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

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63

REPLY COMMENTS OF ALLEGIANCE TELECOM, INC.

Robert W. McCausland
Mary C. Albert
Allegiance Telecom, Inc.
1950 Stemmons Freeway, Suite 3026
Dallas, Texas 75207-3118
(214) 261-8730

Patrick Donovan
Kemal Hawa
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Dated: November 29, 1999

Counsel for Allegiance Telecom Inc.

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SUMMARY

IXCs are unlawfully refusing to pay CLEC tariffed interstate access charges. This proceeding presents an opportunity for the Commission to reaffirm its determination in *MGC Communications* and previous regulatory decisions that customers of tariffed services, including IXCs as customers of interstate access services, must pay tariffed charges pending resolution of any dispute over rates. A prompt determination that IXCs must pay CLEC tariffed interstate access charges will restore orderly business practices to the interstate access marketplace. The Commission should additionally enforce this requirement by issuing notices of apparent liability for forfeitures to those IXCs - principally AT&T and Sprint - that are the worst offenders in this regard.

There is little basis in the record for embarking on new regulatory programs to regulate CLEC interstate access charges. The best approach would be for the Commission to rely on marketplace forces to discipline to the extent necessary CLEC interstate access charges.

If the Commission chooses to adopt a benchmark approach, it should take care to assure that this does not create undue economic or administrative burdens for CLECs. The Commission should not establish the benchmark rate for CLECs as the rate of the ILEC in whose service area CLECs are competing. ILEC rates are not suitable for use as a benchmark because CLECs have higher costs per customer. Investors and lenders demand higher returns from CLECs than ILECs. ILEC rates are also averaged across study areas making them unsuitable for

application to CLECs which typically could not average across such a wide geographic area. The Commission should assure that any benchmark does not directly, or as a practical matter, require CLECs to adopt the same rate structure for interstate access charges as ILECs.

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REPLY COMMENTS OF ALLEGIANCE TELECOM, INC.

Allegiance Telecom, Inc. ("Allegiance") submits these reply comments in response to the August 27, 1999 *NPRM* issued in the above-captioned proceedings.[1]

I. IXCS' REFUSAL TO PAY TARIFFED ACCESS CHARGES IS UNLAWFUL

Initial comments amply demonstrate that the refusal of interexchange carriers ("IXCs") to pay CLECs' tariffed interstate access charges is egregiously unlawful. As pointed out by Allegiance and other commenters, the Commission prohibits customers of tariffed interstate communications services from refusing to pay tariffed charges while continuing to receive

[1] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262,FCC 99-206, released August 27, 1999 ("*NPRM*" or "*Pricing Flexibility Order*").

service.[2] In addition, the Commission has specifically determined that it is unlawful for AT&T to refuse to pay tariffed interstate access charges to CLECs while continuing to accept service from them.[3] Two of the three largest IXCs -- AT&T and Sprint -- are ignoring this determination. It is unprecedented and improper for carriers to flout the Commission's requirements and orders to this extent.

Initial comments also make clear that the IXCs are choosing to act illegally in this regard even as they continue to solicit customers of the CLECs whose tariffed access charges they are refusing to pay. Thus, AT&T and other carriers market and provide their presubscribed long distance, toll free, and dial around services without any exclusion for CLECs whose interstate access charges they are ignoring.[4] In short, AT&T, Sprint and other IXCs are engaged in a pattern of conduct that seeks to exploit the benefits of their unlawful "self-help" practices. Allegiance fully endorses the characterization of this conduct as arrogant and illegal.[5] The Commission should move swiftly to end, and appropriately sanction, this conduct.

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[2] Allegiance Comments at 3, 4; MGC Comments at 11 citing *Business WATS, Inc. v. AT&T*, 7 FCC Rcd 7942 (1992)("a customer ... is not entitled to the self-help measure of withholding payment of tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper ...").

[3] *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999) ("*MGC Communications*").

[4] MGC Comments at 9.

[5] MGC Comments at 11.

II. THE COMMISSION MUST RESTORE ORDER TO THE INTERSTATE EXCHANGE ACCESS MARKET

The IXCs' campaign of illegal self-help has the potential of retarding the growth of competitive alternatives and of creating significant harm to prospective consumers of both CLEC and IXC services. The Commission should neither tolerate the illegal restriction of cash flow to CLECs created by the IXCs' abuse of power nor the reduction in competitive alternatives available to consumers as a result of the IXCs' actions. The self-serving approaches of IXCs such as AT&T and Sprint are hindering the achievement of the pro-competitive goals of the Act.

It has simply never been the case that IXCs or any carriers have given themselves the license to refuse to pay tariffed charges for service. The Commission should act promptly in this proceeding, regardless of other decisions it might make in this proceeding, to determine that IXCs must pay CLEC tariffed interstate access charges. This will restore order and predictability to the interstate access market that is essential for business planning and development of facilities-based local competition.

Allegiance points out that Sprint contends that the amount of CLEC interstate access charges that it disputes and that it is apparently not paying is growing at the rate of $2.3 million per month.[6] This amount is apparently only the portion of CLEC access charges that Sprint contends are above ILEC access charges. In contrast, AT&T is refusing to pay many CLEC access charges. While these amounts are small in comparison to these IXCs' total access costs,

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[6] Sprint Comments at 18.

they represent a substantial and very harmful loss of revenue to CLECs. CLECs cannot be expected to meet the pro-competitive goals of the Act if they cannot plan for and expect that IXCs will pay tariffed interstate access charges.

III. THE COMMISSION SHOULD MAINTAIN UNIVERSAL CONNECTIVITY

The worst possible regulatory alternative discussed in the *NPRM* from a public interest perspective would be to permit IXCs to decline to provide service to customers served by CLECs whose access charges the IXC views as unreasonable. As commenters point out, this would reduce competition and harm consumers because CLECs will not be able to enter a market if consumers are unable to obtain service from the IXC of their choice.[7] Calling parties currently have a well-founded expectation that calls will be completed, and IXCs should honor this expectation.[8] "Any solution that results in long-distance carriers refusing to terminate calls to CLECs will create chaos for consumers."[9] In addition, adopting a policy allowing IXCs to refuse to terminate calls to carriers indiscriminately would eviscerate the subscriber's right to terminate calls to anyone connected to the public switched network and "would seriously undermine the ubiquity of the public switched network."[10] This would also undermine the

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7 NRTA Comments at 6, 8.

8 TTS Comments at 4.

9 C&W Comments at 3.

10 ACI Comments at 7.

competitive impact of the 1996 Act.[11] Moreover, there would be no rational basis for distinguishing in this manner between CLEC and ILEC access charges. If an IXC can refuse to terminate calls to, or accept calls from, a CLEC it could also refuse to terminate or accept calls from the ILECs. This would cause network reliability and universal service to deteriorate.[12] Network reliability will suffer because end users will not be assured that their calls will always be completed.[13] Universal service will suffer because IXCs are likely to abandon rural areas where the cost of providing service is greater.[14]

Further, as pointed out by Allegiance in initial comments, allowing IXCs to refuse to accept or terminate calls would adversely affect the public health and safety.[15] Accordingly, for all these reasons, it would seriously disserve the public interest to determine anything in this proceeding other than that IXCs must complete long distance calls even if they don't like the interstate access charges assessed by some carriers.

Moreover, it would be unlawful for IXCs to refuse to complete calls. Allegiance and numerous commenters point out that Sections 251(a) and 201 require IXCs to interconnect with

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11 *Id.*

12 OPASTCO Comments at 3, 5.

13 *Id.*

14 *Id.*

15 Allegiance Comments at 8.

LECs.[16] These provisions establish, and require the Commission to achieve, universal connectivity within the public switched telephone network. In addition, commenters make the excellent point that IXCs could not discontinue service to a CLEC's customers without prior approval under Section 214 of the Act and filing an application and having it granted pursuant to Section 63.71 of the rules.[17] - The Commission could not, however, determine that it would be in the public interest for an IXC to refuse to complete calls for all of the reasons discussed above. Accordingly, a section 214 application for discontinuance on the ground that a CLEC's interstate access charges are too high could not be granted.

IV. ANY REFUSAL TO PROVIDE SERVICE SHOULD BE APPROPRIATELY COUNTERBALANCED AND CONDITIONED

Several commenters in addition to Allegiance point out that if the Commission permits IXCs in any circumstances to refuse to complete calls it should additionally establish a "fresh look" opportunity for customers of the IXC to switch to other IXCs willing to terminate calls to the CLEC[18] and also to permit CLECs to notify customers that the IXC may not complete calls.[19] A "fresh look" opportunity that would permit customers to switch without penalty to the IXC of

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[16] Allegiance Comments at 5, 10; NRTA Comments at 5 ; RCI Comments at 1; ACI Comments at 6.

[17] 47 C.F.R. Section 63.71. NRTA Comments at 5; NTCA Comments at 4; OPASTCO Comments at 6; ACI Comments at 6.

[18] Allegiance Comments at 11; ALTS Comments at 28.

[19] *Id.*

their choice would equitably balance the IXC's refusal to provide service with consumer choice -- if the IXC believes that a CLEC's interstate access charges are too high, it should free its customers to be served by IXCs who are willing to pay the tariffed rates to originate and terminate their calls.. Authorizing CLECs to notify customers that a particular IXC may not terminate calls, to the extent they do not already have authority to do so, will assure that customers are able to make an informed choice as to which IXC they want to serve them. This notification to consumers should specifically include notification to customers of 8XX Toll Free services.

If it allows IXCs not to complete calls, the Commission should additionally go a step further and require that IXCs in their own advertising make clear that they may not complete calls in all instances. Allegiance believes that in a regulatory environment in which IXCs are not required to complete calls, IXCs' current advertising would actively mislead customers into believing that IXCs are offering universal connectivity. Such a situation should be prevented by Commission action.

V. ANY BENCHMARK SHOULD NOT BE SET AT OR BELOW THE ILEC RATE

It is possible that a benchmark approach could play a useful role in governing CLEC interstate access charges. In order for this to be successful, however, the Commission should reject the facile suggestion and unsupported assertions in initial comments that the reasonable rate level for CLECs is the rate of the ILEC in whose region the CLEC is competing.[20] Instead,

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[20] Sprint Comments at 21.

if the Commission adopts a benchmark approach it should set any benchmark for a CLEC well above the ILEC with which it competes. Or, if the Commission adopts a nationwide benchmark rate, it should set the rate at the high end of the interstate access rates charged by independent local exchange carriers, such as NECA rates.

As pointed out in initial comments, it is not unreasonable for CLECs to charge more than the largest ILECs because, as start-up companies, they have higher per customer costs.[21] This was also recognized by the *NPRM*.[22] As new market entrants, they also experience considerably higher risk than ILECs. Investors and lenders demand higher returns from CLECs than from ILECs. Therefore, it is reasonable for CLECs to charge higher rates. ILEC switched interstate access charges are also averaged across study areas - all of the ILEC's operations in a state. This makes the ILEC rates in any given area totally unsuited for use as a benchmark for a CLEC with fewer customers among whom, and a smaller geographic area over which, it can recover its costs. In this connection, even if an ILEC's rates in an urban area are above its costs of serving that area because of averaging, those rates remain unsuitable as a benchmark. CLECs are more similar to independent ILECs operating in rural areas in terms of lack of economies of scale and lower subscriber density. In addition, a key goal of the 1996 Act is to promote facilities-based local service competition. A constricted benchmark could unduly cramp the ability of CLECs to invest in network infrastructure.

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[21] ALTS Comments at 11.

[22] *NPRM*, para. 244.

Accordingly, if the Commission adopts a benchmark approach in any respect to govern CLEC access charges, it should set the benchmark rate for a CLEC well above the ILEC rate with whom it is competing. If the benchmark rate is based on ILEC rates, the Commission should use the highest NECA rates.

VI. THE COMMISSION MUST ENFORCE IXC OBLIGATIONS TO PAY TARIFFED CLEC INTERSTATE ACCESS CHARGES

The Commission should take steps to vigorously enforce the obligation of IXCs to pay CLECs' tariffed interstate access charges. The Commission should determine that under current rules and outstanding orders IXCs are required to pay tariffed CLEC interstate access charges and that IXCs are subject to forfeitures under Section 503 of the Act. Indeed, after *MCG Communications*, IXCs' refusals to pay interstate access charges constitute precisely the willful and repeated violations of the Commission's requirements that warrant issuance of a notice of apparent liability ("NAL") for forfeiture. Allegiance urges the Commission to promptly issue NALs to AT&T, Sprint and other IXCs that are flagrantly and illegally refusing to pay CLEC tariffed interstate access charges. In this connection, each day of refusing to pay would be subject to a $100,000 penalty with $1,000,000 cap for each instance of a continuing violation.[23] The Commission should impose the maximum penalty permitted under the statute. Allegiance notes that section 503 applies to "any person" and, therefore, applies to corporate officials who knowingly, willfully, and repeatedly violate Commission requirements.

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[23] *See* 47 U.S.C. Section 503(b)(2)(B).

VII. THERE IS NO REASON TO REGULATE CLEC INTERSTATE ACCESS CHARGES

For all the reasons discussed above, the most important action that should come out of this proceeding is the determination that IXCs must pay CLEC tariffed interstate access charges and vigorous enforcement of that requirement. The record, however, reflects little basis for taking the other regulatory steps envisioned in the *NPRM* looking toward regulation of CLEC interstate access charges. Indeed, there is a widespread support among commenters that it is not necessary to take any steps in this proceeding concerning regulation of CLEC interstate access charges. Thus, there is essentially no record support that CLEC access rates are excessive or that the marketplace cannot regulate CLEC pricing.[24] Even ILECs agree that there is no basis for the Commission to embark on new regulatory programs governing CLEC interstate access charges.[25]

Nor do CLECs possess market power in provision of interstate access services, especially in comparison to the enormous bargaining power wielded by IXCs. CLECs do not have market power because large IXCs may exert their considerable market strength during the bargaining process.[26] CLECs are relatively small companies and face stiff competition.[27] IXCs generally have several available methods for reaching end users, whereas CLECs must be able to access

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[24] ACI Comments at 2.

[25] USTA Comments at 26.

[26] RCI Comments at 1.

[27] Cox Comments at 3.

IXC services in order to remain competitive.[28] IXCs have a significant bargaining advantage over CLECs, and generally do not hesitate to exploit this advantage.[29]

Allegiance urges the Commission not to put IXCs "in a position where they can dictate to the CLECs ... they might thereby swing the pendulum too far in the other direction, forcing the CLECs to accept uneconomically low access charges ..."[30] In particular, the Commission should reject the approach suggested by AT&T which would enhance IXCs bargaining power and assure that IXCs can continue to refuse to pay access charges with impunity. Thus, AT&T urges the Commission to encourage CLECs to detariff interstate access charges so that IXCs can negotiate these prices downward.[31] AT&T additionally urges that the Commission require that CLECs that want to charge higher than what AT&T considers to be a competitive rate to justify those rates by onerous cost-of-service proceedings.[32] Thus, AT&T's suggestion is little more than an effort to enshrine in the Commission's rules a recipe to exploit IXCs' already overwhelming power in negotiating access charges with CLECs. The Commission should reject AT&T's self-serving proposal as presenting any realistic basis for moving forward in this proceeding.

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28 *Id.*

29 *Id.*

30 MediaOne Comments at 2,.3.

31 AT&T Comments at 27.

32 *Id.* at 31.

Instead, as discussed, the Commission should provide that IXCs must pay tariffed CLEC interstate access charges subject to any complaint proceeding that IXCs may choose to file.

VIII. ANY BENCHMARK APPROACH MUST BE CAREFULLY CRAFTED TO AVOID UNDUE BURDENS

If the Commission adopts a benchmark approach, it must establish the role that a benchmark will play in governing CLEC access charges that will not be unduly burdensome to CLECs or regulators. As discussed, the rate must be high enough so as not to inhibit CLECs' ability to provide service. In addition, setting a low benchmark would likely result in a large number of rate proceedings that would be burdensome to CLECs and the Commission, which does not have adequate resources to handle *even* its present and increasing workload.

The Commission should also limit the role of the benchmark to only defining the rate above which the CLEC will not enjoy a strong presumption of lawfulness in any complaint proceeding initiated by an IXC. The Commission should determine that the IXC bears the burden of proof in all cases that the CLEC rate is unreasonable, whether the rate is above or below the benchmark.

In no event should the Commission determine that the meaning of the benchmark is that IXCs need not pay above-benchmark tariffed rates. That would essentially adopt the *status quo* in which two of the three largest IXCs – AT&T and Sprint -- have unilaterally ordained RBOC and GTE rates as the benchmark and, as discussed, are engaging in an precedented and flagrantly illegal defiance of their legal obligations to pay tariffed access charges where they differ from

those charged by the RBOCs and GTE. For all the reasons discussed, allowing this to continue would disserve the public interest. Accordingly, the Commission should emphatically conclude that IXCs must pay tariffed CLEC interstate access charges in all cases - both below and above-benchmark rates - subject to any complaint that an IXC may choose to file.

The Commission should also take care that it does not, directly or indirectly, require CLECs to have the same access charge rate structure as ILECs. CLECs are not subject to any of the rate structure requirements applicable to ILECs' interstate access charges and frequently have different rate structures. Some CLECs do not charge the PICC, for example. If the Commission establishes a benchmark, it should also establish a methodology by which CLECs will be able to convert their rates to the rate structure embodied in the benchmark for purposes of making a benchmark comparison. Absent such a methodology, it will be impossible for carriers or regulators to know where a CLEC's rates stand in relation to the benchmark.

The Commission should also reject any suggestion that a benchmark approach would not be burdensome and expensive because there would be a cost-of-service "safety valve" pursuant to which CLECs could seek to justify above-benchmark rates. Cost-of-service proceedings are very burdensome to both carriers and regulators. The Commission does not have the resources to conduct cost-of-service proceedings. Indeed, the Commission has not conducted a genuine cost-of-service proceeding for many years. Therefore, if the Commission adopts a benchmark approach, it should establish a streamlined, readily available and quick

method by which CLECs could seek to justify above-benchmark rates, rather than a full blown cost-of-service proceeding.

IX. CONCLUSION

For these reasons, the Commission should promptly determine that IXCs must pay CLEC tariffed interstate access charges. The Commission should enforce this requirement by issuing notices of apparently liability for forfeitures to those IXCs that are the worst offenders in this regard. If the Commission chooses to adopt a benchmark approach, it should not establish the benchmark rate for CLECs as the rate of the ILEC in whose service area CLECs are competing. The Commission should assure that any benchmark does not directly, or as a practical matter, require CLECs to adopt the same rate structure for interstate access charges as ILECs.

Patrick Donovan
Kemal Hawa
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Counsel for Allegiance Telecom Inc.

Robert W. McCausland
Mary C. Albert
Allegiance Telecom, Inc.
1950 Stemmons Freeway, Suite 3026
Dallas, Texas 75207-3118
(214) 261-8730 (202) 424-7500

Dated: November 29, 1999

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Comments of Allegiance Telecom, Inc. have been served to the persons on the attached list.

Linda Crelling

Date: November 29, 1999