

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

In the Matter of)	
)	
Notice of Inquiry Concerning a Review of the)	
Equal Access and Nondiscrimination)	CC Docket No. 02-39
Obligations Applicable to Local Exchange)	
Carriers)	
)	
)	
)	
)	

COMMENTS OF GENERAL COMMUNICATION, INC.

John T. Nakahata
Fred B. Campbell, Jr.
HARRIS, WILTSHIRE & GRANNIS, LLP
1200 Eighteenth Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 730-1300

Counsel for General Communication Inc.

Frederick W. Hitz III
GENERAL COMMUNICATION INC.
2550 Denali Street
Suite 10000
Anchorage, AK 99503

May 10, 2002

TABLE OF CONTENTS

	<u>Page</u>
I. Summary	1
II. Background.....	2
III. The Commission Established Equal Access and Nondiscrimination Requirements for Incumbent Independent LECs By Order Prior to Adoption of Section 251(g) in Order to Prevent Bottleneck Abuse.....	5
IV. ILECs, Including Incumbent Independent LECs, Retain Bottleneck Control that Continues to Require Equal Access Requirements.....	8
V. Substantial CLEC Retail Market Penetration Does Not Eliminate the Necessity for Equal Access Requirements.....	10
VI. Conclusion	12

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

In the Matter of)	
)	
Notice of Inquiry Concerning a Review of the)	
Equal Access and Nondiscrimination)	CC Docket No. 02-39
Obligations Applicable to Local Exchange)	
Carriers)	
)	
)	
)	

COMMENTS OF GENERAL COMMUNICATION, INC.

General Communication, Inc. (GCI) submits these comments in response to the Commission’s *Notice of Inquiry* examining the continued importance of the equal access and nondiscrimination obligations of Section 251(g) of the Communications Act of 1934, as amended.¹

I. SUMMARY

Upon the “break-up” of AT&T, equal access obligations were adopted for both BOCs and independent ILECs to correct existing discrimination in favor of AT&T based on the historical design of the network, and to prevent recurrence of such discrimination in the future due to the ILECs’ bottleneck control over local networks. The equal access requirements, which were based on concerns regarding the local network and not on the status of competition in the interexchange market, are still necessary to protect the public interest today because ILECs still retain the bottleneck control that required the adoption of equal access rules in the first place.

¹ Notice of Inquiry, *Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, FCC 02-57 (rel. Feb. 28, 2002) (“*NOI*”).

Thus, regardless of whether their affiliated IXCs are dominant or non-dominant, ILECs still have the incentive and—absent appropriate safeguards—ability to misallocate costs to local exchange and exchange access services, to discriminate against their long distance competitors, and to engage in other anticompetitive conduct. Because neither the size of the ILEC nor the market penetration of CLECs eliminate the incentive and ability of CLECs to engage in such discriminatory conduct, the public interest necessitates that the Commission affirm the equal access rules.

II. BACKGROUND

GCI is an Alaska-based company providing competitive local and long distance voice, video and data communications services. GCI's first service offering, initiated 20 years ago, introduced long distance competition to Alaska. In 1991, GCI entered the long haul fiber optic cable market, bringing competition into the market for submarine cable transport between Alaska and the "lower 48," and in 1998 it built the first modern and upgradeable fiber optic cable between Alaska and the rest of the continental U.S. In 1996, following passage of the Telecommunications Act of 1996 ("1996 Act"), GCI purchased cable systems that now pass 85% of Alaskan households.

In long distance, when GCI first entered the market, virtually all long distance calls were analog satellite transmission and used rather crude echo suppressors. GCI immediately introduced digital satellite transmission and echo cancellation, while reducing prices. 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. 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. As GCI expanded its competitive footprint, its competitor responded by upgrading its own facilities and reducing prices. 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.

As a result of GCI's competitive effort and innovation, it has grown to hold a 45% share of the Alaska long distance market. In Anchorage, and to a lesser extent in Fairbanks and Juneau, GCI's long distance customers include customers that have GCI local service, and customers that have ACS local service. In markets outside Anchorage, Fairbanks, and Juneau, all GCI long distance customers are ILEC local customers.

GCI entered the local exchange business in 1997 in Anchorage, and recently entered the Fairbanks and Juneau study areas as well.² In all of its local exchange markets, GCI serves residential as well as business customers, predominantly using an ILEC UNE-loop, its own switch and its own transport fiber ring to provide local exchange and exchange access services. GCI now serves 40% of all local exchange business and residential lines in Anchorage. 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. GCI provides its customers with equal access to long distance carriers, including those that compete with GCI.³

² GCI 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).

³ The dominant ILEC's long distance affiliate, ACS-LD, however, refuses to establish equal access interconnection with GCI's local network in Anchorage, Fairbanks and Juneau in order to avoid serving GCI local customers. They do this in order to induce GCI local customers to switch to the ILEC's local service and to avoid and frustrate other carriers' ability to resell ACS-LD service. Whether ACS-LD can continue with its refusal to establish equal access interconnection with GCI is a matter that is pending with the Regulatory Commission of Alaska (RCA) for determination. GCI has argued to the RCA that ACS-LD's

GCI's local exchange operations do not give GCI the ability to bypass any discriminatory ILEC behavior for two significant subsets of customers, customers that elect to have ILEC local service and customers for whom GCI uses Section 251(c)(4) resale to offer local service. With respect to its customers that are ILEC local customers, once the customer selects the local service provider, GCI has no alternative but to use that ILEC to originate and terminate exchange access traffic. ILEC discrimination in the provision of exchange access will affect GCI's ability to provide interexchange service.⁴ With respect to customers for whom GCI uses Section 251(c)(4) resale, GCI also has no alternative. GCI only uses Section 251(c)(4) resale where it cannot serve the customer from its own fiber loop and where the ILEC has engineered the network to preclude GCI from purchasing unbundled loops, collocating at the ILEC central office, and interconnecting with that unbundled loop.⁵

GCI's recent experience confirms that Alaska ILECs—and in particular, the largest, dominant ILEC, Alaska Communications Systems (ACS)—continue to have the incentive and ability to discriminate in the provision of interconnection and toll dialing parity to independent long distance carriers. Just this year, in 2002, ACS denied that it had any legal obligation to provide 1010XXX functionality so long as it offered end users an opportunity to select a PIC in equal access exchanges. The problem was discovered by one of GCI's technicians in January 2002 when he tried to dial the GCI access code in the Perryville exchange and received a fast

and the ILEC's actions are anticompetitive, discriminatory and contrary to their resale obligations.

⁴ See Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, FCC 01-146, 2001 WL 431685 (rel. Apr. 27, 2001) ("*CLEC Access Charge Order*"); Comments of General Communication, Inc., CC Docket Nos. 00-256, 96-45, 98-77, and 98-166 (filed Feb. 14, 2002).

⁵ See Comments of General Communication, Inc., CC Docket Nos. 01-338, 96-98, and 98-147 (filed Apr. 5, 2002) at 9-12.

busy signal before he was able to complete dialing. Upon inquiry, ACS informed GCI that 1010XXX access codes would not work at any bush site where ACS is the LEC. ACS has indicated that it is exploring a fix that will enable this functionality in equal access exchanges, but does not concede any legal obligation to provision such service.

III. THE COMMISSION ESTABLISHED EQUAL ACCESS AND NONDISCRIMINATION REQUIREMENTS FOR INCUMBENT INDEPENDENT LECS BY ORDER PRIOR TO ADOPTION OF SECTION 251(G) IN ORDER TO PREVENT BOTTLENECK ABUSE

Although BOCs were subject to equal access requirements pursuant to the AT&T Modification of Final Judgment (MFJ),⁶ the Commission, by order, required incumbent independent LECs to provide equal access. Both the MFJ and the Commission imposed equal access requirements for the same reasons, to correct the existing discrimination by local networks in favor of a single long distance provider, AT&T, and to prevent such discrimination from recurring in the future as a result of the ILECs' continued control of the local exchange bottleneck.⁷

At the time of the AT&T “break-up”, local networks were literally designed to support service to only one IXC—AT&T. AT&T “hard-wired” its long distance operation to its local operations, making it difficult for competing IXCs to access the bottleneck local networks even after the local networks were required to interconnect with competing IXCs. When competing

⁶ The MFJ was adopted in *United States v. AT&T Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (subsequent history omitted). Before GTE became part of Verizon, it was subject to equal access requirements contained in a Consent Decree adopted in *United States v. GTE Corp.*, 603 F.Supp. 730 (D.D.C. 1984) (subsequent history omitted).

⁷ *United States v. AT&T Tel. & Tel. Co.*, 552 F. Supp. at 142 (indicating that the equal access requirements were “designed (1) to prevent the divested Operating Companies from discriminating against AT&T’s competitors, and (2) to avoid recurrence of the type of discrimination and cross-subsidization that were the basis of the *AT&T* lawsuit.”).

IXCs did enter the market, they were forced to use inferior connections and dialing arrangements.

To correct this discrimination by ILECs in favor of AT&T, and to prevent its recurrence, the MFJ required the BOCs to “provide to all interexchange carriers and information service providers exchange access, information access and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates.”⁸ By requiring that BOCs provide such equal access, the MFJ required the BOCs to reengineer their networks to support multiple competing long distance carriers and prevented BOCs from using their bottleneck local exchange facilities to favor any particular IXC or to disadvantage any particular IXC.⁹

The Commission, in the *Independent Telephone Company Equal Access Order*, recognized that the “features of equal access services that have been set forth in the MFJ” (and the GTE Consent Decree) were “equally valid in their application” to incumbent independent ILECs.¹⁰ The Commission therefore required independent ILECs, which also control bottleneck local facilities, to meet equal access requirements.

⁸ MFJ § II(A), in *United States v. AT&T Tel. & Tel. Co.*, 552 F. Supp. at 227. The exchange access services to which equal access applies include, but are not limited to, dialing parity, rotary dial access, network control signaling, answer supervision, automatic calling number identification, carrier access code, directory services, testing and maintenance of facilities, provision of information necessary to bill customers, and presubscription. See MFJ § IV(F), 552 F.Supp. at 228; *United States v. GTE Corp.*, 603 F.Supp. at 30 n.55.

⁹ See *United States v. AT&T Tel. & Tel. Co.*, 552 F. Supp. at 195.

¹⁰ Report and Order, *MTS and WATS Market Structure Phase III*, FCC 85-98, 100 F.C.C.2d 860, 877-78, ¶ 59 (1985) (“*Independent Telephone Company Equal Access Order*”). For a discussion of equal access features and standards, see Memorandum Opinion and Order, *Investigation into the Quality of Equal Access Services*, FCC 86-248, 60 Rad. Reg. 2d (P&F) 417 (1986) (“*Equal Access Quality Order*”). Note that in its Second FNPRM regarding carrier identification codes (CICs), released in 1997, the Commission’s inquiries regarding the status of LEC conversion to accept four-digit CICs revealed that some independent incumbent LECs in rural and isolated areas did not yet provide equal access. See Order on

The Commission has made clear that the equal access obligations are rooted in Section 202(a)'s requirement that common carriers not engage in unreasonable discrimination.¹¹ In the *Allocation Orders*, the Commission concluded that the practice of routing all default traffic to AT&T was an unreasonable and discriminatory practice that violated the Communications Act of 1934.¹² For the same reasons the Commission applied the MFJ's equal access requirements to incumbent independent LECs—because both BOCs and independent ILECs exercised bottleneck control over their local networks and could engaged in discrimination regarding a consumers choice of IXCs—the Commission applied its presubscription regulations to both BOCs and incumbent independent LECs.¹³

The 1996 Act altered neither these rules nor the nondiscrimination requirements underlying them. Although the MFJ and the GTE Consent Decree were superseded by the 1996 Act on a prospective basis, the equal access obligations contained in them were explicitly preserved in Section 251(g), while the equal access obligations applicable to independent ILECs, which were imposed by Commission order pursuant to Section 202(a) of the Communications

Reconsideration, Order on Application for Review, and Second Further Notice of Proposed Rulemaking, *Administration of the North American Numbering Plan, Carrier Identification Codes (CICs)*, 12 FCC Rcd. 17876, 17926, ¶ 84 (1997). Considering that it had been more than twelve years since the adoption of the *Independent Telephone Company Equal Access Order*, the Commission tentatively concluded that “all LEC end offices . . . should . . . be required to provide equal access.” *Id.* No decision has yet been reached regarding the CIC Second FNPRM.

¹¹ See, e.g., *Equal Access Quality Order* at ¶ 3 (“Failure by any LEC (including BOCs and [incumbent independent LECs]) to provide equal access to interexchange carriers (IXCs) when required to do so could violate Section 202(a) of the Communications Act.”).

¹² *Investigation of Access and Divestiture Related Tariffs*, 101 F.C.C.2d 911 (1985) (“*Allocation Order*”), modified, 101 F.C.C.2d 935 (1985) (“*Allocation Waiver Order*”), modified on reconsideration, 102 F.C.C.2d 503 (1985) (“*Allocation Reconsideration Order*”); *Illinois Citizens Util. Bd. Petition for Rule Making*, 2 FCC Rcd. 1726 (1987) (“*Illinois Petition*”).

¹³ *Allocation Order*, 101 F.C.C.2d at Appendix B, ¶ 1.

Act, were left untouched. As the DC Circuit Court of Appeals recently stated, “the preexisting ‘restrictions and obligations’ covered by s 251(g) are not limited to Consent Decree obligations; the statute itself explicitly embraces preexisting obligations under a ‘regulation, order, or policy of the Commission,’”¹⁴ which includes the *Independent Telephone Company Equal Access Order* and the *Allocation Orders*.¹⁵ It should also be noted that the 1996 Act itself incorporated by statute some of the equal access obligations—Section 251(b)(3) requires all LECs “to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.”¹⁶

IV. ILECS, INCLUDING INCUMBENT INDEPENDENT LECS, RETAIN BOTTLENECK CONTROL THAT CONTINUES TO REQUIRE EQUAL ACCESS REQUIREMENTS

In the *NOI*, the Commission asks whether the pre-1996 Act equal access requirements are still relevant given that there are no longer any dominant interexchange providers. This question seemingly misapprehends the basis for the MFJ’s equal access requirements. The need for equal access requirements has never been driven by the dominance, *per se*, of a particular regional or national interexchange carrier.¹⁷ As demonstrated above, the purpose of the equal access

¹⁴ *WorldCom, Inc. v. FCC*, Docket No. 01-1218 (D.C.C. decided May 3, 2002), slip op. at 5.

¹⁵ See Second Report in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning Interstate, Interexchange Marketplace*, FCC 97-142, 12 FCC Rcd. 15756, 15855, ¶ 172 (1997) (“*LEC Classification Order*”).

¹⁶ 47 U.S.C. § 251(b)(3). Compare § 251(b)(3) with the exchange access services for which equal access is required, note 8, *supra*.

¹⁷ Indeed, in the *LEC Classification Order*, the Commission relied upon the applicability of the equal access requirements to incumbent independent LECs as one of the safeguards that

obligations was not to protect competitive IXCs (or even LECs) from AT&T because it was the dominant IXC. Rather, the equal access requirements were necessary to the public interest in order to protect competitive IXCs from ILEC discrimination because the ILECs had bottleneck control of their local facilities.¹⁸ The danger was that without equal access safeguards, in interconnecting their local networks with the long distance networks of the various interexchange carriers, ILECs could use their bottleneck control over local facilities to favor their interexchange services or affiliated interexchange carriers and prevent an IXC from accessing ILEC subscribers.¹⁹ This very real danger existed independently of whether AT&T (or any other IXC) dominated the interexchange market, although one result of prior discrimination was that AT&T did dominate the market.

Because ILECs still have bottleneck control over local facilities, the dangers remedied by the equal access requirements still exist today, and those requirements are just as necessary to the public interest now as they were when the MFJ and the *Independent Telephone Company Equal Access Order* were adopted. The Commission has consistently found that, regardless of whether their affiliated IXCs are non-dominant, as long as BOCs and independent LECs retain bottleneck control of local exchange and exchange access services, “they will have some incentive and ability to misallocate costs to local exchange and exchange access services, to discriminate

would allow the Commission to regulate such LECs on a non-dominant basis. *See LEC Classification Order*, 12 FCC Rcd. at 15855, ¶ 172.

¹⁸ *See United States v. AT&T Tel. & Tel. Co.*, 552 F. Supp. at 162 (“[I]t was because of its ownership and control of the local Operating Companies – whose facilities were and are needed for interconnection purposes by AT&T’s competitors – that AT&T was able to prevent these competitors from offering FX and CCSA services.”).

¹⁹ *See, e.g.*, Notice of Proposed Rulemaking and Notice of Inquiry, *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, FCC 94-145, 9 FCC Rcd. 5408 (1994).

against their long distance competitors, and to engage in other anticompetitive conduct.”²⁰ In fact, given that there is no longer a dominant independent IXC from which a large proportion of customers demand service, ILECs have more incentive to favor their own interexchange services and affiliated IXCs than ever. Therefore, to prevent discrimination in the IXC market, the public interest necessitates that the Commission affirm the equal access rules.

V. NEITHER THE SIZE OF THE ILEC NOR SUBSTANTIAL CLEC RETAIL MARKET PENETRATION ELIMINATE THE NECESSITY FOR EQUAL ACCESS REQUIREMENTS

The dangers to interexchange service posed by the ILECs’ bottleneck control that necessitate equal access are not lessened by the size of the ILEC or substantial CLEC retail market penetration in local services. Because it is bottleneck control over the end-user that gives rise to these anticompetitive concerns, the Commission has repeatedly rejected arguments that rural and mid-sized independent LECs have less incentive and ability than larger LECs to engage in cost misallocation, unlawful discrimination, or a price squeeze against rival interexchange carriers.²¹ Regardless of its size, without proper safeguards, ILECs that use their own switching or transmission facilities or capability to provide interexchange services would be able to engage in anticompetitive behavior against competing IXCs by, for example, providing superior interexchange switching or transmission service to their own interexchange operations.²²

Indeed, without equal access, ILECs big and small would eliminate long distance choice for consumers that elect the ILEC’s local service. If it were no longer required to provide

²⁰ *LEC Classification Order*, 12 FCC Rcd. at 15765, ¶ 10.

²¹ *See, e.g.*, Second Order on Reconsideration and Memorandum Opinion and Order, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning Interstate, Interexchange Marketplace*, FCC 99-103, 14 FCC Rcd. 10771, 10781, 10784, ¶¶ 12, 17 (1999) (“*LEC Classification Second Reconsideration Order*”).

²² *See id.* at 0785-786, ¶ 19.

competitive IXCs with connections that are equal in type, quality, and price to its own affiliated IXC, an ILEC would, for example, have the ability to provide lesser quality connections to competitive IXCs that serve its local customers. When affected local customers realized that competitive IXCs could not provide equal service, they would switch their interexchange service to the ILEC's affiliate.

The fact that, in some markets, CLECs such as GCI have substantial market penetration would not prevent ILECs such as ACS from exercising their bottleneck control to discriminate against unaffiliated competitive IXCs. Although GCI provides local services over its own switching facilities whenever it can, its facilities-based network is not ubiquitous. The cold, hard reality is that in *some geographic markets, GCI remains absolutely dependent upon certain ILEC facilities*, which dependency leaves its local exchange customers vulnerable to ILEC discrimination regarding IXCs. In Anchorage, for example, ACS 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. 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. 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 implement GR-303. In those areas where GCI does not provide switching, even its local customers who use GCI long distance or other competitive IXC services would be vulnerable to anticompetitive discrimination directed at their IXCs.

If there is any doubt that, without explicit equal access rules, ILECs would act anticompetitively with respect to IXC interconnection, GCI's experience in Alaska should lay it

to rest. Until recently, ACS was unwilling to comply even with the equal access rules that are currently in place. In its exchanges in the bush, ACS was not providing 1010XXX service, and still believes that it has no legal obligation to do so.

VI. CONCLUSION

Because ILECs still exercise bottleneck control over their local exchange networks, which gives them the incentive and ability to discriminate against IXCs in the absence of equal access safeguards, the public interest requires that the Commission retain the pre-1996 Act equal access obligations.

Respectfully submitted,

By: _____/s/_____

John T. Nakahata
Fred B. Campbell, Jr.
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

Counsel for General Communication Inc.

Frederick W. Hitz III
GENERAL COMMUNICATION INC.
2550 Denali Street
Suite 10000
Anchorage, AK 99503

May 10, 2002