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3 July 2006

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Ex Parte

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

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Federal Communications Commission  
Office of Secretary

Re: *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 Docket No. 05-281.*

Dear Ms. Dortch:

General Communication, Inc. ("GCI"), by and through counsel, hereby responds to recent arguments offered by ACS of Anchorage, Inc. ("ACS") in support of its petition for forbearance in the Anchorage markets.<sup>1</sup> As demonstrated below (and in the

<sup>1</sup> *Reply Comments of ACS of Anchorage, Inc. In Support of Its Petition for Forbearance from Sections 251(c)(3) and 252(d)(1), WC Docket No. 05-281, (filed February 23, 2006) ("ACS Reply Comments"); Ex Parte Submission of ACS of Anchorage, Inc., Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area, WC Docket No. 05-281 (filed May 31, 2006) ("ACS May 31 Ex Parte"); Ex Parte Notice of ACS of Anchorage, Inc., 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 Docket No. 05-281 (filed May 10, 2006) ("ACS May 10 Ex Parte"); Ex Parte Submission Regarding 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 Docket No. 05-281 (filed April 3, 2006) ("ACS April 3 Ex Parte").*

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supporting evidentiary materials), ACS's recent filings, like its original petition, continue to fail to demonstrate that forbearance is warranted in any of the Anchorage markets.

## I. Introduction

The record firmly establishes – and it is undisputed – that GCI is in the midst of a substantial transition from UNE-based local telephone competition to full-facilities, intermodal local telephone competition. GCI has been using UNE loops as the Telecommunications Act of 1996 intended – as a bridge from initial market entry using its own switching and transport network and to the deployment of its own loop facilities. GCI is already a long way across this bridge, having transitioned approximately 25,100 predominantly residential customers to its own facilities as of the end of the first quarter 2006.

But contrary to what ACS would have the Commission believe, the crossing is not yet complete – nor can it be completed within a short period. Limited by Anchorage's short outdoor construction season, GCI has not yet finished the network and outside plant upgrades necessary to serve residential customers over its own cable facilities in many sections of its cable service area. Moreover, with respect to business customers, GCI faces additional obstacles to full loop-based competition both because business customers are much less likely to be located on or near GCI's existing plant and because such customers often require DS1 services not yet reliably delivered over cable facilities and for which there is not yet industry standards-certified equipment. The record demonstrates, nevertheless, that GCI is moving across the bridge from UNEs to its own loop facilities as quickly as possible and has every incentive to continue its progress. GCI continues to project that by the end of 2006 it will convert another approximately 17,000 lines from UNEs to its own facilities statewide, with the bulk of those lines likely to be in Anchorage, and GCI plans to upgrade all of its remaining cable plant to provide DLPS to every possible customer as quickly as it can.<sup>2</sup> At the same time, GCI is aggressively pursuing solutions for environments such as MDUs and businesses that are more difficult to serve using cable technology.

In order to reach full facilities-based loop competition, GCI requires time – time to complete the rapid but orderly roll-out of its own facilities, including the construction

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<sup>2</sup> This is consistent with GCI's projections of 20,000 loops converted statewide in calendar year 2006. GCI converted approximately 3,000 loops in Anchorage in the first quarter of 2006, and expects to convert approximately 17,000 statewide during the remainder of the year. GCI will update the Commission of its progress at the conclusion of the construction season, as any decision should be based on actual numbers, not projections. *See* Section II.B., below (discussing the actual, existing competition standard as opposed to a potential competition standard).

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of cable plant in business districts,<sup>3</sup> and time for the industry to develop stable cable-based DS1 solutions that meet the needs of GCI's business customers. GCI is, after all, doing something that no other entity (including the large national cable companies) has ever done before: migrate a substantial base of *existing* customers from UNE-based service to cable-based service. Indeed, this is the exact situation that the Commission expressly did "not consider or address" in the *Omaha Forbearance Order*, i.e., "the situation where the incumbent LEC's primary competitor uses unbundled network elements (UNEs), particularly unbundled loops, as the primary vehicle for serving and acquiring customers in the relevant market."<sup>4</sup>

With its forbearance petition, ACS asks the Commission to demolish the 1996 Act's UNE bridge while GCI is midspan. There is no evidence, however, that forbearance would leave consumers and competition unscathed, or that forbearance is necessary to motivate GCI to move onto its own facilities. To the contrary, the record demonstrates that GCI is moving customers to its own facilities as quickly as possible, and needs no additional incentives to complete this transition. In light of GCI's substantial progress towards full deployment of its own facilities, and ACS's own assertion that GCI "intends to provide service throughout the market fully independent of ACS's UNEs within eighteen months,"<sup>5</sup> ACS's forbearance request is best understood as a last-ditch effort to create the maximum amount of disruption to GCI's customers and GCI's transition, in the hopes of damaging GCI's brand and thereby winning back customers. Section 10, which has at its heart the public interest, precludes ACS's attempt to use forbearance to disrupt competition.

The Commission should be particularly skeptical of ACS's claim that GCI (and the Commission) can rely on commercial negotiations to replace the transitional bridge of UNE loops. This self-serving invocation of commercial negotiations is nothing more than a convenient fiction, contradicted by ACS's repeated reluctance to negotiate in similar settings in which GCI has announced plans to enter local markets wholly on its own facilities, bypassing ACS's network entirely. Most recently, GCI suggested that the parties *voluntarily* negotiate UNE terms and conditions for a rural study area where GCI

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<sup>3</sup> The Commission has recognized that construction of local loops "generally takes between six to nine months." *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19467 (¶ 104) (2005) ("*Omaha Forbearance Order*"). Because Alaska's construction season is shorter than in the continental United States, generally lasting just five months, *see, e.g.*, Declaration of Kevin Sheridan ("Sheridan Decl.") ¶¶ 5, 21-22, attached hereto as Exhibit A, GCI can accomplish fewer local loop conversions in any one year than a similarly situated competitor in the lower 48, thus lengthening the time required to complete a comparable number of conversions.

<sup>4</sup> *Omaha Forbearance Order*, 20 FCC Rcd 19417.

<sup>5</sup> ACS Reply Comments at 11.

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is taking steps to provide intermodal local service, but where ACS is not obligated to provide UNE access. ACS responded to this proposal for voluntary, commercial negotiations by seeking revocation of GCI's operating authority – a move that the RCA has now rejected. This recent real-world example demonstrates that ACS is not genuinely interested in pursuing commercial UNE negotiations, preferring to use its control of existing last-mile facilities to disrupt emerging competition and denying access altogether unless compelled by law.

In the sections below, we first explain how ACS's requested relief would require the Commission to depart in several respects from its *Omaha Forbearance Order*, and detail ACS's failure to offer any principled bases for these departures. We next show that ACS has overstated GCI's ability to immediately deploy DLPS throughout the market, and that ACS's professed intent to negotiate commercially reasonable terms for UNE access should not be trusted. Finally, we detail GCI's continued efforts to roll out services to all markets as quickly as possible, including GCI's efforts to reach market segments that are particularly difficult to serve using cable technology.

## **II. ACS Disregards and Distorts the Commission's *Omaha Forbearance Order*.**

Any decision on ACS's Petition must be consistent with the Commission's recent *Omaha Forbearance Order* or, at a minimum, present a reasonable basis for any departure from that precedent. ACS, however, does not deal forthrightly with the *Omaha Forbearance Order*, asking the Commission to depart substantially from that decision without offering any principled basis for doing so. First, ACS offers no reason why the Commission can or should deviate from its decision in the *Omaha Forbearance Order* to require continued access to UNEs irrespective of whether those elements must be offered at TELRIC or other just and reasonable rates. Instead, ACS asks the Commission to relieve it from *any* obligation to make UNEs available, stating only that it is not subject to Section 271 requirements. But that, of course, is exactly the point. The Commission expressly declined in the *Omaha Forbearance Order* to forbear from all Section 251(c)(3) unbundling requirements without the safeguards of separate unbundling requirements – such as those in Section 271(c)(2)(B)(iv). ACS offers no analysis of the Commission's competition concerns and fails to demonstrate – because it cannot – that those same competition concerns are absent in the Anchorage markets. Accordingly, there is no basis for forbearing from the obligation to provide *access* to UNEs. The only issue here should be the appropriate pricing standard.

Second, ACS disregards the clear teaching of the *Omaha Forbearance Order* that forbearance is appropriate only where competitive facilities (including self-provisioned facilities) are currently available to provide substitute service within a commercially reasonable time. Instead, ACS would have the Commission forbear based on the *theoretical*, eventual availability of alternative facilities or services, including facilities

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and services that the Commission has previously found are *not* substitutes for wireline telephony. ACS again provides no record or analytic basis for such a departure.

Finally, ACS attempts to distort the meaning of the *Omaha Forbearance Order* by aggregating wire centers in an effort to obscure material differences in competitive conditions across Anchorage. ACS goes so far as to claim that the Commission should combine areas of Anchorage where GCI is in the midst of its cable telephony (“DLPS”) deployment with areas where GCI is not even the certificated cable provider and has no cable facilities. ACS offers no persuasive reason why the Commission should overlook vastly different levels of last-mile competition among ACS’s wire centers.

**A. Availability of UNEs is a Cornerstone of both the *Omaha Forbearance Order* and Local Competition.**

While ACS is quick to tout the fact that the Commission forbore from Section 251(c)(3) in the *Omaha Forbearance Order* with respect to certain wire centers, it conveniently ignores Qwest’s continued obligation to make UNEs available at just and reasonable rates under Section 271(c)(2)(B)(iv-v). The relief ACS trumpets depended on this continued availability, as the Commission tied the grant of Section 251(c)(3) forbearance to the continuation of other mandatory unbundling requirements: “Our justification for forbearing from Qwest’s section 251(c)(3) obligations for loop and transport in certain areas *depends in part on the continued applicability of Qwest’s wholesale obligations to provide these network elements under sections 271(c)(2)(B)(iv) and (v).*”<sup>6</sup> Thus, the Commission concluded, “while section 10(a) is satisfied with respect to forbearance from certain 251(c)(3) unbundling requirements for loops and transport, that measure of deregulation *is predicated* on the availability of other regulatory protections that function as a backstop to prevent harm to competition – including, most notably here, Section 271(c).”<sup>7</sup>

Moreover, in explaining why access to unbundled loops at just and reasonable rates (under Section 271) remained necessary even while the Commission forbore from

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<sup>6</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19468 (emphasis added); see also *id.* at 19450 (“We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that relies on Qwest’s wholesale inputs – which must be priced at just, reasonable and nondiscriminatory rates *and is subject to Qwest’s continuing obligations under section 251(c)(4) and section 271(c)* – supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary to ensure that the prices and terms of Qwest’s telecommunications offerings are just and reasonable and nondiscriminatory under section 10(a)(1).”) (emphasis added).

<sup>7</sup> *Id.*, 20 FCC Rcd at 19466. (emphasis added).

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requiring unbundling at TELRIC rates, the Commission made the importance of continued UNE availability to existing and emerging competition clear:

[I]t sometimes is not feasible for a reasonably efficient competitive carrier economically to construct all of the facilities necessary to provide a telecommunications service to a particular customer despite not being impaired under the Commission's rules without access to such facilities. In addition, even when it is economically feasible for a reasonably efficient competitor to construct such facilities, 'the construction of local loops generally takes between six to nine months absent unforeseen delay.' In order to provide service to customers, competitive LECs therefore may require wholesale access to Qwest's network on a temporary basis while they construct their own facilities to their customers' premises. If carriers lacked wholesale access to Qwest's network elements in such cases, they sometimes would not be able to provide service to that customer. The record contains no evidence to indicate that such an outcome would be a rare occurrence.<sup>8</sup>

ACS here advances no evidence that a competitor's need for temporary access to ACS network elements would be a "rare occurrence," or that the Commission's competitive concerns with respect to the prospect of the *unavailability* of UNEs at just and reasonable rates in Omaha are not equally applicable to the Anchorage markets. Indeed, as GCI has shown, the Anchorage markets do not yet enjoy the level of facilities-based loop competition that the Commission concluded justified forbearance in some Omaha wire centers.<sup>9</sup> Against this competitive backdrop, the continued availability of wholesale elements is more critical in Anchorage than it was in Omaha, yet ACS has offered the Commission no persuasive justification for departing from its earlier reasoning.

Instead, ACS casually dismisses Section 271 as "wholly irrelevant."<sup>10</sup> In support of this conclusion, ACS asserts that there is "no reason" for ACS to be subject to Section 271-like availability requirements because ACS lacks the ability "to hinder *long-distance* competition."<sup>11</sup> This argument misses the point. In Omaha, the Commission relied on the continued availability of UNEs pursuant to Section 271 to ensure continued *local* – not long-distance – competition.<sup>12</sup>

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<sup>8</sup> *Id.*, 20 FCC Rcd at 19467.

<sup>9</sup> *Opposition of General Communication, Inc. to the Petition for Forbearance from Sections 251(c)(3) and 252(d)(1) of the Communications Act Filed by ACS of Anchorage*, WC Docket No. 05-281, at 69-70 (filed January 9, 2006) ("GCI Opposition").

<sup>10</sup> ACS Reply Comments at 47.

<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19466.

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Moreover, in arguing that the Commission's retention of Section 271 obligations in Omaha is "inconsequential" to the instant proceeding, ACS mischaracterizes its *own* forbearance petition, calling it a "narrow UNE pricing relief request."<sup>13</sup> But the language of ACS's Petition belies that convenient characterization, making clear that ACS seeks much more than pricing relief. Indeed, in the first paragraph of its Petition, ACS states its intent to be relieved of all obligations to make UNEs available, regardless of price, asserting that it seeks forbearance from "Section 252(d)(1) pricing standards for unbundled network elements . . . to the extent ACS chooses to continue to offer Unbundled Network Elements ("UNEs") in Anchorage."<sup>14</sup> This language reveals the true goal of ACS's Petition – to disrupt competition by withdrawing any access to UNEs, even at non-TELRIC just and reasonable rates – and illustrates the risk to competition if ACS's request is granted.<sup>15</sup>

ACS next claims that continued availability obligations are unnecessary because FCC and RCA oversight will be sufficient to ensure that ACS "retail" services will be offered at just and reasonable prices even if forbearance is granted.<sup>16</sup> This careful use of the term "retail" confirms ACS's interest in pulling wholesale elements from the market (or pricing them unreasonably) if its requested forbearance is granted. More importantly, ACS understates the effect of recent changes to the Alaska regulatory regime on the RCA's oversight of ACS's rates when it claims that "state regulation will ensure that ACS's rates and practices are just [and] reasonable."<sup>17</sup> As G. Nanette Thompson, former Chairman of the RCA, has explained, the new regulations specifically omit the just and reasonable criteria for evaluating tariffed rates where, as in Anchorage, there is no

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<sup>13</sup> ACS Reply Comments at 47-48.

<sup>14</sup> *Petition of ACS of Anchorage, Inc. for Forbearance from Sections 251(c)(3) and 252(d)(1)*, WC Docket No. 05-281, at 1 (filed September 30, 2005) ("ACS Petition") (emphasis added). Notably, ACS has never limited its requested relief to Section 252(d)(1), even as a request for alternative relief. Instead, ACS's only alternative requested relief is forbearance from Section 251(c)(3) with respect to GCI. ACS Petition at 48-49. The Commission should ask ACS to set forth clearly the scope of its Petition and, if ACS fails to do so, should dismiss the Petition for failing to specify the relief sought. *Cf. Omaha Forbearance Order*, 20 FCC Rcd at 19425; *AT&T v. FCC*, 2006 U.S. App. LEXIS 16068, at \*23 (D.C. Cir. June 27, 2006) (remanding to the Commission to "reconsider the sufficiency of the SBC petition in light of the specificity standard").

<sup>15</sup> ACS's suggestion that GCI could rely broadly on tariffed services to replace UNE loops overlooks the significant differences in ACS's service obligations with respect to its tariffed services and UNE loops. As a result of those differences, ACS's metallic service tariff is not a suitable substitute for UNE loops.

<sup>16</sup> ACS Reply Comments at 30.

<sup>17</sup> ACS May 10 *Ex Parte* at 1.

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dominant carrier.<sup>18</sup> In addition, she explains, under the new regulations, there is no mechanism that allows the RCA to review these rates before they become effective, or, as a practical matter, for any substantive review in the absence of a complaint proceeding.<sup>19</sup> For these reasons, ACS's argument that it "must maintain just and reasonable rates for intrastate services under state regulation"<sup>20</sup> and its related suggestion that competition will not be harmed by granting forbearance without requiring continued UNE availability are wholly inaccurate and should be rejected.

#### **B. ACS Relies on Hypothetical Facilities to Request Actual Forbearance.**

The Commission in the *Omaha Forbearance Order* set forth a simple test to determine where in Omaha forbearance was warranted: forbearance was appropriate where Cox provided "substantial intermodal competition for telecommunications services provided over [its] own extensive facilities."<sup>21</sup> The Commission could not have been more clear in explaining that the current availability of alternative last-mile facilities, not the presence of retail competition, justified forbearance, and that where such facilities were not available, forbearance was not warranted:

We find that forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last-mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Omaha MSA.

In other words, competition – actual, existing competition or competition that could become available in a commercially reasonable period of time – was necessary to forbearance. Moreover, a "commercially reasonable period of time" is properly viewed as the time in which a customer would choose to go to another provider, not a long run test.<sup>22</sup>

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<sup>18</sup> Declaration of G. Nanette Thompson ("Thompson Decl.") ¶¶ 4-8, attached hereto as Exhibit B.

<sup>19</sup> *Id.*

<sup>20</sup> ACS Reply Comments at 46.

<sup>21</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19444.

<sup>22</sup> Indeed, the record reflects that the amount of time the vast majority of customers are willing to wait for service – *i.e.*, the commercially reasonable period in which a competitive alternative must be available for the consumer to believe that it has a choice – is under 30 days. Even ACS's own declarant confirms that ACS provisions business customers in less than 30 days over 90% of the time. Declaration of Kenneth L. Sprain ¶ 9, attached as Exhibit A to ACS Reply Comments.

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ACS implicitly recognizes that this is the correct test when it contends (incorrectly) that GCI is “capable of serving almost all residential customers and a substantial portion of the business customers in the Anchorage study area entirely over its own facilities today.”<sup>23</sup> ACS’s assertion that the test is satisfied here, however, rests on a misreading of GCI’s economic feasibility analysis. As Dr. Zarakas explained, his analysis assumes GCI’s ability to “upgrade and/or extend its networks in a technically and operationally feasible time frame.”<sup>24</sup> In other words, GCI’s analysis illustrates where GCI can feasibly provide last-mile facilities in the long term, and does not describe GCI’s ability to construct and deploy these facilities in the short-term period necessary to answer a request for service.

Apparently recognizing that the Commission’s test will not provide the extraordinary relief it seeks, ACS also asks the Commission to grant forbearance based on the theoretical ability to provide service using any hypothetically available network technology, irrespective of whether that technology is actually deployed and capable of serving customers. This analysis has no logical stopping point. Any forbearance based on the “*potential*”<sup>25</sup> to deploy alternative loop technologies or services – for example, forbearance in the southeastern Anchorage wire centers that are not within GCI’s cable franchise, where GCI does not have existing facilities, and in which GCI does not offer cable, broadband, or voice – would justify forbearance in virtually any market, rendering the statutory requirement that specific findings be made before relief may be granted a nullity.<sup>26</sup>

ACS, for example, asserts that “over-the-top” VoIP service is “an effective substitute for ACS’s local exchange service,” even though it acknowledges that not a single “over-the-top” VoIP provider offers Alaska phone numbers.<sup>27</sup> Instead, ACS argues that the Commission should forbear because “over-the-top” VoIP providers “could” offer such numbers.<sup>28</sup> ACS offers no evidence (other than conclusory statements<sup>29</sup>) to counter the Commission’s recent conclusion that “over-the-top” VoIP is

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<sup>23</sup> ACS Reply Comments at 26.

<sup>24</sup> Declaration of William P. Zarakas (“Zarakas Decl.”) ¶ 28, attached as Exhibit C to GCI Opposition.

<sup>25</sup> *See, e.g.*, ACS Reply Comments at 20 (calling on “potential facilities-based retail competition”).

<sup>26</sup> A ruling adopting this facially impermissible result would be subject to reversal.

<sup>27</sup> ACS Reply Comments at 30.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (VoIP “is an effective substitute for ACS’s local exchange service.”); Statement of Charles L. Jackson (“Jackson Statement”) ¶ 23, attached as Exhibit E to ACS Reply Comments (cited in ACS Reply Comments at 30) (“VoIP is a reasonable substitute for many residential customers.”)

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a *not* substitute for wireline telephony.<sup>30</sup> GCI believes the Commission got it right: if “over-the-top” VoIP adequately substituted for wireline local telephone service, GCI would not be investing to upgrade its cable network to provide telephony. ACS, on the other hand, would have the Commission forbear on the basis of services that are not currently available in the marketplace and that the Commission has concluded are not competitive substitutes.

Moreover, ACS’s claim that VoIP over broadband “is priced competitively to wireline phone service” is contrary to the facts on the ground.<sup>31</sup> To illustrate, basic broadband Internet service from GCI is \$39.99 per month.<sup>32</sup> Basic service from Vonage (with only a non-Alaska telephone number) is \$14.99 per month.<sup>33</sup> Thus, even the most basic phone service from an “over-the-top” VoIP provider would cost almost \$55 per month, before taxes and fees, and would not even provide a local phone number. It is entirely unclear how this will “impose competitive pressures on ACS’s pricing decisions”<sup>34</sup> when ACS currently offers its basic phone service, including taxes and fees, for approximately \$23.<sup>35</sup> By contrast, GCI’s current pricing for basic wireline telephone services of about \$20 puts real pressure on ACS, a pressure that ACS is attempting to relieve by improperly invoking Section 10.

Likewise, ACS makes much of GCI’s limited use of wireless local loops (“WLLs”).<sup>36</sup> GCI’s existing WLL network, however, is not designed to replace UNEs throughout Anchorage, or to provide high capacity services.<sup>37</sup> Further, there are areas of Anchorage (particularly southern Anchorage) where the terrain, tree cover, and other factors make it difficult to add customers to GCI’s existing WLL network.<sup>38</sup> To replace a significant number of UNEs with WLLs, GCI would have to embark on a large-scale network redesign, provisioning, and installation process.<sup>39</sup> This process would take years, not months.<sup>40</sup> Even if GCI were to endeavor to replace UNEs with WLLs, there is no guarantee that it could successfully replace DS1 services using WLLs.<sup>41</sup> Other

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<sup>30</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 (¶ 39 n.188) (2005).

<sup>31</sup> Statement of David C. Eisenberg (“Eisenberg Statement”) ¶ 9, attached as Exhibit C to ACS Reply Comments.

<sup>32</sup> [http://www.gci.com/forhome/promos/xtreme\\_standalone/xtreme\\_std\\_asd7.htm](http://www.gci.com/forhome/promos/xtreme_standalone/xtreme_std_asd7.htm)

<sup>33</sup> [http://vonage.com/index.php?lid=nav\\_index](http://vonage.com/index.php?lid=nav_index)

<sup>34</sup> ACS Reply Comments at 30.

<sup>35</sup> Exhibit DT2, attached to GCI Opposition.

<sup>36</sup> ACS Reply Comments at 37-38.

<sup>37</sup> Declaration of Gene Strid (“Strid Decl.”) ¶ 3, attached hereto as Exhibit C.

<sup>38</sup> *Id.* ¶ 4.

<sup>39</sup> *Id.* ¶ 5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶ 6.

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companies, such as Teligent and Winstar, that have tried to provide DS1-equivalent service using WLLs have failed.<sup>42</sup> Yet ACS, again, would have the Commission grant forbearance on the basis of facilities that do not exist using a technology that is not a substitute and could not be deployed as one within a commercially reasonable period of time.

ACS next points to CMRS competition to support the incredible claim that “ACS’s wireline network is not now . . . necessary for the provision of traditional or advanced local exchange services in Anchorage.”<sup>43</sup> Once again ACS ignores the inconvenient Commission determination that CMRS does not constrain pricing of primary line wireline services.<sup>44</sup> ACS likewise fails to explain how CMRS serves as a substitute for integrated packages of services and high capacity services necessary to provide comprehensive solutions to business customers.

In a further attempt to manufacture support for its requested forbearance, ACS contends that GCI should deploy nascent technology to provide high capacity business services using its cable plant. This argument, too, is at odds with the Commission’s focus on currently available competitive alternatives. Of course, in many areas, GCI simply does not have cable plant near businesses and, regardless of the available technology, cannot serve those businesses in a commercially reasonable time.<sup>45</sup> Where GCI does have cable plant in place, ACS suggests that GCI should use technology that has not yet been widely adopted to provide high capacity business services. As detailed further below, there are significant limitations on the technology ACS would have GCI deploy.<sup>46</sup>

The nature of the business market, furthermore, would magnify the harm of overbroad forbearance. First, business customers often require integrated packages of services. A bank, for example, may need multiple high capacity lines for voice and data at its main office, and lower capacity lines to serve branch offices and ATMs scattered throughout the Anchorage markets. An inability to provide any one of the required

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<sup>42</sup> *Id.*; See also Declaration of Douglas Sobieski ¶¶ 5-10, attached as Exhibit 4 to *Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers are Impaired Without DS1 UNE Loops*, WC Docket No. 04-313 (filed Sept. 29, 2004).

<sup>43</sup> ACS Reply Comments at 31.

<sup>44</sup> *SBC Communications and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18342 (¶ 90 n.277) (2005) (“*SBC-AT&T Order*”).

<sup>45</sup> As already noted, the Commission has recognized that construction of local loops “generally takes between six to nine months.” *Omaha Forbearance Order*, 20 FCC Rcd at 19467.

<sup>46</sup> See Section IV.C., below.

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services – even within a limited geographic area – is likely to hinder GCI’s efforts to serve business customers throughout Anchorage.

Second, contrary to ACS’s suggestion that business rates are determined on a postalized basis across the entirety of its Anchorage service area,<sup>47</sup> the business markets are characterized by individually negotiated contracts and pricing. ACS has acknowledged as much in a more recent forbearance petition, in which it describes existing *customer-specific*, not postalized, price competition in the Anchorage enterprise markets.<sup>48</sup> ACS’s and GCI’s tariffs confirm this flexibility: both the ACS and GCI tariffs permit significant case-by-case discounts (GCI’s tariff permits gratuities of up to \$200 per line per year; ACS’s tariff permits gratuities of up to \$150 per line per year) to business customers. Both GCI and ACS utilize these tariff provisions to tailor individual, customer-specific deals.<sup>49</sup> In addition, ACS ignores the fact that recent changes to the Alaska regulatory scheme, coupled with ACS’s treatment as a nondominant carrier, reduce substantially the oversight of the special contracts carriers typically use to negotiate individualized contracts with business users. ACS can now implement these special contract provisions with no pre-effectiveness review, simply posting information to its website and filing a copy of the special contract, and some incidental information, with the RCA.<sup>50</sup>

As a result of this pricing flexibility, removal of UNE access would allow ACS to exercise market power with respect to those customers GCI can serve only by using ACS facilities.<sup>51</sup> This, in turn, would allow ACS to use UNE pricing to raise its rival’s costs extracting monopoly rents from the business consumer without any fear that higher prices would cause it to lose customers in the areas in which it faced competition. Where ACS can exercise such a strategy, the requirements of Section 10(a)(1),(2), and (3) cannot be met because UNEs will remain necessary to discipline ACS’s market power and prevent ACS from charging unjust and unreasonable rates to business consumers.

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<sup>47</sup> See, e.g., ACS Reply Comments at 18.

<sup>48</sup> *Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Intrastate Access Services, and for Forbearance from Title II Regulations of its Broadband Services, in Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, at 41–42 (filed May 22, 2006) (“ACS Title II Petition”).

<sup>49</sup> In fact, as support for its recent petition for forbearance from certain Title II regulations, ACS specifically highlights its ability to tailor contract prices to compete for enterprise customers. *Id.* at 41–42.

<sup>50</sup> Thompson Decl. ¶¶ 8-10.

<sup>51</sup> Declaration of Gina Borland (“Borland Decl.”) ¶ 44, attached as Exhibit A to GCI Opposition; Thompson Decl. ¶¶ 11-12.

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**C. ACS's Market Definitions Obscure Material Differences in Competitive Conditions in the Anchorage Markets.**

Finally, ACS disregards the teaching of the *Omaha Forbearance Order* with respect to proper market definitions. ACS would have the Commission aggregate the various wire centers in Anchorage despite material differences between wire centers with respect to the availability of alternative last-mile facilities. Just as important, ACS again wildly overstates the competitive alternatives available to residential and business customers.<sup>52</sup>

**1. Competitive Alternatives Differ Widely By Wire Center**

ACS contends, incorrectly, that GCI has called for a customer-by-customer market analysis.<sup>53</sup> Instead, GCI recognized the Commission's focus on wire centers in similar settings and provided substantial wire-center level data showing the variation in competitive conditions across Anchorage.<sup>54</sup> ACS has now recognized the relevance of wire centers, but nevertheless asks the Commission to aggregate various wire centers for the purpose of its forbearance analysis.<sup>55</sup> The Commission should reject this attempt to mask significant differences in competitive conditions by grouping wire centers as ACS requests.

First, there is no principled basis for the aggregation ACS seeks. Indeed, in filing its NECA tariff, ACS identified each of the Anchorage wire centers that GCI also identified here. The Commission should disregard ACS's effort to avoid its own wire center tariff designations,<sup>56</sup> particularly given the significant differences in competitive conditions in those wire centers. ACS, for example, would have the Commission

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<sup>52</sup> See, e.g., ACS Reply Comments at 39 (suggesting, incorrectly, that "GCI is more than capable of providing service to mass market and enterprise customers throughout the Anchorage study area using current network technologies, without costly upgrades."); ACS April 3 *Ex Parte* at 1 ("[GCI] is able to serve substantially all customers in the market over its own facilities."); ACS May 31 *Ex Parte* at 2 ("GCI currently has extensive voice-enabled capabilities throughout Anchorage and is capable of deploying its own facilities within a reasonable time in any locations that are not currently voice-enabled.").

<sup>53</sup> ACS Reply Comments at 6-8.

<sup>54</sup> See, e.g., *Omaha Forbearance Order*, 20 FCC Rcd at 19438 ("[W]hen evaluating whether certain network elements should be made available on an unbundled basis, which implicates issues of economic self-provisioning, the Commission has focused its analysis on wire centers.").

<sup>55</sup> See ACS Reply Comments at 7-8.

<sup>56</sup> See National Exchange Carrier Association, Inc. Tariff F.C.C. No. 4, Section 13, at 2-3, 141<sup>st</sup> Revision, issued September 16, 2005 (effective Oct. 1, 2005).

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aggregate the O'Malley and Rabbit Creek wire centers with the South wire center. But, as GCI has previously demonstrated, doing so would aggregate areas (the O'Malley and Rabbit Creek wire centers) where, as of the start of the 2006 construction season, GCI had performed almost none of the node upgrades necessary to provide DLPS with an area (South wire center) where GCI has made substantial progress in rolling out its own facilities.<sup>57</sup> ACS would apparently also include in its South wire center the Girdwood, Bird-Indian, and Hope areas, even though these areas fall outside of GCI's cable-certificated area and thus outside of GCI's cable facilities footprint. It does not make sense to combine, for the purpose of forbearance analysis, areas where GCI does not even have the right to deploy cable with areas where it has begun to convert customers to DLPS. These differences in competitive alternatives confirm that the appropriate geographic markets for the Commission's analysis of GCI's ability to serve locations within a commercially reasonable period are, at minimum, the wire centers ACS has designated in its tariff.

Granting forbearance in overbroad geographic markets, as ACS advocates, would distort the meaning of the *Omaha Forbearance Order*. The Commission there determined that forbearance was appropriate in wire centers where a competitor had reached a certain level of facilities deployment, reasoning that additional facilities necessary to provide broader service could be deployed during a transition period. But moving from substantial coverage to ubiquitous coverage during a brief transition period for a relatively small geographic area, such as a wire center, is much more achievable than moving from substantial coverage to ubiquitous coverage over a larger area, such as the multiple wire centers ACS seeks to aggregate. Indeed, the Commission recognized the challenges of self-provisioning in concluding that wire centers are the appropriate geographic level at which to conduct an unbundling analysis.<sup>58</sup> The Commission should decline ACS's invitation to take a new approach to geographic markets in order to grant relief that does not reflect the actual competitive conditions in ACS's actual wire centers.

## 2. Competitive Alternatives Also Differ by Service Offering

The record demonstrates that there are substantial differences in the competitive alternatives available in the residential and business markets as well. As GCI has previously explained, Anchorage-wide, GCI will not be able to self-provision loops to serve approximately [BEGIN CONFIDENTIAL][END CONFIDENTIAL] of small business customer lines.<sup>59</sup> An analysis of the location of GCI's cable plant in relation to all Anchorage small businesses – not just existing GCI customers – confirms that GCI cannot use its existing cable plant – even were such plant fully upgraded for cable

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<sup>57</sup> See GCI Opposition Exhibit F (detailing nodes released for service as of 10/1/05, the end of last year's construction season).

<sup>58</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19438.

<sup>59</sup> Zarakas Decl. ¶ 36 and Exhibit I, attached thereto.

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telephony – to serve a substantial number of business customers throughout Anchorage. Specifically, GCI has plant near only [BEGIN CONFIDENTIAL][END CONFIDENTIAL] of the small business locations in Anchorage.<sup>60</sup> Similarly, GCI has cable or fiber plant near only [BEGIN CONFIDENTIAL][END CONFIDENTIAL] of the medium and large business locations in Anchorage.<sup>61</sup>

GCI's analysis, notably, assumes that *all* of GCI's cable plant will be upgraded to provide cable telephony, with most upgrades completed by the end of this year. Even assuming GCI will be able to complete this aggressive upgrade program, this analysis demonstrates that GCI will be unable to use its existing plant to serve a substantial number of Anchorage business locations. Reaching these customers will require, instead, construction of new cable or fiber plant. These customers – customers that are not served by existing alternative last-mile facilities *or* by facilities capable of being upgraded to serve as alternatives to ACS's loops within a commercially reasonable period after their request for service – face far different competitive alternatives than customers located on GCI's cable or fiber plant. Moreover, because the Anchorage business markets are characterized by substantial pricing discretion,<sup>62</sup> these material differences in competitive alternatives can be easily translated into pricing differences. Forbearance with respect to these markets, consequently, cannot be squared with the requirements of Section 10.

### **III. ACS Continues to Overstate GCI's Ability to Immediately Deploy DLPS and ACS's Willingness to Voluntarily Negotiate UNE Access in an Attempt to Disrupt GCI's Expeditious Deployment**

By now it is clear that ACS requests forbearance not out of a desire to benefit consumers or increase facilities-based competition, but rather to stem the rising tide of competition by disrupting GCI's steady deployment of full-facilities-based voice services. Indeed, if ACS truly believes – however incorrectly – that GCI “intends to provide service throughout the market fully independent of ACS's UNEs within eighteen months,”<sup>63</sup> ACS would not rationally expend all of the time, effort, and money necessary to sustain this Petition, but would instead figure out how to retain revenue by securing GCI's continued use of its network through the commercial negotiation ACS claims that it will suddenly be inspired to pursue upon grant of the Petition. It is more likely that ACS asks the Commission to “promptly grant”<sup>64</sup> its Petition in a last-ditch effort to maintain its monopoly power by removing UNE access altogether and thus disrupting GCI's customer relationships or using its monopoly power to capture monopoly rents.

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<sup>60</sup> See Exhibit 1, attached to Declaration of Alan Mitchell (“Mitchell Decl.”), attached hereto as Exhibit D.

<sup>61</sup> *Id.*

<sup>62</sup> See generally Section II.B., above.

<sup>63</sup> ACS April 3 *Ex Parte* at 1.

<sup>64</sup> ACS Reply Comments at 5.

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Indeed, ACS admits that it hopes *to prevent* GCI from building out its own facilities.<sup>65</sup> This, certainly, is not the purpose of the Act.

**A. GCI Continues to Work to Serve Every Customer it Can Over its Own Facilities.**

GCI has consistently promised to steadily advance its full-facilities-based DLPS deployment and has kept those promises. As ACS has already recognized, in late 2003, when GCI was preparing to commercially deploy DLPS starting in April 2004, it estimated that it would be able to migrate most of its customers over five years. That was two and a half years ago.<sup>66</sup> GCI has not changed from that estimation, recently predicting that it would serve substantially all of its residential customers within two-and-a-half years.<sup>67</sup>

ACS suggests that GCI is selectively remaining on UNEs. This insinuation is contradicted by GCI's prompt and continuing roll out of DLPS in all areas where it has completed the necessary node upgrades. Likewise, ACS's claims are belied by GCI's continuing process of upgrading nodes as quickly as possible. There is, in other words, simply no factual basis for ACS's assertion that GCI is cherry-picking by transitioning only some customers from UNEs to GCI's own facilities or by upgrading only portions of its cable plant. Quite to the contrary, GCI anticipates moving all of its customers to its own facilities as quickly as it can reasonably construct those facilities, and, particularly in the business market, as the technology matures to provide a stable basis for providing DS1 services. ACS's contrary assertions are driven not by reality (or evidentiary support), but by its desire to inflict competitive harm before GCI completes its transition.

Not surprisingly, ACS's claims that GCI is selectively transitioning customers or upgrading plant depend on distortions of the record. For example, ACS asserts that GCI "opts to serve only those customers that are guaranteed to result in profit."<sup>68</sup> That is simply not the case, and the authority ACS cites does not support its claim. The cited statement instead explains that GCI seeks to "quickly generate return by serving the greatest number of customers as possible,"<sup>69</sup> illustrating GCI's interest in serving as many customers as it can as quickly as it can over its own facilities. GCI also made clear that its actions are economically rational, explaining that its priority is "upgrading plant in those locations with the greatest density and lowest implementation costs per

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<sup>65</sup> *Id.* at 43-44 ("[I]n order to continue to receive the revenue from leasing ACS's facilities, ACS must offer UNEs at reasonable prices or GCI will find constructing alternative facilities more attractive than remaining on ACS's network.").

<sup>66</sup> *Comments of ACS of Anchorage, Inc.*, WC Docket No. 04-313; CC Docket No. 01-338, at 8 (filed October 8, 2004).

<sup>67</sup> March 2, 2005, GCI Earnings Conference Call Transcript, at 5 (Statement of Ron Duncan, GCI President & CEO).

<sup>68</sup> ACS Reply Comments at 16.

<sup>69</sup> Borland Decl. ¶ 7.

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customer.”<sup>70</sup> By pursuing this course, GCI is reducing as fast as possible its dependence on ACS-provided UNE loops. This straightforward description of GCI’s deployment strategy provides no basis for an assertion that GCI intends to selectively eschew its own facilities in favor of ACS’s, and GCI’s behavior confirms that it intends to serve every customer possible over its own plant as quickly as it can.

Moreover, ACS contends that GCI has “increased its deployment of digital local phone service to service its customers *because* reliance on UNEs became less economically attractive.”<sup>71</sup> This statement fails to recognize that GCI is already motivated to move off of ACS facilities wherever it can as quickly as it can because of the costs GCI can avoid and the customer service benefits of serving a customer entirely over GCI facilities. In truth, GCI stated:

Increased [local loop rental] costs were mitigated by our continued deployment of digital local phone service, *which allows us to avoid loop rental and wholesale costs and provide much improved service to our customers.*<sup>72</sup>

In other words, contrary to ACS’s assertions that GCI wants to remain on UNE loops as long as possible, GCI’s statements make clear that it is fully motivated to continue DLPS deployment as quickly as possible. Yet, “[t]here are simply capacity constraints in the system of how fast you can” transition customers to DLPS.<sup>73</sup> The fact is, GCI has a careful plan to transition from UNE loops to its own facilities in an expedient but sustainable manner. As envisioned by Section 251 and as the Commission recognized in denying forbearance from Section 271(c)(2)(B)(iv-v) in the *Omaha Forbearance Order*, that plan includes the transitional use of UNE loops.<sup>74</sup> The abrupt removal of those UNE loops (or monopolistic price increases) would disrupt that plan, disrupt service arrangements for GCI’s customers, injure GCI’s customer relationships by forcing consumers through multiple service conversions, remove revenue necessary to build out GCI’s facilities not only in Anchorage but in other areas of Alaska as well, and harm the competitive alternatives available to Anchorage customers.

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<sup>70</sup> *Id.*

<sup>71</sup> *Ex Parte Submission Regarding 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 Docket No. 05-281, at 2 (filed April 3, 2006) (“ACS April 3 *Ex Parte*”) (emphasis added).

<sup>72</sup> March 2, 2006, GCI Earnings Conference Call Transcript, at 4 (statement of Ron Duncan, GCI President & CEO) (emphasis added).

<sup>73</sup> *Id.* at 7 (statement of Ron Duncan, GCI President & CEO in response to investor’s question that “[g]iven the attractive economics of transitioning your customers over to DLPS, why not do it sooner?”).

<sup>74</sup> *See also Omaha Forbearance Order* 20 FCC Rcd at 19417 (noting that a situation in which a CLEC relies substantially on UNE-loops “necessarily raises different issues with respect to our section 10 analysis”).

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ACS likewise misreads GCI's impairment analysis when it asserts that GCI makes the "erroneous assumption that it should be required to deploy its own facilities only where it has determined that it can earn a comfortable profit."<sup>75</sup> GCI's impairment analysis rests on conservative assumptions, and confirms the economic rationality of GCI's efforts to roll out DLPS everywhere it has cable plant as quickly as it can.<sup>76</sup> ACS's contrary suggestion that it is not appropriate for GCI to evaluate the economic benefits of self-provisioning runs up against common sense, economic theory, and the Commission's own forbearance precedent,<sup>77</sup> all of which recognize that self-provisioning is driven by potential economic benefit.

Similarly, ACS's argument that GCI is required to "provide service in the entire study area and recover its costs on an averaged basis"<sup>78</sup> even without UNE access is, again, inconsistent with Commission precedent and the realities of entering a market where the incumbent has had years to build a monopoly network.<sup>79</sup> The Commission has treated wire centers – not study areas – as the appropriate geographic area for forbearance analysis.<sup>80</sup> And, as a new entrant, GCI faces substantially greater risk in constructing its facilities than ILECs like ACS typically faced in the decades spent constructing their monopoly networks.<sup>81</sup> Applying ACS's logic would penalize new entrants and impair competition by granting forbearance in large geographic areas where construction of facilities is uneconomic.

In any event, ACS's allegations of cherry-picking and selectively building facilities only in low cost areas do not justify forbearance. ACS charges averaged UNE rates in Anchorage by choice: it has never asked to deaverage its UNE rates. If cherry picking was a real issue, ACS would have demanded and, if necessary, arbitrated UNE price deaveraging. ACS clearly made a strategic decision that it would rather charge averaged UNE rates in high cost areas than deaveraged rates in low cost areas. ACS's strategic decision cannot now justify forbearance from the obligation to offer UNEs at just and reasonable TELRIC rates.

Finally, any arguments based on the supposed burden of ACS's status as the carrier of last resort ("COLR") are undermined by its own failure to seek available relief from these obligations. ACS, for example, is free to ask the RCA to allocate COLR

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<sup>75</sup> ACS Reply Comment at 3.

<sup>76</sup> *See generally*, Zarakas Decl.

<sup>77</sup> *Omaha Forbearance Order* at ¶ 104 (noting Commission impairment analysis is "designed to provide incentives for self-provisioning competitive facilities").

<sup>78</sup> ACS Reply Comments at 3.

<sup>79</sup> Moreover, this is patently untrue in the business marketer, which has individual contracts and discounts.

<sup>80</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19438.

<sup>81</sup> For this reason, ACS's assertion that it faces the same obstacles as GCI in building out plant misses the point. ACS Reply Comments at 22. ACS may face the same obstacles, but, as the owner of the existing network, does not face the same *need* to construct facilities in order to provide service.

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obligations among multiple local exchange carriers, but ACS has not asked the RCA to take this step.<sup>82</sup> More likely, ACS views its COLR status in Anchorage as a competitive advantage, allowing it to lock customers into long-term service arrangements under the line-extension provisions of its local tariff.

**B. ACS Cannot be Expected to Make UNEs Voluntarily Available.**

ACS's own behavior belies its insincere (and nonbinding) assertion that it will voluntarily make UNEs available through future commercial negotiations in the absence of a regulatory compulsion to do so.<sup>83</sup> First, given existing regulatory uncertainty and GCI's continuing roll-out of its own facilities, GCI agrees that both GCI and ACS *should* have strong incentives to negotiate for continued UNE access in Anchorage *now*. But ACS has not taken steps towards commercial negotiations, despite these existing incentives. Instead, ACS has refused to negotiate mutually agreeable terms for UNEs in Anchorage.<sup>84</sup>

Tellingly, GCI's previous offers to negotiate UNE access in the absence of a regulatory requirement to provide such access have been met with punitive responses. ACS not only rebuffed GCI's recent overture to negotiate, but also used GCI's offer to negotiate in a failed effort to revoke GCI's recently granted local service certification for ten additional rural areas. Specifically, in late January of this year, GCI contacted ACS to propose a framework for discussing settlement of a number of issues, including voluntarily negotiated terms for unbundled network elements for an area served by ACS operating company ACS of the Northland, the "Glacier State" study area and Sitka.<sup>85</sup> ACS did not respond to this invitation for voluntary, commercial negotiations in a rural area where it had no 251(c)(3) unbundling obligations.<sup>86</sup> Instead, on March 9, 2006, ACS filed a petition with the RCA seeking an investigation into GCI's fitness, willingness, and ability to serve in ten additional study areas that GCI had been certified to serve.<sup>87</sup> The basis for this filing was GCI's attempt to initiate settlement discussions, which, according to David Eisenberg, "raised questions as to whether GCI actually meets the fit, willing and able criteria to fully serve either of ACS-N's study areas."<sup>88</sup> In other words, ACS's

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<sup>82</sup> 3 AAC 52.390(c) ("The incumbent local exchange carrier is the carrier of last resort unless the commission by order changes the carrier's responsibilities under this subsection. Upon petition or on its own motion and after an opportunity for a hearing, the commission may reassign carrier of last resort responsibilities, in whole or in part, to one or more facilities-based local exchange carriers.").

<sup>83</sup> ACS May 10 *Ex Parte* at 10 (claiming that ACS "has demonstrated its willingness and ability to negotiate unbundling arrangements with GCI"); *see also* ACS Reply Comments at 43.

<sup>84</sup> Declaration of Frederick W. Hitz, III ("Hitz Decl.") ¶ 7, attached hereto as Exhibit E.

<sup>85</sup> *Id.* ¶ 4.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* ¶ 5

<sup>88</sup> *Id.*; Affidavit of David C. Eisenberg at 2, attached as Exhibit Q to *Petition for the Commission to Open an Investigation into GCI's Ongoing Compliance with AS*

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response to GCI's attempt to voluntarily negotiate terms for unbundled network elements in the absence of an unbundling requirement was to use that attempt as a basis for blocking GCI's ability to enter the market in the first place.

Both ACS's forbearance petition in Anchorage and its efforts to rescind GCI's local service certificate for the Glacier State study area demonstrate that its incentive is to disrupt GCI's service to existing customers and to block entry, not to negotiate commercially reasonable resolutions. Finally, if ACS were truly financially self-interested to negotiate mutually agreeable terms for UNEs in Anchorage, as it claims, then ACS would have had every opportunity and reason to embark upon that path in any of the prior two years when GCI announced and commenced its cable telephony deployment. It has not.

#### **IV. GCI Continues to Explore New Technologies and Deploy Facilities as Quickly as Possible**

##### **A. Residential Deployment**

##### **1. Single Family Homes**

As already detailed in this proceeding, GCI was one of the first MSOs to deploy cable telephony and, in the absence of an industry standard, GCI decided to use network-powered, outdoor-provisioned technology because at the time it provided the highest quality service at the lowest cost with the least interruption to its already sizeable customer base.<sup>89</sup> The major MSOs, however, have since adopted customer-powered, indoor-provisioned cable voice service technology. Consequently, all but one manufacturer discontinued production of outdoor, network-powered eMTAs.<sup>90</sup> The lack of vendor competition hampered innovation and price-reduction, thus illustrating one of the dangers of being a small MSO at the forefront of new technology.<sup>91</sup> By contrast, several competing manufacturers have developed indoor eMTA units for the major MSOs, thus greatly reducing the price and increasing the quality of those units.<sup>92</sup> Accordingly, in its continuing efforts to improve and speed deployment of cable telephony, GCI intends to install primarily customer-powered DLPS going forward.

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*42.05.241 and Violation of AS 42.05.271 and for Suspension of Recently Granted Amendments to Certificate No. 489 Pending Investigation, RCA Docket No. U-06-023 (filed March 9, 2006), also attached to Hitz Decl. as Exhibit 1. As a rural telephone company, ACS of Northland is exempt from Section 251(c) pursuant to Section 251(f)(1)'s "rural exemption."*

<sup>89</sup> See, e.g., Declaration of Richard Dowling ("Dowling Decl."), attached as Exhibit G to GCI Opposition.

<sup>90</sup> Sheridan Decl. ¶3.

<sup>91</sup> *Id.*

<sup>92</sup> Moreover, because fewer nodes are needed to provision customer-powered DLPS, plant upgrades are cheaper and less time consuming. See Declaration of Gary Haynes ("Haynes Decl.") ¶¶ 8, 10, attached as Exhibit H to GCI Opposition.

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Although this technology has its advantages, it presents challenges that would preclude the immediate deployment that forbearance would require. Even though the eMTA is installed indoors, GCI must first perform preparatory outdoor work. For one, GCI must still evaluate and in many cases split optical nodes, as well as add node batteries to ensure that the network itself – not the customer-powered eMTAs – will remain operable for eight hours in the event of a power outage.<sup>93</sup> GCI expects these node modifications to take approximately two to three weeks per node, but can only perform the modifications during Anchorage’s shortened construction season, which generally runs from sometime in late May until late September or early October.<sup>94</sup> Moreover, GCI must assess each cable drop – originally designed for video service – to ensure that they will adequately support digital voice service.<sup>95</sup> Of course, GCI cannot replace any buried drops during the winter months.

After the outdoor upgrades are complete, GCI has to gain access to the customer’s residence.<sup>96</sup> This task is not as easy as it might appear. GCI must first contact the resident, which in the age of caller ID and voice mail could take several weeks.<sup>97</sup> GCI must then arrange an appointment with the resident, who may not welcome the attendant scheduling issues and temporary phone service interruptions when they are already satisfied with their service.<sup>98</sup> GCI has made every effort to alleviate these impediments by, for instance, extending installation hours to better meet the needs of the working public, performing installations seven days per week, and offering a variety of service and price incentives.<sup>99</sup> Yet, there is only so much GCI can do if a customer, already

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<sup>93</sup> To be sure, the nodes will not require the same power upgrades necessary to deploy network-powered DLPS, *see* Haynes Decl. ¶¶ 7-8, but many will require time-consuming and essential upgrades nonetheless. Sheridan Decl. ¶ 5 n.2.

<sup>94</sup> GCI can only estimate the time it will take to upgrade nodes for customer-powered DLPS because the construction season has only just begun in Anchorage, thus GCI has yet to upgrade nodes for this technology. GCI has, however, deployed customer-powered DLPS using nodes that have already been upgraded for network-powered DLPS where circumstances warrant. Sheridan Decl. ¶ 5 n.3.

<sup>95</sup> *Id.* ¶ 6.

<sup>96</sup> *Id.* ¶ 7.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* This highlights the disruption that abrupt removal of UNE loop access will cause. If UNE loops are shut off, customers will be faced with a decision to either schedule an immediate appointment so that GCI can do an emergency installation of its customer-powered eMTA (even assuming the necessary node and drop work is already completed) or call ACS simply to flip a switch. Thus, here again, the fact that GCI relies heavily on UNE loops again distinguishes Anchorage from Omaha. *See Omaha Forbearance Order*, 20 FCC Rcd 19417 (noting that a situation in which a CLEC relies substantially on UNE loops “necessarily raises different issues with respect to our section 10 analysis”).

<sup>99</sup> *Id.*

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receiving service from GCI over UNE loops, understandably declines access to their home due to perceived inconvenience.<sup>100</sup>

Moreover, it is frequently the case that the cable outlet is a good distance from the main phone jack, thus requiring GCI to relocate the cable outlet.<sup>101</sup> GCI can accomplish this process quickly if the home has a crawlspace or the owner does not object to additional outside wires. But this process can be delayed if the owner – or, more often, an owner’s association – delays or outright disallows such work.<sup>102</sup> GCI must also split, test, and frequently replace inside wiring to provide sufficient quality for digital voice service.<sup>103</sup> GCI also makes every effort to isolate cable plant that feeds video service to provide future access to other cable or satellite video providers in the future.<sup>104</sup>

## 2. MDUs

Deploying customer-powered DLPS in multiple dwelling units (“MDUs”) presents additional challenges. The most efficient way to deploy customer-powered DLPS in MDUs is to place the eMTAs in a central telecommunications closet and connect them to the existing inside wiring for each residence.<sup>105</sup> In most cases, such an arrangement alleviates the need to access each customer’s premises. Unfortunately, however, most MDUs in Anchorage do not have the necessary space, power, security, or access to accommodate this deployment strategy.<sup>106</sup> A telecommunications closet must have adequate space to house a good deal of equipment – several eMTA units, a shelf to support the eMTAs, the incoming feed amplifiers to boost the signal, all the telephone house wire, and the intermediate blocks to tie down the wire, and still leave sufficient room for maintenance and repairs.<sup>107</sup> Moreover, many building owners do not embrace such an arrangement when their tenants already receive perfectly good GCI phone service through UNE loops.<sup>108</sup>

The telecommunications closet must also be secure enough to protect the equipment, but at the same time allow GCI to access the building and the

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<sup>100</sup> Contrary to ACS’s suggestion, this is a genuine barrier to entry not faced by incumbents like ACS.

<sup>101</sup> Sheridan Decl. ¶8.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* ¶ 9.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* ¶ 12.

<sup>106</sup> *Id.* Security can be problematic as telecommunication closets are frequently located in publicly accessible areas, such as laundry rooms or boiler rooms. *Id.*

<sup>107</sup> *Id.* GCI is currently testing a 12-line eMTA, which may alleviate some of the space concerns when available for deployment. This exemplifies GCI’s continuing efforts to address operational impediments to converting from UNE loops to its own full-facilities-based DLPS.

<sup>108</sup> *Id.*

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telecommunications closet for repairs and maintenance, whether day or night.<sup>109</sup> Moreover, GCI must install new wiring to the intermediate block and then to individual eMTAs, and in certain cases “clean up” or upgrade the wiring that connects to the individual dwellings so that it functions at the higher standard necessary to provide digital service rather than traditional phone service.<sup>110</sup>

Despite these obstacles, GCI has scoured Anchorage for opportunities to deploy DLPS through telecommunications closets in MDUs.<sup>111</sup> The Alpine Apartment complex in the Central Wire Center, for example, presented GCI with the relatively rare combination of characteristics necessary to support such deployment.<sup>112</sup> First, this complex, which is comprised of 6 buildings with a total of 386 apartments, provided plenty of space to house all of the equipment in a secure environment.<sup>113</sup> More importantly, the owner of the complex provided permission to use not only the space, but provided the necessary access to the building and power supplies.<sup>114</sup> Moreover, the set-up ACS cites – which would have to be replicated several times over to provide service throughout the Alpine complex – is one of the most efficient arrangements GCI has been able to secure, and certainly not representative of the company’s MDU experience to date.<sup>115</sup> For these reasons, ACS’s suggestion that GCI’s successful deployment at Alpine evinces an ability to deploy DLPS in all MDUs in Anchorage is simplistic and misleading.<sup>116</sup>

For those MDUs that do not have sufficient telecommunications closet space to house the necessary eMTAs and other equipment, two additional obstacles arise beyond the obvious need to access each resident’s home.<sup>117</sup> For one, as in single family homes, the phone jacks are traditionally not near the cable outlet. Unlike in single family homes, however, it is difficult to run additional cable to the phone jack in an apartment building or other MDU – even assuming the building owner or condominium board permits such additional cable wiring either inside or outside of the building.<sup>118</sup> GCI also must identify, isolate, and trace the line from the dwelling all the way back to the main building jack, which can be a time-consuming process in the MDU setting.<sup>119</sup> Then GCI must either remove or “cap” the line to prevent stray radio frequency or electric current from

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* ¶ 13.

<sup>111</sup> *Id.* ¶ 15.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See ACS April 3 *Ex Parte* at 4.

<sup>117</sup> Sheridan Decl. ¶16.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* ¶17.

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interfering with its DLPS service.<sup>120</sup> In all this, however, GCI must maintain the integrity of the line so that other service providers (or GCI) can use the line if necessary.<sup>121</sup>

ACS's attempt to downplay the extent of the MDU problem is unavailing. ACS claims that "[m]ost older residential MDUs in Anchorage typically have four to six units, and thus, GCI's claimed technical capabilities are sufficient to serve these customers."<sup>122</sup> First, it is unclear why ACS artificially restricts its numbers to "older residential MDUs." It is equally unclear where ACS obtained even this subset of numbers, as it provides no supporting citation.<sup>123</sup> In truth, the most recent U.S. Census Bureau data from 2001 demonstrates that of the Anchorage MDUs containing five or more units, more than 60% are larger than ten units and thus are difficult for GCI to serve with current technology and space constraints; a situation that will improve over time, but cannot be solved overnight.<sup>124</sup> Clearly, the obstacles to immediately serving MDU customers, comprising a significant portion of the residential market, without UNE access are no small matter.

## B. Small Business Deployment

In the small businesses context – even where the facilities and technology exists to provide service over cable plant – operational difficulties will prevent immediate deployment. For one, small business customers are understandably even more sensitive than residential customers to the service interruptions required to install DLPS.<sup>125</sup> As such, GCI faces longer delays in its attempts to coordinate with small business customers and is mostly limited to off-hour installation.<sup>126</sup> Moreover, GCI does not have cable plant in many small business areas.<sup>127</sup> Even where cable is near a commercial building, few businesses subscribe to cable television services and thus most are not currently wired with GCI's cable plant.<sup>128</sup>

Contrary to ACS's claims that "GCI could extend its facilities to most of its customers at relatively low cost due to the short distances that likely exist between GCI's

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> ACS Reply Comments at 15-16.

<sup>123</sup> In its Reply, ACS cites to "*Id.* at ¶ 5," but the previous citation was to GCI's Opposition, which does not contain paragraph numbers. The cite prior to that was an "id" to Eisenberg's Declaration, but ¶ 5 does not mention anything about the number of units in Anchorage MDUs.

<sup>124</sup> See The Types of Housing Units in Anchorage Municipality, Alaska in 2001, attached hereto as Exhibit F.

<sup>125</sup> Sheridan Decl. ¶ 20.

<sup>126</sup> *Id.*

<sup>127</sup> See Section II.C.2., above.

<sup>128</sup> Sheridan Decl. ¶ 21.

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existing facilities and almost all residential and many enterprise customer locations,”<sup>129</sup> distance is not the sole or even most important determinant of the ability, time, money, or effort required to connect small business customers to GCI’s cable plant.<sup>130</sup> Indeed, only a small number of businesses can be reached with an aerial drop; most can be reached only through buried conduit.<sup>131</sup> In turn, access to buried conduit requires access to existing conduit or the ability for GCI to lay its own conduit.<sup>132</sup> As discussed in previous submissions, ACS has been less than accommodating in providing conduit access.<sup>133</sup>

Moreover, seasonal, economic, and operational issues constrain GCI’s ability to lay its own conduit (which, again, can only be done during the late May to September/October construction season).<sup>134</sup> Connecting cable to small business customers in a typical strip mall, for example, is much more difficult than placing a drop to a single family home.<sup>135</sup> Connecting to the businesses often requires boring or digging up asphalt parking lots and accessing conduit.<sup>136</sup> Underground drop installation requires not only property owner permission and access coordination, but also presents seasonal obstacles.<sup>137</sup> Thus, even where GCI’s cable plant passes adjacent to a concentration of small businesses and can meet the needs of those businesses, deploying service over its own last-mile facilities is more complicated and time-consuming than ACS suggests.<sup>138</sup>

None of the challenges that GCI faces in deploying customer-powered DLPS is insurmountable given sufficient time and opportunity, but the facts simply do not support ACS’s claims that GCI can do so “with minimal additional investment”<sup>139</sup> and “minimum effort.”<sup>140</sup> Certainly, denying GCI access to UNE loops will not make these conversion issues easier to resolve.

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<sup>129</sup> ACS Reply Comments at 41.

<sup>130</sup> Sheridan Decl. ¶ 21.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Declaration of Blaine Brown (“Brown Decl.”) ¶¶ 18-19, attached as Exhibit J to GCI Opposition.

<sup>134</sup> Sheridan Decl. ¶ 21.

<sup>135</sup> *Id.* ¶22.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> ACS Reply Comments at 24 (claiming that GCI will be able to serve “[a]ny customer . . . with minimum effort in the near future.”).

<sup>139</sup> *Id.* at 21 n.68.

<sup>140</sup> *Id.* at 24.