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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 23, 2003

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On January 22, 2003, Kevin Joseph of Allegiance Telecom and I discussed with Matt Brill the possibility of applying use restrictions to stand-alone unbundled loops and transport. Our comments were consistent with the attached letter.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), a copy of this letter is being filed electronically for inclusion in the public record of each of the above-referenced proceedings.

Sincerely,

Thomas Jones
Counsel to Allegiance Telecom, Inc.

Enclosure

cc: Matt Brill

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January 17, 2003

EX PARTE

Mr. Christopher Libertelli
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 01-338; 96-98; 98-147

Dear Mr. Libertelli:

This letter is written on behalf of Allegiance Telecom, Inc. ("Allegiance") to offer an initial response to reports that the Commission may be considering applying use restrictions to stand-alone unbundled high-capacity T-1 loops as well as possibly to stand-alone unbundled transport. As briefly explained below, such an approach cannot be justified as a logical or necessary extension of the policies supporting use restrictions on enhanced extended loops ("EELs") and, at least as apparently contemplated by the Commission, cannot be squared with a proper application of the impairment standard in Section 251(d)(2) of the Act.

First, there is no basis for extending the policy goals supporting the existing EEL use restrictions as the basis for imposing use restrictions on stand-alone loops or transport. The existing EEL use restrictions were established (1) to avoid disruptions in the Commission's reform of access charge policies and of implicit subsidies for universal service that purportedly remain embedded in ILEC special access prices, and (2) to promote facilities-based competition.[1] Neither policy justifies application of use restrictions of any kind to stand-alone loops or transport. There is no basis for believing that the ILECs' special access revenues (and whatever amount of implicit universal service subsidies that may supposedly still be embedded therein) are somehow threatened by the availability of stand-alone high-capacity loops and transport. The ILECs have not even attempted to make such a showing in this proceeding. Moreover, as AT&T has recently demonstrated in its petition regarding the effect of pricing flexibility on ILEC special access prices, ILEC overall revenues and rates-of-

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1 *See Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587, ¶¶ 7, 18 (2000).

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return for interstate special access have increased substantially in recent years.[2] This has occurred during a period when competitors have had the right to stand-alone high-capacity loops and transport free of use restrictions. Nor is there any basis for concluding that facilities-based special access competition is undermined somehow by the availability of stand-alone loops and transport. In fact, there is abundant evidence in this proceeding that it would be affirmatively wasteful for competitors to build their own high-capacity loops (especially the T-1 loops Allegiance purchases) in all cases and transport in most cases.

The Commission must balance the meager "benefits" of extending use restrictions to stand-alone loops and transport with the substantial harm in terms of foregone innovation that such a policy would create. The integrated access device ("IAD") product that Allegiance and other competitors provide to small and medium sized businesses illustrates this point. This service, which is provided via stand-alone unbundled high-capacity loops and CLEC collocated electronics, allows small and medium sized businesses to use the voice grade equivalent circuits in a T-1 for voice, data, and Internet access in the proportion that they desire. CLECs pioneered this service, and have encountered extremely strong customer demand for broadband in this form. Moreover, the ILECs did not even provide this service until competition forced them to do so. Integrated access service offerings have therefore resulted in substantial increases in consumer welfare that would not have occurred in the absence of unbundled stand-alone high-capacity loops. Use restrictions jeopardize such innovation to the extent that they limit CLECs' ability to rely on these inputs to provide Internet access or any other component of the bundled integrated access product offering. Moreover, the possibility of audits and intrusive oversight by ILECs and even regulators chills the incentive to introduce important advances in consumer welfare. It is hard to see that such a steep price is worth paying for what amount to essentially non-existent benefits.

Second, there is no way to argue that a service-specific impairment analysis can be appropriately applied in the manner in which the Commission apparently contemplates. It is Allegiance's understanding that the Commission may be considering restrictions on the use of stand-alone high-capacity loops and possibly transport to provide interexchange voice and data (including Internet access) services based on a service-specific impairment analysis. But such an approach is incoherent. As the D.C. Circuit held, ILEC facilities should be subject to unbundling where "multiple, competitive supply [of a UNE] is unsuitable."[3] This is so regardless of whether ILECs have been prevented by past or present regulations (*e.g.*, line of business restrictions on interLATA service and Computer II/III protections) from establishing a dominant market share in a particular service market. For example, because of historic line of business restrictions on interLATA service, ILECs do not (yet) have a dominant share in the provision of interLATA data services (such as frame relay and ATM) for which ILEC T-1 loops are an essential input of production for all competitors in virtually all geographic markets. But this does not mean that requesting carriers that seek to provide such services are unimpaired in the absence of high-capacity loops. That issue is determined based on whether "multiple, competitive supply is unsuitable," and there should be little question that it is. Any other

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2 *See AT&T Corp. Petition for Rulemaking To Reform Regulation Of Incumbent Local Exchange Carrier Rates For Interstate Special Access Services*, RM No. 10593, Petition for Rulemaking at 9 (filed Oct. 15, 2002).

3 *United States Telecom Association v. FCC,* 290 F.3d 415, 427 (D.C. Cir. 2002).

approach would expose competitors to the obvious risk of a price squeeze and ILEC tactics to raise their rivals' costs. It is therefore incoherent (except perhaps in the outlier situation discussed below) to apply service-specific use restrictions to high-capacity stand-alone loops and transport based on the impairment analysis.[4]

The only situation in which it might make sense to use a service-specific impairment analysis that could result in service-specific use restrictions is where an ILEC faces significant facilities-based competition in a limited number of product markets and the facilities-based competitors do not make their facilities available on a wholesale basis to other competitors. It may be possible in such situations to conclude that "multiple, competitive supply" is suitable (*i.e.*, efficient) solely for the purposes of providing the services offered by the facilities-based competitors. This would be the case, for example, where an ILEC faces competition for a retail service offering from intermodal competitors that do not rely on the ILEC's facilities to provide the service. Such competitors may well be under no obligation to provide access to their facilities to competitors and may choose not to. In this limited circumstance, there may not be significant benefits to consumer welfare in requiring the ILEC to unbundle its facilities to other competitors seeking to provide the specific services at issue. Of course, even in this situation, the Commission would need to engage in a careful cost-benefit analysis to determine the extent to which the benefits of such use restrictions outweigh the costs in terms of competitor uncertainty, compliance costs and administrative expense.

But no such analysis is even relevant to the vast majority of service offerings. For example, there are no intermodal competitors of any significance that provide data (including Internet access) or voice service to small and medium sized business customers served by Allegiance. There is simply no basis, therefore, for applying a service-specific impairment analysis to high-capacity loops and transport used to provide service to those customers.

Sincerely,

/s/
Thomas Jones
Counsel to Allegiance Telecom, Inc.

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4 It is important to emphasize that, in its review of the EEL use restrictions, the D.C. Court of Appeals only concluded that the Commission may, in appropriate circumstances, impose use restrictions. See *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d at 12-13. The court went to great lengths in that decision to clarify that it did not hold that a service-specific approach to impairment is required by the statute.