

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

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| In the Matter of |) | |
| |) | |
| Unbundled Access to Network Elements |) | |
| |) | WC Docket No. 04-313 |
| Review of the Section 251 Unbundling Obligations |) | CC Docket No. 01-338 |
| of Incumbent Local Exchange Carriers |) | |
| |) | |

COMMENTS OF ACS OF ANCHORAGE, INC.

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Comments of ACS of Anchorage, Inc., ACS of Fairbanks, Inc., and ACS of Alaska, Inc.,
filed in RCA Docket No. R-03-07 (Jan. 12, 2004)

Affidavit of Stephen A. Pratt

Affidavit of Howard Shelanski; Errata Correction to Affidavit of Howard Shelanski

EXHIBIT B

ACS' Reply Comments, filed in RCA Docket No. R-03-07 (Apr. 2, 2004)

Reply Affidavit of Howard A. Shelanski

Affidavit of Kenneth Sprain

Affidavit of Debra D. Morris

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COMMENTS OF ACS OF ANCHORAGE, INC.

ACS of Anchorage, Inc. (“ACS”), through counsel, hereby submits its initial Comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

ACS is the incumbent local exchange carrier (“ILEC”) in Anchorage, Alaska, among the most competitive telecommunications markets in the country. ACS’s chief competitor is the incumbent cable television company, General Communication, Inc. (“GCI”), which currently provides local exchange service to approximately 45 percent of the Anchorage local exchange market. GCI provides these services substantially over its own facilities and is transitioning the entirety of its local exchange services customer base to GCI’s cable plant, which passes nearly every residence and business in Anchorage.

In these Comments, ACS demonstrates that GCI would not be impaired without mandatory access to ACS’s unbundled network elements (“UNEs”). The Communications Act of 1934, as amended (the “Act”) requires that the Commission begin with the presumption that there is no “impairment” absent access to any UNE in a particular market. The Commission must not make a national finding of “impairment” in the face of evidence that there are markets where the competitive local exchange carrier (“CLEC”) in the market would not be impaired

without mandatory access to UNEs. Under the requirements of the Act, the Commission bears the burden to identify impairment before it may lawfully require unbundling.

In light of GCI's substantial market share and extensive facilities deployment, ACS will show that the Act does not require ACS to provide mandatory unbundling of: (1) mass market switching; (2) shared transport; (3) dedicated transport; (4) DS-3 and dark fiber loops; and (5) mass market loops. To show lack of impairment, ACS provides the Commission with substantial evidence of GCI's considerable market share and facilities deployment in Anchorage. ACS submits that unless GCI can show impairment within the meaning of the Act, as articulated by the DC Circuit, ACS must be relieved of these obligations. ACS further requests that the Commission provide relief for its unbundling requirements without the excessive delay it proposed in its Notice of Proposed Rulemaking ("NPRM"). The Commission's proposal to leave mandatory unbundling in place for an additional six month period after a finding of non-impairment – more than a year after the DC Circuit's ruling striking down the Commission's prior rules – would present an unnecessary burden on incumbent carriers and disserve the public interest.

Although the record requires an end to mandatory unbundling in Anchorage, ACS does not intend to terminate GCI's access to UNEs. GCI provides service to nearly as many customers in Anchorage as ACS, and GCI has built out facilities to certain residential areas and businesses where ACS has no facilities. Moreover, GCI increasingly is providing telecommunications service over its own cable facilities. Because GCI has no obligation under Section 251 of the Act to allow ACS access to its traditional telecommunications facilities or cable plant, the bargaining power of the two competitors would be equalized in the Anchorage market, and ACS would have ample incentive to continue offering network elements to GCI

after a Commission finding of non-impairment. GCI will continue to have access to UNEs, but on commercially negotiated, rather than regulated, terms and conditions.

II. THE COMMISSION IS REQUIRED BY LAW TO CONDUCT A MARKET-SPECIFIC IMPAIRMENT ANALYSIS BEFORE IT MAY RE-IMPOSE ANY UNBUNDLING OBLIGATIONS

A. The Act Presumes No Impairment

The Act requires that an ILEC must provide access to UNEs only in certain narrowly defined circumstances.¹ Section 251(d)(2) of the Act states the Commission should require access to a network element only if:

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.²

The presumption is that the ILEC has no unbundling obligations under the Act unless and until the Commission makes the required finding under Section 251(d)(2). As explained by the Supreme Court:

Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the “necessary” and “impair” requirements.³

¹ 47 U.S.C. § 251(d)(2).

² *Id.*; *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 391-392 (1999) (“*Iowa Utilities*”).

³ *Iowa Utilities*, 525 U.S. at 391-392 [emphasis in original].

The DC Circuit similarly has discredited what it termed “the Commission’s . . . belief . . . that more unbundling is better.”⁴ In other words, the Act’s starting presumption is that no unbundling is required, and the Commission has the burden to justify unbundling as to each element in each geographic market, under the Act’s “necessary” and “impair” tests. The focus of ACS’s Comments is those elements deemed non-proprietary and therefore subject only to the “impairment” standard.

It cannot be the ILEC’s responsibility to rebut an unsubstantiated assumption that there is impairment. *The Commission has conceded that there is no impairment in certain markets*, thus making unlawful any national unbundling requirements.⁵ Moreover, the DC Circuit warned that if lack of access would not “impair” a competitive carrier’s ability to offer its services in a particular market, the Commission may not rely on a waiver process to make an over-broad impairment finding lawful.⁶ “[T]he mere existence of a safety valve does not cure an irrational rule.”⁷

The determination of whether a UNE meets the “impairment” standard must be made on a market-by-market or carrier-by-carrier basis. In *USTA I*, the DC Circuit found that the Commission must not adopt national requirements when evidence demonstrates that there is not impairment.⁸ UNE rules must not produce a scenario in which “UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is

⁴ *United States Telecom Assoc. v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2000) (“*USTA I*”).

⁵ *See, e.g., United States Telecom Assoc. v. FCC*, 359 F.3d 554, 570 (switching), 574 (dedicated transport) (D.C. Cir. 2004) (“*USTA II*”).

⁶ *Id.* at 571.

⁷ *Id.*

⁸ *USTA I*, 290 F.3d at 422.

suffering from any impairments of a sort that might have [been] the object of Congress's concern."⁹

Of course, a CLEC may at any time petition the Commission for an impairment finding and request that UNEs be made available pursuant to Section 251(c)(3) and 251(d)(2). Further, as discussed below, where one CLEC fails to demonstrate impairment, it does not necessarily mean that another CLEC would not be successful in making an impairment showing. Such result might occur, for example, where the former serves a substantial portion of the market and has deployed its own facilities, but the latter is a new entrant and can show that there are no commercially available wholesale alternatives.

B. The Burden of Proof Must Rest with the Competitive Carrier Seeking UNE Access to Demonstrate Impairment

In the Triennial Review Order, the Commission set standards for finding non-impairment that rest on the existence of multiple facilities-based competitive telecommunications carriers in a market.¹⁰ Such standards are wholly inappropriate and could lead to absurd results in the Anchorage market, where ACS faces only one significant facilities-based competitor, but one that has captured nearly half the Anchorage market.¹¹ The DC Circuit recognized that, when determining “whether the enumerated operational and entry barriers ‘make entry into a market

⁹ *Id.*

¹⁰ *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advance Telecommunications Capability*, CC docket Nos. 01-338, 96-98, 98-147, FCC 03-36, at ¶¶ 333, 508 (2003) (“Triennial Review Order”).

¹¹ Comments of ACS of Anchorage, Inc., ACS of Fairbanks, Inc., and ACS of Alaska, Inc., filed in RCA Docket No. R-03-07, at 2 (Jan. 12, 2004) (“ACS RCA Comments”) (attached hereto at Exhibit A).

uneconomic,” the evaluation must focus on the competitive carrier in the market.¹² The court criticized Commission’s use of “uneconomic entry” as a standard for impairment, without providing any specificity as to how it assessed economic entry barriers:

Uneconomic by whom? By *any* CLEC, no matter how inefficient? By an “average” or “representative” CLEC? By the most efficient existing CLEC? By a hypothetical CLEC that used “the most efficient telecommunications technology currently available,” the standard that is built into TELRIC?¹³

ACS suggests that, in assessing a claim of impairment, the Commission should look to the actual CLEC seeking UNE access. The Commission should not presume that all CLECs in a market should enjoy access to UNEs until the ILEC proves for each UNE that there is a vibrant wholesale market with three or four participants. Anchorage is a market that has two facilities-based local exchange services providers (ACS and GCI) with nearly equal market share and equal facilities access to residences and businesses in the market.¹⁴ GCI also has a far greater presence than ACS in the cable television and long-distance segments of the market. Regardless of the prospects of addition of multiple facilities-based carriers in Anchorage, the Act dictates that GCI should no longer have mandatory access to ACS’s UNEs.

The Commission should address the realities of smaller markets, such as Anchorage, where competitive entry by multiple facilities-based CLECs likely will never occur, but where continued mandatory unbundling to a particular facilities-based competitor cannot be justified under the Act’s “necessary” and “impair” standards. ACS does not attempt to establish here whether “*any* CLEC” would be impaired without UNEs if it determined to enter the

¹² *USTA II*, 359 F.3d at 572.

¹³ *Id.* [emphasis in original].

¹⁴ ACS RCA Comments at 1-5.

Anchorage market. However, the overwhelming evidence demonstrates that GCI would not be impaired in the absence of mandatory access to ACS UNEs in order to “provide the services it seeks to offer.” In other words, *the only carrier that has ever ordered UNEs from ACS would not be impaired without them.* By the standards established in the Act, as affirmed by the courts, the Commission may not continue to order unbundling.

As discussed further below, such unbundling requirements place unnecessary burdens on the ILEC and impede the CLEC’s incentives to expand the reach of its facilities. Thus, the Commission’s previous unbundling criteria are unsuitable for smaller markets such as Anchorage. The Commission must realistically evaluate local market conditions and place the burden on the carrier seeking access to a UNE to demonstrate that it would be impaired without such access.

III. AS ACS HAS DEMONSTRATED TO THE RCA, THERE IS NO “IMPAIRMENT” JUSTIFYING THE CONTINUED OBLIGATION TO OFFER UNES IN ANCHORAGE

The Anchorage telecommunications market is by most measures the most competitive in the country. In the Anchorage market, ACS has lost approximately 50 percent of the local exchange market. As one Regulatory Commission of Alaska (“RCA”) commissioner remarked, “Anchorage’s level of competition in the retail local telephone market exceeds that of every other city in the Lower 48 [states] by nearly 20 points.”¹⁵ ACS’s primary competitor is the

¹⁵ ACS RCA Comments at 2 (quoting *Investigation of the Local Exchange Revenue-Requirement, Depreciation, Cost-of-Service, Rate Design Studies, and Tariff Rate Revisions Designated as TA429-120, TA431-120, and TA457-120 Filed by ACS of Anchorage, Inc., Order Granting Reconsideration, in Part; Granting Confidentiality; Making Rates Interim But Not Refundable; Subsuming Issues Into Docket U-01-34, Amending Docket Title; Affirming Electronic Ruling Extending Filing Deadline; and Closing Docket U-09-99, U-01-34(27), Dissenting Statement of Commissioner Kate Giard at 1 (Reg. Comm. of Alaska, Dec. 8, 2003)*).

incumbent cable television company, GCI, which has gained approximately 45 percent of the Anchorage local exchange market in six years, and controls roughly half of the long-distance market in the state.¹⁶ In addition to GCI's traditional telecommunications facilities, it is important to note that fact that GCI's cable television plant passes over 95 percent of the households in Alaska, and it has begun a transition to providing cable telephony.¹⁷ GCI plans to migrate virtually all of its telephone customers to its monopoly cable network over the next five years, beginning with 10,000 customers in 2004.¹⁸

ACS already has amassed substantial evidence that GCI would not be impaired if UNEs were no longer offered at mandatory TELRIC rates in Anchorage. It would be inappropriate for the Commission to require unbundling by ACS for: (1) mass market switching; (2) shared transport; (3) dedicated transport; (4) DS-3 and dark fiber loops; and (5) mass market loops. Considering that GCI has ample telecommunications facilities to serve nearly every home and business in Anchorage, ACS should not be required to make any of these network elements available to GCI.

A. ACS Has Demonstrated There Is No Impairment in the Absence of the Mass Market Switching UNE or Shared Transport UNE

The Commission should no longer require ACS to unbundled switching or shared transport. As the Commission found in its Triennial Review Order, evidence of switch deployment is the best indicator of whether CLECs are able to overcome barriers to entry for

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 4.

¹⁸ *Id.* 4-5.

facilities deployment.¹⁹ GCI has its own Lucent 5E switch in Anchorage,²⁰ has collocated in all of ACS's major wire centers and in many locations where ACS has placed remote switches.²¹ Due to the extensive nature of GCI's switching facilities, *GCI has never ordered the switching UNE from ACS in Anchorage.*²² In fact, GCI's switches are capable of reaching 92 percent of all local loops in Anchorage,²³ and GCI actually serves 42 percent of all lines in Anchorage over its own switches.²⁴ As former Federal Communications Commission Chief Economist Howard Shelanski noted, "[b]y any measure, the ability of a competitor to enter a market and in a few years to take nearly 45% or even a 20% share is impressive, and strongly rebuts any inference of economically meaningful competitive impairment."²⁵ It is hard to imagine any plausible argument that GCI's access to switching could be required by statute, when GCI garnered nearly half of the Anchorage local exchange market without once ordering a switching UNE.

As the Commission found in its Triennial Review Order, if there is no "impairment" without the switching UNE, then the Commission will not require unbundling of the shared transport network element.²⁶ ACS already has demonstrated that Section 251(d)(2)

¹⁹ Triennial Review Order at ¶ 435.

²⁰ GCI also has its own switches in the smaller communities of Fairbanks and Juneau, which qualify as "rural" under the Act.

²¹ Affidavit of Stephen Pratt at ¶ 4 (submitted with the ACS RCA Comments, attached) ("Pratt Affidavit").

²² *Id.*

²³ *Id.* ¶ 5 (citing GCI SEC Form 10-K at 32 (Dec. 31, 2002)).

²⁴ *Id.* ¶ 7.

²⁵ Affidavit of Howard A. Shelanski at ¶ 24 (submitted with the ACS RCA Comments, attached) ("Shelanski Affidavit").

²⁶ Triennial Review Order at ¶ 534. Shared transport refers the "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches,

does not support requiring unbundling of switching by ACS in the Anchorage market. The evidence of GCI's actual entry into the market, its substantial market share, the fact that GCI is collocated in 100% of ACS's main switching centers in Anchorage and GCI's extensive cable telephony platform, overwhelmingly demonstrates that GCI is not impaired without access to the mass-market switching UNE.²⁷ Thus, ACS should not be required to unbundle switching or shared transport in the Anchorage market.

B. ACS Has Demonstrated There Is No Impairment in the Absence of the Dedicated Interoffice DS-3 and Dark Fiber Transport UNEs

The Commission set forth a limited definition of the dedicated transport network element to include "only those transmission facilities connecting incumbent LEC switches or wire centers."²⁸ The evidence demonstrates that GCI's ability to "provide the services it seeks to offer" in the Anchorage market would not be impaired without access to the dedicated transport UNE from ACS.

GCI provides its own transport throughout Anchorage over its extensive fiber network, including transport between its host and remote switches collocated with ACS facilities.²⁹ GCI provides all of its own transport between ACS wire centers, and *has never ordered the transport UNE in the Anchorage market.*³⁰ GCI has the ability to connect either directly or indirectly between any two ACS central offices, through facilities GCI owns, controls,

between end office switches and tandem switches, and between tandem switches in the incumbent LEC's network." *Id.* ¶ 535.

²⁷ ACS RCA Comments at 18.

²⁸ Triennial Review Order at ¶ 359.

²⁹ Affidavit of Stephen Pratt at ¶ 14.

³⁰ *Id.*

leases, or otherwise has obtained the right to use, from an entity other than ACS.³¹ Additionally, “GCI’s extensive cable network provides GCI with an alternative set of transport facilities which eliminate any possibility of impairment, especially as GCI pursues its strategy of cable telephony.”³² GCI also has submarine cable landing at Whittier, Alaska that, with a spur to Juneau, extends to Anchorage, Valdez, and along the pipeline route to Fairbanks. Further, an independent carrier, Alaska Fiber Star, also provides fiber transport between four of ACS’s five main wire centers in Anchorage.³³ As noted above, GCI has operated to this point without once ordering transport in the Anchorage market, and still has managed to win an approximately 45 percent market share. These facts lead to the conclusion that GCI does not require access to unbundled dedicated transport from ACS. In short, requiring ACS to provide access to unbundled transport would be contrary to the Act.

C. There Is No Evidence of Impairment in the Absence of the High-Capacity Loop UNE or the Dark Fiber Loop UNE

In *USTA II*, the D.C. Circuit vacated the Commission’s national impairment findings with respect to DS1, DS3 and dark fiber, in part, because, “the [Triennial Review] Order itself suggests that the Commission doubts a national impairment finding is justified on this record.”³⁴ The national impairment finding impermissibly required ACS to continue to provide access to these high-capacity loop UNEs when no finding was made in Anchorage that competition would in any way be harmed by removing this UNE requirement.

³¹ ACS’ Reply Comments, filed in RCA Docket No. R-03-07, at 31 (Apr. 2, 2004) (“ACS RCA Reply”) (attached hereto at Exhibit B).

³² Shelanski Affidavit at ¶ 34.

³³ Pratt Affidavit at ¶ 15.

³⁴ *USTA II*, 359 F.3d at 574.

Indeed, the record casts serious doubt on whether GCI could make such a showing, especially as to DS-3 and dark fiber loops, as to which ACS presented evidence to the RCA.³⁵ GCI already owns loop facilities that serve 25 percent of its retail lines throughout its service areas in Alaska.³⁶ Among its loop facilities, GCI has exclusive loop facilities to two subdivisions in Anchorage.³⁷ ACS cannot reach these customers unless it negotiates with GCI for access or builds its own loop facilities.³⁸ GCI also has constructed a fiber ring that serves 22 office buildings in Anchorage and which places GCI in position to extend additional high-capacity loops to additional businesses in proximity to the ring.³⁹ Further supporting this analysis, in response to a data request, GCI provided a list of end points for all high capacity loops and dark fiber loops in the Anchorage service area that GCI controls, and that could be available for the provision of service comparable to UNE DS-3 or dark fiber loop services.⁴⁰ GCI stated, “GCI is not currently aware of any limitations with respect to the identified facilities that would affect their use as a replacement for the incumbent’s unbundled network element DS-3 and/or dark fiber services, as available at each of the customer locations listed.”⁴¹

Additionally, as a practical matter, a non-impairment finding will not result in GCI losing access to ACS’s high-capacity loops. ACS needs access to GCI’s facilities where GCI is the exclusive

³⁵ Although ACS did not challenge the Commission’s impairment finding as to DS-1 Loops, it should not have to in order to cease mandatory provisioning of DS-1 loops. The burden is on GCI to demonstrate that it is impaired without mandatory access to these facilities, not *vice versa*. See, *supra*, Section II.B.

³⁶ Shelanski Affidavit at ¶ 35.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* ¶¶ 8, 35

⁴⁰ ACS RCA Reply at 29.

⁴¹ *Id.* (citing GCI Response to Data Request).

facilities-based carrier, and thus will continue to offer reciprocal access to ACS's loops and other UNEs on market-based, negotiated terms.⁴²

D. Market Conditions Demonstrate That There is No Impairment in the Absence of Mass Market Loops

In its Triennial Review Order, the Commission found that “the record indicates that cable and wireless technologies are currently being used, and will likely increasingly be used, to provide loop substitutes to support services that compete with local services.”⁴³ The Commission continued by finding that, where cable facilities are used for telephone services, “cable infrastructure serves as a replacement for loops.”⁴⁴ In Anchorage, GCI is transitioning all of its local exchange customers to its cable plant. GCI serves approximately 45 percent of the Anchorage local exchange market. GCI's cable plant acts as a “replacement for loops” to an increasing portion of these customers, and GCI has already begun an aggressive program of migrating its customers to cable telephony. Today, GCI serves a small percent of customers in Anchorage exclusively over its own facilities, including two subdivisions in Anchorage where GCI is the sole provider of traditional telecommunications facilities and office buildings where GCI is also the sole provider of facilities. But GCI has announced plans to migrate most of their customers completely to GCI's own facilities within the next few years. In short, under the precedent established by the Commission, the Supreme Court and the DC Circuit, GCI would *not* be “impaired” absent mandatory access to ACS mass-market loops in Anchorage.

There is a point at which a CLEC has sufficient market share such that the CLEC is no longer afforded mandatory access to unbundled loops for mass market customers. The

⁴² *Id.* at 30.

⁴³ Triennial Review Order at ¶ 228.

⁴⁴ *Id.* ¶ 229.

framework established by the Commission in its prior orders, however, made no provision for relief from unbundling obligations for mass market loops. However, as the DC Circuit made amply clear, the Commission may not preserve impairment on a national basis. Therefore, ACS proposes a test for impairment consistent with the DC Circuit's instructions. Significantly, ACS proposes a test that is specific to the CLEC requesting unbundled access to the mass market loop. In this way, ACS's proposal is tailored to the market conditions experienced by the regulated carrier.

ACS proposes the following criteria, which, if met, would merit a presumption of non-impairment regarding a particular CLEC's access to mass market UNE loops. Specifically, the Commission should presume no impairment in the ILEC's local exchange serving area where a CLEC: (1) has 30 percent or more of the local exchange market served by the ILEC; (2) can reach 60 percent or more of the customers in the market using its own loop facilities; and (3) is actually providing local exchange services over some portion of its own facilities in that market. Under such circumstances, the ILEC should not be subject to mandatory unbundling *as to that CLEC*.

GCI far exceeds each of these criteria in Anchorage, and thus should not have mandatory access to ACS's local loops. First, GCI serves approximately 45 percent of the Anchorage local exchange market. Second, GCI can reach nearly 100 percent of Anchorage customers using its own loop facilities, including its cable plant. Third, GCI serves a portion of its customers over its own loop facilities, and GCI is transitioning nearly *all* of its local exchange customers to its cable plant. Where a CLEC such as GCI meets the above-stated criteria, continued mandatory access to UNE-loops would impose unnecessary, costly obligations on the ILEC, while discouraging expansion of competitive facilities-based services. Continued

mandatory access to UNEs for GCI in Anchorage disserves the public interest and should be discontinued.

IV. BASED ON THE RECORD PRESENTED TO THE RCA, THE ACT REQUIRES THAT THE COMMISSION DISCONTINUE UNBUNDLING REQUIREMENTS IN ANCHORAGE

There is no legal justification for the Commission to continue mandatory unbundling in Anchorage in the absence of an affirmative finding of impairment. ACS respectfully submits that the facts presented herein provide compelling evidence that the Anchorage market must *not* be subject to a nationwide impairment presumption. The Act requires that the Commission address Anchorage and other highly competitive markets individually.

Especially with regard to competitive markets, such as the Anchorage market, the Act does not permit the Commission to hold unbundling requirements in place while the Commission determines whether they should be removed. A “temporary” or “transitional” finding of impairment that places the burden on ACS to demonstrate non-impairment would be unlawful, and would continue to saddle ACS with an unnecessary, costly competitive burden. As explained by the DC Circuit, “In competitive markets, an ILEC can’t be used as a piñata.”⁴⁵ The Commission cannot lawfully continue to hoist substantial unbundling burdens on ACS for an indefinite period of time, when impairment never has been established. Quite the opposite is required by the Act’s “impairment” test. As noted above, “[T]he mere existence of a safety

⁴⁵ *USTA II*, 359 F.3d at 573.

valve does not cure an irrational rule.”⁴⁶ Considering the strong evidence against impairment, even a provisional finding of impairment would be “an irrational rule.”

As it did in the RCA proceeding, GCI likely will claim that all it must show to demonstrate impairment is that there is some percentage of customers in Anchorage that GCI cannot serve today over its own facilities. Such an argument is wrong on both legal and policy grounds. Any such limitation on its reaching customers has not impaired GCI’s ability to command 45 percent market share in Anchorage. Further, GCI has shown its ability to self-deploy facilities where desirable to serve its customers. As stated, GCI has never requested a switching or transport UNE in Anchorage because GCI has its own facilities to self-provision switching and transport services. GCI also is currently migrating its customer base to its cable plant, which passes nearly every business and residence in Anchorage. Some residential and business customers are served *exclusively* by GCI – and ACS has no ability, under current rules, to gain competitive access to those customers. The record overwhelmingly demonstrates GCI’s current and increasing ability to serve the entirety of the Anchorage market over its own facilities. Based on the forgoing, the fact that there currently are some areas in Anchorage that GCI cannot serve at this time is not a legally sufficient basis to find impairment.

To the extent that GCI may lack access to some customers today from its own switches, GCI has the ability to remedy this shortcoming at relatively little expense and effort. For example, where GCI does not have direct access from its switch today, GCI can connect its switch with those customers by making a small investment in remote switching facilities and

⁴⁶ *Id.* at 571.

transport.⁴⁷ While there may be some legitimate debate about the intent of Congress when it required unbundling, it cannot be good public policy that a carrier as significant as GCI, with its substantial customer base and capital expenditure budget, may elect not to make minor investments and then claim that it needs federal government intervention to compete.⁴⁸

The Supreme Court expressly rejected the idea that any that an increase in costs or effort by the CLEC, however minimal, may be deemed an “impairment” under the Act:

the proper analogy here . . . is not the absence of a ladder, but the presence of a ladder tall enough to enable one to do the job, but not without stretching one’s arm to its full extension. A ladder one-half inch taller is not, “within an ordinary and fair meaning of the word” . . . “necessary,” nor does its absence “impair” one’s ability to do the job.⁴⁹

GCI already is an established competitor whose facilities based reach most certainly has reached critical mass. GCI has the “ladder” in place, and even without access to UNEs could compete successfully as it continues to build-out to the few areas of the Anchorage market that it does not yet serve. The Act’s rebuttable presumption against impairment cannot be overcome simply

⁴⁷ See generally Affidavit of Kenneth Sprain (submitted with the ACS RCA Reply, attached); Affidavit of Howard A. Shelanski (as corrected by the Errata Correction to Affidavit of Howard Shelanski (included at Exhibit A)) at ¶ 21 (“[T]he mere fact that GCI would have to purchase a remote switch and either build or buy transport does not of course mean that . . . new customers should be viewed as a separate market. Only if such costs are so high as to make it uneconomic or inefficient to use an existing host switch to serve those customers should the market be defined more narrowly. I have seen no evidence to suggest that GCI cannot continue to add remote switching capability and transport that extends the reach of its existing switches to new customers . . .”).

⁴⁸ See *Iowa Utilities*, 525 U.S. at 390 (“An entrant whose anticipated annual profits from the proposed service are reduced from 100% to 99% of investment has perhaps been ‘impaired’ in its ability to amass earnings, but has not *ipso facto* been ‘impaired in its ability to provide the services it seeks to offer’; and it cannot realistically be said that the network element enabling it to raise its profits to 100% is ‘necessary’”).

⁴⁹ *Id.* at n.11.

because GCI must, to paraphrase the Supreme Court, stretch a bit in order to provide its services to areas to which it currently does not have facilities-based access.

Continuing the regulatory mandate to make UNEs available to GCI at TELRIC prices will serve only to further extend an unnecessary and burdensome regulatory process. In Anchorage, for example, ACS has been trying to obtain UNE loop rates for more than 4 ½ years – a process that harms consumers by diverting resources to a process that is expensive, time-consuming and burdensome. There is no need to slow GCI’s migration to its own facilities and its build-out to those few areas in Anchorage that it cannot reach. As the DC Circuit recognized, “the Commission’s own assumption that universal access to virtually all network elements would prove attractive (leading to rapid introduction of ‘competition’) suggests that such a disincentive [to investment in facilities] cannot be discounted *a priori*.”⁵⁰ The Commission echoed this sentiment in its Triennial Review Order, stating “We are very aware that excessive network unbundling requirements tend to undermine the incentives of both [ILECs] and new entrants to invest in new facilities and deploy new technology.”⁵¹ Continued mandatory unbundling by ACS would undermine the Commission’s stated goal of encouraging facilities investment.

Additionally, GCI’s position in local telecommunications market is not appreciably different from ACS’s. Aside from the obvious similarities of ACS’s and GCI’s Anchorage market shares, GCI is the sole facilities-based provider in two subdivisions in Anchorage.⁵² Despite ACS’s lack of facilities in these subdivisions, the Act does not require

⁵⁰ *USTA I*, 290 F.3d at 425.

⁵¹ Triennial Review Order at ¶ 3.

⁵² Pratt Affidavit at 6. The same is true for business customers, as some Anchorage office buildings are served exclusively by GCI’s fiber.

reciprocal unbundling by GCI, a CLEC. Just as ACS must build out to customers that it would like to serve, so should GCI.

At the same time, it is precisely GCI's prominent position and its exclusive access to certain areas in Anchorage that ensures that ACS will not completely discontinue GCI's access to UNEs. ACS has every incentive to provide GCI UNEs access at negotiated, market-based prices. As explained in the ACS RCA Comments, "Based on GCI's ever growing market share and its promises to implement cable telephony and leave ACS' network entirely, the bargaining power between GCI and ACS in negotiating reasonable market rates for network elements has become equalized in [all of ACS's] local exchange markets."⁵³

ACS requests that the Commission find no "no impairment" with regard to GCI in the absence of mandatory unbundling in the Anchorage market. If the Commission concludes that other CLECs could be impaired without access to the same UNEs, ACS requests that the Commission limit the unbundling requirement to those new entrants to which the "impairment" finding may apply, and not GCI.

V. ANY TRANSITION THE COMMISSION ORDERS SHOULD BE LIMITED TO WHAT IS NECESSARY TO AVOID IMPAIRMENT, CONSISTENT WITH THE REQUIREMENTS OF THE STATUTE

In the NPRM, the Commission proposes a "twelve month plan."⁵⁴ Until the earlier of March 13, 2005⁵⁵ or the effective date of the Commission's final unbundling rules, the

⁵³ ACS RCA Comments at 3.

⁵⁴ NPRM at ¶ 29.

⁵⁵ March 13, 2005 is six months from the date the NPRM was published in the Federal Register. 69 Fed. Reg. 55128-35 (Sept. 13, 2004).

Commission determined to keep its vacated UNE rules in effect.⁵⁶ For the six months after that, until September 13, 2005, the Commission proposes to require that ILECs continue to unbundle network elements even if the Commission finds that there is no impairment as to any particular UNE.⁵⁷

Such an extension of unbundling obligations would be unlawful. It could require the Commission's unbundling requirements to remain in effect for a full 18 months after the DC Circuit vacated them, even if the Commission determines in its final rules that there is no impairment as to any or all UNEs in a market. ACS seeks relief especially as to the second six-month period, which is entirely unjustified. The Act dictates that there should be a presumption that no unbundling is necessary, and any interim period should result in the orderly cessation of mandatory unbundling unless and until a finding is made that there actually is impairment. Allowing GCI to continue to purchase UNEs at TELRIC prices when they are not impaired works a hardship on ACS and stifles competitive deployment of facilities.

Therefore, ACS suggests that the Commission's rulings in this proceeding terminating unbundling obligations of ACS as to GCI be effective the *earlier* of: (1) the date of Federal Register publication; or (2) three months from the release of its order. This will provide adequate time for ACS and GCI to transition from mandatory unbundling to a market-based contract for UNE access, especially in light of the Commission's *Interim Order* and the current transition period.⁵⁸ Further, ACS agrees that, if the Commission does require ILECs to continue

⁵⁶ NPRM at ¶ 29.

⁵⁷ *Id.*

⁵⁸ Section 1.427(b) of the Commission's rules permits rules to become effective less than 30 days from publication in the Federal Register for good cause, and for rules relieving restrictions and granting exemptions. 47 C.F.R. § 1.427(b).

unbundling in the absence of a finding of impairment during the transition period, “this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates.”⁵⁹ For any new customers, ILECs and CLECs should negotiate market-based commercial agreements for access to UNEs rather than mandatory unbundling.

VI. CONCLUSION

Based on the foregoing, the Commission should discontinue mandatory access to ACS’s UNEs in the Anchorage market. In light of GCI’s market share and facilities deployment to nearly all customers in the Anchorage market, it would not be “impaired” without such access. These same factors demonstrate that ACS and GCI have equal bargaining power in Anchorage. Therefore, absent mandatory unbundling requirements, ACS will continue to provide GCI with access to UNEs on commercially negotiated terms and conditions.

Respectfully submitted,

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⁵⁹ NPRM at ¶ 29.