February 5, 2003

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

Re: Ex Parte, CC Docket Nos. 01-338, 96-98, 98-147, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,

Dear Ms. Dortch:

El Paso Global Networks ("El Paso or EPN"), through undersigned counsel, files this letter to provide the Commission with further information regarding the proper impairment analysis for interoffice transport, especially interoffice dark fiber. In particular, El Paso writes this letter to express its support for and provide additional comment on the January 30, 2003 *ex parte* letter filed by Allegiance on this same issue.[1]

THE PROPOSED INTEROFFICE IMPAIRMENT TEST FOR DARK FIBER ALLEVIATES THE NEED FOR ANY CAPACITY LIMITS

First, El Paso supports the general approach suggested by Allegiance and believes that it would obviate the rationale for an artificial impairment test with a self-provisioning proxy that uses a geographic market broader than a specific A-to-Z route. Similarly, the Allegiance proposal eliminates any rationale for artificially limiting a carrier's ability to obtain certain levels of lit capacity on an unbundled basis. Such a capacity based test would be unreasonable and irrational.

There is no record basis for the Commission to make a sweeping finding that CLECs are unimpaired with respect to access to interoffice transport of a certain capacity level and above; for example, that CLECs are unimpaired with respect to interoffice transport at the OC48 level and above. There is no basis for this conclusion other than vague, generalized ILEC allegations, which are insufficient. Further, there is no relationship demonstrated in the record between capacity and costs of self-deployment. In fact, the cost of construction of interoffice transport and loops does not vary significantly based on capacity. In El Paso's experience, at any given time, the cost of installing copper is not much different than installing fiber because the bulk of the cost is in digging up streets, securing permits, rights-of-way, and building access, not in the transmission media.

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[1] See Letter from Thomas Jones, Counsel for Allegiance Telecom, Inc. to M. Dortch, FCC, CC Dkt Nos. 01-338, 96-98, 98-147, (January 30, 2003).

Further, there is no clear relationship between revenues and capacity either in logic or in the record.[2] If anything, increasing technological efficiencies foreclose any lockstep relationship between capacity and revenues.

A capacity based test for dark fiber would be particularly irrational. By itself, dark fiber has virtually unlimited capacity. It is the electronics that define the capacity of fiber, which is entirely variable depending on the electronics. Further, Allegiance's approach appears to eliminate any logic for a cap on the level of capacity at which a carrier using UNE dark fiber could light that dark fiber. Such a cap would artificially constrain the CLEC's ability to create a market through innovation, to deploy next generation optical equipment and to efficiently use that dark fiber. It would be irrational for the Commission to include wholesale carriers using dark fiber as alternatives to unbundled lit transport while simultaneously restricting those carriers ability to innovate, and deploy their network efficiently. Such restrictions would hinder the carriers efforts to offer competitive and innovative services to the ILEC and would thus frustrate the Commission's apparent goal of encouraging CLECs to use competitive transport services or deploy their own.

Likewise it would be equally irrational for the Commission to count wholesale CLECs using dark fiber as non ILEC alternatives for the purposes of evaluating the lack of impairment for lit transport services, and then impose restrictions on the use of such dark fiber. For example a significant local usage requirement on stand alone UNEs similar to the requirements currently in place regarding conversions of special access to loop and transport combinations, could effectively preclude a CLEC from using dark fiber UNEs to serve other carriers. It is irrational for the Commission to rely on CLECs to develop as viable competitors and count them as non ILEC suppliers when evaluating impairment but turn around and then tie the CLECs hands through use restrictions that limit the CLECs ability to serve the market.

THE COMMISSION'S INTEROFFICE UNE IMPAIRMENT ANALYSIS MUST REQUIRE THE PRESENCE OF THREE NON-ILEC WHOLESALE ALTERNATIVES AS A PREDICATE FOR A FINDING OF NO IMPAIRMENT

EPN is concerned that the presence of two non-ILEC alternative carriers does not offer sufficient evidence that competitive supply of an element is feasible. The Commission's UNE transport impairment analysis should focus on three non-ILEC alternatives (in addition to the ILEC) because, in reviewing competition in telecommunications markets, the Commission has consistently expressed skepticism that the presence of three market participants (i.e. two plus the ILEC) alone, is sufficiently competitive. For example, the Commission recognizes that barriers to entry and anti-competitive conditions still exist in such markets. Because of those conditions, the FCC

[2] El Paso supports the portion of Allegiance's February 3, 2003 letter discussing this same issue. *See* Letter from Thomas Jones, Counsel for Allegiance Telecom, Inc. to M. Dortch, FCC, CC Dkt. Nos. 01-338, 96-98, 98-147, (February 3, 2003)

should require the presence of at least three wholesale competitors to the ILEC on a point to point route before finding that carriers are not impaired.

By reaching below the number three in the wholesale alternative prong of the impairment test, the Commission would be ignoring its own warnings regarding the dangers of oligopolistic markets and threats to competition in those markets. The Commission has specifically warned that markets with three participants are not competitive.

For instance, when the Commission considered CMRS carrier petitions for forbearance from spectrum caps, the Commission observed that in "three-firm oligopolies … price competition could be reduced or eliminated." The Commission based its analysis on its "experience in other telecommunications markets, where consumers generally have benefited from their ability to choose from among more than three firms to obtain the services they desire."[3]

In other cases the Commission has favored policies that that are similarly skeptical about the level of competition when there are three market participants. For example, the Commission has observed that "tacit price collusion is more likely to occur where there are only a few competitors who have an oligopoly in the market."[4] In addition, the Commission recognizes that in an oligopoly, a "reduction in competition occurs because the market effectively becomes an even more concentrated oligopoly, in which all of the companies are better off keeping prices high and competing instead on such matters as corporate image."[5] For example, the Commission when it approved AOL's merger with Time Warner, imposed a condition on AOL's use of its Instant Messenger service because of competitive concerns that would not have dissipated even if two additional competitors had equal footing in the market with AOL.

The Commission should adhere to these policy conclusions and adopt an impairment test that starts with three wholesale alternatives to the incumbent as the

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[3] *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap; Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services,* Report And Order, 15 FCC Rcd 9219, September 22, 1999, FCC 99-244 ¶ 45.

[4] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Order On Reconsideration And Erratum, 14 FCC Rcd 6004, FCC 99-47, Rel. March 31, 1999, at ¶ 16*, citing* F. M. Scherer and D. Ross, Industrial Market Structure and Economic Performance 277-315 (1990).

[5] *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendments of the Commission's Cellular/PCS Cross-Ownership Rule ,* Report and Order, 11 FCC Rcd 7824, FCC 96-278, rel. June 24, 1996 at ¶ 123.

starting point for its impairment analysis into whether NON-ILEC wholesale alternatives exist on a route.

THE COMMISSION MUST LIKEWISE REQUIRE THE PRESENCE OF FOUR SELF-DEPLOYED NON-ILEC CARRIERS BEFORE FINDING NO IMPAIRMENT

The Commission should adopt the Allegiance approach but with the modification of the self-provisioning test to require the presence of four non-ILEC carriers that have self provisioned fiber based transport before a finding of non-impairment can be reached. Such a modification is warranted given the presumption of illegality in the Department of Justice's Merger Guidelines for any merger that results in a Herfindahl-Hirschman Index ("HHI") score over 1800. It is also warranted as a reasonable way for the Commission to assure that the self-provisioned non-ILEC carriers will include similarly situated carriers to smaller CLECs who would use UNEs along the requested route.

Reliance on the DOJ Merger Guidelines is warranted here. As El Paso noted when it proposed a similar test for dark fiber, the presence of four non-ILEC carriers on a route does not actually "pass muster under the Merger Guidelines" but when four non-ILEC carriers have deployed their own facilities then "the HHI (which would be 2000) comes *reasonably close* to the level of market concentration deemed permissible in the Merger Guidelines."[6] The Commission should not use an impairment test where the level of concentration in the market is not at least "reasonably close" to showing signs that the market is competitive.

Thus, at a minimum, it would be unreasonable for the Commission to make a non-impairment finding based on the presence of three self provisioned non-ILEC carriers where the presence of those market participants fails to bring the market reasonably close to meeting the DOJ standard for evaluating impermissible and anti-competitive concentration. The Commission can then conclude that once the specific transport UNE in question is eliminated on a particular route, the addition of another self provisioned non-ILEC competitor will bring the market into the zone of competitiveness established under the Merger Guidelines. More importantly, *only* by adding a requirement that a fourth self-provisioned non-ILEC carrier be present before scaling back the UNE under the self-provisioning test, can the Commission also be assured that even without additional non-ILEC carriers self-provisioning transport, the route will remain "reasonably close" to being competitive under the DOJ's merger guidelines, despite the lack of UNEs on that route.

Further, if the Commission were to adopt an interoffice impairment test that uses the presence of three carriers employing self-deployed transport, it is likely that some carriers could be excluded from the market. It is unreasonable for the Commission to

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[6] Letter from S. Crawford, El Paso Global Networks, and S. Sawyer, Conversent Communications Inc. to M. Dortch, FCC, Docket No. 01-338, 96-98, 98-147, (November 26, 2002).

adopt a test that leaves a substantial likelihood that a state commission could find a lack of impairment for one requesting carrier even in circumstances where there are no similarly situated carriers that allow the Commission to draw a conclusion that self provisioning for that specific requesting carrier is feasible. In essence, the self provisioning prong of this impairment test says that because other Carriers A, B & C have deployed their own transport, Carrier X can also deploy its own, despite any consideration of the specific characteristics that might have allowed the Carriers A-C to deploy their own transport and similarly divorced from any consideration of the factors that might prevent Carrier X from deploying transport along that same exact route. The addition of a fourth non-ILEC carrier that has self provisioned increases the likelihood that there will be similarities among the non-ILEC carriers on the route.

For example, there is the potential that in some instances, large national carriers could each deploy their own transport along a particular route, because they each have enough traffic to warrant such a build on their own. But in such an example where no other carrier provides a wholesale alternative to the ILEC, a subsequent entrant without the economies of scale, traffic aggregation and resources available to the large national carriers would be excluded from the market or forced to use ILEC special access. The second prong of the Commission's interoffice transport UNE impairment test, at a minimum, should require the presence of four non-ILEC carriers using self-deployed transport before the state commission can make a finding of non-impairment. This provides the Commission with a greater likelihood that at least one of those carriers with self deployed transport will be similarly situated to the requesting carrier. Such a requirement would be reasonable, particularly when the Supreme Court recognized that smaller entrants face different economic conditions than the major national carriers.[7]

THE COMMISSION MUST PROVIDE SPECIFIC DETAILS IN ITS TEST TO ENSURE THE TEST WILL BE APPLIED EVENLY THROUGHOUT THE NATION

In supporting the basic approach offered by Allegiance, EPN offers some suggestions regarding details the Commission or state commission must consider in evaluating whether a carrier is truly an alternative to the ILEC on the requested route. For example, in evaluating a claim that a non-ILEC transport provider makes a wholesale offering as an alternative to the ILEC, the Commission should distinguish between carriers that make point-to-point services available on a wholesale basis and those that require carriers to purchase an entire ring to obtain a small point-to-point link. The Commission has previously recognized that a requirement to purchase more service or facilities than the CLEC needs artificially raises that competitors' costs and impedes competition.[8] In other words the comparison must be apples to apples. If a CLEC must

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[7] *See Verizon v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 1672 n. 27 (2002).

[8] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. No. 98-147, Third Report and Order, *Implementation of the Local Competition Provisions of the*

purchase an eighty mile ring to obtain a five mile span, that is not a viable alternative to the point-to-point services the CLEC may obtain from the ILEC.

EPN has similar concerns regarding the details of the self-provisioning prong of the impairment analysis offered by Allegiance. In particular, EPN strongly disagrees with the suggestion that the Commission can effectively "double-count" fiber deployed by a single non-ILEC. Not only does such double counting defy a common sense application of the term "self-provisioning" but it also is counter intuitive to the goals the Commission is pursuing in its implementation of § 251(d)(2)(b) of the Act.

The term self-provisioning for purposes of this test, should mean that the carrier has deployed *its own* fiber. Purchasing fiber strands or capacity via an IRU in no way amounts to self provisioning, because it fails to reflect the whether the costs inherent in constructing fiber on that route remain a barrier to entry in that particular market. Namely, the barrier entry for fiber-based carriers is not the cost of the fiber but the cost of constructing the trench, obtaining rights-of-way and building access. The self deployment prong of the Commission's transport impairment test should be measuring whether "separate construction of facilities…would be wasteful."[9] The goal implicit in such a test is not multiple use of the same facility by many firms but "multiple, competitive supply" of an element.[10]

In other words, the fact that other carriers have constructed their own fiber can be evidence that the construction costs do not serve as barrier to competitive entry along that route and such "multiple, competitive supply" is not wasteful. If Carrier A builds its own fiber route and then makes fiber available via an IRU to carriers B and C those IRUs offer no evidence that the cost of construction is no longer a barrier for subsequent entrants.

The Commission must also specifically define how it intends to define the route on which the state commission will analyze competitive alternatives. The Commission must be clear that the state commission, when looking at alternative transport providers of self deployed transport on a route must be looking at the entire route for which the requesting carrier seeks access. For example, a connection between two ILEC central offices generally traverses through multiple central offices before the end point (Z location) of the circuit. Thus, a CLEC seeking interoffice transport between point A and Z may have its transport circuit physically routed through intermediate offices such as CO B and C. It is also possible that the CLEC might not be impaired on the part of the route between A to B, but is impaired on the remainder of the route. In such a situation it

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1996 Act, Fourth Report and Order, CC Dkt. No.; 96-98, FCC 99-355, (Dec. 9, 1999) ¶¶ 39-42, *remanded USTA* v. *FCC,*290 F.3d 415 (D.C. Cir. 2002).

[9] *United States Telephone Association* v. FCC, 290 F.3d 415 (D.C. Cir. 2002) at p. 427 ("*USTA").*

[10] *Id*.

must be clear that the CLEC would be impaired on the route between A to Z despite the presence of alternatives on portions of the route. In other words, the Commission should specify that the state commission must analyze impairment on the entire route and whether there are alternative carriers or self deployed transport on portions of the route should not alter a finding of impairment.

Further, the Commission should clarify, that similar to cost proceedings for unbundled network elements, the incumbent has the burden of proof before a state commission that alternatives are available or self deployment is feasible along a particular point to point route.

THE COMMISSION SHOULD ADOPT A TRANSITION PERIOD THAT ALLOWS A SUFFICIENT TIME FOR THE REQUESTING CARRIER TO CONSTRUCT ITS OWN FIBER FACILITIES

EPN is concerned with the proposed approach regarding transition in the event the state commission determines requesting carriers are not impaired without interoffice UNEs on a particular route. The Commission should adopt a transition plan for carriers that currently use interoffice transport UNEs or dark fiber UNEs to allow such CLECs a reasonable period of time to shift their services to other sources of transport capacity, dark fiber, or to construct their own fiber. EPN's experience in obtaining dark fiber from ILECs and then activating it for use in a reliable, state of the art network, is that six months is not enough time. Within that six months the carrier that is going to obtain dark fiber must 1) locate spare dark fiber that is available within the ILEC network; 2) develop a request for proposal and seek bids from equipment vendors; 3) negotiate contracts with suppliers and 4) then test and install the equipment. At a minimum, carriers transitioning from lit UNE transport to dark fiber UNEs need nine to twelve months before they can be reasonably expected to roll their traffic from one network to another.

EPN is more concerned that a six month period is inadequate in circumstances where the self-deployment prong is used to determine lack of impairment, and the Commission must afford competitors sufficient time to deploy their own fiber. As EPN has noted in its previous filings in this docket, it takes between one year and eighteen months to obtain the rights-of-way, building access agreements, and other permits, and then construct the route, place conduit and pull the fiber. Once construction is complete the carrier requires additional time for testing before it can turn up the fiber and provide its customer with enforceable service level guarantees regarding performance of that fiber. At a minimum, the carrier should have twelve to eighteen months to cease using the UNE dark fiber and have the right to petition the state commission for extensions for good cause.

THE COMMISSION SHOULD REQUIRE UNBUNDLED ACCESS TO DARK FIBER IN THE LOOP

EPN urges the Commission to make a national finding of impairment without access to all UNE loops, including high capacity and dark fiber loops. If the Commission is unwilling to make such finding, it must allow states to gather such evidence on loops where there is no impairment.

There is no evidence in the record that would allow the Commission to make a national determination that there is no impairment on loops above an OCn level. The Commission does not have the evidence or the tools to gather such evidence in each particular relevant market. For example, EPN's experience is that even within same cities and wire centers in those cities, the cost of constructing fiber loops can vary by hundreds of dollars per foot. A national rule that bars unbundled access to high capacity loops above an OCn level would be sufficiently divorced from any specific market evaluation to be unreasonable under the Act.

If the Commission is inclined to use a national capacity limit on unbundled loops, it must be sure that dark fiber loops remain available. First, there can be no logical capacity test applied to dark fiber loops because the fiber itself has no capacity. The capacity is controlled entirely by the carrier that invests in the optical network gear that lights the fiber.[11] Second, the Commission should preserve access to dark fiber in the loop for the same reason it is preserved in interoffice transport; carriers using dark fiber invest extensively in facilities to light the fiber and carriers using dark fiber loops innovate providing next generation services to compete with the ILEC's traditional offerings.

Please do not hesitate to contact either of us in the event you have any questions.

[11] *See* Letter from Thomas Jones, Counsel for Allegiance Telecom, Inc. to M. Dortch, FCC, CC Dkt Nos. 01-338, 96-98, 98-147, (January 30, 2003).

Respectfully,

/s/_____
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