

February 4, 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 February 3, 2003, the undersigned, on behalf of Allegiance Telecom, Inc., had separate telephone conversations with Jeff Carlisle of the Wireline Competition Bureau and Matt Brill, Senior Legal Advisor to Commissioner Kathleen Abernathy. During both conversations, I argued that it would be bad public policy for the Commission to include in its impairment test for interoffice transport a rule that state regulatory commissions could eliminate unbundled interoffice transport on point-to-point route A (on which no carrier has deployed interoffice fiber) that shares some characteristics with point-to-point route B, on which unbundling has been eliminated because the relevant impairment test has been met. As I explained, some kind of inferential standard may be an appropriate part of the impairment test for lit interoffice transport. That test measures whether competitors can efficiently deploy their own electronics. As Allegiance explained in a recent *ex parte* filing in the above-referenced proceeding, the Commission could conclude that, even where no carrier has deployed its own electronics on a point-to-point route, a competitor could nonetheless be deemed to be unimpaired in the absence of unbundled lit interoffice transport in excess of ten DS3s of capacity.<sup>1</sup>

Such an analysis may be appropriate in the context of lit interoffice transport for two reasons. First, as explained in the DS3 Limit Letter, there are very few relevant factors to consider in assessing impairment at different levels of DS3 capacity (*e.g.*, a comparison of the cost of lit UNE transport with

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<sup>1</sup> See Letter from Thomas Jones, Counsel for Allegiance Telecom, Inc. to Ms. Marlene H. Dortch, CC Docket Nos. 01-338; 96-98; 98-147 (Feb. 3, 2003) (“DS3 Limit Letter”).

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the combined cost of dark fiber and of the capital costs associated with deploying electronics), and those variables are knowable. Second, the risk of deploying electronics, while substantial, is not unsustainable because at least some of the costs are not sunk (*e.g.*, electronics can be deployed for use on other point-to-point routes). *See* DS3 Limit Letter at 2. Neither of these reasons support the use of some inferential test for the construction of fiber. First, the cost variables associated with constructing fiber are numerous and differ significantly among point-to-point routes. For example, whether a competitor can obtain access to underground conduit has a very significant effect on the cost of deploying interoffice facilities (costs are much higher where such access is not available). The variability of the costs associated with construction makes it virtually impossible to build a cost-benefit model such as the one Allegiance has proposed for lit transport. It is also important to point out that it is impossible in most cases to infer from the presence of non-ILEC fiber on some routes that construction could be efficient elsewhere since many (perhaps most) of the firms that have built their own interoffice fiber are now in bankruptcy (indicating that their investment was inefficient) Second, essentially all of the costs associated with constructing fiber are sunk, thereby making such investments much riskier than investments in electronics for competitors without large embedded customer bases. The second fact is critical, because the increased risk of investment makes it much less likely that a company would make such investment. Inferential models designed to determine the circumstances under which fiber deployment would be efficient would almost certainly be highly inaccurate. Moreover, the cost in terms of the administrative resources required to make such an assessment would be very significant and would far outweigh any possible benefits.

In accordance with the Commission's rules, an electronic version of this letter is being filed in the record of the above-referenced dockets.

Sincerely,

/s/

Thomas Jones

Counsel for Allegiance Telecom, Inc.

cc: Jeff Carlisle  
Matt Brill