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ATTORNEYS AT LAW

16 November 2006

Ex Parte

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

Re: *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area, WC Docket No. 05-281.*

Dear Ms. Dortch:

On November 15, 2006, Tina Pidgeon of General Communication, Inc. (“GCI”), John Nakahata and Brita Strandberg of this firm, and undersigned counsel met with Thomas Navin, Chief of the Wireline Competition Bureau, Julie Veach, Deputy Chief of the Wireline Competition Bureau, and Marcus Maher, Legal Counsel to the Chief of the Wireline Competition Bureau. In that meeting, GCI discussed points that have been summarized in previous pleadings and *ex parte* filings in this proceeding.

In particular, GCI explained that the record of this proceeding differs markedly from the record underlying the *Omaha Forbearance Order*, which the Commission decided based on “factors unique to the Omaha MSA.”¹ Indeed, the Commission explicitly emphasized that “each case must be judged on its own merit” and thus “adopt[ed] no rules of general applicability.”² The Commission must therefore evaluate the facts presented in this case on their own merits and cannot simply assume that the factual conclusions reached in the *Omaha Forbearance Order* are justified by the record in this case. GCI’s *ex parte* letter

¹ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19416 (¶ 2 & n.4) (emphasis added) (“*Omaha Forbearance Order*”).

² *Id.*

Marlene Dortch
16 November 2006
Page 2

of November 14, 2006 catalogues the substantial and material differences in the record of this case as compared to those in Omaha. These differences compel the Commission to reach different results from those it reached in Omaha. In this case, for example, the record clearly establishes that GCI's ability (when upgrades are completed) to serve a substantial majority of the residential customers within a given wire center does not translate to an ability to serve business customers (whether small business or enterprise customers) in the same wire center. Moreover, unlike in Omaha, the record here reflects that ACS engages in customer-specific pricing in the business markets (both small business and enterprise), and thus competition for customers to whom GCI has alternative loop facilities will not discipline the rates ACS can charge to customers that GCI cannot serve over its own loops. Applying the *Omaha Forbearance Order* as if it established rules of general applicability, in the face of record evidence differing substantially from the *Omaha Forbearance Order*, would be arbitrary and capricious.

GCI also noted that ACS, unlike Qwest, is not subject to the "*independent and ongoing obligations* for BOCs to provide wholesale access to loops" pursuant to section 271.³ Thus, to remain consistent with the *Omaha Forbearance Order*, any relief (assuming that any is warranted) must preserve ACS's regulatory obligation to provide wholesale *access* to unbundled loops at just, reasonable, and nondiscriminatory rates. ACS has provided the Commission with no reason to deviate from its decision to maintain access to unbundled loops in Anchorage. Indeed, it would be arbitrary, capricious, and wholly unsupported by the record for the Commission to eliminate the requirement to provide access to unbundled loops.

Although ACS asserts that the *Omaha Forbearance Order* did not "grant[] forbearance from UNE TELRIC rates while maintaining the obligation to provide UNEs,"⁴ that is, in fact, *exactly* what the Commission did in the *Omaha Forbearance Order*. Specifically, the Commission held that:

"in granting Qwest forbearance from its obligation to provide unbundled access to loops and transport pursuant to section 251(c)(3), consistent with the language of the Act, we determined that the application of *section 251(c)(3) with its TELRIC pricing standard* was not necessary in certain wire centers to ensure that the standards of section 10(a) are satisfied. We did *not* determine that Qwest's provision of wholesale access to loops and transport was no longer necessary to ensure that the standards of section 10(a) are satisfied."⁵

³ *Id.* at 19465 (¶ 100) (emphasis added).

⁴ *September 8th Ex Parte Notice of ACS of Anchorage*, WC Docket No. 05-281, at 6 (filed Sept. 8, 2006) ("ACS September 8th Ex Parte") (claiming that GCI "misconstrues" the *Omaha Forbearance Order* by so asserting).

⁵ *Omaha Forbearance Order*, 20 FCC Rcd at 19468 (¶105) (emphasis in original).

Marlene Dortch
16 November 2006
Page 3

In other words, while the Commission determined that facilities-based competition obviated the need for TELRIC pricing in 9 of the 24 wire centers in Omaha, it also determined that relieving Qwest of its obligation to provide wholesale *access* to network elements would fail to protect consumers and would harm the public interest.⁶ To that end, the Commission maintained Section 271 as a “backstop.”⁷ Further, the Commission did so in a market where facilities-based competition is more fully developed than in Anchorage. Unlike Qwest, however, ACS is not an RBOC and thus is not subject to the Section 271 backstop that was available in Omaha. As such, blanket forbearance from 251(c)(3) would, contrary to the Commission’s decision in the *Omaha Forbearance Order*, allow ACS to withdraw access to UNEs entirely.⁸

To reach a result consistent with the relief granted in the *Omaha Forbearance Order* (assuming that the Commission finds some relief in some product markets and wire centers appropriate), the Commission can simply (1) forbear from the parenthetical portion of the pricing standard of Section 252(d)(1)(A)(i), which prevents states from relying on rate-of-return or other rate-based proceedings when evaluating whether UNE rates are just and reasonable;⁹ (2) forbear from its TELRIC pricing rules (47 CFR §§ 51.503(b)(1), 51.503(b)(2), 51.505); and (3) leave existing interconnection agreements in place, enabling changes in existing rates through application of change of law provisions within those interconnection agreements and retaining the authority of the Regulatory Commission of Alaska (“RCA”) to arbitrate disputes over pricing. By taking these steps, the Commission could grant ACS relief from TELRIC pricing while ensuring that ACS continues to offer access to UNE loops at “just and reasonable” and “nondiscriminatory”

⁶ *Id.*, 20 FCC Rcd at 19470 (¶ 109) (“We do not believe that eliminating Qwest’s section 271 *access obligations* for the legacy facilities would enhance competition in the Omaha MSA as contemplated in section 10.”) (emphasis added); see also *id.*, 20 FCC Rcd at 19466 (¶ 102) (defining “legacy elements” as “loops, switching and transport elements no subject to unbundling requirements pursuant to section 251(c)(3) that Qwest must provide pursuant to sections 271(c)(2)(B)(iv)-(v)”; *id.*, 20 FCC Rcd at 19467 (¶ 105) (making clear that “[o]ur justification for forbearing from Qwest’s section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of Qwest’s wholesale obligations to provide these network elements under sections 271(c)(2)(B)(iv) and (v)”).

⁷ *Id.*, 20 FCC Rcd at 19466 (¶ 103).

⁸ Contrary to ACS’s assertion, section 271 does not have “identical obligations [to those] that appear in Sections 201 and 202.” ACS September 8th *Ex Parte* at 6. First, nothing in Sections 201 and 202 provide an obligation to provide *access* to its loops. Sections 201 and 202 provide simply that if ACS should decide to provide access, it must do so on just, reasonable, and nondiscriminatory terms.

⁹ See attached 47 U.S.C. 252(d)(1)(A)(i) (proposing to strike the language “determined without reference to a rate-of-return or other rate-based proceeding” to effectively mirror the relief granted in Omaha where appropriate (if anywhere) in Anchorage).

HARRIS, WILTSHIRE & GRANNIS

Marlene Dortch
16 November 2006
Page 4

rates. In addition, this approach would provide an orderly and familiar RCA process for addressing any post-forbearance disputes over whether the ILEC's conduct (including pricing behavior) was, in fact, just, reasonable, and nondiscriminatory.

In accordance with FCC rules, a copy of this letter being filed electronically in the above-referenced docket.

Sincerely yours,

A handwritten signature in black ink, appearing to read "C. Nierman". The signature is fluid and cursive, with a prominent initial "C" and a period at the end.

Christopher P. Nierman
Counsel to General Communication, Inc.

cc: Thomas Navin
Julie Veach
Marcus Maher