



1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

November 21, 2002

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On November 20, 2002, Mark Dinneen (of GCI) and I (on behalf of GCI) met with Brent Olson, Deputy Chief, Competition Policy Division, Wireline Competition Bureau (“WCB”), Tom Navin, Deputy Chief, Competition Policy Division, WCB, Mike Engel, Jeremy Miller, Aaron Goldberger and Robert Tanner, all of the Competition Policy Division, WCB.

The substance of our discussion is summarized in the attached letter to Bill Maher.

In accordance with FCC rules, a copy of this letter, with attachment, is being filed electronically in each of the above-captioned dockets.

Sincerely,

/s/

John T. Nakahata

JTN/krs
Attachment

November 21, 2002



Mr. William Maher
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, 98-147

Dear Mr. Maher:

I am writing on behalf of General Communication, Inc. ("GCI") to follow-up in greater detail on points GCI previously made with respect to the FCC's Triennial Review of unbundled network elements.

As you know, GCI is a CLEC operating in Alaska serving both residential and business customers. GCI is a facilities-based carrier, with its own switching and transport facilities in Anchorage, Fairbanks and Juneau. GCI uses a mix of methods to cover the "last mile" to its customers: some of its customers are served entirely over GCI's own loops (for example, about 22 buildings in Anchorage are served from GCI's fiber ring); many customers are served with GCI leasing unbundled loops from the incumbent LEC, ACS, but with GCI-provided switching and transport; and other customers are served using UNE-P or total service resale. GCI is actively investing in cable telephony, and plans to migrate as much service as is possible from ILEC facilities to GCI's own facilities using cable telephony.

GCI's preference is to serve its customers with as much of its own facilities as is possible. For example, GCI will use its own switching and transport, when possible, rather than purchase UNE-P or resale from the incumbent LEC. GCI needs no regulatory stick to do this. Having invested in our own switch and transport facilities, it is in GCI's interest to use those facilities whenever possible, so long as ILEC provisioning and collocation charges are kept reasonable and the ILEC actually provisions GCI's loop orders in a timely manner. Moreover, the imperfections of ILEC provisioning, and the difficulty of coordinating service with the ILEC, are substantial, and represent a hidden cost of using UNEs. When these hidden costs are taken into account, it is economically rational for GCI to use its own facilities to serve its customers even when its own facilities are nominally more costly than ILEC UNE prices.

The converse is that there will be situations in which a CLEC like GCI will be impaired in providing the services it seeks to provide without access to particular UNEs, even when it may own what appear to be substitutable facilities. Even when GCI has its own switch and transport facilities, it cannot use those facilities if it cannot get access to a loop at the end office (for example, because the ILEC uses loop concentrators or digital loop carriers that are not capable of loop unbundling). GCI is

impaired when it cannot order and have UNE loops provisioned in a nondiscriminatory timely manner. And although GCI has a fiber ring from which it technically could serve additional business customers, building access and rights-of-way issues make it infeasible to do so, forcing GCI to use unbundled loops (often DSL-qualified loops) to serve those customers.

In its comments, GCI has made the case that impairment – and particularly the determination that a carrier is *not* impaired without access to a particular UNE – must be made in the context of evaluating specific market conditions in a given product and geographic market. There is no doubt that the geographic market for these inputs to local exchange and exchange access services is local. Nor is there really any doubt that the alternative sources of supply for an input – other than use of an unbundled network element – will and does vary even within, for example, Anchorage, Fairbanks and Juneau, Alaska. The fact that loops are unbundled in New York, or indeed in one part of Fairbanks, does not mean that there is access to an unbundled loop in another part of Fairbanks that sits behind a non-accessible DLC. The Department of Justice Horizontal Merger Guidelines, which the FCC has also applied to evaluate market power in its own merger proceedings, provides a ready template for structuring the analytical inquiry into impairment. Moreover, another commenter has suggested in comments that the standard for impairment itself should be whether, in the absence to access to an unbundled network element, the requesting carrier would have a small, but significant and non-transitory, decrease in output of the services it seeks to provide.¹ No ILEC has actually put forth a cogent explanation of why this standard – which is well-grounded in and adapted from settled antitrust law – does not adequately articulate the concept of “impairment” under Section 251(d).

Actual market behavior in the Anchorage market has also directly illustrated why, from the perspective of the consumer, a cost-based combination of UNE elements (including combinations of all elements) is superior to resale as a means of non-facilities-based entry. Last November, the RCA authorized a 24 percent retail rate increase for ACS Anchorage. At the same time, the RCA also instituted an interim and refundable increase in UNE loop rates. When ACS increased its rates, the other CLEC other than GCI, which purchases total service resale services from ACS, also increased its retail rates. GCI, however, decided to hold the line on any retail rate increases, and simply absorbed the higher UNE loop charge. The result was a marketplace response by consumers, who flocked to GCI. Entry using cost-based UNEs (including UNE-P) allows competitors to set their prices independent of ILEC retail prices, whereas total service resale directly ties ILEC retail price movements to its competitors’ costs, and therefore puts substantial pressure on competitors to mirror ILEC price increases.

Finally, if the Commission does decide that it wants to take actions to force CLECs to expand the use of UNE-L, it should recognize that such actions would likely *slow* the development of facilities-based competition, particularly if the FCC does not provide a sufficiently long transition period. Particularly under current market conditions, capital is extremely limited. Area by area, GCI must decide whether to allocate capital to continued cable telephony development, or to additional collocation and fiber deployments to support UNE-L. If the Commission attempts a relatively

¹ Reply Comments of Z-Tel Communications, CC Docket No. 01-338, at 21 (filed July 17, 2002).

truncated elimination of unbundled switching, the Commission will dictate this choice of facilities investment, rather than allowing investment to flow rationally. Accordingly, any transition should be of sufficient length so as not to distort existing facilities investment plans.

We turn to a discussion of what GCI – as a facilities-based provider – has found to be necessary pre-requisites to substituting its own facilities for ILEC switches or loops, and when GCI – as a facilities-based provider – is impaired without access to ILEC switches and loops.

A. Making UNE-L Work.

UNE-L entry sounds deceptively simple – buy a switch, get collocation, and order UNE loops. Of course, it is not that simple, and is operationally extremely difficult, especially because it relies on a high degree of forced cooperation from the ILEC. Moreover, without an alternative source for loops (which does not generally exist yet in Alaska), the ILEC has no incentive to cooperate because it can keep all customers on its network even if it does not cooperate, and indeed can increase its revenues and network utilization by not cooperating with the UNE-L CLEC. As will be discussed further below, GCI has had to endure substantial attempts by its ILEC, ACS, to divert customers to ACS' retail services through discriminatory provisioning tactics.

The UNE loop must be actually available. It may seem axiomatic, but in order for a carrier to use its own switch (or switch capacity resold by another switch owner) to provide service using a UNE loop, the UNE loop must be actually available. GCI faces many instances, affecting whole neighborhoods, where UNE-loops are not available at the ILEC central office. In these situations, the ILEC has installed a remote concentrator – sometimes, but not always, a digital loop carrier – at a remote terminal and hauls that traffic back to its central office in multiplexed, and often optical, form. In order to interconnect with the unbundled loop, however, the traffic from the CLEC customer must be separated out and sent to the CLEC's collocation space prior to the traffic entering the ILEC switch. Except where the ILEC has implemented a GR-303 capability, however, it is not possible to gain access to the unbundled loop traffic at the central office prior to switching.

In some of its central offices in Anchorage, the ILEC, ACS, has implemented GR-303 capability. Elsewhere, however, it has not. Where GR-303 has not been implemented, GCI cannot gain access to the ILEC unbundled loop prior to switching in the ILEC Central Office. Accordingly, in those offices, GCI would be impaired without access to unbundled local switching when it seeks to serve customers on loops served behind non-GR-303 capable concentrators.

GCI knows for a fact that it is technically and economically feasible to implement GR-303 because it has done so when it has installed DLCs of its own. In the Aurora Subdivision, Elmendorff Air Force Base, GCI has gone in to wire an area and has installed its own carrier equipment. In those areas, GCI installed GR-303 capability so that it would, in the future, have the technical ability to handle requests for unbundled loops that it might receive from other carriers.²

² In some, but not all, areas, ACS has also installed GR-303 capable DLCs. The technical feasibility of meeting GR-303 is not an issue.

No discriminatory refusal to provide necessary facilities that are provided to the ILEC's retail operations. Reconfiguring their networks using DLCs is not the only tactic that ILECs use to avoid loop unbundling requirements. Other CLECs have reported that ILECs are rejecting UNE orders claiming facilities exhaust, even when the ILEC is simultaneously expanding facilities or adding minor pieces of equipment for its own retail operations.³ GCI is facing similar problems, and ILEC claims, in its markets in Alaska. If ILECs are allowed to refuse to provision UNE orders claiming facilities exhaust, but then continue to expand plant for their own retail operations, UNE-L facilities-based competition cannot survive.

Specifically, GCI's experience has been that although ACS for years added service drops or pair gain devices when necessary to create an additional loop, in May 2002, ACS unilaterally ceased doing so, and instead demanded that GCI pay additional compensation in those instances, beyond the charges for a field installation of a loop in the interconnection agreements. Notably, these are not circumstances in which ACS is entitled to special construction charges under its tariffs, but situations in which, for its retail customers, ACS makes these facilities modifications without additional charge. The facilities in question are not dedicated to GCI use, and ACS receives payment for these facilities either as UNEs, when GCI is the retail service provider, or from the end user customer, when ACS is the retail service provider.

ACS' actions have a significant impact on competition in areas where there has been new home or office construction. Rather than put in service drops at the time of new construction, ACS leaves these drops to be installed later, so that it can claim that it does not have to provide an unbundled loop to those premises. However, if the customer signs up with ACS for retail service, then ACS will install the drop. In these areas, ACS is attempting to use its market power over loops to either stymie competition or to leverage additional payments to which it is not entitled under its interconnection agreements. GCI is currently in arbitration seeking to halt these unlawful practices.

Conditioned loops must be available, in addition to loops with bridge taps and load coils. For some customers, for some services, GCI must use conditioned loops, i.e., loops without bridge taps and load coils that will be managed in DSL-capable binder groups, in order to provide the service the customer needs. In particular, GCI, in some cases, uses these types of loops, combined with its own electronics, to provide PRI ISDN and T-1 services to business customers. GCI will also use these types of facilities to provide DSL to customers that need DSL. In some instances, GCI must use these loops, with its own pair gain facilities, in order to get around ACS' refusal to provide additional drops or pair gain devices for UNE loop service. GCI has recently run into situations in which the ILEC is now installing RF filters to limit GCI's use of these conditioned loops, even though an arbitrator previously ruled that intrusive devices should not be placed on loops identified as DSL-qualified.

³ See Letter of Jake E. Jennings, New South Communications to Christopher Libertelli, Legal Adviser, Office of the Chairman, FCC, CC Docket No. 01-338 (dated Nov. 6, 2002).

Loops and other services must be able to be ordered and provisioned in a nondiscriminatory and timely manner. Even if loops are technically available, a UNE-L provider cannot use them if they cannot be ordered and are not provisioned in a timely manner. GCI has suffered from ordering and provisioning problems that have, at times, literally stopped GCI's market entry.

GCI has suffered from chronic provisioning problems from its ILEC, ACS (and ACS' predecessors) ever since GCI began operation. In its early years, the backlogs in ordering and provisioning became so bad that GCI resorted to holding a weekly drawing for a trip to Hawaii for any customer that stayed on GCI's waiting list. Earlier this year, ACS again developed a huge order backlog, so that it would routinely take weeks for ACS simply to enter a GCI order into its system and issue either a firm order confirmation or reject. ACS then decided that it would prioritize conversions of lines from ACS to GCI ahead of GCI requests for new dialtone service for customers that were moving or seeking new lines. The result was that GCI customers who moved into or across town would sometimes be without service for several weeks.

The attached charts show ACS' total ordering and provisioning performance for both residential conversions and residential moves and new lines since early June 2002, and compares those times with the same day service available to ACS retail customers. As is apparent from these charts, ACS' provisioning has been patently discriminatory.

ACS did not finally get serious about eliminating its ordering backlog until after GCI filed an accelerated docket request at the FCC and the Regulatory Commission of Alaska conducted two days of hearings. During the RCA's hearings, it became apparent that at any time during the year that GCI was suffering from ordering backlogs, ACS could have cured the backlog simply by authorizing some overtime and adding only four employees (which were the steps it ultimately took to eliminate the backlog). ACS clearly did not do so because: (1) curing the backlog (and therefore providing service on a less discriminatory basis) would cost it money for overtime and new staff; and (2) it benefited from the existence of the backlog. While the backlog was in place, GCI would lose customers who became exasperated with GCI's inability to get delivery dates from ACS, and who then found that they could receive service immediately if they signed up with ACS. In addition, causing long backlogs at GCI endangered GCI's own brand and service reputation.

Although ACS has now largely eliminated the ordering backlog, GCI has no assurance that these discriminatory actions will not recur. ACS continues to have every incentive to engage in discrimination: if it can cause delays in the processing and provisioning of GCI orders, ACS will shift some customers to its own retail service when they get fed up with the delays ACS has manufactured for GCI, and it will force GCI to be more gradual in its market expansions; even if provisioning delays simply shift customers from GCI UNE-L service to GCI using total service resale, ACS will increase its total revenue from the service to that customer.

Notably, this was not the only type of discrimination in ordering and provisioning that GCI suffered during the past year. As previously described, in an effort to frustrate GCI's ability to compete using UNE loops, ACS has refused to make routine modifications to loop facilities that it

carries out for its own retail services. In addition, at other times during the past year, ACS has decided to impose arbitrary limits on the number of GCI loop orders it would work in a given day – limiting specific wire centers to 10 lines during the day and 20 lines during the night. No explanation was given when these restrictions were put in place, nor was any reason given when they were removed. In some cases, GCI was not even formally notified that these restrictions were removed.

The critical thing for the Commission to realize is that total service resale is not an adequate response to these types of discriminatory actions by the ILEC. First, GCI's orders for total service resale were subject to the same ordering delays as its orders for UNE loops. Second, and of more significance to an impairment determination, because the ILEC generally receives significantly more revenue from total service resale than from UNE-L (in GCI's case, its total service resale customers have negative margins), by diverting GCI's customers from UNE-L to total service resale, the ILEC continues to earn revenue it would have lost had it provisioned the UNE-loop in a nondiscriminatory and timely manner. Although UNE-P also allows the ILEC to retain unbundled switching and transport revenue it would not have earned had it provisioned UNE-loops in a timely and nondiscriminatory manner, because the ILEC does not get to charge above-cost access charges, its reward for delay is muted.

Nor are the FCC's or state commission enforcement processes an adequate antidote. In order to bring a complaint, a CLEC must accumulate evidence of discrimination. This usually means that discrimination must be tolerated for some months while evidence is compiled. Once evidence is compiled, the enforcement process itself consumes many more months. The FCC's rocket docket, for example, requires a two-month long period (including mediation) during which the Commission decides whether a matter qualifies for the "rocket docket." Only if the complaint is accepted will adjudication on the "rocket docket" actually begin. In the meantime, the ILEC continues to benefit from its discriminatory behavior in the marketplace. In short, obstruction and delay pay.

Moreover, UNE-P provides a ready solution to the second problem of limitations on the volume of loops that the ILEC is capable or willing to provision in a timely and nondiscriminatory manner. Because UNE-P is an arrangement that requires no network changes, if an ILEC does impose limits on the number of UNE-loop orders it can process – or simply cannot process a sufficient number of orders in timely and nondiscriminatory manner – UNE-P provides an alternative service arrangement for provisioning customer orders without giving a large financial windfall to the ILEC.

Although performance measures, performance monitoring and self-effectuating liquidated damages do not by themselves assure nondiscriminatory and timely provisioning, there is virtually no chance of achieving nondiscriminatory and timely provisioning where these tools are not in place. Thus, the Commission should also adopt rules to require that interconnection agreements contain performance measures, a system of performance monitoring, and self-effectuating liquidated damages in the event that the performance monitoring detects violations of the measures of nondiscriminatory and timely ordering and provisioning.⁴

⁴ Reply Comments of General Communication Inc. *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Dockets No. 01-318, 98-56, 98-147, 96-98, 98-141 at 6, 9-13 (filed Feb. 12, 2002)

Collocation must be available and CLECs must have sufficient time to establish collocation. Collocation is a clear prerequisite to use of UNE-L to provide local service. However, collocation is not easy to establish. Space must be available for collocation. This can be a particular problem in some GCI service areas because, in some cases, remotes are treated as central offices under interconnection agreements. Collocation at these remotes is particularly difficult, and at times requires facilities modifications. GCI and ACS must agree on these facilities changes, and in GCI's experience ACS has not always agreed to cost-effective solutions. Even when the process is moving, it can take 8 months to a year to complete collocation. During the period during which GCI is attempting to establish collocation, it can only enter the market through UNE-P or resale. Again, because resale yields greater revenue for the ILEC, the ILEC would have an even greater incentive to slow-roll collocation arrangements if UNE-P were not available.

Transport must be available at reasonable prices. In its principal markets, GCI has its own transport ring that interconnects both its cable headends and the ILEC central offices. This gives GCI its own source of transport between the ILEC central offices in Anchorage, Fairbanks and Juneau, and GCI's switch. As GCI continues to expand within and beyond Alaska's three metropolitan areas, however, this will not always be the case. In more remote locations with only a single central office, for example, GCI may need to purchase unbundled backhaul from the ILEC central office to GCI's switching facilities in order to implement a UNE-L entry strategy. In those markets, GCI will be impaired without access to unbundled transport at reasonable, TELRIC-based rates.

In addition, if the Commission is going to adopt rules to promote facilities-based competition over non-facilities-based competition, the Commission must also prevent ILECs from taking steps that deny CLECs the ability to gain economies of scope from their own transport facilities. For example, ACS has, in at least one instance, converted a central office to a remote. Although GCI can interconnect at the remote for the purposes of UNE-based entry, it cannot interconnect at the remote for expanded interconnection for interstate access services. In this particular central office, GCI must purchase transport from the ILEC all the way back to the host central office, even though GCI has its own fiber facilities at the remote that would be capable of picking up and transporting exchange access traffic.

In addition, the Commission must also make clear that ILECs cannot charge carriers that use their own fiber to provide their own exchange access transport for entrance facilities into ILEC central offices that they do not use. Even when GCI uses expanded interconnection to provide its own transport to an ILEC end office, the ILECs still charge GCI for two channel terminations, one for the loop that GCI uses and one for the ILEC entrance facilities that GCI does not use.⁵

⁵ See, e.g., ACS of Anchorage, Inc. Tariff FCC No. 1, § 6.1.3(A)(1), Original Page 6-8, §§ 7.2.1(A), Original Page 7-16; NECA Tariff FCC No. 5, § 6.1.3(A)(1), 3d Revised Page 6-8.1, § 7.2.1(A), 10th Revised Page 7-13.

B. Barriers to Use of Own Loop Facilities.

I. GCI's Fiber Ring.

GCI today serves approximately ten percent of its lines over its own facilities. These are primarily large businesses that are in one of the 22 buildings served from GCI's own fiber facilities via its fiber ring.

Service from the fiber ring cannot be easily established to other buildings that GCI's ring passes. WorldCom has documented many of the problems that it faces in trying to enter multitenant buildings, and GCI faces many of the same problems.⁶ As WorldCom accurately describes, the ILEC is already in every building, with facilities reaching every office, while the CLEC must seek permission to enter every building and to obtain facilities to reach every office. To enter a new building, GCI must be able to get access to conduit into the building, or be able to place its own conduit into the building. Both of these options present problems, as landlords are reluctant or wish to charge substantial amounts for placing new conduits, and the ILEC is not willing to allow GCI to place its facilities in the ILEC's conduits. Once in the building, GCI needs to have space to place equipment, as well as access to riser conduits. This can also be a problem, especially where riser conduits are full.

In one case, GCI has built out fiber to an office park, but it cannot fully utilize that fiber because the internal building conduits are full and the landlord does not want to have the ceilings and walls ripped open to add more conduit. In that case, GCI has been forced to lease loop facilities from the ILEC, bypassing the fiber facilities GCI has already installed, because it has no alternative to use of the ILECs facilities to reach the customer.

2. GCI's Cable Plant.

GCI fully anticipates using its cable plant in the future to be able to delivery telephony services. When it does so, it will use an IP-based technology to provide a service that is fully substitutable for today's circuit switched service.

However, as the Commission most recently acknowledged in its *AT&T-Comcast Merger Order*, "Cable VoIP, however, is still nascent; although the concept has existed for several years, no cable operator in the United States has yet deployed the technology on a wide-scale commercial basis."⁷ The Commission then concluded, "This creates a high level of uncertainty surrounding the pace of cable telephony deployment," and, in the context of that merger, led the Commission to conclude that

⁶ "Building Access Issues Presented in the UNE Triennial Review," attached to Letter of Ruth Milkman, Lawler, Metzger & Milkman LLC to Marlene H. Dortch, Secretary, FCC, CC Dockets No. 01-338, 96-98, 98-147 (dated Oct. 25, 2002).

⁷ Memorandum Opinion and Order, *In the matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, FCC 02-310, p. 75, ¶ 192 (rel. Nov. 14, 2002).

public interest benefits from the acceleration of cable telephony deployment were "speculative at best and, therefore, difficult to evaluate."⁸

Thus, cable telephony does not yet today provide a means for GCI to bypass the ILEC's loops. GCI is continuing to work to develop cable telephony. But until it becomes a commercial, operational reality, GCI will be impaired in serving its customers without access to ILEC unbundled loops.

C. Evaluating "Impairment" -- A Market-Specific Task Best Performed by the States.

As should be apparent from the above discussion, whether a CLEC is "impaired" without access to an ILEC element is a determination that will turn on a multiplicity of market-specific facts and factors. Notwithstanding ILEC efforts to portray unbundled switching as a national market, it is simply not so. The conditions that will permit a switched to be used in serving an individual market are highly localized -- such as whether individual lines are served by a GR-303-capable DLC or by a non-compliant DLC, or whether the local ILEC can provision loops in a nondiscriminatory and timely manner. These determinations cannot be made on some national, "one-size-fits-all" basis.

Section 251(d)(2)(B) requires the Commission to consider, *inter alia*, whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer." 47 U.S.C. 251(d)(2)(B). As GCI set forth in its comments, the inquiry as to whether a CLEC is impaired without access to an ILEC UNE is best conducted with respect to traditional antitrust-type competition analysis. GCI submits that the Commission should adopt the following framework to govern impairment determinations, regardless of whether the factual determinations and the application of law to fact are made by the Commission or the states:

- I. What is the market the CLEC is seeking to serve?**⁹ To answer this inquiry requires defining the product and geographic market the CLEC is seeking to serve. This should be conducted according to traditional competition analysis principles, examining both the specific product the CLEC is seeking to offer and close substitutes. This analysis should take account -- as the Department of Justice/FTC Horizontal Merger Guidelines do -- that there can be distinct submarkets. Likely distinct submarkets are residential, mass-market small business, medium-sized business, and enterprise customers, as well as voice and data services for each customer class. GCI agrees with those commenters that have argued that mass-market services are distinct from services sold on a more individualized basis.

It is important to recognize that different classes of customers may seek different product characteristics. Broadband, for example, is not a single product market. Residential and very small business users generally can be served with an asymmetric, on-demand service.

⁸ *Id.*

⁹ Reply Comments of General Communication, Inc., CC Dockets 01-338, 96-98, 98-147 at iii (filed July 17, 2002).

Some residences and small businesses, and many larger businesses, however, need symmetric service with guaranteed throughput. Enterprise businesses have still different needs, and may need more advanced network management. These are a distinct product markets.

The geographic market cannot be ignored. Telephone service in Anchorage is not a substitute for telephone service in Fairbanks, and telephone service in a neighborhood not served by a non-compliant DLC is not a substitute for telephone service in a neighborhood served by a non-compliant DLC. As the Commission has previously observed, the market is literally the location sought to be served, although the Commission can, for convenience of analysis, aggregate locations of similar characteristics into a single market. However, a market served by a non-compliant DLC does not have similar characteristics to a market in which GCI has access to the unbundled loop at the central office, as this particular characteristic materially distinguishes the two markets with respect to the alternatives available to GCI to provide service.

2. **What is the relevant product and geographic market of the input that the CLEC seeks as a UNE?**¹⁰ This question focuses on the CLEC to help define the relevant input market that includes the ILEC UNE. In most cases, the relevant product and geographic market for the input is obvious. Switching in Anchorage is the relevant product and geographic market for unbundled local switching in Anchorage. Unbundled loops are in product market of last mile transmission service to a particular location, and transmission to other locations is not a substitute (although broadband markets may have sub-markets defined by capacity, whether capacity is symmetrical, and quality levels). Similarly, cable plant to one neighborhood will not be an actual or potential source of POTS or broadband service to a neighborhood not passed by the cable plant.
3. **Other than the ILEC UNE, what are the other actual and potential sources of supply of the functions provided by that ILEC network element, in the relevant input market, that could permit the requesting carrier to offer its services in the relevant input market?**¹¹ Using switching as an example, other actual or potential sources of supply of switching could be other Class 5 switches installed in the same geographic market, or a CLEC's self-provisioning of its own switch in that market.
4. **What are the barriers to use of the other actual or potential sources of supply of the functions provided by the ILEC UNE?**¹² For the most part, this is where the real dispute will lie. With respect to unbundled switching, for example, non-ILEC sources of switching (such as GCI's own switches) cannot be used if the ILEC has installed a DLC or concentrator that is not GR-303 capable -- at least until GCI develops its own loop facilities.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Similarly, GCI must have had adequate time to collocate its facilities in the end office to be able to access the loop. In addition, provisioning problems such as an inadequate number of loop cutovers in a central office or untimely or discriminatory provisioning of loop cutovers can make it impractical to use any source of switching other than the ILEC's. As many CLEC comments have documented, transport costs can also be a potential barrier to use of non-ILEC sources of switching.¹³

The Commission must also recognize (as the merger guidelines do) that in some instances scale itself will be a barrier to deployment of alternative facilities. For example, if a particular CO (or ILEC study area) is small enough or remote from other areas served, it will not be economically feasible for another carrier to enter and install its own fiber to that CO. As Dr. Robert Willig recently pointed out, the minimum viable scale increases as the fixed costs of entry increase, when these costs are largely sunk.¹⁴ In such an instance, the installation costs of its own fiber constitute a substantial barrier to a CLEC's deployment of its own facilities, and can constitute a source of impairment for dedicated transport. In addition, the costs to establish collocation are a classic example of a sunk cost, and high collocation costs can essentially preclude UNE-L entry into a smaller CO by increasing the minimum viable scale for entry.

- 5. Would the CLEC's output of the service it seeks to provide be reduced by a small but significant and non-transitory amount if it did not have access to the ILEC UNE?**¹⁵ This standard, drawn from antitrust precedent and economic literature, is an economically defensible way to define impairment. It focuses on the critical result -- whether the CLEC can serve the customer it seeks to serve with the services it seeks to offer or whether, for some small, but significant number of customers, the CLEC will be unable to provide service. In determining whether a reduction in output is non-transitory, the period to be considered should be substantially shorter than the two years usually used under the antitrust laws (a more appropriate period would be something like three months), as a two year delay in market entry would most likely be fatal in markets in which competition is only emerging. Moreover, where there is already an installed base of customers, it is not in the public interest to have service to those customers (or even the growth in competition) disrupted during any transition.

Once the Commission establishes the analytical framework for impairment, it must then determine whether it or the state commission is the more appropriate forum for making impairment determinations, and whether the burden should be on the CLEC to show it is impaired or on the ILEC to establish non-impairment. Given the localized nature of the factual findings that will be necessary to determine that a CLEC is not impaired, those findings are more appropriately made by the state

¹³ See, e.g., "Building Access Issues Presented in the UNE-Triennial Review," dated Oct. 25, 2002.

¹⁴ "Determining 'Impairment' Using the *Horizontal Merger Guidelines* Entry Analysis," at 5, attached to Letter of Frank Simone, AT&T to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (filed Nov. 18, 2002).

¹⁵ Z-Tel Reply Comments at 21.

commission, which is both closer to the facts and which must adjudicate the market conditions when arbitrating and approving interconnection agreements. The FCC, by contrast, does not have a direct hand in establishing market conditions under interconnection agreements, does not have direct knowledge of the network architectures to be used, and generally does not make use of the tools of direct and cross-examination that will be necessary. Moreover, if the FCC attempts to draft a detailed rule to try to anticipate every potential source of barriers to CLEC deployment and use of its own facilities in every market, it will fail, and the rules themselves will provide a roadmap to ILECs as to how to create impediments to UNE-L competition.

In addition, because non-impairment, particularly for switching, requires the ILEC affirmatively to act to put the conditions for non-impairment in place, and because the conditions that create non-impairment are much less likely to occur than the conditions that create impairment, the Commission's unbundling rules should presume impairment in the absence of a state commission finding that the ILEC is not impaired. There is a practical reason for such a presumption as well. In the absence of such a clear presumption, ILECs will immediately move to disconnect and discontinue all CLEC uses of elements that they wish to argue do not meet the impairment standard. Allowing the ILEC to take such self-help measures prior to a finding of non-impairment will alter the status quo ante and harm consumers by depriving them of competitive choices before a finding is made that the CLEC is not impaired without access to the ILEC's UNE. Given that CLECs already have ample marketplace and operational incentives to abandon use of ILEC UNEs as soon as possible and that ILECs control the conditions (i.e. the level of their own cooperation) that will permit UNE-L entry to be possible, placing the burden on the ILECs to rebut a presumption of impairment will not result in significant public interest harms, and will likely result in public interest benefits.

D. Conclusion

Even a company such as GCI that is providing service predominantly over its own facilities, including providing its own switching and transport where possible, faces circumstances in which it will be impaired in offering the services it seeks to provide without access to ILEC unbundled switching. A careful economic analysis will delineate those circumstances. However, the FCC lacks the resources and the capabilities to conduct such a determination for every market in the country, and in any event such market-specific factual inquiries are best conducted by the state PUCs. The burden in any such proceeding should be on the ILEC to show that the conditions of non-impairment exist. In that way, the Commission will run the least risk of erroneously harming competition.

Sincerely,


Frederick W. Hitz, III
Director, Rates and Tariffs
General Communication, Inc.