

February 13, 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 12, 2003, Kevin Joseph of Allegiance Telecom, Inc. (“Allegiance”) and I met with Bill Maher, Jeff Carlisle, Rich Lerner, Brent Olson, Tom Navin, and Jeremy Miller of the Wireline Competition Bureau. In addition to reiterating arguments Allegiance has previously made in its comments, reply comments, and *ex partes* in the above-referenced Triennial Review dockets, we described the manner in which the Commission should approach any limitations it may place on ILEC unbundling obligations for new investments in broadband infrastructure. At the request of the staff, that approach is described below.

As explained by the D.C. Circuit, the impairment test requires (at least as long as TELRIC-based prices apply) an inquiry into whether it would be efficient for “multiple, competitive” suppliers to invest in the deployment of a particular piece of the telecommunications network (e.g., loops, transport, etc.).¹ The fact that an ILEC has made or will soon make a new incremental investment in facilities that can be used to provide broadband services says nothing about whether it would be efficient for multiple competitive firms to do the same. Neither the timing of the investment nor the fact that the facilities can be used to provide broadband is a relevant part of the inquiry. Instead, the question of whether multiple suppliers could efficiently make the same investment turns on, among other things, the level of demand in the relevant product and geographic market and the relevant economies of scale (or scope) needed to achieve efficient deployment. Thus, to the extent that the

¹ *United States Telephone Association v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

Commission does decide to adopt a limitation on unbundling requirements applicable to new ILEC investment in broadband, it should do so pursuant to its authority to consider factors other than impairment in determining ILEC unbundling obligations.² One of the goals of the 1996 Act is the promotion of the deployment of advanced services (including broadband), as is illustrated by Section 706.³ The Commission should therefore rely on its authority to consider the statutory goal of the promotion of advanced services as the basis for any broadband relief.

In assessing the extent to which it should advance this statutory goal in the Triennial Review, the Commission should engage in a cost-benefit analysis. That analysis is different in markets where the ILEC faces an intermodal competitor, especially one that is the market leader, than in markets where it does not. In markets where the ILEC faces an intermodal competitor like a cable modem service provider that is a market leader, the costs of unbundling are relatively high. Costs of compliance and any diminished incentive to invest in broadband that may be caused by unbundling⁴ are borne in this instance only by one of the two intermodal competitors, a fact that is likely to distort competition. Moreover, the benefits of unbundling are less significant (though hardly negligible) in this situation than would otherwise be the case because at least some measure of intermodal competition would exist without unbundling.⁵

In markets where no viable intermodal competitor exists, such as the small business market, the costs of unbundling are less significant. In those markets, the ILEC is not faced with a full facilities-based competitor like a cable modem service provider that has a leading position in the market. It faces only competitors that must bear the cost and risk of trying to obtain access to the ILEC's network facilities through the unbundling process. At the same time, the benefits of unbundling are more significant in such markets because the sole source of competition (and the associated consumer benefits that come from lower prices and innovation) is UNE-based competition. For example, the sole drivers of innovation in the small business broadband market are CLECs that must rely on ILEC

² See 47 U.S.C. § 251(d)(2) (requiring that the Commission consider "at a minimum" whether a requesting carrier would be impaired without a UNE).

³ See 47 U.S.C. § 157.

⁴ It should be noted that these costs are probably quite limited. As Allegiance has explained, many of the investments the ILECs claim are necessary for broadband deployment, such as replacing copper with fiber in the feeder plant, are made to reduce ILEC costs in the provision of existing services. See *e.g.* "The Death of Facilities-based Competition" attached to Letter from Thomas Jones, Counsel for Allegiance Telecom, Inc. to Marlene H. Dortch, Secretary, CC Docket Nos. 01-338; 96-98; 98-147 (filed February 6, 2003). Unbundling would appear to place *de minimis* costs in these situations.

⁵ Notwithstanding the differences in the cost-benefit analysis in markets where there exists an intermodal competitor (i.e., the residential broadband market), Allegiance continues to believe that the proper policy would be to avoid imposing any limit on CLEC access to ILEC loops for the purpose of providing competitive broadband service. Indeed, the Commission must at the very least ensure that CLECs seeking to serve residential customers can obtain unbundled access to levels of loop capacity available today (as opposed to what may be available as a result of future upgrades) in the ILEC network. Nonetheless, whatever the relative merits of imposing limits on the residential side, there is absolutely no basis for doing so (as explained below) on the business side.

unbundled high-capacity loops. These firms were the first to introduce products like integrated access service. Indeed, the ILECs recently began offering integrated access services only because they were forced to do so by market share losses to CLECs. If limitations were placed on CLECs' ability to obtain access to high-capacity unbundled loops (either as they exist today or as they exist in the future), innovation and price competition will be eliminated. For example, bandwidth constraints would arbitrarily freeze CLECs at today's loop performance levels, while the ILEC (their chief competitor/supplier) would face no such constraints. Similarly, limiting CLEC access to TDM loop technology (and precluding unbundled access to ATM loop technology) would suspend Moore's law for both CLECs and their customers by shackling them to higher cost, less flexible and less efficient access technology. That is a very high cost in terms of consumer welfare.

It follows that any unbundling relief the Commission may provide to ILECs for new investment in broadband should apply, if at all, only in the markets in which the ILEC faces a viable intermodal (or full facilities-based) competitor. The only viable full facilities-based or intermodal competitors the ILECs face in the broadband market are cable modem service providers.⁶ Moreover, cable modem service is overwhelmingly a residential service offering, both because cable systems are primarily deployed in residential areas and because the inherent limitations of cable modem service (shared network architecture, limited upstream capacity, limited security features, etc.) make it suitable primarily to residential customers and unsuitable to businesses.⁷

Based on this analysis, the Commission should rule that, whatever limitations that may apply to unbundling of broadband loops do not apply to CLECs seeking to serve business customers. In so doing, the Commission must reject the imposition of bandwidth constraints placed on unbundled loops to which CLECs seek access for the purpose of serving business customers. The Commission must also reject any means of restricting CLEC access to any form of technology deployed in ILEC loop facilities in the future (e.g., ATM) for the purpose of serving business customers. The only constraint on CLEC access to high-capacity loops for purposes of serving business customers should be determined by application of an appropriate impairment standard.

⁶ See e.g., Reply Comments of Allegiance Telecom, CC Docket No. 01-337 (Apr. 22, 2002) (explaining why fixed wireless and satellite broadband services are not viable substitutes for ILEC broadband service).

⁷ See *id.* at 6-7 (explaining why cable modem service is not a competitive alternative for most business customers).

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In accordance with the Commission's rules, a copy of this letter is being filed electronically for inclusion in the public record of each of the above-referenced proceedings.

Sincerely,

/s/

Thomas Jones
Counsel for Allegiance Telecom, Inc.

cc: Bill Maher
Jeff Carlisle
Rich Lerner
Brent Olson
Tom Navin
Jeremy Miller