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February 6, 2003

***EX PARTE* SUBMISSION – VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Response to GCI January 23, 2003 *Ex Parte* Submission in CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

Alaska Communications Systems Group, Inc. ("ACS"), through its attorneys, hereby submits this *ex parte* letter in response to the January 23, 2003, January 24, 2003, January 31, 2003 and February 3, 2003 submissions by General Communication Inc. ("GCI") in the above-captioned proceeding.[1] The local exchange service competition goals of the Communications Act of 1934, as amended (the "Act"), have been achieved in Anchorage, rendering the market-opening requirements unnecessary. In fact, maintaining the effectiveness of such requirements has proven harmful to the public interest and does not promote healthy competition in the Alaska markets.

GCI, the only party to this proceeding that has commented on the ACS markets, makes plain in their recent ex parte submissions that they do not want to be on even footing with the ILEC – rather, they seek to maintain significant competitive advantages over the ILEC despite their incredible success. GCI urges the Commission to maintain its UNE policy so that ACS will remain unable to compete in a market where the goals of the Act have been achieved:

- GCI demands that ACS bear the cost of building facilities for GCI's convenience in areas where ACS' costs are highest;
- GCI expects to purchase ACS' network elements at below-cost prices indefinitely;

[1] Letter from Frederick W. Hitz, III, GCI, to William Maher, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (Jan. 23, 2003) ("January 23 *Ex Parte* Letter"); Letter from Frederick W. Hitz, III, GCI, to William Maher, FCC, CC Docket Nos. 01-338, 96-98, 98-147, 01-318, 98-56, 98-141 (dated Jan. 24, 2003, filed Jan. 27, 2003) ("January 24 *Ex Parte* Letter"); Letter from John Nakahata, Counsel to GCI, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, 01-318, 98-56, 98-141 (Jan 31, 2003) ("January 31 *Ex Parte* Letter"); Letter from John Nakahata, Counsel to GCI, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, 01-318, 98-56, 98-141 (Feb. 3, 2003) ("February 3 *Ex Parte* Letter").

- GCI claims that it is impaired based on all costs that it must incur that are in excess of the UNE price;

- GCI promises to strand ACS' facilities when it becomes profitable for GCI to self-provision, regardless of whether ACS has recovered its costs arising from constructing facilities specifically at GCI's request; and

- GCI takes advantage of below-cost UNE pricing, primarily where ACS' costs are above average, then collects universal service support based on ACS' average costs, even where GCI has below-average costs.[2]

Contrary to what GCI indicates in its January 23 *Ex Parte* Letter, neither the Act nor the Commission's rules require ACS to construct new facilities, deploy new equipment or reconfigure its network for the purpose of reducing GCI's already below-market costs. GCI argues that the costs it must incur above and beyond UNE costs constitute "impairment" under the Act and that, as long as it incurs such costs, it is entitled to continued regulatory advantages despite its significant market share in the Alaska local exchange markets. GCI attempts to divert attention away from its success in these markets by placing undue emphasis on proceedings before the Regulatory Commission of Alaska ("RCA") that are irrelevant, misleading, and pending appeal. Further, GCI's arguments regarding the infeasibility of cable telephony are incredulous. The continued regulatory advantage that GCI receives under the Act and the Commission's rules have discouraged GCI's investment in cable telephony and have caused significant financial harm to ACS. For these reasons, the Commission should find the claims and accusations made in GCI's *ex parte* letters meritless.

ACS urges the Commission to relieve ACS of all of the unbundling requirements of the Act and its rules. As demonstrated by the record in this proceeding, a competitive marketplace for local exchange service has been created in the Alaska markets. GCI does not refute ACS' assessment that the parties have equal incentives to negotiate for access to each other's networks. It is now time for the Commission to recognize that the goals of the Act have been satisfied in these markets and to replace the current regulatory regime with market-driven UNE arrangements that the parties negotiate without regulatory distortions.

1. Unbundling Requirements Apply Only to Existing ILEC Facilities

Throughout GCI's January 23 *Ex Parte* Letter, it is apparent that GCI fails to understand that the unbundling requirements of Sections 251 and 252 of the Act apply only to existing ILEC facilities, and do not require the construction of new facilities. Those provisions do not require ACS, or any other ILEC, to construct new facilities or deploy new equipment solely to

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[2] As explained elsewhere in this letter, GCI has below average loop costs for at least two reasons: (1) GCI has the benefit of below-cost TELRIC average loop costs established by state regulators; and (2) GCI has the benefit of building loops when the cost of doing so is less than its UNE loop price. Consequently, GCI's average loop cost is an average of below-cost UNE rates and even less expensive loops it has built. At the same time, GCI seeks to compel ACS to build loops that cost more than the average TELRIC price, and then rent them at the discounted average TELRIC price.

accommodate competing carriers, as doing so would provide disincentives for competitors to transition to their own facilities. It is well settled that the ILEC's obligation to provision unbundled interoffice transmission facilities is limited to existing ILEC facilities.[3] The Commission's position on this matter is supported by the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*.[4] The Commission stated in the *UNE Remand Order* that building loop plant is prohibitively expensive and time-consuming. The Commission specifically noted that "if the competitive LEC loses the customer back to the incumbent or to another competitor, the competitive LEC would probably bear the full loss of its sunk investment in the redundant loop."[5] For the same reason, an ILEC that is required to construct new facilities just to provision the elements of these facilities to competitors will be unable to recoup the costs of these facilities, particularly where GCI requests new facilities be built in low-density, rural areas[6] or where GCI requests facilities be built that will be stranded when the customer is served over GCI's cable network.

Likewise, ACS should not be obligated to reconfigure its network or make significant modifications simply to accommodate GCI. The Commission's rationale for excluding construction of new facilities from an ILEC's obligations also extends to costly upgrades and reconfiguration of the ILEC network. Although GCI claims that ACS recovers the costs of facilities modification through TELRIC rates,[7] GCI fails to consider the fact that the TELRIC methodology generates below-cost UNE rates that are not intended to cover the full costs of constructing the network.[8] The Commission's rules on UNE pricing provide that UNE rates "be measured based on the use of the most efficient telecommunications technology *currently available* and the lowest cost network configuration, given the *existing location of the incumbent LEC's wire centers*."[9] By assuming the current locations for wire centers and customers, the

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[3] *See Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") ("we do not require incumbent LECs to construct new transport facilities to meet specific competition LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 ¶¶ 441, 451 (1996) ("*Local Competition First Report and Order*") ("The rules we establish for the unbundled interoffice facilities should maximize a competitor's flexibility to use new technologies in combination with existing LEC facilities. . . . We expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities.").

[4] *See Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (holding that section 251(c)(3) "implicitly requires unbundled access only to an incumbent LEC's existing network – not a yet unbuilt superior one.").

[5] *UNE Remand Order*, 15 FCC Rcd at ¶ 183.

[6] January 23 *Ex Parte* Letter at 4.

[7] January 23 *Ex Parte* Letter at 7.

[8] *Local Competition First Report and Order* at ¶¶ 704-7.

[9] 47 C.F.R. § 51.505(b)(1) (emphasis added).

TELRIC model does not account for the addition of new customer locations. It would be wholly illogical to base the UNE rate on the ILEC's current network but to require construction of new facilities or reconfiguration of the network without any compensation mechanism. As the Commission expressed in the *Local Competition First Report and Order*, TELRIC pricing is intended to cover the costs of provisioning the UNE, but not the embedded cost of constructing the network.[10]

Yet GCI insists that it is impaired without access to specific technology (i.e., GR-303) for UNE loop provisioning. GCI even makes the ridiculous claim that ACS purposely chose a "network configuration [that] forecloses access by its competitors."[11] As ACS indicated in its January 6, 2003 *ex parte* submission, prior to local interconnection, ACS installed non-GR-303 compatible remote concentrators in rural markets, including Fairbanks, North Pole and Juneau, well before GCI requested interconnection in these markets. As ACS explained before, these markets have extremely low densities, and ACS could not justify deploying expensive GR-303 compatible remote concentrators in these areas at the time. Indeed, at the time most of these remote concentrators or DLCs were installed, GR-303-compatible equipment did not exist and competition in local exchange markets had not been contemplated.

Furthermore, at the time it requested interconnection in these markets, GCI was fully aware of the unavailability of GR-303 compatible remote concentrators. During the arbitration of the Fairbanks interconnection agreement nearly three years ago, GCI agreed to incorporate its plan to collocate at these remote switches and obtain transport from ACS back to the central office ("CO") into the loop model. Upon GCI's request, ACS actually constructed the remote to CO transport, but because GCI has never actually used these facilities, ACS has been unable to recover any of these construction costs. Consequently, GCI clearly understood that the ACS legacy network contained non-GR-303 compatible remote concentrators, not that ACS had deployed such units for the primary purpose of blocking access to these customer loops.[12] GCI challenges ACS to demonstrate why it is infeasible to upgrade all remotes to GR-303 in these rural areas.[13] However, the law does not require such a showing. The Act does not require a certain technology or network architecture, and ACS is not obligated to reconfigure its network or deploy new equipment solely to decrease GCI's costs further.

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[10] *Local Competition First Report and Order* at ¶ 620 ("states may not set prices lower than the forward-looking incremental costs directly attributable to provision of a given element").

[11] January 23 *Ex Parte* Letter at 6.

[12] *See id.* at 6 ("GCI can only conclude that ACS chose to deploy non-GR-303 capable technology knowing that this would make it more difficult for its competitors to obtain loops"). *See also id.* at 2 ("ACS-created impairments"). These misleading and pejorative representations are intended to persuade the Commission that the nation's most successful CLEC should continue to be treated as a brand-new entrant in need of assistance in its battle to overcome the ILEC. ACS finds these representations a peculiar reward for its voluntary and cooperative work with GCI to develop and prospectively deploy GR-303 compatible technology. In fact, ACS is an early adopter of this advanced "dual-hosting" technology.

[13] January 23 *Ex Parte* Letter at 6.

2. GCI's Definition of Impairment Is Inconsistent With The Intent of Act Because GCI Confuses Impairment With Costs In Excess Of UNE Rates

ACS urges the Commission to reject GCI's notion of "impairment" because it does not comport with the Supreme Court's decision in *Iowa Utilities* interpreting impairment under the Act. The Supreme Court held that the Act did not contemplate impairment to mean "*any* increase in cost (or decrease in quality) imposed by denial of a network element."[14] Instead, the Act requires "*some* limiting standard, rationally related to the goals of the Act."[15] As discussed above, the UNE cost recovery mechanisms under the Act and the Commission's rules do not contemplate a requirement that an ILEC construct new facilities or reconfigure its network solely to reduce the cost to the CLEC of network access. Thus, it is assumed that some of these costs must fall on the CLEC.

a. GCI's Reliance On Antitrust Theory Is Misplaced

GCI, and other CLECs, have relied heavily on the Department of Justice horizontal merger guidelines and other antitrust analyses to define impairment.[16] While these guidelines and analyses are generally accepted for the analysis of mergers, there is no legal precedent for using any aspect of these to analyze the conditions under which a firm should grant a competitor access to its facilities.[17] GCI relies specifically on Judge Bork's letter to the Commission in which he states that "from a basic antitrust viewpoint, the Commission's task in implementing the 'impairment' standard is to assess whether entry barriers exist for each particular network element that would prevent multiple firms from deploying alternative facilities."[18] GCI tries to make Bork's description of entry barriers into something it is not, by insisting that any cost of or impediment to entry constitutes impairment under the Act.[19] However, even Judge Bork does not assign such far-reaching significance to entry barriers and has acknowledged that:

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[14] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 368 (1999) ("*Iowa Utilities*").

[15] *Id*. at 388.

[16] *See* January 23 *Ex Parte* Letter at 5; AT&T *Ex Parte* Submission, Letter from Robert H. Bork to Michael J. Powell, Chairman, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (Jan. 10, 2003) ("Bork Letter"); AT&T *Ex Parte* Submission, Letter from Frank Simone, AT&T to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (Nov. 17, 2002).

[17] Further, the Commission should disregard applicability to GCI of the analysis of the "learned commentators" that GCI refers to on page 5 of its January 23 *Ex Parte* Letter. These commentators refer to "artificial" barriers to entry that can impede the success of a CLEC. GCI, however, has been unusually successful. GCI acknowledges that it has achieved the largest market share of any CLEC in the country. *See* January 24 *Ex Parte* Letter at 8 (acknowledging that Alaska is "the nation's most competitive state"). *See also id.* 10-11 ("the most successful facilities-based residential market entrant in the country").

[18] Bork Letter at 2.

[19] GCI would include in the category of impairment economies of scope and scale that accrue to ACS.

> [w]hen existing firms are efficient and possess valuable plants, equipment, knowledge, skill and reputation, potential entrants will find it correspondingly more difficult to enter the industry, since they must acquire those things. . . . But these difficulties are natural; . . . There can be no objection to barriers of this sort. . . . The question for antitrust is whether there exist *artificial* entry barriers. These must be barriers that are not forms of superior efficiency and which yet prevent the forces of the market – entry or the growth of smaller firms already within the industry – from operating to erode market positions *not based on efficiency*. Care must be taken to distinguish between forms of efficiency and artificial barriers. Otherwise, the law will find itself – indeed, it has found itself – attacking efficiency in the name of market freedom. [emphasis added][20]

Nonetheless, GCI appears to argue that any barrier to entry into the market constitutes legal "impairment" under the Act. Specifically, GCI argues that it is impaired without access to non-GR-303-capable remotes because, in order to access UNE loops, GCI must collocate its own concentration equipment at the remote site and must physically cross-connect.[21] Indeed, ACS agrees with GCI that in these rural areas GCI must collocate and cross-connect at the remote concentrator and not at the central office. However, incurring these costs (essentially the same costs that ACS must incur) does not constitute impairment. The D.C. Circuit has rejected a standard for impairment that does not consider the costs that are necessarily incurred by any entrant in the market. "To rely on cost 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."[22]

Moreover, GCI is not impaired simply because the location of the central offices in these rural areas requires it to pay for back-haul charges. As indicated above, ACS is not obligated to build new central offices where they are convenient for GCI. Therefore, GCI's arguments that ACS must continue to unbundle its network as long as GCI must incur additional transport costs to reach a remote terminal[23] are without merit. In fact, by using advanced "dual-hosting" technology in GR-303-capable remotes in most areas today, ACS does use the most efficient technology available; however, ACS has limited resources and must have discretion to install network technologies and architecture that are reasonable given its economic constraints. GCI's suggestion that ACS' installation of non-GR-303-compatible remote concentrators in rural areas

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[20] Robert H. Bork, "The Antitrust Paradox: A policy at War with Itself," 310-11 (The Free Press 1993) (1978).

[21] January 23 *Ex Parte* Letter at 3. What GCI is really arguing, of course, is that any costs greater than its UNE costs constitute "impairment." *See id.* at 3 ("[T]hese substantial added costs are sufficient to establish that GCI is impaired in those areas without access to unbundled switching and shared transport.").

[22] *USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

[23] January 23 *Ex Parte* Letter at 4.

constitutes a barrier to entry, however, is not anticompetitive but rather, economically rational behavior even under antitrust law.[24]

b. GCI Seeks To Maintain Its Cost Advantage By Claiming That It Is Impaired

Based on its faulty impairment analysis, GCI seeks to maintain its cost advantage over ACS. GCI's theory that any cost it incurs above the UNE cost constitutes impairment, fails to recognize the fact that it is difficult for any carrier to recover its costs in these markets. By maintaining its cost advantage, GCI is on stronger footing than ACS in markets that have substantial competition. For instance, GCI complains that it is unable to recover all of the sunk costs arising from collocation, concentration equipment, cross-connects and transport facilities, from the small base of end users, "usually fewer than 1,000 per remote site, or whom only a portion will be GCI customers."[25] GCI argues that it, "cannot build a loop to serve every one of its customers given high sunk costs and GCI's limited economies of scale and scope."[26] But this argument is illogical in a market such as Anchorage, where GCI has virtually the same local market share as the incumbent, has the majority of the interexchange market, and a virtual monopoly on the cable TV and cable modem markets.[27]

UNE pricing under TELRIC provides GCI and other competing providers below-market rates and minimal competitive risks, which discourages investment in competitive network facilities and equipment.[28] GCI attempts to justify its claim that ACS should be required to build expensive, above-average cost loops for GCI' use by noting that "TELRIC measures the ILEC's

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[24]*See* Brief for the United States and the Federal Trade Commission as Amici Curiae at 9-13, *Verizon v. Trinko*, No. 02-682 (Sup. Ct. 2002).

[25]January 23 *Ex Parte* Letter at 4; January 24 *Ex Parte* Letter at 5. *See also* January 24 *Ex Parte* Letter at 6, stating, "In fact, scale itself can be a barrier to the deployment of alternative facilities, particularly when it is not economically viable for another carrier to enter and install its own facilities. . . . .This is clearly the case with regard to GCI's collocation of DLC equipment and transport facilities used to serve customers in rural areas." This logic, of course, helps explain why competition may not be suitable for rural areas and why, therefore, Congress granted an exemption from unbundling to rural companies. Because rural areas typically have high costs and low or negative margins, it is important for the Commission to adopt a national rule clarifying that the burden of proof for terminating these exemptions lies on the CLEC.

[26]January 24 *Ex Parte* Letter at 5.

[27]Additionally, GCI suggests that it is impaired because it faces difficulty when trying to obtain access to multi-tenant buildings. *See* January 24 *Ex Parte* Letter at 4. GCI's complaints that it has had problems with reluctant landlords is not a matter subject to the jurisdiction of this Commission. Despite GCI's "reluctant landlord" problem, it now is the exclusive provider of telecommunications facilities to several of Anchorage's commercial buildings. Consequently, GCI not only has the "first mover" advantage in these buildings, but because it claims no obligation to share its facilities with any other carrier, it has the advantage of being a monopoly provider.

[28]Indeed, GCI knows exactly how good a deal it is obtaining via TELRIC pricing because it has, in at least one instance, built traditional telephone plant in the Aurora Subdivision. Unfortunately, the customers served by GCI in that subdivision have a very limited choice of carriers as GCI claims it has no obligation to unbundle its network for the benefit of other carriers.

forward-looking cost, on average, to provide a UNE" and that UNE loop rates include "both loops that are expensive to provision . . . and loops that are inexpensive to provision."[29] In reality, GCI self-provisions inexpensive loops, then claims an entitlement to lease expensive loops from ACS at average TELRIC prices. This tactic significantly reduces GCI's average cost per loop below TELRIC averages, provides GCI a government-mandated inherent cost advantage vis-à-vis ACS and other competitors who build their own facilities and reduces or eliminates ACS' opportunity for cost recovery on its loop facilities. In addition, GCI's receipt of universal service revenue on each of its loops in rural areas unnecessarily burdens universal service fund mechanisms and gives GCI another government-mandated competitive advantage over ACS or other competitors who desire to compete through actual facilities deployment.

Moreover, GCI misrepresents the number of lines it serves over its own facilities by changing its method of counting these lines to enhance its argument that it is dependent on ACS.[30] ACS has, from time to time, attempted to estimate the number of lines GCI serves over its own facilities. In all cases, ACS has used the information GCI has filed with state or federal regulators, made available to the public in its financial reports filed with Securities and Exchange Commission, its quarterly earnings press releases, and its quarterly conference calls with investors. However, in the January 24 *Ex Parte* Letter, GCI indicates that ACS' 27% estimate is entirely off the mark. Significantly, GCI has represented in this proceeding that it serves 7 percent, 10 percent, and 25 percent of its customer lines over its own facilities.[31] Apparently, GCI's most recent representation of 7 percent was based on the number of "outside," or most expensive, loops that GCI self-provisions.[32] Depending on which of these GCI numbers are to be believed, GCI's collocated, self-provisioned, extremely *inexpensive* lines amount to 18% of GCI's total customer lines, driving GCI's average cost per line significantly below any market-clearing, competitive cost.[33]

Further, GCI attempts to divert the Commission's attention from the fact that GCI no longer deserves this regulatory advantage by GCI misrepresenting to this Commission that "ACS price increases . . . are not cost-based."[34] Much to ACS' chagrin, all of ACS' local service rates are subject to legacy rate of return regulation despite the competitive market that has developed.

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[29] January 23 *Ex Parte* Letter at 7.

[30] *See* January 24 *Ex Parte* Letter at 4. It is not clear from Footnote 11 in GCI's January 24 *Ex Parte* Letter whether or not GCI is acknowledging that its prior representations were misleading.

[31] *See* Comments of GCI, CC Docket Nos. 01-338, 96-98, 98-147, Declaration of Frederick W. Hitz, III at ¶ 5 (Apr. 5, 2002) (claiming that it provides 25% of its lines over its own facilities); GCI *Ex Parte* Submission in CC Docket Nos. 01-338, 96-98, 98-147 at 8 (Nov. 21, 2002) (claiming it serves 10% of its lines over its own facilities); January 24 *Ex Parte* Letter at 4-5 (claiming both that GCI is dependent upon ACS for 93% of its customer access lines and that it serves less than 7% of its *outside* loops entirely over its own facilities).

[32] *See* January 24 *Ex Parte* Letter at 4.

[33] Despite their low cost, GCI does receive high cost loop support for its extremely inexpensive, collocated self-provisioned lines located in rural areas where it has CETC status.

[34] January 23 *Ex Parte* Letter at 5.

GCI further represents that it can discipline ACS' retail price movements more effectively than retail price regulation because "it can price [its services] independently."[35] GCI's retail prices, of course, have been wholly dependent on the cost advantage it has obtained from below-cost TELRIC UNE prices set by *regulators*. Additionally, GCI represents that ACS' facilities policy is "nothing more than a naked attempt to limit GCI's competitive inroads by increasing GCI's cost of providing service."[36] Meanwhile, GCI seeks to use the regulatory environment to achieve a competitive advantage by seeking to force ACS to incur capital costs, which GCI erroneously theorizes will be recovered through TELRIC rates set by state regulators at less than cost. Further, GCI declares that it will ultimately deploy its cable telephony, leaving ACS with stranded facilities for which it will never recover its costs.

In its February 3 *Ex Parte* Letter, GCI suggests that Alaska's markets require a higher level of regulatory scrutiny despite the significant levels of competition in these markets.[37] GCI's entry into small, rural markets demonstrates that a line density test that only offers unbundled switching relief in wire centers of more than 5,000 lines is inappropriate. In the first place, such a bright-line test fails to satisfy the D.C. Circuit's mandate that the FCC conduct a market-specific analysis. Second, it ignores the reality that small and rural markets can and do face significant competition.[38] Indeed, the record contains evidence of other small markets, which face substantial competition from facilities-based competitors.[39] Nonetheless, GCI proposes to apply such a line density test to apply to a market smaller than a wire center (*i.e.*, points where "a CLEC can collocate and directly cross-connect with an unbundled loop").[40] Such a line density test is highly unrealistic and would create administrative burdens that would make serving these areas even more costly than they already are. There is no precedent for evaluating the "market" at such a microscopic level. Any attempt to carve up the market in such artificially defined slices would fail to satisfy the D.C. Circuit's requirement that the Commission justify its unbundling rules by *market* analysis.[41]

GCI's insistence on the continuing availability of UNEs is part of its scheme to use its cost advantages to dominate all sectors of the Alaskan communications industry. Contrary to GCI's claim that it has "no power in the wholesale market for UNEs," it has the power to strand a substantial portion of ACS' plant through its deployment of fiber and cable telephony – a power that provides ACS an incentive to negotiate a loop rate that will keep GCI as a customer. GCI

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[35]*Id*. at 6.

[36]*Id*. at 7.

[37]*See* February 3 *Ex Parte* Letter at 1.

[38]The Texas PUC's annual competition report demonstrates that more remote areas are more likely to have facilities-based competition than urban areas or areas with higher density. *See* Public Util. Comm'n of Texas, "Report to the 78th Texas Legislature: Scope of Competition in Telecommunications Markets of Texas" 28-29 (Jan. 2003).

[39]*See, e.g.*, ITTA *Ex Parte* Submissions, CC Docket Nos. 01-338, 96-98, 98-147 (Jan. 29, 2003, Feb. 3, 2003, Feb 6, 2003).

[40]February 3 *Ex Parte* Letter at 1.

[41]*See USTA v. FCC,* 290 F.3d at 422-23.

also has constructed its own plant to business and residential customers that are not served by ACS facilities – giving GCI the power to demand fair prices if ACS is ever to be entitled to access to GCI's network. In both regards, the greater GCI's market share, the more power it has in these negotiations.

Despite GCI's complaints that it should not be required to build costly facilities to serve a small number of customers, ACS, as the carrier of last resort, is required to build facilities to serve these low-density areas, regardless of the cost or the rate of return. GCI, as an ETC, receives the same universal service support for serving these remote areas, but does not have the same costs of maintaining the facilities as ACS.[42] Despite the higher costs to all carriers of serving rural areas, GCI is equally well positioned to make these investments to develop their own networks and, consistent with the underlying goals of the Act, should be encouraged to do so.

As illustrated by this scenario, the impairment standard set forth by GCI in its January 23 *Ex Parte* Letter only promotes increased dependence on ACS' network, contrary to competitive goals of the Act and of the Commission. GCI itself claims that it is wholly dependent on ACS to provide loops,[43] but such a claim from a 6-year competitor only suggests that below-market UNE rates in an environment of substantial competition does not promote facilities-based competition. GCI's underlying assumption is that TELRIC UNE rates were meant to apply indefinitely. However, this assumption is undermined by the fact that the Commission implemented a triennial review because it recognized that "market conditions would change and create a need for commensurate changes to the unbundling rules."[44] Additionally, statements by economists in the record support an end to unbundling requirements "[o]nce facilities-based competition in a UNE market arises or proves economically feasible."[45]

3. GCI Mischaracterizes The State Of Competition In Alaska, Which Does Not Justify New, Burdensome Regulatory Requirements

Throughout its *ex parte* submissions, GCI attempts to divert attention from the issues facing this Commission by describing claims in Alaska state proceedings that are irrelevant to the Commission's UNE Triennial Review proceeding and by raising allegations that are simply untrue. Further, GCI's misleading claims highlight its attempt to hide the substantial cost advantage it hopes to maintain under the guise of impairment under the Act.

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[42] In Fairbanks, for example, where the cost of a local loop to ACS exceeds $30 per month per line, and therefore, entitles ACS to High Cost Loop Support, GCI receives exactly the same amount of USF per month per line as ACS even though its UNE cost for a local loop is only approximately $19. Further, because GCI provides service over some of its own lines at very low cost, such as cables it runs across the room to its ISP facilities, GCI real average loop cost in Fairbanks is probably less than $19.

[43] January 24 *Ex Parte* Letter at 3.

[44] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Notice of Proposed Rulemaking, FCC 01-361 ¶ 1 (rel. Dec. 20, 2001).

[45] Declaration of Howard A. Shelanski, Comments of SBC Communications, Inc., CC Docket Nos. 01-338, 96-98, 98-147, Attachment D at 14 (filed Apr. 5, 2002).

The Alaska telecommunications market is the most fiercely competitive in the country. Six years after commencing local exchange service in Anchorage, GCI has gained 45 percent of all lines in that market,[46] and its market share continues to grow. In fact, GCI provides local exchange service to about the same number of residential customers in Anchorage as ACS. GCI is now poised to make similar competitive gains in the rural markets of Fairbanks and Juneau. As an illustration, in less than eighteen months GCI has garnered approximately 25 percent of the local exchange market in Fairbanks. Because of GCI's ever growing market share, its position in ACS' markets as the dominant interexchange provider, its status as the incumbent cable television provider throughout most of Alaska, and its dominance in the broadband internet access market, GCI is a large, formidable, and dominant competitor who now has bargaining power equal to that of ACS in the local exchange markets of Alaska. However, without immediate guidance from the Commission on the standard for "impairment" in Alaska, GCI maintains the advantage of below-cost UNE rates afforded by the Act and the Commission's rules.

GCI misleads the Commission by ignoring these facts and by placing an inordinate amount of weight on an RCA order, which held that (i) ACS must process service orders within the same timelines it provides to its own customers, and (ii) ACS must amend its tariff so that GCI customers pay the same amount that ACS customers would pay for unusual construction costs, including installation of new facilities or equipment. Contrary to GCI's recounting of this proceeding, the RCA refused to impose any sanctions on ACS for discrimination and did not open a formal investigation.[47] Rather, the RCA held that ACS' actions did not violate the terms of the existing tariff because the language in the tariff was ambiguous and could be interpreted to give ACS discretion to charge customers for unusual construction charges. The RCA merely instructed ACS to amend the tariff to clarify this language, which ACS has done.[48] This, and related RCA Orders, are currently pending appeal.[49]

Further, GCI has no basis for its provisioning complaints.[50] Specifically, GCI cites problems with its order processing that it experienced over a year ago, which generated order

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[46] January 31 *Ex Parte* Letter at 5.

[47] *Order Accepting, In Part, Hearing Examiner's Recommendation and Requiring Filing*, U-01-43 (2) at 2 (Aug. 6, 2002). GCI misleads the Commission when it states, "In reality, ACS always recovers the cost of provisioning a UNE loop through the TELRIC-based rates paid by GCI and the retail rates that ACS charges its own customers." *See* January 23 *Ex Parte* Letter at 7. In fact, there can be great disparities such as in Fairbanks, where ACS' local loop cost is in excess of $30 per month per line, but the TELRIC rate is only $19. Further, if GCI is suggesting that ACS can make up any difference through its retail rates, then it is promoting an improper and implicit scheme for having ACS' retail customers subsidize the competitor and its customers.

[48] *See Order Acknowledging Compliance Filing, Approving Tariff Revisions, and Requiring Filing*, U-01-43 (3) (Nov. 15, 2002).

[49] *See* ACS of Alaska, Inc., ACS of Anchorage, Inc. and ACS of Fairbanks, Inc., Notice of Appeal, Case No. 3AN-02-14020 CI (Super. Ct. Alaska Dec. 27, 2002).

[50] GCI misleads the Commission in suggesting some nefarious motive as the basis for "ACS' decision to prioritize conversions of lines from ACS to GCI ahead of GCI requests for new dial tone service for

backlogs.[51] Since that time, however, ACS has resolved the problems and is now current on provisioning orders. GCI has acknowledged this fact by withdrawing its complaint with the Commission on this matter.[52] As discussed above, the practical difference in provisioning processes do not constitute "impairment" under the Act. ACS is not required to utilize a specific network technology or configuration in unbundling its network to competitors. Therefore, GCI's mention of these provisioning issues is merely a smoke screen to divert attention from the undeniable fact that it has achieved unprecedented levels of market share in the Anchorage and Fairbanks markets, and that it is now time to allow the market to dictate UNE prices. Further, GCI's unprecedented success makes a mockery of its claims that it and its customers have somehow been harmed by ACS' practices.

Without justification, GCI seeks new performance measures and monitoring, and "self-effectuating liquidated damages" to prevent ACS from abusing its "control over critical bottleneck facilities as a means of protecting their market share."[53] The evidence, however, does not support GCI's assertion. In Anchorage, GCI claims it now has 45 percent of the local exchange market. In Fairbanks, GCI has grabbed almost 25 percent of the local exchange market in less than 18 months. These facts do not support GCI's claim that it has been harmed by ACS' "control over critical . . . facilities." Rather, they suggest that ACS has not been abusing its control to protect its market share. Consequently, there is no need for additional and burdensome performance monitoring and self-effectuating damages which in all likelihood would violate the Act.

4. GCI's Faulty Logic Discounts Cable Telephony As a Competitive Alternative

In its January 24 *Ex Parte* Letter, GCI states its intent eventually to provide cable telephony to its customers. While approximately 2 million customers in the nation already receive cable telephony service,[54] GCI indicates that it has not deployed cable telephony service because it is waiting for the arrival of advanced IP-based technology.[55] GCI concedes that switched circuit technology that would enable it to use its connections to its customers is

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customers that were moving or seeking new lines." *See* January 23 *Ex Parte* Letter at 8. As GCI knows all too well, it had previously complained that ACS was not complying with an Alaska state rule, 3 AAC 53.290(g), which requires the ILEC to process all conversions within seven days. ACS' decision to process conversions first was simply an effort to accommodate GCI's request that ACS comply with the state rule.

[51] January 23 *Ex Parte* Letter at 8.

[52] Letter from John T. Nakahata, Counsel to GCI, to Anthony J. DeLaurentis, Enforcement Bureau, FCC, Regarding Request for Inclusion on the Accelerated Docket (Dec. 18, 2002) (withdrawing GCI's request for inclusion on the Commission's accelerated docket of a yet-to-be-filed complaint against ACS).

[53] January 23 *Ex Parte* Letter at 2.

[54] *See Federal Communications Commission Releases Data on Local Telephone Competition*, FCC News Release (Dec. 9, 2002).

[55] January 24 *Ex Parte* Letter at 8-9.

currently available.[56] GCI's inclination to avoid implementation of existing technology clearly demonstrates that it makes more economic sense for GCI to rely on below-cost UNEs than to invest in its own facilities. GCI's own statements over the course of the past year demonstrate that GCI's reliance on UNEs has grown.[57]

On the other hand, ACS does not have the luxury of waiting for new, cutting-edge technologies to be proven reliable and cost effective. Instead, ACS must invest in currently available equipment to provide service today.[58] While ACS acknowledges that the Commission's rules do not require GCI to build such facilities, ACS urges the Commission to recognize GCI's unwillingness to invest in its own facilities as a factor in determining whether it is impaired without access to ACS' network. As the D.C. Circuit instructed in *USTA v. FCC*, the Commission must consider whether the cost disparity to the CLEC is one that genuinely would make it wasteful to duplicate the function of an element.[59] All carriers face the same risk of investing in technology and equipment that will become outdated as newer, more efficient technologies are developed. GCI should not be able to rely on the regulatory crutch provided by TELRIC-based rates indefinitely while it has access to alternative facilities.

5. Regulatory Policy Has In Fact Harmed ACS

In its January 24 *Ex Parte* Letter, GCI presents the findings of Snavely, King, Majoros, Conner & Lee, Inc. ("Snavely Report"), which erroneously conclude that ACS' initial decision to purchase the local exchange telephone company, and not the current regulatory policy, is to blame for ACS' financial situation. The Snavely Report contains significant flaws and presents misleading results.[60] The Report's emphasis on the purchase price being more than net book value of the assets and ACS' debt financing is misplaced. Acquiring assets at a premium over

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[56] *See id*.

[57] *See* Comments of GCI, CC Docket Nos. 01-338, 96-98, 98-147, Declaration of Frederick W. Hitz, III at ¶ 5 (Apr. 5, 2002) (claiming that it provides 25% of its lines over its own facilities); GCI *Ex Parte* Submission in CC Docket Nos. 01-338, 96-98, 98-147 at 8 (Nov. 21, 2002) (claiming it serves 10% of its lines over its own facilities); January 24 *Ex Parte* Letter at 4-5 (claiming GCI serves less than 7% of its *outside* loops entirely over its own facilities). Further, in the January 24 *Ex Parte* Letter, GCI's percentage of self-provisioned lines are based on its outside loops. This indicates that GCI's other representations on self-provisioned lines includes collocation lines within their own facilities. Incidentally, GCI receives high cost loop support for these "inside" loops, which never go outside their facilities.

[58] ACS' predecessors, for example, did not have the luxury of refraining from investing in electro-mechanical switches even when digital switches were on the horizon. This is because ACS' predecessors had little choice but to use the technology then currently available if they were to provide telecommunications services.

[59] *USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

[60] *See* Affidavit of Wayne Graham, ACS-ANC's Consolidated: 1) Reply Memorandum in Support of Motion for Establishment of Interim and Refundable UNE Loop Rate, and 2) Opposition to GCI's Cross-Motion to Reduce the Loop Rate and Declare Interim Rates for Switching and Common Transport, Filed in RCA Docket U-98-89 (Dec. 27, 2002) ("Graham Affidavit").

book value is common in acquisitions. In fact, the premium paid by ACS was very low compared to that paid in other telecommunications acquisitions, including that consummated by GCI in Alaska.[61]

Further, the Snavely Report concludes that ACS has suffered and continues to suffer large losses from its non-regulated operations. While it is not uncommon for businesses to incur losses in growth industries, the Report's calculation of losses for ACS' regulated and non-regulated businesses are misleading. By allocating a disproportionate amount of ACS' debt to the non-regulated businesses, the Report underestimates the financial performance of these businesses and overstates the performance of ACS' regulated businesses. Mr. King, the consultant hired to prepare the Report confirms this by disclaiming the reliability of his analysis: "Schedule 6 overstates the disparity on profitability between the regulated and unregulated segments of the Company because it imputes almost all of the company's interest expense to the non-regulated activities."[62]

The findings of the Snavely Report have no support in the financial markets. Contrary to GCI's assertions, ACS's financial performance is severely impacted by the current regulatory policy, because it is forced to sell its network to a competitor at rates below ACS's cost to provide service. The investment community recognizes this, and has expressed concern about the future prospects of ACS, as demonstrated in investment reports, attached hereto as Attachment A.

Investor research reports on ACS' performance in the third quarter of 2002 indicate that "ACS is experiencing competitive access line loss at a faster rate than the Bells" and that "ACS posted strong cellular results this quarter," "mitigat[ing] the weak results of the local telephone segment."[63] "[T]he on-going reduction in lines continues to impeded growth . . . [ACS] continues to work with state regulators to raise UNE rates but relief appears a year away."[64] "While market share losses appear to have stabilized in Anchorage, GCI has expanded to Fairbanks and Juneau and is more actively taking share in those smaller cities."[65] The second and third quarter of 2002 for ACS "have reflected the ongoing negative impact on operations of the challenging regulatory and competitive environment the company continues to face in its incumbent territory."[66]

More recently, on January 16, 2003 Standard & Poor's Rating Services lowered its credit rating of ACS:

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[61] *See* Graham Affidavit at ¶¶ 4-6, 8.

[62] *See* Snavely Report at 6.

[63] JPMorgan Report (October 26, 2002).

[64] CIBC World Markets Report (October 25, 2002).

[65] Jefferies Telecom Services Group Report (October 25, 2002).

[66] Legg Mason Equity Research Report, The RLEC Monitor Winter at 65 (Dec. 5, 2002).

> based on competitive pressure that has materially weakened ACS' business profile [and] impaired operating performance. . . . ACS's business risk profile has declined as the company has lost local retail access lines to competition that has taken advantage of regulated low unbundled network element (UNE) loop rates in the company's key markets. Standard & Poor's is concerned that, absent regulatory changes, competitive pressure could continue to weigh on ACS and limit credit measure improvement. . . . Most of the decline is due to line losses to diversified communications company GCI Inc.'s competitive local exchange carrier (CLEC) business. . .. One of the most pressing issues is an appeal to lift UNE rates in Anchorage, where GCI has a 40% share of access lines."[67]

Still other analysts have projected lower estimates for 2003 because as of the third quarter of 2002, ACS "continue[d] to face competitive pressure, specifically in the wireline business where market share in Anchorage has fallen almost to 50%."[68] "The ACS UNE rate of $14.92 in Anchorage . . . seems low, particularly considering a lack of de-averaging zones in the state. We believe this has put a significant burden on the operations of ACS, and any positive changes regarding the regulatory structure in Alaska would be very beneficial for ACS shareholders."[69]

Further, the financial data GCI sets forth in its January 24 *Ex Parte* Letter is seriously misleading. GCI estimates total 2002 revenue of $229 million by annualizing revenue reported in a subset of ACS' quarterly reports. One of these reports included a one-time extraordinary gain clearly disclosed on ACS' financial statements. When this one-time extraordinary gain is backed out, ACS' 2002 operating revenue drops to approximately $214 million; a *decrease* from the prior period of nearly 5% rather than the increase of about 3% suggested by GCI. Even this amount of revenue is supported by a competition-induced interim and refundable rate increase in Anchorage; backing out that revenue reduces the figure to about $209 million, or a 7% decrease from the prior period. Similarly, EBITDA does not grow as GCI suggests, but rather remains flat at approximately $94 million. When backing out the interim and refundable revenue, EBITDA falls by 5% to $89 million.

GCI has misrepresented the impact of competition on ACS' operating LECs by: (1) GCI's failure to adjust for out-of-period revenues, which are clearly disclosed in ACS' financial statement; and (2) by aggregating Anchorage with service areas that have not yet experienced significant competition. The comparison of GCI's misleading data with ACS' accurate figures, in the chart below, further demonstrates that the regulatory environment has harmed ACS' regulated businesses.

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[67] Eric Geil Report.

[68] Goldman Sachs Report (Oct. 29, 2002).

[69] Raymond James & Associates, Inc., Telecommunications Industry Report, "The ILEC Industry: Defensible Markets Create Defensive Stocks" at 120 (Jan. 28, 2003).

ACS Operating Cos.	1999	2000	2001	2002 (ann.)	Change 1999-2002
What GCI said:					
Operating Revenue ($ millions)	222	222	221	229	**3.12%**
EBITDA	N/A	91.3	100.7	109.2	**8.44%**
Adjusted for out-of-period					
Operating Revenue ($ millions)	222	222	221	229	
Out-of-period revenue: GCI/ACS IPS dispute	3	3	-	(15)	
Op. Revenue Adjusted for out-of-period ISP	225	225	221	214	-4.8%
Normalized for local service rate Increase					
Annual rate increase ($ millions)	-	-	-	(5)	
Adjusted Operating Revenue	225	225	221	209	**-7.0%**
EBITDA	N/A	91.3	100.7	109.2	
Out-of-period revenue: GCI/ACS IPS dispute		3	-	(15)	
Adjusted for out-of-period revenue		94	101	94	
Adjusted EBITDA		94	101	89	**-5.2%**

6. GCI's Assessment of ACS' Depreciation Rates Are Wholly Inaccurate

GCI misleads this Commission with its rebuttal to ACS' representations that state regulators have unfairly reduced ACS' depreciation expense.[70] GCI asserts that factors, such as service lives, used to determine depreciation expense for its telephone network, are irrelevant to the question of whether the RCA has established appropriate service lives for ACS in its present rate cases.[71] This argument is frivolous. In parts of Anchorage, GCI has built traditional, copper telephone plant, and has become the *de facto* incumbent (with none of the obligations of an ILEC). GCI is using a 12-year life to depreciate its copper cable--aerial, underground and buried. The RCA, however, has decreed that ACS must use 25, 30, and 30-year lives respectively for these types of cable in the same market.[72] Such disparate treatment of competitors simply cannot lead to fair competition.

GCI is attempting to mislead the Commission into believing that it has not built traditional copper plant, and that it does not use a 12-year depreciation life on traditional copper telephone networks, by arguing that "GCI is investing in entirely different network

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[70] *See* January 24 *Ex Parte* Letter at 15.

[71] *See id.*

[72] *See, e.g.*, Investigation of the Local Exchange Revenue-Requirement Cost-of-Service, and Rate Design Study Filings Required Pursuant To U-98-173(7); Depreciation Study filing Required Pursuant to U-96-78(1) for ACS of Anchorage, Inc.

ACS Local Service, and ACS

technologies."[73] However, GCI has reported in its financial statements and in its representations to ACS that it does in fact use a 12-year depreciation life for its traditional telephone assets. Indeed, financial accounting standards require the proper matching of revenue and expense, making GCI's 12-year service life for telephone assets a relevant guideline for similar assets of ACS. The proper matching of expense to the period the asset is used, useful, and generating revenue is a common requirement for both rate-making and financial accounting.

GCI further claims that "[t]he eventual obsolescence of ACS's loops, switches and trunks is not affected by competition from GCI but by much broader technological developments in the industry in loops, switches and trunks."[74] Given GCI's repeated public pronouncements about its intent to bypass ACS' current network with cable telephony and leave ACS' plant stranded, it is hard to believe that "competition from GCI" won't be the driving force in limiting the useful, revenue generating potential, of ACS' plant. This will certainly shorten useful lives well below the lives that were calculated in prior studies.

According to GCI, "[c]areful review of the RCA's June 6, 2002 order reveals that the RCA did not in fact lengthen any of the lives for the ACS LECs' plant accounts."[75] In fact, the RCA substantially increased the service lives for ACS of Anchorage, Inc. from their immediately prior levels:

	1988 Service Life (1986 Test Year) RCA Order U-88-18	1997 Service Life (1995 Test Year) RCA Order U-96-78	New Approved Service Life RCA June 6, 2002 Order
Aerial Cable – Copper	25 years	22.2 years	25 years
Underground Cable – Copper	30 years	23 years	30 years
Buried Cable – Copper	30 years	19.7 years	30 years

As this chart shows, the RCA's June 6, 2002 Order re-implements service lives calculated in an era far before local competition, and before the advent of any viable local service alternatives. It was an era before cable telephony, before PCS spectrum became available, and before analog cellular service was widely available in Alaska.

The service lives that were in effect immediately prior to the RCA's June 6, 2002 Order were approved on September 29, 1997, retroactive to January 1, 1997. These service lives were erroneously not contained in the record in the RCA U-01-34 proceeding, a fact which ACS-ANC sought to correct over GCI's strenuous objection. Because of this, GCI was, at the very least, well aware of ACS-ANC's current service lives prior to filing its January 24, 2003 *ex parte. GCI's* statement that "the RCA did not in fact lengthen any of the lives for the ACS LECs' plant

[73] January 24 *Ex Parte* Letter at 15.

[74] *Id.*

[75] *Id.* at 16.

accounts" based on what "the RCA's June 6, 2002 order reveals"[76] is simply another willful attempt to deceive this Commission.

In conclusion, it is clear that GCI is looking for an economic advantage instead of striving to compete on equal footing. GCI pleads with the Commission for "a meaningful opportunity to compete," which it contends can only be achieved through perpetual access to UNEs at TELRIC-based rates.[77] As GCI concedes, however, it has achieved the largest market share of any CLEC in the country.[78] Despite this fact, GCI maintains its fundamental strategy of claiming impairment based on any costs exceeding the UNE price.

The continued application of the market-opening provisions of the Act undermine the objectives of improved services and lower costs to consumers. If the impairment standard does not limit the unbundling obligations of Sections 251 and 252 in a case such as this, where the CLEC is as strong or stronger than the ILEC in the market and it has its own network available for service, then it is unlikely the Commission will ever make a finding of no impairment.[79] ACS has complied with the RCA's mandates to construct new loop facilities specifically so that GCI can lease these facilities at below-cost prices, until such time as GCI deploys cable telephony abandoning these facilities and leaving ACS with stranded costs. This harms not only ACS' shareholders, but Alaska's consumers of telecommunications services. ACS has had to delay investment in new services as a result. As the incumbent's network continues to degrade, ultimately the consumers will be harmed by GCI's exploitation of a regulatory advantage that was not intended to continue through the level of competition achieved by GCI.

Ultimately, ACS and GCI agree that both parties would benefit by striking a commercially reasonable deal, which includes both parties "providing nondiscriminatory access to *reasonably priced UNEs*."[80] As ACS explains in this submission, ACS does not wish to deny network access to GCI because doing so would cause much of ACS' network to become stranded, especially portions which it constructed specifically for GCI. ACS does, however, wish to be relieved of UNE prices that are below cost, and instead negotiate UNE prices at market rates. As noted above, GCI's cable telephony alternative and exclusive link to some customers provide it with substantial negotiating power in a commercial transaction. Without regulatory involvement in the pricing of UNEs, the UNE pricing in a competitive market will be governed by market forces, as contemplated by the Act.

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[76] January 24 *Ex Parte* Letter at 16.

[77] January 23 *Ex Parte* Letter at 10.

[78] January 24 *Ex Parte* Letter at 8 (acknowledging that Alaska is "the nation's most competitive state"). *See also id.* 10-11 ("the most successful facilities-based residential market entrant in the country").

[79] The Supreme Court has rejected an interpretation of the impairment standard that does not limit the unbundling obligations. *See Iowa Utilities*.

[80] January 24 *Ex Parte* Letter at 9 (emphasis added).

Therefore, ACS urges the Commission to find that ACS is entitled to relief from the unbundling requirements of Sections 251 and 252 of the Act because competition has been achieved in the Alaska markets and GCI is no longer impaired under the statute.

Please contact us at (202) 637-2200 if you should have any questions regarding this submission.

Respectfully submitted,

/s/ Karen Brinkmann
Karen Brinkmann
Elizabeth Park

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin
Christopher Libertelli
Matthew Brill
Lisa Zaina
Jordan Goldstein
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