



December 7, 2004

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EX PARTE – VIA ELECTRONIC FILING

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

Re: *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338
Notice of Written Ex Parte Presentation

Dear Ms. Dortch:

General Communication, Inc. (“GCI”) through its undersigned counsel hereby submits this letter in the above-captioned docket to address several critical issues raised in recent ex parte submissions to the Federal Communications Commission (“Commission” or “FCC”) including issues specifically raised by Alaska Communications Systems (“ACS”). GCI emphasizes the following points, described further herein:

1. Commission clarification of access to IDLC-served loops is necessary to place the appropriate incentive on ILECs to provide unbundled access to loops at the central office via any technically feasible means. Forcing the CLEC to resale or subloop access does *not* satisfy the loop access obligation. Without this clarification, incumbent LECs will continue to deny competitors access to last mile facilities through ILEC-controlled decision-making to deploy and refuse to provide access to non-multihostable DLCs.

2. As a related matter, it is also essential that, to the extent that the FCC adopts any line-based test as a means to evaluate impairment regarding the provision of a particular unbundled network element (“UNE”), that the FCC specify clarify that any test based on a count of lines must only include those lines that are actually accessible to competitive local exchange carriers (“CLECs”).

3. The Commission must reject ILEC arguments to limit competitive access to UNEs based on arbitrary market share tests. The Commission already rejected such “tests” with good reason—they do not provide any meaningful measure of impairment.

4. Finally, GCI agrees with other parties that any workable DS1 loop impairment test must include certain criteria requiring that facilities-based wholesale provider or self-provisioner be carriers (not end users), unaffiliated with the ILEC, and currently providing service at the relevant capacity to the particular customer premises in question.

The FCC Must Clarify ILEC Obligations to Provide Access to the Loop Where Non-Multihostable DLCs are Deployed. The clarification GCI seeks is not a policy change nor is it asking the FCC to do anything new. The Commission has already determined that ILECs must “present requesting carriers with a technically feasible method of unbundled access” to voice-grade loops.¹ To give full effect to this prior—and unchallenged—ruling, GCI seeks a clarification from the FCC that if the ILEC is unable to provide access to the entire loop (from central office switch to the customer premises) via a home-run copper loop, universal DLC, or multihosting at the DLC, then the ILEC must provide the unbundled loop in combination with unbundled switching and transport.

As GCI has demonstrated in this proceeding, where the ILEC network architecture blocks access to the loop through deployments of non-multi-hostable devices, including DLCs, the FCC should clarify that the combination of unbundled switching in combination with unbundled transport and loops—must remain available, not as individual UNEs, but as a remedy where access to the most fundamental UNE, the loop, is denied.² Without this necessary clarification, an ILEC can render CLEC facilities investment (namely, switching) irrelevant by denying access to the last mile facility, the customer loop.³

Similarly, the experiences of other CLECs support the need for this remedy as well. For instance, as described by MCI throughout the docket, ILECs have not implemented the necessary procedures to unbundle IDLCs as required by the FCC in the *Triennial Review Order*, often relegating the CLECs instead to inferior quality facilities, such as UDLCs or substitute copper loop (only if available).⁴ More importantly, there is nothing to stop ACS—or any other ILEC—from widespread deployment of devices that do not support multihosting and make large portions or the entirety of the market inaccessible to CLECs by blocking access to the “last mile” loop facility. Indeed several parties to this proceeding have highlighted the growing practice by the ILECs of deploying IDLC technology with increasing frequency, especially in suburban and rural areas where mass market customers are concentrated.⁵ GCI’s proposed alternative remedy

¹ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 at ¶ 297 (rel. Aug. 21, 2003) (“*Triennial Review Order*” or “TRO”). This paragraph of the *Triennial Review Order* was not challenged in or vacated by *USTA II*.

² See GCI Reply Comments at 20-21.

³ Because this is a loop access issue, any UNE-P transition adopted by the Commission here would have no effect on access to unbundled elements necessary to gain access to loops in a “technically feasible manner” as required under *Triennial Review Order* ¶ 297.

⁴ See MCI Comments at 66 (citing *Triennial Review Order* ¶ 297, n. 855); MCI Reply Comments at 40.

⁵ MCI Comments at 68; see also Comments of Joint Commenters at 94.

creates the right incentives to ensure that ILECs do not deploy non-multihostable devices for the purpose of disrupting the competitive market any further.⁶

ACS again claims that it has “demonstrated its willingness and ability to negotiate unbundling arrangements with GCI” by signing an “agreement through 2007 to provide UNEs to GCI in its rural markets at negotiated prices.”⁷ However, ACS has entered into no such voluntary agreement for Anchorage, the Fairbanks and Juneau agreements are limited in durations, and there is no such agreement in place for any new markets that GCI or any other carrier may wish to enter where this problem may be similarly pervasive.

Finally, ACS includes a diagram in its most recent *ex parte* where it depicts how it places the burden on GCI to access subloops at the IDLC.⁸ This diagram illustrates the need for GCI’s requested clarification—ACS is forcing GCI to subloop access. Rather than providing access to the entire loop, as required, ACS suggests instead that GCI is “free to place” its own collocation at the remote terminal [off of the SAI] or “completely bypass the ILEC network” through its deployment of cable telephony.⁹ ACS has made these same arguments before. As GCI responded in its Reply Comments, ACS’ arguments fail to consider that collocation costs vary greatly from site-to-site depending on various factors, including the types of devices ACS has installed with which interconnection is to be achieved, availability of space and power at the collocation site, whether the collocation will be physical or adjacent, and the number of lines for which the space and equipment must be designed.¹⁰ Additionally, in GCI’s experience, there are many potential barriers to collocation that may limit the ability to collocate at a particular site. For instance, collocation and cross-connection may not be achievable where there is insufficient space at the site for physical or adjacent collocation.¹¹ Other issues arise due to insufficient capacity at the main distribution frame to terminate tie cables, or lack of space for cross connection in housing for remotes or concentrators.¹² ACS’ bare diagram does not demonstrate that forced subloop access is a technically feasible alternative to access to the loop.

⁶ In its filings to date, ACS has focused on the nine percent of lines that GCI cannot currently access in Anchorage because of certain IDLC deployments to suggest that, despite ACS’ use of non-multihostable DLCs, GCI must not be impaired because it is only unable to access that percentage of loops in Anchorage. *See e.g.* ACS Reply Comments at 2. But ACS never denies that its current network architecture blocks GCI’s unbundled loop access to that group of customers. Nor does ACS even once address the fact that it has denied access to 29% of the loops in Fairbanks and 47% in Juneau through ACS deployment of remote terminals that do not include multi-hostable DLCs. These numbers are not insignificant and must be addressed through GCI’s remedy proposal.

⁷ *Ex Parte* Letter, dated December 3, 2004, from Karen Brinkmann, Latham & Watkins, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, Presentation at 3 and 6.

⁸ ACS December 3, 2004 *Ex Parte*, Presentation at 7.

⁹ *Id.*

¹⁰ GCI Reply Comments at 21-22.

¹¹ *Id.*

¹² *Id.*

The second part of ACS' recommended course of action for GCI is more of its on-going attempt to overstate GCI's cable telephony roll-out and that, as a result, GCI no longer needs access to certain UNEs. Again, this is not a new claim by ACS.¹³ GCI's cable plant cannot be used as a UNE-loop alternative prior to necessary plant upgrades, which require significant resources and investment. As GCI has described in detail throughout this proceeding, it is undertaking these upgrades, but they do not occur overnight.¹⁴ Additionally, ACS vastly overstates GCI's access to the business market via its cable facilities. As in most locations, the cable footprint is concentrated in residential locations. ACS includes in this most recent ex parte filing that GCI's access to an overwhelming number of lines in the Anchorage market is "through the leasing of loops from ACS".¹⁵ By its own presentation then, ACS once again disproves its claims that denying UNE loop access would not have any impact on competition in Anchorage.¹⁶

ILEC Market Share Tests Should be Rejected Once Again. In its most recent filing, ACS once again proposes that the FCC adopt a retail market share test for mass market loops in order to end competition in Alaska.¹⁷ Specifically, ACS claims that the FCC should presume no impairment as to mass market loops where a CLEC: (1) has 30 percent or more of the local exchange market served by the ILEC; (2) has deployed distribution facilities that pass 60 percent or more of the customers in the market (regardless of the technology); and (3) is actually providing local exchange services over some portion of its own facilities."¹⁸ This is essentially the same market share test that the FCC rejected in the first round of the *Triennial Review* and must reject again. A retail market share test is not indicative of whether impairment exists. The FCC recognized this fact when it rejected a market share test in the *Triennial Review Order* and should do so again now. Specifically, the FCC determined it would "not . . . base [its] impairment determination on whether the level of retail competition is sufficient such that unbundling is no longer required to enable further entry."¹⁹ Recognizing that "the relationship between retail competition and unbundling is complex," the FCC found that "[i]n many

¹³ For instance, in its Reply Comments, ACS erroneously claimed that "GCI has effective facilities-based access to all or virtually all homes and businesses in Anchorage." See ACS Reply Comments at 5. See also *Ex Parte* Letter, dated November 12, 2004, from Lisa R. Youngers, GCI, to Marlene H. Dortch, Secretary, FCC, at 6 (rebutting ACS' overbroad assertion).

¹⁴ GCI Comments at 8, GCI Reply Comments at 15.

¹⁵ ACS December 3, 2004 *Ex Parte* at 6.

¹⁶ Similarly, ACS' CEO recently admitted that GCI's "plant that's capable for telephony over cable addresses a portion but not all of the ACS plant clearly." GCI November, 12, 2004 *Ex Parte* at 6 (citing Third Quarter 2004, Alaska Communications Systems Group Earnings Conference Call, October 28, 2004, Transcript at 12.)

¹⁷ ACS December 3, 2004 *Ex Parte* Presentation at 4. GCI also reiterates here that the discussion of mass market or DS0 loops is not appropriately before this Commission in this proceeding as it was not included in the DC Circuit's remand to the FCC, was not an issue in *USTA II*, and was not properly noticed in the Commission's NPRM in this docket. GCI includes discussion of the item here as a rebuttal to ACS' submissions to the Commission. See also GCI Reply Comments at 22; GCI's November 12, 2004 *Ex Parte* Letter at 2.

¹⁸ *Id.* See GCI's November 12, 2004 *Ex Parte* Letter at 3-5 (responding to ACS' proposed test and why it lacks merit as to GCI's provision of services in the Anchorage market).

¹⁹ *Triennial Review Order* at ¶ 115.

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.”²⁰ These Commission findings are certainly applicable in Anchorage where, without access to the loop, GCI would lose the ability to access more than two-thirds of its current customers—immediately dropping GCI’s retail market share far below the 30 percent threshold that ACS claims to be the relevant measure.

Critically, a retail market share test also suffers from operating as an effective “cap” on competition, permitting a new entrant to be successful only to a certain point, then immediately eliminating its ability to capture new customers, or even retain the ones it has on unbundled loops once the designated threshold is exceeded. While some level of retail market share may be indicative of the need for retail rate deregulation and even shared carrier-of-last-resort requirements (depending on the circumstances)—both of which GCI has advocated in its local service markets, it does not substantiate the need to eliminate access to the wholesale input that is necessary for the competitor to provide the retail service.²¹

Recently, the Independent Telephone and Telecommunications Alliance (“ITTA”) also proposed a market share test but one that reaches even further, in some respects, than ACS’ proposal. Specifically, ITTA proposes that the FCC should make a finding of non-impairment with respect to transport or loops of DS-1 or lower capacity in any market in which competitors, individually or together, hold at least a 35% share of the local market share.²² As in the case of ACS’ proposed market share test, ITTA’s test is similarly devoid of any evidence or rationale to support its adoption by the Commission. Without any reliance on record evidence, the market share percentage of 35 is wholly arbitrary. In an effort to ensure its trigger is met, ITTA takes its test one step further, and proposes that the market share of more than one CLEC may be aggregated together to arrive at ITTA’s randomly selected percentage. Once triggered, unbundled access to transport or loops—the very inputs necessary to build the market share being used as the trigger—would cease to be available to all CLECs in a particular market. This is the same kind of circular, market share test that fails to take into account the availability of wholesale inputs necessary to provide the retail service the competitor “seeks to offer.” There is simply no rational basis upon which the FCC could adopt this test to assess impairment. As such, ITTA’s proposal also must be rejected.

²⁰ *Id.*

²¹ GCI notes that in ACS’ most recent filing, it raises, once again, GCI’s build-out of facilities-based services to two neighborhoods on the Elmendorf Air Force Base (EAFB) in Anchorage. ACS December 3, 2004 *Ex Parte*, Presentation at 3. ACS’ representations on this point are simply false. First, although ACS attempts to portray this service as some meaningful indicator of GCI market share in Anchorage, in reality, GCI’s services to these communities represent less than one-half of one percent of the total Anchorage market. *See* GCI Reply Comments at 29. Second, ACS further misleads the FCC by suggesting that it “has no ability to compete for those customers unless GCI agrees to give ACS access to GCI’s loop facilities serving those customers”. ACS December 3, 2004 *Ex Parte*, Presentation at 3. This is false. GCI has offered ACS UNEs (including multi-hosting) at these two subdivisions on the same rates, terms and conditions that ACS provides them to GCI. GCI Reply Comments at 29. To date, ACS has not availed itself of this service arrangement.

²² *Ex Parte* Letter, dated November 29, 2004, from Karen Brinkmann, Latham & Watkins, Counsel to ITTA, to Marlene H. Dortch, Secretary, FCC, at 3.

Any Line Count Test Must Not Include Inaccessible Lines. If the FCC elects to adopt an impairment test for any UNE that includes a line number count, it is critical that the number of lines being counted in that test do not include loops that are inaccessible to competitors because of IDLCs or non-multihostable concentration devices. For example, if the Commission adopted a line density test for DS3 loops that counts the number of business lines from a particular central office to a specific location or a transport test that also relies on the number of business lines to determine whether impairment exists, this obligation must not be assessed based on loops that are inaccessible at the central office. Thus, any “density” test must expressly exclude loops that cannot be unbundled at the ILEC central office.

Assessment of Impairment for DS1 Loops That is Based on Wholesale Providers and Self-Provisioners Must Include Certain Criteria. GCI’s position with respect to DS1 loops remains that there is sufficient evidence before the FCC upon which the FCC should continue to make a national finding of impairment.²³ If the FCC should, however, adopt an impairment test in this proceeding relevant to the provision of DS1 loops, GCI makes the following recommendations. First, to the extent the FCC includes in its test the presence of a wholesale provider or providers serving a particular customer premises, the FCC must ensure that the wholesale provider is unaffiliated with the ILEC (or with one another in the case of a two wholesale provider test) and is not simply reselling ILEC services. Consistent with the FCC’s definition of “wholesale provider” in the *Triennial Review Order*, the Commission should require that a wholesale provider must be able to offer “an equivalent wholesale loop product at a comparable level of capacity, quality, and reliability, have access to the entire multi-unit customer premises, and offer the specific type of high-capacity loop over their own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location....”²⁴ In the absence of these criteria and safeguards, the standard will not offer any real measure of whether a carrier would be impaired without access to the ILEC DS1 facilities in a specific building location.

Additionally, to the extent the FCC adopts a self-provisioner (or self-provisioners) component of a DS1 loop impairment test, GCI urges that, as provided in the *Triennial Review Order*, the self-provisioner must be a carrier (as opposed to an end-user), unaffiliated with the ILEC, and have existing facilities in place to provide the relevant loop capacity level.²⁵ Further, the FCC should specifically find that such facilities must currently be in use to deliver services. Facilities that are outdated or not in use do not provide a meaningful measure of impairment in terms of the current technological needs of business occupants, the technological and infrastructure capabilities in or near the building that allow for the provisioning of DS1 loops, any relevant rights-of-way requirements, and the policies of current building management to support CLECs that want to self-provide their own services. Self-provisioners that no longer use facilities may have had arrangements with prior management that were more conducive to non-ILEC facilities deployment within a building. Additionally, large, anchor tenants may have had

²³ See GCI Comments at 29; GCI Reply Comments at 27.

²⁴ *Triennial Review Order* at ¶ 337.

²⁵ *Triennial Review Order* at ¶ 333.

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leverage with prior or current building management to build-out their own facilities in a specific location that would not be available to a CLEC entrant. Rules governing rights-of-ways and other land use requirements by local government entities may also have changed since an existing self-provisioner entered the location with its own DS1 loops. As such, a self-provisioner criterion must specifically be limited to facilities currently in use in order to be a true representation of building conditions and local rules in order to show whether impairment as to DS1 loops exists.

In accordance with the Commission's rules, a copy of this letter is being filed in the above-captioned proceeding. If you have any questions, please contact the undersigned at (202) 457-8815.

Sincerely,

/s/

Lisa R. Youngers
Federal Regulatory Attorney

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