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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

REPLY COMMENTS OF GENERAL COMMUNICATION INC.

Martin Weinstein
Mark Moderow
GENERAL COMMUNICATION, INC.
2550 Denali Street
Suite 10000
Anchorage, AK 99503

John T. Nakahata
Michael G. Grable
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

Of Counsel

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SUMMARY OF ARGUMENT

General Communication Inc. (GCI) congratulates the Commission for having undertaken this important review of unbundled network element (UNE) performance measurements. GCI is a CLEC success story, having captured nearly 40% of the market and saved its customers millions of dollars in its first four years of operations as a facilities-based CLEC in Anchorage, Alaska. GCI is confident that it will be able to bring the benefits of competition to more and more Alaskans, but, as the Commission has recognized, the non-discriminatory offering, delivery, provisioning, maintenance and billing for unbundled network elements is critical to the development of facilities-based competition.

GCI agrees with the vast majority of commenters—including the Bell Operating Companies (BOCs)—on the need for concrete performance measures to verify non-discriminatory performance or detect discrimination. The vast majority of commenters also agree—and even some of the BOCs appear to contemplate—that to be competitively meaningful, performance measures must be tied to contractual enforcement mechanisms in the interconnection agreements, as well as being subject to FCC or state commission enforcement actions. Specifically, the FCC should require self-effectuating liquidated damages as part of any ILEC interconnection agreement. FCC action is necessary because not all states authorize self-effectuating liquidating damages, and some states—including Alaska—have construed their state laws to preclude such damages in interconnection agreements.

Service-quality and provisioning commitments, with contractual enforcement provisions, have long been standard in contracts negotiated between non-monopoly carriers and sophisticated commercial customers. Such commitments are even more crucial in the context of section 251 interconnection agreements, because CLECs cannot simply declare a material breach and take their business to an alternative supplier.

Finally, these basic principles of measured, enforced non-discrimination are no less compelling for mid-sized and small ILECs. Although the particular means of measuring and enforcing non-discrimination should be tailored to the needs and capabilities of specific local markets, the mid-sized and small incumbent LECs should not be "exempted" from having to back paper promises of non-discrimination with actual performance. Otherwise, consumers in markets served by mid-sized and small companies—including the entire state of Alaska—will be denied the substantial benefits that GCI has already demonstrated come from true and vibrant competition.

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REPLY COMMENTS OF GENERAL COMMUNICATION INC.

General Communication Inc. (GCI) congratulates the Commission for having undertaken this important review of unbundled network element (UNE) performance measurements. As the Commission has recognized, the non-discriminatory offering, delivery, provisioning, maintenance and billing for unbundled network elements is both critical to the development of facilities-based competition and required by law. The vast majority of commenters—including the Bell Operating Companies (BOCs)—agree on the need for concrete performance measures to verify non-discriminatory performance or detect discrimination. The vast majority of commenters also agree—and even some of the BOCs appear to contemplate—that to be competitively meaningful, performance measures must be tied to contractual enforcement mechanisms in the interconnection agreements, as well as being subject to FCC or state commission enforcement actions. Service-quality and provisioning commitments, with contractual enforcement provisions, have long been standard in contracts negotiated between non-monopoly carriers and sophisticated commercial customers. Such commitments are even more crucial in the context of section 251 interconnection agreements, because CLECs cannot simply declare a material breach and take their business to an alternative supplier. Finally, these basic principles of measured, enforced non-discrimination are no less compelling for mid-sized and small ILECs. Although the particular means of measuring and enforcing non-discrimination should be tailored to the needs and capabilities of specific local markets, the mid-sized and small incumbent LECs should not be "exempted" from having to back paper promises of non-discrimination with actual performance. Otherwise, consumers in markets served by mid-sized and small companies—including the entire state of Alaska—will be denied the substantial benefits that GCI has already demonstrated come from true and vibrant competition.

I. GCI and Alaska: A CLEC Success Story

GCI is one of the success stories of the 1996 Act, though its successes have not come without significant struggle. GCI is a diversified communications carrier, offering facilities-based interexchange service, facilities-based competitive local-exchange service, ISP, cable, and other services throughout Alaska. Its ISP services include providing "Distance Education" broadband access to many of Alaska's rural schools—285 schools at last count—as well as "Telehealth" broadband access to five regional health organizations and 70 rural health clinics. GCI is also rolling out high-speed broadband service to all areas it serves in Alaska—both in urban areas and in the Alaskan bush—by 2004. Many of the services found only in larger metropolitan areas in the Lower 48 states are already available in much smaller Alaska communities served by GCI.

GCI entered the CLEC market in Anchorage in 1997. Within a year, GCI obtained a 14% market share. Between 1997 and the end of 2001, the price for the most common local-service package plummeted 26%. GCI estimates that its customers have saved more than $14 million. GCI's market share has grown to approximately 38% in Anchorage, with more than 77,000 access lines. Although its CLEC service in Fairbanks only began last summer, GCI has already claimed approximately 13% of the market, with over 6,000 access lines. GCI will roll out CLEC service in Juneau in the current quarter, as soon as its advanced digital switching network is complete.

In light of GCI's immediate and lasting success in the Anchorage market, one might wonder why GCI waited until summer 2001 and spring 2002 to expand to the two next largest Alaska markets, Juneau and Fairbanks. The answer is that, although Alaska does not have an incumbent BOC, it *does* have a powerful incumbent monopolist in ACS.[1] GCI actually requested interconnection in Juneau and Fairbanks as far back as April 1997, but had to fight through more than four years of regulatory and litigation roadblocks thrown up by ACS. Thus, while competition and consumer choice took root and blossomed in Anchorage, the weeds of ACS' obstructionism choked off competition in Fairbanks and Juneau. Four years of litigation (which ACS continues to pursue to this

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1 ACS is a relatively recent conglomeration of the incumbent LECs serving the principal urban areas in Alaska, including Juneau, Fairbanks, Anchorage, and the Kenai Peninsula (Seward). They own approximately 70% of the access lines in Alaska.

day) over Section 251(f)'s rural exemption denied Fairbanks and Juneau consumers the choice and benefits of facilities-based competition that GCI has brought to Anchorage.

Notwithstanding the fact that they meet the Communications Act's definition of "rural" areas—if only because ACS has been permitted to retain Anchorage, Fairbanks and Juneau as three separate study areas rather than consolidating its statewide operations into a single study area—Fairbanks and Juneau are not exactly remote, small communities. Fairbanks' 49,000 telephone lines reflect its position as the commercial hub of interior Alaska. Juneau, the state capital, has 30,000 telephone lines. If ACS' study areas in Alaska were consolidated, as they would be for most other local-exchange companies providing statewide service to approximately 330,000 switched access lines, ACS would not qualify for a rural exemption in either of these communities. ACS itself is a substantial incumbent; its Alaska local operations make it the nation's fourth largest rate-of-return LEC.

While ACS kept the courts and regulators busy with unavailing pleas for "rural" protectionism, ACS has also developed a pattern of more insidious behavior by delaying unbundled-loop provisioning and attempting to frustrate those customers who've voted against ACS' service by switching to GCI. GCI local customers commonly encounter difficulties when they call GCI for repair service or for second-line installation. ACS controls these services, and it is apparent that ACS tends to prioritize service to their own customers over GCI local customers. We infer this from the many difficulties our customers have in obtaining these services from ACS, as well as multiple occasions on which our customers have complained that ACS personnel flatly told them that they would have received better and faster service had they been ACS customers.[2]

Additionally, because ACS controls the loops, they can (and apparently often do) place pair-gain devices (DAML) on the lines of our customers without our knowledge. These devices help the incumbent expand on plant capacity, but they also degrade the condition of the lines. We suspect the GCI local customers bear a disproportionate burden in having their lines saddled with these devices.

Even billing disputes with the incumbent can affect service to our customers. Quite often, GCI and ACS disagree about the charges owed for a particular interconnection service or function, and ACS will threaten not to provide the service or function unless GCI pays the bill. We have managed to avoid a crisis on many occasions, but ACS commonly makes this threat against GCI. If ACS ever follows through on any of these threats, the Regulatory Commission of Alaska's formal complaint procedures and even the ADR procedures in the Interconnection Agreement between GCI and ACS would be of little use. Meaningful performance standards and contractually-based self-effectuating penalties are needed to put an end to this sort of anticompetitive behavior.

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[2] ACS' behavior towards GCI personnel, likewise, is erratic at best. A typical example occurred four days ago. The Interconnection Agreement and Operations Manual between ACS and GCI state that GCI should use a particular ACS email inbox (CustCare2) to notify ACS of changed orders, order queries, and other day-to-day issues. Last Friday at 5:03 PM, ACS notified GCI that, effective immediately, emails received between 5 PM and 8 AM would be deleted, ostensibly because too many emails were being received. Even aside from the fact that a time limit on email receipt is nonsensical—GCI will now simply have to wait until 8 AM to send the same email that

II. Performance Metrics are Critical to Enforcing Non-Discrimination and Must Be a Mandatory Part of All Incumbent LEC Interconnection Agreements.

The comments reveal widespread agreement on the need for measured, timely, nondiscriminatory provisioning, and performance metrics are crucial to ensuring that incumbent LECs' cheap talk is followed by meaningful action. To take a few examples:

- "The process for acquiring and utilizing any ILEC service or UNE is well understood: pre-ordering, ordering, installation, maintenance, repair and billing. With the possible exception of billing, each of these functions constitutes an opportunity for ILEC discrimination, and thus each needs specific metrics." (ALTS)[3]

- "Without [measurements and standards], it is simply too hard for CLECs to prove they are receiving inadequate provisioning, too easy for an ILEC to deny that it is provisioning UNEs in an unjust and unreasonable manner, and too easy for regulators to avoid imposing penalties on ILECs." (Adelphia)[4]

- "Federal performance measurements and standards would provide a basis for taking enforcement action against ILECs that are not providing collocation, UNEs and interconnection in a just, reasonable, and nondiscriminatory manner. ... [P]erformance rules would make more transparent the extent to which an ILEC is providing wholesale services in a just, reasonable, and nondiscriminatory manner, by permitting direct comparisons between an ILEC's performance in providing wholesale and retail services and between the performances of two different ILECs in providing services to competing carriers." (CompTel)[5]

- "Knowing that their performance would finally be subject to clear, apples-to-apples comparisons with similarly situated carriers, ILECs would be more inclined to ensure that their individual performance is satisfactory." (Dynegy et al.)[6]

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might have been sent at 5:10 PM—it is a breach of the Operations Manual, which requires 30 days' notice before proposed changes in procedure can be implemented.

3 ALTS Comments at 4.

4 Comments of Adelphia Business Solutions at 3; *see also id.* at 5-12.

5 CompTel Comments at 8.

6 Comments of Dynegy *et al.* at 4.

- "[A]fter about five and a half years of operating under the basic framework established by the First Report and Order in the Local Competition proceeding, including numerous Section 271 proceedings, the industry has accumulated a fairly significant list of ILEC best practices. This record is critical because it provides concrete evidence that ILECs have achieved a given level of accuracy or timeliness in a particular measurement or have been able to adopt a given set of business rules for a performance measure. Where one ILEC is able to do something, the others should be able to as well." (Allegiance)[7]

Even those parties that don't support federal metrics, like AT&T, recognize that state-imposed metrics requirements are crucial to enabling CLECs to compete fairly.[8] And, significantly, the Commission's insistence that the Bell Companies be able to demonstrate that they are in fact meeting their Section 271(c)(2)(B)(ii) obligations to provide network elements on a non-discriminatory basis has persuaded even the BOCs that a core set of performance measures will increase efficiency, promote the Commission's market-opening objectives, facilitate enforcement actions, and "further the procompetitive, deregulatory objectives of the Act."[9]

Given this broad agreement, the FCC can and should require that any interconnection agreement must include metrics for assuring nondiscriminatory provisioning. There is strong commercial precedent for requiring that interconnection agreements include performance metrics.[10] It is a common practice in fully competitive communication markets, such as long distance or backbone capacity, for agreements involving sophisticated commercial parties, neither of whom possesses monopoly market

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7 Comments of Allegiance Telecom, Inc. at 6; *see also id.* at 7-10 (arguing that the proposed performance rules and standards will ensure the growth of facilities-based competition).

8 *See* Comments of AT&T Corp. at 10-23.

9 SBC Comments at 7; *see also* BellSouth Comments at 3 ("The best alternative would be to have a mandatory federal plan that includes a streamlined set of measurements that would apply uniformly.").

10 ALTS Comments at 9 (noting that construction contracts, for example, typically include liquidated damages for a party's failure to meet delivery deadlines).

power, to enter into service level agreements (SLAs). These agreements often embody promises as to service quality, timeliness of provision, promptness of repair and restoration, and many of the other topics addressed by interconnection agreements. They also typically include ways to measure performance with these service quality commitments, and enforcement mechanisms in the case of breach.

These private parties do not rely only on governmental or even litigation remedies to enforce contractual damages. Parties to SLAs could easily rely on FCC common-carrier oversight authority and FCC complaint procedures to rein in the behavior of common carriers. They build self-enforcing penalties directly into their contracts, because such penalties are much more timely than enforcement proceedings, and much more effective at ensuring compliance with the contract.

In the context of the purchase of unbundled network elements from incumbent LECs, the need for service quality commitments, means of measuring whether service is delivered according to those quality commitments, and means of enforcing those commitments is even more critical, as many states commissions, including the Regulatory Commission of Alaska, have recognized.[11]

GCI also agrees, however, that there cannot be a "one-size-fits-all" set of performance metrics, and that the level and nature of the metrics will depend on the operational systems and capabilities of both the incumbent LEC and the CLEC.[12] The

11 *See, e.g.*, Order Approving, in Part, and Modifying, in Part, Arbitrator's Recommendation, *In re Petition by GCI Communication Corp. for Arbitration under 47 U.S.C. §§ 251 & 252 for the Purpose of Instituting Local Exchange Competition*, Regulatory Commission of Alaska, 2000 Alas. PUC LEXIS 382, at *8 (Aug. 24, 2000) (hereinafter "*RCA Order on Arbitration*") ("Without performance standards, the ILEC could render many of the obligations detailed in the interconnection agreement meaningless by delivering lower quality and less timely service to the CLEC's customers.").

12 *See* Comments of AT&T Corp. at 16, 19.

Commission has correctly identified many of the proper topics of performance measures.[13] However, the specific metrics themselves, for example, appear to contemplate an electronic OSS,[14] which is not fully operational in Alaska and is not encouraged by a Section 271 carrot.

This type of "on-the-ground" difference between the Alaska market and many of the Bell Company markets means that, although performance metrics should be required to be a part of any incumbent LEC interconnection agreement, the specific form and content of those metrics will have to be left to the state commission rather than being federally specified. To ensure that CLECs really do receive the non-discriminatory provision of unbundled network elements required by law, the most critical step for the Commission to take is to require that all interconnection agreements entered into by incumbent LECs contain a set of performance measures, backed by contract-based enforcement. State commissions, in arbitrations, can then create an appropriate set of metrics.

III. Strict Contract-based Enforcement Is Crucial

The Commission must not ignore the fact that the best set of performance measures and standards in the world will have virtually no impact unless those measures and standards are backed by contract-based enforcement methods that are significant enough to command ILECs' attention. For far too long, ILECs of all sizes have been able to perform cost-benefit analyses and determine that the costs of non-compliance are lower than the costs of competition. The Commission must impose penalties that shake ILECs from their obvious complacency with the status quo:

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13 *See* NPRM ¶¶ 35-72 (discussing pre-order, order-status, provisioning, and maintenance and repair measurements).

> Poor ILEC performance has routinely been detected, but such detection has not resulted in consequences that are large enough to cause the ILECs to reform their anti-competitive behavior. Indeed, as financial analysts have recently observed, "as long as the cost of violating [performance requirements] is below the cost of allowing competitors to enter the market, it continues to be cheaper to pay the government for violating certain performance targets versus completely opening up the local markets to competitors." In short, ILECs will continue to provide substandard service unless the consequences of doing so are more than a mere cost of doing business.[15]

Perhaps the single best way to ensure greatly improved ILEC compliance would be to require self-effectuating liquidated damages as part of any ILEC interconnection agreement. While FCC and state commission enforcement actions are also important, the time it takes to prosecute complaints makes such actions a distant second-best to contract-based enforcement.

Thus, first and foremost, the Commission should follow through with its proposal to require that interconnection agreements include self-effectuating liquidated damages.[16] As the NPRM notes, the Commission already has extensive experience with such plans.[17] There are also several state PUC precedents for self-effectuating liquidated damages, such as the performance assurance plans (PAPs) that have been adopted in several state 271 proceedings and that have been recommended by several parties to this proceeding.[18]

As ALTS points out, FCC action is necessary because PAP penalties do not exist in all states.[19] Moreover, states such as Alaska have construed state law to preclude self-

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14 *See id.* ¶ 40.

15 *Comments of AT&T Corp.* at 8 (internal quotations omitted).

16 *See* NPRM ¶ 22.

17 *Id.*; *see also Bell Atlantic-GTE Merger Order*, 15 FCC Rcd 14032, 14334-38, app. D, attachment A, ¶¶ 8-16; *SBC/GTE Merger Order*, 14 FCC Rcd at 15042-46, app. C, attachment A, ¶¶ 8-16.

18 *See, e.g.*, Comments of Adelphia Communications at 12.

19 ALTS Comments at 9; *see also* Comments of Allegiance Telecom at 27.

effectuating liquidated damages.[20] Under current Alaska law, ACS can repeatedly and willfully violate any performance standard and face no consequences more serious than a $100 fine upon the third repeated violation,[21] and even that minimal forfeiture to the state treasury is only a possibility if GCI is willing to: (1) file a lengthy report detailing prior performance failures; (2) describe the consequences of those failures; and (3) pursue the complaint to completion before the Regulatory Commission of Alaska.[22] A federal requirement that interconnection agreements contain meaningful enforcement mechanisms is therefore necessary.[23]

Self-effectuating, contract-based liquidated damages serve very important purposes that cannot be met in any other way, and that particularly cannot be addressed through fines that go to either the federal or state treasuries. Contract-based liquidated damages are the only way to redress the failure to meet competition requirements and to compensate the competitor, at least partially, for the damage done to the competitor's business by the incumbent LEC's failure to meet its service guarantees and performance levels. They will create uniquely reliable incentives for better compliance, due to the simple but undeniable fact that companies *hate* reimbursing their competitors (they would much rather pay the government). And as AT&T notes, federally mandated remedies are particularly important in smaller states that may otherwise lack sufficient leverage over recalcitrant ILECs.[24]

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20 *See RCA Order on Arbitration* at *21-*22.

21 *See id.* at *22 (deciding that the most severe penalty that can be imposed under Alaska law is a $100 regulatory penalty pursuant to Alaska Stat. § 42.05.571).

22 *See id.*

23 *See generally* Comments of Allegiance Telecom at 27-32.

24 *See* Comments of AT&T Corp. at 25.

A few small and mid-sized ITCs commented that the proposed base forfeitures should "differentiate between large and small ILECs, and adopt a much lower base forfeiture amount for small ILECs"[25] Of course, not all rural or "small" ILECs are created equal; for the tiniest of ILECs (assuming they're exposed to competition at all), there may be a point at which the proposed forfeitures might become burdensome. However, there are plenty of mid-sized and small ILECs, ACS among them, that have more than sufficient resources to absorb the proposed forfeitures, and such ILECs should not be allowed to claim artificially low forfeiture ceilings by hiding behind a "rural" or "small" designation. On one hand, GCI would support a sliding scale based on annualized local-service revenues, as proposed by Dynegy *et al.*, provided that local service revenues were calculated at the holding-company level and not at the artificial level of study areas.[26] But on the other, even sliding-scale forfeitures must be hefty enough that ILEC cost-benefit analyses lead them to conclude that it is preferable to strive for nondiscriminatory access rather than to obstruct it and take the forfeitures instead.

BellSouth and SBC question whether the Commission has authority to impose self-executing liquidated damages.[27] BellSouth's alternative proposal—for the Commission to adopt self-liquidating penalties, but set them at a level that ILECs would accept[28]— is a poor parody of real damages. Suffice it to say that letting ILECs set the penalty amounts would be akin to putting the fox in charge of guarding the henhouse.

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25 Comments of the Small ITCs at 6; *see also* Comments of NECA *et al.* at 4-5.

26 *See* Comments of Dynegy *et al.* at 20.

27 *See, e.g.*, BellSouth Comments at 23 (raising hearing requirements, specific-damages statutory provisions, Notice of Apparent Liability procedures, and due process to cast doubt on the Commission's authority to order self-effectuating liquidated damages).

28 BellSouth Comments at 21.

BellSouth is, however, absolutely correct in noting that the enforcement goal should be to "incent" incumbents to avoid discrimination.[29] Unfortunately, BellSouth does not recognize that nothing will incent incumbents to avoid discrimination quite so effectively as hefty damages that must be paid directly to competitors.

The hearing requirements cited by several commenters are not a bar to self-liquidating, contract-based damages, and they are a legal non-sequitur. As Dynegy explained in detail, Section 201 and Section 202, together with Sections 206 through 208, clearly allow the Commission to decide, in advance, that an ILEC's failure to provide nondiscriminatory service to a competitor, pursuant to a pre-determined and well-defined metric, is grounds for a self-effectuating forfeiture payment to the competitor who suffered the discriminatory treatment.[30] The Act requires incumbent local exchange carriers to provide unbundled network elements on a non-discriminatory basis, and it grants to the FCC the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[31] Section 252 gives the state commission the power to arbitrate "any open issues" between the incumbent LEC and the requesting carrier in an interconnection agreement, which may include performance assurance requirements such as performance metrics backed by contract-based, self-liquidating damages.

All of the foregoing is not to say that increases in FCC and/or state forfeitures would be useless. On the contrary, GCI believes that such increased forfeitures could only be helpful, but the bottom line is that such measures will not substitute for self-

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29 BellSouth Comments at 22.
30 Comments of Dynegy *et al.* at 14-15.
31 42 U.S.C. § 201(b); *AT&T v. Iowa Utility Board*, 525 U.S. 366, 377-78 (1999).

effectuating penalties paid directly to the injured party.[32] First, as noted above, payments to governmental treasuries do not have the same prohibitive effect as payments that must be made directly to injured competitors.[33] Second, even in the best of circumstances, FCC and state forfeiture proceedings take six months to one year, often followed by endless appeals. GCI does support the Commission's tentative proposal to take compliance with UNE measurements and standards into account in examining potential violations of section 251, section 271, or local-competition rules.[34] But Commission forfeitures can't be the be-all and the end-all of UNE enforcement.

In the end, GCI believes that all interconnection agreements between an ILEC and a requesting carrier need to include standards for ensuring nondiscriminatory service and provisioning quality, metrics for measuring those standards, and penalties for failure to meet the metrics, and that the FCC has authority to incorporate these regulations into its rules implementing Section 251.

IV. <u>Flexibility for Small and Midsize ILECs Is Fine; Exemption Is Not</u>

ACS' stubborn resistance to competition, of course, is far from unique, and it is simply factually wrong to say that there are no problems with the non-discriminatory provision of unbundled network elements by mid-sized and small incumbent LECs. Every CLEC can report obstreperous behavior by incumbents, whether large or small. GCI is therefore greatly concerned by the fact that many small and mid-sized ILECs are

32 *See, e.g.*, Comments of Dynegy *et al.* at 17.

33 *See, e.g.*, CompTel Comments at 11 ("The fact that ILECs are repeatedly incurring fines and forfeitures for noncompliance is highly indicative of the fact that the ILECs view these penalties as an acceptable cost of doing business—as a cost of maintaining their monopoly market share."); *see also* Comments of AT&T Corp. at 8, 23-25.

34 NPRM ¶¶ 21-22.

proposing to exempt themselves from the proposed measurements and standards.[35] Of course, competition is no less valuable to the customers of small and mid-sized companies, and the real victims of the blatant economic protectionism sought by small and mid-sized ILECs would be the consumers who, as GCI has demonstrated, benefit substantially when competition comes to areas served by these smaller companies.

It is simply disingenuous for these incumbents to claim that the absence of enforcement plans for small ILECs means that there is no need to subject them to standardized measurements. The only reason enforcement plans exist for the BOCs is because the Commission and the Department of Justice insisted that the Bell Companies actually demonstrate non-discriminatory provisioning of UNEs in order to obtain long-distance approval. ITCs lack enforcement plans not because they are fully complying with the law, but simply because none is required to apply for Section 271 authority.[36]

Similar claims by ITTA and other small and mid-sized ILECs that their UNE and interconnection processes are problem-free[37] are likewise grossly untrue. ACS, the incumbent that dragged GCI through five years of litigation and strife, is an ITTA member. The comments filed by ALTS describe its members' "years of experience and analysis as to the various ways in which ILECs can [discriminate] and have discriminated against CLECs seeking to purchase UNEs."[38]

Of course, GCI is not proposing that small, rural LECs be required to develop performance metrics and self-liquidating damages prior to receiving a bona fide request for interconnection. But once a bona fide request is received and the state commission

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[35] *See, e.g.*, Comments of the Small ITCs at 2.
[36] *See* Comments of Dynegy *et al.* at 18.
[37] *See* Comments of ITTA at 7, 9-10; Comments of the Small ITCs at 2.
[38] ALTS Comments at 4.

terminates the rural exemption, there is no basis in the Communications Act (or in logic) for justifying any exemption from the requirement that UNEs be provided on a non-discriminatory basis. Section 251(f), the requirement of a bona fide request, and a state-commission determination that the rural exemption be terminated fully protect the legitimate interests of small ILECs in not being required to build unneeded compliance monitoring mechanisms.

Moreover, small and mid-sized ILECs do not seem to recognize that the Regulatory Flexibility Act does not authorize or support exemption from non-discrimination requirements, but only supports flexibility in how those requirements are evaluated and enforced. NECA, for example, argues that "[i]nstead of adopting a 'one-size-fits-all' approach to performance measurements and standards, the Commission should exempt rural ILECs from any such requirements."[39] NECA erects an all-or-nothing strawman that ignores the obvious alternative: to require that performance metrics and contract-based self-liquidating enforcement mechanisms be part of every interconnection agreement, but to leave the specifics of those metrics and enforcement mechanisms to be arbitrated by the state commissions if the parties cannot agree. For those rural/small ILECs for whom the state commission has terminated the rural exemption in response to a bona fide request, NECA's conclusory dismissal of performance metrics as of "questionable benefit" is flat wrong; they will be of great benefit to CLECs trying to compete in those markets, as well as to the customers who are otherwise denied the benefits of competition. As ALTS put it, "[c]urrently, ILECs can

[39] Comments of NECA *et al.* at 3; *see also* Comments of ITTA at 5, 9.

degrade the quality of their competitors' UNEs without suffering any negative consequences in terms of lost market share."[40]

The Commission can and should act to change this status quo for *all* ILECs that offer interconnection, even if substantial flexibility is required to design appropriate performance metrics for smaller ILECs that are not on the scale of the BOCs. Dynegy, for example, very sensibly argues that regulators should be able to consider an ILEC's size in deciding on which specific metrics to require.[41] As noted previously, however, such a sliding scale should not turn on the Act's artificial study area-based definitions of a "rural telephone company," but should instead be based on assessment of the holding company's local service revenues.

GCI would support a plan that leaves substantial discretion to state PUCs to set whatever performance metrics are appropriate in the circumstances of that state. As the Commission knows, "many state commissions have already adopted an extensive set of performance measurements, standards, and penalty plans to capture incumbent LECs' performance in provisioning UNEs, interconnection trunks and collocation."[42] These standards have derived from extensive state review of interconnection agreements, and GCI agrees with both SBC and Comptel that myriad differences in ILEC networks, ILEC systems, and state regulatory environments preclude inflexible, preemptive, one-size-fits-all specific metrics; and states need the flexibility to tailor performance rules to accommodate whatever unique conditions exist within their jurisdiction.[43]

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40 ALTS Comments at 8; *see also id.* at 9 (noting that any reduction in an ILEC's wholesale profits is typically more than offset by increases in the ILEC's retail profits).

41 *See* Comments of Dynegy *et al.* at 19.

42 NPRM ¶ 15.

43 SBC Comments at 34; CompTel Comments at 7.

Simply put, all of the foregoing arguments go to the question of *what* plan to require, not *whether* to require a plan at all. A flexible approach for smaller markets and/or smaller ILECs is fine; exemption of smaller markets and/or smaller ILECs is unacceptable.

V. Conclusion

The FCC is to be commended for tackling the topics raised in this review. The Commission can ensure nondiscriminatory treatment for all CLECs by concluding that *all* LEC interconnection will be governed by reasonable but firm metrics, and that the penalties for failure to meet those metrics will be sufficient to convince ILECs to meet them.

Respectfully submitted,

By: ____________________

John T. Nakahata
Michael G. Grable
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

Counsel for General Communication, Inc.

Of Counsel

Martin Weinstein
Mark Moderow
GENERAL COMMUNICATION, INC.
2550 Denali Street
Suite 10000
Anchorage, AK 99503

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