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the actual and potential competition made possible by the availability of those loops was a *basis for its forbearance from the other requirements – principally the pricing requirements – from which it forbore under Section 251(c)(3).*²⁵³ Indeed, the Commission specifically relied upon the requirement that Qwest continue to provide unbundled loops, albeit under Section 271, as a basis for rejecting arguments that forbearance would result in consumers facing “risk of duopoly and of coordinated behavior or other anticompetitive conduct.”²⁵⁴ In sum, the Commission rejected Qwest’s request to be freed of all requirements to provide unbundled loops specifically because the Commission was concerned that without the competition that unbundled loops provide, “telecommunications services available to consumers might not be offered on just, reasonable and non-discriminatory terms.”²⁵⁵ Here, because ACS is not subject to 271 obligations, the logic of the *Omaha Forbearance Order* requires that ACS’s Section 251(c)(3) obligations remain in effect.

Finally, and most significantly, the *Omaha Forbearance Order* does not support relief here because the extent of loop-based competition in Anchorage appears to be less than it was in the Omaha wire centers for which forbearance was granted. In Omaha, Qwest was competing with Cox, which had already substantially built out its network so that it was apparently able to serve an overwhelming majority of customer locations from its cable network within a commercially reasonable period of time. Even putting aside (1) those portions of the business market that cannot be served today using cable plant, and (2) those businesses and residences that do not lie on GCI’s cable plant, GCI does not

²⁵³ *Omaha Forbearance Order* ¶ 105.

²⁵⁴ *Id.* ¶ 71.

²⁵⁵ *Id.* ¶ 103.

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have Cox's ability to serve an overwhelming majority of customers. Instead, GCI is in the midst of extensive upgrades that do not currently allow GCI to serve most customers over its own facilities.²⁵⁶ It is thus indisputable that alternative loop facilities are less fully deployed in Anchorage today than they are in Omaha.

Furthermore, unlike the situation it faced with Qwest, the Commission cannot simply forbear from Section 251(c)(3) as a means for forbearing from TELRIC pricing while relying on Section 271 to maintain a basic unbundling requirement. ACS is not subject to Section 271. Therefore, even to mimic the result the Commission reached in its *Omaha Forbearance Order* – which would itself violate Section 10 as applied to the Anchorage markets – the Commission would have to deny ACS's request for forbearance with respect to Section 251(c)(3) while granting forbearance from Section 252(d)(1)(A)(i)'s requirement that UNE prices be set based on "cost (determined without reference to a rate-of-return or other rate-based proceeding)." Granting such relief is unwarranted here, however, as ACS has neither requested nor justified such additional forbearance.

Thus, there is no way that the Commission could reconcile its reasoning in the *Omaha Forbearance Order* with a grant of the full scope of ACS's request for forbearance from Section 251(c)(3) as to unbundled loops. The *Omaha Forbearance Order* simply precludes any grant of forbearance that would allow ACS to cease offering access to unbundled loops altogether.

²⁵⁶ Zarakas Decl. ¶¶ 7, 12-13, 16.

ii. Forbearance from the Availability of UNEs Would Increase ACS's Ability to Charge Unjust and Unreasonable Prices for Retail Telecommunications Services.

Even apart from the precedent of the *Omaha Forbearance Order*, the Commission must reject ACS's request for forbearance from loop availability requirements pursuant to Section 251(c)(3) because such forbearance would give ACS the ability to raise prices to unjust and unreasonable levels for retail telecommunications services, in violation of Section 10(a)(1). The Commission cannot, as ACS does, ignore the vertical effects of ACS's requested forbearance.

In applying the first prong of the forbearance analysis, the Commission has long recognized that "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."²⁵⁷ While the existence of robust competition at the retail level is an important precondition for finding that the first prong is met, it is far from the end of the inquiry.²⁵⁸ As the Commission emphasized in the *Omaha Forbearance Order*, the more critical question is whether there are "very high levels of retail competition *that do not rely on [the incumbent LEC's] facilities.*"²⁵⁹

²⁵⁷ *Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Service; Petition of US WEST Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270 (¶ 31) (1999) (cited by *Omaha Forbearance Order* ¶ 63).

²⁵⁸ See *Omaha Forbearance Order* ¶¶ 63-68.

²⁵⁹ *Id.* ¶ 67 (emphasis added).

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The difference here is significant, especially with respect to ACS's *request to be* relieved of all regulatory obligations to make UNEs available. In the absence of UNEs, GCI would have only two alternatives to serve a customer – extending its own loop facilities to serve that customer or purchasing ACS's retail services for resale.

In any of the product markets for which GCI purchases UNE loops today, ACS's market power would increase were GCI to be limited today to just those two alternatives. With respect to resale, as Dr. Sappington describes and as discussed above,²⁶⁰ because the prices GCI pays for wholesale resale services are directly pegged to ACS's retail prices, ACS can increase both GCI's costs and the price it seeks to obtain in the retail market by increasing its retail prices. GCI's experience in the Anchorage markets demonstrates that a carrier that relies on wholesale resale is not in a position to exert a strong competitive discipline on ACS's retail prices – particularly compared with a UNE-based provider.²⁶¹ If ACS were free to force GCI onto ACS resale products by withdrawing UNEs from the market, ACS would be able to raise its retail rates to unjust and unreasonable levels.

Nor does the potential for GCI to eventually construct its own loop facilities provide a meaningful check on consumer retail rates. As discussed above, the Commission concluded in the *Omaha Forbearance Order* that the *availability* of unbundled elements was necessary to ensure that rates were just and reasonable and not unreasonably discriminatory “even when it is economically feasible for a reasonably efficient competitor to construct such facilities.”²⁶² In so doing, the Commission

²⁶⁰ See Section II.B above; Sappington Decl. ¶¶ 89-90.

²⁶¹ See Tindall Decl. ¶ 13; Sappington Decl. ¶¶ 89-90; Borland Decl. ¶ 47.

²⁶² *Omaha Forbearance Order* ¶ 104.

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necessarily concluded that expected new loop construction would not discipline prices in the period before and during construction.

This conclusion, as Dr. Sappington explains, is fully consistent with the purpose and logic underlying Section 251(c)(3)'s unbundling obligations.²⁶³ Congress intended the Act's competition provisions to replace the need for retail rate regulation, as part of a "pro-competitive, de-regulatory national policy framework."²⁶⁴ Moreover, UNEs were expressly provided to permit retail competition to arise when alternative facilities were not yet available.²⁶⁵ Thus, forbearance is not warranted if it permits an ILEC to exercise market power for even a few months while competitive facilities are being built.²⁶⁶

ACS's ability, in the absence of a UNE unbundling requirement, to engage in a raising rivals' cost strategy to exercise market power in the retail market is even stronger in the business market, particularly with respect to medium sized business locations, than it is in the residential and small business markets. As discussed in the Declaration of Gary Haynes, these locations are generally served today using unbundled loop facilities and cannot, using current standard cable telephony, be served using cable plant.²⁶⁷ Moreover, as the Declarations of Blaine Brown and William Zarakas make clear, customers with locations of less than two DSIs in volume cannot economically be served by fiber, and even many customers that purchase more DSIs to a single location cannot

²⁶³ Sappington Decl. ¶ 13.

²⁶⁴ S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.)

²⁶⁵ See *id.* at 148; Sappington Decl. ¶ 13.

²⁶⁶ Sappington Decl. ¶¶ 15-16.

²⁶⁷ Haynes Decl. ¶¶ 20-23.

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be served economically using fiber.²⁶⁸ By withdrawing DS0 and DS1 UNEs from the market, ACS would relegate GCI entirely to wholesale resale services to serve the medium and large enterprise customers that cannot be served using cable plant.²⁶⁹ This, in turn, would allow ACS to raise resale prices when it raises its retail rates. Moreover, because these medium and large sized enterprise locations are generally served through individually negotiated contracts, it would particularly easy for ACS to exercise its market power, with little check from GCI.²⁷⁰

This is true regardless of GCI's retail market share. In evaluating market power, the Commission in the *Omaha Forbearance Order* looked beyond the mere retail market share upon which ACS fixates. Instead, the Commission recognized that the degree of demand and supply elasticity present in a market affects the ability of competitors in that market to compete. As explained in Section III.D above, GCI faces unique limits on its ability to build facilities, including Anchorage's brief construction season and paucity of seasonal workers. In the medium to large enterprise market, technology and cost are significant further constraints on supply, as services demanded by these customers cannot feasibly be offered using GCI's cable facilities. These services, instead, must be

²⁶⁸ Brown Decl. ¶¶ 11-19; Zarakas Decl. ¶¶ 15-16, 38-44, 48.

²⁶⁹ It is important to note that for a significant number of medium to large enterprise locations, GCI provisions services using unbundled DSL-qualified DS0 loops, rather than UNE DS1s. GCI does so by adding its own electronics to the DS0 loop. These loops serve a separate product market – the medium to large enterprise locations – than the DS0 loops that GCI leases today to serve residential and small business customers. These latter DS0 loops can be replaced by cable telephony, but the DS0 loops to which GCI adds its own electronics to provide high capacity service cannot feasibly be replaced with cable telephony. Thus, in evaluating ACS's request for forbearance, DS0s used for this purpose must be evaluated under Section 10(a)(1) separately from DS0s used in the mass market.

²⁷⁰ See Sappington Decl. ¶ 115.

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provided over UNEs or fiber.²⁷¹ And, as Mr. Zarakas demonstrates, it is not economically feasible for GCI, or any reasonably efficient competitor to ACS, to replace fractional and whole DS1s with fiber until the demand at that customer's location exceeds, at minimum, 2 DS1s and often more.²⁷² For these reasons, GCI cannot serve these customers or feasibly expand its capacity to do so without access to UNEs.²⁷³ Moreover, as Dr. Sappington points out, because these medium to large enterprise location customers are generally served through individually negotiated contracts rather than general tariffed rates, these customers are particularly vulnerable to anticompetitive behavior by ACS.²⁷⁴

Even in the residential and small business product markets, GCI supply elasticity is limited. First, GCI cannot upgrade cable plant to provide telephony service in areas where it is not even authorized to provide cable service and does not have cable plant. ACS's request for forbearance must therefore be denied with respect to all wire centers, or portions thereof, that lie outside GCI's franchised cable area, including the Girdwood, Hope and Bird-Indian wire centers.²⁷⁵ Likewise, many small business customers are not passed by GCI's cable plant, as GCI cable predominantly serves residential areas. Further, even for those customers that are on GCI's cable plant, the evidence makes clear that GCI could not simply flip a switch and convert residential and small business

²⁷¹ Haynes Decl. ¶ 22.

²⁷² Zarakas Decl. ¶¶ 15-16, 38-44.

²⁷³ This is true whether GCI serves these customers with DS0 UNEs to which GCI adds its own electronics or with DS1 UNEs.

²⁷⁴ Sappington Decl. ¶ 115.

²⁷⁵ See Exhibit E attached hereto. The cable operator in Girdwood is Eyecom, a subsidiary of the TelAlaska, another Alaska ILEC. Borland Decl. ¶ 28.

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customers that are being served by UNEs to GCI's own facilities.²⁷⁶ The Commission's assessment of ACS's ability to constrain competition should take these and other limits on GCI's supply elasticity into account.

iii. ACS Has Not Shown that Application of Sections 251(c)(3) and 252(d)(1) is Unnecessary.

ACS's arguments that continued application of Sections 251(c)(3) and 252(d)(1) is not necessary to ensure that retail prices in Anchorage markets are just, reasonable, and not unreasonably discriminatory are not persuasive.²⁷⁷ First, ACS's interpretation of the Commission's recent *Section 271 Broadband Order*²⁷⁸ is specifically rejected by the *Omaha Forbearance Order*. ACS suggests that the *Section 271 Broadband Order* stands for the general proposition that forbearance is appropriate where there is sufficient competition in the retail market even without sufficient competition in the wholesale market.²⁷⁹ In fact, that *Order* suggests only that (1) sufficient full *facilities-based* competition in the retail market can justify forbearance, if (and only if) (2) unbundling requirements at the wholesale level create significant "investment disincentives."²⁸⁰

²⁷⁶ See generally Section III.A-III.C above.

²⁷⁷ ACS Petition at 20-23, 29-37.

²⁷⁸ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc., Petition for Forbearance under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) ("*Section 271 Broadband Order*").

²⁷⁹ ACS Petition at 21-22.

²⁸⁰ See *Section 271 Broadband Order* ¶ 22 (emphasizing that the retail competition for high speed Internet access is chiefly between facilities based DSL and cable modem providers); ¶¶ 24-25 (describing in detail the reduced incentives to building new facilities caused by the BOCs' Section 271 unbundling obligations); see also *Omaha Forbearance Order* ¶ 106 (characterizing the *Section 271 Broadband Order*'s holding as relying on (1) the existence of "numerous intermodal broadband competitors" and (2) the fact that

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Here, neither half of the Section 271 Broadband Order's logic applies. As to the first half, retail competition in Anchorage is not yet substantially full-facilities based, but rather currently relies, in large part, on access to unbundled loops at regulated prices. This is precisely why access to unbundled loops at TELRIC prices remains necessary to ensure just, reasonable, and nondiscriminatory prices (as was the case in 15 of the *Omaha Forbearance Order's* wire centers in Omaha). As for the second half, the facilities at issue here are *legacy* facilities – not the fiber facilities at issue in the *Section 271 Broadband Order* – and ACS has not even *alleged* that it is facing a disincentive to invest in upkeep of these legacy facilities. Indeed, the *Omaha Forbearance Order* makes this exact finding:

The reasoning that formed the basis of the Commission's decision to forbear from applying the Section 271 network access requirements to certain of the BOCs' broadband facilities does not extend to Qwest's legacy elements. The supply market for legacy services is quite different from the supply market for broadband services. As explicitly recognized in Section 706, it is important for this Commission to remove investment disincentives that apply to *broadband* services in order to encourage the construction of next generation facilities to customers nationwide. In contrast, the policies of Section 706 do not apply to already-constructed legacy elements.²⁸¹

Second, ACS's scattershot arguments about why it will continue to offer just, reasonable, and nondiscriminatory retail rates are either expressly foreclosed by the *Omaha Forbearance Order* or are unreasonable on their face. To begin with, the *Omaha Forbearance Order* makes clear that, contrary to ACS's promises,²⁸² an incumbent will *not* have an incentive to offer loops at just, reasonable, and nondiscriminatory prices – or

“Section 271 unbundling obligations create disincentives for the BOCs to make substantial incentives in . . . new fiber technologies”).

²⁸¹ *Omaha Forbearance Order* ¶ 107.

²⁸² ACS Petition at 43-45.

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even at all – if left to its own devices. That is why the Commission declined to offer relief from Section 271 unbundling in any wire center and from Section 251 unbundling in wire centers where the competitor does not have last-mile facilities covering a significant portion of end users in the wire center. ACS's citation to the 1995 decision that declared AT&T non-dominant when it still had 60% of the long-distance market is beside the point²⁸³ – here ACS actually has 85% of the relevant market, which is last-mile connections to customer premises.²⁸⁴ And it is control over that bottleneck facility that would allow ACS to raise GCI's costs so as to produce monopoly prices.²⁸⁵

ACS also suggests that GCI will “exert disciplinary effects” in the local service market merely because it has *announced* that it intends to build its own facilities to serve residential customers, even though it has not yet done so.²⁸⁶ ACS's bald assertion makes no sense. For the reasons explained above, an incumbent with control over bottleneck loop facilities will be able to raise its rivals' costs until the rivals actually build facilities, regardless of what the rivals have announced they intend to do. Certainly, the *PCIA*

²⁸³ *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3307-08 (¶ 68) (1995).

²⁸⁴ See Exhibit I, attached to Zarakas Decl.

²⁸⁵ ACS also cites *Worldcom v. FCC*, 238 F.3d 449, 459-60, and *TRO* ¶ 259, for the proposition that the Commission can grant deregulation based on imperfect current competition. ACS Petition at 22 n.104. But the *Worldcom* decision says only that an imperfect measure of competition can withstand deferential judicial review – this does not mean the Commission should not strive for more accurate measures where possible. *Id.* And the *TRO* language that ACS cites says that competition was sufficiently advanced to decline to unbundle (under Section 251) the high frequency portion of copper loops. But that decision applies a totally different standard for deregulation than applies to forbearance under Section 10.

²⁸⁶ ACS Petition at 30.

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Order that ACS cites does not support its claim.²⁸⁷ That Order merely says that “licensees do not exert any disciplinary effect in their markets until after they announce their intentions to commence operations, identify the services they intend to offer, and begin soliciting business” – it does not imply the indefensible extension drawn by ACS that a mere announcement can substitute for actually building facilities.²⁸⁸

Nor is it correct to suggest that wireless and VoIP providers offer meaningful intermodal competition in Anchorage that will eliminate ACS’s ability to charge unjust and unreasonable prices, even if ACS were to withdraw UNEs from the market. As discussed above, and as the FCC concluded in the *SBC-AT&T* and *Verizon-MCI Orders*, there is no evidence that “over-the-top” VoIP is in the same product market as the local exchange and exchange access services ACS and GCI currently provide. This particularly true because there does not appear to be any “over-the-top” VoIP provider that offers service using Anchorage telephone numbers.²⁸⁹ With respect to CMRS, ACS

²⁸⁷ *Personal Communications Indus. Ass’n’s Broadband Personal Communications Servs. Alliance Petition for Forbearance for Broadband Personal Communications Servs.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998) (“*PCIA Order*”) (cited by ACS Petition at 30).

²⁸⁸ *Id.* ¶ 22. ACS is also incorrect to assert that GCI made any general representation to the RCA that “markets can be deemed competitive even before facilities-based competition exists throughout the geographic area.” ACS Petition at 30. In truth, GCI simply argued that it is appropriate to deem a local exchange market “competitive” for state law purposes governing retail price regulation where “competitive entry may not serve 100% of the customers within an exchange area.” See GCI Reply Comments at 3-4, attached to ACS Petition as Exhibit H. But this is a far cry from the proposition that ACS puts forth here – namely that the wholesale market in Anchorage is competitive even though the incumbent controls the last-mile facilities currently used to serve over 85% of the market. See Exhibit I, attached to Zarakas Decl.

²⁸⁹ ACS’s expert baldly asserts that “there is no question that customers are substituting VoIP . . . for ACS local exchange and access services in escalating numbers.” Blessing Stmt. at 13. He bases this conclusion on two *Wall Street Journal* articles and a 2003 J.D. Power & Associates report. *Id.* These sources address the use of VoIP across the entire

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presents no serious argument that these services are a substitute for the services that GCI provides over UNE loops to businesses. And ACS likewise presents no evidence to show that the limited degree to which CMRS can substitute for wireline local service will significantly constrain the prices that ACS could charge to residential customers for primary line service in the absence of UNEs.²⁹⁰ In other words, there is simply no serious argument that these service modes provide any meaningful price discipline on wireline local service that makes UNE unbundling superfluous.²⁹¹

Third, ACS is also mistaken, for two distinct reasons, to assert that the RCA's deregulation of retail pricing cuts in favor of granting forbearance here.²⁹² To begin with, if the RCA grants ACS's request for nondominant retail treatment under new Alaska rules, the RCA will have done so relying on the strength of retail competition as it exists today under the current unbundling rules. If ACS receives the relief it seeks here and withdraws UNEs from the market, that competition would evaporate. The RCA's conclusion that retail competition (based in large part on UNEs) is sufficient today plainly cannot lead the Commission to eliminate the very retail competition that provided the original justification for price deregulation. As the Commission explained in the

United States, not in Anchorage where, as noted above, there are no "over-the-top" VoIP providers.

²⁹⁰ Sappington Decl. ¶¶ 106-107; *SBC-AT&T Order* ¶ 90 n.277.

²⁹¹ ACS's expert also baldly asserts that "there is no question" that customers are substituting CMRS services for ACS service. Blessing Stmt. at 13. As with his analysis of VoIP, this statement is based in part on a report (by the FCC) that addresses the entire country, not Anchorage. *Id.* Even more important, the analysis fails to disclose that ACS is itself a leading wireless provider in Alaska and thus is poised to benefit from, rather than be hurt by, an increase in wireless use. ACS also fails to offer any evidence for its suggestion that wireless loops are a widely-available and/or feasible substitute for UNE loops in Anchorage. *See* ACS Petition at 35.

²⁹² *Id.* at 33.

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Omaha Forbearance Order. “In the Omaha MSA, where retail competition often is based on the use of Qwest’s facilities, eliminating the requirement to provide wholesale access to Qwest’s loops . . . is likely to result in a reduction of the very competition Qwest relies on to justify granting its Petition.”²⁹³ The same logic applies to the RCA’s retail price deregulation.

Moreover, if the RCA grants ACS’s request for nondominant retail treatment (which GCI has not opposed), the retail price deregulation resulting from that treatment would actually magnify ACS’s ability to raise retail prices to unjust, unreasonable, and discriminatory levels if ACS receives the forbearance it seeks. As noted above, forbearance from loop unbundling will give ACS the ability to raise GCI’s costs (by forcing GCI onto wholesale resale services) to a point where GCI is charged the monopoly wholesale rate and ACS is thereby permitted to raise its rates to monopoly levels without fear that GCI could undercut its prices. If, at that point, ACS has already been granted nondominant status by the RCA, it will not be subject to requirements to file cost support with its tariffs, and thus will be able to raise rates largely unchecked by state regulation.

Accordingly, there is no basis for granting ACS’s request for forbearance from Section 251(c)(3)’s requirement that it make unbundled loops and other network elements available to GCI and other requesting carriers in any of the Anchorage markets.

2. ACS is not Entitled to Independent Relief from UNE Pricing Standards.

As discussed above, ACS does not seek forbearance from Section 251(d)(1)’s UNE pricing standards, and the FCC rules issued thereunder, separately from Section

²⁹³ *Omaha Forbearance Order* ¶ 110.

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251(c)(3)'s requirement that UNEs be made available. As the Commission explained in the *Omaha Forbearance Order*, it "is under no statutory obligation to evaluate [a forbearance petition] other than as pled."²⁹⁴ Moreover, in that *Order* the Commission specifically denied the petitioner "relief from other regulations that apply to dominant carriers" on the ground that it "fail[ed] to identify specific regulations or to explain how they meet the Section 10 criteria."²⁹⁵ Thus, because ACS has failed to show that forbearance from Section 251(c)(3) will not lead to unjust, unreasonable or unreasonably discriminatory rates, terms and conditions, the Commission need not consider separately whether it should forbear from Section 251(d)(1) even if it does not forbear from Section 251(c)(3). However, to the extent ACS's petition is reinterpreted to include an independent request for forbearance from Section 251(d)(1) and the FCC's implementing rules, such forbearance also must be denied under Section 10(a)(1).

i. Rate Structure Rules are Necessary to Ensure Rates are Just and Reasonable.

Forbearance must be denied because the Commission's UNE rate structure rules, its rule precluding the assessment of access charges on UNEs, and its rule precluding variations in UNE rates based on customer class or the services that the requesting carrier seeks to provide remain necessary to ensure that prices in Anchorage markets are just, reasonable, and not unreasonably discriminatory. In its *Local Competition Order*, the FCC established UNE rate structure rules to implement Section 251(c)(3)'s requirement that rates be just and reasonable, and 252(d)(1)'s requirement that rates be cost-based.²⁹⁶

²⁹⁴ *Id.* ¶ 61 & n.161.

²⁹⁵ *Id.* ¶ 16.

²⁹⁶ *Local Competition Order* ¶ 743.

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When it adopted these rules, a significant purpose was to “prevent incumbent LECs from inefficiently raising costs in order to deter entry.”²⁹⁷ ACS presents no evidence to show why it should be excused from these requirements.

ACS does not, for example, explain why it should be permitted to charge usage based rates for dedicated loops for which cost does not vary with usage.²⁹⁸ Nor does ACS present any reason why it would be just and reasonable for ACS to impose an access charge on a purchaser of an unbundled loop.

By contrast, the Commission has found that its rate structure and no access charge rules are necessary to ensure that rates are just and reasonable. For example, the Commission has specifically found that recovery of recurring costs in a non-recurring charge is not just and reasonable.²⁹⁹ Likewise, the Commission has expressly forbidden ILEC differentiation of UNE charges based on the class of service (i.e., residential v. business service) or type of service offered by a requesting carrier.³⁰⁰ ACS provides no explanation why the Commission should now reach a different conclusion with respect to the Anchorage markets.

Furthermore, continued application of the Commission’s rate structure and no access charge rules is necessary to prevent ACS from exercising market power more effectively. If ACS could charge different rates for different classes of service, it could

²⁹⁷ *Id.* These rules are codified in Sections 51.503(b)(first clause), (c), and 51.507-509 of the Commission’s rules. 47 C.F.R. §§ 51.503(b), (c), 51.507-509 (Section 51.503(b)(1) addresses forward looking cost-based pricing, which is addressed separately in Section IV.D.2 below). The Commission also adopted Section 51.515(a), which precluded ILECs from assessing access charges on UNE elements. 47 C.F.R. § 51.515(a). The remainder of Section 51.515 is obsolete.

²⁹⁸ *Cf.* 47 C.F.R. § 51.507(a), (b).

²⁹⁹ *Local Competition Order* ¶ 746.

³⁰⁰ 47 C.F.R. § 51.503(c); *Local Competition Order* ¶ 766.

better drive up prices in those product and geographic markets where GCI cannot, within a commercially reasonable time, offer services entirely over its own facilities.³⁰¹

Moreover, because these rules only apply to situations in which the parties cannot agree on rates, and do not preclude or override voluntary agreements,³⁰² continued application of these rules does not prevent any mutually beneficial arrangements. Because ACS's petition fails to show that these rules are not necessary to ensure that rates are just and reasonable, any request for forbearance from these portions of the Commission's FCC's UNE rate structure rules, and Sections 251(c)(3) and 251(d)(2), which they implement, must be denied.

ii. Pricing Rules are Necessary to Ensure Rates are Just and Reasonable.

ACS also fails to demonstrate that rates for UNEs – particularly UNE loops – would remain just, reasonable and not unreasonably discriminatory if the Commission were to forbear from Section 252(d)(1)'s cost-based pricing requirement and the Commission's rules requiring pricing according the forward-looking TELRIC methodology. Just as with the availability of UNEs, if the Commission grants ACS's request for forbearance from TELRIC pricing, ACS will gain the ability to exercise market power by raising GCI's costs and thereby increasing the prices that ACS can charge its own retail customers.

In the first instance, the Commission's *Omaha Forbearance Order* does not compel grant of ACS's petition with respect to TELRIC pricing. The Commission made clear that its Omaha decision did "not reach the situation where the incumbent LEC's

³⁰¹ Sappington Decl. ¶ 115.

³⁰² *Local Competition Order* ¶ 752.

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primary competitor uses unbundled network elements (UNEs), particularly unbundled loops, as the primary vehicle for serving and acquiring customers in the relevant market.”³⁰³ That is precisely the circumstance presented here.

Moreover, as discussed previously, the Omaha, Nebraska market presented a very different situation. Unlike GCI in Anchorage, Cox in Omaha had already substantially deployed its cable plant and deployed its cable telephony service throughout the nine wire centers in which the FCC granted forbearance. In contrast, GCI is in the midst of upgrading its network and deploying cable telephony, and cable telephony in Anchorage remains a nascent service. Consequently, GCI depends on UNE loops to offer service to the residential, small business, and medium to large enterprise markets, including acquiring customers, serving those customers and, wherever possible, transitioning customers to GCI facilities.³⁰⁴

As Dr. Sappington sets forth, simply requiring ACS to provide UNEs, as Qwest was required to do, will not protect Anchorage consumers against unjust and unreasonable charges.³⁰⁵ Even if it were required to continue to provide unbundled network elements, ACS has the incentive and ability to price those elements at a level designed to extract ACS’s single monopoly profit. By so doing, ACS would not only increase the revenue it obtains from GCI, but also increase the revenue it obtains from its own retail customers. Thus, without a TELRIC pricing requirement, basic economic principles make it clear that ACS will be able to charge unjust and reasonable rates not

³⁰³ *Omaha Forbearance Order* ¶ 2 n.4.

³⁰⁴ See generally Section III.A-III.C above.

³⁰⁵ Sappington Decl. ¶¶ 17-23, 45-54, 87-99.

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just for the UNEs it offers to competitors, but also for the retail services it offers to consumers

Finally, ACS's suggestion that pricing relief is appropriate because its TELRIC UNE rates are "below cost" simply does not hold water.³⁰⁶ While ACS's TELRIC rates are below the NECA reported unseparated average loop cost of \$24.62,³⁰⁷ that loop cost reflects embedded cost, and therefore is not relevant here.³⁰⁸ As the Commission explained in its *Local Competition Order*, pricing UNEs on the basis of ILEC embedded costs would create an anticompetitive pro-ILEC bias.³⁰⁹ Despite ACS's insistence to the contrary, TELRIC rates are fully compensatory for an efficient incumbent LEC.³¹⁰

The Commission recently confirmed this principle in the *Triennial Review Order* when it clarified that the appropriate cost of capital must reflect the risks of a competitive market and any unique risks associated with new services that might be provided over certain types of facilities,³¹¹ and permitted accelerated depreciation to reflect the decline in an asset's "value that would be anticipated in the competitive market TELRIC

³⁰⁶ In any event, if ACS feels it is entitled to a different TELRIC price, the appropriate remedy is not forbearance from TELRIC pricing requirements.

³⁰⁷ NECA reported that ACS of Anchorage had unseparated annual loop costs of \$295.41, or monthly costs of \$24.62. *Universal Service Fund Data: NECA Study Results*, File USF2005LC05.xls in USF05R04.ZIP at <http://www.fcc.gov/wcb/iatd/neca.html>.

³⁰⁸ By way of comparison, ACS sought a monthly UNE rate of \$25.88 for a DS0 loop in recent arbitration. (*In the Matter of the Petition by GCI Communications Corp. d/b/a General Communication, Inc., and/b/a GCI for Arbitration Under Section 252 of the Telecommunications Act of 1996 with the Municipality of Anchorage d/b/a Anchorage Telephone Utility a/k/a ATU Telecommunications for the Purpose of Instituting Local Exchange Competition*, Docket U-96-089, ACS of Anchorage, ACS-ANC and GCI Interconnection Agreement (proposed), Part C, Attachment 1 at 27, filed May 12, 2004).

³⁰⁹ *Local Competition Order* ¶ 705.

³¹⁰ Sappington Decl. ¶ 63.

³¹¹ *TRO* ¶¶ 680, 683

assumes.”³¹² ACS’s UNE loop rates in Anchorage were set after the *TRO* took effect, with the RCA implementing the provisions on cost of capital and depreciation.³¹³ There can be no argument, then, that ACS’s current UNE rates are not fully compensatory.

For all of these reasons, ACS has failed to demonstrate that the cost-based pricing requirements of Section 252(d)(1) and the Commission’s TELRIC pricing rules, codified in 47 C.F.R. §§ 51.503(b)(1), 51.505, and 51.511, are not necessary to ensure that rates both for UNEs and for retail services are just, reasonable and not unreasonably discriminatory. To the contrary, the evidence shows that these critical statutory and regulatory protections remain necessary to protect the competition – and thus the market discipline on retail rates – that has developed in the Anchorage markets.

C. Section 251(c)(3) and 251(d)(1) Requirements Remain Necessary to Protect Consumers.

ACS correctly states that the analysis for the second prong of the test – whether the challenged regulation “is necessary for the protection of consumers” – is largely identical to the first.³¹⁴ Accordingly, the fact that forbearance from the loop unbundling regulations will give ACS the ability to control retail prices by raising GCI’s costs provides a clear reason that the petition fails the second prong. ACS also asserts under this prong that GCI’s success in gaining customers in 2001, when ACS raised its prices, indicates that GCI could do the same today if ACS were to raise prices.³¹⁵ But the 2001

³¹² *Id.* ¶ 689.

³¹³ In its arbitration order, the RCA used a Weighted Average Cost of Capital of 13.89%. GCI has appealed the RCA’s order because it believes that the RCA’s calculation of the cost of capital was flawed and unreasonable. GCI’s Opening Brief in *GCI v. Regulatory Commission of Alaska*, Case No. A05-03CV (D. Alaska Oct. 7, 2005).

³¹⁴ ACS Petition at 23-24; *Omaha Forbearance Order* ¶¶ 73, 108.

³¹⁵ ACS Petition at 38-39.

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episode actually illustrates quite clearly why access to unbundled loops is essential to allowing GCI to provide continued price discipline. As noted above, GCI was able to keep its prices low (unlike AT&T Alascom, a resale-based service provider) because it had access to UNE loops and its own switch and transport facilities. If GCI had been forced in 2001 to pay whatever price ACS demanded for loop access, or to use Section 252(c)(4) resale, then it would *not* have been able to keep its prices at then existing levels. Instead, ACS would have succeeded in forcing all carriers to raise retail prices – to the detriment of consumers.

D. Forbearance From Loop Unbundling Is Not in The Public Interest and Would Not Promote Competition

In applying the third prong of the forbearance, the Commission has developed two additional lines of analysis for assessing the effect of forbearance from unbundling on the public interest and on competition.

First, the Commission explained in the *Omaha Forbearance Order* that it must weigh the costs and benefits of unbundling obligations.³¹⁶ As the Order explains, “a high degree of regulatory intervention may initially be required in order to generate competition among direct competitors in a situation where one carrier owns the telecommunications network that will be used to provide service to a single pool of customers.”³¹⁷ Though this process concededly imposes “a number of costs,” the *Order* concludes that the costs of requiring unbundled loops at regulated prices do not outweigh the benefits in any wire center, regardless of the degree of facilities based competition.³¹⁸

³¹⁶ *Omaha Forbearance Order* ¶ 76-77.

³¹⁷ *Id.* ¶ 76.

³¹⁸ *Id.* ¶¶ 109-110

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The costs of requiring unbundled loops at TELRIC prices only outweigh the benefits “once the local exchange markets . . . are sufficiently competitive” as in the nine wire centers in Omaha.

None of Anchorage’s wire centers is sufficiently competitive to warrant forbearance. Equally important, there is no issue here of ACS’s incentives to invest because, as noted above, this petition involves “legacy services” and not “broadband services” (which are supplied over GCI’s cable plant).³¹⁹ ACS attempts to revive this line of argument by asserting that “GCI’s incentive to transition to its own network will be inhibited as long as it continues to profit from using ACS’s network.”³²⁰ However, GCI has shown that it is moving as quickly as possible to develop new facilities.³²¹ Certainly, ACS has not provided any evidence that GCI has slowed down its transition to DLPS because of the UNE rules.³²²

Second, the Commission explained that “[o]nce the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities . . . , we believe that it is in the public interest to place intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms.”³²³ Here, of course, competition is not currently between two competitors with different modes of providing last-mile access. Instead, it is between an incumbent that owns the bottleneck loops and a competitor that is building,

³¹⁹ *Id.* ¶ 107.

³²⁰ ACS Petition at 41.

³²¹ *See* Section III.A-III.D above; Sappington Decl. ¶¶ 118-120.

³²² *Id.*

³²³ *Omaha Forbearance Order* ¶ 78.

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but has not yet fully built, telephony-capable residential last-mile loops and that cannot economically build last-mile facilities to reach many businesses and MDUs. Under the standard announced by the *Omaha Forbearance Order*, the time is not yet ripe for regulatory parity.

Of particular importance, the Commission noted in its analysis of the regulatory parity issue that because of Cox's facilities-based presence in Omaha, the incumbent LEC "will be subject to very strong market incentives to ensure that its network is used to optimal capacity . . . in order to minimize revenue losses resulting from customer defections to Cox's service."³²⁴ But in Anchorage, the fact that GCI has not yet built last-mile facilities to a large percentage of end users ensures that ACS does *not* have comparable incentives to offer reasonable prices. Instead, for all the reasons provided above, if granted forbearance, ACS will have the means and the motive to either eliminate loop access altogether or to charge supracompetitive prices for loop access.

Moreover, the Commission cannot, as ACS would have it do, ignore the fact that there are distinct product markets and geographic markets and that not all product and geographic markets can be served using the cable telephony on which ACS relies. Cable telephony, for example, cannot be used to serve a small business customer in an area not served by cable, and the presence of competition in the residential market will only to a limited extent constrain ACS's ability to raise rates and reduce competition for small business customers. Similarly, medium enterprise locations – those above eight lines but less than a DS3 in capacity at a single location – are a distinct market from residential and small business markets and cannot reasonably be lumped together with the residential

³²⁴ *Id.* ¶ 81; *see also* ACS Petition at 43-45.

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and small business markets. When these distinct markets are analyzed, it is even more clear that ACS cannot show that forbearance is pro-competitive and in the public interest.

Finally, in conducting its public interest inquiry, the Commission cannot ignore the significant social waste that would occur if GCI were forced in a short period of time to eliminate its use of UNE loops. Doing so would require GCI to switch virtually all of its current UNE loop customers to resale within whatever time window the Commission permitted. As the Declaration of Gina Borland explains, this process would be extremely expensive for GCI, harm the quality of service GCI provides to its customers, and compromise GCI's transition to the process of upgrading its cable plant.³²⁵ Most importantly, GCI and its customers will incur these costs without creating any social value – only ACS will benefit from the process. An expenditure of social resources without any offsetting social gain is the very definition of an action that is not in the public interest.

1. Forbearance Only As To GCI Is Not a Reasonable Alternative

ACS also suggests that the Commission, in the alternative, could provide ACS with forbearance from Section 251(c) only as to GCI.³²⁶ This idea is absurd on its face and without any support in precedent or economic policy. Because GCI is the only purchaser of the loops in question, if ACS's request for general forbearance does not pass muster, as a matter of logic, the analysis cannot change if applied to GCI only. The effects on prices, consumers, and the public interest will be identical under either general or GCI-specific forbearance.

³²⁵ See generally Borland Decl. ¶¶ 40-49; see also Wurts Decl. ¶¶ 8-12.

³²⁶ ACS Petition at 48-49.

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V. CONCLUSION

Consistent with the goals of the 1996 Act, GCI has brought the enormous benefits of retail competition to the Anchorage markets. GCI is currently working to extend this competition by constructing its own last-mile facilities, but this process is far from complete and GCI continues to rely on unbundled loops to offer facilities-based service to Anchorage customers in all markets. As a result of ACS's control over this bottleneck facility, removing unbundling requirements would enable ACS to raise its rivals' costs and otherwise stifle the very retail competition that ACS relies on in its request for forbearance. Granting ACS's request would also run counter to the Commission's recent *Omaha Forbearance Order*, in which the Commission carefully maintained requirements that the incumbent make unbundled loops available at regulated rates. Finally, ACS has failed to satisfy even a single prong of the statutory test for forbearance. For these reasons, ACS's Petition should be denied.

Respectfully submitted,

/s/

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