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August 11, 2006

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Suite TW-A325
Washington D.C. 20554

Re: Petition of ACS Anchorage Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. 160(c)) 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 Dkt. No. 06-109

Dear Ms. Dortch:

On behalf Time Warner Telecom, Inc., One Communications Corp. and Cbeyond Communications, LLC, the undersigned counsel hereby files a redacted version of the above referenced parties' opposition to ACS' petition for forbearance.¹ A confidential version of the enclosed opposition has been served with the Secretary's office. At the direction of Carol Simpson of the wireline competition bureau, two confidential copies have also been served with Gary Remondino.

Please let us know if you have any questions in connection with this filing.

Respectfully submitted,

/s/

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¹ See Petition of ACS Anchorage Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. 160(c)) 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 Dkt. No. 06-109 (filed May 22, 2006).

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ATTORNEYS FOR TIME WARNER TELECOM, INC,
CBEYOND COMMUNICATIONS, LLC AND ONE
COMMUNICATIONS CORP.

cc: Janice M. Myles (redacted version)
Best Copy and Printing (redacted version)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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)	
Petition of ACS Anchorage Inc. Pursuant to)	
Section 10 of the Communications Act of 1934,)	
as amended (47 U.S.C. 160(c)) for)	
Forbearance from Certain Dominant Carrier)	
Regulation of its Interstate Access Services)	WC Dkt. No. 06-109
and for forbearance from Title II Regulation)	
of Its Broadband Services in the Anchorage,)	
Alaska, Incumbent Local Exchange Study Area)	
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)	

OPPOSITION OF TIME WARNER TELECOM, INC., CBeyond COMMUNICATIONS, LLC AND ONE COMMUNICATIONS CORP.

Time Warner Telecom, Inc. (“TWTC”), Cbeyond Communications LLC, (“Cbeyond”) and One Communications Corp. (“OCC”) (collectively, the “Joint Commenters”) by their attorneys, hereby submit this opposition to the petition for forbearance in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

ACS has again filed a petition seeking forbearance¹ from a wide-range of regulations meant to protect consumers from its market power in the Anchorage MSA. As with its previous petition², the instant request for forbearance suffers from several fundamental and fatal flaws.

¹ See Petition of ACS Anchorage Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. 160(c)) 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 Dkt. No. 06-109 (filed May 22, 2006) (“*Petition*”).

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Most obviously, as General Communications Inc. (“GCI”) has argued in a motion to dismiss filed in this proceeding, the *Petition* must be rejected because ACS has failed to describe the rules and statutory provisions from which it seeks forbearance. ACS’ failure to clearly describe the legal requirements from which it seeks relief precludes any assessment of the merits of the *Petition*. If there is no way to know what relief ACS has asked for, there is no way for the Commission to determine whether relief should be granted. On this ground alone the Commission should deny the *Petition*.

Assuming for purposes of this discussion that ACS seeks relief from Title II, and most importantly, dominant carrier regulation of TDM-based and packetized broadband services, there is no basis for granting such relief in the enterprise market in Anchorage. The critical inquiry in assessing a request for forbearance from dominant carrier regulation in the enterprise market is whether the incumbent LEC still controls bottleneck transmission facilities needed to serve business customers. ACS offers no evidence that it has lost its stranglehold over these facilities. ACS’ reliance in its *Petition* on competition from GCI in the mass market and GCI’s moderate success in gaining market share in the downstream retail enterprise market are simply red herrings. Indeed, even ACS’ skewed market data indicate that ACS controls bottleneck facilities connecting some **[proprietary begin] [proprietary end]** percent of the enterprise market locations in Anchorage. Given the high entry barriers associated with deploying such facilities, it is clear that ACS is dominant in the market for local transmission facilities in the enterprise market. Accordingly, ACS retains the incentive to raise rivals’ costs. Dominant carrier

² See Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area, WC Dkt. No. 05-281 (filed Sept. 30, 2005).

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regulation, and of course Title II common carriage requirements more generally, therefore continue to be necessary to limit ACS' opportunities to act on this incentive.

II. ACS' PETITION SHOULD BE DENIED BECAUSE ACS HAS FAILED TO DESCRIBE THE RELIEF IT SEEKS

In a motion to dismiss filed in response to the *Petition*, GCI correctly argues that ACS has failed to describe the relief it seeks.³ The absence of a clear description of the relief sought prevents the Commission from determining whether the *Petition* should be granted, and it prevents interested parties from commenting on the *Petition*. On this basis alone the Commission should deny the *Petition*.

The *Petition* is a model of opacity and internal contradiction. For example, ACS argues that it is not seeking "forbearance from the regulation of wholesale rates" (*Petition* at 5) or "the obligation to provide wholesale service pursuant to § 251(c)(4)."⁴ Yet, ACS is also seeking forbearance from pricing, rate structure and Part 65 rate of return regulation which apply to all services, both wholesale and retail.⁵

ACS also requests "forbearance consistent with that granted to the Verizon telephone companies on March 19, 2006." *Petition* at 6. While the scope of the regulations from which Verizon was granted forbearance is not entirely clear, it is possible that Verizon was granted relief from all of Title II regulation for its packetized transmission services, including the FCC's authority to set prices for such services. Verizon's petition did not make a distinction between

³ See GCI Motion to Dismiss, WC Dkt No. 06-109 (filed July 17, 2006). See also GCI Reply in Support of GCI's Motion to Dismiss, WC Dkt. No. 06-109 (filed July 24, 2006) ("*GCI Reply to Motion*").

⁴ Letter of Karen Brinkman, Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-109, at 1 (filed July 21, 2006) ("*ACS Letter*").

⁵ See Appendix A, attached to *Petition*.

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packetized services sold to wholesale or retail customers. Therefore, whatever relief was provided to Verizon likely encompassed services sold to both wholesale and retail customers. In light of ACS' disclaimer regarding wholesale services described above, it is anyone's guess whether the "Verizon relief" requested by ACS applies to the wholesale *and* retail markets or just the retail market. Moreover, it is unclear exactly what ACS services would be subject to such relief because ACS does not provide a list of services for which it seeks forbearance (as Verizon eventually did).

Adding further confusion, ACS requests relief consistent with that granted to Qwest in Omaha. *See Petition* at 3. Qwest's request for non-dominant treatment with respect to enterprise services was denied, yet it was granted non-dominant treatment with respect to the mass market in Omaha⁶. The logical inference is that ACS seeks relief only from dominant carrier regulation as it applies to the mass market. Yet, ACS has "clarified" that it "unambiguously seeks relief as to the Anchorage enterprise market." *ACS Letter* at 2.

These internal inconsistencies make it impossible for the Commission or interested parties to determine the relief sought by ACS. Absent such an understanding, it is impossible for the Commission to assess ACS' eligibility for forbearance. The FCC should therefore, in accordance with GCI's request, dismiss the *Petition* "and direct ACS to file a petition that adequately explains the relief it seeks." *GCI Reply to Motion* at 4. Without such dismissal or a withdrawal, ACS' *Petition* must be denied.

⁶ *See Petition of Qwest for Forbearance Pursuant to Section 47 U.S.C. 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶¶ 25,50 (2005) ("*Qwest Omaha Order*").

III. ACS REMAINS DOMINANT WITH RESPECT TO THE WHOLESALE AND RETAIL ENTERPRISE BROADBAND MARKET IN ANCHORAGE

Even if it were clear that ACS seeks forbearance from Title II regulation, and in particular dominant carrier regulation, of its service offerings in the enterprise market (the focus of this opposition), ACS offers no basis for granting such relief in Anchorage.⁷ The *Petition* must therefore be denied on this basis as well.

Section 10 of the Communications Act requires that the Commission forbear from applying a statutory provision or regulation only if it determines that (1) the requirement is not “necessary” to ensure just, reasonable and not unjustly or unreasonably discriminatory charges and practices; (2) the requirement is not necessary for the protection of consumers; and (3) forbearance is in the public interest. 47 U.S.C. § 160(a). These requirements are conjunctive, so the failure to meet any of the three requires denial of a petition for forbearance.⁸ In the context of Section 10, “necessary” does not mean “absolutely required” or “indispensable.” *CTIA v. FCC*, 330 F.3d at 511. A requirement is “necessary” to ensure just, reasonable and nondiscriminatory rates, terms and conditions if there is merely a “strong connection” between a requirement and “what the agency permissibly sought to achieve with the disputed regulation.” *Id.* at 512. Moreover, in making a determination as to whether granting a petition is in the public

⁷ For the purposes this opposition, the Joint Commenters assume the most expansive interpretation of ACS’ request for relief with respect to the market for broadband transmission services provided to the enterprise market: that ACS seeks relief from Title II and dominant carrier regulation for both its packetized and TDM based broadband services sold to both retail and wholesale enterprise customers in the Anchorage MSA. This opposition does not address the implications, if any, of the *Petition* on the regulation of ACS with respect to the mass market or for switched access services provided to the enterprise market.

⁸ See *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (*CTIA v. FCC*).

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interest, the Commission “shall” consider the extent to which granting forbearance will “promote competitive market conditions.” 47 U.S.C. § 160(b).

When determining whether to grant forbearance under Section 10 from dominant carrier regulation, the D.C. Circuit has held that the Commission must apply its traditional standard for determining dominance established pursuant to statutory provisions other than Section 10 (mainly Sections 201 and 202) unless the Commission explains why a departure from that test is appropriate.⁹ Accordingly, in determining whether to grant ACS’ request for forbearance from dominant carrier regulation in Anchorage, the Commission must apply its traditional non-dominance test.

The FCC’s rules and past precedents define a dominant carrier as a carrier that possesses market power.¹⁰ As the Commission recently reiterated in the *Qwest Omaha Forbearance Order*, the FCC has applied the same dominance analysis since the *Competitive Carrier* proceedings and the dawn of competition in the late 1970s. Through the *Competitive Carrier Proceeding*, the Commission established a regulatory framework to distinguish between dominant carriers, which have market power, and carriers classified as non-dominant, which lack market power. Under the framework set forth in the *LEC Classification Order*, the Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic

⁹ See *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (2001) (“The FCC departed from its traditional non-dominance analysis without explanation. The FCC’s new policy that market share data [alone] is essential to evaluate a carrier’s market power may well be reasonable, but until the Commission has adequately explained the basis for this conclusion, it has not discharged its statutory obligation under the Administrative Procedure Act. Where, as here, an agency has failed ... to explain the path that it has taken, we have no choice but to remand for a reasoned explanation.”) (internal cites omitted).

¹⁰ See 47 C.F.R § 61.3(q); see also, e.g., *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 5 (1995) (“*AT&T Non-Dominance Order*”).

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markets for examination of market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses individual market power in that market. *See Qwest Omaha Order* ¶ 18.

More importantly, to the extent ACS seeks, among other things, forbearance from Title II and dominant carrier regulation with respect to packetized and TDM-based broadband services provided to enterprises, Commission precedent demonstrates that the dominance/non-dominance analysis must focus on the extent to which ACS dominates the market for the underlying transmission facilities which are necessary inputs for such services. In the 2001 *Broadband Dom/Non-Dom NPRM*,¹¹ for example, the Commission recognized the need to investigate each particular broadband product and geographic market to determine if a “carrier may be able to raise prices by increasing its rivals’ costs or by restricting its rivals’ output through the *carrier’s control of an essential input, such as access to bottleneck facilities*, that its rivals need to offer their [broadband] services.” *Broadband Dom/Non-Dom NPRM*. ¶ 28 (emphasis added). The Commission acknowledged that “[h]igh initial investment, economies of scale, access to customers, and the monopoly legacy of the telecommunications networks all contribute to incumbent LEC market power in the local exchange and exchange access market.” *Id.* ¶ 29. To the extent that competitors must rely on loop facilities as inputs, the FCC recognized that the dominance/non-dominance inquiry must focus on “the extent to which current statutory and regulatory requirements, including any competitive safeguards” limit the incumbents’ ability to raise rivals’ costs. *Id.* ¶ 32.

¹¹ *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, ¶ 17 (2001) (“*Broadband Dom/Non-Dom NPRM*”).

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The FCC's treatment of the relationship between retail market power and control over bottleneck facilities necessary to provide such services demonstrates that ACS' reliance on the AT&T non-dominance order is misplaced. *See Petition* at 40. When the FCC declared AT&T to be non-dominant in the long distance market, it did so in large part because AT&T no longer controlled local bottleneck facilities and therefore had little ability to foreclose rivals' access to the retail long-distance marketplace. *See AT&T Non-Dominance Order* ¶ 32. Accordingly, if ACS continues to control bottleneck facilities, it cannot rely on the AT&T non-dominance order as the basis for eliminating dominant carrier regulation, let alone other, less stringent Title II regulation.

A. THE "EVIDENCE" PROFFERED BY ACS IN SUPPORT OF ITS REQUEST FOR FORBEARANCE FROM REGULATION IN THE ENTERPRISE MARKET IS UNPERSUASIVE

ACS offers no basis for concluding that it has lost control over bottleneck facilities. Indeed, in support of its *Petition*, ACS proffers only irrelevant or unhelpfully vague competitive information. *First*, ACS argues that, because GCI is "collocated in 100 percent of ACS' central office wire centers," GCI can serve "virtually every customer in the Anchorage market."¹² But as the FCC has found, the presence of collocations is a necessary, but not sufficient condition for the deployment of loop facilities. This is why the impairment test for loops in *conjunctive*¹³: to demonstrate that there is sufficient competition to eliminate unbundling, CLECs must be collocated in wire centers with a substantial number of business access lines *and* collocations. A high number of collocations in a wire center is a proxy for CLEC deployment of fiber transport

¹² *Petition* Ex. C, Statement of Howard Shelanski ¶ 10.

¹³ *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533, ¶ 5 (2005) ("TRRO")*.

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networks in that wire center. In turn, a high number of business access lines in a particular wire center demonstrates that there is sufficient revenue opportunity in that wire center for CLECs to construct DS1 or DS3 loops from the splice points on CLECs' transport networks.¹⁴

The Joint Commenters' own experience demonstrates that there is essentially no link between the mere presence of CLEC collocations and CLEC loop deployment. For example, TWTC is collocated in **[proprietary begin] [proprietary end]**, yet is only able to serve approximately 25 percent of its customers over its own loop facilities.¹⁵ Many of the remaining 75 percent of its customers that it serves over primarily ILEC special access facilities are within wire centers where TWTC has established collocations. Cbeyond, which sells exclusively DS-1 services, is collocated in **[proprietary begin] [proprietary end]** ILEC wire centers, yet deploys *no* loop facilities because it is generally not economic for Cbeyond¹⁶ or any other CLEC (*see TRRO* ¶ 166) to deploy DS-1 level facilities because the revenue opportunities are so low.

Moreover, as ACS declarant Doucette notes, nearly all of the special access facilities in Anchorage are deployed at the DS-1 level.¹⁷ The FCC has determined that it is not even possible for competitors to deploy DS-1 loops in wire centers with the business line density found in

¹⁴ *TRRO* ¶ 155 (“As explained below, we adopt a wire center-based test, finding that requesting carriers are not impaired within the service areas of wire centers that contain significant competitive fiber deployment, as evidenced by collocation, and exhibit substantial revenue opportunities, as evidenced by the number of business lines served by the particular wire center.”).

¹⁵ *See* Time Warner Telecom, Inc., SEC Form 10-Q Quarterly Report for the Period Ended Mar. 31, 2006, at 24 (filed May 10, 2006).

¹⁶ Cbeyond explains that all of its customers are served by DS1 loops provided by ILECs because it is never economically rational for Cbeyond to deploy DS1 facilities. *See* Declaration of Richard Baatelan on behalf of Cbeyond, attached to Comments of ALTS, WC Dkt. Nos. 04-313 *et al.*, App. C ¶ 5 (Oct. 4, 2004).

¹⁷ *See* *Petition* Ex. A, Statement of Robert Doucette ¶ 3, (“*Doucette Decl.*”).

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Anchorage. ACS has provided no evidence as to why this conclusion is somehow invalid in Anchorage. Thus, it is likely that there is even less competitive deployment of wireline loops capable of serving enterprise customers in the Anchorage market than in many markets in which there is demand for OCn loops.

Second, the limited evidence ACS proffers with respect to GCI's fiber deployment is also irrelevant to measuring ACS' dominance of the special access market in Anchorage. ACS describes GCI's fiber network in the following terms: "GCI's fiber facilities run through the densely populated areas in Anchorage, and are particularly extensive in the large enterprise districts within areas served by the Central and North wire centers." *Petition* at 43. Furthermore "GCI stated that it served 22 buildings in Anchorage from its fiber ring, and since then ACS is aware of several new office buildings that GCI serves using its fiber facilities." *Id.* It is clear from this description that GCI, like nearly every other CLEC in the nation, builds its fiber rings primarily in downtown areas closest to customers with highest levels of demand. From its fiber ring, GCI, just like TWTC, can deploy fiber loops to serve those buildings where the revenue opportunity compensates for the high cost of construction. In this respect, GCI is no different than any other CLEC. Again, ACS has not provided any evidence as to how GCI's deployment of its fiber networks is any different than a "reasonably efficient competitor" that cannot deploy DS3s and DS1s loops in most areas. *See TRRO* ¶¶ 24-28, 166.

Third, the extremely limited evidence presented by ACS of enterprise market share captured by GCI is equally inapposite. While ACS does not clearly describe the inputs used in its market share data, it seems that the market shares it offers for "enterprise connections" are based on a sum of the number of voice grade lines and "broadband internet access connections," which includes DS-1 lines. *See Doucette Decl.* ¶ 3. If so, ACS is likely combining switched and

special access lines provided to enterprises in the same metric, making this metric useless for determining ACS' or GCI's retail special access market share since the inclusion of switched lines skews the totals.

In any event, GCI's retail market share is irrelevant to GCI's continued dependence on ACS' facilities. Indeed ACS estimates that [proprietary begin] [proprietary end] percent of GCI's "enterprise connections" are provided over GCI's own facilities. *See id.* ACS also asserts that GCI has captured [proprietary begin] [proprietary end] percent of the retail enterprise market. *See id.* ¶ 4. Even assuming that this percentage represents an accurate estimate of the percentage of *special access* enterprise customers that GCI serves over its own facilities (and as explained above, this is unlikely given the inclusion of switched lines in the data), ACS continues to control approximately [proprietary begin]¹⁸ [proprietary end] percent of the facilities needed to serve enterprise customers in Anchorage with special access services. Any carrier that retains a [proprietary begin] [proprietary end] percent share of the inputs needed to provide service at retail must be considered dominant.

B. ACS CONTROLS THE FACILITIES NECESSARY TO PROVIDE PACKETIZED BROADBAND SERVICES TO ENTERPRISES

ACS also presents no evidence that there is *either* wholesale *or* retail competition in the provision of the packetized transmission services for which Verizon was granted forbearance by operation of law. Even assuming such competition exists, there is no reason to think that ACS' competitors in these markets can deploy packetized facilities any more easily than competitors can generally deploy TDM-based facilities. This conclusion is borne out by examining the manner in which Ethernet, a typical packetized broadband service, is provided.

¹⁸ GCI's facilities market share is [proprietary begin][proprietary end] percent.

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To begin with, aside from the type of electronics placed on the loop itself, there is no real difference between a finished Ethernet loop and a TDM-based loop.¹⁹ Therefore, the barriers to facilities-based entry are largely the same whether the loop carries TDM or Ethernet traffic.²⁰ Just as competitors generally cannot deploy DS-1 facilities, it is not economic for CLECs to deploy finished Ethernet loops at lower capacities and at longer distances where the cost of construction cannot be recouped. For this reason, CLECs are just as dependant upon ILEC transmission facilities to provide finished Ethernet services as they are to provide TDM-based services.

ACS' market power with respect to packetized services is further amplified because "packetized" UNEs are not available. It is important to emphasize that, in eliminating unbundling for the packetized capabilities of hybrid loops in the *Triennial Review Order*, the Commission did not rely on the absence of barriers to construction for these facilities. Rather, the Commission eliminated packetized UNEs because it found such deregulation would encourage CLEC and ILEC investment in new, advanced facilities and because the Commission retained unbundling for the TDM features of these loops. *See TRRO* ¶¶ 289-90. The Commission believed that the continued availability the TDM-based functionality of packetized loops would provide CLECs a viable alternative to packetized loop UNEs. However, the

¹⁹ *See* Reply Declaration of Parley C. Casto ¶ 21, attached to Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Dkt. No. 06-74 (filed June 20, 2006).

²⁰ The barriers to loop construction largely stem from the cost of laying the fiber itself, not the electronics used to light the fiber. *See TRRO* n. 493; *See also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order, 18 FCC Rcd 16978, ¶ 381 (2003), *subsequent history omitted* ("TRO").

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Commission's predictions regarding increased CLEC deployment of packetized loops and the ability of carriers to employ TDM loops for Ethernet services are both proven to be unfounded.²¹ There is no indication that GCI or any other CLEC has been able to effectively use TDM-based loops to provide packetized services.

There are many reasons why ILEC-provided TDM loop facilities cannot generally be employed by CLECs to provide packetized services. For example, in TWTC's experience, the need to purchase two sets of electronics (TDM and Ethernet), and the inefficiencies of converting signals from TDM to Ethernet precludes the use of TDM transmission facilities as inputs for Ethernet service in most instances.

When a CLEC purchases a TDM loop, that circuit is provisioned with TDM electronics. Although CLECs do not pay a separate charge for these TDM electronics, the fixed cost of these electronics is surely incorporated into the monthly recurring charge for the circuit.²² Carriers must then place Ethernet customer premises electronics on top of the existing TDM electronics to enable the CLEC to offer Ethernet service. *See Taylor Reply Decl.* ¶ 18. These added electronics can add thousands of dollars in cost per circuit depending upon the configuration and capacity of the circuit. *See id.* CLECs are therefore essentially paying "double" for the electronics to provide Ethernet over TDM: once for the TDM electronics and once for the equipment to convert the TDM signal to Ethernet. *See id.*

²¹ Of course, if ACS' *UNE Forbearance Petition* were granted, even TDM-based UNEs would no longer be available at all as an input for packetized UNEs.

²² *See Reply Declaration of Graham Taylor, attached to Letter of Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-74 ¶ 18 (filed Aug. 8, 2006) ("Taylor Reply Decl.")*.

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Furthermore, Mr. Taylor explains that “Ethernet-over-TDM also increases [CLECs’] costs because [CLECs] must purchase much more TDM capacity than [needed] to provide Ethernet service. For example, a DS3 provides approximately 45 Mbps of bandwidth.” *Id.* ¶ 20. If a customer demands a 50 Mbps Ethernet loop, the CLEC must purchase two DS3s from the ILEC. *See id.* Because of bandwidth loss that occurs when TDM is converted into Ethernet, the customer does not receive 90 Mbps of bandwidth when it utilizes two DS3s. *See id.* Indeed, “[r]ather, assuming a 512 kbps frame (essentially a packet) size, two DS3s only provide 66.5 Mbps of Ethernet bandwidth.” *Id.* As a result, “using Ethernet over TDM results in between a 4 to 30 percent bandwidth loss from the TDM circuit.” *Id.*

When employing Ethernet-over-TDM, “[t]he inefficiencies are highest at the lowest Ethernet capacity,” where a CLEC must purchase a single DS3 to provide 10 Mbps of Ethernet service. *See id.* ¶ 22. Because businesses in the Anchorage market generally demand less than a single DS3 of capacity, the need for CLECs to purchase substantially more TDM capacity than they need to provide Ethernet-over-TDM would make it extremely difficult for carriers to compete using ACS’ TDM facilities. This problem would only be exacerbated if ACS were granted relief from rate-of-return regulation in Part 65. In that case, ACS could charge whatever price it wanted for its TDM-based broadband facilities.

Lastly, “[r]eliance on TDM loops to provide packetized services also introduces additional points of potential failure into the circuit.” *Id.* ¶ 24. “Moreover, identifying the source of service problems is slower, more complex and likely more costly if [CLECs] must rely on two sets of equipment rather than one.” *Id.* “If there is a problem with service quality and a circuit provisioned with both TDM and Ethernet electronics goes down, [a CLEC] must send its technicians to the site and the ILEC must also send its technicians to the site to determine

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whether the failure was caused by the [CLEC's] equipment, the ILEC's equipment, the ILEC's circuit, or some combination of these." *Id.* Because such equipment and the circuit are often located far from the areas where the CLEC has built a substantial portion of its network facilities, maintenance calls can take several hours. *See id.* "In addition, where [CLECs] self-deploy [] [their] own Ethernet loops, service repair and maintenance truck-rolls are generally much less costly in terms of labor and time because [CLECs] can only deploy loop facilities close to [their] existing network, decreasing the distance that must be traveled by the techs and increasing their utilization." *Id.*

For all of these reasons, CLECs cannot use TDM facilities to provide packetized services in most instances. Therefore, if ACS were granted the same relief that Verizon received by operation of law, CLECs in Anchorage would be forced to rely on packetized loops provided by ACS for which there would be no price regulation. Because ACS continues to have market power over these facilities, ACS will likely set the price for these facilities at monopoly levels, severely harming competition in Anchorage.

C. THE BARRIERS TO FACILITIES BASED ENTRY TO THE MARKET FOR BROADBAND SERVICES REMAIN HIGH AND PRECLUDE RAPID ENTRY

Although few competitors have built facilities capable of serving enterprise customers in the Anchorage market, ACS argues that new competitors could easily enter the market. *See Petition* at 33. As ACS correctly asserts, elasticity of supply is an important metric for determining whether the incumbent remains dominant in a particular market. *See id.* at 9. ACS argues that in Anchorage, competitors in the enterprise market can, "relatively easily acquire significant additional capacity to serve the enterprise market, and the enterprise market demonstrates a similar absence of barriers to entry." *Id.* at 42. There is no reason to credit this assertion.

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To begin with, ACS' assertion is contrary to the FCC's own findings. In the two most recent unbundling orders, the FCC found that substantial barriers exist to high capacity loop construction, making rapid entry extremely difficult. *See TRRO* ¶ 153; *TRO* ¶ 150. In its recent RBOC/IXC orders, the FCC reiterated that it is extremely difficult for competitors to construct special access facilities, making facilities-based entry into the enterprise market extremely difficult.²³

Furthermore, evidence of local loop deployment in the enterprise market across the country demonstrates that there are steep entry barriers associated with such deployment. Last year, Verizon indicated that CLECs have deployed high capacity loops to approximately 32,000 buildings.²⁴ Verizon also showed that, back in 1996, there were fully 24,000 buildings "served directly by CLEC fiber."²⁵ In other words, in nearly 10 years, CLECs have added connections to only approximately 8,000 buildings.

ACS proffers no indication as to why the barriers to the construction of high capacity facilities would be any different in Anchorage as compared to the nation as a whole. Absent

²³ *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18290, ¶ 32 (2005) ("As discussed below, we find that the elimination of AT&T as a provider of wholesale special access services is likely to result in anticompetitive effects in the provision of Type I special access services to particular buildings where AT&T is currently the sole carrier, besides SBC, with a direct wireline connection to the building, *and where barriers to entry make it unlikely that other carriers will build their own facilities*. Absent appropriate remedies, these building-specific effects may also lead to increases in SBC's MSA-wide special access prices.") (emphasis added).

²⁴ *See* Verizon Comments, WC Dkt. No. 05-25, Attach. D, Declaration of Quintin Lew, at App. B (filed June 13, 2005).

²⁵ *See* Verizon Comments, WC Dkt. No. 05-25, Attach. C, Declaration of William E. Taylor, at Table 10 (filed June 13, 2005).

such evidence, the Commission must assume that there is little possibility that many loops will be constructed to serve enterprise customers in Anchorage in the foreseeable future.

D. CABLE MODEM SERVICE AND WIRELESS LOCAL LOOPS DO NOT PROVIDE ADEQUATE SUBSTITUTES FOR WIRELINE LOOPS FOR THE ENTERPRISE MARKET

No doubt aware of the weakness of its argument with respect to competitive deployment of high capacity wireline facilities, ACS argues that intermodal providers can serve the enterprise market over their own facilities. This argument is unavailing. ACS argues that GCI is able to utilize its hybrid-fiber coax (“HFC”) facilities to provide DS-1 level services. *See Petition* at 43. However, as the Commission has repeatedly found, HFC facilities are not capable of providing enterprise level services. The FCC has found that *cable modem service* does not provide the level of service quality that most businesses require. *See TRRO* ¶¶ 39, 193-194, n.508. To the extent that cable companies like GCI serve enterprise customers, they do so largely using fiber optic facilities, not HFC facilities, and therefore face the same barriers as other CLECs. *See id.* nn.511, 514. It is no doubt true that some businesses purchase some cable modem service for some uses. However, the FCC found that this fact does not show that cable modem service is a replacement for wireline loops for most business applications. *See id.* n.511.

Moreover, as GCI explained at length, it cannot yet provide DS-1 services over its HFC facilities because numerous technical hurdles prevent this use of the HFC facilities. As GCI argued, the DS-1 over-HFC solutions that currently exist are not standardized and pose substantial implementation problems.²⁶ Even if all the technical hurdles are overcome “full commercial deployment is likely a good two years away,” (*GCI July 3 Letter* at 27) and will

²⁶ *See* Letter of John Nakahata, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281 at 26-28 (filed July 3, 2006) (“*GCI July 3 Letter*”).

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require substantial and expensive upgrades to GCI's cable network. *See id.* at 28. HFC facilities are clearly not yet capable of providing DS-1 level services in most cases.

The deployment of wireless local loops ("WLL") by GCI is similarly irrelevant to ACS' continued dominance over the market for high capacity services to enterprises. As GCI has explained, GCI's WLLs are not designed "for the provision of high capacity services."²⁷ GCI declarant Gene Strid argues that "GCI...cannot provide DS1 or other multi-megabit capacity services over its existing WLL network." *Strid Decl.* ¶ 3. Moreover, there are many areas of Anchorage where terrain and other factors preclude the use of WLL's in many instances. *See id.* ¶ 4. These are the same obstacles that have prevented past providers of fixed wireless service from serving the enterprise market on a widespread basis. *See id.* ¶ 6. Indeed, Mr. Strid is "unaware of any service provider currently using WLLs to successfully provide DS-1 equivalent service on any significant scale." *Id.*

²⁷ *See GCI July 3 Letter Ex. C., Declaration of Gene Strid* ¶ 3 ("*Strid Decl.*").

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CERTIFICATE OF SERVICE

I, Jonathan Lechter, do hereby certify that on this 11th day of August, 2006, I caused to be served true and correct copies of the foregoing opposition by delivering copies thereof via hand delivery, overnight mail and e-mail to the following:

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