

October 25, 2000

**EX PARTE**

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
Room TW-A325  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: CC Docket No. 96-98

Dear Ms. Salas:

Several parties have requested that the Commission reconsider its holding in the UNE Remand Order that competitive LECs without access to unbundled local switching are not impaired in their ability to serve customers with four or more lines in density zone 1 in the top 50 metropolitan statistical areas (“MSAs”) where the incumbent LEC provides nondiscriminatory access to the enhanced extended link, or “EEL.”<sup>1</sup> Allegiance Telecom, Inc. (“Allegiance”), Cablevision Lightpath, Inc. (“Lightpath”), Cbeyond Communications (“Cbeyond”), Time Warner Telecom (“TWTC”), and XO Communications (“XO”) respectfully submit that the Commission’s decision in that order was, in general, supported by the evidence in the record, and was based on sound policy grounds.

In its examination of the supply of local switching from non-incumbent LEC sources in the UNE Remand Order, the Commission considered a number of factors, including the number and location of competitive switches and the ability of competitive LECs to serve discrete market segments, such as residential customers, using self-provisioned or third-party switches. See UNE Remand Order ¶¶ 276-299. The Commission found that “a significant number of competitive switches” had been deployed in the top 50 MSAs. Id. ¶ 281. Specifically, of the 700 competitive switches deployed as of March 1999, the Commission found that roughly 61% had been installed in the top 50 MSAs. Id. ¶ 280. Furthermore, the Commission found that 48 of the top 50 MSAs contained four or more competitive switches. Id.<sup>2</sup>

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<sup>1</sup> Local Competition Provisions of the Telecommunications Act of 1996, UNE Remand Order, 15 FCC Rcd 3696, ¶ 278 (1999) (“UNE Remand Order”).

<sup>2</sup> Only two MSAs, Cincinnati and Las Vegas, had fewer than four competitive switches at that time. UNE Remand Order ¶ 280.

Based on these findings, the Commission held that incumbent LECs need not provide unbundled switching in the top 50 MSAs, subject to certain qualifications. Those qualifications were designed to ensure that this “exception” to the Commission’s unbundling rules would be appropriately tailored. First, in an overabundance of caution, the Commission limited the exception to only the densest calling zones (zone 1) within the top 50 MSAs. Id. ¶¶ 284-285. Second, to ensure that competitors would be able to serve the residential and small business market, the Commission limited the exception to customers with four or more lines. Id. ¶¶ 290-298. Finally, to qualify for the exception, the Commission required incumbent LECs to provide competitors nondiscriminatory access to the EEL. Id. ¶¶ 288-289. The Commission reasoned that the EEL would allow competitive carriers to decrease their collocation costs and increase their efficiencies by transporting aggregated loops to their central switching facilities, thus eliminating an impairment that might otherwise result from the Commission’s exception to the unbundled switching rules. Id. ¶ 288.

The Commission’s decision in the UNE Remand Order was, except for the zone 1 restriction, eminently reasonable. The ruling relieved incumbent LECs of their obligation to provide unbundled local switching in at least some of the areas in which there is evidence that competitors are able to economically self-provision switches, and in fact are doing so, thereby furthering one of the primary goals of the 1996 Act -- facilities-based competition. At the same time, it encouraged new investment by facilities-based competitors, thus sending efficient entry signals to the marketplace and allowing for increased innovation. Nor did the Commission’s ruling harm residential competition, as incumbent LECs must continue to provide access to unbundled switching for “virtually all residential customers.” Id. ¶ 293. Indeed, as the Commission has recognized, establishing the preconditions for competition in the business customer market ultimately benefits the mass market.<sup>3</sup>

Furthermore, the evidence submitted in this proceeding since the UNE Remand Order was released confirms that competition is thriving in markets where the requirement to provide unbundled switching has been removed. For example, Allegiance, Lightpath, TWTC, and XO currently market and provide local service using self-provisioned switches to customers in 26, 3, 14, and 32 of the top 50 MSAs, respectively.<sup>4</sup> Indeed, Allegiance specifically targets the small-to-medium business market, focusing on customers with 4 to 24 lines. Similarly, Cbeyond, which has not yet begun to provide local service, plans to target small business customers with 5 to 25 lines. Moreover, Allegiance, Lightpath, TWTC, and XO generally provide services using their own switches throughout the MSAs served. This fact supports the conclusion that, if any

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<sup>3</sup> See Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, ¶ 266 n.349 (1997).

<sup>4</sup> Further, by year end 2001, Allegiance plans to enter 10 more of the top 50 MSAs using its own switches, and XO plans to have entered all 50 of the top 50 MSAs using its own switches. Cbeyond also plans to enter 25 of the top 50 MSAs using its own switches beginning early 2001. Clearly, there is no impediment to serving the small-to-medium business market without access to unbundled switching.

change is to be made to the existing rules, it should be the extension of the restriction on switch unbundling throughout all calling zones in the top 50 MSAs.<sup>5</sup>

More generally, Verizon has submitted evidence in this proceeding that the number of competitive switches has increased by 80% in its East territory since the Commission released the UNE Remand Order.<sup>6</sup> Similarly, according to SBC, in comparison to the 700 competitive switches that had been deployed as of March 1999, “CLECs now have deployed in excess of 1100 switches nationwide (a 50% increase from one year ago),”<sup>7</sup> and “for the past 2 years, they have been deploying circuit switches at a rate of a switch a day.”<sup>8</sup> As the Supreme Court counseled, in determining whether the failure to obtain access to a particular UNE would impair a competitor’s ability to provide service, the “Commission cannot blind itself to the availability of elements outside the incumbent’s network.” AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S. Ct. 721, 735 (1999). There is therefore absolutely no basis in the record for narrowing the Commission’s prior ruling.<sup>9</sup>

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<sup>5</sup> In fact, there is further evidence on the record to support this conclusion. See, e.g., Letter from Melissa E. Newman, Vice President - Federal Regulatory, U S West, to Magalie R. Salas, Secretary, FCC, at 2-3 (filed June 12, 2000) (submitting data showing that competitive switches have been deployed throughout the top 50 MSAs in U S West’s region, not just in density zone 1 areas); Letter from Gary L. Phillips, General Attorney, SBC, to Magalie R. Salas, Secretary, FCC, Attachment at 1-3 (filed May 19, 2000) (submitting data in support of an expansion of the exception to all wire centers in the top 50 MSAs); Letter from Joseph J. Mulieri, Director, Government Relations - FCC, Bell Atlantic, to Magalie R. Salas, Secretary, FCC, Attachment at 3 (filed May 12, 2000) (“83% of the rate centers that are served by at least one competitor’s switch in the top 50 MSAs in [Verizon’s] region are not in Zone 1 areas”).

<sup>6</sup> See Letter from W. Scott Randolph, Director - Regulatory Matters, Verizon, to Magalie R. Salas, Secretary, FCC, Attachment at 2 (filed Sept. 27, 2000).

<sup>7</sup> Compare Letter from Gary L. Phillips, General Attorney, SBC, to Magalie R. Salas, Secretary, FCC, Attachment at 2 (filed May 19, 2000), with UNE Remand Order ¶ 280.

<sup>8</sup> Letter from Gary L. Phillips, General Attorney, SBC, to Magalie R. Salas, Secretary, FCC, at 3 (filed June 13, 2000).

<sup>9</sup> It should be noted that the Commission has recognized that it is proper to consider the effect of its rulings on competitive carriers’ established lines of business. See Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification ¶ 18 & n.56 (June 2, 2000) (citing TWTC comments at 19). To change the rules governing unbundled switching at this point would allow users of the UNE-platform to undercut facilities-based carriers such as Allegiance, Cbeyond, Lightpath, TWTC, and XO. This arbitrage opportunity would make it more difficult for these carriers to recover their investments and would discourage facilities-based competition, thereby undermining a fundamental goal of the 1996 Act.

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Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), one copy of this letter is being filed electronically for inclusion in the above-referenced proceeding.

Sincerely,

\_\_\_\_\_/s/\_\_\_\_\_  
Kevin Joseph, Vice President  
Government Affairs  
Allegiance Telecom

\_\_\_\_\_/s/\_\_\_\_\_  
Lee Schroeder, Vice President  
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