

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

DOCKET FILE COPY ORIGINAL  
**RECEIVED**  
MAR 8 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
The Development of a National Framework to ) RM 9474  
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 )

**STATEMENT OF WINSTAR COMMUNICATIONS, INC.  
SUPPORTING PETITION FOR EXPEDITED RULEMAKING**

WinStar Communications, Inc. ("WinStar"), by undersigned counsel and pursuant to the February 5, 1999 Public Notice, supports the Petition for Expedited Rulemaking ("Petition") filed by Allegiance Telecom, Inc. ("Allegiance") on February 1, 1999. Allegiance petitioned the Commission to spell out how it will enforce Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), in the event of "backsliding" by the Bell Operating Companies ("BOCs"). The Allegiance Petition is timely in recognition of the increasing likelihood that one or more BOCs may succeed in obtaining 271 relief within the next year.

With BOC 271 approval apparently imminent, it is imperative that the Commission, on an expedited basis, undertake two principal policy tasks: first, address several outstanding issues critical to establishing prospectively sustainable marketplace competition. Absent action on these issues, a true, robust framework for sustainable marketplace competition will not be in place at such time BOC 271 relief is first granted, thereby virtually ensuring a failure of both policy and growth of a competitive marketplace in the intermediate and long term. Second, in parallel, the Commission should put in place appropriate anti-backsliding mechanisms in *advance* of any 271 relief being granted to forestall an inexorable return to marketplace conditions substantially below the 271 benchmark.

No. of Copies rec'd 015  
List A B C D E

Part I of this Petition deals with those prospective actions the Commission needs to address immediately to ensure that a reliable, competitive foundation is in place prior to BOC entry. Part II of this Petition demonstrates the need for anti-backsliding mechanisms that will ensure from a pragmatic and business perspective – once the 271 bar is cleared – the BOC in question will not backslide to a less than lawful manner of conduct.

**I. RESOLUTION OF CRITICAL COMPETITIVE ISSUES IS NECESSARY TO ENSURE THE FOUNDATION FOR A STRONG COMPETITIVE MARKETPLACE IN ADVANCE OF BOC ENTRY.**

The Commission needs to address certain competitive issues immediately to ensure that a reliable, competitive foundation is in place prior to BOC entry. These issues, critical to sustaining a competitive market, have been brought before the Commission, but remain unresolved. Without resolution, the BOCs with 271 approval will be in a position to take advantage of Commission inaction. Furthermore, these issues must be resolved *before* 271 approval since they will likely impact the criteria by which Congress intended the BOCs to be judged. Otherwise, the BOCs may enter the in-region, interLATA market without fulfilling the requirements of the Act.

**A. Nondiscriminatory Access to Rights-of-Way**

In compliance with Section 224 of the Act, Allegiance recommends that the Commission require BOCs to make transmission pathways located in multiple dwelling units ("MDUs") available to CLECs.<sup>1</sup> Allegiance also suggests that inside wiring be made available as a UNE to CLECs.<sup>2</sup> WinStar agrees that these requirements should be recognized in the Competitive Checklist since they

---

<sup>1</sup>Allegiance at 20.

<sup>2</sup>*Id.*

are mandated by the Act and accomplish the objectives of the Act to bring the benefits of competition to all Americans. However, these rights-of-way issues and others remain the subject of debate before the Commission.<sup>3</sup> WinStar urges the Commission to resolve these open issues immediately in light of impending 271 approvals over the next year. Specifically, the Commission should determine whether the Act requires BOCs to make transmission pathways located in MDUs available to CLECs and whether BOCs must offer inside wiring on a UNE basis. Failure to resolve these issues prior to 271 approval could be devastating to the competitive marketplace and compliance with Congress' intent. If the Commission determines, as WinStar believes it must, that these steps are required by the Act, then the Commission must be able to ascertain BOC compliance before granting 271 relief, as well as monitor post-271 compliance.

WinStar has brought to the Commission's attention on multiple occasions the issue of building access in MDUs. Despite repeated requests, the industry has not received a resolution of this issue. Continued delay blocks numerous Americans from access to the services of WinStar and other CLECs and as a practical matter effectively allows BOCs to maintain a monopoly presence in these markets. The Commission noted in its recent Report on the status of advanced telecommunications in the United States that MDUs "comprise[] approximately 28% of all housing units nationwide, and that percentage is likely [to] grow[]." <sup>4</sup> The Commission concluded that "[i]f

---

<sup>3</sup>*E.g., Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices*, WinStar Petition for Reconsideration, CS Docket No. 96-83 (Jan. 22, 1999).

<sup>4</sup>*Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Report, CC Docket No. 98-146, at para. 104 (February 2, 1999).

a significant portion of these units is not accessible to competitive providers of broadband, that fact could seriously detract from local competition in general and the achievement of broadband availability to 'all Americans' in particular."<sup>5</sup> The Commission acknowledged that it is looking into this issue in several other proceedings and, therefore, it did not need to be addressed in the *Advanced Services* proceeding. The only problem with the Commission's deferral is that these "other proceedings" have been collecting dust. The proceeding that the Commission specifically defers to is WinStar's *Petition for Clarification or Reconsideration* that was filed in September 1996 – almost three years ago. Extraordinarily, this proceeding, which addresses an issue that the Commission concedes affects millions of Americans and seriously detracts from the development of true facilities-based local competition, has been allowed to remain pending for almost three years.

**B. Uniform, National Standards for Operation Support Systems**

In its Petition, Allegiance recommends that the Commission adopt national OSS standards.<sup>6</sup> WinStar supports Allegiance's recommendation and urges the Commission to resolve this issue, which is the subject of a long-standing open proceeding.<sup>7</sup> WinStar concurs with Allegiance that Commission action is necessary to ensure nondiscriminatory OSS access.

The Commission should immediately order BOCs to disclose their internal performance standards for OSS functions and set minimum performance standards for those functions with penalties for failure to meet those standards. In addition, the Commission should compel BOCs to

---

<sup>5</sup>*Id.*

<sup>6</sup>Allegiance at 18.

<sup>7</sup>*Rulemaking to Establish Reporting Requirements and Performance and Technical Standards for OSS*, RM-9101.

transition to a standardized, uniform national OSS. A carrier such as WinStar that is attempting to deploy competitive local exchange service nationwide is faced with the prospect of developing multiple separate processes to interact with inconsistent BOC operations support. This lack of standardization has delayed WinStar's ability to enter some markets, hampered its ability to turn up and bill its customers, and resulted in loss of goodwill.

Several unresolved issues before the Commission likely will substantively impact the criteria by which Congress intended BOCs to be judged. Without resolution, BOCs likely will not be fully compliant with the Act in substance when granted 271 authority. Furthermore, if the criteria mandated by the Act is not fully met in practice then the marketplace will not be sufficiently competitive to withstand the entrance of a BOC. WinStar urges the Commission to resolve the critical issues that remain open before the Commission in order to ensure that the intent of the Act is fully complied with and the competitive foundation that has been built over the past three years can sustain BOC entry.

## **II. THE COMMISSION SHOULD ADOPT ANTI-BACKSLIDING MECHANISMS BEFORE GRANTING SECTION 271 APPROVAL**

### **A. Section 271(d)(6) Expressly Provides that the Commission Has Authority to Address Backsliding Concerns.**

Section 271(d)(6) of the Act provides the Commission express authority to address post-section 271 "backsliding" by a BOC. Section 271(d)(6) specifically provides that,

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission 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.

Section 271(d)(6) imposes on the Commission the responsibility of determining when a 271 approved BOC "cease[s] to meet any of the conditions required for [271] approval."<sup>8</sup> Under this Congressional mandate, the Commission must monitor the actions of "approved" BOCs and enforce compliance with conditions imposed on those BOCs to ensure that the level of competition mandated for 271 approval is sustained. Allegiance merely requests that the Commission prescribe rules to implement the requirements of Section 271(d)(6). WinStar believes that the framework set forth by Allegiance provides a good foundation for the Commission to adopt such mechanisms.

Section 271(d)(6) clearly indicates that Congress anticipated a need for the Commission to oversee approved BOC actions and ensure that the requirements imposed on BOCs continued following the grant of 271 approval. Congress' concern that the BOCs would need supervision and enforcement incentives has been validated by the reluctance, and at times refusal, of BOCs to comply with the Act. In light of BOC actions, there is no reason to believe that once a BOC obtains its 271 approval it will abide by the many promises it made to obtain approval.

Section 271(d)(6) makes it clear that interLATA approval is not crossing the finish-line but meeting a threshold. Once a BOC crosses this threshold, the Commission must be prepared to assure continued compliance with the Competitive Checklist. While the Commission could conceivably proceed on an ad hoc basis, coming up with process and penalties as needed, the risk of destroying the competitive foundation built over the past three years is too great. The context of the Allegiance Petition allows the Commission to establish procedures and define penalties pursuant to the Section 271(d)(6) mandate – a certainty that both BOCs and CLECs should welcome.

---

<sup>8</sup>47 U.S.C. §271(d)(6).

**B. The Commission Should Act Before Granting 271 Authority to the BOCs**

A realistic view of the telecommunications industry and the obvious impact BOCs will have when entering the in-region, interLATA market demonstrate that the Commission must take action immediately to lay a foundation to prevent BOC backsliding. As Allegiance pointed out, "once BOCs are permitted to provide in-region interLATA service, they will have little incentive to keep the plethora of promises made to achieve 271 relief, despite the fact that section 271 creates continuing obligations."<sup>9</sup>

The BOCs continue to maintain a monopolistic market share of local access lines.<sup>10</sup> In addition to its control over local access lines, the BOCs control almost every aspect of providing local service to end users (*i.e.*, operation support systems, central office space, interconnection arrangements, etc.). A CLEC cannot provide local telecommunications service without the cooperation of the BOC. It is in the BOC's natural interest to forestall and prevent a CLEC's entry into the local telecommunications market. Realizing this tension, the Act provided an incentive to BOCs by forbidding their entry into the in-region, interLATA market until they cooperated with and assisted CLECs in entering the local telecommunications market. Once a BOC achieves its goal and is permitted entry into the in-region interLATA market, the incentive to cooperate will no longer exist, but the control over the local service infrastructure will.

---

<sup>9</sup>Allegiance at 4.

<sup>10</sup>Allegiance reports that the ILECs own approximately 97% of all local access lines. Allegiance at 13, *citing The 1998 CLEC Report: Annual Report on Local Telecommunications Competition*, New Paradigm Research Group, Inc., and Connecticut Research at Chap. 4, p. 9 (1998).

The BOCs' performance record to date when they do have an incentive to cooperate is far from encouraging. For example, AT&T recently filed a complaint with the Massachusetts Department of Telecommunications and Energy accusing Bell Atlantic-Massachusetts ("Bell Atlantic") of failing to properly and accurately provide the two most important aspects of local competition: coordinated cut-overs and number porting. AT&T argues that since these steps have not been completed promptly and accurately, AT&T customers have experienced numerous service interruptions. According to AT&T, these service interruptions have inhibited the smooth and seamless migration of Bell Atlantic customers to AT&T and greatly inhibited AT&T's ability to provide local exchange services. Moreover, AT&T states that Bell Atlantic's procedures for correcting service interruptions remain wholly unacceptable due to the inadequate resources Bell Atlantic has devoted to correcting the problems and Bell Atlantic's unresponsive attitude. This is just one example of BOC tactics under the current regime where Bell Atlantic is on "best behavior" hoping to meet the 271 requirements.<sup>11</sup> It is obvious that without the 271 incentive, the problems will only get worse and BOCs may intentionally, or inadvertently, allow commitments to slide.

If a BOC is not properly cutting over loops and porting numbers at a time when the BOC is being scrutinized for 271 compliance, it is hard to believe that its performance will improve after interLATA entry. For the same reasons, the resources dedicated by the BOCs, which are already scarce, for handling CLEC relations will likely be further cut. Commitments made to CLECs in

---

<sup>11</sup>In a complaint proceeding initiated by MCI WorldCom ("MCIW"), the Washington Utilities and Transportation Commission found US West in violation of state law and its interconnection agreement with MCI WorldCom (MCIW). US West had imposed "undue disadvantages" on MCIW and had given "unreasonable preferences" to itself. *MCI Metro Access Transmission Services, Inc., v. U S West Communications, Inc.*, Commission Decision and Final Order, Dkt. No. UT-971063 (February 10, 1999).

order to obtain 271 authority may never be fulfilled. As Allegiance pointed out, "Bell Atlantic [failed] to live up to commitments that it made to secure approval for its merger with NYNEX."<sup>12</sup> While the Commission may address backsliding on an ad hoc basis, such assistance typically takes a long time and is usually too late – the damage has already been done. WinStar urges the Commission to act in advance in fulfilling its Section 271(d)(6) obligations.

**C. The Commission Should Consider Establishing a Separate Dispute Resolution Process To Address Backsliding Complaints.**

Section 271(d)(6)(B) directs the Commission to "establish complaint procedures for the review of complaints concerning failures by [BOCs]" to maintain section 271 obligations.<sup>13</sup> The statute provides for resolution within 90 days.<sup>14</sup> Allegiance recommends that the Commission "establish a forum akin to its 'Rocket Docket' expedited complaint process."<sup>15</sup> WinStar supports the use of the Rocket Docket for guidance in establishing complaint procedures; however, the Rocket Docket requires mediation, which can take much longer than 90 days. Therefore, in order to adhere to the mandatory 90 day time frame, CLECs must be able to obtain relief without first pursuing a mandatory mediation process. Furthermore, a default should be put in place in the event that a resolution is not reached within the statutory 90 day time frame. For example, absent resolution or

---

<sup>12</sup>Allegiance at 7, citing *Application of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporations and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (Aug. 14, 1997).

<sup>13</sup>47 U.S.C. § 271(d)(6)(B).

<sup>14</sup>*Id.*

<sup>15</sup>Allegiance 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.

a final order with 90 days, the 271 authority of the BOC should be suspended indefinitely pending Commission findings that no backsliding has occurred. WinStar recognizes the business and social implications of suspending a BOC's 271 authority; however, such result is workable and was envisioned by Congress as an option for addressing 271 violations.<sup>16</sup> By Section 271(d)(6), Congress provided the Commission with the power to prevent, to severely punish and to protect CLECs from BOC violations. In light of the serious harm that may occur to both consumers and CLECs from BOC backsliding, the Commission should be vigilant in prosecuting alleged violations.

### III. CONCLUSION

It is imperative that the Commission establish certain safeguards and act on several open regulatory issues *prior* to granting 271 authority to any BOC. WinStar recommends that the Commission initiate a rulemaking proceeding as proposed by Allegiance to adopt a framework for deterring, detecting and correcting BOC backsliding, and strongly urges the Commission to resolve those long-pending open regulatory dockets cited in Part I that, without resolution, will seriously exacerbate the already skewed telecommunications environment once a BOC receives 271 authority.

Respectfully submitted,

Robert Berger  
Russell Merbeth  
WINSTAR COMMUNICATIONS, INC.  
1146 19<sup>th</sup> Street, N.W.  
Washington, DC 20036

  
Russell M. Blau  
Kathleen L. Greenan  
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP  
3000 K Street, N.W. Suite 300  
Washington, DC 20007  
(202) 424-7500

Dated: March 8, 1999

---

<sup>16</sup>47 U.S.C. § 271(d)(6)(A)(iii).

**CERTIFICATE OF SERVICE**

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

Magalie Roman Salas, Esq. **(Original + 4)\*\***  
Secretary  
Federal Communications Commission  
Portals - 445 12th Street, S.W.  
Filing Counter TWS-A325  
Washington, D.C.

Robert W. McCausland  
Vice President, Regulatory and  
Interconnection  
Allegiance Telecom, Inc.  
1950 Stemmons Freeway, Suite 3026  
Dallas, TX 75207-3118

International Transcription Service\*\*  
1231 20th Street, N.W.  
Washington, d.C. 20054

Jonathan E. Canis  
Ross A. Buntrock  
Michael B. Hazzard  
Kelley Dye & Warren LLP  
1200 Nineteenth Street, N.W.  
Fifth Floor  
Washington, D.C. 20036

  
Susie Gustavson