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June 3, 2004 ***EX PARTE***

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

Re: CC Docket No. 01-338

Dear Ms. Dortch:

On June 2, 2004, Christopher McKee of XO Communications and Megan Delany of Allegiance Telecom met separately with Matt Brill, Senior Legal Advisor to Commissioner Kathleen Abernathy, Jessica Rosenworcel, Legal Advisor to Commissioner Michael Copps, Dan Gonzalez, Senior Legal Advisor to Commissioner Kevin Martin, and Scott Bergmann, Legal Advisor to Commissioner Jonathan Adelstein. The attached outline formed the basis for the discussions. Pursuant to Section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), an electronic copy of this notice and the attached outline is being filed in the above-referenced proceeding.

Sincerely,

/s/
Thomas Jones

Attachment

cc: Matt Brill
Jessica Rosenworcel
Dan Gonzalez
Scott Bergmann

XO COMMUNICATIONS PRESENTATION REGARDING BELLSOUTH'S PETITION FOR RECONSIDERATION AND CLARIFICATION
CC Dkt. 01-338 (June 2, 2004)

- CLECS Must Have The Right To Obtain Unbundled DS1 And DS3 Loops Over Newly Deployed Hybrid Loops.

  - If XO and other CLECs are denied access even to TDM loops as UNEs, the consequences for competition in the small- and medium-sized business market could be devastating.

  - If TDM loops are unavailable as UNEs, an entire segment of the market would lose the benefit of competition that, in most locations, comes only from intra-modal competitors like XO.

- Whatever Else It May Mean, The Exemption From Unbundling The Packetized Capabilities Of A Hybrid Loop Was Never Intended To Limit CLECs' Access To DS1 And DS3 loops For Serving Small- And Medium-Sized Business Customers.

  - "DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops." TRO n.956.

  - "The unbundling obligation associated with DS1 loops is *in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers*." *Id.* (emphasis added).

- In Addressing Access To DS1 And DS3 Loops, The Commission Must Remain Consistent With Its Rules Regarding Routine Network Modifications.

  - "We conclude that incumbent LECs, in provisioning high-capacity loop facilities to competitors, must make the same routine modifications to their existing loop facilities that they make for their own customers." *Id.* ¶ 633.

  - "A routine network modification is any activity that the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(8)(ii).

- There Is No Question That The Work Required To Deploy TDM Capabilities On A Hybrid Loop That Does Not Have Such Capabilities Falls Squarely Within The Duty To Make Routine Network Modifications.

  - Routine network modifications "include, but are not limited to" "*deploying a new multiplexer* or reconfiguring an existing multiplexer; and attaching electronics and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer." 47 C.F.R. § 51.319(a)(8)(ii) (emphasis added).

  - "The requirement that we establish for incumbent LECs to modify their networks on a nondiscriminatory basis is not limited to copper loops, but applies to all transmission facilities." TRO ¶ 638.

  - The only activity an incumbent LEC "regularly undertakes" on behalf of its own customers that is excluded from the definition of "routine network modification" is "the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier." 47 C.F.R. § 51.319(a)(8)(ii).

- BellSouth May Not Engineer Its Network In A Manner That Diminishes Access To Unbundled DS1 And DS3 Loops.

  - An ILEC "shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that disrupts or degrades access to a local loop or subloop, including the time division multiplexing-based features, functions, and capabilities of a hybrid loop, for which a requesting telecommunications carrier may obtain or has obtained access." *Id*. at § 51.319(a)(9).

  - "In their submissions in this proceeding, incumbent LECs demonstrate that they typically segregate transmissions over hybrid loops onto two paths, i.e., a circuit-switched path using TDM technology and a packet-switched path (usually over an ATM network)." TRO n.846 (citing SBC Jan. 15, 2003 *Ex Parte* Letter).

  - BellSouth has not made any effort to demonstrate why it must depart from this practice.

- The Duty To Make Routine Modifications Was Established Pursuant To The Requirement That ILECs Make UNEs Available To Requesting Competitors On A "Nondiscriminatory" Basis Under Section 251(c)(3). As A Matter Of Logic And Sound Policy, There Can Be No "Geographic" Limitation On The Nondiscrimination Test. Hybrid Loops Cannot Be Deemed To Have Different Characteristics, Justifying Different Network Modification Duties, Solely Because They Are In Different Locations. The FCC's Discussion Of This Issue Reveals That It Had No Intention Of Engaging In Granular Geographic Analysis Of The Feasibility Of Routine Modifications.

  - "The record reveals that attaching routine electronics, such as multiplexers, apparatus cases, and doublers, to high-capacity loops is already standard practice in most areas of the country." *Id.* ¶ 635.

- Consistent With The Rules Regarding The Retirement Of Copper And Unbundling Of Voice Grade Circuits (*see e.g.,* 47 C.F.R. § 51.319(a)(3)(iii)), ILECs Should Be Given The Choice Of Meeting Their Regulatory Obligations With Regard To TDM-Based Services By Either Adding TDM Facilities Or Providing TDM-Equivalent Services Over Packet-Switched Hybrid Loops.

- ILECs Will Be Compensated For Any Work Associated With Making DS1 and DS3 UNE Loops Available:

  - "The Commission's pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine modifications we require here." *Id.* ¶ 640.

- In The Unlikely Event That An ILEC Experiences Extraordinary Hardship As A Result Of These Requirements, The Commission Retains The Authority To Exercise Its Forbearance And Waiver Powers.