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BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In the Matter of: )  
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)  
)  
Petition of ACS of Anchorage, Inc. Pursuant to ) WC Dkt. No. 05-281  
Section 10 of the Communications Act of 1934, as )  
amended, for Forbearance from Sections 251(c)(3) )  
and 252(d)(1) in the Anchorage LEC Study Area )  
)  
)

**OPPOSITION OF TIME WARNER TELECOM, CONVERSENT  
COMMUNICATIONS CBeyond COMMUNICATIONS AND CTC  
COMMUNICATIONS**

Time Warner Telecom, Inc., Cbeyond Communications LLC, Conversent  
Communications LLC and CTC Communications, Inc., by their attorneys hereby file this  
Opposition to the Petition for Forbearance filed by ACS of Anchorage, Inc. (“ACS”).<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

Following the adoption of the Commission’s *Omaha Order*<sup>2</sup> ACS has filed the  
first of what will surely be a parade of incumbent LEC “me-too” petitions seeking  
forbearance from unbundling obligations in their respective markets. Unfortunately, the  
instant petition again asks the Commission to rely on (in this case relatively limited)

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<sup>1</sup> See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934*, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area, WC Dkt. No. 05-281 (filed Oct. 6, 2005) (“*Petition*”).

<sup>2</sup> See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005) (“*Omaha Order*”).

intermodal competition in the residential market as a justification for eliminating unbundling in the business market. No doubt ACS believes that it can sneak through relief in the business market because the Commission has to some extent in the past been willing to grant such relief in markets characterized by substantial intermodal competition in the mass market. But there is no basis under even the dangerously permissive deregulatory orders that the Commission has released in the recent past for forbearing from unbundling any broadband loops used to serve business customers (*i.e.*, copper DS0 loops, including conditioned loops, as well as DS-1 and DS-3 loops) or transport in Anchorage.

As the D.C. Circuit has held, the Commission shall only forbear if there is no longer a “strong connection” between a regulation and “what the agency sought to achieve with the disputed regulation.” Moreover, in assessing forbearance requests, the Commission must adhere to the analytical framework previously used in similar contexts or explain why a new framework or test is appropriate. This means that the Commission can only forbear from unbundling loops used to provide broadband to business customers and transport if there is more actual competition or a greater potential for entry (lower entry barriers and/or greater revenue opportunities) in the relevant markets for transmission facilities than the Commission assumed would be the case in markets like Anchorage that do not meet the impairment thresholds established in the *Triennial Review Remand Order*. ACS has not met this standard, and it has not even attempted to show why the Commission should apply a different standard.

ACS has failed to explain why it is appropriate to depart from the Commission’s use of separate product markets for DS0 loops, DS-1 loops, DS-3 loops and transport of

different capacities. Indeed, ACS's own expert economist acknowledges that residential and business services are reasonably viewed as separate product markets. ACS has also failed to explain why it is reasonable to use the entire ACS Anchorage study area as the relevant geographic market when recent Commission orders have appropriately used much smaller geographic markets (wire centers and transport routes). When business loops and transport are examined in light of appropriate relevant markets, it is clear that forbearance from unbundling these facilities is unwarranted.

In fact, Anchorage conforms with the Commission's conclusion in the *Triennial Review Remand Order* that markets that do not (as Anchorage apparently does not) meet the relevant thresholds for unbundling do not offer sufficient revenue opportunities to support efficient loop deployment for DS0, xDSL, DS-1 and single DS-3 loops serving business customers or transport. Whatever else may be the case in the *residential* market, the available evidence indicates that the market for loops serving *business customers* in Anchorage is almost completely controlled by ACS, and there is no evidence that this will change in the near future. Unsurprisingly, the available evidence indicates that no carrier other than ACS has built DS-1 loops in Anchorage. The only other facilities-based carrier serving the business market in Anchorage, GCI, only serves a limited number of business customer locations on or in close proximity to its fiber ring. Except for those few buildings served by its high capacity loops, to the extent that GCI serves the local exchange market in Anchorage, it does so over its hybrid-fiber-coax (HFC) facilities, which, the FCC has found, are generally incapable of providing business services. Moreover, only GCI competes with ACS in the provision of broadband to very small business customers. Nor is there any indication that the entry barriers are

sufficiently lower or the revenue opportunities sufficiently greater in Anchorage than in other areas of similar density such that more “reasonably efficient” competitors can be expected to enter and build transmission facilities. This conclusion is as true for transport as it is for loops.

Accordingly, GCI or any other carrier attempting to serve business customers in the Anchorage market must rely on ACS’s transmission facilities, including UNE loops. In such an environment, in the absence of UNEs, ACS would be able to fully exercise its market power by raising the price of business loops sold at wholesale and retail to supracompetitive levels. For these reasons, ACS’s petition must be denied, at the very least, with regard to loops used to provide broadband service to businesses and for transport.

**II. IN REVIEWING ACS’S PETITION, THE COMMISSION MUST APPLY THE ANALYTICAL FRAMEWORK ESTABLISHED FOR DETERMINING IMPAIRMENT IN ITS PREVIOUS ORDERS.**

Section 10 of the Communications Act requires that the Commission forbear from applying a statutory provision or regulation if it determines that (1) the requirement is not “necessary” to ensure just, reasonable and not unjustly or unreasonably discriminatory charges and practices; (2) the requirement is not necessary for the protection of consumers; and (3) forbearance is in the public interest. 47 U.S.C. § 160(a). These requirements are conjunctive, so that failure to meet any of the three requires denial of a petition for forbearance. *See Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (*CTIA v. FCC*). In the context of Section 10, “necessary” does not mean “absolutely required” or “indispensable.” *Id.* at 511. A requirement is “necessary” to ensure just, reasonable and nondiscriminatory rates, terms and conditions if there is merely a “strong connection” between a requirement and “what the agency

permissibly sought to achieve with the disputed regulation.” *Id.* at 512. Moreover, in making a determination as to whether granting a petition is in the public interest, the Commission “shall” consider the extent to which granting forbearance will “promote competitive market conditions.” 47 U.S.C. § 160(b).

In assessing whether the Section 10 standard is met, the Commission must either review the petition under the analytical framework for making impairment determinations adopted in the unbundling orders, especially the *Triennial Review Order*<sup>3</sup> and *Triennial Review Remand Order*<sup>4</sup> and the D.C. Circuit decisions reviewing those orders, or it must explain why it is reasonable to depart from that framework.<sup>5</sup> There are five aspects of that framework that are of particular importance. *First*, the Commission determined in the *Triennial Review Remand Order* that it is generally not possible for reasonably efficient competitors to construct DS-1,<sup>6</sup> or single DS-3<sup>7</sup> loops to business customers in

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<sup>3</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”), vacated and remanded in part and *aff’d* in part, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”) *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

<sup>4</sup> *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005) (“*Triennial Review Remand Order*”).

<sup>5</sup> *See AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (overturning FCC denial of petition for forbearance from dominant carrier regulation where the FCC did not apply its traditional non-dominance analysis and failed to explain why such a departure was reasonable).

<sup>6</sup> *See Triennial Review Remand Order* ¶ 178 (“For DS1-capacity loops, we adopt a proxy test that does not require unbundling in any building served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. . . . [w]e conclude [DS1 loops] are likely actually to be widely deployed already (and thus available for potential channelization) only in wire centers with greater [than 38,000] line counts.”).

wire centers similar to those in Anchorage, because of the inadequate revenue opportunities available from the provision of facilities at these capacities.<sup>8</sup> The Commission used business access line density and fiber-based collocations as proxies for the revenue opportunities available for high capacity business loops. *See Triennial Review Remand Order* ¶ 174. Similarly, the Commission determined in the *Triennial Review Remand Order* that it is generally not possible for competitors to construct DS-1 or DS-3 transport circuits between wire centers that are as sparsely concentrated as those in Anchorage and in which multiple fiber-based collocations have not been established. *See id.* ¶ 66.

*Second*, while the Commission has been careful to account for the presence of intermodal competition in its unbundling framework, it has also balanced deregulation with preservation of unbundled network elements needed to ensure the continued viability of competition. For example, in the *Triennial Review Order*, the Commission concluded that cable modem service provided a robust, facilities-based alternative to

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<sup>7</sup> *See id.* ¶ 174 (“Based on the economic analysis described above, we adopt a proxy test that does not unbundle DS3 loops in any building served by a wire center with at least 38,000 business lines and four fiber-based collocators... We have selected these thresholds because we find they indicate fiber deployment and revenue opportunities sufficient to render competitive deployment of DS3 loops economic.”).

<sup>8</sup> ACS indicates that no wire center in ACS would meet the *Triennial Review Remand Order* thresholds. *See Petition* at 19. Although it is unclear exactly how many business access lines are in each of the Anchorage study areas, it is likely to be well below the *Triennial Review Remand Order* thresholds. Census data regarding persons per square mile gives an indication of just how sparsely populated Anchorage is, making deployment of high capacity loops uneconomic in most circumstances. According to census data, Anchorage has a population density per square mile of 153.4, whereas Omaha is 3,370.7, Chicago is 12,750.3 and New York City is 26,402.9. *See* <http://quickfacts.census.gov/qfd/states/>. Considering that no wire centers in Omaha qualified for loop unbundling under the *Triennial Review Remand Order* triggers, it is likely the wire centers in Anchorage are even further away from meeting these triggers.

incumbent LEC xDSL service, and the Commission therefore eliminated unbundled line sharing. But the Commission continued to permit access to unbundled DS0 loops for the purpose of, among other things, the provision of DSL. The Commission held that despite cable competition, “incumbent LECs must provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops.” *Triennial Review Order* ¶ 642. Moreover, the FCC maintained the obligation of incumbent LECs to condition their UNE DS0 loops upon request to permit the use of those loops for DSL.<sup>9</sup>

*Third*, it is clear that the presence of a single competitor that has deployed a particular type of facility in a particular market is insufficient by itself to support a finding of non-impairment for the facility. In the *Triennial Review Order*, for example, the Commission required that loop unbundling would only be justified if multiple CLECs had built high capacity loops to a particular business location.<sup>10</sup> The D.C. Circuit implicitly agreed with the Commission’s approach when it observed that the concept of impairment in the statute “reaches beyond natural monopoly.” *USTA II* 359 F.3d at 572. A natural monopoly is a market in which a service can be provided more efficiently by a single firm (with declining average marginal costs over the range of demand in the

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<sup>9</sup> *See id.* (“Because providing a local loop without conditioning the loop for xDSL services would fail to address the impairment competitive LECs face, we require incumbent LECs to provide line conditioning to requesting carriers.”).

<sup>10</sup> *See id.* n.974 (“We establish the number of competitors to the incumbent LEC necessary to satisfy each trigger for high-capacity loops subject to a finding of impairment at two in order to ensure that multiple competitive entry at each location is feasible.”).

market) than by multiple firms.<sup>11</sup> A test designed only to identify markets that are characterized by natural monopoly would merely tie impairment to the presence of a single competitor. That the statute “reaches beyond” natural monopoly indicates that at the very least two competitors must be able to serve the market. This reading is buttressed by the court’s statement in *USTA I* that impairment does not exist where “multiple competitive” suppliers can be found<sup>12</sup> and the court’s implicit recognition in *USTA II* that the test for interoffice transport should be whether “multiple competitors” are able to serve a particular transport route. *See USTA II*, 359 F.3d at 575.

In the *Triennial Review Remand Order*, the FCC continued targeting its unbundling relief only to those areas with multiple facilities-based competitors. For example, the Commission established its Tier 1 transport trigger at 38,000 business access lines or four or more fiber based collocators because, at that level, “*multiple competitive entry [is] possible...*” *Triennial Review Remand Order* ¶ 112 (emphasis added). These triggers “sufficiently identif[y] the likelihood of the presence of multiple transport providers.” *Id.* ¶ 117. In the same way, the loop “test captures areas characterized by high revenue opportunities and the likely presence of *multiple competitive fiber rings.*” *Id.* ¶ 168 (emphasis added). Importantly, the Commission set its impairment thresholds with the full knowledge that unbundling would continue to be

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<sup>11</sup> See Robert B. Friedrich, Note, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications: How Congress and the FCC Can Encourage Competition and Technological Progress in Telecommunications*, 80 CORNELL L. REV. 646, n.34 (1995) (“The local access sector of the telecommunications industry traditionally has been considered a natural monopoly because of the high capital costs of entry and sharply declining long-run average costs.”).

<sup>12</sup> *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (“*USTA I*”).

required even though one or even two competitors might have deployed transport (or likely loops) of the relevant capacity in the wire center or on the relevant route.<sup>13</sup>

*Fourth*, the Commission has made clear that the availability of products like special access that incumbent LECs offer at wholesale pursuant to Sections 201 and 202 of the Communications Act is not a valid basis for eliminating unbundled network elements offered under Section 251(c)(3). As the Commission held, reliance on non-UNE incumbent LEC wholesale offerings in lieu of UNEs would be administratively impractical and would expose competitors to a high risk of price squeezes. *See id.* ¶¶ 55-63. The Commission also held that a competitor's current use of incumbent LEC non-UNE wholesale services as a means of competitive entry does not justify the conclusion that such alternatives are substitutes for UNEs. *See id.* ¶¶ 64-65.<sup>14</sup>

*Fifth*, retail market share, by itself, is irrelevant to the impairment analysis. The relevant inquiry in the impairment analysis is whether reasonably efficient intramodal or intermodal competitors can deploy the facility under review. *See Triennial Review*

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<sup>13</sup> *See id.* ¶ 120 (asserting that, based on evidence submitted by the BOCs, multiple competitors have deployed transport on routes between wire centers with between 5,000 and 10,000 business access lines). BellSouth, among others, submitted evidence showing that carriers had deployed their own optical termination equipment (which in many cases indicates the presence of a CLEC deployed loop) at buildings in wire centers with as few as 5,000 business access lines. *See BellSouth Comments, WC Dkt. Nos. 04-313 et al.*, at 44 (filed Oct. 4, 2004).

<sup>14</sup> Although the Commission relied to some degree on the presence of non-UNE incumbent LEC wholesale service offerings as a basis for eliminating unbundling in the Omaha territory, that decision was inconsistent with the Commission's conclusions in the *Triennial Review Remand Order* and the Commission failed to offer any explanation as to why its departure from its past approach was reasonable. *See Omaha Order*. The Commission should not compound that error by repeating it here. But even if the Commission were to rely on resold non-UNE offerings by ACS, the instant petition cannot be granted under the *Omaha Order* precedent. This is because the Commission relied on the continued availability of Section 271 network elements in Omaha (*see id.* ¶ 64) whereas ACS is not subject to Section 271.

*Remand Order* ¶¶ 24-28. Thus, while ACS makes much of the fact that GCI serves a substantial share of the retail business (and residential) customers in Anchorage, this by itself is not relevant information. GCI's market share in the retail business market is only relevant to the extent GCI has attained that market share by providing service over its own transmission facilities.

For ACS to meet the Section 10 forbearance standard in light of this framework, it must demonstrate that there is more actual competition or a greater potential (lower entry barriers and/or greater revenue opportunities) for competitors to deploy loop and transport facilities used to serve business customers than the Commission assumed would be the case in markets like Anchorage that do not meet impairment thresholds. For DS-1 or DS-3 loops, it is not enough to show that a single competitor had deployed these facilities in some locations within a wire center that does not meet the relevant impairment thresholds. ACS must instead show that multiple competitors have already deployed those facilities on a widespread basis or that the barriers for such deployment are so much lower than in similar markets elsewhere in the country that deployment by multiple competitors is likely. For conditioned DS0 loops used to provide xDSL service, it is not enough to show that a single cable modem service provider has acquired a substantial, even dominant, presence in the broadband market. ACS must instead show that it faces broadband competition from other facilities-based carriers offering substitutes for cable modem and xDSL service. Similarly for transport, it is not enough to show that one or two competitors have deployed transport along a particular route that does not meet the relevant impairment threshold. ACS must instead show that multiple facilities-based carriers that do not collocate and would not be captured by the

impairment threshold provide transport along the route or that the barriers for such deployment are so much lower than in similar markets elsewhere in the country that deployment by multiple competitors is likely.

Finally, it is worth emphasizing that ACS must meet these standards by applying the relevant geographic markets (wire centers for loops and interoffice routes for transport)<sup>15</sup> and product markets (DS0, DS-1 and DS-3 all separately analyzed) used by the Commission in past unbundling decisions. ACS claims that the relevant Anchorage LEC study area is the relevant geographic market because that area is “fairly uniform in population density, topography, and development,” and both ACS and GCI have purportedly “deployed their copper and cable facilities, respectively, throughout the area.” *See Petition* at 27. For loops serving business customers, however, the scope of GCI’s cable facilities is not dispositive of the question of available supply. As discussed in the following section, the Commission has determined that traditional cable networks cannot support most business services (*e.g.*, DS-1 and DS-3 services). Moreover, for all loop and transport transmission facilities used to serve businesses, the key issue for purposes of this proceeding is whether GCI *and other competitors* have or can efficiently deploy the facilities within the wire centers or along the interoffice transport routes in

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<sup>15</sup> The Commission rejected the use of an MSA in the *Triennial Review Order* and *Triennial Review Remand Order* when determining impairment. A study area, like an MSA, is too large to account for the variances in competitive deployment that occur on a wire-center, or indeed, a building-by-building basis. *See Triennial Review Remand Order* ¶ 155 (“...a properly designed building-specific test could assess variations in impairment far more subtly than could a wire center or MSA-based approach, but would entail steep (and indeed, as we conclude below, insurmountable) hurdles with regard to administrability. In contrast, an MSA-wide approach relying on objective, readily available data would alleviate dramatically any concerns regarding administrability, but (as we also describe below) would require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate.”).

question. The level of actual entry can vary from one area to another. In addition, the Commission has held that the revenue opportunities for serving business customers in a particular area are an important factor in determining the likelihood of entry. *See e.g., Triennial Review Remand Order* ¶ 43. ACS has not offered any basis for concluding that this opportunity is evenly distributed throughout the Anchorage study area. In this regard it is relevant that the Commission used wire centers as the relevant geographic area in considering Qwest's request for forbearance from unbundling in Omaha. *See Omaha Order* ¶ 62. There is no reason to think that the Commission could justify a different approach for Anchorage.

Nor has ACS offered any basis for treating loops and transport facilities of all capacities as belonging to the same loop and transport product markets respectively. The Commission has explained that it is appropriate to consider the feasibility of competitive deployment of DS0, DS-1, and DS-3 loops as well as DS-1 and DS-3 transport all separately. This is because (1) each type of loop facility offers a different revenue potential while loops of all kinds pose similar deployment costs (*see Triennial Review Remand Order* ¶ 149) and (2) each type of transport offers a different revenue potential while transport circuits of all kinds pose similar deployment costs. *See id.* ¶ 71. There is no reason to think that this is less true in Anchorage than elsewhere in the country. ACS's own expert economist acknowledges that DS0 and DS-1 loops are sensibly treated as belonging to separate product markets.<sup>16</sup> It is equally clear DS-3 loops, to the extent they exist in Anchorage, should be treated as separate product markets. DS-1 and DS-3 transport should also be treated separately. As explained in the following section, when

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<sup>16</sup> *Petition*, Exhibit D, Declaration of Howard A. Shelanski ¶ 14 (“*Shelanski Dec.*”).

considered on this appropriately disaggregated basis, it is clear that forbearance is not justified in any Anchorage wire center for any loops used to provide broadband to business customers or for any Anchorage transport route.

**III. THE EVIDENCE IN THE RECORD DOES NOT JUSTIFY FORBEARANCE FROM REQUIRING ACS TO UNBUNDLE LOOPS SERVING BUSINESS CUSTOMERS OR TRANSPORT IN ANCHORAGE**

The available evidence demonstrates that competitors are impaired in the absence of unbundled loops used to serve business customers in Anchorage. First, notwithstanding its substantial retail market share, GCI's reliance on its own transmission facilities is both limited and, where it exists, is of relatively limited relevance to business services. ACS and GCI have both submitted evidence into the record showing that GCI has relied heavily on three methods for provisioning access lines (1) UNE-P ; (2) UNE-L coupled with GCI's own circuit switching and (3) delivery of telephony services over GCI's HFC cable plant. The migration of GCI's local exchange services to their cable facilities has been slow, and GCI "remains almost wholly dependant on ACS to provide unbundled loops."<sup>17</sup> Therefore, "ACS' market power in the market for loops is virtually undiminished from the days before competition." *Id.* at 16. As a result, "*GCI still serves a very small percentage of its lines entirely over its own facilities.*" *Id.* at 12. (emphasis in original). Indeed, in its most recent SEC filing, GCI stated that as of Sept. 30, 2005, it had deployed cable telephony service to only 16,800 of its customers. *See GCI 2005 Q3 10-Q* at 36. Even ACS admits that the vast majority of GCI's lines are provided over ACS's UNE facilities. *See Petition* at 7.

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<sup>17</sup> Reply Comments of GCI, WC Dkt. Nos. 04-313 *et al.*, at 11 (filed Oct. 19, 2005) ("*GCI Triennial Review Remand Order Reply Comments*").

The available evidence indicates that, to the extent GCI is providing local exchange service over its own facilities, it does so overwhelmingly via its HFC facilities, which as the FCC repeatedly held, are incapable of providing business service. In the *Triennial Review Order*, the Commission determined that HFC networks generally do not serve businesses and that “[t]he cable companies have remained focused on mass market, largely residential service consistent with their historic residential network footprints.” *Triennial Review Order* ¶ 52. The Commission concluded that, to the limited extent that cable companies were serving customers in the business market, they were not selling HFC-based cable modem service but rather traditional broadband transmission services over fiber loops.<sup>18</sup>

The Commission reiterated and reinforced these findings in the *Triennial Review Remand Order*. There, the Commission again concluded that, to the extent cable companies serve businesses at all, they focus on selling cable modem services to “home offices or very small stand-alone businesses, neither of which typically requires high-capacity loop facilities.” *Id.* ¶ 193. Most businesses have thus far apparently viewed cable modem service as insufficient for their needs, because “bandwidth, security, and other technical limitations on cable modem service render it an imperfect substitute for service provided over DS1 loops.” *Id.* Finally, the absence of cross elasticity of demand

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<sup>18</sup> For example, the Commission rejected Qwest’s assertion that it had lost customers to “intermodal competition” from cable companies because “those losses are to the circuit-switched telephony service offered by Cox’s competitive LEC affiliate, rather than to its cable operation.” *Triennial Review Remand Order* n.514.

between cable modem service and wireline broadband transmission facilities indicates that they are not substitutes.<sup>19</sup>

There is no reason to believe that GCI's HFC network is any more suitable for the provision of services demanded by most businesses than the HFC networks described in the Commission's unbundling orders. ACS has proffered no information differentiating GCI's HFC facilities, and GCI's past comments indicate that the characteristics and deployment patterns of its HFC networks are no different than any other HFC network. As GCI explains, "[a]s is the case with most cable footprints, the GCI cable plant reaches almost exclusively residential premises." *GCI Triennial Review Remand Reply Comments* at 16. Despite the fact that GCI's "cable telephony [network] will pass 98% of the homes in Anchorage, there are still many business customers whom we will not be able to serve over our cable telephony network." *Petition*, Exhibit J at 5. Even if GCI's HFC facilities somehow did provide business service, GCI stated only three months ago that it can only reach 17 percent of its local exchange customers via its cable telephony product.<sup>20</sup> The coverage of its local exchange capable HFC facilities are extremely limited.

*Second*, ACS's assertion that fixed and mobile (CMRS) wireless and VoIP providers serve as competitors in the local exchange market should be dismissed out of hand. *See Petition* at 16-17. As the Commission has held, neither wireless nor VoIP

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<sup>19</sup> *See id.* ¶ 193 ("Commenters also note that businesses that do require DS1 loops are willing to pay significantly more for them than the cost of a cable modem connection, which also indicates that the two are not interchangeable. Finally, at least two competitors maintain that, based on their internal data, they rarely lose enterprise customers to cable providers.").

<sup>20</sup> *See GCI Data submission, Regulatory Commission of Alaska, Dkt. No. U-05-55, at 3 (filed Oct. 17, 2005).*

services serve as substitutes for traditional phone service.<sup>21</sup> More importantly, neither CMRS nor VoIP services can serve as a replacement for high capacity loops serving business customers. The Commission has also recently determined that fixed wireless services are not a replacement for high capacity wireline loops. *Triennial Review Remand Order* ¶ 193, n.508. GCI's fixed wireline facilities are no different. Indeed, copies of e-mail communications submitted into the record by ACS indicate that the wireless local loops deployed by GCI serve as a replacement for HFC, not high capacity loops serving capable of serving business customers.<sup>22</sup> Moreover, it appears GCI's fixed wireless facilities are only going to be deployed in areas outside of Anchorage, assumedly where line of sight issues make fixed wireless more viable.<sup>23</sup>

*Third*, in those few instances where GCI has attempted to construct high capacity loops to business customer locations in Anchorage, there is no reason to think that its choices of where and when to build are any different than those faced by other competitors. There is also no reason to think that GCI faces entry barriers that are different than those competitors face in other, similar geographic areas. As the

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<sup>21</sup> See *Triennial Review Remand Order* n. 118; *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation; For Consent to Transfer Control of Licenses and Authorizations et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 239 (2004).

<sup>22</sup> See *Petition*, Exhibit G, e-mail from Jimmy Jackson to Derek Welton, *et al.*, July 27, 2005 (“WLL will not be temporary. As stated in GCI's letter of March 22, 2005, some of the communities are larger than GCI can expect to serve with HFC within 5 years. In those communities, at the end of five years portions of the service area will be served with HFC and other areas with WLL (or resale).”).

<sup>23</sup> See *Petition*, Exhibit G, e-mail from Jimmy Jackson to Derek Welton, Aug. 15, 2005 (“...under present plans, WLL will be used only in the areas adjacent to HFC areas, such as in the general Valdez area but outside of the HFC coverage in Valdez.”).

Commission has concluded, CLECs generally build fiber rings in the densest downtown areas. The limited number of buildings through which the ring passes can be served by the CLEC, while those buildings that are off the ring,<sup>24</sup> yet within a short distance, can only be served by the CLEC's facilities if the revenue opportunities justify the substantial cost of construction.<sup>25</sup> For this reason, the Commission concluded that competitors generally cannot deploy transmission facilities for the purpose of providing DS1 or stand-alone DS3 service because the revenue opportunities associated with such services are too small to cover the costs of loop deployment. *See id.* ¶ 149; *Triennial Review Order* ¶ 298. In light of these difficulties, in the nearly 10 years since the passage of the Act, CLECs have deployed, at the very most, only 4.3 percent of the high capacity loops nationwide and CLECs have only built an additional 9,000 loops since the Act was passed.<sup>26</sup>

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<sup>24</sup> *Triennial Review Remand Order* ¶ 154 (“Competitive carriers explain that when they build fiber rings in a metropolitan area, they do so in a manner that identifies geographically proximate commercial buildings that house as many potential customers as possible, and attempt to design and build the ring such that it directly passes and can be used to serve as many of those buildings as possible.”).

<sup>25</sup> *See id.* ¶ 154 (“the record indicates that when deciding whether and where to build their own facilities, competitive LECs target areas that offer the greatest demand for high-capacity offerings (*i.e.*, that maximize potential revenues) and that are close to their current fiber rings (*i.e.*, that minimize the costs of deployment.)”).

<sup>26</sup> Earlier this year, Verizon showed the number of buildings to which CLECs have constructed fiber has increased by only 9000, from 24,000 to 32,000 since 1996. *See* Verizon Comments, WC Dkt. No. 05-25 Attachment D, Decl. of Quintin Lew, at Attachment B (filed June 13, 2005); *id.* at Attachment C, Decl. of William Taylor, Table 10, at 5. Assuming that there are between 739,000 and 3 million commercial buildings in this country (*see Triennial Review Remand Order* ¶ 157), competitive carriers have constructed wireline loop facilities to, at the very most, 4.3 percent of commercial buildings nationwide.

ACS fails to show how the experience of GCI in constructing high capacity loops to businesses in Anchorage departs from these norms or that ACS does not continue to provide the vast majority of loops to businesses in the Anchorage market. Rather, the available evidence is to the contrary. For example, like any other CLEC, it is difficult for GCI to deploy laterals to buildings off of its fiber rings. As GCI notes, “[e]ven when GCI’s network passes a retail customer, such as the large businesses in one of the 22 office buildings in Anchorage...it is very difficult to obtain access to other buildings that GCI’s ring passes.” *GCI Triennial Review Remand Reply Comments* at 18. Like other CLECs, the ability of GCI to construct fiber laterals is complicated by building access, access to rights-of-way, and other issues that the incumbent LEC does not face. As GCI indicates, there are “significant difficulties a competitive carrier faces...when trying to negotiate access to conduit, either with a reluctant landlord or the ILEC.” *Id.* Because of these difficulties, it appears from the evidence that GCI has only been able to construct laterals providing at least DS3 service to five buildings NOT directly on its fiber ring as well as an additional number of buildings served by dark fiber.<sup>27</sup> It is important to note that it is unclear whether GCI could have obtained DS3 UNEs to these buildings even under the current unbundling regime since the customers in these buildings may demand

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<sup>27</sup> See *Petition*, Exhibit I (citing “Exhibit GCI-8” attached to GCI Response to RCA Order Requesting Data, Dkt. No. R-03-7 (filed Mar. 19, 2004)). GCI stated in the Alaska *Triennial Review Order* state proceeding that it served only 27 buildings in Anchorage with at least DS3 level services over its own facilities. Since GCI has noted previously that it served 22 buildings on its fiber ring, it appears that GCI serves only five buildings off of its ring. ACS seems to agree with this assessment, arguing that “[i]n 2002, GCI stated that it served 22 buildings in Anchorage from its fiber ring. Since GCI made this statement, ACS is aware of several new office buildings that GCI serves using its fiber facilities.” *Petition*, Exhibit B, Bowman Statement ¶ 6 (“*Bowman Statement*”).

multiple DS3 of service.<sup>28</sup> If so, then GCI's lateral deployment is exactly what should be expected under the Commission's conclusion in the *Triennial Review Remand Order* that carriers are generally able to self-deploy facilities to buildings with more than 2 DS3s of demand.

In the *Triennial Review Remand Order*, the Commission determined that it is *almost never* rational for CLECs to construct DS-1 loops. *See Triennial Review Remand Order* ¶ 166. It is unsurprising therefore that the record indicates that GCI has *never* constructed any DS-1 loops. As ACS admits, in the Alaska *Triennial Review Order* state proceeding, "ACS did not challenge the Commission's impairment finding as to DS1 loops."<sup>29</sup> Where a DS1 loop is required, "GCI has no alternative but for ACS." *GCI Triennial Review Remand Order Reply Comments* at 27. For this reason, GCI is forced to lease its DS-1 level and HDSL circuits in the Anchorage market. *See GCI 2004 10-K* at 38. The hard economic realities surrounding DS-1 deployment dictate that GCI will remain reliant on ACS's DS-1 capacity loop facilities to serve the vast majority business customers in the Anchorage market for the foreseeable future. Because "there are virtually no customers large enough to purchase capacity above the DS-1 level" in Anchorage,<sup>30</sup> ACS's dominance of the business market in Anchorage will actually be

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<sup>28</sup> It appears from the language of the Regulatory Commission of Alaska request, GCI's facilities carry *at least* DS3 service. *See Petition*, Exhibit I at 8 ("Please list all the end points to all high capacity loops and dark fiber loops in the ACS-AN, ACS-F and ACS-AK services areas that you own or control and that could be available for the provision of service comparable to UNE DS3 or dark fiber loop services.").

<sup>29</sup> ACS Comments, WC Dkt. Nos. 04-313 *et al.*, at 12 n.35 (filed Oct. 4, 2004).

<sup>30</sup> *See Shelanski Dec.* ¶ 14. ACS also argues that since all of the access lines in Anchorage are allegedly provisioned over DS-1, DS-0 or mass market copper loops, than "the distinction between mass market and enterprise loops is irrelevant." *Petition* at 12. To the contrary, simply because most business customers demand only DS-1 access in

even more acute than most markets where there are many customers who demand multiple DS3s or OCn level services.

Furthermore, in light of GCI's limited fiber deployment, GCI is simply not "willing and able within a commercially reasonable time" (*Omaha Order* n. 156) to construct high capacity wireline loops to the vast majority of businesses in Anchorage, regardless of the reach of its HFC networks. The pattern of GCI's fiber construction may reflect the fact that GCI must build a high capacity fiber ring as a prerequisite to deploying its cable facilities to serve mass market customers. It is also possible that GCI, like any other CLEC, built its fiber ring to pass through those buildings where demand for telecommunications services is highest. Regardless of why GCI chose to construct its fiber ring where it did, HFC facilities covering an area several miles square near a GCI ring cannot provide business services to all of the buildings "covered" by the HFC facilities. Like other CLECs, the ability of GCI to deploy its fiber facilities to buildings from splice points on its fiber ring is solely a function of the revenue opportunities and the cost of deployment along with any particular building access/right-of-way issues that may crop up at a particular location.

*Fourth*, ACS admits that no carrier other than GCI has deployed any wireline loop facilities, high capacity or not, in the Anchorage market. For example, as ACS shows, to the extent that carriers other than GCI, such as AT&T, serve the local exchange market in

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Anchorage does not transform a DS-1 into a mass market product. As explained *supra* with respect to cable modem service, DS-1 service has characteristics that are uniquely demanded by business customers. In any case, Mr. Shelanski seems to contradict the petition in his declaration when he argues that "there are at most two classes of service, DS-1 (or business) and DS-0 (or residential) service." *Shelanski Dec.* ¶ 14.

Anchorage, they do so exclusively through resale.<sup>31</sup> Moreover, these carriers are very minor players in the market.<sup>32</sup> As ACS states, "...AT&T has maintained a steady market share of about 3%..." *Petition* at 30. There is no indication that any of these competitors serves the business loop market at all over their own facilities. Indeed, GCI was the only carrier to submit evidence of high capacity loop deployment in the *Alaska Triennial Review Order* proceeding. *See GCI Triennial Review Remand Order Reply Comments* at 30.

Even if carriers did compete for business customers by *reselling* ACS loop facilities in Anchorage, this does not (as explained in the previous section) cast doubt on ACS's enduring market power in the business loop market in Anchorage. Therefore, unbundling remains necessary to prevent the exercise of that market power. Of course, carriers that rely on UNEs to compete cannot be used as a justification for eliminating the availability of those same UNEs.<sup>33</sup> As Dr. Shelanski, has previously argued on behalf of

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<sup>31</sup> GCI 2004 10-K at 39 ("We compete against ACS, the ILEC in Anchorage...and with AT&T Alascom in the Anchorage Service Area. AT&T Alascom offers local exchange service only to residential customers through total service resale. We also compete in the business market against TelAlaska Long Distance, Inc. ("TelAlaska") in the Anchorage service area.").

<sup>32</sup> ACS recently submitted evidence to the Regulatory Commission of Alaska indicating that, of the 173,929 access lines in Anchorage, only 193 were served by TelAlaska, and 5,291 were served by AT&T Alascom, both of which served their customers exclusively through resale. *See Exhibit A*, attached to Compliance Filing to Order No. 2 by ACS of Anchorage Inc, ACS Fairbanks, Inc. and ACS of Alaska Inc., Regulatory Commission of Alaska, Dkt. No. U-05-55 (filed Oct. 17, 2005).

<sup>33</sup> *See Omaha Order* n.185 ("Granting Qwest forbearance from the application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification.").

ACS, “[i]t would be circular to use market share based on UNEs to declare an end for the need for UNEs.”<sup>34</sup>

*Fifth*, the presence of GCI alone in the market for loop transmission facilities serving business customers cannot justify forbearance from unbundling such facilities. Even if GCI could somehow be considered a facilities-based competitor serving all parts of the Anchorage business market (which the evidence indicates it is not), Anchorage’s business customers would be served by a duopoly for the foreseeable future.<sup>35</sup> Based on the characteristics of the Anchorage market, it is unlikely that any facilities-based competitors other than GCI will enter to serve business customers. Under these conditions, the Commission must retain the availability of unbundled high capacity loops in Anchorage.

Moreover, GCI’s deployment of a limited number of business loops does not indicate that it is possible for other competitors to deploy loops to businesses. GCI was likely only able to construct its Anchorage network because for years (at least until the development of DBS) it received monopoly rents for the provision of its cable service. Even today, its fiber backbone and HFC networks are supported by revenues from voice, video and data services. Those revenue streams have apparently yielded economies of

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<sup>34</sup> Reply Comments of ACS LECs, Reply Affidavit of Howard A. Shelanski, Regulatory Commission of Alaska, Dkt. No. R-03-07 ¶ 5 (filed Apr. 2, 2004).

<sup>35</sup> The Commission has found that a market with two competitors is not workably competitive. This is especially so in markets where (as here) entry barriers are high, products are relatively undifferentiated and information about competitive pricing is easily obtained and relatively uniform across the market. *See EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, ¶¶ 150, 173, 186 (2002).

scope that other competitors could not replicate. The Commission has held that granting incumbent LECs unbundling relief based on the evidence of one facilities-based competitor “runs the risk of failing to accommodate unusual circumstances unique to that single provider that may not reflect the ability of other competitors to similarly deploy.” *Triennial Review Order* n.974. That concern is justified in Anchorage.

To the extent that the Anchorage market differs from the norm, it is particularly *unsusceptible* to competitive entry. Given that the business line densities of the wire centers in Anchorage are no doubt well below the *Triennial Review Remand Order* thresholds, it is unlikely that any carrier without GCI’s economies of scope could serve the Anchorage market with high capacity loop facilities. It is therefore unsurprising that GCI is the only facilities-based competitor in the market. Going forward, it is inconceivable that there is another potential entrant with similar advantages that could serve the Anchorage market.

Finally, ACS has not offered any evidence that there is a greater level of actual competition in the provision of transport or a greater likelihood that such competition will emerge than the Commission assumed would be case on transport routes that do not meet the impairment thresholds. ACS has offered no evidence that competitive transport providers have entered the market without relying on physical collocation with ACS. Moreover, ACS has offered no evidence at all regarding the level of entry barriers or revenue opportunities for competitive providers of transport. That a single competitor, GCI, has apparently deployed its own transport is not dispositive. As explained in the previous section, the Commission fully assumed that some amount of transport had been deployed by competitors on routes in which its thresholds would require continued

unbundling. Again, Anchorage seems to conform precisely to the Commission's expectations.

For all of these reasons, therefore, there is no basis for concluding that GCI's presence in the business loop market justifies forbearance from requiring ACS to unbundle loops of any capacity serving business customers. In particular, regardless of whether the Commission grants ACS unbundling relief with regard to residential loops in Anchorage, it must require that ACS continue to unbundle DS0 loops (including conditioned DS0 loops), DS-1 loops and single DS-3 loops serving businesses in Anchorage. Nor is there any basis for forbearing from requiring ACS to unbundle transport in Anchorage.

#### **IV. CONCLUSION**

For the reasons stated above, we respectfully request that the Commission deny ACS's petition for forbearance.

Respectfully submitted,

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/s/

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January 9, 2005

**CERTIFICATE OF SERVICE**

I, Jonathan Lechter, do hereby certify that on this 9<sup>th</sup> day of January, 2006, I caused to be served a true and correct copy of the foregoing "Opposition of Time Warner Telecom, Conversent Communications, Cbeyond Communications and CTC Communications" by delivering a copies thereof via U.S. mail to the following:

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