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May 4, 2004

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, SW
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, 98-147; WC Docket No. 03-220

Dear Ms. Dortch:

This letter is written for the purpose of supplementing the record in the above-referenced proceedings regarding BellSouth's requests that the Commission (1) dramatically expand the fiber-to-the-home ("FTTH") unbundling exemption adopted in the Triennial Review Order¹ by eliminating Section 251(c)(3) unbundling requirements for fiber-to-the-curb ("FTTC") loops as well as for FTTH and FTTC loops serving multi-unit premises² and (2) forbear from applying unbundling, collocation, and resale requirements currently applicable to incumbent LEC loops serving what BellSouth refers to as "new build, multi-premise developments," a term that encompasses virtually every newly constructed building in the BellSouth region, including every multi-unit building in that region.³ BellSouth has failed to provide any basis for granting these extraordinary measures, but there are three aspects of BellSouth's wish list that warrant special attention.

¹ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16,978, ¶¶ 273-284 (2003) ("*Triennial Review Order*"); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Errata, 18 FCC Rcd 19,020, ¶¶ 37-38 (2003) ("*Errata*").

² See BellSouth Petition for Clarification and/or Partial Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (Oct. 2, 2003) ("*BellSouth Reconsideration Petition*").

³ See BellSouth Petition for Forbearance Under 47 U.S.C. 160(c) From Application of Sections 251(c)(3), (4), and (6) in New-Build, Multi-Premise Developments, WC Docket No. 03-220 (Oct. 8, 2003).

First, in the Triennial Review Order, the Commission left competitors serving the business market with precious few loop unbundling rights. Notwithstanding Congress' express goal of relying on competition as the means of driving innovation and investment, the Commission decided to spur broadband investment by giving the incumbents the incentive to re-monopolize the business market by exempting from unbundling requirements the new packetized capabilities of hybrid fiber-copper loops. Competitors were left with only the right to unbundle the older TDM capabilities of hybrid loops. BellSouth blithely claims that its requested exemption for FTTC loops requires only a modest expansion of the existing FTTH exemption that will have few consequences for competition. See BellSouth Reconsideration Petition at 6-7. But the Commission should not be fooled by this characterization. If adopted, BellSouth's proposal would eliminate even competitors' residual unbundling rights to TDM capabilities of hybrid loops. This is because FTTC loops consist of a fiber-copper combination. They are nothing more than hybrid loops, and once the Commission prohibits unbundling of all of the broadband capabilities (packetized as well as TDM) of one type of hybrid loop, all other types of hybrid loops will inevitably receive the same treatment. This would be disastrous public policy. Allegiance and other facilities-based competitors cannot compete in the absence of unbundled access to hybrid loops since, as the Commission itself concluded, building new loops to enterprise business customers (especially the small business customers targeted by Allegiance) to whom the incumbent has already constructed such loops "generally does not present sufficient opportunities for competitors to recover their costs." Triennial Review Order n.856.

But the Commission need not even consider the harmful consequences of BellSouth's FTTC proposal because the proposal falls of its own weight. BellSouth has claimed that expanding the FTTH exemption to include FTTC is justified because the two types of loops deliver roughly the same level of capacity to end user customers. See BellSouth Reconsideration Petition at 3-6. But the record in the Triennial Review Order proceeding shows that this is simply not the case. FTTH delivers far greater bandwidth to the customer than FTTC.⁴ Even on its own terms, therefore, BellSouth's requested relief for FTTC hybrid loops is without foundation. That is why the Commission rejected similar proposals made prior to the release of the Triennial Review Order (see Triennial Review Order n.811) and that is why, even when it expanded the scope of the FTTH exemption in the Errata, the Commission retained the requirement that fiber in a loop extend all the way to the end user's premises to qualify for the FTTH exemption.

Second, in the Triennial Review Order, the Commission eliminated unbundling requirements for FTTH loops serving mass-market customers only, but the Commission never clarified what it meant by mass-market customers. The sole "clarification" provided by the Commission after release of the Triennial Review Order was its decision in the Errata to replace the phrase "residential unit" with "end user's customer premises" in Section 51.319(a)(3)(i) of the rules. See Errata ¶ 38. This change expands the scope of the FTTH exemption to encompass

⁴ See Letter from Dan Tataraka, Executive Director, Fiber-to-the-Home Council, to Marlene H. Dortch, CC Docket No. 01-338, attached presentation at 16 (Feb. 13, 2004) (FTTH "is clearly superior to alternative fiber loop technologies for delivering high bandwidth, symmetrical services to the home, both now and in the future"); Letter from Walter Steimel, Jr. to Marlene Dortch, CC Docket No. 01-338, attached presentation (Dec. 16, 2003) (describing reasons why FTTH provides greater bandwidth and other advantages as compared to FTTC).

some business lines in direct contradiction to the Commission's findings in the Triennial Review Order. As Allegiance has long argued, the mass market should be defined for purposes of broadband loops to include residential customers only.⁵ The conclusions reached by the Commission in the Triennial Review Order support this approach. On the supply side of the market, the Commission concluded in the Triennial Review Order that cable operators, the only source of widespread inter-modal broadband competition, "have remained focused on mass market, largely residential service consistent with their historic residential network footprints." Triennial Review Order ¶ 52. On the demand side of the market, the Commission concluded in the Triennial Review Order that the demand characteristics of small businesses and mass-market customers "are sufficiently different that they constitute major market segments." Id. ¶ 123.

Nevertheless, despite Allegiance's stated objections to the Errata and the conclusions reached in the Triennial Review Order these two outcomes can only be harmonized by narrowly defining mass-market customers subject to the FTTH exemption as including only residential and home office lines. Home office "business" lines are often subject to intermodal competition from cable operators and generally exhibit the demand characteristics of residential customer lines. By including home office business lines in the definition of mass-market, the Commission could give meaning to the change adopted in the Errata without running afoul of the finding in the Triennial Review Order that conventional small business lines should not be included in the mass-market.

Third, in the Triennial Review Order, the Commission was silent as to whether the FTTH exemption should apply to multi-unit buildings. BellSouth now asks that the Commission apply the exemption to all customers in multi-unit buildings without regard to differences in supply or customer demand. As Allegiance has argued, there is no basis for granting this broad and unsupported request.⁶ Nevertheless, in a recent ex parte filing, NTIA argued that the Commission should grant BellSouth's request for purposes of "residential multiunit premises."⁷ To the extent that the Commission feels compelled to extend the application of the FTTH exemption beyond single-occupancy buildings, limiting such relief to residential customers located in multi-unit buildings, as advocated by NTIA, is at least consistent with the Commission's conclusion, discussed above, that the supply and demand characteristics of the residential mass-market are fundamentally different from the characteristics of business markets. This approach is also relatively simple to administer and would provide some regulatory stability for the marketplace.

It is critical, however, that the Commission not extend the FTTH exemption to business customers located in multi-unit buildings. Such an approach would simply stop competition for small business customers in its tracks by sheltering a large and growing portion of the addressable market from competition. For example, on nationwide basis, fully 58 percent of

⁵ See Reply Comments of Allegiance Telecom, Inc., CC Docket No. 01-337 (Apr. 22, 2002).

⁶ See Opposition of Allegiance Telecom, Inc. WC Docket No. 03-220 (Nov. 10, 2003).

⁷ See Letter from Michael D. Gallagher, Acting Assistant Secretary for Communications and Information to Chairman, Michael K. Powell, CC Docket No. 01-338 (Apr. 29, 2004).

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Allegiance's current business customer base is located in multi-unit buildings, and Allegiance estimates that 58 percent of its prospective business customer base nationwide is also located in multi-unit buildings. In the BellSouth region, 56 percent of Allegiance's current business customer base is located in multi-unit buildings, and Allegiance estimates that 58 percent of its prospective business customer base in the BellSouth region is also located in multi-unit buildings. It is difficult enough under the current rules for competitors to achieve the economies of scale necessary to operate profitable competitive local exchange businesses. But if Allegiance and other similarly situated competitors were left with only the ability to compete for roughly 42 percent of the currently addressable market, efficient competitive entry, the touchstone of the Telecommunications Act of 1996, would not be possible.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), one electronic copy of this letter is being filed in each of the above-referenced proceedings.

Sincerely,

/s/

Kevin M. Joseph
Megan Delany
Allegiance Telecom