

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matters of)	
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Joint Petition for Forbearance From)	WC Docket No. 03-189
the Current Pricing Rules for)	
the Unbundled Network Element Platform)	
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Petition for Forbearance From)	
the Current Pricing Rules for)	WC Docket No. 03-157
the Unbundled Network Element Platform)	
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REPLY COMMENTS OF GENERAL COMMUNICATION, INC.

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INTRODUCTION

General Communication, Inc. (“GCI”) hereby submits these reply comments in opposition to the Joint Petition filed by Qwest Corporation, BellSouth Telecommunications, Inc., and SBC Communications Inc., (“Joint Petitioners”) on July 31, 2003.¹ The Joint Petitioners seek “exactly the same relief”² that Verizon seeks in its July 1 forbearance petition, namely that the Commission: (1) replace TELRIC rates with resale rates for the UNE platform and (2) prohibit UNE platform carriers from collecting access charges.³ GCI, along with numerous

¹ See Joint Petition of Qwest Corporation, BellSouth Telecommunications, Inc. and SBC Communications Inc. for Expedited Forbearance, WC Docket No. 03-189 (filed July 31, 2003) (“Joint Petition”).

² *Id.* at 2.

³ See Petition for Expedited Forbearance of the Verizon Telephone Companies, WC Docket No. 03-157 (filed July 1, 2003) (“Verizon Petition”).

other commenters – including, notably, state commissions and consumer advocates – have already described the procedural and substantive shortcomings of the Verizon Petition, each of which is applicable to the Joint Petition filed in this docket. Likewise, GCI and other commenters have explained that ACS of Anchorage’s (“ACS-ANC”) “me too” request for relief is procedurally deficient, unsupported by empirical evidence, and in direct conflict with the Communications Act of 1934 (the “Act”) and Commission precedent. Thus, GCI incorporates by reference the reply comments it filed in opposition to the Verizon Petition.⁴ GCI also renews its request that the Commission promptly dismiss the Verizon Petition and the Joint Petition, along with ACS-ANC’s attempt to free ride on the Bell Operating Companies’ (“BOCs”) forbearance requests without satisfying the requirements of the Commission’s rules implementing Section 10.⁵

I. THE BOC FORBEARANCE REQUESTS – AND ACS-ANC’S ATTEMPT TO OBTAIN SIMILAR RELIEF – ARE PROCEDURALLY IMPROPER.

Verizon and the Joint Petitioners seek a substantive change in the Commission’s existing pricing rules for the elements that comprise the UNE platform, from the cost-based rate for UNEs in Section 252(d)(1) of the Act to the retail-less-avoided-cost rate for resale in Section 252(d)(3). Similarly, the BOCs’ proposed rule changes effectively redefine the unbundled local switching UNE with respect to exchange access services provided by competitive local exchange carriers (“CLECs”). Because the BOCs seek substantive changes in Commission rules of general applicability – not limited forbearance from their application – the BOCs’ requests must

⁴ See *Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform*, Reply Comments of General Communication, Inc., WC Docket No. 03-157 (filed Sept. 2, 2003) (“GCI reply comments” in the “Verizon Forbearance Proceeding”).

⁵ *Id.*

be handled in a notice and comment rulemaking, such as the Commission’s recently initiated TELRIC docket.⁶

Moreover, Section 10 is not an appropriate avenue for an untimely appeal of State UNE pricing decisions, which must be heard in federal district court.⁷ Notably, Verizon, Joint Petitioners, and ACS-ANC all fail to disclose their appellate records. Indeed, despite ACS-ANC’s continued unsubstantiated claims about allegedly “[b]elow-cost UNE prices in Anchorage,”⁸ ACS-ANC’s predecessor did not appeal either the initial UNE rates and ACS-ANC did not appeal the interim rates that are currently in effect.⁹ The Commission should reject the use of forbearance as a “back door” route to FCC review of State commission pricing decisions – especially where, as here, ACS-ANC never sought judicial review of those orders.

Regardless, the pending forbearance request submitted by the Joint Petitioners and the “me too” ACS-ANC comments fail to comply with the Commission’s rules and its past implementation of Section 10. GCI agrees with AT&T that, consistent with Commission precedent, “forbearance from enforcing ‘dominant carrier regulation under section 10’ demands a ‘painstaking analysis of market conditions’ supported by empirical evidence, not just unverified assertions.”¹⁰ To the contrary, Joint Petitioners and ACS-ANC simply rely on

⁶ See *Review of the Commission’s Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 03-173 (rel. Sept. 15, 2003).

⁷ See 47 U.S.C. § 252(e)(6).

⁸ *Joint Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform*, Comments of ACS of Anchorage, Inc., WC Docket No. 03-189 at 5 (filed Sept. 22, 2003) (“ACS-ANC comments” in the “BOC Forbearance Proceeding”).

⁹ See GCI reply comments at 9-10.

¹⁰ See BOC Forbearance Proceeding, Comments of AT&T Corp. at 4 (filed Sept. 18, 2003), citing *Worldcom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T v. FCC*, 236 F.3d 735-37 (D.C. Cir. 2001) (“AT&T comments”).

Verizon’s broad-based attack on the application of TELRIC pricing to the UNE-P combination as grounds for identical relief. Clearly, such skimpy, “me too” filings fail “to demonstrate the competitive effects of forbearance in the particular local markets they serve,” and therefore fail to meet the rigorous evidentiary burden that the Commission has imposed on a party seeking forbearance under Section 10.¹¹

Likewise, the Commission must reject ACS-ANC’s attempt to piggy-back on the relief sought by the BOCs’ forbearance petitions without filing its own petition as required by rule 1.53.¹² ACS-ANC tries to evade this requirement by arguing that, “so long as the original petition is properly captioned, as it was in the case of both the Verizon and BOC Petitions, there can be no argument that the Commission was unable to identify the petitions or consider these requests within the statutory timeframe.”¹³ This argument fails on two grounds. As a threshold matter, neither the Verizon Petition nor the Joint Petition complies with rule 1.53, which requires that “any petition requesting that the Commission exercise its forbearance authority under 47 U.S.C. § 160 shall be filed as a separate pleading *and shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. § 160(c).*” Verizon, in fact, did not caption its petition with the required reference to 47 U.S.C. § 160(c), and neither did the Joint Petitioners. It would be absurd to let ACS-ANC – which itself has not filed any petition – rely on other petitions that fail to comply with rule 1.53 to demonstrate that ACS-ANC has satisfied the requirements of rule 1.53.

¹¹ *Id.* at 4.

¹² 47 C.F.R. § 1.53.

¹³ ACS-ANC comments at 5.

Second, as AT&T explains, “the very reason that the Commission adopted its rule regarding the captioning of forbearance petitions was to prevent parties from claiming they invoked the section 10 process by merely asserting ‘me too’ requests in filed comments in other proceedings.”¹⁴ It would be nonsensical to allow ACS-ANC to “free ride” on the forbearance petition filed by Verizon or the follow-on petition filed by Joint Petitioners when neither of those petitions submitted evidence specific to any market, not to mention the Anchorage market itself. GCI therefore concurs with the New Jersey Division of Ratepayer Advocate that “ACS and other companies that seek forbearance should submit petitions tailored to their own circumstances, rather than a bootstrap petition that seeks to invoke a regulatory policy based upon experience and circumstances in other markets.”¹⁵ Accordingly, no consideration may be given to forbearance under Section 10 in the Anchorage market (or any other market) unless and until a market-specific petition consistent with the express terms of rule 1.53 is filed.

II. VERIZON, JOINT PETITIONERS, AND ACS-ANC HAVE FAILED TO SATISFY THE REQUIREMENTS OF SECTION 10.

Notwithstanding the procedural deficiencies of the BOC forbearance requests, as GCI and other commenting parties have previously explained, the Commission simply cannot grant the relief sought because such relief would be in direct conflict with the express terms of the Act, notably the cost-based pricing requirement in Section 252(d)(1).¹⁶ Pricing the UNE-P combination at the wholesale rate in Section 252(d)(3), and shifting all access charge payments

¹⁴ See Verizon Forbearance Proceeding, Opposition of AT&T Corp. at 22-23 (filed Sept. 2, 2003) *citing* Rules and Regulations, FCC, 47 C.F.R. Part I, Separate Pleadings for Petitions for Forbearances, 65 Fed. Reg. 7460-01 (Feb. 15, 2000) (“AT&T reply comments”).

¹⁵ Verizon Forbearance Proceeding, Reply Comments of the New Jersey Division of Ratepayer Advocate at 6 (filed Sept. 2, 2003).

¹⁶ See, e.g., GCI reply comments at 5-6.

to the ILECs, would violate Section 252(d)(1)'s mandate that UNEs (including the loop, switching, and transport) be priced at cost.¹⁷

Verizon, Joint Petitioners, and ACS-ANC also have failed to satisfy the requirements of Section 10. ACS-ANC, in particular, has not demonstrated that market conditions in the Anchorage, Alaska market warrant forbearance. First, ACS-ANC – like Verizon and the Joint Petitioners – has not “fully implemented” the requirements of Section 251(c), and thus fails to meet Section 10(d)'s prerequisite for forbearance from Section 251(c) duties. The Commission's recent Triennial Review Order sets forth a number of activities that carriers, State commissions, and this Commission must undertake to implement Section 251(c).¹⁸ And, as AT&T aptly notes, ACS-ANC “offers no evidence at all that it has fully complied with existing Commission regulations” implementing Section 251(c), let alone these new requirements.¹⁹ For example, as GCI explained in the Triennial Review proceeding, GCI generally uses unbundled local switching when ACS-ANC has an underlying network architecture that precludes GCI from gaining access to an unbundled loop at a central office. True full implementation of Section 251(c) by ACS-ANC, in accordance with the Triennial Review Order, would eliminate GCI's need to order the UNE platform in central offices in which it has already collocated.²⁰ Thus, the

¹⁷ See Verizon Forbearance Proceeding, Reply of MCI at 2 (filed Sept. 2, 2003).

¹⁸ See *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers and Implementation of the Local Competition Provisions in the Local Telecommunications Act of 1996*, Report and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003) (“Triennial Review Order”).

¹⁹ AT&T reply comments at 24.

²⁰ ACS-ANC also must demonstrate compliance with other obligations that it has long refused to perform, such as provisioning certain routine loop modifications (*see* Triennial Review Order at ¶¶ 632-634) and developing a “batch hot cut” process to speed loop provisioning at a lower cost (*see id.* at ¶¶ 487-92).

Commission cannot find that Section 10(d) is satisfied until ACS-ANC can be found to have complied with the Commission's revised rules implementing Section 251(c).

Further, despite ACS-ANC's claims to the contrary, GCI's retail market share in Anchorage does not itself establish that ACS-ANC has fully implemented Section 251(c).²¹ For the same reasons that the Commission declined to use retail market share to determine "impairment" under Section 251(d)(2) in the Triennial Review Order, retail market share also does not provide a reliable indicator of whether an ILEC has fully implemented its Section 251(c) obligations.²² In fact, by relying on GCI's retail market share to argue that Section 10(d) is satisfied, ACS-ANC ignores that enforcement of the rules from which ACS-ANC seeks forbearance is required for vigorous retail competition. As GCI already explained, for Section 251(c) to be "fully implemented," there must be a mature wholesale market for the inputs for which forbearance is sought.²³ Because there is no such market for the UNEs that GCI purchases from ACS-ANC, Section 10(d) is not satisfied.²⁴

Second, Verizon, Joint Petitioners, and ACS-ANC have failed to show that forbearance would benefit consumers or preclude unjust, unreasonable and discriminatory rates, as required by Sections 10(a)(1)–(2). Again relying on GCI's retail market share, ACS-ANC asserts that

²¹ See ACS-ANC comments at 5.

²² See GCI reply comments at 13, citing Triennial Review Order at ¶ 114 ("In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; thus a standard that takes away UNEs when a retail competition threshold has been met could be circular.").

²³ See *id.* at 14-15.

²⁴ See *id.* In addition, the Regulatory Commission of Alaska has opened a proceeding to consider what factors, if any, would call for deviation from TELRIC rates in a given market. See *Order Seeking Comment on Whether to Petition for Waiver from the Requirement to Price Unbundled Network Elements on the Basis of Total Element Long Run Incremental Cost in Competitive Markets*, R-03-4.

“the current UNE-P pricing rules are unnecessary because market forces will ensure that ACS provides UNEs in a reasonable and non-discriminatory manner.”²⁵ As discussed above, however, ACS-ANC provides no basis for its assertion that declining retail market share reflects declining market power with respect to the prices for UNEs. To the contrary, in a pending interconnection negotiation, ACS-ANC has “offered” GCI a “market-based rate” for loops that exceeds its embedded loop costs by 50 percent.²⁶ ACS-ANC obviously recognizes that GCI has no alternative source for loops – either through a third-party wholesale provider or through self-provisioning – and is attempting to exercise its monopoly power in the wholesale market for UNEs. Thus, in the absence of the Commission’s TELRIC pricing rules, it is clear that ACS-ANC will price UNEs at unjust and unreasonable rates.

Likewise, GCI’s plans to upgrade its cable plant to provide IP-based telephony “does little to show that ACS’s local markets are fully opened to competition, and that new entrant carriers can compete absent combinations of network elements at cost-based rates.”²⁷ As GCI has previously explained,²⁸ and as the Commission itself noted in the Triennial Review Order,²⁹ the development and implementation of standards-based cable telephony has not been smooth. Importantly, until IP-based cable telephony becomes a commercially viable alternative, GCI will be forced to rely on access to UNEs at TELRIC-based rates. Also, on a long-term basis, GCI will continue to rely on UNE loops for customers in business areas because GCI’s cable plant

²⁵ ACS-ANC comments at 5.

²⁶ *See* GCI reply comments at 20.

²⁷ AT&T reply comments at 24.

²⁸ *See* GCI reply comments at 22-23.

²⁹ *See* Triennial Review Order at ¶ 229.

does not pass these customers. GCI is not capable of self-provisioning these loops today and, in the absence of a wholesale market, GCI must rely on ACS-ANC for these bottleneck facilities.

Based on the foregoing, it is quite clear that forbearance from the Commission's TELRIC pricing rules would not benefit consumers, nor would it be in the public interest. If cost-based UNE rates were eliminated through forbearance while ACS-ANC retained market power with respect to UNEs, ACS-ANC could raise rivals' costs, either to increase retail prices in the market or to engineer a "price-margin squeeze" that could force competitors to retrench.³⁰ Such a result naturally would "deprive millions of consumers their chosen local telephone service and, for most, would put an end to local telephone choice overnight."³¹ Even those customers who chose to remain with the ILEC would suffer. As GCI explained, ACS-ANC's ILEC subsidiaries have offered a package of local service and calling features in those markets where GCI has entered, or in those markets GCI is permitted to enter – but not in markets that don't face the threat of competitive entry.³² Eliminating TELRIC pricing for UNEs will lessen the scope of competitive entry, and concomitantly, the ILEC's response. Moreover, by effectively tying a new entrant's costs to the ILEC's retail rates, resale pricing under Section 252(d)(3) forces the competitor to follow, rather than discipline, the ILEC's retail price increases. For example, but for GCI's access to UNEs priced at TELRIC, GCI would have been forced to follow ACS-ANC's retail rate increase in November 2001.³³ However, because GCI's UNE-based costs were not tied to ACS-ANC's retail prices, GCI was able to "hold the line" on its own retail rates. It is without

³⁰ See GCI reply comments at 19.

³¹ AT&T comments at 3.

³² GCI reply comments at 25, Attachment A.

³³ See *id.* at 18.

dispute that this outcome provided a clear benefit to consumers, many of whom exercised their choice in providers by moving to GCI.

The Commission therefore must not forbear from its TELRIC pricing rules in Anchorage or any other Alaska market. ACS-ANC's continued market power – and its ability and willingness to abuse it – is demonstrated by its “offering” GCI UNE rates that are unjust and unreasonably discriminatory in a pending interconnection negotiation. Verizon and the Joint Petitioners provide no evidence that they would be constrained from doing the same in the absence of the Commission's TELRIC pricing rules. This outcome would limit – or eliminate – competitive choice for mass market consumers, robbing them of the retail rate cuts, innovative service offerings, and improved service quality that have resulted from competition enabled by individual network elements and those that comprise the UNE platform.

CONCLUSION

For the reasons discussed herein, the Verizon Petition, the Joint Petition, and ACS-ANC's “request” for identical relief should be dismissed or denied.

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