

B. Intermodal Competition Is Robust in Anchorage

The scope of retail competition in the Anchorage market continues to expand and diversify.⁷⁵ The Chair of the Regulatory Commission of Alaska (“RCA”) recently commented in a proceeding deliberating new local exchange competitive regulations in Alaska, that one of the reasons the competitive regulations were being written was to address the pressures on ILECs and CLECs that are coming from wireless and Voice-over-Internet Protocol (“VoIP”). According to Chairman Giard, “the world is now competition between internet conversations and wireless conversations, and the pressure is going to be on the traditional ILEC and CLEC to keep those rates down because people are just going to give up their lines.”⁷⁶

Today, customers can obtain effective substitutes to ILEC service using commercial wireless radio services (“CMRS”), broadband-based VoIP services and other technologies. In addition to fierce wireline competition, wireless carriers are also providing increasing retail competition in the Anchorage market. Dobson Cellular, Alaska Digitel, and ACS Wireless each provide wireless service in Anchorage. The RCA has granted Alaska Digitel eligible telecommunications carrier (“ETC”) status in Anchorage, and Dobson Cellular’s ETC petition currently remains pending. Both ACS and GCI have experienced line loss due to wireless competition.⁷⁷ Although it is impossible to say with certainty how many customers use wireless telephony as a substitute for wireline service, as described in the Blessing Statement,

⁷⁵ The D.C. Circuit has instructed the Commission to consider intermodal competition as a significant factor in the unbundling context. *USTA v. FCC*, 359 F.3d 554, 572-583 (D.C. Cir. 2004) (“*USTA IP*”). Additionally, in the context of Verizon’s petition for forbearance from Section 271 obligations, the Commission looked at intermodal competition and the numerous emerging competitors. *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 USC § 160(c)*, 19 FCC Rcd 21496, FCC 04-254, at ¶ 22 (Oct. 27, 2004)

⁷⁶ RCA Public Meeting, Volume I, R-03-03, Chairman Giard at 71 (June 8, 2005).

⁷⁷ See, e.g., GCI Q1 2005 Earning Call Transcript at 11 (May 5, 2005), attached hereto as Exhibit F (statement of Ron Duncan).

there is a significant number of wireless connections serving customers in Anchorage.⁷⁸

Additionally, industry analysts project Wireless and VoIP competition to grow significantly in the coming years.⁷⁹

C. Resellers Also Provide Competitive Choice in Anchorage

In addition to traditional facilities-based competition and intermodal competition, CLECs in Anchorage provide customers a choice of local exchange carriers through resale under Section 251(c)(4). GCI, AT&T and TelAlaska each serve customers through resale. By ACS's estimate, approximately 11,000 lines in Anchorage are served using resale.⁸⁰ ACS is not requesting forbearance from the resale obligations under Section 251(c)(4). Therefore, resale competition would not be impacted by a grant of forbearance, and competitive entry will remain available under the resale provisions.

III. THE APPLICABLE LEGAL STANDARD FOR FORBEARANCE UNDER SECTION 10 OF THE COMMUNICATIONS ACT

ACS seeks forbearance relief from Section 251(c)(3) and the related pricing provisions of Section 252(d)(1) of the Act throughout ACS's study area.⁸¹ If the Commission determines that forbearance from the requirement to provide UNEs under Section 251(c)(3) is warranted, then it should also forbear from the UNE pricing standards of Section 252(d)(1). Section 10(a) of the Act provides that the Commission "shall" forbear from applying any provision of the Act or regulation implementing the Act to a telecommunications carrier in a particular geographic market if the Commission determines:

⁷⁸ Blessing Statement, at 13.

⁷⁹ *Id.* at 12.

⁸⁰ Meade Statement at ¶ 9.

⁸¹ ACS also incorporates by reference the UNE requirements and pricing provisions set forth in the Commission's rules adopted pursuant to Sections 251(c)(3) and 252(d)(1). *See, e.g.*, 47 C.F.R. §§ 51.307-51.321, 51.333.

- (1) enforcement of that regulation or statutory provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just, reasonable, and not unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary to protect consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁸²

Additionally, Section 10(d), requires that the Commission determine that Section 251(c) is “fully implemented” before granting forbearance of any part of that section.⁸³ These prongs are described in further detail below. As an initial matter, forbearance from UNE obligations is the appropriate relief for ACS because, due to the small size of the Anchorage market, the specific tests for unbundling relief adopted by the Commission in its Part 51 rules cannot be met.

A. Section 10 Forbearance Is The Appropriate Form of Relief for ACS In Anchorage

Section 10 was passed to facilitate the 1996 Act’s pro-competitive and deregulatory purposes.⁸⁴ As the House Committee drafting the Telecommunications Act of 1996 explained, “[g]iven that the purpose of this legislation is to shift monopoly markets to competition as quickly as possible, the Committee anticipates this forbearance authority will be a

⁸² 47 U.S.C. §160(a) (2000); see also *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecomm. Servs.*, 17 FCC Rcd 27000, at ¶ 12 (2002).

⁸³ 47 U.S.C. §160(d). The Commission may forbear from all or part of a provision of the Act, including Section 251(c). See, e.g. *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 USC § 160(c)*, 19 FCC Rcd 21496, FCC 04-254, at ¶ 37 (Oct. 27, 2004) (granting forbearance from Section 271(c)(1)(B) of the Act).

⁸⁴ See *Cellular Telecomm. & Internet Assoc. v. FCC*, 330 F.3d 502, 504-05 (D.C. Cir. 2003) (“*Cellular Telecomm*”); *In the Matter of Petition for Forbearance of Iowa Telecomm. Servs., Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. §160(C) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the Calls Order or a Forward Looking Cost Study*, 17 FCC Rcd 24319, at ¶ 6 (2002) (relying on the policy statement in the Telecommunications Act when interpreting the standard for forbearance).

useful tool in ending unnecessary regulation.”⁸⁵ The Commission has stated “[i]n determining when to forbear from applying specific statutory or regulatory provisions, our goal, consistent with sound public policy and Congressional intent, is to deregulate wherever the operation of competitive market forces is capable of rendering regulation unnecessary.”⁸⁶

The Court of Appeals for the District of Columbia applied the principle of regulatory restraint to the unbundling context when it declared that the imposition of unbundling requirements is not “an unqualified good.”⁸⁷ The court ruled, and the Commission since has conceded, that mandatory unbundling should be used as a limited tool, not a permanent handicap upon ILECs.⁸⁸

Forbearance from UNE obligations is appropriate relief for ACS in the Anchorage market. A market the size of Anchorage could never meet the thresholds for relief adopted in the Triennial Review Order and Triennial Review Remand Order. However, the Commission foresaw that there would be markets where the relief tests could not be met, but where relief from unbundling obligations was warranted nonetheless. In its Triennial Review Remand Order, the Commission encouraged ILECs to file for forbearance from the unbundling rules where they believe that the aims of Section 251(c)(3) have been “fully implemented” and the other requirements for forbearance have been met, even where the specific tests in the Triennial

⁸⁵ H. REPT. NO. 104-204, at 89 (1995).

⁸⁶ *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, WT Docket No. 98-100, FCC 00-311, at ¶13 (2000).

⁸⁷ *United States Telecom Assoc. v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (“*USTA I*”) (quoting *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 428-29 (1999) (Breyer, J. concurring in part and dissenting in part)), *cert denied sub nom. Worldcom, Inc. v. U.S. Telecom Assoc.*, 123 S.Ct. 1571 (2003).

⁸⁸ *USTA I*, 290 F.3d at 429 (“mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource . . . the Commission ‘cannot, consistent with the statute, blind itself to the availability of elements outside of the incumbent’s network.’”).

Review Remand Order cannot be met.⁸⁹ The FCC noted that one ILEC, Qwest, has already sought such relief and it encouraged other ILECs to file similar petitions where appropriate.⁹⁰ Qwest's petition has since been granted in part.⁹¹ As demonstrated in this Petition, the nature of the competition in Anchorage is more than sufficient to warrant forbearance from UNE obligations.

B. Enforcement of Section 251(c)(3) and the Related Pricing Standards of Section 252(d)(1) Are Not Necessary to Ensure that the Charges, Practices, Classifications, or Regulations by, for, or in Connection with that Telecommunications Carrier or Telecommunications Service Are Just, Reasonable, and Not Unreasonably Discriminatory

The first prong of the Section 10 analysis requires the Commission to determine whether continuing to subject ACS to Section 251(c)(3) bundling obligations and the related Section 252(d)(1) pricing standards is "necessary to ensure that the charges, practices, classifications, or regulations" of the relevant carrier "are just and reasonable and are not unjustly or unreasonably discriminatory."⁹² "Necessary" in this context means that there must be a "strong connection" between the regulation and just and reasonable pricing.⁹³ "'Necessary' certainly cannot plainly mean 'absolutely required' or 'indispensable.'"⁹⁴

According to the Commission, "competition is the most effective means of ensuring" this prong is met.⁹⁵ The Commission has repeatedly found that competition is a

⁸⁹ *Triennial Review Remand Order* ¶ 39.

⁹⁰ *Id.* See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-233 (filed Jun. 21, 2004).

⁹¹ See FCC News, *FCC Grants Qwest Forbearance Relief in Omaha MSA* (rel. Sept. 16, 2005).

⁹² 47 U.S.C. §160(a)(1).

⁹³ See *Cellular Telecomm.*, 330 F.3d at 512.

⁹⁴ *Id.* at 503.

⁹⁵ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 USC § 160(c)*, 19 FCC Rcd 21496, FCC 04-254, at ¶ 24 (Oct. 27, 2004) ("*Verizon Petition*").

deterrent to unjust and unreasonable pricing and that a carrier without market power cannot succeed in charging unjust or unreasonable rates.⁹⁶

In granting the Bell Operating Companies (“BOCs”) forbearance from Section 271 unbundling obligations for broadband elements, the Commission has emphasized the importance of competition in the *retail* broadband market. The FCC concluded that competition in the retail broadband market will pressure the BOCs to tailor their wholesale offerings to grow their share of the broadband market and thus offer customers reasonable rates.⁹⁷ The FCC found it was appropriate “to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market.”⁹⁸ The Commission examined intermodal competition and the emerging competitors at the retail level,⁹⁹ and determined that because both the retail and wholesale broadband markets were developing with new services and deployment of facilities, Section 271 unbundling was only modestly contributing to ensuring just and reasonable rates at the retail level. Without the unbundling requirements, there would be greater competitive pressure on all providers.¹⁰⁰ The Commission also noted the effects of unbundling

⁹⁶ See, e.g., *In the Matter of Petition of U.S. West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 21086, at ¶ 31 (1999) (“We find that competition is the most effective means of ensuring that the charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory”) (*U.S. West Order*); *In the Matter of Review of Regulatory Requirements for ILEC Broadband Telecomm. Servs.*, 17 FCC Rcd 27000, 27022 (2002) (Joint Statement of Commissioner Michael J. Copps and Commissioner Jonathan Adelstein, Concurring) (“In previous orders forbearing from tariff requirements, the Commission has rested its decision on its conclusion that carriers lacking market power could not successfully charge rates that violate the Communications Act”) (“*Review of Regulatory Requirements*”).

⁹⁷ *Verizon Petition* at ¶ 26.

⁹⁸ *Id.* at ¶ 21.

⁹⁹ *Id.* at ¶ 22.

¹⁰⁰ *Id.* at ¶ 21.

as a disincentive on ILEC investment.¹⁰¹ The Commission found that the “beneficial effect of unbundling [was] small given the particular characteristics of [that] *retail* market.”¹⁰²

Further, in determining whether the first prong of the forbearance standard has been met, the market need not be fully or perfectly competitive to warrant deregulation. The Commission has found Section 10(a)(1) to be satisfied where a market, although not fully competitive, had “sufficient competition” and where the Commission had reason to believe “that the strength of competition would increase in the near future.”¹⁰³ In fact, the Commission has based numerous deregulatory measures on imperfect competition.¹⁰⁴ Moreover, when the FCC declared AT&T to be non-dominant in 1995, AT&T still had 60% of the long-distance market.¹⁰⁵

In the context of forbearance from broadband unbundling requirements, the FCC rejected the CLECs’ argument that a fully competitive wholesale market is a mandatory precursor to finding that section 10(a)(1) is satisfied, regardless of the state of intermodal competition in the retail market and the effects on ILEC investment. The Commission concluded that “forbearance need not await the development of a fully competitive market when the section 10 criteria are otherwise satisfied.”¹⁰⁶ The Commission noted that if a fully

¹⁰¹ *Id.*

¹⁰² *Id.* (emphasis added).

¹⁰³ *In the Matter of Personal Communications Indus. Ass’n’s Broadband Personal Communications Servs. Alliance’s Petition for Forbearance for Broadband Personal Communication Servs.*, 13 FCC Rcd 16857, FCC 98-134, at ¶ 82 (1998) (“PCIA Order”).

¹⁰⁴ *See, e.g., Triennial Review Order* at ¶ 259 (finding no impairment with respect to the high frequency portion of the loop (HFPL) even though the “nascency of local competition and the lack of viable alternatives . . . have not been completely reversed . . .”); *WorldCom v. FCC*, 238 F.3d 449, 459, 460 (upholding the FCC’s decision to “rely upon an admittedly imperfect measure of competition;” “the fact that the FCC did not engage in the thorough competition analysis common in non-dominance proceedings does not render the FCC’s action arbitrary and capricious.”).

¹⁰⁵ *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 at ¶ 68 (1995).

¹⁰⁶ *Verizon Petition* at ¶ 28.

competitive wholesale market were required, “no amount of intermodal retail competition or investment disincentives could ever warrant forbearance.”¹⁰⁷ Due to the existence of facilities-based competition in the Anchorage local exchange market, this reasoning is equally applicable to the case at hand. Thus, in conducting its analysis of whether this prong of the forbearance standard is met in Anchorage, the Commission should use analysis similar to that in the Section 271 broadband forbearance case.

C. Enforcement of Sections 251(c)(3) and 252(d)(2) Are Not Necessary to Protect Consumers

The analysis for the second prong of the test is virtually identical to the first prong.¹⁰⁸ In granting forbearance from broadband unbundling, the Commission concluded that because the BOCs had limited competitive advantages with regard to the broadband elements, the unbundling obligations were unnecessary for the protection of consumers.¹⁰⁹ Moreover, the Commission has determined that market forces promote more efficient incentives to invest in facilities, thereby benefiting consumers with new and better services and lower rates.¹¹⁰ Even

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., *Review of Regulatory Requirements* at ¶ 24 (“For reasons similar to those that persuade us that tariff regulation is not necessary within the meaning of section 10(a)(1), we also conclude that tariff regulation is not necessary for the protection of consumers.”); *In the Matter of Petition of U.S. West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 21086, ¶ 47 (1999) (finding forbearance appropriate under Section 10(a)(2) for the same reasons that justified it under 10(a)(1)); *In the Matter of 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecomm. Carriers*, 15 FCC Rcd 9219, ¶ 125 (1999). (citing the same reasons invoked under its Section 10(a)(1) analysis when analyzing Section 10(a)(2)); *In the Matter of Amendment of the Commission’s Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Servs.*, 14 FCC Rcd. 11343, at ¶ 14 (1999); *In the Matter of Cellular Telecomm. Indus. Ass’n’s Petition for Forbearance from Commercial Mobile Radio Servs. Number Portability Obligations*, 14 FCC Rcd. 3092, at ¶ 22 (1999).

¹⁰⁹ *Verizon Petition* at ¶ 30.

¹¹⁰ *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum and Report, FCC 99-108, at ¶ 11 (1999) (“By definition, a new service expands the range of service options available to consumers. Because new services may benefit some customers, and existing customers may continue to purchase existing services if they find the new

when new services are designed for a subset of consumers, the Commission has found competition and consumer welfare on the whole have been enhanced.¹¹¹

D. Forbearance from Applying the Unbundling Requirements to ACS's Network Is Consistent with the Public Interest

Under the third prong of the Act's Section 10 analysis, the Commission must determine whether forbearance from applying Section 251(c)(3) unbundling requirements and Section 251(d)(1) pricing standards is "consistent with the public interest."¹¹² In making that public interest determination, the Commission must consider whether forbearance will "promote competitive market conditions, including the extent such forbearance will enhance competition among providers of telecommunications services."¹¹³ A finding that forbearance will promote competition is sufficient to satisfy the public interest prong.¹¹⁴

E. "Full Implementation" of Section 251(c)(3)

Section 10 of the Act permits the FCC to forbear from Section 251(c), including the unbundling requirements of Section 251(c)(3), when it finds that section to have been "fully implemented." To date, the Commission has not interpreted "fully implemented" within the context of Section 251(c). However, the FCC should find Section 251(c)(3) "fully implemented" if the pro-competitive goals of the unbundling requirements are fulfilled and if competitors no longer would be impaired in the absence of UNEs.

In this analysis, the Commission should consider the unique characteristics of the Anchorage market. As discussed above, the Commission anticipated that there would be some

service rate structure or rate level unattractive . . ." the second prong of the forbearance request was met).

¹¹¹ *Id.*

¹¹² 47 U.S.C. §160(a).

¹¹³ 47 U.S.C. § 160(b).

¹¹⁴ *Id.*

markets where the competitive thresholds in the Triennial Review and Triennial Review Remand Orders could not be met, but where forbearance may be appropriate. Thus, the test for “full implementation” of the unbundling requirements of Section 251(c)(3) should not be the same as the threshold requirements for a finding of non-impairment adopted in those Orders. The current rules by design provide relief from unbundling only in markets with significantly larger concentrations of business lines than can be found in any Anchorage wire center. Moreover, for relief from mass market loop unbundling, the most significant area of relief ACS is seeking, the Commission has *not yet specified* a test for non-impairment, and for DS-1 loops, the rules establish a minimum threshold of 60,000 business lines in a wire center¹¹⁵—a level of concentration that does not exist in Anchorage.¹¹⁶ Thus, limiting forbearance to markets that meet the tests set forth in the current rules would ignore the realities of smaller markets where forbearance is the only way for the purposes of the Act to be fulfilled. The Commission should determine whether competition *in the Anchorage market* would be impaired if the requested relief is granted, regardless of the size of the wire centers or the number of collocated competitors in the market.

At least one aspect of the Triennial Review Remand Order *is* relevant to the present analysis. The Commission clarified that in assessing impairment, the FCC presumes a “reasonably efficient competitor.”¹¹⁷ Specifically, when evaluating whether lack of access to an ILEC network element “poses a barrier or barriers to entry . . . that are unlikely to make entry into a market uneconomic,” the Commission considers whether entry is economic by a

¹¹⁵ *Triennial Review Remand Order* at ¶¶ 5, 146.

¹¹⁶ *See Meade Statement* at ¶ 5. By ACS’s estimate, there are only about 86,000 business lines in all of Anchorage.

¹¹⁷ *Triennial Review Remand Order* at ¶¶ 5, 24-28.

hypothetical competitor acting reasonably efficiently, using reasonably efficient technology.¹¹⁸

The FCC declined to make a market-specific impairment evaluation, but instead relied heavily on generalized tests, based on inferences that could be drawn from a hypothetical market.¹¹⁹

Because ACS is seeking forbearance relief only from the unbundling requirements of Section 251(c)(3), the Commission must consider only whether this subsection has been fully implemented. The narrow relief that ACS requests does not warrant an examination of the entirety of Section 251(c). The Commission should assess only whether the unbundling requirements have been fully implemented because these are the only requirements from which ACS seeks forbearance. ACS does not seek forbearance from the other 251(c) requirements—ACS will continue to fulfill its resale, interconnection and number portability obligations, for example. This application of the “fully implemented” analysis is consistent with the language of the Triennial Review Remand Order, which notes that ILECs may seek forbearance from unbundling rules in specific geographic markets “where they believe the aims of *section 251(c)(3)* have been ‘fully implemented’ and the other requirements for forbearance have been met.”¹²⁰

IV. ACS’S FORBEARANCE REQUEST MEETS THE STATUTORY CRITERIA SET FORTH IN SECTION 10 OF THE ACT

A. Definition of Relevant Geographic Market for Forbearance

The geographic market in which ACS seeks forbearance from Section 251(c)(3) and the related pricing provision of Section 252(d)(1) is the Anchorage LEC study area. The ACS Anchorage study area consists of nearly the same area as the Anchorage urban metropolitan

¹¹⁸ *Id.* at ¶ 26.

¹¹⁹ *Id.* at ¶ 41-45.

¹²⁰ *Id.* at ¶ 39 (emphasis added).

area.¹²¹ Thus, regulatory boundaries in this case closely follow geopolitical boundaries. The Anchorage study area served by ACS is fairly uniform in population density, topography, and development, and ACS and GCI have deployed their copper and cable facilities, respectively, throughout the area.

In considering whether a carrier possesses market power, the FCC has defined the relevant geographic market as “an area in which all customers in that area will likely face the same competitive alternatives.”¹²² The Anchorage LEC study area is the appropriate geographic market under this standard. All areas of the Anchorage study area are equally competitive and are subject to uniform retail rates.¹²³ Based on GCI’s statements regarding its facilities, GCI’s distribution of its fiber and cable lines largely mirrors the distribution of ACS’s facilities in the study area as a whole.¹²⁴ Most customers in virtually all parts of the study area have a choice of at least two facilities-based wireline competitors, ACS and GCI, in addition to a variety of intermodal competitors. Some exceptions exist, such as those buildings where GCI has an exclusive right of access as the sole wireline provider, and customers do not have the choice of using ACS’s local exchange services. For these reasons, forbearance is merited throughout the ACS Anchorage study area.

GCI’s cable plant serves close to the entire Anchorage study area, and GCI is collocated in 100 percent of ACS’s central office wire centers, providing GCI with the ability to serve nearly all of the customers in the Anchorage market using its own switched telephony

¹²¹ See ACS Anchorage Study Area Map; Meade Statement at ¶ 3; Bowman Statement at ¶ 3.

¹²² *In the Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation to Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Red 19985, 20016-17, at ¶ 54 (1997).

¹²³ See Meade Statement at ¶¶ 2, 3.

¹²⁴ See Bowman Statement at ¶ 12; *GCI Data Response* at 7, 8, Exhibit GCI-7, Exhibit GCI-8.

network.¹²⁵ GCI serves the entire customer base from a single class 5E switch.¹²⁶ As described above, GCI also has extensive fiber facilities. As stated by former FCC Chief Economist, Howard Shelanski,

the Anchorage Study Area represents a geographic market in which GCI and ACS meaningfully compete for the overwhelming majority of customers. It comprises a market in which neither company can unilaterally raise prices in a sustained way without losing market share to the other.¹²⁷

A smaller geographic market definition would be inappropriate.¹²⁸ For instance, a geographic market definition that groups customers into “markets” according to the ILEC wire center with which their service is associated would give competitors the incentive to limit its collocation to certain of the ILEC’s wire centers in order to avoid crossing the threshold for impairment.¹²⁹ Indeed, the Commission has recognized that collocation underestimates the presence of competitors that have wholly bypassed the ILEC’s facilities.¹³⁰

Moreover, the RCA has established a single UNE loop rate and uniform retail rates for ACS’s entire study area. Thus, ACS cannot set different prices for different residential

¹²⁵ ACS Remand Comments at 4 (citing *The Future of Universal Service: Hearing Before The Communications Subcommittee of the Senate Committee on Commerce, Science and Transportation* (April 2, 2003) (testimony of Dana Tindall, Sr. Vice President, Legal, Regulatory & Gov’t Affairs, General Communication, Inc.), LEXIS Nexis Library, FNS File (“*Tindall Senate Testimony*”).

¹²⁶ ACS Remand Comments at 9.

¹²⁷ Shelanski Statement at ¶ 20.

¹²⁸ “The FCC has itself cautioned against artificially narrow market definitions. In the context of switching, the Commission stated that the market for local switching should not be defined as being so small ‘that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market.’ [citation omitted] The FCC’s admonition with respect to switching applies more generally and implies at a minimum that local exchange markets should not be defined in such a way that artificially severs areas that could economically be served from existing facilities.” Shelanski Statement at ¶ 15 (citing Triennial Review Order at ¶ 495).

¹²⁹ “[I]n the particular context of the Anchorage Study Area, narrowing the market definition to wire centers for UNE purposes would likely slow competition.” *Id.* at ¶ 17.

¹³⁰ *WorldCom v. FCC*, 238 F.3d at 462.

customers within the Anchorage study area, "so the competition ACS faces protects all Anchorage customers."¹³¹

As a CLEC, GCI is not required to report data on its wire centers or customer locations, and thus, ACS does not have access to this data. ACS requests that the Commission compel GCI to produce information regarding its network and customers to the extent the Commission determines that such information would be relevant to its determination of the level of competition in the Anchorage market.

B. Enforcement of Sections 251(c)(3) and 252(d)(1) Is Not Necessary to Ensure that ACS's Rates and Practices Are Just, Reasonable, and Not Unreasonably Discriminatory

Due to the extremely high levels of competition in the Anchorage local exchange market, unbundling requirements and TELRIC pricing provisions are unnecessary to ensure that ACS's rates and practices are just, reasonable and not unreasonably discriminatory. Further, the existence of extensive competitive facilities in the market ensures that there would be no barriers to entry should the requested relief be granted. Even if the Commission forbears from enforcing the obligations Sections 251(c)(3) and 252(d)(1), other provisions of the Act will obligate ACS to provide retail and wholesale services at just, reasonable, and non-discriminatory rates, and ACS has strong incentives to negotiate with GCI for continued UNE revenue and mutual access to customers.

1. Competitive Market Forces Will Ensure that ACS's Retail Rates and Practices Are Just and Reasonable and Not Unreasonably Discriminatory

In Anchorage, competition in the retail local exchange market is thriving. *Every* Anchorage customer, business and residential, has a choice of facilities-based providers. ACS's

¹³¹ Shelanski Statement at ¶ 14.

market share has fallen to less than a 50 percent share of the Anchorage local exchange and exchange access market.¹³² While GCI enjoys most of this market share, there is no evidence of barriers to entry for other CLECs and AT&T has maintained a steady market share of about 3% over the past 5 or more years.¹³³ At 52 percent, ACS's rate of line loss through 2004 is significantly higher than the national ILEC line loss over the same period.¹³⁴

The Commission has held that competitors will exert disciplinary effects in their markets when "they announce their intentions to commence operations, identify the services they intend to offer, and begin soliciting business."¹³⁵ In Anchorage, GCI has surpassed this standard by not merely soliciting business, but successfully winning over half of the local exchange customers in Anchorage. Further, the retail pricing of local exchange service and the aggressive marketing and advertising efforts of both GCI and ACS illustrate the high level of competition in the market.¹³⁶ Indeed, the level and nature of competition in Anchorage exceeds the level that the Commission based its deregulatory measures in its AT&T and PCIA decisions.¹³⁷ GCI agrees, in the RCA's proceeding to detariff competitive services, that markets can be deemed competitive even before facilities-based competition exists throughout the geographic area.¹³⁸

¹³² Meade Statement at ¶ 8. In the most recent Earnings Call, GCI estimated statewide that "[r]esidential customers represent about 61% of our lines [and] [b]usiness customers are approximately 36%." GCI Q2 2005 Earnings Call Transcript at 3 (statement of John M. Lowber).

¹³³ See Meade Statement at ¶¶ 9, 14.

¹³⁴ See *id.* at ¶ 8.

¹³⁵ PCIA Order at ¶ 22.

¹³⁶ See Blessing Statement at 4-5.

¹³⁷ See Section III(B), *supra*; PCIA Order at ¶ 82; *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 at ¶ 68 (1995).

¹³⁸ *In the Matter of Commission Review of the Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies, and Competition in Telecommunications*, GCI's Reply Comments, RCA Docket No. R-03-03 at 4 (May 19, 2005), attached hereto as Exhibit H.

With so much of the competition in Anchorage being facilities-based, GCI's and ACS's bargaining power have equalized. GCI is aggressively migrating its customers off of ACS's network and onto its own switched cable telephony network. Within two years or less, GCI expects to have ceased using ACS UNE loops. Moreover, any new entrant could get access to consumers from GCI as effectively as from ACS, but for the fact that GCI is not required to open its network to competitors.¹³⁹ Given GCI's substantial market share and extensive facilities, the regulatory asymmetry resulting from continued application of Section 251(c) is not sustainable or justifiable. Both intramodal and intermodal competition to ACS's local exchange services in the market have eliminated the need to continue regulation of UNE prices.¹⁴⁰

Furthermore, in examining the exchange access services market in 2000, the Commission ruled that the level of facilities-based competition in the Anchorage market precludes ACS from engaging in predatory practices to drive out competitors.¹⁴¹ The Commission granted ACS's predecessor, ATU Telecommunications, certain pricing and tariffing relief in the Anchorage market, finding, "given the level of competition that exists in the Anchorage market, the public interest could be better served by the conditional grant of the requested waiver, rather than strict adherence to the existing rules."¹⁴² The Commission stated, "as competition develops in the access market, pricing flexibility would be necessary to avoid the potential adverse consequences of applying rules designed for monopolistic conditions to

¹³⁹ As described below, ACS believes that granting forbearance would give GCI a greater incentive to permit access to its own network, upon request by another telecommunications carrier, because GCI and ACS would be on more even footing.

¹⁴⁰ Shelanski Statement at ¶ 24.

¹⁴¹ *ATU Telecommunications Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission's Rules*, CPD 98-40, Order, FCC 00-379, at ¶ 21 (2000) ("*ATU Order*").

¹⁴² *ATU Order* at ¶ 2.

competitive markets.”¹⁴³ Since the Commission made that finding in 2000, competition in the Anchorage market has significantly intensified, particularly through the use of alternative facilities, making Anchorage among the most competitive local exchange markets in the country.¹⁴⁴ GCI has even stated its strong belief that no markets in Alaska will return to monopoly status.¹⁴⁵

The Commission has recognized the D.C. Circuit’s admonition in *USTA II* that, in the unbundling context, the FCC may not ignore intermodal competition.¹⁴⁶ In addition to competition from GCI and other CLECs, the scope of competition continues to broaden in the Anchorage market. Wireless carriers are providing increasingly stiff competition for ACS as wireless services substitute for wireline services. The Commission has cited evidence that “[i]n some areas, wireless use has begun to erode wireline revenue due to ‘technology substitution,’ that is, the substitution of new technologies for existing ones.”¹⁴⁷ 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

¹⁴³ *Id.* at ¶ 17.

¹⁴⁴ Significantly, the Commission has deregulated pricing in markets with far less competition than the Anchorage market via its “phase II” pricing flexibility test. A “price cap” LEC may offer dedicated transport and special access services free from the FCC’s rate structure and price cap rules by showing that unaffiliated competitors have collocated in at least 50% of its wire centers within an MSA or have collocated in wire centers accounting for at least 65% of the LECs revenues from the relevant services in the MSA. *Access Charge Reform, Price Cap Performance Review for LECs*, FCC 99-206, at ¶ 25 (1999).

¹⁴⁵ *In the Matter of Commission Review of the Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies, and Competition in Telecommunications*, GCI’s Reply Comments, RCA Docket No. R-03-03 at 8 (May 19, 2005).

¹⁴⁶ *Verizon Petition* at ¶ 28.

¹⁴⁷ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Sixth Report, FCC 01-192, at 32 (2001) (citing evidence that, “[f]or some, wireless service is no longer a complement to wireline service but has become the preferred method of communication.”).

services that compete with local services.”¹⁴⁸ The Commission continued by finding that, where cable facilities are used for telephone services, “cable infrastructure serves as a replacement for loops.”¹⁴⁹ According to the FCC’s annual report on the current state of local competition, “The threat [to the phone companies] from cable is not theoretical,’ says Scott Cleland, CEO of Precursor, a research firm that serves institutional investors. ‘It is real, and it is devastating.’”¹⁵⁰

This substitution by intermodal services for wireline connections has added another dimension to the analysis.¹⁵¹ In addition to ACS losing half of the market to CLECs, ACS also has lost customers and minutes to non-traditional carriers.¹⁵² Accordingly, ACS’s market share is overstated since it does not reflect loss of minutes and lines to wireless and/or VoIP connections.¹⁵³

Furthermore, the RCA has found the retail local exchange market in Anchorage to be competitive and has adopted regulations under which ACS will be considered nondominant.¹⁵⁴ Therefore, the competitive nature of the market is sufficient to guard against ACS acting in an unreasonable or discriminatory fashion. Moreover, there is sufficient

¹⁴⁸ *Triennial Review Order* at ¶ 228.

¹⁴⁹ *Id.* at ¶ 229.

¹⁵⁰ See Pethokoukis, James. “War of the Wires.” U.S. News & World Report. Sept. 27, 2004. <<http://www.usnews.com/usnews/issue/040927/tech/27cable.htm>> (noting “that in Orange County, California, and Omaha, Cox [Cable] has a 40 percent market share for voice.”).

¹⁵¹ See Blessing Statement at 11-13.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *In the Matter of Commission Review of Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies and Competition in Telecommunications*, Order Adopting Regulations, RCA Docket No. R-03-03 (June 22, 2005); see Section II, n. 15, *supra*.

competition to indicate the strength of competition will continue to grow, and retail competition will be even more robust once unbundling is no longer mandatory.¹⁵⁵

As discussed in detail above, “competition is the most effective means of ensuring” that ACS’s rates and practices are just, reasonable, and not unreasonably discriminatory.¹⁵⁶ The substantial competition in the Anchorage local exchange retail market demonstrates this prong of the forbearance test has been satisfied.¹⁵⁷

2. There Are No Barriers To Competitive Entry In The Wholesale Market

GCI’s facilities-based capability also will ensure that ACS’s wholesale rates will remain just and reasonable and non-discriminatory. GCI will increasingly need to make decisions as to the economics of serving particular customers over ACS’s plant or transitioning them to cable telephony or fiber optic cable service. Therefore, even without Section 251(c)(3) unbundling obligations and Section 252(d)(1) pricing standards, ACS has great incentive to price its UNEs at a reasonable rate to maintain its revenue stream from GCI leasing ACS’s facilities, and in hopes of negotiating arrangements with GCI to gain access to GCI’s facilities in areas that ACS’s facilities do not reach. GCI recently acknowledged that ILECs would be motivated to enter into negotiations for UNEs voluntarily, without regulation.¹⁵⁸ In fact, GCI and ACS successfully negotiated just such an agreement in April 2004 for the Fairbanks and Juneau

¹⁵⁵ See Section III(B), *supra*.

¹⁵⁶ *Verizon Petition* at ¶ 24.

¹⁵⁷ See Section III(B), *supra*. *Verizon Petition* at ¶ 24 (competition in retail market is important); *U.S. West Order* at ¶ 31 (“We find that competition is the most effective means of ensuring that the charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory.”).

¹⁵⁸ *In the Matter of Commission Review of Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies and Competition in Telecommunications*, GCI Reply Comments, RCA Docket No. R-03-03, at 7 (filed May 19, 2005).

markets.¹⁵⁹ Moreover, GCI argued that it would be forced to build more of its own facilities if UNEs were unavailable. Thus, if UNEs were not available, GCI would not be prevented from providing service.

There are no barriers to entry in the Anchorage wholesale market.¹⁶⁰ As described above, GCI has such extensive switching and transport facilities, it never has requested those network elements from ACS.¹⁶¹ GCI has demonstrated that it can provide service without ACS's loops. GCI has employed the use of its own wireless local loops, both in Anchorage and in rural markets where the ILEC is not required to provide UNEs pursuant to the Section 251(f) rural exemption.¹⁶² Further, GCI has exclusive loop facilities. GCI's cable telephony platform essentially duplicates ACS's wireline network, and ACS estimates that GCI already serves a significant number of its customers without the use of ACS's loops.¹⁶³ Indeed, as GCI has characterized the market, in Anchorage, there are no entry barriers, only costs of doing business. When asked about the existence of any "bottlenecks" preventing cable telephony deployment at a hastened pace, the Chief Executive Officer of GCI replied "All of them can be cured by money."¹⁶⁴

Additionally, intermodal competition demonstrates that it is possible for competitors to offer service in the market without relying on ACS's network. Resale pursuant to Section 251(c)(4) of the Act also will remain an entry method for any new entrant in the future.

¹⁵⁹ Meade Statement at ¶ 16.

¹⁶⁰ Shelanski Statement at ¶¶ 21, 23-24.

¹⁶¹ See Sections II(A)(2)(a), II(A)(2)(b), *supra*.

¹⁶² Letter from Jimmy Jackson, GCI, to RCA Commissioners, regarding *In the Matter of the Application by GCI for an Amendment to its Certificate of Public Convenience and Necessity To Operate as a Competitive Local Exchange Telecommunications Carrier*, RCA Docket No. U-05-004 (Aug. 23, 2005); see also, 47 U.S.C. § 251(f)(1)(A).

¹⁶³ See Bowman Statement at ¶¶ 8, 12; Meade Statement at ¶ 14.

¹⁶⁴ GCI Q2 2004 Earnings Call Transcript at 11 (statement of Ron Duncan).

Thus, ACS has no wholesale bottleneck in the Anchorage market. The extensive degree of facilities-based competition in the Anchorage study area is more than sufficient for the Commission to conclude that “forbearance need not await the development of a fully competitive market” because the section 10 criteria are satisfied.¹⁶⁵

3. **Other Provisions of the Act Provide Safeguards to Ensure that ACS’s Retail Rates and Practices Are Just and Reasonable and Not Unreasonably Discriminatory**

In granting prior forbearance petitions, the FCC has analyzed the extent to which other remaining provisions of the Act will provide safeguards to ensure that retail rates and practices are just and reasonable and not unreasonably discriminatory.¹⁶⁶ For example, in granting forbearance from certain tariffing rules, the Commission noted that Section 202 of the Act provides safeguards for consumers in areas that have been deregulated by the Commission.¹⁶⁷ Similarly, with regard to ACS’s requested forbearance from Section 251(c)(3) unbundling requirements and the related Section 252(d)(1) pricing standards, Sections 201 and 202 of the Act still obligate ACS to provide retail and access services at just, reasonable, and non-discriminatory rates.¹⁶⁸ The Commission also has the authority to prescribe just and

¹⁶⁵ See *Verizon Petition* at ¶ 28.

¹⁶⁶ *PCIA Order* at ¶ 31; See also *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum and Report, 14 FCC Rcd 10840, at ¶ 10 (1999) (Sections 202, 204, 205, 208); *Petition of US West Communications for Forbearance*, 14 FCC Rcd 16252, ¶ 40 (1999) (Section 272)).

¹⁶⁷ *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum and Report, FCC 99-108, 14 FCC Rcd 10840, at ¶ 10 (1999) (the Commission granted ITTA’s request for forbearance from Part 69 and section 69.1(b), price cap and rate of return, to allow two percent carriers introduction of new exchange access services without obtaining prior permission through either waiver or petition because the FCC could still “enforce Section 202 of the Act, which prohibits unreasonable discrimination among customers and rates that are unjust and unreasonable.” Further, parties could still petition the FCC to reject, or suspend and investigate, the proposed rates in the tariff introducing the new service and the FCC could investigate the rates under Section 204 or 205 or file complaints under Section 208).

¹⁶⁸ 47 U.S.C. §§ 201, 202.

reasonable rates for retail and access services under Section 205 and to adjudicate any allegations of unreasonable rates and practices under Section 208, even after UNE rates are no longer regulated.¹⁶⁹

Thus, if the Commission were to forbear from applying Section 251(c)(3) and the related pricing provisions of Section 252(d)(1) to ACS in the Anchorage market, a framework still would exist to ensure that ACS's retail rates remain just, reasonable and not unreasonably discriminatory, even if ACS is no longer obligated to provide UNEs at regulated rates. Further, ACS is not seeking forbearance from any other provision of Sections 251(c) or 252 at this time. Therefore, its obligations to provide competitors with interconnection, collocation and discounted wholesale service for resale will not be diminished by a grant of forbearance from the unbundling requirements of the Act.

C. Consumers Will Be Protected Without Regulation Under 251(c)(3)

The analysis for this second prong of the test is virtually identical to the first prong.¹⁷⁰ Market forces are sufficient to ensure that ACS continues to act in a reasonable, non-discriminatory manner for the reasons stated above. Additionally, the Anchorage local exchange market has high elasticity of demand and supply. Consumers in Alaska have demonstrated a

¹⁶⁹ 47 U.S.C. §§ 205, 208.

¹⁷⁰ See, e.g., *Review of Regulatory Requirements* at ¶ 24 ("For reasons similar to those that persuade us that tariff regulation is not necessary within the meaning of section 10(a)(1), we also conclude that tariff regulation is not necessary for the protection of consumers."); *In the Matter of Petition of U.S. West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 21086, ¶ 47 (1999) (finding forbearance appropriate under Section 10(a)(2) for the same reasons that justified it under 10(a)(1)); *In the Matter of 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecomm. Carriers*, 15 FCC Rcd 9219, ¶ 125 (1999) (citing the same reasons invoked under its Section 10(a)(1) analysis when analyzing Section 10(a)(2)); *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Servs.*, 14 FCC Rcd. 11343, at ¶ 14 (1999); *In the Matter of Cellular Telecomm. Indus. Ass'n's Petition for Forbearance from Commercial Mobile Radio Servs. Number Portability Obligations*, 14 FCC Rcd. 3092, at ¶ 22 (1999).

willingness to change carriers and ACS's competitors have shown an ability to serve the customers that leave ACS.¹⁷¹

ACS describes in detail above the high degree of supply elasticity in Anchorage. GCI has described its ability to expand its operations to serve additional customers over its own facilities, limited only by the rate at which GCI spends the money necessary to do so.¹⁷² Further, GCI is not the only retail competitor in Anchorage. Consumers have both intramodal and intermodal alternatives to GCI and ACS, including AT&T, TelAlaska, and Dobson Cellular. GCI has demonstrated its ability to accommodate the needs of any customer who may wish to switch their local exchange service from ACS to GCI. GCI has shown its ability to transition 525 customers in a single day.¹⁷³ GCI's extensive network facilities will ensure that, if ACS raises rates or restricts output, at a minimum, GCI will step in to meet demand. Other competitors clearly have the potential to do so as well.

The price sensitivity of Anchorage consumers and high demand elasticity in the Anchorage market are also beyond dispute. When ACS implemented a 24% retail rate increase in November 2001, GCI did not raise retail prices in response, but rather kept its rates in check, unfettered by costly dominant carrier regulation and able to rely on below-cost UNE loops for facilities. According to GCI, "following the rate increase we has a significant number of customers that wanted to switch their service to GCI."¹⁷⁴ GCI's Chief Executive Officer stated

¹⁷¹ See Blessing Statement at 6-8.

¹⁷² GCI Q2 2004 Earnings Call Transcript at 11 (statement of Ron Duncan).

¹⁷³ Meade Statement at ¶ 11.

¹⁷⁴ *Investigation Into Disparities in Service Provided to Customers if a CLEC and an ILEC*, RCA Public Hearing, Vol. II, Docket U-02-97, at 288 (Oct. 22, 2002) (testimony of Gina Borland, Vice President and General Manager of Local Phone Service of GCI), attached hereto as Exhibit L. See also, *In the Matter of Commission Review of the Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies, and Competition in*

of the rate increase, “[w]e kind of think of it as a gift,” and GCI began signing up local customers at twice the rate that it had been.¹⁷⁵ In other contexts, GCI has testified to the price sensitivity of Anchorage customers, attributing ACS’s market share loss to its price increases in a competitive market.¹⁷⁶ Anchorage consumers have demonstrated a willingness to change local exchange carriers in direct response to price changes.¹⁷⁷ This example also underscores the supply elasticity in the Anchorage market, as GCI was able to absorb all the new customers without capacity constraint. Therefore, forbearance will not harm consumers in the market.

D. Forbearance Is In the Public Interest and Will Promote Competitive Market Conditions

The current requirement for ACS to provide UNEs to GCI at significant discounts from market prices disserves the public interest because it actually discourages GCI from investing more heavily in its own facilities. Forbearance will create far better incentives for *both* GCI and ACS to make rational market-based decisions to invest in their own facilities and to negotiate wholesale terms of access with each other where appropriate. Competing on market-based terms also will stimulate even more vigorous retail competition, increasing incentives for both carriers to provide innovative services and pricing.¹⁷⁸

Telecommunications, GCI’s Reply Comments, RCA Docket No. R-03-03 at 6 (May 19, 2005) (“GCI Reply in RCA Detariffing Proceeding”).

¹⁷⁵ Tony Hopfinger, ACS hike sends customers packing; GCI leaves rates the same; benefits from competitor’s move, Anchorage Daily News, Nov. 21, 2001, at E1 (quoting Ron Duncan).

¹⁷⁶ *GCI Reply in RCA Detariffing Proceeding* at 6.

¹⁷⁷ See Blessing Statement at 7-8. In granting another carrier’s forbearance petition from dominant carrier rate regulation in competitive markets, the Commission stated, “In competitive markets, other service providers possess sufficient unutilized capacity enabling [the carrier’s] customers to switch if [that carrier] were to charge non-competitive rates.” *Comsat Corporation, Petition Pursuant to Section 10(c) for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, FCC 98-78, at ¶ 144 (1998).

¹⁷⁸ See *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum and Report, FCC 99-108, at ¶ 12 (1999).

1. **Forbearance from Section 251(c)(3) Unbundling Requirements Will Encourage Investment In New Facilities and Innovation in Retail Offerings.**

The FCC has found that the “public interest is served by the development and implementation of new services.”¹⁷⁹ In granting forbearance in the Section 271 unbundling broadband context, the FCC determined that removing broadband unbundling requirements would increase investment incentives and noted the negative effect that unbundling has of discouraging investment.¹⁸⁰ Further, policy-makers widely agree that the goal of the Act is to encourage facilities-based competition.¹⁸¹ Therefore, once competition has taken hold, unbundling obligations must be promptly lifted.

Requiring ILECs to provide UNEs to competitors at a deep discount is a disincentive to investment in facilities-based competition, and should be discontinued as soon as competition is unimpaired in the market. The Commission has long recognized that “[w]hile unbundling can serve to bring competition to markets faster than it might otherwise develop, we are very aware that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new

¹⁷⁹ *Id.*

¹⁸⁰ *Verizon Petition* at ¶¶ 24, 25, 35.

¹⁸¹ *See Health of the Telecommunications Sector: A Perspective From the Commissioners of the Federal Communications Commission: Hearing Before the Subcommittee on Telecomm. and the Internet of the House Committee on Energy and Commerce, 108th Cong. 31 (2003) (“Health of the Sector Hearing”)* (prepared statement of Hon. Michael K. Powell, Chairman of the FCC) (“It has long been my view that facilities-based competition (both full and partial) has produced the most welfare for consumers (through lower prices and differential product offerings), provides for positive investment for our economy, creates jobs and provides us with valuable infrastructure alternatives in the face of threats to our homeland.”); Kathleen Q. Abernathy, *The Nascent Services Doctrine*, Remarks Before the Federal Communications Bar Ass’n (July 11, 2002); Kevin J. Martin, Remarks Before the Kaufman Brothers Fifth Annual Communications Conference (Sept. 4, 2002) (“The events of [September 11th] taught us the value of having redundant and diverse facilities-based networks. . . . September 11th has only reinforced the need to promote policies that advance local competition which enable facilities-based service providers to enter the market and invest in new infrastructure”).