵ Allegiance Petition, at 23 (citing *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Second Report and Order, 13 FCC Rcd 17018 (1998)).

the local exchange market to stagnate. But despite its expedited nature, the Accelerated Docket as it presently stands cannot promise relief quickly enough to address the dangers posed by backsliding and to satisfy the requirements of section 271(d)(6).

The fundamental problem with using the "Accelerated Docket" arises because of the manner in which it compels carriers to seek dispute resolution. Specifically, under the Commission's rules, parties seeking resolution through this expedited procedure must first engage in pre-filing settlement discussions supervised by Common Carrier Bureau Staff.⁶ While these negotiations may be useful, they may very well take more than 90 days. The threat of section 271 backsliding is of such competitive concern that the Commission should not compel parties to proceed first with extended settlement negotiations. Another concern is that the Accelerated Docket is discretionary in nature, with complaints accepted for filing only after the Bureau Staff considers a number of factors in the context of each proposed complaint.⁷ Following the granting of in-region, interLATA authority to a BOC, however, the prospects for competitive harm could become significantly enhanced as the newly-enabled full-service BOC is better able to engage in the same kinds of anticompetitive conduct. Section 271(d)(6) recognizes the need for quick and efficient action in this context by setting a strict 90-day time frame for the resolution of backsliding complaints. Thus, the Commission should act affirmatively to resolve any backsliding complaint that is brought to its attention within 90 days, without requiring parties to engage first in negotiations or placing the acceptance of a complaint within Staff's discretion.

⁶ See 47 C.F.R. § 1.730(b) (1998).

⁷ *Id.* at § 1.730(e).

Once these procedural hurdles are removed, Hyperion believes that the Accelerated Docket may provide an appropriate mechanism to address backsliding complaints pursuant to section 271(d)(6). While the Accelerated Docket schedules complaints for resolution within 60 days, the significant competitive concerns associated with backsliding will likely merit quicker responses, so that backsliding complaints should be resolved within 30 to 45 days wherever feasible. Hyperion urges the Commission to propose the adoption of this sort of revised Accelerated Docket procedure as part of any NPRM issued in response to Allegiance's Petition.

III. STIFF AND CERTAIN PENALTIES ARE NEEDED TO DETER BACKSLIDING.

Hyperion agrees with Allegiance's contention that "meaningful remedies" are essential in deterring backsliding by the BOCs.⁸ In fact, Congress itself recognized that penalties are needed to address the incentives that BOCs will almost certainly have to backslide following a grant of section 271 authority.⁹ The three-tiered structure proposed by Allegiance appears consistent with these statutory remedies and provides a sound starting point from which the Commission should invite comments on potential remedies. The ultimate establishment of penalties as proposed by Allegiance could provide certainty that would benefit both the BOCs and the CLECs. Facing specific penalties, the BOCs would know clearly the consequences of their actions. CLECs, on the other hand, would be able to concentrate upon prosecuting the merits of their backsliding claims without fear that a collateral dispute might arise over whether the "punishment" fit the "crime."

⁸ Allegiance Petition, at 24.

⁹ 47 U.S.C. § 271(d)(6)(A)(i)-(iii) (1996). This section provides the Commission with the authority to direct BOCs to correct any deficiency in their section 271 compliance, to impose financial penalties upon backsliding BOCs, or to suspend the BOC's provision of in-region interLATA services.

There are several additional matters that the Commission may want to consider in issuing a NPRM based upon the Allegiance remedy proposals. First, the Commission should propose that once a BOC has been subjected to "Tier 2" penalties (suspending the BOC's ability to accept new orders for interLATA services), the BOC's failure to meet performance metrics for the prior 60 days will also constitute a *prima facie* showing that it is failing to provide services at parity under the relevant provisions of its interconnection or resale agreements. In such a case, affected CLECs could then seek whatever relief is available to them under their agreements with the knowledge that the burden of proof will be on the BOC to show that it still complies with the relevant provisions of those contracts and state and federal law.

Hyperion also recommends that the Commission specify in its NPRM the amount of the penalties that it would apply in those cases in which a BOC has reached the third tier of remedies. Section 271(d)(6)(A)(ii) provides that the Commission may impose a penalty on the BOC pursuant to Title V of the Act. Given that the conditions for obtaining in-region interLATA authority are set forth in the Act itself, Hyperion submits that the Commission should propose assessing penalties upon the BOCs set forth in section 501 of the Act, which identifies the penalty for deeds that violate the Act.¹⁰ Moreover, a BOC's backsliding would violate the specific conditions under which the Commission granted interLATA authority to the BOC, meaning that such action would fall within the violations covered by section 502 of the Act.¹¹ Because identifying the precise penalties that will apply when backsliding occurs will provide the optimal deterrent, the Commission should offer for

¹⁰ 47 U.S.C. § 501 (1996).

¹¹ *Id.* at § 502. This section provides the Commission with the authority to impose penalties for failures to comply with rules, regulations, or conditions it has imposed.

comment that a BOC's failure to adhere to the conditions of its section 271 approval will result in the maximum fine permitted by these two sections – \$10,000 plus \$500 for each and every day during which the offense occurs. Indeed, applying the maximum penalties permitted by statute would not be unreasonable in such cases, as the BOCs would have full knowledge beforehand of the extent of their liability, and 120 days should provide sufficient time for the BOC to cure any failure to comply with section 271.

Finally, Hyperion notes that much of the promise of section 271 comes from its use as a "carrot" to incent BOCs to open their markets in exchange for the opportunity to provide in-region, interLATA services. Once section 271 authority has been granted, however, the "carrot" has effectively been removed, leaving only the "stick" of penalties as proposed by Allegiance. Hyperion believes that the Commission should consider methods by which it can maintain the incentives for BOCs to keep their local exchange markets open even after a grant of authority pursuant to section 271. Hyperion proposes that the Commission consider establishing a kind of "good BOC" program, in which a BOC that demonstrates that it has provided service at parity over a sustained period of time would be eligible for a reduction in the level of penalties it would face going forward for failing to comply with the conditions of section 271. For example, the Commission might provide that where a BOC has maintained constant compliance with section 271 (as determined through appropriate performance metrics) for 3 years, the BOC would not be subject to the "Tier I" price reductions proposed by Allegiance. If a BOC were to maintain a continuous level of parity over 5 years, the Commission might then extend the triggers for Tier II and Tier III to 120 days and 270

days, respectively.¹² Providing BOCs with the opportunity to reduce the burden of potential penalties for noncompliance with section 271 might supply the incentives that are apparently needed to force the BOCs to comply with federal law.

III. CONCLUSION

The Allegiance Petition provides the Commission with a valuable opportunity to fill the post-section 271 enforcement gap in a manner that is specifically envisioned by the Act. Hyperion supports the Allegiance request for a rulemaking on these issues, and urges the Commission to utilize the recommendations contained herein in proposing rules to address BOC backsliding.

Respectfully submitted,



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¹² Of course, the Commission would need to make clear that nothing under this "good BOC program" would preclude individual CLECs from exercising their contractual and statutory rights to challenge substandard behavior by the BOCs as it occurs. The Commission would also need to be vigilant in ensuring that the BOCs do not subsequently backslide once certain penalties have been waived, reduced, or delayed.

CERTIFICATE OF SERVICE

I hereby certify on this 8th day of March 1999, that copies of the foregoing STATEMENT OF HYPERION TELECOMMUNICATIONS, INC. IN SUPPORT OF PETITION FOR EXPEDITED RULEMAKING, were served via Messenger** or U.S. Mail, postage prepaid, upon the following parties:

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