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September 7, 2006

VIA HAND DELIVERY **REDACTED – FOR PUBLIC INSPECTION**

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistronix, Inc.
236 Massachusetts Avenue, N.E., Suite 110
Washington, D.C. 20002

RE: *WT Docket No. 06-114*
In the Matter of Applications for Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.

Dear Ms. Dortch:

On behalf of ACS Wireless, Inc., enclosed for filing in the above-referenced docket is the redacted version of the *Supplemental Comments of ACS Wireless, Inc.* Also included is the full version of *ACS Wireless Inc.'s Request for Confidential Treatment of its Subscriber Data.*

Please direct any questions regarding the foregoing to the undersigned. Thank you.

Sincerely,

Elisabeth H. Ross

Elisabeth H. Ross
Counsel for ACS Wireless, Inc.

cc: Erin McGrath, Wireless Telecommunications Bureau, Federal Communications Commission
Susan Singer, Wireless Telecommunications Bureau, Federal Communications Commission
Stefan M. Lopatkiewicz, Counsel for MTA Communications, Inc., d/b/a MTA Wireless
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REDACTED FOR PUBLIC INSPECTION

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

In the Matter of Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and Transfer of Control of Interest in Alaska DigiTel, L.L.C. to General Communication, Inc.	WC Docket No. 06-114

To: The Commission

SUPPLEMENTAL COMMENTS OF ACS WIRELESS, INC.

September 6, 2006

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SUMMARY

The Confidential Documents confirm that the Transaction poses the serious risks to competition and the public interest that ACS Wireless, Inc. ("ACSW") described in its Comments and Transport Letter. GCI has egregiously minimized its close, cooperative relationship with Dobson Communication, Inc. ("Dobson") and the extent of its control over DigiTel's management and operations, to downplay the substantial competitive effects of the Transaction.

GCI has entered into

. GCI's description of the as a standard reseller agreement completely mischaracterizes the arrangement. The Agreement contains

that far exceed a normal reseller agreement, and have wide-ranging implications for wireless competition in Alaska.

Similarly, GCI's characterization of the Transaction, that it results in a non-consequential and non-controversial *pro forma* change in control, is absurd. GCI cries that it will have only one representative on the Board of Managers. As it does throughout many of its arguments, GCI elevates form over substance. GCI is purchasing a substantial majority ownership position (78%) in DigiTel. Moreover, GCI will have so many direct and indirect powers over management and operations, including veto rights over the budget approval process and

that it will certainly exercise *de facto* control.

As a result of the Transaction, GCI will own, control or be aligned with three of the four carriers that provide CMRS service in Anchorage. The Transaction will create market power for GCI in the Alaska mobile telephony markets and enhance its market power in the wholesale

transport market, without creating any offsetting efficiencies. GCI's end game is not to increase competition, but to buy a facilities-based carrier so that it can maximize profits and shed the financial limitations of resale. As it has admitted, GCI's acquisition of DigiTel is a hedge in the interim, while it waits to purchase Dobson, the largest facilities-based wireless carrier in Alaska.

The Commission should find that the Transaction warrants in-depth review for competitive impacts. After the Transaction, GCI will tie up an inordinate amount of spectrum statewide, and in the Anchorage market, specifically. The Commission should apply its spectrum concentration benchmark conservatively, taking into account the unique characteristics of the Alaska market. An "HHI" analysis further supports comprehensive review of competitive impacts.

The Commission should deny the applications based on the current record. If it proceeds forward, it must adopt conditions that prevent GCI from harming competition. The Commission should impose conditions that prevent GCI from exercising control over DigiTel. It should bar GCI from tying wholesale transport to roaming and from offering any wireless service below cost. It should impose common carrier obligations on GCI's fiber optic cables between Alaska and the Lower 48. Strict conditions are absolutely necessary to ensure the Transaction does not limit the development of wireless competition in Alaska.

REDACTED FOR PUBLIC INSPECTION

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

In the Matter of Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and Transfer of Control of Interest in Alaska DigiTel, L.L.C. to General Communication, Inc.	WC Docket No. 06-114

SUPPLEMENTAL COMMENTS OF ACS WIRELESS, INC.

ACS Wireless, Inc. ("ACSW") files these supplemental comments concerning two applications, File Nos. 0002343582 and 0002453706, consolidated in WC Docket No. 06-114, seeking approval for the assignment of licenses from Denali PCS, L.L.C. ("Denali") to Alaska DigiTel, L.L.C. ("DigiTel"), and for transfer of control of DigiTel to General Communication, Inc. ("GCI") (collectively, "the Applicants"). These comments supplement the arguments ACSW made in its Comments[1] and Transport Letter[2] in this proceeding.

I. INTRODUCTION.

The Confidential Documents[3] confirm that the Transaction poses the serious risks to competition and the public interest that ACSW described in its Comments and Transport Letter.

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[1] Comments/*Ex Parte Filing and Petition to Intervene* of ACS Wireless (ACSW), *In the Matter of Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.*, WT Docket No. 06-114 (filed Jul. 21, 2006) ("ACSW Comments")

[2] Letter from ACS Wireless (ACSW) to Marlene Dortch, *In the Matter of Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.*, WT Docket No. 06-114 (filed Aug. 14, 2006) ("ACSW Transport Letter")

[3] These supplemental comments incorporate evidence derived from the confidential agreements produced by Applicants to ACSW on August 23, 2006, including: the agreements related to

GCI has tried egregiously to minimize its control over DigiTel and its arrangement with Dobson to downplay the competitive impacts of the Transaction. In truth, the Transaction is a key strategic move in GCI's chess game to dominate the Alaska wireless market through acquisitions rather by constructing its own network and using its own spectrum license.

GCI has a number of pieces that it is advancing on the board. ACSW has already highlighted the fact that GCI has repeatedly expressed its

Now, the Confidential Documents show that

Applicant's characterization of the arrangements as a "normal" reseller arrangement with distribution and marketing rights is absurd. The agreements are structured as .

To strengthen its position on the board while it waits to capture Dobson's Alaska facilities, GCI is acquiring control over DigiTel (which will have Denali's licenses after the Transaction), in which it will have a 78% ownership position if the Transaction closes. Now, the Confidential Documents show that GCI has structured its Reorganization Agreement to give it both direct and indirect control over management and operational decisions. GCI's conquering of DigiTel is a hedge move on the board, allowing it to acquire control of a facilities-based carrier, while it waits to seize Dobson.

Dobson Communications Co.; the agreements related to the comprehensive Transaction involving GCI, DigiTel and Denali ("the Transaction"); the confidential Numbering Resource Utilization and Forecast ("NRUF") and Local Number Portability ("LNP") data; and the

(all confidential agreements and data in this proceeding are collectively referred to as "the Confidential Documents").

The Confidential Documents definitely confirm that after the Transaction, GCI will own, control, operate, or be strategically aligned with three of the four carriers providing CMRS service in the Anchorage market.[4] The Confidential Documents also provide supporting data on the unique characteristics of the Alaska market that make GCI's post-Transaction market concentration exceedingly risky. Overall, GCI will tie up sufficient spectrum to have the ability to harm competition in the wireless market not only in Anchorage, but also potentially in other Alaska markets and statewide.

The Confidential Documents also reveal that, from its position with DigiTel, GCI will have sufficient control over DigiTel's management and business decisions to tie DigiTel roaming services to interstate wholesale transport for Lower 48 carriers and to manipulate the packaged price for the two services in a manner that restricts competition for roaming – just as ACSW said it could. The Dobson arrangement shows that GCI has

Finally, the Confidential Documents verify that the Applicants have not met their burden of proof that the Transaction is in the public interest. This Transaction creates market power for GCI in the Anchorage mobile telephony market (and potentially in other markets), and enhances GCI's market power in the transport market. Moreover, it facilitates GCI's use of market power in both markets, and produces no offsetting efficiencies or other public benefits. The Commission should deny the Applications outright on the basis of the current record.

[4] ACSW stated in its Comments that five carriers served the Anchorage market. *See, e.g.,* ACSW Comments at 10.

If it considers moving forward, the Commission should designate the case for an evidentiary hearing to examine GCI's meritless factual claims, including that it will not have *de facto* control of DigiTel, and that it has merely a resale arrangement with Dobson. Also, if it considers approving the applications, it must adopt conditions tailored to prevent the risk of competitive harms. These include:

- Barring GCI from tying wholesale transport and roaming services;
- Barring GCI from offering any wireless services below their cost;
- Imposing common carrier status on GCI's two fiber optic cables between Alaska and the Lower 48; and
- Eliminating GCI's powers that give it excessively more control over DigiTel's management and operations than a passive investor,

II. THE TRANSACTION POSES SERIOUS RISKS TO ALASKA WIRELESS COMPETITION AND THE PUBLIC INTEREST.

A. The Transaction Will Allow GCI To Exert Market Power In Mobile Telephony Markets in Alaska.

1. The Amended Operating Agreements Give GCI Control Over DigiTel Through Rights and Veto Power Over Major Management and Operational Decisions.

In its Comments, ACSW showed that the Transaction will give GCI control over DigiTel as well as control over an exceptional amount of spectrum in Alaska, raising serious competitive concerns about GCI's ability to exercise market power in the Anchorage mobile telephony market.[5] It stated that GCI's attempt to present its DigiTel acquisition as a "passive" investment was not credible.[6] The Confidential Documents do more than just confirm that GCI will control DigiTel – and the 30 MHz of spectrum licensed to DigiTel – after the Transaction. They show

[5] *See* ACSW Comments at 6-10.

[6] *See* ACSW Comments at 7.

that GCI will have the ability to and will have key powers over the Board of Managers. GCI will be pulling DigiTel's puppet strings, and any attempt to minimize that control is absurd.

The Commission should analyze the Transaction as though GCI is seeking

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GCI is the self-proclaimed "leading integrated, facilities-based communications provider in Alaska,"[13] and is the largest provider in almost every telecommunications market in Alaska.

Even if GCI kept its right in its pocket, it could still strategically dominate DigiTel by exercising its numerous veto powers. In their response, the Applicants attempted to show that GCI could not control DigiTel's day-to-day activities because DigiTel's management will be "vested exclusively" in its Board of Managers and GCI can only appoint only one Manager.[15] This alleged "independence" of the Board is a total illusion.

In practice, the limitations on the Board of Managers' authority significantly restrict the Board's ability to "manage" DigiTel independently. First, GCI has super-majority veto rights over key board decisions, some of which are ordinary Board functions.[16] Thus, GCI will be able to keep DigiTel's short- and long-term decisions under close supervision. Second, GCI will control DigiTel's expenditures of funds, because the annual budget cannot be approved without

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[13] *See* General Communication, Inc. Annual Report to Securities and Exchange Commission, Form 10-K for the Fiscal Year Ended December 31, 2005, File No. 0-15279 (Mar 14, 2006) (GCI 10-K) at 12.

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[15] *See* Joint Opposition to MTA Comments at 8.

[16] *See* Amended Operating Agreement § 7.1.

GCI's consent.[17] In other words, DigiTel cannot finalize its business plan, marketing program and priorities, operational plans, including network construction and improvement, and the actions that arise from those plans, without GCI's sign-off. Third, GCI will control DigiTel's tax planning activities and consolidate DigiTel's earnings within its financial statements.[18] So, for financial reporting purposes, the two companies will appear as one. Fourth, DigiTel will not be able to incur any significant debt without GCI's approval, further limiting its ability to construct new facilities and thus, offer certain new services, without GCI's direction.[19] Fifth and finally, GCI can micromanage business decisions indirectly by requiring a detailed budget. DigiTel cannot deviate by more than 10%, even from individual line items unless GCI gives the green light.[20] The Board's ability to act independently at all, of course, assumes that GCI has not

Thus, the provisions that the Applicants characterize as mere "investor protections" are really the vehicles through which GCI can (1) or (2) control DigiTel through a heckler's veto on the Board of Managers. When the Amended Operating Agreement is viewed in full, it becomes clear why GCI includes DigiTel wireless subscribers within its

[17] *Id.* GCI's concession that it will agree to not "unreasonably withhold" consent regarding approval of the budget (Joint Opposition to MTA Comments at 13-14) shows how key this power is as an indicia of control. GCI's concession is form over substance and does nothing to prevent GCI from dominating budget decisions. What is "unreasonable" in this test is certainly subject to GCI's whim. If GCI has its reasons for withholding consent, even if they are "unreasonable" objectively, GCI wins.

[18] See Amended Operating Agreement §§ 10.3-10.5.

[19] *See* Amended and Restated Operating Agreement, § 7.1.

[20] *See id.* § 7.5.

[21] GCI can also amend the agreement in certain ways even if it chooses

subscriber count presented to investors: it controls their future. Because the Transaction will transfer *de jure* and *de facto* control of DigiTel to GCI, the Commission should include DigiTel's post-Transaction 30 MHz of PCS spectrum as part of GCI's spectrum holdings for spectrum aggregation purposes.

2. GCI's Agreements with Dobson Unmask That Exceeds a Common Reseller Arrangement in Extraordinary Ways.

The Applicants produced three agreements detailing GCI's resale/wholesale and spectrum leasing arrangements with Dobson: 1) the

2) the GCI/Dobson Long-Term *De Facto* Transfer Spectrum Lease Agreement, dated April 15, 2005 ("Spectrum Transfer Lease"); and 3) the GCI/Dobson Short Term Spectrum Manager Lease Agreement ("Spectrum Manager Lease"), which has been superseded by the Spectrum Transfer Lease. The Agreements reflect a close, cooperative arrangement between competitors that far exceeds the scope, terms, and expectations of a "normal" reseller arrangement. The many established in the Agreements demonstrate conclusively that GCI is aligned with Dobson in the marketplace because the two carriers and operate cooperatively.

Applicants' repeated attempts to paint the expansive GCI/Dobson relationship as a "normal" or "common" reseller arrangement with "mere marketing and distribution rights"[22] are misleading and completely wrong. The GCI/Dobson arrangement is not in any way limited to GCI's purchase of wireless service from Dobson with marketing and distribution rights, and First, GCI actually provides a critical input to that

[22] See Joint Opposition at 3, 4, 17.

resale arrangement. In its Spectrum Transfer Lease, it grants Dobson rights to use its spectrum and conveys *de facto* control over the leased spectrum.[24] Therefore, GCI not only resells service, but provides Dobson with spectrum necessary for Dobson to provide service for its own customers, as well as wholesale providers. The arrangement, which provides far more resembles a joint venture or partnership than a standard reseller agreement with one-way terms.

GCI/Dobson acknowledge that this primary

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Dobson has already created a new business entity and wholly owned subsidiary that will own and operate Dobson's assets and operations in Alaska.[38]

Applicants' characterization of the GCI/Dobson arrangement as a normal reseller arrangement is subterfuge. GCI tries vainly to point to a provision stating that the

To demand that it disposes of issues within the FCC's discretion in this proceeding surely elevates form over substance. The cooperative arrangements clearly

3. As a Result of the Transaction, GCI Will Have Sufficient Concentration of Spectrum to Harm Competition.

The Confidential Documents show that the Transaction fails to meet the Commission's public interest standard.[41] In particular, the Transaction fails both the spectrum holdings analysis

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[38] *See Regulatory Commission of Alaska Order Reopening Docket, Granting Transfer of Eligible Telecommunications Carrier Status Subject to Conditions, and Requiring Filing*, U-05-41(3), August 16, 2006, at 2. For Dobson, creating an Alaska subsidiary is a first step toward sale of its Alaska assets to GCI. GCI may attempt to downplay this move, and may claim that Dobson created the subsidiary to facilitate receipt of universal service support in Alaska. However, Dobson may not have found it necessary to create separate subsidiaries in every other state where it receives USF support. Dobson likely had other strategic motives for creating an Alaska subsidiary.

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[41] *See In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation for*

and the HHI analysis that the Commission has relied on historically as part of its competition analysis.[42] The Confidential Documents also uncover additional restraints on competition that the Commission must review to assess the Transaction's competitive effects. After the Transaction, GCI will have a significant incentive and ability to engage in anticompetitive actions, such as raising prices or reducing output, either by itself or in coordination with other firms, due to its cooperative agreements with other carriers in the Alaska markets.

(a) The Public Interest Standard.

The Commission's public interest standard encompasses a comprehensive fact and policy-based analysis. It covers the "broad aims of the Communications Act,"[43] including "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest."[44] As an essential part of the public interest analysis, the Commission analyzes the potential competitive harms of the proposed Transaction in an evaluation informed by (though not limited to) modern antitrust

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Consent to Assignment and Long-Term DeFacto Lease of Licenses; Applications of Triton PCS License Company, LLC, AT&T Wireless, LLC, and Lafayette Communications Company, LLC, Memorandum Opinion and Order, 19 FCC Rcd. 21,522, 21,542 ¶ 40 (2004)(Cingular-AT&T Wireless Order). 47 U.S.C. §§ 214(a), 310(d). The Commission must determine whether the Applicants have demonstrated that the proposed transfer of control will serve the public interest, convenience, and necessity. Id.

[42] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21,564-565, 21,568; *In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd. 13,967, 13,993 ¶¶ 62-63 (2005) (*Sprint-Nextel Order*).

[43] *Sprint-Nextel Order*, 20 FCC Rcd. at 13,977 ¶ 21.

[44] *Sprint-Nextel Order*, 20 FCC Rcd. at 13,977 ¶ 21.

principles.[45] At all stages, the Applicants have the burden of showing that the Transaction is in the public interest.[46]

Under its broad public interest analysis, the Commission has applied several "initial screens" of whether a license transfer may impair competition and market performance.[47] For one benchmark, the Commission has examined whether the Applicants will hold 70 MHz or more of spectrum in the market.[48] In addition, the Commission has used HHI calculations as a benchmark showing the potential for competitive harm.[49] This case clearly meets both screens.

Also, the Commission's competitive analysis, and its broader public interest analysis, are necessarily comprehensive and flexible. The Commission analyzes factors such as market structure and whether the Transaction will create or enhance market power, or facilitate its use, in order to ensure that the Transaction will serve the Act's goals.[50] For example, the Commission has repeatedly taken a conservative approach in its initial screen of spectrum holdings, and considers other market factors, such as the existence of resellers, and market

[45] *See Cingular-AT&T Wirelss Order*, 19 FCC Rcd. at 21,552 ¶ 57. In addition to considering whether the merger will reduce existing competition, therefore, the Commission's fact-based, case-by-case analysis also focuses on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition. See id. ¶ 42.

[46] *Sprint-Nextel Order*, 20 FCC Rcd. at 13,977-78 ¶ 22.

[47] *Sprint-Nextel Order*, 20 FCC Rcd. at 13,993-94 ¶¶ 62-65.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 13,981 ¶¶ 30-31.

structure, in assessing potential competitive harms.[51] The 70 MHz spectrum screen is not the exclusive trigger for an in-depth competitive analysis.[52]

(b) The Transaction Meets the Standards for the 70 MHz Screen.

The Confidential Documents confirm that after the Transaction GCI will own control, or have tied-up more than 70 MHz of spectrum throughout Alaska, which is more than sufficient spectrum to harm competition. The Confidential Documents confirm that GCI will control DigiTel after the Transaction and that GCI has an extraordinarily cooperative relationship with Dobson. Thus, the Commission should add DigiTel's 30 MHz of spectrum (post-Transaction) to GCI's 30 MHz of spectrum to calculate GCI's spectrum aggregation. The Commission should also note and add Dobson's spectrum, for purposes of an initial screen of whether the Transaction may impair competition and market performance, especially in light of the

agreement between GCI and Dobson. The Commission has clearly said that it will take account of the role of resellers in its analysis and it should do so here.[53] GCI has effectively tied up this spectrum through agreements that align the competitors'

DigiTel Spectrum. The extent and nature of the Amended Operating Agreement between DigiTel and GCI provide indisputable evidence that the two companies intend to

[51] *Id.* at 13,993-94 ¶¶ 62-65.

[52] The Applicants have erroneously relied on the 70 MHz benchmark as the exclusive gateway to an in-depth analysis. *See e.g.* Applicants' Opposition, p. 2. The Commission's competitive analysis, and its broader public interest analysis, are far more comprehensive and flexible. As one example, the Commission has also regularly used HHI calculations to help determine the potential for competitive harm However, even under the Applicants' erroneous interpretation, the Transaction merits in-depth scrutiny for anticompetitive harm.

[53] *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21523 ¶ 92.

cooperate (and coordinate their 60 MHz of statewide spectrum).[54] In its Comments, ACSW showed that GCI and DigiTel will have strong financial incentives to coordinate, not compete.[55] The Commission can therefore infer that GCI intends to use its DigiTel purchase to enhance its own wireless presence, not to strengthen DigiTel as an independent competitor in the market.

Dobson Spectrum. The Commission should also consider Dobson's spectrum when reviewing potential anticompetitive harms. The Dobson agreements contain numerous

Thus, Dobson and GCI will not act as effective competitive restraints on each other in the market. GCI and Dobson have already agreed to

The Confidential Documents certainly do not prevent GCI from applying similar strategies to ensure DigiTel operates in a manner that does not negatively impact GCI's wireless business.

In order to see the DigiTel-GCI-Denali Transaction for what it truly is, the Commission should take into account all the spectrum that GCI has tied up for competitive purposes, including the spectrum used to resell Dobson's wireless services.[56] GCI makes use of its own spectrum through its agreements with Dobson. Thus, GCI

[54] The Commission must analyze DigiTel's spectrum and market shares in any review of potential harms. Remarkably, the Applicants continue to assert that the Commission should not include DigiTel's 30 MHz because *de facto* control will not change. As discussed above, the Transaction will result in a *de facto* transfer of control.

[55] *See* ACSW Comments at 8-9. The Applicants have completely failed to address these harms in their filings.

[56] *See Sprint-Nextel Order*, 20 FCC Rcd. at 13,991 ¶ 58.

for Dobson's mobile services, which GCI resells. In this circumstance, the Commission should attribute all of GCI's currently-licensed spectrum to GCI.

(c) The Unique Characteristics of this Market Warrants Using a More Conservative Initial Screen for In-Depth Analysis

Although the Commission has used a 70 MHz screen in recent nationwide carrier mergers as one means to identify markets that warrant additional review, the specific facts and circumstances of this Alaska proceeding – highlighted in the Confidential Documents – warrant a more conservative spectrum screen such as 60 MHz as a trigger for its competitive analysis. In particular, the extent of GCI's agreements with other carriers in the Alaska market warrants close inspection.[57]

The Alaska market for wireless services has unique characteristics, making GCI's acquisition of DigiTel likely to have an even greater impact. There are four carriers that actually provide CMRS service in Anchorage – ACSW, Dobson, DigiTel, and GCI. After the Transaction, three of those four will be aligned through agreements: DigiTel,[58] will be majority-

[57] The Commission need not find that <u>any</u> particular amount of spectrum will be under GCI's control in order to find that the Transaction is not in the public interest. The public interest standard, as well as its prior competitive analyses, all provide flexibility to review the market for harm outside of any particular spectrum aggregation.

[58]

owned by GCI, which has with Dobson. Based on information and belief, GCI may already provide Lower 48 transport for DigiTel, just as it provides transport for other carriers like Sprint.[59]

The unique Alaska market structure makes GCI's spectrum concentration particularly risky. Through the Transaction, GCI will reduce competition without gaining any offsetting efficiencies. It will swallow up a carrier that could act as an effective constraint against anti-competitive behavior in the mobile telephony market – DigiTel – rather than construct its own network (like ACSW, Dobson, DigiTel, and MTAW have done). As a facilities-based carrier that operates in Anchorage and other Alaska areas, DigiTel's role in the competitive market is very important. DigiTel prevents GCI from unilaterally raising prices, reducing service quality, or restricting output in an anticompetitive manner. DigiTel offers advanced wireless services to compete with GCI's own bundled offerings. Here, GCI is merely buying control of a competitor and reducing competition, rather than developing its own infrastructure.[60]

In fact, the Transaction is a key strategic move for GCI to dominate the Alaska wireless market through acquisitions rather by constructing its own network and using its own spectrum

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[59] See GCI 10-K at 20.

[60] The Applicants concede that facilities-based carriers bring a higher level of competition than resellers.

license. GCI's DigiTel deal is a hedge move, allowing it to acquire control of a facilities-based carrier, while it waits to purchase Dobson, the largest wireless carrier in Alaska.[61]

Further, GCI's spectrum concentration poses extreme risks because it is extremely likely that new facilities based carriers will enter the Alaska market. The substantial infrastructure costs, wide population dispersion, and thin markets make it very difficult for an entity with no

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[61] In GCI's May 10, 2006 Earnings Call, Deutsche Bank asked GCI whether purchasing DigiTel was a hedge against acquiring Dobson. Its representative asked:

> You've placed a little bit of a hedge bet with Alaska DigiTel. But that would seem like, at best, that's a small hedge against at some point having outright ownership of the GSM asset up there. What really is...the long-term plan...?

Ron Duncan responded:

> . . . We believe that the products that are currently in the bundle are sufficient to maintain our position in the marketplace and give us adequate competitive tools to deal with the competitors' bundling issues and the product offerings they might make in the marketplace. That said, the margin on wireless products, because they're resold through the Dobson relationship, is not what we'd like it to be. We're not generating the EBITDA from that product that we do on the products where we own our own facilities. . . . *We'd very much like to own the Dobson wireless facility in Alaska, we've been quite candid about that.*

See GCI May 10 2006 Earnings Call Transcript, pp. 6-7 (emphasis added), attached as Exhibit C.

In its August 9, 2006 Earnings Call, GCI confirmed this hedge strategy. Deutche Bank's representative asked: .

> ...[J[ust remind us again of the strategy with respect to Alaska DigiTel, ...is that kind of the hedge against ultimately being able to own something up there in Alaska out right with respect to Dobson..

GCI answered:

> I think you summarized it pretty well.

See GCI Communication, Inc., Transcript, Q2 2006 Earnings Call (Aug. 9, 2006), attached as Exhibit D.

existing customers in Alaska to enter the market.[62] Therefore, it is extremely unlikely that new facilities-based carriers will enter the Alaska market to act as constraints against GCI's behavior.

For all these reasons, the 60 MHz held by GCI, post-Transaction, is itself sufficient to cause competitive harm in Alaska – especially since it is warehousing its own spectrum.

(d) The Transaction Meets the Commission's HHI Analysis.

The Commission also regularly uses a separate HHI screen in its competitive analysis.[63] Under this review, further review of a market is necessary "if the post-transaction HHI would be greater than 2800 and the change in HHI would be 100 or greater; or if the change in HHI would be 250 or greater, regardless of the level of the HHI."[64] The NRUF reports currently in the record show number utilization for Alaska carriers, broken down by "County." In addition, in response to a Commission request, GCI and DigiTel submitted their current subscriber totals, by "Borough," accurate as of June 2006. Based on this information in the record and based on other publicly available information, ACSW has estimated the effect of the Transaction on the HHI for several markets. These estimates show that the HHI increases and overall HHI totals

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In order to estimate the HHI levels, ACSW first looked at the data available in the record. DigiTel and GCI's submission regarding 2006 information only listed subscribers in the

[62] It is also unclear which spectrum a new entrant would use: the PCS spectrum in Anchorage is fully used, and new services that rely on the AWS spectrum are not expected to reach the market for some time. In any event, it appears as of the time of this filing that existing competitors will obtain the AWS licenses.

[63] *See Sprint-Nextel Order*, 20 FCC Rcd. at 13,993 ¶ 62; *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21,654 ¶ 107.

[64] *See Sprint-Nextel Order*, 20 FCC Rcd. at 13, 993 ¶ 62.

[65] *See Sprint-Nextel Order*, 20 FCC Rcd. at 13,993 ¶ 62 & n.159.

Anchorage, Juneau, and Matanuska-Susitna Boroughs. As a result, ACSW limited its analysis to each of the three boroughs. To estimate market shares for each of the three Boroughs, ACSW had to supply 2006 data for itself and for Dobson, the other two carriers serving the Boroughs.[66] With four service providers in the market, the analysis revealed the following:

The estimates reveal an

Although these estimates should be refined with current data from all service providers in the relevant markets (consistent with ACSW's document request), they demonstrate a significant potential for anticompetitive effects.[68]

B. The Confidential Documents Confirm The Transaction Creates Competitive Risks in The Roaming Market.

In its Comments, ACSW identified a real risk of the Transaction that GCI could use its market power in the wholesale transport market between Alaska and the Lower 48 to restrict

[66] *See* Declaration of Robert Doucette, Director of Corporate Strategy for ACS Holdings ¶¶ 2-3, attached as Exhibit A. To provide as close an approximation as possible, ACSW estimated its market share for June 2006 by interpolating its February 2006 and August 2006 NRUF data, and estimated Dobson's market share by carrying over Dobson's June 2005 NRUF data. Although ACSW acknowledges that Dobson may have had some subscriber growth in Alaska between June 2005 and June 2006, it used the 2005 data because (1) Dobson had a net loss in wireless subscribers during that period, viewing the company as a whole (*See* Exhibit E), and (2) it did not have more recent Dobson subscriber totals for the Alaska market. ACSW has asked the Commission to supplement the record with current NRUF data and subscriber totals by Borough to refine this analysis.

[67] *See* HHI Estimates, Exhibit B.

[68]

competition for Lower 48 carriers' roaming agreements.[69] ACSW showed that after the Transaction, GCI will be able to enter the roaming market for the first time as a facilities-based carrier.[70] GCI already has a strong hold on the wholesale transport market through its ownership of two of the three undersea fiber optic cables between Alaska and the Lower 48.[71] GCI could leverage this market power to harm competition in the related roaming market, since Lower 48 carriers need both services to complete customers' calls to and from Alaska. Contracts with Lower 48 carriers are very strategically important, because they can generate some of the highest traffic volume in the market.

The Reorganization Agreement confirms that GCI will be positioned to tie its transport with DigiTel's roaming services in an anticompetitive manner. Also, the GCI/Dobson Agreement shows that GCI has

The Reorganization Agreement provides significant insights for several reasons. First, it aligns GCI's financial interests with DigiTel's fully, through sharing DigiTel's profits/losses and consolidating the two companies' financial statements.[72] The two companies will have the same incentives and motivations to approach Lower 48 Carriers with a service proposal that ties transport and roaming in a manner that will cut any other roaming service competitors out of the running. Indeed, since the carriers' financial statements will be consolidated, any losses resulting from pricing one service below cost may be offset by gains from other bundled

[69] *See* ACSW Comments, at 13-14.

[70] *See* ACSW Comments at 13.

[71] *See* ACSW Comments at 12.

[72] *See* Second Amended Operating Agreement, Articles 5, 5.2, 10.5.

services. Of course, no term in the Reorganization Agreement bars GCI from bundling its services with DigiTel's, or pricing the services together as a bundled offering. GCI is free to cut these deals.

Moreover, because of GCI's substantial equity interest in DigiTel and

and the management structure adopted in the Reorganization/Management Agreement, GCI will be positioned to make special deals with Lower 48 carriers that tie GCI and DigiTel services. GCI could certainly ensure that it was authorized to offer DigiTel services to Lower 48 carriers in a package deal, or to bring DigiTel to the table in a three-way contract. The deals would not even need to be formally connected. GCI could tie the total purchases for Lower 48 carriers together in contract negotiations.

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III. THE TRANSACTION RESULTS IN A SUBSTANTIAL CHANGE IN CONTROL, DUE TO GCI'S ACQUISITION OF MAJORITY OWNERSHIP AND NUMEROUS CONTROLLING POWERS.

A. The Applicants Have Misstated The Law Regarding Transfers of Control.

The Applicants try in vain to create an issue over whether GCI will have *de facto* control over DigiTel after the Transaction, even though a decision on that question now has no bearing on this proceeding. The Commission cannot grant approval unless it finds that the Transaction is in the public interest.[79] The Applicants argue incorrectly that the Transaction should receive *pro forma* treatment under the Commission's rules and completely misstate the law regarding *de facto* control.[80] Simply put, the Transaction results in a "substantial" transfer of control that requires prior Commission approval.[81]

To begin, the Applicants concede that the Transaction generally results in a transfer of control because there is a change in equity ownership from less than 50% to more than 50%.[82] On this point, they are correct, as GCI will obtain a 78% equity share in DigiTel. Therefore, under section 310(d) of the Act, the Commission must determine whether the transfer of control

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[79] *See* 47 U.S.C. §310(d).

[80] *See* Joint Opposition to MTA Comments at 4-15.

[81] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21556, ¶ 68; *Sprint-Nextel Order*, ¶ 30.

[82] *See* Joint Opposition to MTA Comments at 2.

to GCI is in the public interest.[83] If the Applicants fail to prove that the transfer is in the public interest, the Commission must deny the application.[84]

The Commission distinguishes between *de facto* and *de jure* transfers in its rules, and the type of control transferred can impact whether Commission treats it procedurally as substantial or *pro forma*.[85] *De jure* control is "control as a matter of law," and "is based on who holds the equity shares of an entity."[86] *De facto*, or actual control, is based on a case-by-case analysis of which party "has the power to control or dominate management of the licensee."[87] Transfers of *de facto* control are always considered "substantial" under the Commission's rules.[88] The Transaction results in both a *de jure* transfer of control and a *de facto* transfer of control to GCI – undoubtedly a "substantial" transfer of control under the Commission's rules.[89]

Along these lines, the Commission has made clear that "[a] change in *de jure* control is generally considered substantial."[90] This is a reasonable assumption, because an entity that owns more than half of the equity shares of a company can control that company. Thus, if a company

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[83] *See* 47 U.S.C. § 310(d).

[84] *See id.*

[85] *See 2000 Biennial Regulatory Review: Amendment of Parts 43 and 63 of the Commission's Rules, Notice of Proposed Rulemaking*, 15 FCC Rcd 24264, 24279 ¶ 13 (2000) ("*Biennial Review NPRM*"); *2000 Biennial Regulatory Review: Amendment of Parts 43 and 63 of the Commission's Rules, Report and Order*, 17 FCC Rcd 11416 ¶ 6 (2002) ("*Biennial Review R&O*"); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Notice of Proposed Rulemaking,* 15 FCC Rcd 24203, 24228-28 ¶70 (2000) ("*Secondary Markets NPRM*"). "Substantial" transfers of control require prior approval, while *pro forma* transfers of control may proceed without prior approval. *See* 47 § C.F.R. § 1.948(c)(1).

[86] *Biennial Review NPRM* at 24270-71 ¶ 14.

[87] *See id.*

[88] *Biennial Review R&O* at 11419-20 ¶ 6; *Biennial Review NPRM* at 24270 ¶ 13.

[89] *See* 47 C.F.R. § 1.948(c)(1).

[90] *Biennial Review R&O* at 11419-20 ¶ 6; *Biennial Review NPRM* at 24270 ¶ 13.

that had a minority ownership and did not have *de facto* control purchased a majority equity stake, the transaction would likely result in a change in *de jure* and *de facto* control. Here, GCI has no equity stake in DigiTel and is seeking to purchase 78% of the company as part of a *de jure* (and *clearly de facto*) transfer of control.

Indeed, the Applicants confuse how the Commission applies its rules. They assert that "if a new entity will acquire *de jure* control, then a transfer of control will occur, but the transfer can be "non-substantial" depending on an analysis of *de facto* control."[91] This is plain wrong. The size of an entity's equity ownership is "not necessarily a determinative factor in establishing *de facto* control.[92] Thus, an entity can still acquire *de facto* control *even if there is no de jure transfer* (i.e., an entity with only a 40% equity stake could still gain *de facto* control, which would make the transaction a *de facto* but not *de jure* transfer). However, if an entity acquires *de jure* control, the transfer will almost always be a *de facto* transfer.[93]

Further, the Applicants claim incorrectly that the Commission must analyze the Transaction under the *Intermountain Microwave* standard for *de facto* control, regardless of any change in *de jure* control, relying on the following Commission statement:

> If there is a change in *de facto* control, the transfer is considered substantial, and prior Commission approval is required. A change in *de jure* control is generally considered substantial, but if there is an indication that *de facto* control has not changed, the transfer may be considered *pro forma*, and prior approval is not required. The inquiry is fact specific and done on a case-by-case basis.[94]

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[91] *See* Joint Opposition to MTA Comments at 7.

[92] *See FCBA'S Petition for Forbearance from § 310 of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, Memorandum Opinion and Order*, 13 FCC Rcd 6293, 6298 ¶ 7 (1998) ("*FCBA Forbearance Order*").

[93] *See Biennial Review R&O* at 11419-20 ¶ 6; *Biennial Review NPRM* at 24270 ¶ 13.

[94] *See id.*; Joint Opposition to MTA Comments at 6.

Again, they are wrong. This language, allowing the Commission to classify a change in *de jure* control as *pro forma*, is designed to cover one very specific exception: where the entity obtaining a majority equity stake *already has de facto control* over the licensee. As the Commission stated in the 2000 Biennial Review:

> We also adopt the proposal to treat a change from less than 50 percent controlling ownership – de facto control – to 50 percent or more ownership – de jure control – as a transfer of control...we find that such an increase in ownership level constitutes a change in the type of control, from de facto control to de jure control, and the Commission should be notified of this change...Further,...as a pro forma transfer, the carrier need only notify the Commission of the new ownership structure within 30 days after the change.[95]

Thus, where an entity that already has *de facto* control seeks to obtain *de jure* control, the transfer of control is merely *pro forma*.[96] The Commission confirmed this interpretation in its *FCBA Forbearance Order*:

> Additionally, if a licensee chooses to notify us of a pro forma transaction in a letter form, the post-transaction notification letter must contain the licensee's certification that the subject transfer or assignment is non-substantial and that, together with all previous non-substantial transactions, it does not involve a change in the ultimate de facto or de jure control of the licensee.[97]

In fact, Applicants seeking *pro forma* treatment must confirm that neither *de facto* <u>nor</u> *de jure* control has changed.[98]

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[95] *See Biennial Review R&O* at 11419-20 ¶ 6

[96] *See id.*; *see also Secondary Markets NPRM* at 24227-28 ¶ 70 (stating that prior Commission sapproval is required "not only for transfers of legal (*de jure*) control, but also for transfers of actual (*de facto*) control under the special circumstances presented.").

[97] *FCBA Forbearance Order* at 6311-12 ¶ 34.

[98] *See id.*; *see also Wireless Telecommunications Bureau and International Bureau Complete Review of Proposed Investment by Telefonos de Mexico, S.A. de C.V. in Parent of Cellular Communications of Puerto Rico*, Public Notice, DA 99-2286 (rel. Oct. 29, 1999).

The Applicants simply cannot confirm that neither *de facto* nor *de jure* control has changed.[99] GCI plans to acquire a 78% equity share of DigiTel and will acquire numerous powers that will enable it to control DigiTel. As such, the Transaction results in a substantial transfer of control that requires prior Commission approval.

B. The Transaction Results in a *De Facto* Change of Control Under the Commission's *Intermoutain Microwave* Standards

Even if the Commission applied the *Intermountain Microwave* standards to this case, it would certainly find that the Transaction goes well beyond the indicia of *de facto* control used in that case. Under the *Intermountain Microwave* line of cases, a change in *de facto* control is fact-specific and depends on the "totality of the circumstances."[100] While the Commission looks primarily at six factors, it may consider additional circumstances as well.[101]

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[99] In fact, it appears that the Applicants have conceded that the Transaction constitutes a *de jure* transfer of control. *See, e.g.,* Joint Opposition to MTA Comments at 8-9. (stating "the fact that the Applicants treated the proposed GCI acquisition as if it would result in a transfer of *de jure* control of DigiTel does not mean that it would effect a substantial change in DigiTel's control.") Although they dispute the existence of a change in *de facto* control, they have not disputed that the Transaction constitutes a *de jure* transfer of control.

[100] These factors are: (1) Who controls daily operations?; (2) Who is in charge of employment, supervision and dismissal of personnel?; (3) Does the licensee have unfettered use of all facilities and equipment?; (4) Who is in charge of the payment of financing obligations, including expenses arising out of operations?; (5) Who receives monies and profits from the operation of the facilities?; and (6) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? *See Intermountain Microwave*, 24 Rad. Reg. (P&F) 983, 984. There are several formulations of the *Intermountain Microwave* standard, but the overall analysis remains the same. *See, e.g., Biennial Review R&O* at 11422-23 ¶ 15; *Application of Ellis Thompson Corp, Memorandum Opinion and Order and Hearing Designation Order*, 9 FCC Rcd 7138 (1994); *Summary of Decision of Administrative Law Judge Joseph Chachkin*, 10 FCC Rcd 12554 (1995) (together "*Ellis Thompson Decisions*").

[101] *See Application of Baker Creek Communications, L.P., Memorandum Opinion and Order,* 13 FCC Rcd 18709, 18713-14 ¶ 7 (1998) ("*Baker Creek*"). The *Intermountain Microwave* factors "must be applied to the entire set of circumstances" surrounding an application, not just to a particular service agreement. *See Baker Creek* at 18718 ¶ 16.

The Commission has found in other cases that the types of controls GCI will exercise over DigiTel's management and operations meet the standards for *de facto* control. In particular, GCI's powers closely follow those of the Limited Partner in *Baker Creek*, who exercised *de facto* control over Baker Creek Communications L.P. through key powers to control the business plan and budget, and other decisions dependent on the budget/business plan. Similarly here, GCI's veto power over the budget, and resulting indirect power over many other aspects of DigiTel's actual operations, constitute *de facto* control.[102] Additionally, GCI's

makes GCI's *de facto* control even stronger. Other provisions, such as GCI's consolidating of DigiTel's financial statements for reporting and tax purposes, and its unilateral ability to make certain amendments to the Operating Agreement, all demonstrate control. Following is a specific analysis of the *Intermountain Microwave* factors.

Control Over Daily Operations. GCI's absolute control over the budget will enable it to exert control over daily operations. Section 7.5 of the Operating Agreement requires unanimous consent, including consent from GCI's representatives, to approve the annual budget.[103] In

[102] The Applicants have incorrectly argued that the Commission has not found minority investor protections to lead to *de facto* control. See, e.g., Joint Opposition at 13. To the contrary, the Commission has said that investor protections "may give the minority shareholder a decision-making role," but *transfer actual control when they allow for the minority owner to "dominate" corporate affairs*. *See Baker Creek* at 18714-15 ¶ 9. The provisions in the Amended Operating Agreement in this case go far beyond mere "investor protection." In addition, when viewed as only one part of the whole relationship, they provide vehicles that allow GCI to dominate DigiTel's corporate operations.

[103] *See* Operating Agreement § 7.5. The facts presented in *Alaska Native Wireless, L.L.C., Order,* 17 FCC Rcd 4231 (2002) ("*Alaska Native Wireless*"), relied on by the Applicants, are not analogous. In that proceeding, the Commission explicitly recognized that the entity's involvement with the budget and business plan was *limited to consultation* in assessing whether it exercised de facto control. *See Alaska Native Wireless* at 4239-40 ¶ 16.

Baker Creek, the Commission found that a Limited Partner's control over the budget could lead to oversight of daily operations.[104]

Responsibility for Financial Obligations. GCI will also be responsible for DigiTel's financial obligations in manners similar to the Limited Partner in *Baker Creek*. In *Baker Creek*, the Commission found that because the Limited Partner had approval power over the business plan and budget, it also had the power to determine the amount of capital the company required.[105] Thus, the provisions made the Limited Partner "ultimately responsible" for the financial obligations.[106] In addition, like here, the Limited Partner was the primary source of capital.[107] The Partnership Agreement also prohibited the company from incurring any debt outside the contemplation of the business plan.[108] Similarly, the Operating Agreement prohibits DigiTel's management from incurring or guaranteeing any debt except for debt already contemplated in the business plan or Reorganization Agreement.[109]

Control of Employment Decisions. The Transaction also satisfies this factor. In *Baker Creek*, the Commission recognized that the General Partner could only make personnel decisions

[104] *See Baker Creek* at 18719 ¶ 17. In that proceeding, the Partnership Agreement provided the Limited Partner with management responsibilities in accordance with the business plan, but it was the overall budget veto that was the crucial factor in determining whether he exercised *de facto* control. *See id.* at 18719 ¶¶ 17-18.

[105] *See id.* at 18721-22 ¶ 23. Applicants attempt to place emphasis on the fact that in *Baker Creek*, the business plan also needed approval by the Limited Partner. Their reliance is misplaced and translates to form over substance. With veto control over the budget, GCI can directly influence all business plans.

[106] *See id.* at 18722-23 ¶ 24-25; *compare 1995 Ellis Thompson Decision*, 10 FCC Rcd at 12561.

[107] *See Baker Creek* at 18721-22 ¶ 23. Here, GCI touts its substantial investment in DigiTel as infusing sufficient capital in DigiTel to improve its services to the public and to compete effectively against other large competitors. *See Application* at Exhibit 1, page 4.

[108] *See Baker Creek* at 18720 ¶ 23.

[109] *See* Operating Agreement, 7.1.

to the extent they were in accordance with the budget.[110] It noted that the Limited Partner could "exert pressure" on the General Partner if the General Partner made decisions contrary to its wishes. Consequently, the Commission found that the Limited Partner's veto power over the business plan and budget, and ability control capital availability (also present in this Transaction), when combined, demonstrated that the Limited Partner could control employment decisions.[111] The same factors are present here. GCI's ability to veto the budget, and hence, the business plan, and ability to control capital availability show that GCI can apply sufficient influence to control employment decisions.

Receipt of Monies and Profits. Once again, the Commission has concluded that if an entity can veto a budget it effectively controls receipt of monies and profits.[112] The Transaction meets this criterion as well. DigiTel's budget is contingent upon GCI's approval. Consequently, as in *Baker Creek,* the Operating Agreement "establishes the parameters for determining the amount of capital" needed to operate the company, which allows GCI to "manipulate the return" received by the non-GCI owners.[113] For example, GCI can specify the "scope and speed" of any network modifications, repairs, or improvements through its budget veto, allowing it to control the company's receipt of monies and profits.[114]

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[110] *See Baker Creek* at 18720 ¶ 19 n.90. Although the Baker Creek transaction placed a duty on the General Partner to consult with the Limited Partner regarding certain C-level executives, the Commission determined that under the circumstances, the provision merely provided additional leverage to the Limited Partner on employment decisions. *See id.*

[111] *See id.*

[112] *See id.* at 18723-24 ¶¶ 26-27.

[113] *See id.* at 18723 ¶ 26.

[114] *See id.* at 18723-24 ¶¶ 26-27.

Control of Policy Decisions. GCI will control DigiTel's policy decisions after the Transaction through direct and indirect means. Under the Operating Agreement, DigiTel may not pursue other lines of business, even though there are multiple uses for the spectrum license. Thus, as in *Baker Creek*, GCI has already had an impact on policy decisions, and "to some extent, the policy decisions regarding the direction of the business venture have been predetermined and are no longer within" DigiTel's control.[115] GCI can also control policy through its budget veto and the subsequent limits on financing and expenditures.[116]

Use of Facilities and Equipment. It is unclear from the Operating Agreement whether DigiTel will retain unfettered access to its facilities, or whether GCI can indirectly restrict use through the budget process. The Applicants have the burden of showing that DigiTel will remain in control, but have not established how DigiTel can prevent GCI's domination from the budgeting process.[117]

Other Relevant Indicia of Control. Beyond its ability to control the budget (and through it the business plan), the policy, the monies and profits, personnel, and daily operations, GCI has an

Effectively, this

[115] *See Baker Creek* at 18724 ¶ 28.

[116] *See id.* at 18724-25 ¶¶ 28-29.

[117] Similarly, the Applicants have not met their burden of proof regarding the other *Intermountain* factors.

[118] *See* Amended Operating Agreement Section 14.1.

The Transaction presents a number of additional parallels to *Baker Creek*. The General Partner in *Baker Creek* (analogous to DigiTel), and Baker Creek Communications' Management Committee could not take any of the following actions, without the consent of the Limited Partner (analogous to GCI):

- Sell any equity or convertible debt interest
- Incur debt outside the budget
- Act as a guarantor
- Enter into any transactions with the General Partner
- Dispose of any material property
- Acquire assets beyond the scope of the budget-approved business plan
- Engage in any business other than [the particular wireless service at issue][119]

Similarly in this case, DigiTel is restricted from taking any of these actions without prior consent from GCI.

The Applicants list several "distinguishing factors" between *Baker Creek* and the Transaction.[120] Contrary to the Applicants' assertions, the issue of a family relationship did not play a role in the Commission's analysis,[1] GCI has indirect control over the business plan, has control over financing (even if it does not retain a right of first refusal), controls the monies and profits that compensate the other DigiTel members, and controls policy decisions. Just because DigiTel may have more representatives on the Board of Managers that GCI does not mean that it

[119] *See Baker Creek* at 18717 ¶ 13.

[120] *See* Joint Opposition to MTA Comments at 12 n.35.

has *de facto* control in light of the many direct and indirect powers GCI actually exercises under the Operating Agreement.[121]

IV. THE COMMISSION SHOULD DENY THE APPLICATIONS, OR AT A MINIMUM, IMPOSE CONDITIONS DESIGNED TO PROTECT AGAINST ANTI-COMPETITIVE CONDUCT.

The Confidential Documents confirm that ACSW's recommended disposition of the proceeding is appropriate and well-supported in the record. The Commission should deny the applications, or at a minimum, hold an evidentiary hearing and impose conditions tailored to protect against anti-competitive conduct.[122]

A. Deny the Applications.

The Commission should deny the proposed license transfers and other transfers of control because the Applicants have not shown by a preponderance of the evidence that the Transaction, on balance, serves the public interest.[123] To the extent a transaction creates or enhances significant market power or facilitates its use, it is unlikely to serve the public interest, absent significant offsetting efficiencies or other public interest benefits.[124] Here, GCI claims only one public interest benefit to weigh against the serious risks of competitive harm: that GCI's infusion of cash will strengthen DigiTel so that it can compete more effectively against other large competitors in the marketplace.[125] GCI's claim is not consistent with evidence in the record.

The Confidential Documents strongly confirm that GCI's investment in DigiTel is designed not to strengthen DigiTel as an independent competitor, but rather, to strengthen the

[121] *See Baker Creek* at 18725-26 ¶ 30.

[122] *See* ACSW Comments at 14-17.

[123] *See* 47 U.S.C. §§ 34-39, 214(a), 310(d); *see also SBC-AT&T Order* at 18,300-03 ¶¶ 16, 19.

[124] *See* Cingular/AT&T Order, 19 FCC Rcd at 21556 ¶ 68; Sprint-Nextel Order ¶ 30.

[125] *See* Applications, Exhibit 1 at 4.

combined GCI/DigiTel entity aligned with Dobson and enhance its power in the marketplace. As ACSW showed in its Comments, GCI will have strong financial incentives to coordinate its GCI-branded offering with DigiTel and not treat DigiTel as a fully separate competitor.[126] The terms of the Reorganization Agreement support this conclusion. GCI will be positioned to control DigiTel's business strategy so that it can minimize direct product or service competition with its own branded wireless offerings with Dobson. GCI has 78% of its stock, receives its profits, has veto power on key management decisions, controls its budget – among numerous other provisions that allow GCI to direct DigiTel's path. To ensure it can control DigiTel's business strategy, GCI can

At the same time, the Confidential Documents add details showing real risks of competitive harm. GCI can use its undue concentration of spectrum to harm competition in the Anchorage mobile telephony market and in other geographic areas, and can leverage its market power in the wholesale transport market to harm competition in the roaming market, if the Transaction proceeds. Thus, the Transaction will give GCI market power in the Anchorage mobile telephony market and enhance GCI's market power in the transport market. These harms far outweigh any illusory public interest benefit. The Applicants have not shown that the Transaction is in the public interest, on balance. Therefore, the applications should be denied.

B. Hold an Evidentiary Hearing.

The Confidential Documents definitely uncover the Transaction's competitive impacts. The Applicants minimized the full extent of GCI's control of DigiTel and grossly underplayed

[126] *See* ACSW Comments at 8.

GCI's multi-faceted cooperative arrangement with Dobson.[127] If the Commission does not deny the applications on the basis of the current record, as it should, it should hold an evidentiary hearing on factual claims that the Applicants assert. These issues include:

- That, despite GCI's control over DigiTel's budget, its other powers over DigiTel's management and operations, its stake in DigiTel profits, and its ability to *de facto* control over DigiTel will not change;
- That, despite the two companies' numerous cooperative arrangements, the GCI/Dobson arrangement is limited strictly to a normal reseller arrangement; and
- That any risks that GCI could use its market power in the wholesale transport market to limit competition are purely imagined and totally speculative; [128]

These factual claims by the Applicants are not supported by the record.

C. Adopt Conditions.

If the Commission considers approving the Transaction, it is imperative that it impose conditions tailored to protect against anti-competitive conduct. The conditions should ensure that the Transaction does not give GCI market power in any relevant mobile telephony markets in Alaska or enhance its market power in the wholesale transport market.

To protect against the competitive risks in the Anchorage (and other) mobile telephony markets, the Commission should impose conditions preventing GCI from exercising control over DigiTel. After all, GCI claims that it will be only a passive investor in DigiTel, without *de facto*

[127] Under Section 309(e) of the Act, the Commission must designate an application for an evidentiary hearing where the record presents any substantial and material questions of fact regarding the Transaction's public interest value. *See* 47 U.S.C. § 309(e).

[128] See ACSW Transport Letter.

control over DigiTel's operations.[129] Therefore, the Commission should ensure GCI's role is consistent with its representations. It should remove GCI's veto authority over managerial decisions identified in § 7.1 of the Operating Agreement, including veto authority over adoption of the DigiTel Annual Budget and certain deviations from the Annual Budget,[130] and other powers not characteristic of a true "passive investor." It should bar GCI from consolidating DigiTel's results in its financial statements.[131] It should remove GCI's

If the Commission adopts these conditions, DigiTel will remain an independent facilities-based wireless competitor in the market place. GCI will hold stock on one side of a Chinese wall, which blocks management and operational control. GCI's claimed public interest benefit, producing a stronger independent competitor, may have a chance of coming true.

Alternatively, or in addition, it could require GCI to divest certain spectrum in Anchorage, to protect against the risk that GCI may abuse its spectrum concentration. Divestiture would address the same goal of reducing GCI's power in the marketplace, but through a different means.

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[129] *See e.g.* Joint Opposition to Petition to Deny Applications, File Nos. 0002453582, 0002453706, at 8 (Mar. 1, 2006).

[130] Section 7.5 of the Amended Operating Agreement requires that a GCI representative serve on the Board of Manager's Budget Committee, and § 7.5(b) states that approval of the budget requires unanimous consent of either the Board of Managers or its Budget Committee. Section 7.1 requires GCI's approval for deviations from the Annual Budget of 10% or greater.

[131] *See* Amended Operating Agreement § 10.5.

[132] *Id.* Article 14.

[133] *See,* Amended Operating Agreement §§ 14(a)-(c).

The Commission should adopt additional conditions to protect against potential anticompetitive conduct in the roaming market if GCI ties wholesale transport to roaming. As the most straightforward and simple-to-enforce approach, the Commission should simply bar GCI from tying wholesale transport and roaming. If GCI is prevented from tying these two services together, it will not have any opportunity to leverage its market power in the transport market to limit competition in the roaming market.

The Commission should also impose common carrier status on the two GCI fiber optic cables, as it recommended as a remedy in 1997 if the public interest required.[134] With common carrier obligations, GCI will not be able to discriminate unreasonably in offering capacity to competitors (or deny available capacity)[135] and will not be able to charge unreasonable prices for capacity.[136] These conditions are imperative to protect against anti-competitive conduct if the Commission allows the Transaction to go forward.

Overall, GCI's close relationship with Dobson and control over DigiTel provides GCI the means to advance a complex predatory pricing strategy that harms competition and consumers. Currently, GCI has complete After the Transaction, it may package DigiTel services as well in its bundles, or otherwise offer DigiTel and GCI services jointly. To prevent GCI from arbitraging prices through DigiTel or Dobson, or pricing in an anticompetitive manner, the Commission should bar GCI offering any wireless services below its (GCI's) cost. When reselling Dobson services, GCI must charge a

[134] *See Cable Landing License, In the Matter of General Communication, Inc. Application for a license to land and operate in the United States a digital submarine cable system extending between the Pacific Northwest United States and Alaska*, 12 FCC Rcd. 18,292, 18298 ¶ 20.

[135] *See e.g.* 47 U.S.C. §§ 201, 202.

[136]

[137]

price that has a positive contribution margin net of all its costs, direct and allocated, including general and administrative expenses, marketing, and handsets subsidies. Similarly, if it resells DigiTel services, GCI must not price the DigiTel service below GCI's direct and allocated costs. Further, because GCI is but a "passive investor," it should be prohibited from using intracompany (GCI-DigiTel) trades,[138] in-kind payments, or eliminations[139] (e.g., through providing transport that was not properly accounted for on the GCI or DigiTel books)) to obscure the true cost of service, for the purpose of justifying below-true-cost prices.

V. CONCLUSION.

The Confidential Documents confirm that the Transaction will pose serious risks to competition in the mobile telephony market and throughout Alaska, as well as in the roaming market. Consequently, the Commission should deny the Applications because GCI and DigiTel have failed to present sufficient evidence that the transfers will serve the public interest. Alternatively, it should designate the case for an evidentiary hearing, in order to investigate GCI's meritless factual assertions that it will not achieve *de facto* control of DigiTel and other facts GCI incorrectly asserts. If it considers approving the applications, it must adopt conditions necessary to protect against competitive harms, including a clear prohibition against GCI tying roaming and transport services or offering any wireless services below cost.

[138] "In-kind trades" would be equivalent to bartering services.

[139] "Eliminations" is an accounting procedure under which one affiliate may eliminate expenses and/or revenues for reporting purposes when it provides a service to another affiliate. For example, if GCI provided local transport to DigiTel, this transaction *should* appear as revenue to GCI and an expense to DigiTel for purposes of calculating true costs.

REDACTED FOR PUBLIC INSPECTION

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Respectfully submitted,

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