

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
	)	

**COMMENTS OF ALASKA COMMUNICATIONS**

Alaska Communications<sup>1</sup> hereby submits these comments in response to Sections IV.B of the Commission’s December 2012 *Further Notice of Proposed Rulemaking* in the above-captioned proceeding (the “*Special Access FNPRM*”).<sup>2</sup> The record in this proceeding demonstrates that special access competition remains robust in Alaska Communications’ service areas that currently have Phase II pricing flexibility. As such, Alaska Communications urges the Commission to place it on equal regulatory footing with other non-dominant, non-ILEC competitors for these services in these areas. At a bare minimum, the Commission should leave its prior grants of pricing flexibility undisturbed.

**Background**

Alaska Communications obtained Phase I and Phase II pricing flexibility for its incumbent local exchange carrier (“ILEC”) service areas located in the Anchorage Metropolitan Statistical

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<sup>1</sup> In these comments, “Alaska Communications” signifies the four incumbent local exchange carrier (“ILEC”) subsidiaries of Alaska Communications Systems Group, Inc.: ACS of Alaska, LLC, ACS of Anchorage, LLC, ACS of Fairbanks, LLC, and ACS of the Northland, LLC.

<sup>2</sup> *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Report & Order and Further Notice of Proposed Rulemaking, FCC 12-153, 26 FCC Rcd 16318 (2012).

Area (“MSA”), the Fairbanks MSA, and its Juneau (non-MSA) study area in 2010,<sup>3</sup> following the company’s conversion to price cap regulation.<sup>4</sup> Both before and since that time, this Commission and the Regulatory Commission of Alaska have recognized that Alaska Communications’ service areas, particularly in Anchorage, are among the most competitive in the nation.<sup>5</sup>

This competition has grown ever more vigorous over the two decades since the enactment of the Telecommunications Act of 1996, both in terms of geographic scope and products, creating benefits for customers. Special access customers now have competitive choice in

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<sup>3</sup> See *Petition of ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc. for Pricing Flexibility Pursuant to Sections 69.709 and 69.711 of the Commission’s Rules*, WCB/Pricing File No. 10-02, Order, DA 10-1007, 25 FCC Rcd 7128 (Wir. Comp. Bur. 2010), at ¶ 19 (finding that Alaska Communications had demonstrated that the Phase I and Phase II competitive triggers were met) (“*Alaska Pricing Flexibility Order*”).

<sup>4</sup> *ACS of Alaska, Inc., ACS of Anchorage, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc.*, Petition for Conversion to Price Cap Regulation and Limited Waiver Relief, WC Docket No. 08-220, Order, DA 09-854, 24 FCC Rcd 4664 (Wir. Comp. Bur. 2009).

<sup>5</sup> See, e.g., *Alaska Pricing Flexibility Order* at ¶ 12 (competitive triggers met for Phase I and Phase II pricing flexibility); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c))*, for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149, 22 FCC Rcd 16304 (2007), at ¶ 3 (“ACS faces extraordinary facilities-based competition in the Anchorage market”); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, FCC 06-188, 22 FCC Rcd 1958 (2006), at ¶ 20 (finding sufficient facilities-based competition to grant in part forbearance from obligations to provide unbundled access to loop, copper subloop, and transport elements in certain wire centers in Anchorage), ¶ 28 (finding that “[r]etail competition in the Anchorage study area is robust”); *ATU Telecommunications Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission’s Rules*, File No. CPD 98-40, Order, FCC 00-379, 15 FCC Rcd 20655 (2000), at ¶ 14 (granting waiver request after finding that “the level of competition in the Anchorage market is sufficient to conclude that special circumstances exist”); *Commission Review of Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies and Competition in Telecommunications, Order Adopting Regulations*, RCA Docket No. R-03-03 (June 22, 2005) (finding by the Regulatory Commission of Alaska that the retail local exchange market in Anchorage is competitive and adopting regulations under which ACS is considered non-dominant).

service providers throughout Alaska's population centers of Anchorage, Fairbanks, and Juneau, and their surrounding areas. The Commission should not disrupt these benefits by re-imposing unnecessary regulatory constraints on the ILEC. To the contrary, the record demonstrates that the market is beyond ready for the Commission to take the next step, completing the process of removing special access and dedicated transport services from price cap regulation by treating them fully as non-dominant, non-ILEC services for all providers.

### **Discussion**

#### **A. Ubiquitous Special Access Competition in Alaska's MSAs Supports Removal of Those Services from Price Cap Regulation**

Current triggers for Phase I and Phase II pricing flexibility for dedicated transport, special access, and channel termination services are based on a graduated series of metrics measuring competitive collocation in the ILEC's wire centers, including a showing that at least one collocated competitor is relying on transport facilities provided by an entity other than the ILEC.<sup>6</sup> In general, therefore, competition based on unbundled network elements ("UNEs") would not satisfy this trigger.

The special access data submitted in this proceeding demonstrate that, since 2010, the market for these services has grown even more competitive in Alaska. According to a Compass Lexecon analysis, virtually all businesses in Anchorage, Fairbanks, and Juneau that are located in census blocks where there is demand for special access services are served by one or more facilities-based (*i.e.*, non-UNE-based) competitive providers, based on a combination of the special access data submitted in this proceeding and information on DOCSIS 3.0 services shown

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<sup>6</sup> See, *e.g.*, *Alaska Pricing Flexibility Order* at ¶¶ 6-9.

on the National Broadband Map.<sup>7</sup> Even excluding the National Broadband Map data, the Compass Lexecon analysis shows that the overwhelming majority of businesses in census blocks in Anchorage, Fairbanks, and Juneau where there is special access demand have a choice of one or more facilities-based (*i.e.*, non-UNE-based) competitive providers, based solely on the data submitted in response to the Commission’s special access data request.<sup>8</sup>

The Commission seeks comment on the “relaxation or even the elimination of price cap regulation where we find the presence of actual or potential competition sufficient.”<sup>9</sup> Alaska Communications submits that ubiquitous sunk investment in competitive facilities in Alaska meets this test. The Commission’s 1999 conclusion that, “irreversible, or ‘sunk,’ investment in facilities used to provide competitive services is the appropriate standard for determining when pricing flexibility is warranted,” remains valid today. As the Commission explained, “sunk” investment by a competitor protects a market against the possibility of predatory pricing by the ILEC regardless of competitive turnover in the market.<sup>10</sup> This is so because:

Investment in facilities, particularly those that cannot be used for another purpose, is an important indicator of such irreversible entry. If a competitive LEC has made a substantial sunk investment in equipment, that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market.

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<sup>7</sup> *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, M. Israel, D. Rubinfeld & G. Woroch, Compass Lexecon, “Competitive Analysis of the FCC’s Special Access Data Collection” (filed Jan. 28, 2016), at 17 and Table C-MSA. The Fairbanks North Star Borough, although not treated as an MSA under the FCC’s framework in this proceeding, shows a similarly ubiquitous level of facilities-based CLEC penetration, even after eliminating CLECs services delivered via UNEs. *Id.* at 17, n.33.

<sup>8</sup> *Id.* at Table F-MSA.

<sup>9</sup> *Special Access FNPRM* at ¶ 80.

<sup>10</sup> *Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 99-206, 14 FCC Rcd. 14221 (1999) (“*Pricing Flexibility Order*”) at ¶ 79.

Another firm can buy the facilities at a price that reflects expected future earnings and, as long as it can charge a price that covers average variable cost, will be able to compete with the incumbent LEC.<sup>11</sup>

Thus, the Commission should continue to find that sunk investment in competitive facilities that can be used for special access is a reliable indicator of the emergence of fundamental, durable, irreversible competition, regardless of the number of actual competitors at any given time.

Once investment in competitive facilities occurs, “[a]s the market becomes more competitive, [regulatory] constraints become counter-productive.”<sup>12</sup> In markets, such as Alaska’s, where competition is mature and sunk investment is irreversible, asymmetric rate regulation of one market participant can be harmful to the public interest.<sup>13</sup> Indeed, the Commission designed its collocation-based competitive triggers as a proxy to measure the presence of “sunk” investment.<sup>14</sup> Indeed, the emergence of the National Broadband Map and the collection of 2013 special access data validate and reinforce the Commission’s judgment in 2010 that Alaska’s special access markets were subject to irreversible competition as a result of sunk investment by competitive service providers.

With these more recent (and more granular) data now showing ubiquitous competitive alternatives in the portions of Alaska’s MSAs where there is special access demand, it is time for the Commission to take the next deregulatory step. The Commission has already granted Alaska

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<sup>11</sup> *Id.* at ¶ 80.

<sup>12</sup> *Id.* at ¶ 19.

<sup>13</sup> *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, FCC 96-424, 11 FCC Rcd 20730 (1996), at ¶ 23 (“[T]ariff filings by nondominant interexchange carriers for interstate, domestic, interexchange services may facilitate, rather than deter, price coordination, because under a tariffing regime, all rate and service information is collected in one, central location.”).

<sup>14</sup> *See, e.g., Pricing Flexibility Order* at ¶¶ 88, 104.

Communications Phase I and Phase II pricing flexibility in the Anchorage and Fairbanks MSAs, and Alaska Communications' Juneau study area.<sup>15</sup> Using Phase I pricing flexibility, Alaska Communications is already permitted to offer dedicated transport, special access, and channel termination services using contract tariffs and volume and term discounts on one day's notice, but also must maintain its generally available, price cap-constrained, tariffed rates for these services.<sup>16</sup> Using Phase II pricing flexibility, Alaska Communications may offer those services free from the Commission's Part 61 price cap and Part 69 rate structure rules.<sup>17</sup> Nevertheless, even with Phase II pricing flexibility, price cap ILECs were still subject to greater regulatory burdens than their competitors, including ongoing tariffing and other ILEC-specific obligations.<sup>18</sup>

In light of the ubiquitous competition Alaska Communications faces, the Commission should therefore treat Alaska Communications as just another non-dominant, non-ILEC competitor with regard to special access, dedicated transport, and channel termination services in the areas where it has previously received Phase II pricing flexibility. In doing so, the Commission would eliminate the last vestiges of mandatory tariffing for these services, as well as any other remaining ILEC-specific burdens associated with these services or the facilities used to provide them.

The presence within Alaska Communications' Phase II pricing flexibility footprint of census blocks where, today, there is no special access demand is not a reason to defer this relief.

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<sup>15</sup> *Alaska Pricing Flexibility Order* at ¶¶ 12.

<sup>16</sup> 47 C.F.R. § 69.727(a); *Alaska Pricing Flexibility Order* at ¶¶ 6-7.

<sup>17</sup> 47 C.F.R. § 69.727(b); *Alaska Pricing Flexibility Order* at ¶¶ 8-9.

<sup>18</sup> *Pricing Flexibility Order* at ¶¶ 151 ("Upon a Phase II showing, we will not grant incumbent LECs all the regulatory relief we afford to non-dominant carriers. Specifically, incumbent LECs in Phase II are still required to file generally available tariffs, while non-dominant LECs and CAPs are permitted, but not required, to file tariffs."); *cf. Alaska Pricing Flexibility Order* at ¶ 8 ("The LEC, however, *may file*, on one day's notice, generally available tariffs for those services for which it receives Phase II relief.") (*citing* 47 C.F.R. § 69.727(b)(3)).

Even with respect to census blocks where there is no special access demand today, deployment elsewhere in the MSA is a reliable and sufficient indicator of competitive forces at work in that market. Sunk investment by competitors not only represents a serious, long-term commitment to remain present in the market, but also puts the competitor on equal footing with the ILEC in terms of its ability to expand its facilities to meet new demand from customers in census blocks where there is no special access demand today.<sup>19</sup> It is even likely that the competitor, in fact, will deploy (or may already have deployed) facilities *in anticipation* of such future demand.

**B. At a Minimum, the Commission Should Not Disturb the Pricing Flexibility  
Alaska Communications Has Already Received**

The Commission opened this proceeding based on a Petition for Rulemaking filed in 2002 that related to alleged conduct by the Bell Operating Companies with regard to special access services.<sup>20</sup> The Petition, therefore, was filed seven years *before* Alaska Communications converted to price cap regulation and eight years before it received any grant of pricing flexibility. The Commission subsequently made a reasoned decision, based on an extensive record, to grant pricing flexibility to Alaska Communications. In the wake of the Commission's grant of Phase I and Phase II pricing flexibility, in addition to forbearance from other ILEC regulatory obligations, no complaints or concerns about the operation of the market for special access services in Alaska have emerged. Rather, competition has continued to flourish in the state, justifying more – rather than less – pricing flexibility for Alaska Communications.

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<sup>19</sup> See, e.g., *Pricing Flexibility Order* at ¶ 79 (Competitive investment “in sunk facilities” to serve a large customer, “once sunk, can be used to serve adjacent smaller customers.”).

<sup>20</sup> *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002).

The Commission should focus its regulatory efforts on competition and other public policy issues where there is actual evidence of a problem, such as complaints from customers about lack of competitive choices or unreasonable pricing. Alaska Communications is not aware of any Commission findings involving abuse of market power by any special access carriers in Alaska, nor is there any such evidence against Alaska Communications in the record of this proceeding. The market naturally will reveal any areas where it may be appropriate to gather information and assess the benefit of regulation, but the market has not revealed any such problems in Alaska where competition has already taken hold.

**C. Abuse of Market Power by an Unregulated Monopolist Does Exist in Alaska, but the Culprit is Not the ILEC**

While special access competition has taken hold in most of Alaska, there are some locations where Alaska Communications has not been able to enter the market as a competitor due to the prohibitive costs and the lack of available infrastructure. It is not only the ILEC that has the potential to foreclose competitive entry. Indeed, the focus of this proceeding largely (and unfortunately) *excludes* the one area of Alaska facing a demonstrable problem with unlawful discrimination and unreasonable pricing with respect to dedicated transport services – that is, the area served by GCI using its publicly-funded TERRA fiber optic cable and terrestrial microwave-based broadband network.<sup>21</sup> In that remote region of southwest Alaska, historically it has been impossible to justify the expense of terrestrial middle-mile transport facilities for any provider; GCI was able to overcome that entry barrier only through an \$88 million package of

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<sup>21</sup> ACS of the Northland is responsible for providing local exchange and exchange access service to four Alaska Bush communities in the region served by TERRA-SW: Kokhanok, Nondalton, Pedro Bay and Port Alsworth. These service areas include fewer than 350 access lines in total. AT&T's interexchange network serving communities in the TERRA-SW region is satellite-based; it owns and maintains earth stations throughout the area.

Broadband Initiatives Program (“BIP”) loans and grants to GCI’s affiliate, United Utilities, Inc. (“UUI”), from the Rural Utilities Service. GCI sustains its operation of TERRA-SW and is now expanding its unregulated monopoly terrestrial transport network into other remote areas of Alaska through inflated federal universal service subsidies it receives for services it provides to rural health care providers, schools and libraries.<sup>22</sup> Yet despite this public funding, GCI charges monopoly rates for wholesale transport services that are well above the rates for equivalent satellite-based capacity, all in apparent violation of the nondiscrimination and interconnection requirements of BIP.<sup>23</sup> In this circumstance, GCI should be subject to the same federal regulations applicable to any other dominant carrier, and would-be competitors should have rights of access at just, reasonable and non-discriminatory rates, terms and conditions. Unfortunately, this particular transport bottleneck is not being given the scrutiny it deserves in this or any other open Commission proceeding. At the very least, the Commission should conclude that it would be arbitrary and capricious to regulate special access services offered by

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<sup>22</sup> Letter from Megan Delany, GCI, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208 (filed July 30, 2012), at 2-3 (“Further deployment of modern wireless and broadband networks to additional currently unserved communities in rural Alaska . . . depends upon the provision of services to key anchor telemedicine and distance learning customers that are supported by the various programs of the Universal Service Fund as well as continued efforts to leverage this funding to secure other private funding sources.”).

<sup>23</sup> BIP loan and grant awardees were required to “offer interconnection on reasonable rates and terms to be negotiated with requesting parties.” *Notice of Funds Availability*, 74 Fed. Reg. 33104, 33111 (2009). As a loan and grant recipient GCI pledged to adhere to the policies set forth in the Commission’s *Broadband Internet Policy Statement*, CC Docket Nos. 02-33 *et al.*, FCC 05-151 (rel. Sept. 23, 2005). *See id.* GCI specifically agreed to “offer wholesale and retail services to carriers and other customers that wish to provide or use broadband and other services in Service Area communities.” United Utilities Inc., “TERRA-SW: Terrestrial Broadband In Southwestern Alaska,” Executive Summary at 2, *available at*: <http://www.ntia.doc.gov/broadbandgrants/applications/summaries/93.pdf>.

Alaska's ILECs, while allowing the largest competitive provider in the state to deny access to federally-subsidized transport services on reasonable rates, terms and conditions.

### **Conclusion**

The record demonstrates that special access competition is robust in the areas where Alaska Communications has previously received Phase I and Phase II pricing flexibility. Accordingly, the Commission should treat Alaska Communications as it would any other non-dominant, non-ILEC provider in all areas covered by that pricing flexibility. At a minimum, the Commission should leave those grants of pricing flexibility in place, given the absence of any evidence in the record of any market failure or anticompetitive conduct by Alaska Communications. Finally, the Commission should examine all available options for bringing discipline to dedicated transport service, including special access and middle mile services, in remote areas of Alaska where, in many cases, a single, non-ILEC provider is currently free to operate without sufficient regulatory oversight of its rates, terms, and conditions of service.

Respectfully submitted,



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