

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

<u>In the Matter of</u>)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	
Carriers)	CC Docket 01-338
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	
1996)	CC Docket 96-98
)	
Deployment of Wireline Services Offering)	
<u>Advanced Telecommunications Capability</u>)	CC Docket 98-147

COMMENTS OF GENERAL COMMUNICATION, INC.

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SUMMARY

General Communication, Inc., a provider of local exchange, long distance, and Internet access services to residential and business consumers in Alaska, urges the Commission to reaffirm its heretofore strong and pro-competitive unbundling rules. These rules have worked to bring competition, consumer choice and innovative new services to Alaska, and to shake the complacency of the incumbent local exchange carrier. Predominantly using UNEs, GCI has captured 40% of the retail local exchange market in Anchorage, which it has served since 1997, and it is rolling out service in Fairbanks and Juneau, Alaska's second and third largest (but small by national standards) cities. The problem for facilities-based entry today is not unbundling, but high barriers to entry, even in enterprise business markets. Access to UNEs lowers these high barriers to entry. It would be a mistake for the Commission to withdraw UNEs from the list of available elements, as that would raise, rather than lower barriers to entry.

In evaluating which elements to require to be unbundled, the Commission has correctly focused on whether a requesting carrier would suffer a "material diminishment" in its ability to offer the service it seeks to offer. The statutory standard focuses explicitly on the service the CLEC seeks to offer, and that service must be examined in the relevant product and geographic market. In evaluating whether a CLEC has other sources of supply of the unbundled element, including self-provisioning, that would allow the CLEC not to suffer a "material diminishment" if an ILEC refused to provide an unbundled element, the Commission cannot consider the availability of products not in the relevant product market or the relevant geographic market. Because telecommunications markets are point-to-point, the relevant geographic market is the specific location that the CLEC seeks to serve, and does not include other locations.

Cost is a critical component, and the most basic component, in determining impairment. The Commission previously has correctly found that in order to be impaired, the cost of the alternative must be “materially greater than the cost of obtaining the corresponding element from the incumbent.” This standard is fully consistent with the Supreme Court’s decision in *AT&T Corp v. Iowa Utilities Board*, in which the Court criticized the Commission’s earlier assumption that “any” increase in cost created impairment. By limiting impairment to material differences in cost, the Commission fully addressed the Supreme Court’s concerns.

Additional factors such as encouraging facilities based competition and innovation are fully consistent with, and not in conflict with, full unbundling under current rules. When a CLEC is impaired without access to a particular unbundled element, the effect of denying access will be to reduce competition and consumer choice. Recognizing that, the Commission should not remove unbundling in the hope of incenting facilities-based competition without clear evidence that such an incentive will work.

The fact of the matter is that CLECs such as GCI have every incentive to deploy their own facilities to get off of the ILEC’s network. GCI consistently suffers from long provisioning delays, uncertainties as to when provisioning will occur, and discrimination in provisioning at the ILEC’s hands. GCI has sometimes been able to make lemonade out of the ILEC’s provisioning lemons, such as when GCI instituted a monthly drawing for a trip to Hawaii in order to get customers to stay on GCI’s 3-6 month long waiting list for service. Nevertheless, these types of abuses give GCI substantial incentive to install its own facilities whenever possible.

Moreover, relying on UNEs forever would mean leaving GCI’s fate in the hands of regulators forever. Forever is a long time, and GCI would much rather have its competitive fate

in its own hands. It cannot and will not continue to put itself indefinitely in a position in which the incumbent LEC or the regulator can cut off GCI's ability to serve its customers. That is in part why GCI bought cable systems in 1997.

In addition, the current regime gives ILECs plenty of incentive to invest in new advanced services, without excluding competition from those areas where, or for those products for which, cable modem service is not an available or adequate substitute. GCI's cable plant only passes about 50% of the businesses in Anchorage. Moreover, GCI must lease DSL-qualified loops to provide certain high capacity services that cannot be provided over a cable modem system.

GCI would be impaired without access to loops, switching, interoffice and transport and the other unbundled network elements. Loops cannot be duplicated in a timely manner and are extremely costly. GCI will eventually provide cable telephony, but that service is not implemented in the network today. For a quarter of its lines in Fairbanks and over half its lines in Juneau, it is either technically or economically infeasible for GCI to get access to the unbundled loops because of loop concentrators in the ILEC's network. For these loops, GCI is materially impaired in offering "the service it seeks to offer" without access to unbundled local switching. GCI is similarly impaired without access to interoffice transmission, which carries traffic from remotes to host switches. In addition, access to interoffice transmission will be necessary when GCI enters the Alaska bush, because bush communities are small and generally have only one central office.

Finally, the Commission should not and cannot preempt states' ability to add network elements to the national list, using the states' own authority. Section 251(d)(3) clearly preserves states' authority to do so.

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COMMENTS OF GENERAL COMMUNICATION, INC.

General Communication, Inc. (GCI) hereby submits these comments in the Commission's first triennial review of the Commission's policies on unbundled network elements (UNEs).¹ GCI's own experience shows that the Commission's existing unbundling policies work, that they promote facilities-based competition, consumer choice and the growth of innovative advanced services networks. The problem for facilities-based entry is not unbundling, but high barriers to entry, even in enterprise business markets. Access to UNEs lowers these high barriers to entry, and the ensuing competition can bring strong consumer benefits and innovation to any telecommunications market, as demonstrated by the results achieved in Alaska. It would be a mistake for the Commission to contort the pro-competitive Telecommunications Act

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (2001) ("NPRM").

of 1996 ("1996 Act") in order to retreat into an unwarranted presumption that telecommunications is a natural monopoly. Consumers win and the 1996 Act works when consumers have marketplace choices, and consumers lose -- and the 1996 Act fails -- when incumbent LECs are allowed to erect and maintain barriers to consumer choice.

I. BACKGROUND

GCI is an Alaska-based CLEC, IXC, cable operator and ISP. GCI was founded in 1979, and began offering service by introducing long distance competition to Alaska on Thanksgiving Day, 1982. In 1991, GCI entered the long haul fiber optic cable market, introducing competition into the market to carry traffic over submarine cables between Alaska and the 48 contiguous states, and it expanded its competitive presence in 1998 when it built the first modern and upgradeable fiber optic cable linking Alaska to the lower 48 states. In 1996, following passage of the Telecommunications Act of 1996, GCI purchased cable systems that now pass 85% of Alaska households. GCI entered the local exchange business in 1997 in Anchorage, and is entering Fairbanks and Juneau after long and drawn out litigation over whether the Regulatory Commission of Alaska should lift the rural exemption, as it has now done. In all its local exchange markets, GCI serves residential as well as business customers, and it has sought and received ETC status in Anchorage, Fairbanks and Juneau.

Consumers have welcomed the choices and innovations GCI has brought to the marketplace. In long distance, when GCI first entered the market, virtually all long distance calls were analog satellite transmission and used rather crude echo suppressors.² GCI immediately introduced digital satellite transmission and echo cancellation, while

reducing prices.³ Most calls within Alaska itself required a satellite “double-hop” to move the call from the remote origination location to a switching hub, and then from the switching hub to its destination elsewhere in Alaska.⁴ After intrastate competition was approved in 1991, GCI introduced demand assigned multiple access (DAMA) technology that eliminated the second hop, vastly improving service quality within Alaska.⁵ As GCI expanded its competitive footprint, its competitor responded by upgrading its own facilities and reducing prices.⁶ Today, a caller anywhere in Alaska can call nearly anywhere else in Alaska with a clear, high-quality call at low prices, or they can be connected directly to the rest of the United States or the rest of the world, using fiber optic cable.⁷ As a result of GCI’s competitive effort and innovation, it has grown to hold a 45% share of the Alaska long distance market.

GCI first began offering local service in Anchorage, Alaska’s only market in which the ILEC is not a “rural telephone company” and therefore the only Alaska market in which GCI could obtain interconnection and access to network elements without the State commission first lifting the “rural exemption.”⁸ GCI now serves 40% of all business and residential lines in Anchorage. As discussed further below, GCI has brought new services and reduced prices to Alaska consumers. GCI began service as a

² Declaration of Frederick W. Hitz, III (filed April 5, 2002), at ¶ 28, which is attached hereto (“Hitz Declaration”).

³ *Id.*

⁴ *Id.*

⁵ DAMA technology allows calls to be switched at the satellite, rather than at a terrestrial switching hub.

⁶ *Id.*

⁷ *Id.*

⁸ *See* 47 U.S.C. § 251(f).

CLEC in Fairbanks (a “rural” study area) in summer 2001, and already has captured 15% of the market. GCI started service in Juneau (a “rural” study area) in January 2002, where it already has 3% of the market, and has submitted a bona fide request to provide service in the Glacier State Study Area, including the Kenai Peninsula and Kodiak Island (also a “rural” study area).⁹

GCI rolled out its retail Internet service in 1998, and is now Alaska’s largest ISP, providing both dial-up and broadband Internet access. In areas served by GCI’s cable systems, it provides cable modem services, which are currently available to 80% of its subscribers. In Anchorage, it also uses DSL-qualified unbundled loops connected to GCI’s own electronics to provide high capacity data services, particularly for businesses that cannot be served by cable modem either because of the service required or because they are not located in areas passed by cable facilities. GCI is currently introducing high-speed Internet access to Alaska’s rural bush areas using unlicensed wireless (802.11) technology interconnected to a satellite backhaul.¹⁰ GCI anticipates that it will offer high-speed Internet access to all bush locations it currently serves by 2004.¹¹

GCI is not a company that has been hesitant to make investments in the facilities necessary to bring twenty-first century telecommunications and information services to Alaska’s consumers. In less than 10 years, GCI has invested over \$750 million in

⁹ GCI’s entry into Fairbanks and Juneau was delayed for years by litigation over whether the State commission should lift the “rural exemption.” It finally did so, and interconnection agreements were then arbitrated.

¹⁰ Hitz Declaration at ¶ 17.

¹¹ *Id.*

integrated communications assets in some of the most rural markets in the United States.¹²

A. GCI'S LOCAL NETWORK

1. Local Exchange Services

In Anchorage, GCI currently predominantly uses an ILEC UNE-loop, its own switch and its own transport fiber ring to provide local exchange and exchange access services.¹³ In Fairbanks and Juneau, GCI has acquired switches, is constructing collocation facilities, and, in Fairbanks, has begun to cutover customers currently served under Section 251(c)(4) resale to GCI's UNE-L arrangement.¹⁴ In its UNE-L architecture, GCI provisions a single switch in each service area with the ILEC loop forming a portion of GCI's loop facilities.¹⁵ GCI completes its loops facilities by interconnecting its own multiplexing and transport facilities at the collocation cage in the ILEC central office and transporting the call back to GCI's switching center. At the switching center, the call is then switched and placed on other transport facilities for delivery.¹⁶

Where it has a feasible alternative, GCI will not remain captive to the incumbent LEC's facilities. The hidden costs of discrimination and customer aggravation caused by the incumbent LEC failing to provision services in a timely manner and the regulatory uncertainty and transaction costs of constantly litigating the availability and the price of

¹² Hitz Declaration at ¶ 3.

¹³ *Id.* at ¶ 4.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 5.

¹⁶ *Id.*

necessary inputs far outweigh any simplistic calculation of UNE rates versus capital investment costs. For this reason, GCI already serves approximately one-quarter of its local loops entirely with its own facilities.¹⁷ In an effort to further reduce its reliance on the ILEC to supply its local loops, GCI plans to migrate its local exchange services to its cable platforms in areas served by cable, including the residential portions of Anchorage, Fairbanks, and Juneau.¹⁸ GCI will begin testing a cable-based telephone system this year, and is currently making network design decisions with respect to issues such as back-up power and other technical issues.¹⁹ However, actual delivery of commercial telephone service over cable plant remains some time away.

Unfortunately, GCI will never be able to escape the incumbent LEC's network altogether and still be able to provide ubiquitous competitive telephone service. Only about half of GCI's potential business customers are passed by cable facilities, as compared with 95% of potential residential customers.²⁰ GCI also operates a fiber loop in Anchorage, which it uses to connect its facilities in the five Anchorage ILEC end offices, and it serves approximately 20 business customers from these facilities. This loop does not pass all of the 50% of businesses not passed by GCI's cable network. Indeed, problems with building access, particularly access to entrance facilities into a building and to the riser conduits within the building make it uneconomic for GCI to add customers for service over its fiber facilities.²¹ The incumbent LEC's advantages in

¹⁷ This includes customers that are collocated with GCI, as well as customers served directly from GCI's fiber rings. Hitz Declaration at ¶ 5.

¹⁸ *Id.* at ¶ 7.

¹⁹ *Id.*

²⁰ *Id.* at ¶ 9.

²¹ *Id.* at ¶ 10.

terms of already having access to buildings and risers are simply too great. In addition, much of the street conduit in Anchorage is now full, so it is not possible to expand the scope of GCI's ring coverage without extensive digging.²²

Moreover, GCI's fixed wireless assets do not yet appear to be a ubiquitous alternative to the local telephone loop in the areas that GCI will not be able to reach using cable telephony.²³ GCI deployed an experimental fixed wireless system in Anchorage in June 2000. As it conducted its deployment, it discovered several problematic issues. First, the technology was not yet mature so the system was hampered both by a lack of features and, as features were added, by difficulties in upgrading network equipment because of the developmental changes.²⁴ Second, when trees bloomed in the spring, transmission signals weakened.²⁵ Although additional cell sites would probably have cured this problem, the economics of deployment limited that solution.²⁶ In addition, both GCI and AT&T Wireless found that it is difficult to receive local approvals for cell towers in the Anchorage area.²⁷ As such, fixed wireless appears to be more of a pocket strategy to complement UNE-L deployment than a ubiquitous replacement technology.²⁸

Thus, in areas not passed by GCI's cable platform, and particularly in those business areas not accessible either over cable or through GCI's fiber loop, GCI would

²² Hitz Declaration at ¶ 10.

²³ *Id.* at ¶ 11.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* Fixed wireless may hold more promise for deployment in the Alaska bush, where the RF environment is less challenging.

²⁷ *Id.*

²⁸ AT&T wireless also deployed a fixed wireless system in Anchorage as part of its "Project Angel." That offering was shut down in 2001.

need to continue using UNEs provided by the ILEC in order to offer service in those areas.²⁹ Where possible, GCI will continue to employ its own switching and transport facilities, and will only procure UNE loops from the incumbent LEC. Without access to these unbundled loops (including DSL qualified loops), GCI would be unable to provide telecommunications services to a substantial portion of the business market and part of the residential market.³⁰ Of course, until GCI can deploy its cable telephony systems, it would be impaired in reaching the vast majority of both the residential and the business markets.

It is no picnic to try to serve customers using unbundled loops. ILEC provisioning problems make this a particularly difficult mode of entry. GCI has had continual problems with provisioning unbundled loops, especially for business loops, which require a "hot cut." Initially, GCI suffered from backlogs of 3 to 6 months in loop cutovers, and GCI even negotiated to pay the costs of the ILEC hiring additional workers in Anchorage just to increase the level of "hot cuts."³¹ Ultimately, even that proved to be an inadequate solution to the problem of provisioning a sufficient volume of "hot cuts." GCI's objective in Anchorage was to reach 500 hot cuts per day, but at its peak, averaged only approximately 100 per day. This problem remains unsolved.³²

Moreover, there are competitive consequences from the inadequacy of the systems for provisioning unbundled loops. In Fairbanks, for example, GCI is phasing in

²⁹ Hitz Declaration at ¶ 13.

³⁰ *Id.* at ¶ 8-13.

³¹ *Id.* at ¶ 14. These provisioning delays were so persistent and prolonged, GCI resorted to holding a monthly drawing of a trip to Hawaii for its customers stranded on the waiting list so that they would not cancel their orders. *Id.*

³² *Id.*

its residential offerings by zip code so that it can manage customer expectations and provisioning.³³ GCI learned from its experience launching in Anchorage that attempting to serve the whole city from the start simply results in long waiting periods to initiate service because the ILEC cannot or will not cut over the unbundled loops in a timely fashion. GCI would prefer to launch its Fairbanks residential service area-wide immediately, but must limit its launch so that its orders do not outstrip the ILEC's self-imposed manual hot cut capacity.³⁴

Even though GCI will serve the bulk of its customers through either its own facilities or its own facilities in combination with a UNE loop, in some areas GCI will be substantially and materially impaired without access to unbundled switching and transport.³⁵ In Anchorage, for example, Alaska Communications Systems (ACS), the dominant ILEC, operates a number of older integrated digital loop carriers (IDLCs) that have not implemented GR-303 and therefore do not allow unbundled access to multiplexed unbundled loops prior to entering the switch.³⁶ In these areas, GCI simply cannot obtain access to the unbundled UNE loop in order to interconnect and direct that traffic to its collocation space.³⁷ GCI is thus limited to using UNE loop, switch and interoffice transmission in preexisting combination (called UNE-P) or section 251(c)(4) resale in order to offer competing telecommunications services in IDLC areas that do not

³³ Hitz Declaration at ¶ 14.

³⁴ *Id.*

³⁵ Today approximately 10% of GCI's lines are not provided over its own loops or a UNE-loop in combination with GCI's switching.

³⁶ Hitz Declaration at ¶ 20.

³⁷ ACS' newer IDLC now do implement GR-303, although they did not do so at first. ACS, however, is currently seeking to charge GCI twice the interim unbundled loop rate for access to these UNE loops. The arbitration of this issue is pending.

implement GR-303.³⁸ As discussed further below, resale is not an adequate competitive alternative.

Moreover, the network architecture in parts of Alaska, particularly in Fairbanks, Juneau and adjacent areas, makes it impossible to offer ubiquitous competitive service solely through UNE-loop entry. In Fairbanks today, even though GCI is collocated at the only host central office and at one of the remote switching offices, it still does not have direct access to unbundled loops for almost 25% of its lines in service.³⁹ In Juneau, GCI lacks access to unbundled loops for 52% of its lines in service.⁴⁰ These loops enter either the host or principal remote site from other remote switching centers or from remote loop concentrator modules.⁴¹ When the trunks enter the central office, they are not configured to allow unbundled access to the traffic on the incoming trunk prior to its entering the switch. Thus, to serve these lines, GCI must use UNE-P or resale under Section 251(c)(4) of the Communications Act of 1934 (“Communications Act” or “Act”).

Collocation at the subloop level, in order to gain access to distribution plant prior to the loop being placed on the inaccessible IDLC or remote loop concentrator would be cost prohibitive in most cases.⁴² In some cases, access to the subloop distribution plant is not feasible, especially with respect to many remote loop concentrators.⁴³ Even where a frame (or its equivalent) is in place to make collocation possible at that point, in many

³⁸ Hitz Declaration at ¶ 20.

³⁹ *Id.* at ¶ 21.

⁴⁰ *Id.*

⁴¹ Some of these remote loop concentrator modules are in outside huts, in which case they are also referred to as Outside Plant Modules.

⁴² Hitz Declaration at ¶ 22.

⁴³ *Id.*

cases it is economically infeasible, as the costs of replicating the feeder portion of the loop or of leasing a dedicated trunk from the ILEC to the remote switch, IDLC or loop concentrator module are substantial.⁴⁴ Without the ability to buy all network elements in preexisting combination, GCI would have no means of serving these areas other than Section 251(c)(4) resale, at least until it was able to deploy its cable telephony service, and in some cases even after cable telephony becomes available.

Resale of ILEC services under Section 251(c)(4) is not an adequate means, over even the medium term, for GCI to serve customers that it cannot serve through ILEC unbundled loops or GCI's own facilities.⁴⁵ Most significantly, resale does not permit GCI to offer customers the services it wants to offer, but limits GCI to offering the services the ILEC chooses to offer, at the ILEC's chosen service quality.⁴⁶ GCI cannot redefine the service, nor can it add features that the ILEC has not yet implemented. As such, GCI cannot necessarily offer the same offerings to these customers that it offers to the rest of its customers. In addition, when GCI uses Section 251(c)(4) resale, its costs move in tandem with the ILEC's prices, irrespective of costs, and thus it is less able to counterattack non-cost-based ILEC rate increases.

As a second example of network architecture limitations, ACS is increasingly substituting remotes for switches. This has occurred in the North Pole⁴⁷ and Ft.

⁴⁴ Hitz Declaration at ¶ 22.

⁴⁵ *Id.* at ¶ 12.

⁴⁶ *Id.*

⁴⁷ ACS substituted a remote for an end office switch in its North Pole exchange, which is located adjacent to Fairbanks, although in a different study area and operating subsidiary. Expanded interconnection for access traffic from ACS local customers in the North Pole exchange can now only be obtained at the trunk side of the ACS host switch in Fairbanks, and can no longer be obtained at the North Pole switch. Thus,

Wainwright wire centers, which are located in study areas adjacent to Fairbanks, and which home off a host switch in Fairbanks. ACS is also attempting to convert full switches to remotes at Eielson Air Force Base and Kenai. Converting a switch into a remote frustrates the deployment of CLEC facilities by eliminating GCI's ability to interconnect fiber transport facilities on the trunk side of the switch to carry access traffic originating from ACS local customers for whom GCI is the long distance carrier. When GCI cannot carry this access traffic between the remote and GCI's interexchange point of presence, thereby avoiding ILEC charges for switched transport, GCI is deprived of potential economies of scale and scope in installing transport facilities that are necessary to carry GCI's own local exchange and exchange access traffic from the interconnected loop to GCI's switching center.⁴⁸ In the case of the North Pole exchange, the conversion of the switch to a remote occurred after GCI had installed its own fiber to North Pole, and thus deprived GCI of the ability to switch its own long distance traffic to its own facilities. In other cases, losing the savings from carrying its own access traffic make it uneconomic for GCI to extend its own fiber facilities to interconnect at the remote; GCI must then purchase UNE-P (i.e. switching and transport in addition to loop) in order to have the traffic switched and routed to GCI's own network.⁴⁹

2. Advanced Services

GCI is currently rolling out cable modem services in all areas where it provides cable service, and it expects to offer cable modem service to virtually all homes passed

all GCI access traffic must now be hauled by ACS to Fairbanks with GCI paying ACS for transport. This instance was particularly egregious because North Pole and Fairbanks are in different ACS corporate subsidiaries. Hitz Declaration at ¶ 24.

⁴⁸ Hitz Declaration at ¶ 23.

⁴⁹ *See id.*

by the end of 2002.⁵⁰ As discussed above, however, 5% of homes and approximately 50% of businesses are not passed by GCI's cable facilities. In Anchorage, in areas not served by cable or where the customer requires a service that has different characteristics than the cable modem service, such as faster upload speeds or dedicated bandwidth, GCI provides high-capacity advanced services (including DSL) using its own electronics and an ILEC-supplied DSL-qualified loop.⁵¹ GCI plans to offer similar high-capacity advanced services in Fairbanks and Juneau, particularly for business customers, once it has finished installing its collocation facilities. GCI would not be able to offer these advanced services without access to DSL-qualified loops, and in Anchorage it would have to disconnect customers if the Commission permitted ILECs to withdraw DSL-qualified loops.⁵²

GCI's advanced services offerings are not limited to Alaska's urban areas, and can be offered even where GCI has not yet been certified as a local exchange carrier. As noted above, GCI is rolling out high-speed Internet access to the Alaska bush communities it serves, which it expects to complete by 2004. This high-speed service uses unlicensed wireless technology to bridge the "first mile," and will provide download speeds up to 250k. GCI is offering this high-speed service at the same price as its urban cable modem service and has thus far seen a phenomenal take rate.⁵³

⁵⁰ Hitz Declaration at ¶ 16.

⁵¹ *Id.* at ¶ 19.

⁵² *See id.*

⁵³ Unlicensed wireless is particularly well suited to deployment in the Alaska bush where there are small, relatively dense and geographically contained communities that can be served from a single transmitter. It would not be as well suited to an urban environment, which would require multiple antennas and have a heavier demand. *Id.* at ¶ 17.

While significant, GCI's cable modem and bush wireless Internet access services do not mean that all advanced services markets have competitive alternatives. Cable modem services may, for example, be substitute broadband transmission paths for residential and some small business consumers, but not for larger consumers.⁵⁴ GCI's cable modem service provides residential customers with a maximum speed of 1.5 mbps downstream and 256 kbps upstream. This is an acceptable speed for residential service, but does not provide either the downstream speeds (DS-3 or greater) or the upstream speeds that many businesses require. In addition, back-up power considerations are more significant for business users than for residential broadband users, so this issue further limits the extent to which cable modem services can today be used to serve the business market.⁵⁵

B. COMPETITION HAS SIGNIFICANTLY BENEFITED ALASKAN CONSUMERS.

The competition resulting from GCI's market entry has produced significant benefits for Alaskan consumers, beginning with customer service, which ACS has improved as a competitive response to GCI. In Anchorage, ACS started doing business cutovers and installations at night, rather than during the business day, and extended the hours of its customer service operations.⁵⁶ In Fairbanks, ACS began offering PRI ISDN service and digital subscriber service -- both of which it had never offered before -- once it learned GCI would enter Fairbanks.⁵⁷ ACS also began to offer discount packages and bundles to business and residential customers, and to market and promote its additional

⁵⁴ See Hitz Declaration at ¶ 16.

⁵⁵ *Id.* GCI is currently working on an upgrade to its cable system that would allow 8 hours of standby power. That final solution, however, may be a year or more away.

⁵⁶ *Id.* at ¶ 27.

offerings, such as vertical features.⁵⁸ In Fairbanks and Juneau, anecdotal customer stories indicate that impending competition has forced ACS to focus much more attention on customers and customer service, rather than taking customers for granted. Competition is doing what it is supposed to do: forcing the incumbent to improve the value it offers customers, and to truly try to serve the customer.

The competition between GCI and the Anchorage ILEC, ACS, has also benefited consumers with lower prices. Since GCI entered the market in 1997, the most commonly purchased local service package in Anchorage has dropped 26%.⁵⁹ GCI was able to construct a highly attractive package of local service and vertical features that overcame problems created by below-cost ILEC local service rates, and GCI offered that package at a substantial discount. More recently, when ACS raised its rates in Anchorage by 24%, GCI held the line on its rates (even though UNE loop rates had also increased).⁶⁰ GCI's UNE-L based competitive offerings are disciplining ACS' rate increases in the marketplace, and the same would have been true had GCI been providing service using UNE-P.⁶¹ Had GCI been providing service using wholesale resale service under 251(c)(4), however, GCI would not have been able to exert this price discipline on the incumbent LEC's monopoly pricing power.⁶²

⁵⁷ *Id.*

⁵⁸ Hitz Declaration at ¶ 27.

⁵⁹ *Id.* at ¶ 29.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* AT&T, in fact, was forced to raise its retail rates because it was offering service using Section 251(c)(4) resale, and thus experienced a 24% increase in its wholesale rate. *Id.*

Advanced services are also benefiting from GCI's competitive pressure. ACS now states that it plans to upgrade its network over the next 3 to 5 years, completely replacing circuit switches with ATM-packet switches.⁶³ GCI's ability to provide a suite of advanced services both over its cable modem services and, in areas not served by cable facilities, over DSL-qualified UNE loops combined with GCI's own facilities, places competitive pressure on ACS to continue to upgrade its own offerings.⁶⁴ This is exactly how competition is supposed to work.

II. ELIMINATING AN IMPAIRED CLEC'S ACCESS TO UNBUNDLED NETWORK ELEMENTS TO PROMOTE FACILITIES-BASED DEPLOYMENT IS UNNECESSARY AND WILL DEPRIVE CONSUMERS OF THE BENEFITS OF COMPETITION.

In the *NPRM*, the Commission seeks comment on how it should determine when a requesting carrier's ability to offer telecommunications services would be "impaired," and whether it should exclude some elements from unbundling even if competitors are impaired in order to promote the development of facilities-based alternatives to the incumbent LEC network. Eliminating unbundling when CLECs are substantially and materially impaired by the lack of any alternatives to the incumbent LEC's facilities would be profoundly anti-competitive and anti-consumer. It would deprive consumers of the dynamic benefits that come from competition -- as GCI's experience in bringing competition to Alaska clearly demonstrates. Moreover, elimination of unbundling is unnecessary to give CLECs adequate incentives to build their own facilities. GCI does not want to be dependent on ILEC facilities when it does not have to be, and avoids use of ILEC facilities whenever possible. Indeed, GCI is continually exploring the mostly

⁶³ Hitz Declaration at ¶ 30.

⁶⁴ *Id.*

promising prospects for avoiding use of the ILEC facilities altogether, and has invested its own money to do so. But even with substantial investment by GCI in its own facilities, competition will not reach substantial portions of the market unless GCI has access to all unbundled network elements.

Section 251(d)(2) governs the unbundling obligations of ILECs. That provision directs the Commission, “in determining what network elements should be made available,” to “consider, at a minimum,” whether CLECs would be impaired without access to specific network elements.⁶⁵ The *UNE Remand Order* implemented that provision by establishing the framework that the Commission uses to determine which network elements should be made available on a nationwide basis.⁶⁶ Under that analytical framework, a CLEC is impaired if, “taking into consideration the availability of alternative elements outside the incumbent’s network, including self-provisioning . . . or acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier’s ability to provide the services it seeks to offer.”⁶⁷ The *UNE Remand Order* identified five factors of particular relevance to the impairment analysis: “cost, timeliness, quality, ubiquity, and operational issues associated with use of [an] alternative.”⁶⁸

⁶⁵ The impairment standard applies to most network elements. With respect to elements that are “proprietary in nature,” a stricter necessity standard applies. 47 U.S.C. § 251(d)(2)(A).

⁶⁶ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, ¶ 29 (1999) (“*UNE Remand Order*”).

⁶⁷ *Id.* at ¶ 51 (emphasis added).

⁶⁸ *Id.* at 3705 (executive summary).

In addition to impairment, the Commission considers five other factors in order to determine whether an element should be included in the list of elements that must be made available nationwide. The first two of those additional considerations are whether unbundling an element will promote the “rapid introduction of competition in all markets” and the effect of unbundling on “facilities-based competition, investment, and innovation.” The Commission also considers whether unbundling an element “reduce[s] regulation,” along with its effect on “certainty in the market” and “administrative practicality.”⁶⁹ The *NPRM* seeks comment on these factors, specifically asking whether the Commission should “modify or limit incumbents’ unbundling obligations going forward so as to encourage incumbents and others to invest in new construction.”⁷⁰

A. THE COMMISSION CORRECTLY INTERPRETED THE “IMPAIR” STANDARD TO REQUIRE THE REQUESTING CARRIER TO SUFFER A “MATERIAL DIMINISHMENT” OF ITS ABILITY TO OFFER SERVICE.

The first step for the Commission in applying Section 251(d) of the Communications Act is to determine when a requesting carrier will be “impaired” without access to a specific unbundled network element. The Act specifically directs that this inquiry be conducted with respect to the *requesting carrier* and the services “it seeks to offer.” The Commission has correctly concluded that the impairment cannot be minimal or hypothetical, but must be “substantial and material.”

⁶⁹ *Id.* at ¶¶ 113-116.

⁷⁰ *NPRM* at ¶ 24.

1. Section 251(d)(2) focuses on the needs of specific competitors for wholesale inputs to provide the competitor's retail service in the areas it seeks to serve.

In the *NPRM*, the Commission asked, with respect to the unbundling framework, “how should we consider the level of competition for a particular service?”⁷¹ As GCI's own experience shows, although the level of retail service competition undoubtedly is an important consideration in determining the extent of retail regulation, it has little to do, at least in present market circumstances, with the alternatives available to competitors seeking to offer competitive telecommunications services. Section 251(d)(2) directly and expressly focuses on the needs of those competitors by directing the Commission to consider whether the failure to provide access to a particular network element would impair that competitor's ability “to provide the services it seeks to offer.” The focus of the Commission's impairment analysis therefore must be on the specific requesting competitor under section 251(d)(2) and on the particular services that competitor seeks to offer in the relevant product and geographic market.

The ILECs have sometimes claimed that the existence of a single competitor that is not using an element anywhere in a region or even the country shows that CLECs are not impaired without access to that element. There is no merit to that extravagant claim. The Commission correctly rejected the presence of a single competitor providing service, without using the incumbent's unbundled network elements, as establishing non-impairment.⁷² Among other things,⁷³ a single competitor theory is contrary to the plain

⁷¹ *Id.* at ¶ 38.

⁷² GCI therefore agrees that other CLECs may be impaired without access to the ILEC's loops or local switching, even where GCI is able to provide those services to itself.

language of Section 251. Section 251(d)(2)(B) focuses on impairment of “the” requesting carrier, not “any” requesting carrier, *i.e.*, the question is whether the particular carrier seeking access to provide services would be impaired and not whether some other carrier would be impaired. Moreover, Congress expressly provided for three methods of entry—full facilities, UNEs, and resale—and the “single competitor” theory would eliminate UNEs wherever there is a full facilities provider. Congress thus understood that “the Act is not calibrated to the performance of the company whose business plan allows it to rely the least on the incumbent LEC’s network elements.”⁷⁴

The ILECs sometimes contend that CLECs are making an equally extravagant claim: that if one competitor – even a particularly inefficient CLEC – is impaired without access to an element, it must be available to all competitors for any purpose. That is not GCI’s position, although GCI believes that regulatory limitations on the availability of an element are unnecessary in the face of market incentives for a CLEC to seek alternatives to the ILEC’s facilities. Rather, GCI believes that a more granular analysis is appropriate. That analysis must include consideration of the market (both product and geographic) the CLEC seeks to serve, the possible alternative sources of supply of the element the CLEC seeks to obtain as an unbundled element (including self-provisioning), and the “cost, timelines, quality, ubiquity and operational issues associated with use of the alternative.”⁷⁵ Under such an analysis, it is entirely appropriate to consider the needs

The Commission also considered and rejected wholesale market and essential facilities theories. *UNE Remand Order* at ¶¶ 56-61.

⁷³ See *UNE Remand Order* at ¶¶ 53-55 for additional reasons for rejecting the single-competitor theory.

⁷⁴ *Id.* at ¶ 53.

⁷⁵ *Id.* at 3705.

of a reasonably efficient competitor rather than a particularly inefficient competitor. But, as GCI's experience shows, even a reasonably efficient competitor seeking to provide service across all market segments by a variety of entry strategies would be impaired without access to already-combined unbundled network elements at this time.

Analysis of impairment must begin by defining the product and geographic market that the CLEC requesting unbundling seeks to serve. As with all telecommunications services, the geographic market is point-to-point, which means that the geographic market is the specific location that the CLEC seeks to serve, and does not include other geographic points.⁷⁶ Thus, the geographic market does not include other locations that the CLEC may be serving. The product market is the product the CLEC seeks to offer, and all close demand substitutes.⁷⁷ Thus, voice service is not in the same product market as high-speed data service, and symmetric high-speed data service is often not in the same product market as asymmetric data service.

As in any other competitive analysis, the next step in analyzing impairment is to identify the alternatives available to the CLEC to supply its service to the properly defined product market at the specified location, and the degree of impairment in terms of “cost, timeliness, quality, ubiquity and operational issues.” Means of providing the product that do not arrive at the relevant location (*i.e.*, do not participate in the relevant geographic market) must be disregarded. In other words, a CLEC's cable telephony system that passes a residence in one part of town is not a present source of supply in a

⁷⁶ See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report & Order, 12 FCC Rcd. 15756, ¶ 64 (1997) (“*LEC Classification Order*”).

part of town that is not passed by the cable system. In that case, the Commission, or relevant decisionmaker, would have to determine whether cable plant could be extended to serve that area without such a significant cost or delay that the CLEC would be significantly impaired.⁷⁸ Similarly, the source of supply must also be in the relevant product market: an asymmetric data service over its cable modem system at a specific location is not an alternative source of supply that GCI can use to provide a symmetric, higher capacity data service.

At times, the Commission has aggregated markets, particularly geographic markets, for administrative convenience.⁷⁹ The Commission must be extremely careful in using such a technique here. When the Commission has aggregated markets, it has made clear that it is aggregating “point-to-point markets [that] exhibit sufficiently similar competitive characteristics (*i.e.* market structure).”⁸⁰ Where different technologies with different characteristics serve areas of differing scope, even in adjacent neighborhoods (*e.g.* passed and not passed by cable plant) or for neighboring users (*e.g.* residential or enterprise business data service),⁸¹ they may not share the same market structure.⁸² Even

⁷⁷ *See id.* at ¶ 40. Close demand substitutes are all “products or services that consumers view as substitutes for each other, in response to changes in price.” *Id.* at n.120.

⁷⁸ Some alternatives can be easily discarded. In areas where it does not own a cable system, it would be clearly extremely costly for GCI to buy a cable system in order to be able to provide its own services, and thus purchase of a cable system is not an alternative sufficient to eliminate impairment.

⁷⁹ *LEC Classification Order* at ¶ 66.

⁸⁰ *Id.*

⁸¹ As discussed previously, GCI’s cable modem services provide acceptable speeds for residential and some small business users, but do not provide either the downstream speeds (DS-3 or greater) or the upstream speeds that many businesses require (such as a T-1, which has symmetric capacity).

when the Commission has used such an aggregation technique, it has allowed evidence “suggesting that there is or could be a lack of competition in a particular point-to-point market or group of point-to-point markets” to show that aggregation is inappropriate.⁸³ It would be arbitrary and capricious and contrary to the express language of Section 254(d)(2) for the Commission to ignore such differences in the geographic and product market for the service the CLEC “seeks to offer.”

At some point, there may come a time when competitors should not need all elements. For example, for CLECs without any loop or switch facilities, the development of a third-party wholesale market for a complete service that is the equivalent of these already-combined unbundled network elements--allowing the CLEC the same freedom to innovate as under UNE-P--would fundamentally change the analysis. For GCI, although not necessarily for other CLECs, if it had a choice of numerous wholesalers from which it could obtain a connection to the end user of a sufficient capacity and quality in the areas where it cannot get access to unbundled loops, GCI would not be impaired in offering local service in its more urban markets without access to the ILEC platform.⁸⁴ But there is no third-party wholesale market available to provide these alternatives to the ILEC's loops, and GCI remains required to purchase loops, switching, and transport, in order to

⁸² As another example, GCI cannot today substitute its own switches for ILEC unbundled local switching in areas where it cannot get access to the unbundled loop before the loop enters the ILEC switch, even when these areas are adjacent to areas in which GCI has such access.

⁸³ *LEC Classification Order* at ¶ 67.

⁸⁴ A cable operator could, for example, eventually provide such a service.

be able to serve customers in these areas and offer them the services that GCI seeks to offer.⁸⁵

Similarly, although this circumstance does not exist today in Alaska, it is possible that there might be enough full facilities based competitors in some geographic market that, from the consumer's standpoint, unbundling was unnecessary to protect consumer choice in a dynamic market. That would be relevant under section 10 of the Communications Act (regarding forbearance), but not under section 251(d)(2). The second prong of the three-part forbearance analysis is whether "enforcement of such . . . provision is not necessary for the protection of consumers."⁸⁶ Thus, unlike section 251(d)(2), section 10 focuses on consumers. Of course, there are other components of the forbearance analysis as well. And critically, even in the most competitive retail market in the country, GCI is still dependent upon the incumbent LEC's unbundled network elements so that unbundling remains necessary to protect consumer choice. In any event, under section 251(d)(2), the focus is on the needs of the requesting carrier rather than on the level of competition for a particular service.

2. Cost is a key factor in the impairment analysis.

The Commission asked, with respect to the factors governing impairment, whether "cost" should "be afforded less weight than the other factors."⁸⁷ In order to establish the certainty needed for competitive entry, as well as the reasons discussed below, the answer is "no." The Commission previously determined that cost is the most

⁸⁵ Again, GCI could use Section 251(c)(4) resale, but that limits GCI only to the services the ILEC seeks to offer.

⁸⁶ 47 U.S.C. § 160(a)(2).

⁸⁷ *NPRM* at ¶ 19.

important factor in the impairment analysis, and the Commission should adhere to that determination.

From the standpoint of common sense, it is hard to imagine what factor would be more important than cost in an impairment analysis. Of course, competitors will not be able to compete if they must make massive investments to enter markets with no market share that the ILECs served for decades as protected monopolists. Congress understood that fact. It concluded that competitors would not have fully redundant networks in place “because the investment necessary is so significant.”⁸⁸ Therefore, it added, “[s]ome facilities and capabilities (e.g., central office switching) will likely need to be obtained from the incumbent local exchange carrier pursuant to the new section 251.”⁸⁹ Congress thus focused on cost in explaining the need for unbundling.

The Commission, therefore, has consistently and reasonably interpreted the Act as requiring that it pay considerable attention to cost as part of the impairment analysis. As the Commission concluded in the *UNE Remand Order*, an “important purpose . . . of [the Act is] . . . permit[ting] competitive LECs to compete with the same economies of the incumbents.”⁹⁰ Those economic advantages “obtained by the incumbents by virtue of their status as government-sanctioned and protected monopolies”⁹¹ enable them “to serve new customers at a much lower cost” than a new competitor.⁹² The Commission has consistently and correctly concluded since enactment of the 1996 Act that Congress

⁸⁸ Joint Statement of Managers, S. Conf. Rep. 104-230, 104th Cong., 2d Sess., at 148 (1996).

⁸⁹ *Id.*

⁹⁰ *UNE Remand Order* at ¶ 86.

⁹¹ *Id.*

⁹² *Id.* at ¶ 85.

“addressed this problem by mandating that incumbent LECs share their economies of scale and density with competitors.”⁹³

The Commission correctly observed in 1999 that “[t]he incumbent LECs still enjoy cost advantages and superiority of economies of scale, scope, and ubiquity as a result of their historic, government-sanctioned monopolies.”⁹⁴ There is simply no way to ensure that CLECs share in the “cost advantages” resulting from the ILECs’ historic monopoly position without analyzing exactly what those cost advantages are. This is especially true in areas such as those served off a switch by remote concentrators. The ILEC has a ubiquitous network in place that it built as the government-sanctioned monopolist. Except for the larger areas served by these remote concentrators, it is not economic for other providers to duplicate the ILEC's feeder plant to serve these customers by interconnecting at the sub-loop.⁹⁵ Accordingly, consistent with the Act’s “important purpose” of ensuring that competitive entrants share in the economies of scale and scope of the incumbents, the Commission must continue to give substantial weight in the impairment analysis to issues of cost.

The Commission’s finding in the *UNE Remand Order* that impairment exists where the “cost of the alternative element is materially greater than the cost of obtaining

⁹³ *Id.* (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15508-09 (1996) (“*Local Competition First Report and Order*”)).

⁹⁴ *Id.* at ¶ 86 (citing *Local Competition First Report and Order*).

⁹⁵ Many concentrators are incapable of supporting sub-loop unbundling. For those that are, some may be in areas that ultimately will be able to be served independently through cable telephony, but that does not require installing duplicate fiber to reach these remote concentrators, nor does it change the impairment analysis with respect to GCI before cable telephony becomes a reality.

the corresponding element from the incumbent”⁹⁶ is fully consistent with the Supreme Court’s decision in *AT&T Corp. v. Iowa Utilities Board*.⁹⁷ The *AT&T* Court criticized “the Commission’s assumption [in the *First Report and Order*] that *any* increase in cost . . . imposed by the denial of a network element . . . renders access to that element ‘necessary,’ and causes the failure to provide that element to ‘impair’ the entrant’s ability to furnish its desired services.”⁹⁸ The Court continued: “An entrant whose anticipated annual profits are reduced from 100% of investment to 99% of investment has perhaps been ‘impaired’ in its ability to amass earnings, but has not *ipso facto* been ‘impaired . . . in its ability to provide the services it seeks to offer;’ and it cannot realistically be said that the network element enabling it to raise its profits to 100% is ‘necessary.’”⁹⁹ As that shows, the Court did not hold that cost was not a relevant factor, but instead concluded that not *any* difference in cost established impairment.

That can be shown clearly from GCI's experience. As discussed previously, GCI is not impaired and therefore collocates at remote concentrators where the concentrator is configured to permit interconnection and where the volume of traffic can support the investment in installing its cross-connect facilities and running its own fiber or purchasing an ILEC dedicated facility to reach that concentrator. However, if the traffic volume is so low that only a small fraction of a GCI dedicated transport facility would ever be filled, the costs that would be imposed by self-provisioning would lead GCI not

⁹⁶ *UNE Remand Order* at ¶ 73.

⁹⁷ 525 U.S. 366 (1999).

⁹⁸ *Id.* at 389-90 (emphasis in original).

⁹⁹ *Id.* at 390.

to serve that area, or to serve it only by reselling the services the ILEC seeks to offer through 251(c)(4) resale.

B. IF A NETWORK ELEMENT SATISFIES THE “IMPAIR” STANDARD, IT SHOULD BE DESIGNATED AS A UNE UNLESS THE CONTRARY “ADDITIONAL FACTORS” CLEARLY AND SUBSTANTIALLY OUTWEIGH THE IMPAIRMENT FACTORS.

Under the framework established in the *UNE Remand Order*, the Commission considers various factors in addition to those relating to impairment as part of the unbundling analysis. In determining whether a network element must be unbundled, the Commission also considers whether unbundling obligations are likely to:

(1) encourage competitive LECs to rapidly enter the local market and serve the greatest number of consumers; (2) advance the development of facilities-based competition by competitive LECs, and encourage investment and innovation in new technologies and new services by both incumbent and competitive LECs; (3) reduce regulation of unbundled network elements as alternatives to the incumbent LECs’ network elements become available in the future; (4) provide certainty in the marketplace that will allow new entrants and fledgling competitors to develop national and regional business plans and bring the benefits of competition to the greatest number of consumers; and (5) be administratively practical to apply.¹⁰⁰

The Commission has determined that the application of these factors may result in a network element not being designated as a UNE even though the UNE satisfies the “impair” standard. In the *NPRM*, the Commission sought comment on the relevant weight to assign different factors (and whether these factors should consider the Act’s goal of encouraging the deployment of advanced telecommunications capabilities, which is discussed in Part III below).

The first two of those factors – and the two that have received the most attention from the Commission – are the “rapid introduction of competition in all markets” and the

¹⁰⁰ *UNE Remand Order* at ¶ 27.

“promotion of facilities-based competition, investment, and innovation.”¹⁰¹ It is important to note that those two factors are not part of the impairment analysis itself and are not found in the text of the statute. Rather, speeding the introduction of competition and spurring the deployment of facilities are additional policy considerations added by the Commission, not by Congress.¹⁰² The statutory basis for analysis of those additional considerations is that section 251(d)(2) directs the Commission to “consider, at a minimum,” the extent to which CLECs would be impaired without access to a particular element.¹⁰³ Plainly, Congress authorized the Commission to consider other factors besides impairment and the Commission reasonably has chosen to do so.

With respect to the first factor, it is difficult to think of a better shorthand for the basic purpose of sections 251 *et seq.*, which are sometimes referred to as the “market-opening provisions” of the 1996 Act, than the rapid introduction of competition to the local telephone markets. It is therefore only sensible to emphasize the effect of unbundling obligations on that factor. Conversely, it would be unreasonable for the Commission not to give significant weight to the goal of rapidly introducing competition to the local market. As discussed below, it is both clear and unsurprising that the availability of unbundled network elements, including the availability of all elements in a previously unseparated combination, advances the goal of making the local markets competitive.

¹⁰¹ *Id.* at ¶¶ 107-12.

¹⁰² *See id.* at ¶¶ 103-104 (“[I]n addition to the ‘necessary’ and ‘impair’ standard, we conclude that we may consider . . . how the unbundling rules we adopt will promote facilities-based competition.”).

¹⁰³ The Commission recognized in the *NPRM* that encouraging facilities investment is a non-statutory goal by addressing it under the heading “‘At a Minimum’ Statutory Analysis.” *NPRM* at ¶¶ 21 *et seq.*

Promoting the deployment of non-ILEC alternative facilities is also an important goal, which GCI has supported through its own facilities investments. However, the Commission should not *restrict* the availability of any network elements in order to spur the deployment of facilities. As discussed below, restricting the availability of unbundled network elements to further the goal of promoting facilities-based competition (a) is contrary to the terms of the statute and (b) will not increase the rate at which CLECs deploy facilities, as GCI's experience shows. Instead, it will only deprive consumers of the benefits of a competitive marketplace to discipline the caprices and inherent inefficiencies of a monopolist.

In the pertinent regulation, the Commission phrased the second additional factor it considers beyond impairment as whether unbundling an element “promotes facilities-based competition, investment, and innovation.”¹⁰⁴ That phrasing suggests the Commission thinks facilities-based competition and investment always go hand-in-hand with innovation. While facilities-based investment does often allow a CLEC to innovate to a greater extent than if it had used only ILEC network elements, the idea that this is an “either/or” trade-off ignores the fact that UNEs are also necessary to complement innovative facilities-based entry. As GCI's experience shows, even with a combination of different facilities-based strategies, GCI is not likely to be able to duplicate the reach of the ILEC's network. Thus, for facilities-based providers, unbundling remains a necessary complement.

In the *NPRM*, the Commission asked whether it should revise the balance between the rapid introduction of competition and spurring the deployment of facilities to

¹⁰⁴ 47 C.F.R. § 51.317(b)(3)(ii).

give more weight to the second. In the first instance, this presumes that ILEC investments in new facilities would not be made in the absence of changes in the unbundling rules, and that CLECs will not invest when unbundling elements are available. As discussed further in Section III, below, the experience in Alaska has shown that this is not so. Both ILECs and CLECs already have plenty of incentive to invest in new facilities, even with today's unbundling rules. In Alaska, the only effect of eliminating unbundling would be to deprive the consumer of choices, without increasing the likelihood of network investment. In areas that other facilities providers cannot reach, eliminating unbundling of the high capacity loop, for example, would deprive high capacity customers of a competitive choice that would spur the incumbent LEC to further improve its service.¹⁰⁵ Access to unbundled elements uniquely available from ILECs, such as DSL-qualified loops, may allow CLECs to provide innovative services when combined with technologies in which ILECs are unwilling to invest. GCI's experience in long distance and local has been that the incumbent carrier does then decide to invest in new technologies when faced with a competitor offering that technological benefit.

Clearly, when a CLEC is substantially and materially impaired in offering "the services it seeks to offer" without access to an unbundled network element, these additional factors should not lead the Commission to eliminate the element in the absence of clear and substantial evidence that the claimed benefit will actually occur and that relief from unbundling is actually necessary to achieve that outcome. Otherwise, the Commission runs a significant risk of unnecessarily sacrificing the primary purpose of

¹⁰⁵ As previously noted, GCI attaches its own electronics to the DSL-qualified loop, which challenges the ILEC to keep its electronics up to date.

Section 251 -- opening local markets to competition and providing consumers with marketplace choices -- without any true public policy benefits.

Nothing in the statute compels a contrary result. The Supreme Court considered the lawfulness of restricting the availability of all network elements in previously assembled combinations (*i.e.*, UNE-P) in order to spur the deployment of facilities in *AT&T v. Iowa Utilities Board*. In that proceeding, the ILECs devoted more attention to their argument that a “facilities ownership requirement” should be inferred from the statute than to any argument other than the jurisdictional issue. The ILECs specifically argued to the Supreme Court that, in implementing the unbundling provisions of the Act, the Commission should have imposed a “facilities ownership” requirement on CLECs lest the Commission “deter investment in competing facilities and technology.”¹⁰⁶ The ILECs added, just as they will no doubt contend in this proceeding, that CLECs should not be permitted to use “the platform” because “when the government forces a company to ‘provide [a] facility and regulat[es] the price to competitive levels, then the [prospective entrant’s] incentive to build an alternative facility is destroyed altogether.”¹⁰⁷

The Supreme Court squarely rejected those contentions. It held, in response to the argument that CLECs must be required to self-provision facilities in order to foster facilities-based competition, that “[t]he 1996 Act imposes no such limitation; if anything, it suggests the opposite by requiring in § 251(c)(3) that incumbents provide access to

¹⁰⁶ Reply Brief of Bell Atlantic, BellSouth, and SBC in Sup. Ct. No. 97-926, July 17, 1998, at 19.

¹⁰⁷ *Id.*

‘any’ requesting carrier.”¹⁰⁸ Indeed, the Court found the ILECs’ argument so lacking in merit that it devoted only a few sentences to rejecting the argument, and to rejecting it unanimously, although it was the ILECs’ principal non-jurisdictional argument.

III. ALASKA’S EXPERIENCE SHOWS THERE IS NO REAL-WORLD CONFLICT BETWEEN EXISTING UNBUNDLING REQUIREMENTS AND THE GOALS OF FACILITIES-BASED INVESTMENT AND PROMOTING ADVANCED SERVICES DEPLOYMENT.

In the NPRM, the Commission notes “[s]ome parties have argued that imposing unbundling requirements on incumbent LECs, particularly with respect to innovative, new facilities, may deter investment by both incumbent LECs and others.”¹⁰⁹ This argument—that unbundling deters investment—is a theoretical myth, conjured up by ivory tower ILEC economists. It is not supported by the available evidence, and even if it were, the harm caused by foregoing unbundling would outweigh by far the potential benefits of increased investment.

A. CLECs HAVE AN INCENTIVE TO INVEST WHENEVER POSSIBLE IN FACILITIES TO REPLACE ILEC UNBUNDLED NETWORK ELEMENTS.

It has often been claimed that unbundling eliminates incentives for CLEC investment. This argument ignores the substantial “hidden costs” of relying on a competitor (the ILEC) for crucial inputs (UNEs).¹¹⁰ These “hidden costs” include: continual regulatory uncertainty as to whether regulators will allow ILECs to stop supplying your critical inputs, continual regulatory litigation over the price, terms and conditions under which you are supplied your critical inputs, relying on a competitor for timely (or untimely) provisioning and repair of those inputs, extra charges (e.g., duplicate

¹⁰⁸ *AT&T v. Iowa Utilities Board*, 525 U.S. at 392.

¹⁰⁹ *NPRM* at ¶ 23.

¹¹⁰ *See Hitz Declaration* at ¶ 6.

charges for unneeded channel terminations and entrance facilities), lack of control over service quality, and other intangibles.¹¹¹

Assuring oneself of a guaranteed source of supply, and freeing oneself from constant regulatory battles and gamesmanship with respect to the rates, terms and conditions for UNEs are among the biggest incentives for a CLEC to invest in its own facilities. It is, in part, why GCI purchased cable systems in 1997. If GCI were to rely on the incumbent LECs forever to supply UNEs, it would also be relying on regulators to interpret the law in a pro-competitive manner forever. Forever is a long time, and GCI would rather hold its future in its own hands whenever possible. GCI will not keep itself in a position where a single regulatory decision could cut off its ability to serve its customers.

Obtaining timely provisioning of unbundled loops has been a significant problem for GCI in Alaska. At one point, ILEC backlogs were so severe in Anchorage (3 to 6 months) that GCI paid the costs for ATU, then the incumbent LEC, to hire 25 additional workers to increase “hot-cut” volume. This cost GCI over \$3 million per year.¹¹² Moreover, GCI lost customers because of the length of the provisioning delays in Anchorage,¹¹³ and ultimately resorted to holding a monthly drawing for a free trip to Hawaii for all customers still on the waiting list. More recently, in order to prevent similar provisioning backlogs, GCI has staged its rollout of residential service in Fairbanks on a zip-code-by-zip-code basis. This is not how GCI would have preferred to launch its service. If it were not for the predictable provisioning delays that would have

¹¹¹ *See id.*

¹¹² Hitz Declaration at ¶ 14.

¹¹³ *See id.* at ¶ 15.

occurred, GCI would have rolled out its service across Fairbanks. In essence, GCI limited its own competitive entry -- and delayed bringing choice to some consumers -- in order to accommodate ACS' difficulties in scheduling significant volumes of loop cutovers.

It is not just cutover of loops when a new customer signs up that are problems. GCI is also experiencing significant delays in provisioning of unbundled loops when existing customers seek to add new lines, or when an existing customer moves and needs her GCI service moved to her new address.¹¹⁴ In December 2001 and January 2002, 58% of unbundled loops were not provisioned within the seven days required under state regulations.¹¹⁵ During this two-month period, nearly a quarter of these loops were not provisioned within 27 days of the request, and many took much longer.¹¹⁶

To make matters worse, 19 customers have cancelled GCI orders for service since January 1, 2002 because of these provisioning delays.¹¹⁷ In a number of cases, many of which occurred when a customer moved, the customer reported that she switched to ACS because ACS could provision its own service much more quickly.¹¹⁸ These types of discriminatory delays are intolerable, and further fuel GCI's desire to avoid use of any of ACS' network elements whenever possible.

GCI has also been forced to pay a variety of unnecessary "extra" charges. When GCI collocates in an ILEC end office to provide special access, for example, it must pay

¹¹⁴ Hitz Declaration at ¶ 15.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

the same channel termination fee for a tie pair that extends only a few feet across the central office as for a channel from the central office to GCI's premises. In other words, there is no way to avoid the charge for transport. As a result of compromises it had to make in order to get its services going, GCI must also pay two DS1 channel terminations for a local DS1 purchased under section 251 resale as well as a full UNE DS3, thus paying for three channel terminations. ACS is currently attempting to charge GCI twice the UNE loop rate for access to loops served by IDLCs. GCI is required by ACS' substitution of remotes for full switches to buy common transport when it could otherwise have used its own facilities. GCI simply does not want to be subject to these competitive abuses where it can avoid it.

GCI's actual investments demonstrate that these "hidden costs" provide more than enough incentive for GCI to provide its own facilities-based solutions. Where GCI has feasible alternatives, it is not continuing to rely on ILEC facilities. For narrowband services, GCI predominantly uses its own switches and fiber ring transport even where UNE-P is available. GCI will use UNE-P only where the local network precludes use of its own facilities. Likewise, GCI plans to migrate its narrowband telephone services to a cable platform where cable is available, and will begin testing such a system this year. GCI is already rolling out cable modem services where it provides cable service, and will offer this advanced service to virtually all homes passed by the end of the year. In areas not served by the cable network, GCI provides high capacity data service using its own electronics and an ILEC-supplied DSL-qualified loop. GCI is also rolling out high-speed Internet access to the Alaskan bush communities GCI serves using a combination of satellite and unlicensed wireless. The myth that UNEs stifle facilities-based investment

by competitive LECs -- while appealing on an academic chalkboard -- simply does not reflect the full range of costs and incentives in the marketplace, and is belied by GCI's actual practice, which is to build rapidly its own facilities wherever possible.

GCI's investment in facilities also shows that GCI is not concerned about competing with other providers who may use UNE-P. GCI's investment decisions, like those of all other service providers, are much more dynamic than simply a static price of switch or loop v. monthly price tradeoff. For example, GCI can assure its customers that they will get high quality service to a much greater extent when it uses its own facilities than when it, or any other CLEC, uses UNE-P. UNE-P is a good tool, and GCI will use it where it must, but GCI would still prefer, when possible, to serve its customers over its own facilities.

Finally, the fact that there are some CLECs that provide service entirely through UNE-P today does not undercut the points about CLEC incentives. Competition is still nascent and evolving. Some carriers may choose to start first by only acquiring customers. Some may start by building facilities. Some, like GCI, will start by doing both. Over time, the market will bring together companies with customers and companies with facilities. This is part of the healthy growth of a competitive market, and not evidence of "free-riding". In the long run, no CLEC will want to be on the ILEC's network if at all possible, but there can be many economically sound paths to that long run result. The Commission should not become the Commissar of Competition, and select a single or preferred path.

B. UNES, INCLUDING UNE-P, PROVIDE THE MOST FEASIBLE PATH TO FACILITIES-BASED INVESTMENT.

GCI's experience shows that UNES work to create a path to facilities-based competition. Without UNES, GCI would have had to make a huge capital investment upfront to build facilities without any assurance that it would eventually get the customers to sustain that investment. The "field of dreams" approach to telecom investment has ended in a nightmare of overwhelming debt and bankruptcy for more than a few companies that tried that strategy. UNES have allowed GCI to build a significant customer base first, allowing GCI to make its investment in loop plant now, after it has acquired a significant base of customers.

It should also be noted that GCI gained tremendous advantages in deploying its fiber ring and switches from its purchase of cable systems. GCI's fiber ring, which connects its switches to the ILEC end offices, also provides transport for its cable network. A company without these particular synergies would not necessarily have been able to duplicate GCI's entry path. Indeed, AT&T Alascom followed a different entry path. The 1996 Act wisely provided a range of options for CLECs to use to enter markets, and competition – including especially facilities-based competition – will grow most quickly when all those options remain available to all impaired CLECs. Removing entry options from impaired CLECs will only serve to strangle and limit competition, and the new consumer choices and innovations that competition brings.

C. ILECS HAVE SUFFICIENT INCENTIVES TO INVEST IN ADVANCED SERVICE FACILITIES REGARDLESS OF UNBUNDLING.

All available evidence indicates that unbundling of advanced services networks has not stunted the deployment of broadband facilities by ILECs, and there is no reason

to believe that unbundling will significantly slow facilities based investment in advanced services facilities going forward.

Despite current unbundling requirements, broadband deployment is occurring at “an adoption speed that outstrips other technologies such as color television, cell phones, pagers, and VCRs.”¹¹⁹ According to the *Third Advanced Services Report*, “industry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996,” spurred by competition in the marketplace and rapidly rising demand.¹²⁰ The Commission estimated that by the end of 2001, ADSL service—the most popular residential broadband offering over ILEC facilities—was available to about 45% of U.S. homes, compared to about 25% of homes as of the end of 1999.¹²¹ GCI’s own experience confirms that ILEC investment in broadband facilities is occurring regardless of unbundling.

In Alaska, ACS, the largest ILEC, has sought rate increases from the state commission stating that it will completely upgrade its switching network statewide within approximately 3 to 5 years to substitute ATM packet switching for circuit switching technology. There is no caveat in that rate case that these upgrades will occur only if the FCC or state commissions allow ACS to refuse to unbundle certain elements. In fact, the

¹¹⁹ *A Nation Online: How Americans Are Expanding Their Use of the Internet*, Department of Commerce at 41 (2002).

¹²⁰ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 02-33 at ¶¶ 62-63 (rel. Feb. 6, 2002) (“*Third Advanced Services Report*”).

¹²¹ *Id.* at ¶ 48, 51.

Chief Operating Officer of ACS testified that such an exemption from unbundling was not a condition of its upgrades.¹²²

ILECs may claim they will not invest in broadband last-mile facilities in the future if broadband facilities remain unbundled, but carrying out this threat would be irrational and contrary to their interests. In areas where GCI offers a competitive service over its own facilities with which the ILEC must compete, the ILEC must invest in order to be able to offer its own competitive service. In areas in which the ILEC continues to be the only facilities provider, either because of differences in the product market or because alternatives are not available in that geographic market, ILECs will invest because they have the technological lead in that area or product market. The investment in facilities that has already been made provides ILECs with an incentive to continue to make incremental upgrades, regardless of unbundling requirements.

¹²² During the hearing regarding ACS' request for rate modifications related to its upgrade plans, the following exchange occurred between Regulatory Commission of Alaska Chair Nanette Thompson, and ACS' Chief Operating Officer Wesley Carson:

Q (Chair Thompson): An argument that's been voiced in the Lower 48 when incumbents are talking about transition to markets is that the incumbents won't have any incentive to invest in new technology or anything that will deliver broadband services until they've some how been assured that they won't have to resell that network to competitors. I'm -- I wonder whether that argument's going to be raised here or how that fits into ACS' business plan? The network you've outlined for us is a Packet switch network that would allow transmission of high-speed data. Are ACS' plans to invest in that network tied to a requirement that it gets some kind of assurance that they're not going to have to make that network open?

A (Mr. Carson): They are not tied to that kind of assurance.

Hearing of the Regulatory Commission of Alaska, Docket Nos. U-01-34, U-01-82 through U-01-87, U-01-66 (March 6, 2002).

* * *

GCI does not believe that it is appropriate to end unbundling of network elements when CLECs are impaired, either with respect to narrowband services or advanced services. Both the rapid introduction of competition and the promotion of investment in new facilities are worthy goals that may be considered by the Commission in determining what network elements should be unbundled. As discussed above, however, both considerations weigh *in favor* of providing unbundled access to both traditional and advanced services platforms.

IV. SPECIFIC NETWORK ELEMENTS

In addition to examining its general unbundling analysis, the Commission asks for comment on the application of its proposals to specific network elements, including its proposal to apply a more granular analytical approach to unbundling. A more granular approach to unbundling is appropriate, provided that impairment is analyzed with respect to the relevant product and geographic markets. However, litigating impairment with respect to each and every request for elements would create substantial transaction costs, and it is, practically speaking, unnecessary. In the first instance, GCI believes that the FCC should place elements on a national list to be required to be unbundled whenever it is predictable that there will be CLECs that will be impaired without access to that element. While this approach would theoretically entitle unimpaired CLECs to get access to those loops, that concern is entirely theoretical. As previously discussed, there are significant marketplace incentives for unimpaired CLECs to invest in their own facilities or seek other marketplace alternatives. No regulatory “stick” is necessary to

spur such CLEC investment. Regulatory uncertainty makes sustained “free-riding” a myth.

If the Commission believes, nonetheless, that the market and regulatory uncertainty do not provide a sufficient incentive to ensure that CLECs are not self-destructively refusing to invest in their own survival, it should not remove elements from the national list for unbundling when it is plausible that a reasonable CLEC would be impaired without access to the elements.¹²³ Instead, the Commission should define those circumstances in which it would conclusively presume that a CLEC is impaired, because any reasonable CLEC under those circumstances would be impaired. In the case of all other requests for elements, the CLEC should be presumed to be impaired in the absence of clear evidence to the contrary. In this latter set of cases, the Commission should recognize that state regulators are better situated to make judgments as to impairment in those cases.¹²⁴ Again, however, this cumbersome and costly machinery is really unnecessary because of the substantial market survival incentives on CLECs to invest in their own facilities whenever they are not impaired.

Within this general framework, GCI offers the following comments on various network elements that are critical to its service offerings in Alaska.

A. CLECs, INCLUDING GCI, ARE IMPAIRED WITHOUT ACCESS TO THE NID.

The NID is an essential network element. Due to the significant equipment, labor and construction costs involved in installing NIDs at every potential consumer location,

¹²³ Only if no reasonable CLEC would ever be impaired in offering the services it seeks to offer should the Commission remove an element from the nationwide list of unbundled elements.

the *UNE Remand Order* correctly concluded that “requiring a requesting carrier to self-provision NIDs for all customers it seeks to serve would materially raise the cost of entry, delay broad facilities-based market entry, and materially limit the scope and quality of the competitor’s service offerings.”¹²⁵ The Commission was also correct in determining that the NID is an independent network element.¹²⁶ Separately unbundling the NID allows the requesting carrier to choose where best to access the local loop based on economic conditions and the needs of the services it plans to provide, rather than regulatory fiat. For example, allowing competitors to connect at the NID encourages competitive LECs to invest in separate loop facilities by eliminating the additional cost of installing NIDs.

In any event, the Commission should conclusively presume that a CLEC is impaired without access to the NID in any instance in which it does not self-provision its own loop or subloop that connects to the NID. If the CLEC is not providing its own loop, it will not have its own installation crews capable of installing a self-provisioned NID.

B. CLECs, INCLUDING GCI, ARE IMPAIRED WITHOUT ACCESS TO LOOPS AND SUBLOOPS.

There can be no doubt that, under any reasonable interpretation of the “impair” standard of Section 251(d)(2),” the local loop must be subject to unbundling.¹²⁷ Local loops are the most time-consuming and expensive network element to install, and are simply not a viable alternative to unbundling.¹²⁸ Nor are there other alternative sources

¹²⁴ As discussed in Section V, below, a state may always require elements to be unbundled under its own authority, without regard to the Commission’s list of unbundled elements or impairment.

¹²⁵ *UNE Remand Order* at ¶ 232.

¹²⁶ *Id.* at ¶ 235.

¹²⁷ *Id.* at ¶ 163.

¹²⁸ *Id.* at ¶¶ 182, 211.

of loops currently available that can reach all or nearly all consumers currently served by ILECs' local loops with sufficient service quality and without a substantial and material cost premium. Although GCI is developing its own loop capabilities using its cable platform, that service is years off on a widespread basis and cannot provide a basis for finding that GCI would not be impaired without access to loops today. Even if it could currently offer telecommunications services over its cable plant, GCI would be impaired in offering service to customers not passed by cable, and providers other than GCI will be impaired in any event.

The Commission should conclusively presume that a CLEC is impaired without access to the loop or subloop in any case in which there is (a) no third-party provider of alternative loop facilities able and willing to sell loop or platform service to the requesting CLEC and (b) the CLEC itself does not have a loop or subloop serving the premises that is capable of offering the service the CLEC seeks to offer. Self-provisioning a loop when one is not already in place would be both untimely and extremely costly.

1. The Commission Should Not Make Distinctions Between Loop Types Based Solely Upon the Loop Technology, the Time the Loop Was Constructed, or the Services Provided Over the Loop.

The *NPRM* nevertheless seeks comment on a number of issues concerning the availability of unbundled loops, including the possibility of distinguishing between existing facilities and new construction, between new fiber optic loops and standard copper loops, or between loops capable of providing basic services versus those capable of advanced or broadband services. GCI believes there is no statutory or policy basis for making such distinctions, other than as they specifically relate to the "impair" standard.

Thus, subject to an “impairment” analysis under Section 251(d)(2), all loop facilities should be treated the same for purposes of unbundling pursuant to Section 251(c)(3).

The Communications Act does not authorize the Commission to make distinctions between loop types based solely upon the loop technology (i.e., fiber or copper), the time the loop was constructed, or the telecommunications services provided over the loop. Section 3 of the Act defines network elements as facilities or equipment used to provide telecommunications services—it makes no distinctions regarding the technology used in the facilities or equipment, the time when the facilities or equipment were put in service, or the type of telecommunications services provided.¹²⁹ Whether a loop is fiber or copper, new or old, or providing basic or advanced services, so long as it is providing telecommunications services, it is a network element subject to the unbundling requirements of Section 251(c)(3). The unbundling requirements of Section 251(c)(3) do not support making such distinctions either—all network elements must be unbundled, subject to the “necessary” and “impair” standards of Section 251(d)(2). Accordingly, such distinctions regarding the local loop should be made only through application of the “impair” standard and the “additional factors.” In other words, the Commission (or, perhaps more appropriately, state regulators) can distinguish between loop types in its unbundling analysis only if the application of the “impair” standard or the “additional factors” supports such a distinction.

For example, the Commission asks whether it should “distinguish between existing facilities and new construction,”¹³⁰ such as when an ILEC rolls out new loops for a new subdivision. The relevant question is not whether the loops are old or new, but

¹²⁹ 47 U.S.C. § 153(29).

only whether lack of access to the new loops would *materially diminish* a requesting carrier's ability to provide the services it seeks to offer. In circumstances where this answer is not clear, under a service- and location-specific analysis, the state regulator—which would be most familiar with issues of cost, timeliness, quality, ubiquity, and operational issues associated with use of an alternative in the area—should answer that question. The same general analysis can be applied to any of the Commission's questions regarding different loop types, including those concerning “overlay” facilities and fiber loops.

GCI anticipates the ILECs will argue that one of the “additional factors” in the unbundling analysis—the desire to advance facilities-based competition and encourage investment and innovation in new technologies services—should trump the application of the “impair” standard in this instance, and that the Commission should therefore make *per se* distinctions between loop types. However, as GCI has detailed in Part III above, unbundling does not deter investment in facilities, and even if it did, the harm caused by foregoing unbundling would outweigh by far the potential benefits of increased investment. If the ILEC builds to a new subdivision, but is not required to unbundle those loops because they are “new” construction, consumers in that subdivision would lose the benefits of competition Section 251 was designed to provide.

Moreover, an exemption from unbundling for “advanced services” loops would significantly limit the competitive alternatives available to business customers. As previously discussed, GCI today uses DSL-qualified loops and its own electronics to provide advanced services for businesses that cannot be served by cable modem, because

¹³⁰ *NPRM* at ¶ 50.

of differences in the geographic or product market. Eliminating these DSL-qualified loops from the unbundling requirement would mean that GCI cannot provide this service to these customers, and it means that these customers would face cut-off and would return to a world in which they lacked meaningful marketplace choices for their high-speed data services.

If there were any doubt that business advanced services are in a separate product market than residential users, those doubts should be erased by the comments of the Ad Hoc Telecommunications Users Committee in response to the NPRM in Commission's *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*.¹³¹ In those comments, Ad Hoc noted, "Despite being among the largest and most technologically sophisticated users of telecommunications services in the country, the members of the Ad Hoc Committee report that they face no competitive alternatives to ILEC services to meet their broadband services requirements in the overwhelming majority of their service locations."¹³² This was particularly true "with respect to smaller business service locations."¹³³

Moreover, Ad Hoc specifically concluded, "Cable modem service is not a source of intermodal competition for business users," with the possible exception of telecommuting.¹³⁴ Ad Hoc detailed at least three reasons why this was the case. First, cable networks are largely designed to reach residences, so they do not pass many

¹³¹ Comments of Ad Hoc Telecommunications Users Committee, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 (filed March 1, 2002).

¹³² *Id.* at 14.

¹³³ *Id.* at 15.

¹³⁴ *Id.* at 17.

business areas.¹³⁵ By contrast, ILEC advanced services are provisioned over the existing feeder and distribution infrastructure.¹³⁶ Second, according to Ad Hoc, “cable modem-based data service presents serious security and reliability issues that, while also present for residential users, are of far greater concern when used to support business applications.”¹³⁷ Among the issues cited by Ad Hoc were the lack of back-up power on most cable systems and the variation in transmission speeds due to the “shared” architecture of the cable platform. Ad Hoc noted, “whereas residential customers may have flexibility with respect to data transmission speeds, business customers typically do not....”¹³⁸ Ad Hoc’s comments point to a clear delineation between the residential and the business markets, and the extent to which even a cable modem provider, such as GCI, would be impaired in serving its business customers without access to DSL-qualified loops.

Accordingly, the Commission should not exempt advanced services loops from unbundling requirements.

C. EVEN UNE-L CLECs ARE IMPAIRED WITHOUT ACCESS TO UNBUNDLED SWITCHING

With respect to switching, the *UNE Remand Order* found “lack of access to unbundled switching as a general matter, impairs the ability of a requesting carrier to provide service to consumers,”¹³⁹ primarily due to the cost of self-provisioning

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 18.

¹³⁸ *Id.*

¹³⁹ *UNE Remand Order* at ¶ 255.

switches.¹⁴⁰ In addition to the cost of the switches themselves, the Commission recognized the high cost of collocation and “hot cuts” or “cutovers”.¹⁴¹ The Commission also noted “the coordinated loop cutover process imposes a *material delay* on competitive LECs that offer services using self-provisioned switches,”¹⁴² and poses reliability problems. The concerns of cost, delay, and reliability that led to unbundling of switching in the *UNE Remand Order* are as troubling today as they were then.

Despite the high cost and service delays involved in installing switches, issues that GCI has managed to overcome in many instances, some ILECs contend that the deployment of switches by some competing carriers demonstrates that CLECs would not be impaired if local switching were no longer unbundled.¹⁴³ As discussed in Part II.A above, the Commission has already rejected single competitor theories.¹⁴⁴ GCI’s experience since then demonstrates that, although in some areas under some circumstances a CLEC is not impaired without access to switching, all CLECs that seek to provide ubiquitous service to residential and business customers would be impaired without continued access to unbundled switching.

GCI would be impaired without access to unbundled switching in areas where the ILEC has implemented a network architecture that technically or economically prevents

¹⁴⁰ *Id.* at ¶¶ 255-57.

¹⁴¹ *Id.* at ¶ 264 (collocation), and ¶ 265 (cutovers).

¹⁴² *Id.* at ¶ 266.

¹⁴³ *See, e.g.*, Letter of Thomas J. Tauke and Michael E. Glover to Chairman Michael Powell, CC Docket No. 96098 (filed October 19, 2001), at 2-6.

¹⁴⁴ With respect to switching, the Commission has correctly concluded the fact that “carrier is collocated in a particular central office and is not using unbundled switching does not conclusively demonstrate that a variety of carriers can self-provision switches without significant cost or other impediments.” *UNE Remand Order* at ¶ 256.

access to the unbundled loop. As noted above, ACS has deployed several such architectures, including IDLCs, field concentrators, and host/remote arrangements. In Fairbanks, this includes almost 25% of GCI's lines in service; in Juneau, it will constitute almost 52% of GCI's lines in service. In those areas in which there is no access to the unbundled loop in the central office before it enters the switch, GCI and any other CLEC that does not provide its own loop to that location will be impaired without access to unbundled switching. In this situation, at minimum, impairment should be conclusively presumed.

In addition, if the Commission were to eliminate access to unbundled switching as a network element, it would create a perverse network design incentive. The Commission would also provide ILECs with a huge incentive to deploy IDLCs, dumb remotes and concentrators in order to force competitors to build loops, compete using Section 251(c)(4) resale under which the CLEC would be limited to the ILEC's chosen services, or to cease providing service altogether. Such an incentive would contravene any conceivable purpose Section 251 is intended to serve.

In addition, the Commission should recognize that ILEC provisioning systems are inadequate and impose significant costs on the CLEC that competes using a UNE loop and its own switch. Although GCI has been able to grow despite provisioning obstacles, this is the exception that proves the rule. CLECs should not be required to turn an ILEC created backlog into a marketing opportunity by offering monthly drawings for a free trip to Hawaii, as GCI did in Anchorage. CLECs should not be required to pay the ILEC to hire additional workers to work slowly to manually provision more orders. The Commission should conclusively presume that CLECs are impaired with respect to

switching when the ILECs cannot or will not provision sufficient volumes of UNE loops rapidly enough and at a low enough cost (such as through an automated cutover process similar to the long distance PIC change) to enable a CLEC to enter a mass market without self-rationing its deployment, as GCI has done in Fairbanks.

D. CLECs, INCLUDING GCI, ARE IMPAIRED WITHOUT ACCESS TO INTEROFFICE TRANSMISSION.

In the *UNE Remand Order*, the Commission determined that “self-provisioning ubiquitous interoffice transmission facilities, or acquiring these facilities from non-incumbent LEC sources, materially increases a requesting carrier’s costs of entering a market or of expanding the scope of its service, delays broad-based entry, and materially limits the scope and quality of a requesting carrier’s service offerings.”¹⁴⁵ GCI’s experience indicates this finding is still true. GCI needs access to interoffice transmission for the same reasons it needs access to local switching. Although GCI uses its own transport where possible, there are instances in which GCI would be unable to offer service without access to unbundled transport. Where the ILEC has deployed smart remotes, GCI must use ILEC transport to reach the central office where it can interconnect.¹⁴⁶ Without access to unbundled interoffice transmission, GCI would not be able to provide service in many areas it already serves, or, through Section 251(c)(4) resale, its services would be limited to those the incumbent LEC seeks to provide rather than those GCI seeks to provide. In either event, GCI’s entry into new markets would be drastically curtailed.

¹⁴⁵ *UNE Remand Order* at ¶ 321.

¹⁴⁶ *See Hitz Declaration* at ¶ 25. In most instances, these are provided as interoffice transmission, although they are more appropriately functionally classified as feeder, given the network architecture.

GCI may also need access to unbundled interoffice transmission when it enters areas in the Alaska bush. In these very small communities, there is usually only one switching center often serving only at most a few hundred lines.¹⁴⁷ Despite the small size, GCI may be able to install its own switch to connect to UNE loops. GCI would, however, need to be able to connect its switch to its earth station.¹⁴⁸ In such small communities, it is not likely to be economical for GCI to install its own fiber facilities.¹⁴⁹ In these situations, GCI would be significantly and materially impaired in offering its own service if it had to install its own transport services when there is likely to be little demand.¹⁵⁰

The Commission should conclusively presume that GCI is impaired with respect to access to interoffice transmission in any instance in which GCI cannot technically or economically get access to the end office to provide transport, either for UNEs or, because of economies of scale and scope, for interstate access traffic.

E. ACCESS TO OTHER ELEMENTS

In the *UNE Remand Order*, the Commission concluded that call-related databases should be unbundled.¹⁵¹ The Commission asks in the *NPRM* whether it needs to apply its unbundling analysis more specifically to each call-related database, such as by making service or customer distinctions. GCI believes that CLECs need access to all call-related databases, regardless of the service or to whom it is provided. In Alaska, for example,

¹⁴⁷ Hitz Declaration at ¶ 26.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *UNE Remand Order* at ¶ 402.

ACS maintains the portability database as well as the 911 and E911 databases. A CLEC such as GCI cannot duplicate these databases, which are essential not only to providing quality service, but to comply with legal mandates. Accordingly, the Commission should not alter the unbundling analysis for call-related databases, and it should conclusively presume that a CLEC is impaired without access to these databases.

V. SECTION 251(d) DOES NOT PERMIT THE COMMISSION TO RESTRICT THE AUTHORITY OF STATE REGULATORS TO REQUIRE ADDITIONAL UNBUNDLING

Regardless of the elements the Commission identifies for unbundling, states retain the ability to require additional unbundling under Section 251(d), and the statute does not permit the Commission to restrict that authority.¹⁵² Section 251(d)(3), entitled “preservation of state access regulations,” provides that the FCC “shall not preclude the enforcement of any regulation, order, or policy of a State commission that ... establishes access and interconnection obligations of local exchange carriers.” This Section preserves state decisions *creating* unbundling requirements pursuant to their plenary authority to enact rules governing LECs. Accordingly, no difficult delegation questions are likely to be presented with respect to the addition of elements.

The congressional preservation of state authority to add elements is subject to two limitations: the state unbundling obligation must be “consistent with the requirements of this section” and may “not substantially prevent implementation of the requirements of this section and the purposes of this part.”¹⁵³ These limitations do *not* authorize the Commission to preempt state unbundling obligations on the ground that

¹⁵² The Commission has recognized that states generally may require ILECs to unbundle network elements in addition to those for which the Commission requires unbundling. See *UNE Remand Order* at ¶¶ 154-155.

they are different than those established by the FCC. As the Eighth Circuit has noted: “The FCC’s blanket statement that state rules must be consistent with the Commission’s regulations promulgated pursuant to section 251 is not supportable in light of subsection 251(d)(3).”¹⁵⁴ Rather, the provision “shield[s] state access and interconnection orders from FCC preemption.”¹⁵⁵

In light of the Eighth Circuit’s controlling decision, the Commission should not attempt, in advance, to limit the state commissions’ authority to create unbundling requirements. In the interpretation of section 251(d)(3) that was struck down by that court, the Commission had “assert[ed] that a state policy that is inconsistent with an FCC regulation is necessarily also inconsistent with the terms of section 251 and substantially prevents the implementation of section 251.”¹⁵⁶ The Eighth Circuit rejected that assertion: “The FCC’s conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and to be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251.”¹⁵⁷ Therefore, any request by an ILEC to have the Commission preempt an additional state unbundling requirement should be conducted as a separate adjudicative proceeding, similar to that conducted under section 253 when a

¹⁵³ 47 U.S.C. § 251(d)(3).

¹⁵⁴ *Iowa Utilities Board v. FCC*, 120 F.3d 753, 807 (8th Cir. 1997), *not reviewed by AT&T v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 806.

¹⁵⁷ *Id.*

state regulation is alleged to constitute a barrier to entry, and not by a blanket rule developed in this proceeding.

The Commission recognized the limitations on its authority in the *UNE Remand Order* and the regulation concerning state authority adopted in that proceeding. The regulation directs state commissions only to “comply with the standards of this § 51.317 when considering whether to require the unbundling of additional network elements.” As that shows, the Commission recognized that state commissions may add unbundling requirements. In addition, rule 51.317(d) authorizes the states to consider all of the standards of the section, which include “whether unbundling of a network element promotes the rapid introduction of competition.” Accordingly, the Commission acknowledged -- correctly -- that state commissions must be given considerable leeway under section 251(d)(3) to determine whether to order additional unbundling in their states.

CONCLUSION

The best way in which the Commission can promote the growth of facilities-based competition and new advanced services networks is to continue to implement the Telecommunications Act of 1996 and to give CLECs a flexible range of options with which to seek to offer new choices and new innovations to American consumers. Elimination of network elements to implement some centrally planned notion of the proper development of networks will only serve to reduce competition and consumer choices, without meaningfully increasing investment. CLECs already have every reason in the world to invest as fast as possible—or to seek other marketplace alternatives—to

