EX PARTE OR LATE FILED

HARRIS,
WILTSHIRE &
GRANNIS LLP

1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

DOCKET FILE COPY ORIGINAL

September 9, 2005

ORIGINAL

RECEIVED

SEP - 9 2005

Federal Communications Commission
Office of Secretary

Ex Parte

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

Re: *Qwest Petition for Forbearance in the Omaha MSA*, WC Docket No. 04-223

Dear Ms. Dortch:

On September 8, 2005, Tina Pidgeon, Vice President, Federal Relations, General Communication Inc. (GCI) and I met separately with Michelle Carey, Legal Adviser to the Chairman, and with Tom Navin, Chief, Wireline Competition Bureau, Julie Veach, Acting Chief, Competition Policy Division, WCB, Terry Natoli and Jeremy Miller regarding the above-captioned proceeding. The points we made are summarized in the attached. In addition, we stated that the wire center may not be an appropriate geography in small markets.

Sincerely,

John T. Nakahata
Counsel for General Communication Inc.

No. of Copies rec'd 0+1
List ABCDE

Ex Parte Presentation - Qwest Petition for Forbearance in the Omaha MSA
WC Docket No. 04-223
September 2005

I. The Commission should specify that standards for relief based on Omaha market characteristics are limited to factually indistinguishable markets.

- Inquiries regarding the state of competition in a particular service area are fact-specific to that market. These facts must be ascertained on a market-by-market basis.

- The indicia of "full implementation" under Section 10(d) will vary by individual market characteristics and market participants. In addition, in some markets there will have been no prior assessment of competition under Section 271.

- The Omaha case has not given the Commission an opportunity to develop a generally applicable standard particularly where customer acquisition has occurred via UNE-L. For this reason, there should be no ambiguity that the Order does not prejudge any forbearance issues in markets where UNE-loops are used or where the market is in transition from UNE-L to full-facilities based competition.

- The risk of overextending the Omaha facts is the loss of competition and investment in unrelated markets with wholly different opportunities for customer disruption, participants, service characteristics, and regulatory issues.

II. Retail Market Share alone cannot legally support forbearance from Section 251(c).

- Retail market share provides no assessment of the availability of alternative interconnection options (including collocations) or facilities, and is arbitrary.

- For example, if UNE access were denied upon reaching a retain market share threshold, then the very input necessary to build the market share being used as a trigger would cease to be available, and the entity would immediately fall below the threshold again.

- On this basis, the FCC rejected a market share test, finding that

  "[i]n 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." *TRO* ¶ 115.

- Reliance on retail market share is contrary to commission precedent that market share has never been an essential determinant of competition or market power. *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

- Relative retail market share may be indicative of retail rate flexibility and non-dominant treatment. These steps have been taken in Alaska. It may also be indicative of the need for shared carrier of last resort obligations.

III. A "self-provisioned" or "alternative" facilities test must be assessed based on facilities that are presently deployed and accessible for the delivery of telecommunications services. This assessment must be made on a market-by-market basis.

- Facilities that are technologically outdated or no longer in use are not viable alternatives.

- Access to facilities foreclosed by building access and rights-of-way impediments are not viable alternatives.

- Facilities provisioned by an end-user or an ILEC affiliate are not viable alternatives.

- Lines to the home that do not deliver telecommunications services are not viable alternatives until equipped to do so.

    - The FCC has found that "retrofitting" of cable infrastructure takes substantial investment toward modifications necessary to make cable plant hospitable for voice communications.

    - Most businesses are not passed by cable plant and even when retrofitted, typically does not provide an option to reach the enterprise market.

    - Electric plant passes every home and business but BPL is not a current delivery mechanism for voice beyond isolated trials.

- A sure sign of "fully implemented" is the ability for market participants to reach voluntary agreements on price and terms for network access.

IV. Interconnection under Section 251(a) is not a suitable replacement for interconnection under Section 251(c)(2) and collocation under Section 251(c)(6).

- Section 251(a) does not provide for collocation or direct exchange of traffic.

- Section 251(a) provides no incentives for the incumbent to reach reasonable terms for the exchange of traffic with a new entrant.

December 7, 2004

Tina M. Pidgeon
(202) 457-8812
tpidgeon@gci.com

EX PARTE – VIA ELECTRONIC FILING

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

Re: WC Docket No. 04-313; CC Docket No. 01-338
Written Ex Parte Presentation

Dear Ms. Dortch:

On behalf of GCI, I am writing to respond to the recent ACS *ex parte* filing wherein ACS renews its request for a market share test to deny access to the core bottleneck facility—DS0 loops. Neither "test" considers any of the sources of CLEC impairment that continue to require ILECs to provide access to basic local loops. ACS has formulated a set of requirements, which, if imposed, would eliminate its principal competitor's ability to compete, by denying GCI access to many of its existing customers. This would be a disastrous outcome in a state where facilities-based competition is being implemented exactly as envisioned under the 1996 Act.

There has been little dispute about national DS-0 loop impairment. Not a single carrier took appeal of the Commission's national finding of impairment for DS-0 loops in the *Triennial Review Order*.[1] For that reason, the Commission's *TRO NPRM* does not even contemplate revisiting this finding, nor is any further action required to satisfy the Court's remand. As an initial matter, it bears noting that a further notice concerning these issues is the only avenue available consistent with administrative law requirements. The Commission lacks authority to change its rules as they relate to DS-0 loops because it has not provided sufficient notice of its intent to make such a change.[2] In the *Order and Notice of Proposed Rulemaking* released on August 20, 2004, the Commission expressly limited itself to changes "to the Commission's unbundling framework that are

[1] ACS did not appeal the national finding of impairment for DS-0 loops, and further, it did not even challenge GCI's impairment with respect to DS-1 loops in the state proceeding to review UNEs.

[2] *See Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (describing notice requirement of the Administrative Procedure Act).

necessary, *given the guidance of the* USTA II *court*."[3] In other words, the Commission gave notice that it would consider only rules that relate to matters subject to *USTA II*. The *USTA II* court did not consider or address the Commission's nationwide finding of impairment for DS-0 loops,[4] which means that the Commission did not provide any notice of its intention to consider related rules in its *NPRM*. Likewise, the Commission cannot properly consider changes to its rules regarding DS-0 loops as a result of the petitions for reconsideration filed in response to the August 2003 *Triennial Review Order*. None of those petitions for reconsideration addressed DS-0 loops, which means (again) that interested parties were not on notice that the Commission intended to address such rules.[5] Moreover, the relief requested by ACS (and apparently echoed at this late date by Qwest) cannot be justified as a "logical outgrowth" in the absence of an initial valid notice.[6]

Nevertheless, ACS asks this Commission to grant it relief from all unbundling obligations on the grounds that GCI's retail market share and its nascent cable telephony deployment somehow demonstrate that GCI no longer will be impaired with access to UNEs, even DS-0 loops. While GCI does not dispute that the issue of determining when a CLEC is no longer impaired without basic loop access at TELRIC rates is one that deserves further review, ACS' proposal for the immediate adoption of a flash-cut elimination does not serve as any basis for assessment of real market conditions with respect to loop availability.

First, for all the reasons set forth in GCI's Reply Comments (at 8-19) and *ex parte* filing dated November 12, 2004 (at 2-6), the ACS test is effectively a *retail market share test*. This test was rightly rejected by the Commission in the *TRO*,[7] and ACS has provided no rationale for the Commission to revisit that final decision. Retail market share—particularly when divorced from any real assessment of the availability alternative facilities capable of providing the services a carrier seeks to offer—provides absolutely no indication of whether or not a competitor is impaired in the defined market for a particular network element. It provides no evidence of the availability of alternative facilities for any UNE. And even if retail market share did provide some indication of the need to investigate further the conditions in a particular market, ACS has provided absolutely no economic analysis or other factual basis to justify the selection of 30 percent as the appropriate threshold for denying DS-0 UNE-L competition. Even setting aside for the moment the structural problems with the test, this figure is nothing short of arbitrary.

Second, implementation of the ACS test would conflict with existing FCC precedent. Under the ACS test, any "distribution facilities" could trigger the end of access to any UNEs, including DS-0 loops. Distribution facilities is left undefined, and thus, unacceptably broad.

---

3 *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16,783, 16,788 ¶ 9 (2004) (emphasis added).

4 *See USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

5 *See Sprint Corp.*, 315 F.3d at 374-77.

6 *Id.* at 376.

7 *TRO* at ¶ 114.

Certainly not just *any* distribution facilities merit denial of access to the quintessential bottleneck element. But under ACS' test, cable plant that is not retrofitted for local exchange service would apparently suit its purposes to drive GCI from the Anchorage market while its cable telephony deployment is nascent.[8] Wireless service would also qualify, in conflict with the FCC's recent conclusion that it has not developed into a substitute for wireline service.[9]

Nor does the record support ACS' proposed definition of the market as the "ILEC's local exchange serving area." The ACS test does not admit of any distinction among geographic or product markets, proposing a test that does not consider how impairment should be assessed outside of GCI's cable footprint. It certainly ignores the long-held precedent that the relevant service market is assessed on a point-by-point basis,[10] which individual points may be aggregated into a larger geographic area for analytical purposes where they "exhibit sufficiently similar competitive characteristics."[11] Even at such time that all of GCI's cable plant in Anchorage is equipped for cable telephony, these facilities typically do not reach business customers, and based on FCC precedent, these points cannot be defined into a single market. But the ACS scheme would simply wipe out all loop access, regardless of where facilities had been or could be deployed and regardless of the features of separate markets. This approach simply ignores all the classic hallmarks of loop impairment, including building access and rights-of-way issues, upon which the Commission based its unchallenged determination of national impairment for DS-0 loops.[12]

GCI also understands that Qwest has just recently proposed a similar test for unbundling relief, in response to unique situations in two markets: Omaha, Nebraska, where it faces competition from a cable entrant primarily using its cable facilities, and Terry, Montana, where a rural LEC has built edge out into a neighboring Qwest territory. Each of these situations presents different fact sets, none of which provide any common thread that reveals a suitable, uniform rule to assess whether any particular situation calls for unbundling relief. Undoubtedly, these issues deserve full consideration in the context of the unique fact-based situation in particular markets, as they are in the ongoing proceedings pending concerning these two particular markets (including a forbearance proceeding initiated by Qwest, WC Docket No. 04-223). As for a broader view of the issue, it is plain that the contours of this matter can only be fleshed out in the course of a further notice.

The stake for getting this wrong is too high, both for residential and small business users and facilities-based competitors, and ILECs have an overwhelming incentive to get it wrong—

---

8 This result would be directly contrary to the FCC's prior, unchallenged determination that "retrofitting cable infrastructure to support cable telephony and broadband services requires substantial investment and modification." *TRO* at ¶ 229. There is no record evidence disputing this fact; to the contrary, GCI has provided extensive support.

9 *AT&T Wireless/Cingular Merger Order*, WT Docket No. 04-70, *Memorandum Opinion and Order*, FCC 04-255 (rel. Oct. 26, 2005) ¶¶ 239-42.

10 *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, 15793 (¶ 64) (1997).

11 *Id.* at 15794 (¶ 66).

12 *TRO* at ¶ 237-46.

premature termination of loop access disrupts customer relationships and ruins business plans for further facilities deployment. [13] GCI has made significant competitive in-roads with its facilities-based (switch and transport), UNE-L strategy. We serve close to 50 percent of the Anchorage market, 26 percent of the Fairbanks market, and 30 percent of the Juneau market. Of this customer base—split fairly evenly between residential and business customers, GCI currently serves over 90 percent of its customers in Anchorage and over 95 percent of GCI's customers in Fairbanks and Juneau over some leased ACS loop facility—primarily DS-0 loops.[14] Suffice it to say, denial of access to DS-0 loops under the ACS "test" would significantly disrupt, and perhaps eliminate, GCI's continued ability to provide local services.[15] While that result would be entirely consistent with an incumbent's strategy to foreclose the further development of a competitor's transition from incumbent loop facilities, it is not the result dictated by any reading of the impairment standard, the *USTA II* remand, or any record evidence.

Sincerely,

/s/
Tina M. Pidgeon
Vice President, Federal Regulatory Affairs

---

13 Competitors have every incentive to leave the incumbent network as quickly as possible. The transaction costs of relying on a primary competitor for wholesale inputs are too high, and the benefits of controlling one's own method of service delivery are too great.

14 This figure also includes a very limited amount of access lines served via wholesale.

15 GCI has a voluntarily negotiated interconnection agreement with ACS for loop access in each of the Fairbanks and Juneau markets through January 1, 2008. These voluntary agreements—arising from the settlement of numerous issues—do not provide any insulation for the Anchorage market (the largest in the state), nor do they provide any independent evidence that is probative of impairment.