

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area

WC Docket No. 06-109

MOTION TO DISMISS

General Communication, Inc. (“GCI”), hereby moves to dismiss the above-captioned Petition of ACS of Anchorage, Inc. (“ACS”), for forbearance from “application of certain dominant carrier regulation.”¹ ACS’s Petition should be dismissed because it contains inconsistent and contradictory descriptions of the relief requested, and thus fails to provide the specificity necessary to give commenters and the Commission notice of the requested relief and to allow the Commission to perform the forbearance analysis required under Section 10.² In order to cure these defects, the Commission should dismiss ACS’s Petition without prejudice and direct ACS to refile a Petition that clearly sets forth the relief sought.

¹ *Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband services, in the Anchorage, Alaska, Incumbent Local Exchange Study Area*, WC Docket No. 06-109 (filed May 22, 2006) (“ACS Petition”).

² 47 U.S.C. § 160.

It its Petition, ACS asks for forbearance from (1) “certain aspects of dominant carrier regulation of its interstate exchange access services”³ allegedly consistent with relief granted in the *Qwest Omaha Forbearance Order*;⁴ and (2) with respect to broadband services, “forbearance consistent with that granted to Verizon Telephone Companies on March 19, 2006.”⁵ ACS provides a list of dominant carrier regulation from which it purports to seek relief,⁶ but does not similarly delineate the regulations from which it seeks relief in connection with its request for forbearance for broadband services. As explained below, ACS fails to clearly set forth the relief it seeks in three significant respects, and the Commission should require ACS to cure this failure before initial comments on ACS’s Petition are due.

First, in the body of its forbearance request, ACS claims that it does not seek “forbearance from the regulation of wholesale rates.”⁷ ACS’s list of “certain dominant carrier regulation,”⁸ however, contains provisions that govern carrier-to-carrier rates, rather than only end-user rates.⁹ In fact, looking to ACS’s list of specified “dominant carrier regulation,” it appears that ACS seeks forbearance from rate structure, price, rate-of-return, and exit regulation with respect to *all* services, regardless of whether the service is a retail service offered to end-users or a wholesale service offered to other

³ ACS Petition at 3.

⁴ *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 (2005) (“*Qwest Omaha Forbearance Order*”).

⁵ ACS Petition at 6.

⁶ *Id.*, Appendix A.

⁷ *Id.* at 5.

⁸ *Id.*, Appendix A at 1.

⁹ *Association of Communications Enterprises v. FCC*, 253 F.3d 29, 31-32 (D.C. Cir. 2001) (upholding the Commission’s definition of retail services as those sold to “the ultimate consumer” or “end-users” as opposed to wholesale services, which are sold to resellers or carriers).

carriers. This request for relief, in other words, far exceeds the purely retail relief ACS purports to request in the body of its Petition. And, this difference in scope will significantly affect the analysis that the Commission must undertake under Section 10. As GCI and other commenters prepare to respond to ACS's request for forbearance and provide the Commission with the record necessary to enable reasoned decision-making, it is essential that they understand whether ACS is seeking forbearance with respect to only retail rates or whether, in fact, ACS is seeking relief with respect to both wholesale and retail offerings. Furthermore, because Section 10 contains provisions that grant forbearance by operation of law, it is critical to have a clear – rather than self-contradictory – delineation of the scope of a forbearance request at the start of the proceeding.

Second, ACS contends that it seeks relief that is consistent with the relief that the Commission granted in its *Qwest Omaha Forbearance Order* and in response to Verizon's Broadband Forbearance Petition.¹⁰ Neither of these grants included forbearance with respect to circuit-switched special access services, and the *Qwest Omaha Forbearance Order* did not grant forbearance with respect to *any* enterprise services (whether switched or special access services). Nevertheless, ACS's list of specified "certain dominant carrier regulation" includes provisions that govern special access services. As with the contradiction in ACS's Petition regarding wholesale and retail services, this ambiguity significantly affects the scope of ACS's Petition. The Commission should require ACS to resolve this ambiguity and make clear whether it seeks forbearance with respect to its special access offerings.

¹⁰ ACS Petition at 3, 6.

Finally, ACS requests forbearance from “telecommunications carrier or common carrier regulation under Title II of the Communications Act and the FCC’s rules thereunder, for all services it offers or may offer that meet the FCC’s definition of ‘broadband.’”¹¹ ACS has not, however, enumerated the particular statutory or regulatory provisions from which it seeks relief, or the ACS services that it believes would currently be subject to such forbearance. Instead, ACS requests relief “consistent” with the relief granted in response to a similar petition filed by Verizon.¹²

But given the grant by operation of law, the scope of relief granted to Verizon is not clear.¹³ As recognized by Chairman Martin and Commissioner Tate, in their joint statement, “it arguably would have been preferable to have reached consensus on a proposal clearly setting forth the relief granted today.”¹⁴ There is no need to repeat this potential for uncertainty here by simply accepting ACS’s request for relief “consistent” with the relief granted to Verizon, which provides insufficient guidance for commenters to respond to ACS’s request. As the party seeking relief, it is incumbent upon ACS to set forth the relief it seeks, including, at minimum, the statutory and regulatory provisions from which it asks the Commission to forbear, and the services with respect to which it seeks such forbearance.

¹¹ *Id.*, Appendix A at 5.

¹² *Petition of the Verizon Telephone Companies for Forbearance*, WC Docket No. 04-440 (filed Dec. 20, 2004).

¹³ See *Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate*, WC Docket No. 04-440 (March 20, 2006) (“Joint Martin and Tate Statement”); *Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon’s Forbearance Petition*, WC Docket No. 04-440 (March 20, 2006); *Statement of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon Forbearance Petition*, WC Docket No. 04-440 (March 20, 2006).

¹⁴ Joint Martin and Tate Statement at 2 n.10.

The Commission is free to dismiss ACS's Petition and direct ACS to refile a Petition that clearly sets forth its requested relief. As the D.C. Circuit repeatedly has explained, the Commission has "broad discretion to manage its docket"¹⁵ and "order [its] own proceedings."¹⁶ The D.C. Circuit's recent *AT&T v. FCC* decision likewise permits dismissal here.¹⁷ Most importantly, unlike the present matter, that case did not involve action by the Commission taken early in a proceeding or that gave the affected party an opportunity to cure and proceed with its request for relief. Instead, the court in *AT&T v. FCC* considered whether the Commission had adequately explained its decision to deny entirely a petition as not sufficiently specific.¹⁸ By concluding that the Commission had not adequately supported its decision and giving the Commission an opportunity, on remand, to further explain its reasoning, the Court recognized that the Commission may, in appropriate circumstances, deny a petition for failure to specify the relief sought.¹⁹ If the Commission has the discretion to deny a petition on this ground, it certainly has even broader discretion to dismiss a petition with leave to refile.

Clarification of ACS's Petition would aid the Commission in the execution of its statutory duties. First, if ACS is required to correct the contradictions in its Petition and clarify the scope of the relief it seeks, the Commission will benefit from a full record that addresses only the actual relief sought. Second, the Commission will have clear notice of the relevant product and geographic markets for which it must perform the market

¹⁵ *Telecommunications Resellers Ass'n v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir. 1998).

¹⁶ *Association of Business Advocating Tariff Equity v. DOE*, 779 F.2d 697, 701 (D.C. Cir. 1985).

¹⁷ *AT&T v. FCC*, No. 05-1186, 2006 U.S. App. LEXIS 16068.

¹⁸ *Id.*, at *19-23.

¹⁹ *Id.*

analysis that Section 10 requires.²⁰ This clarity is particularly important here, as the statute grants the Commission only a limited time in which to perform its forbearance analysis. Finally, requiring ACS to correct the contradictions in its Petition at this point will ensure that if ACS's Petition is granted by operation of law, all interested parties – ACS, competitors, the market, and the public – will understand precisely the relief that has been granted. There is no reason for ACS not to clearly specify the relief it seeks, as it presumably understands the scope of its request. Moreover, allowing consideration of an internally inconsistent Petition imposes unnecessary burdens on the Commission and third parties, and could lead to needless regulatory uncertainty in the event ACS's current Petition is granted. For all of these reasons, dismissal with leave to refile would be an appropriate exercise of the Commission's discretion.

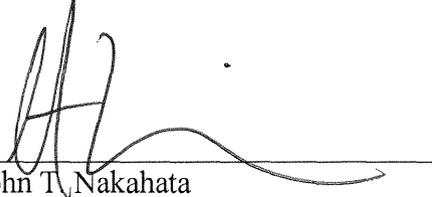
Accordingly, the Commission should dismiss ACS's Petition without prejudice, and direct ACS to file a petition that explains:

- (1) whether ACS seeks forbearance from regulations applicable to its interstate carrier-to-carrier offerings;
- (2) whether ACS seeks forbearance from regulations applicable to its interstate special access offerings; and,
- (3) which statutory and regulatory provisions ACS is asking the Commission to forbear from with respect to its broadband services, and the services with respect to which ACS seeks such forbearance.

²⁰ See ACS Petition at 8 (explaining that its Petition requires the Commission to “perform[] a market analysis”).

Respectfully submitted,

GENERAL COMMUNICATION, INC.

A handwritten signature in black ink, appearing to read "John T. Nakahata", written over a horizontal line.

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