

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
)	

REPLY COMMENTS OF ALASKA COMMUNICATIONS SYSTEMS

The telephone operating companies of Alaska Communications Systems (“ACS”)¹ submit these reply 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”).²

I. Introduction and Summary

As ACS explained in its comments in this proceeding,³ there must be some point where competitors in particular markets no longer need unbundled network elements (“UNEs”) because the competitor has successfully entered the market and has sufficient facilities of its own

¹ The ACS 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”).

² The deadline for submission of reply comments was extended to July 17, *see* Public Notice, DA 02-1284 (released May 29, 2002).

³ *See* Comments of Alaska Communications Systems, CC Docket 01-338, CC Docket 96-98, CC Docket 98-147 at 1-4 (filed Apr. 5, 2002) (“*ACS Comments*”).

to support an independent network. In other words, there must come some time when markets are competitive enough and CLECs are well enough established that UNEs are not “necessary” and their lack of UNEs will not “impair” their ability to provide the services they seek to provide.⁴ As confirmed by the comments of ACS’ largest competitor, General Communication, Inc. (“GCI”), that time has clearly come for the Alaska markets served by ACS. Further, the D.C. Circuit has made it clear that the current unbundling requirements—most of which apply universally, without regard to local market conditions—fail to satisfy the “impairment” standard under the statute. Alaska is an example where the current rules in no way reflect the competitive environment. Accordingly, the Commission should eliminate unbundling requirements where they do not further the goals of the Act.

II. The D.C. Circuit’s opinion in *USTA v. FCC* Confirms That The Commission Should Relax Or Eliminate The Unbundling Requirements For Competitive Markets.

Section 251 of the Act requires the Commission to evaluate the individual circumstances of the requesting carrier and the specific market conditions at the time of the Carrier’s request when considering what—if any—UNEs must be made available to a requesting carrier. As ACS explains in its comments, this fact is clear from the language of the Act and the Supreme Court’s decision in *AT&T v. Iowa Utilities Board*—particularly by the requirement that the Commission take into account, *inter alia*, the availability of the requested element from sources other than the incumbent’s network (*e.g.*, competing facilities in the particular market.)⁵

⁴ Or, as one economist puts it, “[o]nce facilities-based competition in a UNE market arises or proves economically feasible, unbundling should not be mandated at any price.” Declaration of Howard A. Shelanski, Comments of SBC Communications Inc, CC Docket 01-338, CC Docket 96-98, CC Docket 98-147, at Attachment D, p. 14 (filed April 5, 2002) (“*Shelanski Declaration*”)

⁵ See 535 U.S. 366, 389 (1999); see also ACS Comments at 2-4.

The need to “fashion a more targeted approach to unbundling that identifies more precisely the impairment facing requesting carriers”⁶ was recently highlighted by the D.C. Circuit in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002). In *USTA*, the D.C. Circuit struck down the Commission’s local competition and line sharing orders, and in particular criticized the Commission’s uniform and nonspecific application of the “necessary” and “impair” standard. The court noted that as a result of the Commission’s adoption of uniform, national rules for almost every element, “UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have [been] the object of Congress’s concern.”⁷

The court also discussed the disparities between costs and prices in most markets, concluding that there must be market-specific variations in competitive “impairment,” which the Commission failed to address in the orders at issue.

Competitors will presumably not be drawn to markets where customers are already charged below cost, unless either (1) the availability of UNEs priced well below the ILECs' historic cost makes such a strategy promising, or (2) provision of service may, by virtue of economies of scale and scope, enable a CLEC to sell complementary services (such as long distance or enhanced services) at prices high enough to cover incomplete recovery of costs in basic service. The Commission never explicitly addresses by what criteria want of unbundling can be said to impair competition in such markets, where, given the ILECs' regulatory hobbling, any competition will be wholly artificial But it is in the other segments of the markets, where presumably ILECs must charge above cost (at least above average costs allocated in conventional regulatory fashion) in order to offset their losses in the subsidized markets, that the gap in the Commission's reasoning is greatest. In finding that the CLECs' lack of access to each of the many [UNEs] 'materially diminish[ed]' their ability to provide service, the Commission nowhere appears to have considered the advantage CLECs enjoy in being free of any duty to

⁶ NPRM at ¶3.

⁷ *USTA v. FCC*, 290 F.3d at 422. The court further stressed the need for specific analysis when it stated that, “to the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition that might otherwise occur, we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible.” *Id.* at 425.

provided underpriced service to rural and/or residential customers and thus of any need to make up the difference elsewhere.⁸

The court's discussion of distinctions between markets, plus the fact of the critical differences in economic realities and potential responses available to ILECs versus CLECs, makes several points clear. First, the Commission must analyze individual markets when considering what, if any, UNE must be provided. Second, analysis of particular markets may show that certain CLECs are in fact in a far better competitive position than a non-specific analysis might indicate. And third, mandatory unbundling may not promote competition at all in certain markets. While the court did not vacate the existing unbundling rules (other than the line-sharing rules), it is clear that the current rules are unsustainable as long as they fail to reflect actual local market conditions.

III. It Is Obvious From The Record That The Alaska Markets Served By ACS Are Extremely Competitive.

While parties commenting in this proceeding may hotly contest the competitive nature of telecommunications markets in general, or the competitive nature of their particular markets, one thing is clear: the markets served by ACS are, beyond any possible doubt, extremely competitive.

On this point, at least, ACS and its main CLEC competitor, GCI, are in complete agreement. GCI provides numerous examples of, in its own words, "the competition resulting from GCI's market entry,"⁹ and shows that it has done an excellent job of taking market share away from ACS. Based on the services it provides through resale or UNEs from ACS, GCI boasts that it has "captured 40% of the retail local exchange market in Anchorage, which it has

⁸ *Id.* at 422-23.

⁹ Comments of General Communication, Inc., CC Docket 01-338, CC Docket 96-98, CC Docket 98-147, at 14 (Filed Apr. 5, 2002) ("*GCI Comments*").

served since 1997, and is rolling out service in Fairbanks and Juneau.”¹⁰ In addition, “[a]s a result of GCI’s competitive effort and innovation, it has grown to hold a 45% share of the Alaska long distance market.”¹¹ Ironically, GCI complains about the “backlogs” in loop cutovers and notes that ACS had to hire additional workers simply to switch customers over to GCI.¹² In other words, GCI is taking so many customers from ACS so quickly that ACS has had to hire additional staff simply to keep up! If this market is not deemed competitive, it is hard to imagine what a truly competitive market would look like.

GCI is not just taking over the Alaska local markets through UNE provision and resale: it also has its own separate facilities.¹³ GCI first entered the Alaska toll market in 1991 by “introducing competition” via long-haul fiber¹⁴, and “expanded its competitive presence” by building out fiber connecting Alaska and the Lower 48 states.¹⁵ GCI purchased the local cable systems in 1997¹⁶ which “now pass 85% of Alaska households”¹⁷ and “about half” of GCI’s

¹⁰ GCI Comments at 1.

¹¹ GCI Comments at 3.

¹² GCI Comments at 8.

¹³ GCI has deployed a major centralized switching center with multiple remote switches collocated in ACS wirecenters. It also has significant fiber transport infrastructure and, in select circumstances, provides fiber entrance facilities to commercial buildings. GCI has, in select circumstances, deployed fixed wireless technology to provision its CLEC services. Although it claims not to be interested in constructing copper loop plant, GCI has agreed to build-out copper loops in one particular subdivision located on a military reservation. Finally, as noted in another section of these comments, GCI owns and operates cable facilities that reach a substantial majority of the Alaska population. GCI already offers broadband cable modem service and claims to be very nearly ready to deploy two-way voice telephony over these facilities.

¹⁴ This initial strategy relied upon the purchase of IRU capacity from Alaska’s then dominant IXC, Alascom, Inc.

¹⁵ GCI Comments at 2.

¹⁶ GCI Comments at 3.

¹⁷ *Id.* at 2.

potential business customers.¹⁸ In addition, GCI “is now Alaska’s largest ISP” providing both dial up and broadband services, including cable modem services. GCI is also “introducing high-speed Internet access to Alaska’s rural bush areas using unlicensed wireless... technology interconnected to a satellite backhaul.”¹⁹ This service “has thus far seen a phenomenal take rate”²⁰ and GCI expects to complete its deployment by 2004.²¹

ACS agrees that this is an accurate description of GCI’s strong and rapidly growing presence in its markets. The goals of the Communications Act have been fully realized in Alaska; there is simply no further need to “jump start” or promote competition in this fully competitive market.

IV. For All Markets Where UNEs Must Be Made Available, The Commission Must Ensure That UNE Pricing Does Not Destroy Incentives For Facilities-Based Competition, Investment And Innovation.

Although the Commission seeks to promote facilities-based competition,²² the Commission’s current unbundling rules (at least as applied to competitive markets like Anchorage and Fairbanks) deter both ILECs and CLECs from deploying or improving facilities. Economists have pointed out that, in general, “to the extent...that it is economically feasible for competitors to obtain access to [preexisting] facilities or practical substitutes from other sources...an obligation to share them or the advantages they confer with rivals can be

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 4

²⁰ *Id.* at 13.

²¹ *See* Reply Comments of General Communication Inc., CC Docket 01-337, at 6 (filed April 22, 2002.)

²² *See* NPRM at ¶3; *see also* Comments of ACS at 6, n.11 (citing commissioners’ statements stressing the goal of promoting facilities-based competition.)

anticompetitive.”²³ Plus, as the DC Circuit noted, “[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”²⁴ Asymmetrical unbundling obligations “dampen [ILECs’] incentives to upgrade their networks...(1) by effectively allowing CLECs to share in the rewards from the new investments while paying only bare-bones TELRIC prices for that privilege, (2) imposing the costs of accommodating those CLECs...only on the ILECs and not on other facilities-based competitors, and (3) in particular, effectively perpetuating mandatory unbundling as new technologies move potential points of interconnection out of the central office...where collocation arrangements are decreasingly available and/or more costly.”²⁵ Finally, “it is important that the prices for unbundled network elements be set correctly where unbundling does occur. Otherwise, those prices will further exacerbate the deterrent effect that unbundling has on investment in competing facilities.”²⁶

GCI’s current activity in Alaska demonstrates the skewed incentives created by unbundling requirements coupled with faulty UNE pricing. Developing competitive alternatives for desired facilities will not make sense to a CLEC as long as it can provide services using UNEs that are priced below the CLEC’s cost of provisioning alternatives. Currently, GCI can

²³ Declaration of Alfred E. Kahn and Timothy J. Tardiff at 18, *submitted with* Comments and contingent petition for forbearance of the Verizon Telephone Companies, CC Docket 01-338, CC Docket 96-98, CC Docket 98-147 (Filed April 5, 2002) (“*Kahn Declaration*”).

²⁴ *USTA v. FCC*, 290 F.3d at 427. *See also* Shelanski Declaration at 3, 6. (stating that “[u]nbundling can undermine facilities-based competition” because, “when firms use common facilities, the industry at issue is less likely to create or deploy innovative technology or services.”)

²⁵ Kahn Declaration at 17-18.

²⁶ *Id.* at 13.

purchase UNEs at prices slightly over half the actual cost of the elements to ACS.²⁷ Not surprisingly, GCI has not built out or improved its facilities in areas where it can rely on below-cost UNEs. Although GCI claims the capability to provide voice telephony service over its cable facilities -- which by its own estimate pass 85% of Alaska households -- GCI has not actually implemented this service. And while GCI's cable facilities pass "about half of GCI's potential business customers," in Anchorage GCI has not extended this system, extended its fiber systems, or implemented the wireless system it tested in June of 2000.²⁸

Instead, GCI points to the cost and technical and regulatory issues involved in extending its cable and other facilities and concludes that without UNEs, GCI will not be able to provide the services it seeks to provide.²⁹ GCI notes, for example, that to extend its cable system it might have to resort to "extensive digging" in areas where street conduit is already full, and would have to secure building access to extend its fiber system, which GCI claims "make[s] it uneconomic" to add customers in this manner.³⁰ GCI abandoned its efforts to deploy wireless systems in Anchorage because of "difficulties in upgrading network equipment," and because of foliage effects (which apparently GCI had not counted on): GCI explains that "additional cell sites would probably have cured this problem, [but] the economics of deployment limited that solution."³¹

²⁷ As ACS has explained, the Regulatory Commission of Alaska improperly used cost inputs from the Commission's high-cost synthesis model—as opposed to ACS' evidence as to actual costs, and contrary to the Commission's policies—to set ACS' UNE prices below the average TELRIC costs. *See* ACS Comments at 7.

²⁸ *See* GCI Comments at 7.

²⁹ *See* GCI Comments at 6-8.

³⁰ GCI Comments at 6.

³¹ GCI Comments at 7.

The fact that extending or improving existing competitive facilities imposes *some costs* on a CLEC can not mean that access to UNEs is “necessary” or that the CLEC will be “impaired” if it does not get them—or that competition requires UNEs under these circumstances. The Court in *Iowa Utilities* specifically criticized the Commission’s view that “any increase” in a competitor’s cost would be an “impairment.”³² Furthermore, as one economist explains, the CLEC “must be able to show that the up-front or continuing transaction costs of non-UNE alternatives are so high as to render them uneconomic for competitive entry.”³³ The fact that GCI already has and continues to deploy non-UNE alternatives in areas where it cannot rely on cheaper UNE alternatives makes clear that this is not the case.

The DC Circuit has made clear that the Commission must analyze not only the supposed “impairment” to the CLEC of not getting a UNE (as against the benefit of getting it), but must also consider whether the cost disparity to the CLEC is one that genuinely would make it wasteful to duplicate the function of that element. The court explained that, “To rely on costs disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad, even in support of an initial mandate, to be reasonably linked to the purpose of the Act’s unbundling provisions.”³⁴

It could not be clearer that GCI would not be “impaired” if it could not get UNEs from ACS; in fact, it is the provision of those UNEs under the Commission’s rules that keep GCI from improving its facilities to the point where it can offer competitive, facilities-based services to all customers in Alaska. At the same time, ACS cannot even recover its costs when it is

³² See 535 U.S. 366 at 389-90. This decision led the Commission to revise its definition of impair to consider, *inter alia*, self provisioning by a requesting carrier, which GCI could clearly rely on.

³³ Shelanski Declaration at 15.

³⁴ *USTA v. FCC*, 290 F.3d at 427.

forced to provide UNEs below cost to a CLEC that has no obligation or motivation to stop taking them. This situation is completely antithetical to the goals and meaning of the Communications Act, and must be corrected.

V. The Commission Must Ensure That State Commission Actions Do Not Thwart Implementation Of National Telecommunications Policy.

If state commissions fail to apply the Commission's rules and policies correctly and consistently, especially with regard to UNE designation and pricing, the public loses: CLECs are dissuaded from developing competitive facilities and ILECs are prevented from recovering their costs as required by Section 252(d)(1) of the Act. This is precisely what is happening in Alaska. Instead of relying upon ACS' evidence of actual forward-looking costs, the RCA has improperly used nationally averaged "default" cost inputs (or slightly adjusted versions of these "defaults") applied to the Commission's high-cost synthesis model (designed for USF purposes, not UNE pricing).³⁵ While "jump starting" competition may seem attractive in the short run, it is likely to have long-term unintended consequences that will most assuredly not be in the public interest.

The Commission must ensure that its national telecommunications goals are not thwarted by erroneous or inconsistent state commission application of its rules and policies. In that regard, the Commission should reject proposals to expand the role of the states in the areas of UNE designation and pricing policies. ACS urges the Commission to set out a competitive market standard that, when met, justifies the complete termination of an ILEC's obligation to

³⁵ One economist notes that "an unrealistically strong assumption of sustained accuracy in setting regulated UNE prices is required before one can say with any confidence that an unbundling option will not affect incentives to build new, competing facilities or to improve existing ones. The results of difference state pricing proceedings make clear just how unlikely it is that regulators will set prices correctly." Shelanski Declaration at 13. (providing examples of apparently irrationally inconsistent UNE price variations between states.)

offer UNEs. In markets where circumstances do not support the total elimination of UNEs, the Commission should establish a limited and finite list of UNEs that must continue to be provided. The Commission should not create a “default” list that can be added to or subtracted from by state regulators. The Commission should also reject suggestions that states be given broad UNE pricing discretion that will do nothing more than perpetuate the already inconsistent and often erroneous state interpretations of federal policies as experienced in Alaska.

VI. Conclusion

ACS has demonstrated that, by any standard, local competition in Anchorage is robust. In fact, it has been observed that Anchorage may be the most effectively competitive local market in the entire country. Given the more pronounced below-cost UNE pricing imposed by the state regulator for competitive entry in Fairbanks, ACS observes a similar market evolution in that location as well. ACS has already experienced an approximate 15% to 20% market share swing to its competitor in barely one year after competitive entry. This trend is expected to continue and yield a 25% to 30% change in market share by the end of the second full year of local competition.

While market share may not be the best metric for determining when competition is effective, it is a strong indicator that the ILEC no longer holds market power and clearly does not have the ability to unilaterally set prices. For example, when ACS recently raised its retail prices in Anchorage to more cost-based levels (from \$9.70 per month to \$12.35 per month for residential consumers), it lost 18% of its then remaining residential customers in the first six months following that price increase. The absence of market power is the true test of the competitive nature of a market. This test has obviously been met in both Anchorage and Fairbanks.

For the foregoing reasons, the Commission should begin to limit, rather than expand state regulatory discretion in demonstrably competitive markets. The Commission is urged to take the first step in that process by eliminating ACS' obligation, and obligation of all other similarly situated ILECs', to provide UNEs in fully competitive markets like those found in Anchorage and Fairbanks.

Respectfully submitted,

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