

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers)	CC Docket No. 01-338
)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability)	CC Docket No. 98-147
)	

COMMENTS OF ALASKA COMMUNICATIONS SYSTEMS

The telephone operating companies of Alaska Communications Systems (“ACS”)¹ submit these comments in response to the FCC’s Notice of Proposed Rulemaking in the above-captioned dockets released December 20, 2001 (FCC 01-361) (the “NPRM”), to make the following point: Under the “necessary and impair” standard set forth in the Act, the obligation to furnish a requested unbundled network element (“UNE”) *must* evolve with the development of competition in the individual market where the UNE is requested. In other words, the Commission (and the states) cannot determine whether an incumbent local exchange carrier (“ILEC”) must offer any UNE pursuant to Section 251 of the Act without considering whether the “necessary and impair” test has been met *by the requesting carrier itself*. If failure to provide access to the requested UNE would not impair that carrier’s ability to provide the services it seeks to offer, the test is not met and the UNE may not be required.

¹ These four companies are: ACS of Anchorage, Inc., ACS of Fairbanks, Inc., ACS of Alaska, Inc., and ACS of the Northland, Inc., each of which is wholly-owned by Alaska Communications Systems Group, Inc., and each of which is subject to unbundling obligations under Section 251(c) of the Communications Act of 1934, as amended (the “Act”).

The “Necessary and Impair” Test Demands Evaluation of Individual

Circumstances. As the Supreme Court instructed in *AT&T v. Iowa Utilities Board*, the Commission is not free to order ILECs to offer UNEs pursuant to Section 251 of the Act merely because it is “technically feasible” to do so, but may only order the unbundling of elements that meet the “necessary and impair” standard of Section 251(d)(2).² Section 251(d)(2)(B) unambiguously requires the Commission, in determining what UNEs must be made available upon requires pursuant to Section 251(c)(3) of the Act, to consider whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” The statute does not require that the Commission evaluate whether lack of access to a UNE would impair the ability of “any” telecommunications carrier to provide one or more services, but rather is quite specific about focusing on “the telecommunications carrier seeking access” and the services “it” seeks to offer. There can be no doubt, therefore, that the Commission’s UNE rules cannot treat all carriers alike: UNEs can only be mandated after the requesting carrier’s ability to operate without them is considered.

The Supreme Court affirmed this reading of the statute when it required the Commission to develop unbundling rules that take into account, *inter alia*, the availability of the requested UNE from sources other than the ILEC.³ This is by its very nature a market-specific test. It must reflect both the needs of the requesting carrier and its ability to satisfy those needs in the marketplace *at the time of the request*. The Commission has acknowledged the temporal

² 525 U.S. 366 (1999).

³ *AT&T v. Iowa Utilities Board*, *supra*, 525 U.S. at 389 (“The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent’s network.”).

aspect of the “necessary and impair” standard in the *UNE Remand Order* and in the *NPRM*.⁴

The very concept of a triennial review is that the unbundling requirements should evolve with the market. The Commission also acknowledged that its rules should reflect the different options available to competitors in different markets, in the first triennial review in 1999, when it varied the standards for unbundling switching in certain markets, although the Commission still did not go so far as to adapt its rules to take into account the differing circumstances of different requesting carriers.⁵

It is understandable that the first rules adopted by the Commission were general in nature, because they were adopted at a time when few competitive LECs existed, and fewer still had alternative sources for unbundled loops. However, six years have passed since the passage of the Telecommunications Act of 1996, and competitors have flourished in many areas. While it may have been reasonable in 1996 to find that all competitive local exchange carriers (“CLECs”) required access to unbundled loops, for example, that no longer can be said to be a reasonable conclusion. The Commission can no longer defer implementation of the specific requirement of Section 251(d)(2)(B) to consider the circumstances of the requesting carrier in the market it seeks to serve. The Commission must not only make good on its promise “to fashion a more targeted approach to unbundling that identifies more precisely the impairment facing

⁴ *E.g.*, *NPRM* at para. 1 (“Recognizing that market conditions would change and create a need for commensurate changes to the unbundling rules, the Commission determined to revisit its unbundling rules in three years – a schedule we adhere to by adopting this Notice of Proposed Rulemaking (NPRM) today.”).

⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report & Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 15 FCC Rcd 3696, 3844-40 (1999) (“*UNE Remand Order*”).

requesting carriers”⁶ but also relieve ILECs from unbundling where such impairment doesn’t exist.

Some Competitors Cannot Meet the “Necessary and Impair” Test. The ACS companies provide telephone exchange and exchange access services in Anchorage, Fairbanks, Juneau, and other markets in Alaska. Although three of the four ACS companies are rural within the meaning of the Act, none of them enjoys any exemption from unbundling requirements under Section 251.⁷ They have been providing UNEs for several years and face vigorous competition from both facilities-based and resale-based competitors. In Anchorage, where competition first evolved, ACS now has only about a sixty percent market share for both residential and multi-line business customers. One facilities-based competitor has been providing local exchange service for five years, has garnered almost forty percent of the residential market and a substantial share of the business market, and is collocated in every one of ACS’s wire centers. This competitor, which hardly could be considered a “new entrant” by any standard, is affiliated with the only local cable television franchisee, and offers a broadband cable modem platform providing high-speed Internet as well as video programming over facilities wholly independent from those of

⁶ *NPRM* at para. 3. *See also id.* at para. 44 (“We also ask for commenters’ input on whether the Commission should consider any characteristics of the requesting carrier in the unbundling analysis. [...] Should access to UNEs differ depending on whether a particular requesting carrier is impaired without them, as opposed to whether requesting carriers as a whole are impaired?”).

⁷ ACS believes that the rural exemption of ACS of the Northland was terminated only as to a small portion of its Glacier State study area, as requested by the CLEC that made the Section 251(f)(1)(B) request; however, the RCA recently declared that the rural exemption was terminated as to the entire study area, regardless of the scope of the request by the CLEC. This dispute is now before the Alaska Supreme Court.

ACS.⁸ For some time it has claimed it has the capability of offer “cable telephony” over its broadband cable TV platform.⁹ It apparently has not deployed this capability for the mass market, however. Rather, it provides telephony using its own switching and transport capability but UNE loops purchased from ACS. ACS believes this is due to the below-cost UNE pricing ACS has been required to offer its competitors in Anchorage and its other markets – Why should a competitor deploy new facilities or alternative technology when it can purchase the same functionality from the ILEC for less than the forward-looking incremental cost of such deployment?

The Commission needs to acknowledge that there are some competitors, like this one, that simply do not need UNEs, either to “jump-start” their entry into the market or as a sole source supplier of facilities in the market. Where a competitor has both sufficient revenue base to ensure its near-term financial viability and sufficient facilities of its own on which to base an alternative network, the continued availability of UNEs simply is not mandated under Section 251(d)(2)(B).

The Evaluation of Any Individual Requesting Carrier’s Circumstances

Should Include Whether It Can, And Has the Incentive To, Self-Provide the Element. One of the questions the Commission promised to evaluate in this proceeding is whether its policies

⁸ See General Communication, Inc. SEC Form 10-K for the fiscal year ended December 31, 2001 (SEC File No. 0-15279) at 31-32, available on-line at: http://www.nasdaq.com/asp/quotes_news.asp?symbol=GNCMA%60&selected=GNCMA%60

⁹ *Id.* at 25, 27. See also RCA Order U-01-11(2) (granting GCI request to use its cable facilities to provide CLEC services as an eligible telecommunications carrier within the meaning of Section 214(e) of the Act), available on-line at: http://www.state.ak.us/rca/orders/2002/u01011_2.pdf

promote facilities-based entry.¹⁰ Indeed, this goal has been discussed frequently in recent statements by the commissioners.¹¹ The ability of competitors to obtain UNEs from another provider or to self-provide them is one of the factors the Commission must consider before mandating unbundling.¹² In some cases, such as Anchorage, some competitors may have the ability but not the incentive to self-provide because of the availability of UNEs – a concern that has not been lost on the Commission in the past.¹³ This should be one of the factors the Commission considers in making its public interest analysis.¹⁴

¹⁰ *NPRM* at para. 3.

¹¹ *See, e.g.,* Separate Statement of Commissioner Michael K. Powell, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (Dec. 12, 2001) (“[The review of unbundling obligations] underscores the Commission’s ongoing commitment to the promotion of facilities-based competition...”); Separate Statement of Commissioner Kevin J. Martin, *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001) (“... the promotion of facilities-based competition should be a fundamental priority of the Commission. The goal of the Telecommunications Act of 1996 was to establish an environment that promotes meaningful competition and allows for deregulation. To get to true deregulation, we need facilities-based competition ...”); Competition Policy Institute Forum: *Keeping Telecom Competition on Track*, Address by Commissioner Kathleen Q. Abernathy (Dec. 7, 2001) (“The Commission is now engaged in an effort to restore the incentives for facilities-based investment that Congress intended. The same facilities-based competitive model that has driven the success of the wireless and long-distance marketplaces. This means a shift away from policies that actively encourage resale as a long-term business strategy and force the unbundling of virtually every network element at TELRIC rates.”).

¹² *See AT&T v. Iowa Utilities Board, supra*, 525 U.S. at 389 (rejecting FCC’s first unbundling standards, in part, because “comparison with self-provision, or with purchasing from another provider, is excluded”).

¹³ *See, e.g., NPRM* at para. 23 (“the availability of incumbent facilities at cost-based rates may discourage competitive carriers and others from investing in or using alternatives to the incumbent’s network”).

¹⁴ The Commission has identified certain factors that it believes should be weighed, in addition to whether the requesting carrier meets the “necessary and impair” test, before requiring that an element be unbundled. These include the “promotion of facilities-based

ACS believes it is imperative that pricing be weighed in evaluating whether competitors have the incentive to deploy their own facilities. In markets where a requesting carrier can buy UNEs at prices that are artificially held below forward-looking incremental cost (which does occur, even though in violation of the Commission's rules),¹⁵ there appears to be no incentive to invest in alternative facilities, even when the competitor's ability to deploy such facilities is not in any way impaired by the ILEC or other forces. To the contrary, when a CLEC is able to buy below-cost UNEs (and set its retail prices accordingly), it not only threatens the viability of the ILEC but also the viability of economically sustainable competition—a threat

competition, investment, and innovation.” *NPRM* at para. 21, *citing UNE Remand Order*, 15 FCC Rcd at 3747-50.

¹⁵ For example, in Fairbanks, ACS conducted a forward-looking cost study using the FCC's “total element long-run incremental cost” methodology, which established an average loop cost of about \$36. The Regulatory Commission of Alaska, however, disregarded ACS's evidence and established a UNE loop price of \$19 in Fairbanks. This was based largely on inputs derived from the FCC's high-cost synthesis model for non-rural carriers. The RCA simply ignored that the model was only intended to establish a set of national average costs for support purposes, and not to set UNE prices, and in any event did not include cost inputs for Alaska at all. *See, e.g., Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Tenth Report & Order in CC Docket No. 96-45, 14 FCC Rcd 20156, para. 30 (1999)(“[w]e generally adopt nationwide, rather than company-specific, input values in the federal mechanism.”); *Federal-State Joint Board on Universal Service*, Ninth Report & Order and Eighteenth Order on Reconsideration in CC Docket No. 96-45, 14 FCC Rcd 20432, para. 41 (1999)(“We reiterate that the federal cost model was developed for the purpose of determining federal universal service support, and that it may *not* be appropriate to use nationwide values for other purposes, *such as determining prices for unbundled network elements.*”) (emphasis added; subsequent history omitted). By largely ignoring the very real difference between ACS's actual costs to construct even a hypothetical network, and the national average costs for equipment and labor, the RCA illogically based the Fairbanks UNE loop price on non-rural carrier costs in places such as Atlanta, Dallas, Detroit and Kansas City.

widely acknowledged in economic literature and the Commission's own UNE pricing policies.¹⁶ For these reasons, it is difficult to fathom how the Commission can adjust its unbundling policies without considering the very real market distortions created by improperly set UNE prices.

The NPRM does acknowledge, at least in passing, the relationship between UNE pricing and unbundling obligations, and the effect of both on carriers' incentive to invest in their own networks. For example, the Commission seeks comment on whether to "modify or limit incumbents' unbundling obligations going forward to encourage incumbents and other to invest in new construction" and "whether, in lieu of limiting incumbents' unbundling obligations to encourage investment in new facilities, we might clarify or modify our pricing rules to allow incumbent LECs to recover for any unique costs and risks associated with such investment."¹⁷ Indeed, the question implies that UNE pricing is a deterrent to investment even when correctly based on forward-looking incremental cost, let alone when priced below cost. The Commission should pursue this reasoning to its logical conclusion and address the market distortion caused by state-ordered access to UNEs at prices that do not reasonably compensate the ILEC and do nothing to encourage investment by either the ILEC or the CLEC. In particular, this Commission should provide more explicit guidance to the states that UNE prices are to be based on the actual costs of the ILEC whose UNEs are requested, not the abstract average of all ILEC costs nationwide.¹⁸

¹⁶ See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report & Order, 11 FCC Rcd 15499, paras. 683-685 (1996) (subsequent history omitted).

¹⁷ NPRM at para. 24.

¹⁸ The Commission's authority to establish clear pricing guidelines for the states to implement under Sections 251 and 252 of the Act was settled by the U.S. Supreme Court in *AT&T v. Iowa Utilities Board*, *supra*, 525 U.S. at 381-385.

The Commission Should Not Delay In Adopting New Unbundling Rules That

Take Into Account Market Conditions. The Commission is to be applauded for undertaking this comprehensive review of its unbundling policies. The Commission should not be content with its former, prophylactic policies requiring all ILECs to provide all UNEs to all requesting carriers regardless of the cost, regardless of the need. It should act promptly to further redefine unbundling obligations in light of current and emerging market trends, and not allow out-of-date rules to constrain the natural evolution of the market. It is time for the Commission to incorporate into its unbundling policies a mechanism that takes into account the characteristics of the requesting carrier, including that carrier's ability to stand on its own. When UNEs are no longer necessary to "jump-start competition" – especially when UNEs are priced so low as to encourage inefficient market entry and distort facilities investment decisions – it is time to sunset those unbundling obligations.

Respectfully submitted,

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