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May 26, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Second Further Notice of Proposed Rulemaking Concerning Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98.

Dear Ms. Salas:

Attached are the original and twelve copies of the comments of Allegiance Telecom, Inc. regarding the Commission's Second Further Notice of Proposed Rulemaking Concerning Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98.

Sincerely,

Ruth Milkman

Ruth Milkman

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MAY 26 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF ALLEGIANCE TELECOM, INC.

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May 26, 1999

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SUMMARY

Allegiance Telecom, Inc., is a competitive local exchange carrier, interexchange, and international carrier, offering service in thirteen markets in the United States, including Washington, D.C., Atlanta, Dallas, San Jose and Chicago. Allegiance's success to date in deploying service to compete with incumbent local exchange carriers around the country demonstrates in a concrete way the vital importance of national minimum unbundling requirements. It is very doubtful that Allegiance would have been as successful in rolling out its service if it had confronted the prospect of significantly different unbundling requirements in the states it wished to enter.

Allegiance submits that the term "proprietary" should be defined to mean information, software or technology that is protected by patents, copyrights, or trade secrecy laws. The term "necessary" should be interpreted to mean that, as a practical matter, the CLEC will be unable to offer service without access to the element. Finally, Allegiance proposes that the Commission find that failure to provide access to an element would "impair" the CLEC's ability to provide the service it seeks to offer unless there is a competitive wholesale market for the requested element.

Allegiance currently offers service through a combination of its own facilities, and unbundled network elements purchased from incumbent LECs. Allegiance requires access to the following unbundled network elements in order to provide service: loops, network interface devices, interoffice transport, signaling and call-related databases, operations support systems, and operator services and directory assistance.

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COMMENTS OF
ALLEGIANCE TELECOM, INC.

Allegiance Telecom, Inc. ("Allegiance") respectfully submits the following comments in response to the Notice of Proposed Rulemaking issued in this proceeding concerning the minimum set of network elements that incumbent local exchange carriers ("LECs") must make available on an unbundled basis to requesting carriers. Allegiance is a competitive local exchange carrier ("CLEC"), interexchange and international carrier that is rapidly expanding its provision of voice services, Internet access, and high speed data services to areas throughout the country.

Allegiance is a facilities-based CLEC that is in the process of deploying its network in areas throughout the United States. Allegiance currently offers competitive local, long distance, and international service in 13 markets in the United States. Allegiance provides service to end users using a combination of its own facilities and unbundled network elements obtained from the incumbent LECs. In requiring incumbent LECs to unbundle their networks for competitive carriers, Congress clearly recognized

that the cost and delay that would be required to duplicate the incumbent LECs' networks -- which have been built over the course of the last 100 years -- would make competitive entry economically infeasible. Simply stated, facilities-based competitors like Allegiance would not be offering an alternative to the incumbent LECs today if they were unable to obtain access to the unbundled network elements required to provide service.

As Chairman William E. Kennard recently stated, "an open, competitive marketplace will benefit our country with better service and benefit all Americans with lower prices."[1] Chairman Kennard emphasized that residential consumers ought to have a choice of local service providers.[2] Allegiance strongly supports this goal, and believes that access to a national set of unbundled network elements is essential to the development of competition and to bring the benefits of competition to residential consumers.

I. Standards for Identifying Unbundled Network Elements That Incumbent LECs Must Make Available

In its initial Local Competition Order, the Commission established a minimum list of unbundled network elements that all incumbent LECs must make available to competitive LECs upon request.[3] The Commission properly recognized that minimum national requirements for unbundled elements are essential to allow "new entrants, including small entities, seeking to enter local markets on a national or regional scale to

[1] FCC Chairman William E. Kennard, "A Competitive Call to Arms," Association of Local Telecommunications Services (ALTS) Convention, May 3, 1999, at 6.
[2] Id.
[3] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order (FCC 96-325), CC Docket Nos. 96-98, 95-185 at para. 241 (1996) (Local Competition First Report and Order).

take advantage of economies of scale in network design."[4] These requirements have enabled Allegiance and other CLECs with resources dwarfed by those of their incumbent LEC competitors to develop national plans for the design and deployment of their networks in cities throughout the country.

In addition, national requirements have significantly eased the burden of interconnection negotiations and arbitrations for Allegiance. The Commission's rules eliminated the need to litigate in state after state an incumbent LEC's obligation to offer access to loops and other particular network elements that facilities-based CLECs need to offer service. Further, as the Commission correctly anticipated, the establishment of national requirements for unbundled elements has assisted Allegiance in its efforts to attract capital by providing "financial markets greater certainty in assessing new entrants' business plans."[5]

In short, Allegiance's success to date in deploying service to compete with incumbent LECs in markets around the country demonstrates in a concrete way the vital importance of national minimum unbundling requirements. It is very doubtful that Allegiance would have been as successful in rolling out its service if it had not had access to unbundled loops, operations support systems, transport and other network elements in each of the states it wished to enter. Indeed, the Commission earlier this year affirmed the importance of minimum national requirements to the pro-competitive goals of the Act when it adopted additional uniform, nationwide collocation rules.[6]

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[4] See id. at para. 242.
[5] Id.
[6] See Deployment of Wireline Services Offering Advanced Telecommunications Capability (FCC 99-48), First Report and Order and Further Notice of Proposed Rulemaking, CC Docket. No. 98-147, slip op. at para. 23 (March 31, 1999).

Allegiance agrees with the Commission's observation in the Notice that there is "nothing in the Supreme Court's decision that calls into question the [Commission's] decision to establish minimum national unbundling requirements."[7] Moreover, the establishment of national requirements for unbundling network elements does not mean that the Commission is "blind ... to the availability of elements outside the incumbent's network."[8] Rather, the simple fact is that in the local markets in which Allegiance currently offers service or intends to offer service in the near future, the incumbent LECs are the only sources for ubiquitous loops, transport, operations support systems, signaling systems and databases, and other network elements that Allegiance needs to provide service. Should the Commission determine to adopt a procedure to remove unbundled elements from the national list in the future based on changed circumstances, it should require an incumbent LEC seeking relief from its obligation to make a specific network element available to prove that the element can be obtained on a competitive basis from other suppliers as readily as it can be obtained from the incumbent LEC itself.

A. Interpretation of the Term "Proprietary"

Section 251(d)(2)(A) requires the Commission and state commissions to consider whether "access to such network elements as are proprietary in nature is necessary."[9] The Notice seeks comment on "whether the term 'proprietary' should be limited to information, software, or technology that can be protected by patents, copyrights, or trade

[7] Notice at para. 14.
[8] See AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct, 721, 735 (1999).
[9] 47 U.S.C. § 251(d)(2)(A)

secrecy laws. . . ."[10] In Allegiance's view, the term "proprietary" should be defined to mean information, software or technology that is protected by patents, copyrights or trade secrecy laws. This definition has the advantage of providing an administratively workable test for identifying the network elements to which section 251(d)(2)(A) applies. Further, it limits the scope of the section to elements that are already entitled to protection under the law.

These considerations should lead the Commission to conclude that the term "proprietary" should not include materials or technology that are not eligible for protection under patent, copyright or trade secrecy laws. Such an open-ended interpretation of the term inevitably would generate litigation over the precise scope of the term. Further, it would have the effect of according special protection to incumbent LEC information, software and technology that the law currently does not protect from use by others. In addition, an expansive interpretation of the term proprietary would be inconsistent with the overriding pro-competitive goals of the Act. Specifically, to the extent that the Commission concludes that section 251(d)(2)(A) imposes a more stringent test for requesting carriers to obtain access to network elements than section 251(d)(2)(B), expanding the definition of proprietary would hamper the efforts of competitive LECs seeking to enter local markets through the use of unbundled network elements.

The Commission also should affirm the determination in the Local Competition First Report and Order that incumbent LEC signaling networks that adhere to Bellcore protocol standards are not proprietary in nature.[11] More generally, the Commission

[10] Notice at para. 15.
[11] Local Competition First Report and Order at para. 481.

should exclude from the term proprietary network elements any features, functions, interfaces and capabilities that "are defined by recognized industry standard-setting bodies (e.g., ITU, ANSI, or IEEE), are defined by Bellcore general requirements, or otherwise are widely available from vendors."[12] Since these standards and other requirements have been developed for use by the telephone industry as a whole, there is no basis for treating the network elements involved as proprietary in nature.

Finally, the Commission should not treat as proprietary any elements the use of which does not reveal to a CLEC proprietary data or technology. Access to such elements clearly does not raise the same concerns as those that require disclosure of information or technology protected by patent, copyright or trade secrecy statute. Competitive LECs, for example, obtain access to an incumbent LEC's Operations Support Systems (OSS) through an interface that contains proprietary software. Competitive LECs, however, need not and do not obtain access to the source codes or other proprietary information relating to the software when they use the interface.

B. Interpretation of the Term "Necessary"

The statute directs the Commission to consider whether access to network elements that are proprietary in nature is "necessary." Neither the statute nor the legislative history of the Act, however, shed any helpful light on Congress' intent in selecting this term or its relationship to the standard in section 251(d)(2)(B). Allegiance submits the term necessary should be interpreted to mean that, as a practical matter, the CLEC will be unable to offer service without access to the element. Under this standard,

[12] Notice at para. 15.

access to proprietary elements would be "necessary" if without such elements the ability of requesting carriers to compete would be "thwarted."

This interpretation of the term necessary is akin in some respects to the essential facilities doctrine referenced by the Supreme Court.[13] As discussed below, the antitrust essential facilities doctrine opens up "only those 'bottleneck' elements unavailable elsewhere in the marketplace."[14] Similarly, the "necessary" standard Allegiance proposes would require incumbent LECs to offer access to a proprietary element only if denial of access to that element would prevent the CLEC from offering the service it wishes to provide.

C. Interpretation of the Term "Impair"

Section 251(d)(2)(B) of the Act directs the Commission to consider whether the "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." In interpreting the term "impair" as used in this section, Allegiance submits that the Commission should be guided by Section 271 of the Act. In Section 271(c)(2)(B), Congress identified the unbundled network elements that the Bell Operating Companies must make available in order to demonstrate that their markets have been opened to competition. The statutory list includes, but is not limited to, unbundled loops, unbundled transport, operator and directory assistance services, and access to databases and associated signaling necessary for call routing and completion. By including these network elements on the competitive checklist, Congress plainly determined that access

[13] AT&T v. Iowa Utilities Board, 119 S. Ct. at 734.
[14] Id.

to such elements is necessary, and indeed critical, for competitive entry. Consistent with Congressional intent, the Commission should find at a minimum that an incumbent LEC's failure to provide access to any of the unbundled elements on the competitive checklist would impair a requesting carrier's ability to provide service.

Allegiance also proposes that the Commission find that an incumbent LEC's failure to provide access to an element would "impair" the CLEC's ability to provide the service it seeks to offer where there is no competitive wholesale market for the requested element. So long as an incumbent LEC remains the sole or dominant provider of an element, it will retain the ability to restrain competition by, among other things: (1) denying CLECs access to the elements they need to compete; (2) raising the price of elements to levels that render it impossible for CLECs to price any service incorporating the element competitively; and (3) delaying CLECs the ability to make inroads into the local exchange market. In deciding whether there is a competitive wholesale market for the element at issue, the Commission should look to the framework established in the AT&T Reclassification decisions.[15]

Under that framework, the FCC would first define the relevant product market, and then assess whether the incumbent LEC has market power by examining: incumbent LEC market share; the supply elasticity of the market; the demand elasticity of CLECs; and the incumbent LECs' cost structure, size and resources.[16] The relevant product market in each case would be the market for a particular element. The Commission

[15] In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271 (1995) (AT&T Reclassification Order).
[16] See AT&T Reclassification Order at para. 38.

would consider the factors described above to determine whether there is a competitive wholesale market for the element the CLEC is requesting.

The first factor is the market share of the incumbent LEC. If the incumbent LEC is the sole provider of a particular element, the inquiry is at an end. In that case, there can be no question that denial of access to the element would impair the CLEC's ability to provide service.

The second factor is the supply elasticity of the market. In the AT&T Reclassification Order, the Commission explained that two factors determine supply elasticities in a market: the supply capacity of existing competitors and low entry barriers.[17] In particular, a competitive wholesale market for a network element requires the presence of competing providers that have the capability to furnish the element requested by the CLEC in the quantities and time frames needed.[18] If an alternative provider of an element were unable to meet a CLEC's service requirements, the presence of the alternative provider would not constrain the incumbent LEC's conduct. Low entry barriers contribute to the competitiveness of a market by facilitating the addition of new firms and enhancing the impact of the threat of entry on existing providers. In determining the degree of supply elasticities, the Commission should consider the ability of the CLEC to obtain the element from a non-incumbent LEC provider, and should also consider the ability of the CLEC to purchase or construct the facilities needed to provide the element. If the cost of duplicating the incumbent LEC's network facilities is

[17] Id. at para. 57, citing Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5888 (1991).
[18] In the ATT Reclassification Order, the Commission found that "supply elasticities tend to be high if existing competitors have or can easily acquire significant additional capacity in a relatively short time period." Id.

prohibitive or the time involved to recreate the network elements so excessive that it would forestall or discourage competitive entry, the unbundling obligation should not be removed.

Determining whether a competitive wholesale market exists for a particular element also requires an assessment of the demand elasticities of the requesting CLECs with respect to the element: do the CLECs consider the element provided by the incumbent LEC and the facilities or services provided by competitors to be very close substitutes?[19] An incumbent LEC's inability to demonstrate that CLECs will purchase a network element from an alternative provider to obtain better pricing or better service than that offered by the incumbent LEC would be probative evidence that a competitive wholesale market for the element does not exist and that the incumbent LEC is still able unilaterally to implement and sustain a price increase for a network element without losing customers to the asserted competing providers.

In evaluating demand elasticities, the statute requires the Commission to consider the issue from the perspective of the CLEC, and focus on the element provided to the requesting CLEC. Specifically, Section 251(d)(2) directs the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[20] The only service that is relevant is the service that the CLEC wishes to provide. For a DSL carrier seeking loops, for example, a competitive wholesale market for copper loops may be a substitute for the incumbent LEC loop; wireless local loops or other broadband end-user alternatives are not substitutes. Moreover, as the Commission

[19] Id. at para. 63.
[20] 47 U.S.C. § 251(d)(2)(B) (emphasis supplied).

previously concluded, the fact that an incumbent LEC offers a retail service that incorporates a network element, such as local exchange service, is plainly irrelevant to this analysis under Section 251(d)(2). To conclude otherwise would allow incumbent LECs to evade completely the unbundling requirement because they already offer services that incorporate all of the various elements.[21]

The fourth factor that the Commission considered in the AT&T Reclassification Order was whether, even in the presence of competitors, AT&T retained market power simply by virtue of its lower costs, sheer size, superior resources, financial strength and technical capabilities. This inquiry is relevant in the context of the "impair" standard as well, because it suggests that if these factors are present and confer market power on the incumbent LEC, the incumbent LEC could exercise that market power to deny the availability of an element or to raise prices for that element.[22] Therefore, the Commission should consider whether the cost structure, size and resources of the incumbent LECs enable the incumbent LECs to retain market power for each element.

The application of these four factors to a particular network element offered by an incumbent LEC requires a determination of the relevant geographic market. One possible way of defining the relevant geographic area for assessing whether a competitive wholesale market exists for each element is the incumbent LEC service area within each state. Absent any credible evidence that a competitive wholesale market exists for any network element in any incumbent LEC service area in any state in the country, it is appropriate at this time for the Commission to establish minimum nationwide unbundling requirements.

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[21] Local Competition First Report and Order at para. 287.
[22] AT&T Reclassification Order at para. 73.

D. Essential Facilities Doctrine

The Notice seeks comment on whether and how the antitrust "essential facilities" doctrine should be applied to determine the network elements that incumbent LECs must offer to requesting carriers under sections 251(c)(3) and 251(d)(2) of the Act.[23] Allegiance submits that application of that doctrine in these circumstances would be anomalous. If Congress had not enacted these two sections, CLECs would have had to rely on the essential facilities doctrine to obtain the access they needed to the incumbent's networks. The inclusion of those sections in the 1996 Act represents a deliberate determination by Congress not to rely on the uncertain application of the essential facilities doctrine to determine when and under what conditions competitive LECs would gain access to the parts of incumbent LEC networks they need to offer competing services.

Courts and commentators have characterized the essential facilities doctrine as an exception to the general rule that a monopolist has no duty to make its essential facility accessible to a competitor.[24] The elements of an antitrust claim under this doctrine are: (1) a monopolist with whom the plaintiff competes controls an essential facility; (2) the plaintiff cannot practically or reasonably duplicate that facility; (3) the monopolist denied the plaintiff use of the facility; and (4) the monopolist feasibly could have provided the plaintiff access to the facility.[25] Antitrust courts also have recognized a "business justification" defense to an essential facilities claim.[26]

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[23] Notice at para. 22.
[24] See Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless, PLC, 148 F.3d 1080, 1088 (D.C. Cir.1998); Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841, 852 (1989).
[25] See MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).
[26] See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

Application of the essential facilities doctrine to determine the network elements incumbent LECs must offer would be inconsistent with the standard Congress adopted in section 251(d)(2). First, the doctrine could be interpreted to require the Commission to deny a CLEC access to an element unless it could be shown that the CLEC could not practically or reasonably duplicate the requested element. As the Commission correctly observed in the Local Competition First Report and Order, Congress created the entry vehicle of unbundled network elements precisely to eliminate the need for CLECs to construct a duplicate network in order to compete with the incumbents. Congress determined that consumers should not be forced to endure the delays in enjoying the benefits of local competition that would result from this approach. Second, the doctrine's required showing of practical inability to duplicate an element undoubtedly would be more difficult to satisfy than the standard of impairment of competition established for non-proprietary elements. As a result, competitive LECs would be denied access to unbundled network elements that Congress had intended for the FCC to make available as part of the statute's comprehensive plan for introducing competition in local markets.

Ultimately, effective facilities-based competition is a necessary predicate to the full deregulation of local markets. If the essential facilities doctrine is used to preclude CLECs with their own facilities from obtaining access to network elements they need to enter and begin providing competitive services, facilities-based competition will not develop to the point where deregulation is warranted.

E. Other Factors

If the Commission, in applying the standards set forth above, finds that access to proprietary elements is necessary, or that denial of access would impair competition, then

it must order unbundling. To do otherwise would be flatly contrary to the statutory mandate. It is also clear that if the FCC finds that access is not necessary, or would not impair competition, it may nonetheless order unbundling in order to advance statutory objectives.

Section 251(d)(2) provides that the Commission "shall consider, at a minimum" whether access is necessary, or would impair the ability of CLECs to provide services. If the Commission finds that requiring incumbent LECs to offer a given element for a period of time would advance the development of competition, the Commission should conclude that the element must be unbundled. Given the Commission's ability to modify as circumstances warrant the list of network elements that must be unbundled, the risk of overinclusion -- possibly slowing the deployment of facilities owned by CLECs -- is far outweighed by the risk of underinclusion -- stopping competition dead in its tracks.

II. Application of Criteria to Network Elements

A. Loops

In the Notice, the Commission tentatively concluded that loops would be generally subject to the section 251(c)(3) unbundling obligations.[27] The Commission also stated that neither the statute nor the Supreme Court's opinion precludes the Commission from finding that incumbent LECs must provide DSL-conditioned loops upon request. Finally, the Commission sought comment on whether it should modify the definition of loops to include dark fiber.[28] Allegiance submits that the Commission should: (1) reaffirm the conclusion of the Local Competition First Report and Order that loops are

[27] Notice at para. 32.
[28] Notice at para. 34.

unbundled network elements; (2) reaffirm the conclusion of the Advanced Wireline Services Order that ILECs must make DSL-conditioned loops available; and (3) include dark fiber in the definition of unbundled elements.

In the Local Competition First Report and Order, the Commission defined the local loop element as "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises."[29] The Commission also provided specific, illustrative examples of loops that were covered by this definition, including two-wire and four-wire analog voice grade loops, and loops conditioned to transmit the digital signals needed to provide services such as xDSL services.[30] In the August 1998 Advanced Wireline Services Order, the Commission again explicitly ruled that incumbent LECs are obliged to provide CLECs with loops conditioned for DSL service, for example by removing load coils and bridged taps.[31]

The Commission should reconfirm that the definition of loop as an unbundled network element includes all the varieties of loops that incumbent LECs commonly deploy. In particular, the definition of loop should include DSL-capable loops, regardless of whether the ILEC is itself deploying DSL. The definition of loop should also include dark fiber loops, as the Commission suggests.[32] In addition, the Commission should confirm that the definition of loop includes "mixed technology" loops, for example, with copper running from the customer premises to a remote, where it is multiplexed on to a fiber running between the remote and the central office.

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[29] Local Competition First Report and Order at para. 380.
[30] Local Competition First Report and Order at para. 380.

Failure of the incumbent LECs to provide access to DSL-capable and the other types of loops given as examples in the Local Competition First Report and Order[33] as well as the dark fiber and mixed technology loops described above would impair the ability of CLECs to compete. As the Commission concluded in that Order, loops are generally not proprietary, and therefore the "impair" test should govern.[34] Under the standard proposed by Allegiance, loops qualify as unbundled network elements because there are no close substitutes available.

The Commission concluded in the Local Competition First Report and Order that for the vast majority of customers there were no alternative facilities that met the CLECs' need for a transmission path between the central office and the customer premises that was comparable in cost and quality of service to the incumbent LEC's facilities.[35] Today, almost three years later, that conclusion remains true. Entry barriers remain high because new entrants seeking to provide wireline services to end users must, among other things, obtain rights of way and undertake a massive capital construction project. For virtually all customers -- and especially residential customers -- the only alternative to access to an incumbent LEC's unbundled loop is for the CLEC to construct its own loop, and for the reasons described below, duplicating the incumbent LEC's ubiquitous loop network is not an option that is available to CLECs such as Allegiance.

For Allegiance, providing the loop itself is not a substitute for obtaining the loop UNE from the incumbent LEC because it would be prohibitively expensisve and would

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[31] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, paras. 52-53 (released Aug 7, 1998).
[32] Notice at para. 34.
[33] Local Competition First Report and Order at para. 380.
[34] Local Competition First Report and Order at para. 388.
[35] Local Competition First Report and Order at para. 389.

seriously delay Allegiance's ability to provide a competitive service. As the Commission properly concluded in the Local Competition First Report and Order, without access to unbundled local loops, new entrants would need to invest immediately in duplicative facilities to compete for customers, which would delay market entry and postpone the benefits of local telephone competition for consumers.[36] For the reasons given above, the Commission should adopt its tentative conclusion and find that loops, including dark fiber, DSL-capable, and mixed technology loops, are network elements that must be unbundled and provided on a nationwide basis.

B. Network Interface Devices

In the Local Competition First Report and Order, the Commission concluded that incumbent LECs must offer unbundled access to the network interface device (NID) as a network element. The Commission found that there was no evidence of proprietary concerns with respect to the NID, and thus the "impair" standard should apply. Allegiance submits that the NID should continue to be included on the list of unbundled network elements. As a practical matter, in most cases, the NID is the point of access to the customer's inside wire, and there is no cost-effective alternative mechanism for accessing the customer's inside wire. Therefore, as the Commission concluded, to be able to serve the customer, the CLEC must have access to the incumbent LEC's NID. In these cases, the incumbent LEC is the sole provider of the NID, and thus the Commission should conclude that failure to provide unbundled access to the NID would impair the ability of CLECs to compete, and should require that the NID be included on the nationwide list of unbundled network elements.

[36] Local Competition First Report and Order at para. 378.

C. Interoffice Transport

Interoffice transport is obviously essential to a CLEC's ability to offer service. Today, as in 1996, incumbent LECs are the only carriers that operate networks with the capability to provide interoffice transport throughout urban and non-urban areas. Consequently, as we show below, it is imperative that incumbent LECs continue to offer access to shared and dedicated transport as unbundled network elements. As the Commission previously concluded, access to interoffice transport raises no proprietary issues. Therefore, the "impair" standard applies.

In the Local Competition First Report and Order, the Commission concluded that incumbent LECs must offer unbundled access to interoffice transport, notwithstanding the fact that there are alternative suppliers of interoffice facilities in certain areas.[37] Alternative suppliers of interoffice transport operate only in a limited number of cities, and provide transport in small geographic areas within those cities. In addition, these alternative suppliers often do not have the capacity to provide transport needed by CLECs.

The situation in Atlanta is reasonably typical of the availability of transport in the larger U.S. cities in which Allegiance is providing service. In Atlanta, the sole alternative provider of interoffice transport offers service between only three central offices in downtown Atlanta. In addition, this provider is not always willing or able to make capacity available to Allegiance. As a result, Allegiance must rely heavily on access to BellSouth's unbundled transport network elements in order to offer competitive local exchange service.

[37] Local Competition First Report and Order at paras. 441 and 447.

In Atlanta, as in the other cities where Allegiance provides service or plans to provide service, Allegiance has only one alternative if it is denied access to the incumbent LEC's unbundled transport network elements: duplicate the incumbent's network. The barriers to entry are high, because the construction of transport requires access to rights of way, as well as significant capital. If Allegiance were required to provide its own transport, its ability to offer service to customers would be significantly delayed because of the time required as well as the need to divert capital to the building of transport facilities. Therefore, the Commission should conclude that denial of access to inter-office transport would impair the ability of CLECs to offer service.

In the Notice, the Commission also sought comment on whether the definition of transport should include dark fiber transport.[38] Allegiance uses dark fiber transport, and believes that incumbent LECs should be required to provide access to dark fiber as well as other types of interoffice transport. Without access to dark fiber as an unbundled network element, Allegiance's ability to offer service would be impaired.

D. Signaling Networks and Call-Related Databases

In the Local Competition First Report and Order, the Commission concluded that incumbent LECs must offer unbundled access to signaling links and signal transfer points, to call-related databases, and to service management systems (SMS).[39] With respect to signaling links, signal transfer points, and call-related databases, and SMS not used for other Advanced Intelligent Network (AIN) capabilities, the Commission found no proprietary concerns, because these elements adhere to Bellcore standards, and found

[38] Notice at para. 34.
[39] Local Competition First Report and Order at paras. 479, 484, and 493.

limited proprietary concerns with respect to SMS used for AIN capabilities.[40] Under the definition of "proprietary" proposed by Allegiance, none of the elements that adheres to a Bellcore standard would be considered proprietary, and therefore the "impair" standard would apply.

As the Commission found in the Local Competition Report and Order, the vast majority of calls made over incumbent LEC networks are set up and controlled by separate local Signaling System 7 networks.[41] In the markets in which Allegiance offers or plans to offer service, there are no local alternatives to the incumbent LEC local signaling system. There are significant advantages to using the incumbent LEC local signaling system, including engineering efficiencies. By contrast, there are significant disadvantages to attempting to use a national signaling system. Because any national signaling system must connect back to the incumbent LEC local signaling system in order to route calls originating and terminating in the incumbent LEC service area, using a national system provides no advantages, and introduces an additional point of failure as well as being inefficient from an engineering standpoint.

In addition, there is an inherent advantage in obtaining access to call-related databases from the source of local signaling because these databases are associated with the local network. In particular, the 800 database, local number portability database, and AIN platform are inherently related to the signaling network. In the absence of a substitute provider of local signaling, it is necessary for CLECs to use the incumbent LEC for local signaling, and for the related databases as well. Finally, there is no alternative to the incumbent LEC's AIN capabilities. Because AIN is a service platform

[40] Local Competition First Report and Order at paras. 481, 490, 497-98.
[41] Local Competition First Report and Order at paras. 482.

that incumbent LECs use to build their own services, CLECs cannot offer comparable services without access to AIN capabilities. For these reasons, the Commission should conclude that access to signaling, call-related databases, and SMS must be offered as unbundled network elements.

E. Operations Support Systems

The Commission repeatedly has ruled that CLECs need access to the incumbent LEC's OSS in order to provide service to their customers at a level comparable to the service provided by the incumbent LECs to their customers. Indeed, the Commission has determined that "a competing carrier that lacks access to operations support systems equivalent to those the incumbent LEC provides to itself, its affiliates or its customers, 'will be severely disadvantaged, if not precluded altogether from fairly competing in the local exchange market.'" [42]

In the record before the Commission at the time of the Local Competition First Report and Order, incumbent LECs argued that there were proprietary interfaces used to access OSSs. It is true that CLECs obtain access to an incumbent LEC's OSS through an interface that contains proprietary software. Competitive LECs, however, need not and do not obtain access to that software when they use the interface. Therefore, under Allegiance's proposed definition of proprietary, access to OSS does not raise any proprietary issues and, consequently, the "impair" standard should be applied.

[42] See, e.g., Application by BellSouth Corporation, et al, Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231 (rel. Feb. 4, 1998), at para. 20, citing Local Competition First Report and Order at para. 482 and Application by BellSouth Corporation, et al, Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208 (rel. Dec. 24, 1997), at para. 82.

Under Allegiance's proposed "impair" standard, the Commission would look to the factors identified above, including whether the incumbent LEC is the sole provider. By definition, the incumbent LEC is effectively the sole provider of the element, because the incumbent LEC is the only entity with access to the crucial underlying information, such as the large base of information pertaining to its customers, necessary to perform pre-ordering, ordering and provisioning functions, as well as service interval information, and maintenance histories. Without access to that information, the CLEC's ability to serve the customer is significantly curtailed. Therefore, the Commission should conclude that access to OSS should continue to be offered as an unbundled network element on a nationwide basis. Even assuming, arguendo, the Commission were to conclude that the incumbent LECs' operations support systems are proprietary, it is clear that access to OSS is necessary for CLECs to provision service competitive with that of the incumbent LECs. Under Allegiance's proposed definition, necessary should be interpreted to mean that without the element, the ability of requesting carriers to compete would be thwarted. As the Commission concluded in the Local Competition First Report and Order, access to OSS is required to order, provision and maintain unbundled elements and resold services, and to market competing services effectively to an incumbent LEC's customers.[43] For example, without information such as the facilities and services assigned to a particular customer, the CLEC would be unable to provision service to that customer.

F. Operator Services and Directory Assistance

In the Local Competition First Report and Order, the Commission concluded that parties had not identified proprietary concerns with respect to access to operator services

[43] Local Competition First Report and Order at para. 518.

and directory assistance (OS/DA), and that without such access, the ability of requesting carriers to provide service would be impaired.[44] Because access to OS/DA does not raise any proprietary issues, the "impair" standard applies.

Without access to incumbent LEC operator services and directory assistance, Allegiance's ability to provide service to its customers would be impaired. While there are competing providers of operator services and directory assistance, to date the services offered by these alternative providers have been known to be significantly less reliable and of lesser quality than that provided by the incumbent LECs. The incumbent LEC continues to have the vast majority of the subscriber lines, and therefore is the primary source of the vast majority of data for all other vendors of OS/DA databases. The constant need to update third party OS/DA databases results in delays, during which the third party database is inaccurate or incomplete.

The need to update third party OS/DA databases also creates an additional opportunity for the introduction of errors; it is important to Allegiance, that the database that has Allegiance customers' names and numbers be as valid as possible. Inaccuracies in the database can lead to failure to reach Allegiance customers. The delay before the accurate information is accessible can cause problems, particularly for business customers. Consider the case of the Allegiance customer that is switching to Allegiance from an incumbent LEC. If Allegiance has access to the incumbent LEC database, the customers' name and number will stay in the same database. There is substantially less opportunity for the introduction of error, and the likelihood that the customer's customers will be able to find the number, even on the first day of service, is substantially higher.

[44] Local Competition First Report and Order at paras. 539-540.

Similarly, there is no comparable substitute for incumbent LEC operator services. While there are alternative providers of operator services, they generally are national service providers, and do not have the type of familiarity with the local area that is enjoyed by the incumbent LEC local operators. For example, local operators may have language skills that are useful in serving ethnic communities in their local service areas.

At present, Allegiance believes that the absence of access to OS/DA would impair our ability to provide service, and therefore recommends that the Commission require access to OS/DA on a nationwide basis. The ability to access reliable OS and DA services is an extremely important factor for consumers who depend on those services for assistance in placing calls, assistance in obtaining information and finding telephone numbers and, in some cases, assistance in contacting police or fire departments in the event of an emergency. If CLECs cannot offer the same quality of OS/DA that the incumbent LEC provides, customers may decline to switch providers.

III. Modifications to Unbundling Requirements

In the Notice, the Commission sought comment on whether it should adopt a mechanism by which network elements would no longer have to be unbundled at a future date.[45] Allegiance recognizes that, over time, a competitive wholesale market may well develop for specific unbundled network elements, but such a market does not currently exist. If the Commission decides to develop a procedure by which the incumbent LECs may petition the FCC for removal of a particular element from unbundling requirements, it must require that the incumbent LEC prove that the element may be obtained on a

[45] Notice at para. 36.

competitive basis from other suppliers as readily as it can be obtained from the incumbent LEC.

It seems unlikely that competitive wholesale markets for particular elements will develop uniformly across the country. Therefore, in developing a procedure for the removal of elements, the Commission may wish to consider using smaller geographic markets. One possible way of defining the relevant geographic area is the incumbent LEC service area within each state. Any larger geographic area may well prove unworkable. For example, if two large incumbent LECs operate in adjacent areas of a single state -- such as GTE and Southwestern Bell Telephone Company in Texas -- the availability of competitive alternatives in GTE's territory should not preclude CLECs from continuing to have access to unbundled elements from Southwestern Bell if there are no competitive alternatives in Southwestern Bell's territory. Allegiance also believes that it is important for the Commission, at least initially, to be involved in evaluating petitions to remove elements from unbundling requirements. Once the Commission has gained some experience, it may be possible to formulate guidelines and then turn the process over to state commissions.

The Notice also sought comment on whether there should be a specific period, for example two years, during which incumbents would be restricted from seeking removal of elements from unbundling requirements.[46] Allegiance strongly recommends that the Commission adopt a rule that guarantees that network elements will be available for at least two years, in order to provide certainty and allow competition to develop.

[46] Notice at para. 37.

In addition, the modification process established by the Commission must take full account of what a requesting carrier needs to provide the service it seeks to offer, as mandated by the statute. For example, if AT&T, through its mergers with cable companies, at some point in the future is able to provide loops to its own customers, that will not create a competitive wholesale market for loops. A competitive wholesale market could not exist unless AT&T were to unbundle its network to make the loops available to requesting carriers and the loops were of the same quality that a CLEC is able to get from the incumbent LEC. In light of the fact that AT&T is under no statutory obligation to unbundle its network, such a scenario is not likely to develop. In evaluating the state of competition in a wholesale market for a given element, the Commission must look to the requirements of CLECs such as Allegiance, and not only at the requirements of large companies such as AT&T.

IV. Conclusion

The Commission's decision in the Local Competition First Report and Order to establish a national policy with respect to unbundled network elements has been critical to the development of local competition. Allegiance has deployed service across the country through the combined use of Allegiance facilities and unbundled network elements. In order to support the continued growth of local competition, the Commission should require access to unbundled network elements on a national basis, including loops, network interface devices, interoffice transport, signaling and call-related databases, operations support systems, and operator services and directory assistance.

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Certificate of Service

I, Ruth Milkman, hereby certify that on this 26th day of May 1999, copies of the foregoing Comments of Allegiance Telecom, Inc. were hand delivered to the parties listed below.

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