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September 13, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Ex Parte

CC Docket Nos. 01-338, 98-147, 96-98, 01-318
CPD/CCB File No. 01-06

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on September 12, 2002, Jonathan Askin, General Counsel, Association for Local Telecommunications Services, Mary Albert, Vice President Regulatory and Interconnection, Allegiance Telecom, Inc., Richard Metzger, Vice President Regulatory, Focal Communications Corp., Cathy Massey, Vice President Regulatory, and Chris, McKee, XO Communications, Inc., and the undersigned, on behalf of the above and Mpower Communications Corp., met with the following persons concerning issues in the above-captioned proceedings: Christopher Libertelli, Office of the Chairman; Matthew Brill, Office of Commissioner Abernathy; Sam Feder, Office of Commissioner Kevin Martin; and Tom Navin, Rob Tanner, and Jeremy Miller, Competition Policy Division, Wireline Competition Bureau. Mary Albert attended only the meeting with Msrs. Navin, Tanner, and Miller. Cathy Massey and Jonathan Askin did not attend the meeting with Sam Feder. We presented the views set forth in the attached document which was provided at the meeting.

Sincerely,



Patrick J. Donovan

“No Facilities”

Verizon Policy

- In May 2001, Verizon initiated a training program for its employees instructing them to decline to fill UNE orders due to “no facilities” in a wide variety of circumstances.¹ In July 2001, it sent an industry letter to CLECs.
- Rejection rates: XO - 50%; Allegiance – 22%;² Cavalier – 49%.³
- Verizon admits it rejects 10% -30%.⁴
- Verizon will “build” for its retail customers.
- No other BOC has this policy.

Impact

- CLECs must decline the customer or purchase special access. Imposes delays, additional costs on CLECs that thwart competition.
- Verizon states that it plans to revise its special access tariffs to require minimum terms of one year, which means that CLECs will be forced to pay higher special access rates for a full year before converting the facilities to UNE status.
- Forecloses CLECs’ ability to compete in the broadband market in the Verizon region.
- Forced CLECs out of business – Broadslate.

“No Facilities” Is A Response to Competition

- Verizon established this policy (successfully so far) to hinder competition in provision of broadband services.
- DS-1 loops can be used in conjunction with “next generation” technology to provide a host of high quality voice and data services.
- ILECs are trying to push CLECs to higher priced special access.

¹ Virginia 271 Transcript, at 664, 810-812.

² Allegiance Comments, CC Docket No. 02-214, filed August 21, 2002, at 4.

³ Virginia 271 Hearing Examiners Report at 116.

⁴ Virginia 271 Hearing Examiner’s Report at 114.

The FCC Has the Authority to Proscribe “No Facilities” Practice

- Section 251(c)(3) requires “nondiscriminatory” access to UNEs. Verizon’s “no facilities” policy discriminates in that it will “build” for its retail customers.
- CLECs are requesting nondiscriminatory access to the existing network, not a “yet unbuilt superior network.” Adding electronics to an existing loop does not constitute construction of a “yet unbuilt superior network.”
- Whether ILECs are removing or adding equipment is not legally significant.
- The FCC in the *Virginia Arbitration Order* concluded that Verizon may not refuse to provide a UNE loop “by claiming that multiplexing equipment is absent.”⁵
- Illinois and Michigan⁶ have already determined that ILECs must engage in construction activities in order to provide to CLECs as UNEs the same functionality that ILECs provide to their own retail customers.
- The Virginia Hearing examiner in that state’s 271 proceeding concluded that Verizon’s “no facilities” policy “has a significant and adverse effect on competition in Virginia, is inconsistently applied across UNEs, is at odds with industry accounting rules, and is inconsistent with TELRIC-pricing principles.”⁷

Requested Relief

- Determine in the *Triennial Review* that ILECs must provide as part of UNEs whatever facility augmentation they provide to their own retail customers.
- Determine that augmentation must be provided without separate additional charge and as part of the TELRIC price for the UNE.
- Establish a metric in the *UNE Metrics Proceeding* to monitor and enforce “no facilities.”
- Enforcement will not work absent a clear FCC standard.
- In the limited instances, if any, in which “no facilities” response is acceptable, require compliance with the original UNE FOC date.

⁵ *Virginia Arbitration Order*, fn. 1658.

⁶ *Illinois Bell Telephone Company*, 99-0593 (ICC August 15, 2000), at 20; *BRE Communications v. Ameritech*, Case No. U-11735, at 8 (Mich. PSC February 9, 1999).

⁷ *Virginia 271 Hearing Examiner’s Report* at 116-117.

- Establish objective, clear criteria for when, if ever, a “no facilities” designation is appropriate and require the ILEC to provide specific detail at the time the ASR is rejected regarding the reason for the “no facilities” response.