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20 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 17, 2006, Tina Pidgeon of General Communication, Inc. ("GCI"), John Nakahata of this firm, and undersigned counsel met with Sam Feder, FCC General Counsel, Matthew Berry, FCC Deputy General Counsel, and Christopher Killion, Deputy Associate General Counsel of the Office of General Counsel's Administrative Law Division. In that meeting, GCI discussed points summarized in previous filings in this proceeding and in the attachments to this *ex parte*.

Sincerely yours,

Brita D. Strandberg
Counsel to General Communication, Inc.

cc: Sam Feder
Matthew Berry
Christopher Killion

THE COMMISSION'S COMMITMENT TO FACT-BASED FORBEARANCE

In its *Qwest Forbearance Order*, the Commission rightfully acknowledged that its decision was driven by the facts before it. The Commission asserted:

- "[E]ach case must be judged on its own merits." *Qwest* ¶ 2.

- "[W]e adopt herein no rules of general applicability." *Qwest* ¶ 2.

- "This proceeding considers factors unique to the Omaha MSA. It does not consider and does not reach the situation where the incumbent LEC's primary competitor uses unbundled network elements (UNEs), particularly unbundled loops, as the primary vehicle for serving and acquiring customers in the relevant market. Such a situation necessarily raises different issues with respect to our section 10 analysis. We do not consider or address them here." *Qwest* ¶ 2 n.4.

- "We stress that our decision today is based on the totality of the record evidence particular to the Omaha MSA." *Qwest* ¶ 14 n.46.

- "[I]n undertaking this [forbearance] analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record." *Qwest* ¶ 14.

- "[I]n today's Order, we do not craft any new tests for impairment or incumbent LEC status, or any other generally applicable tests we might fashion were a different category of petition before us." *Qwest* ¶ 14 n.47.

- "In today's Order, rather than making national impairment findings, we are applying the statutory standards of section 10 in a specific geographic market." *Qwest* ¶ 67 n.177.

- "We emphasize that because our analysis relies on the extent to which facilities-based competition has taken root in the Omaha MSA and the specific nature of that competition, the appropriate coverage threshold for forbearance relief – if any – may differ in other geographic markets exhibiting different characteristics." *Qwest* ¶ 69 n.189.

KEY RECORD DIFFERENCES IN ANCHORAGE AND OMAHA

Differences in All Product Markets

OMAHA	ANCHORAGE
Competitor had completed network deployment.[1]	Competitor is still upgrading its own network to provide cable-based telephony and will upgrade entire network to provide telephony.[2]
Competitor did not rely on UNEs.[3]	Competitor entered market on UNEs (particularly UNE loops) and relies on UNEs to continue to serve many customers, especially in the business markets.[4]
Incumbent required to make UNEs available at just and reasonable rates pursuant to Section 271; Incumbent voluntarily offered UNE-P wholesale substitute.[5]	Incumbent has no unbundling requirement other than Section 251(c)(3), and seeks freedom to deny access to UNEs entirely, at any rate.[6]
Competitor treated Omaha as comprised of two markets: residential/mass market and business/enterprise.[7]	Competitor has shown that both it and Incumbent treat residential, small business, and enterprise as separate markets and demonstrated products are not substitutable across markets.[8]
Competitor provided approximate numbers of business and residential customers in aggregated groups of wire centers.[9]	Competitor has provided detailed wire-center-by-wire-center data demonstrating Competitor's current reliance on UNEs by product market.[10]
Competitor capable of providing all services where plant present.[11]	Competitor has provided extensive record showing that many customers served on UNEs today cannot be served over Competitor's cable or fiber facilities in the near or medium term.[12]

1 *Petition of Qwest Corporation from Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area,* Memorandum Opinion and Order, 20 FCC Rcd 19415, at 19416 (¶ 2) (2005) ("*Omaha Forbearance Order*") (granting relief where Cox had "substantially built out its network").

2 *See, e.g., Opposition of General Communication, Inc. to the Petition for Forbearance from Sections 251(c)(3) and 252(d)(1) of the Communications Act Filed by ACS of Anchorage,* WC Docket No. 05-281, at 33–38 (filed Jan. 9, 2006) ("GCI Opposition"); *Reply Comments of General Communication, Inc.,* WC Docket No. 05-281, at 9–12, (filed Feb. 23, 2006) ("GCI Reply Comments"); *July 3rd Ex Parte Notice Filed by General Communication, Inc.,* WC Docket No. 05-281, at 15–19 (filed July 3, 2006) ("GCI July 3rd Ex Parte"); *August 22nd Ex Parte Notice Filed by General Communication, Inc.,* WC Docket No. 05-281 (filed Aug. 22, 2006); *November 7th Ex Parte Notice of General Communication, Inc.,* WC Docket No. 05-281 (filed Nov. 7, 2006).

3 *Omaha Forbearance Order,* 20 FCC Rcd at 19417 (¶ 2 n.4).

4 *November 14th Ex Parte Letter Filed by General Communication, Inc. re: Coverage*, WC Docket No. 05-281, at 3, 6 (filed Nov. 14, 2006) ("GCI November 14th Coverage Ex Parte"); Declaration of Richard Dowling ("Dowling Decl."), attached as Exhibit G to GCI Opposition (discussing history of GCI's entrance into the local telephone market); Declaration of Gina Borland ("Borland Decl.") ¶¶ 44-49, attached as Exhibit A to GCI Opposition; Declaration of William P. Zarakas ("Zarakas Decl."), attached as Exhibit C to GCI Opposition (identifying where GCI relies on UNE loops); Exhibit VIIA ("Updated Exhibit VIIA"), attached to *November 7th Ex Parte Notice Filed by General Communication, Inc.*, WC Docket No. 05-281 (filed Nov. 7, 2006) (updating original Zarakas data).

5 *Omaha Forbearance Order*, 20 FCC Rcd at 19448–9 (¶ 67).

6 ACS has indicated from the outset that it seeks the ability to pull UNEs from the market, regardless of price. In the first paragraph of its Petition, ACS asserts that it seeks forbearance from "Section 251(d)(1) pricing standards for unbundled network elements . . . *to the extent that ACS chooses* to continue to offer Unbundled Network Elements (UNEs) in Anchorage." *Petition of ACS of Anchorage, Inc. for Forbearance from Sections 251(c)(3) and 252(d)(1),* WC Docket No. 05-281, at 1 (filed Sept. 30, 2005) ("ACS Petition") (emphasis added). Moreover, prior voluntary agreements in other service areas on UNE pricing do not demonstrate any course of dealing in an environment where unbundled access was no longer required. *September 27th Ex Parte Notice of General Communication, Inc.,* WC Docket No. 05-281 (filed Sept. 27, 2006).

7 *Omaha Forbearance Order,* 20 FCC Rcd at 19427 (¶ 22 n.63) ("[T]he evidence submitted into the record . . . often distinguishes between residential and business customers but does not generally provide a more granular break-down between small and large businesses or other categories.").

8 GCI Opposition at 12–19; GCI July 3rd Ex Parte at 14; Declaration of Kenneth Sprain ("Sprain Decl.") ¶ 6, attached as Exhibit A to *Reply Comments of ACS of Anchorage, Inc. in Support of its Petition for Forbearance from Sections 251(c)(3) and 252(d)(1)*, WC Docket No. 05-281 (filed Feb. 23, 2006) ("ACS Reply Comments") (providing information for "both business and residential customers"); Reply Statement of Howard A. Shelanski ("Shelanski Decl.") ¶ 3, attached as Exhibit G to ACS Reply Comments ("I agree that services to mass-market (residential and small business) customers and services to enterprise (medium- and large-business) customers constitute distinct product markets."); Declaration of David E. M. Sappington ("Sappington Decl.") at ¶ 31, attached as Exhibit D to GCI Opposition; Zarakas Decl.; Declaration of Alan Mitchell ("Mitchell Decl."), attached as Exhibit D to GCI July 3rd Ex Parte; Updated Exhibit VIIA; Reply Declaration of Alan Mitchell ("Mitchell Reply Decl."), attached as Exhibit 1 to GCI November 14th Coverage Ex Parte (updating original Mitchell data); Exhibits V and VI ("Updated Exhibits V and VI"), attached to *October 24th Ex Parte Notice of General Communication, Inc.*, WC Docket No. 05-281 (filed Oct. 24, 2006) (updating original Zarakas data).

9 *Cox Responses to Staff Inquiry*, WC Docket No. 04-233, at 2 (filed June 30, 2005) ("Cox June 30th Response").

10 *See, e.g.*, Zarakas Decl.; Sappington Decl.; Updated Exhibit VIIA; Updated Exhibits V and VI.

11 Cox June 30th Response; *Cox Responses to Staff Inquiry*, WC Docket No. 04-223 (filed Aug. 22, 2005); see also *Omaha Forbearance Order,* 20 FCC Rcd at 19448 (¶ 66 n.171).

12 GCI Opposition at 20–38; Declaration of Gary Haynes ("Haynes Decl.") ¶¶ 14–23, attached as Exhibit H to GCI Opposition; Declaration of Blaine Brown ("Brown Decl.") ¶¶ 10–19, attached as Exhibit J to GCI Opposition; GCI July 3rd Ex Parte at 20–29; see also Declaration of Kevin Sheridan ("Sheridan Decl."), attached as Exhibit A to GCI July 3rd Ex Parte; Declaration of Dennis Hardman ("Hardman Decl."), attached as Exhibit G to GCI July 3rd Ex Parte; GCI November 14th Coverage Ex Parte.

KEY RECORD DIFFERENCES IN ANCHORAGE AND OMAHA

Differences in the Small Business Markets

OMAHA	ANCHORAGE
Competitor identified single business market.[1]	Competitor has shown existence of two distinct business markets: small business and enterprise.[2]
Competitor did not rely on UNEs.[3]	Competitor entered market on UNEs (particularly UNE loops) and relies on UNEs to continue to serve the vast majority of customers in the small business market, even in areas where cable nodes have been upgraded for residential telephony service.[4]
Commission found that competition in a significant portion of a wire center would discipline pricing in the remainder of the wire center.[5]	Both Competitor and Incumbent have significant customer-by-customer pricing discretion in the small business markets.[6] As a result, Incumbent can charge higher prices (or fail to discount prices) with less favorable terms and conditions where alternative facilities do not serve a business location.
Competitor capable of providing small business services where plant passed the small business location.[7]	Upgraded facilities passing the customer's location alone often not enough to serve small business customers; many customers served on UNEs today cannot be served over Competitor's cable or fiber facilities in the near or medium term.[8] Reasons include: • Plant reach (many business locations not on cable and/or require difficult-to-acquire entry facilities (*i.e.*, drops)). • Fiber is not an economically feasible alternative for serving small business locations with small line demand. • Competitor lacks the ability to serve many PBX and key systems, due to absence of standard DOCSIS equipment to provide compatible functionality. • Difficulty providing multiline hunt and similar services. • Incompatibility with most alarm systems. • Inability to provide transparent transmission path over cable, requiring customer disclosure of intended applications and uses.

1 *Omaha Forbearance Order,* 20 FCC Rcd at 19427 (¶ 22 n.63) ("the evidence submitted into the record . . . often distinguishes between residential and business customers but does not generally provide a more granular break-down between small and large businesses or other categories").

2 GCI Opposition at 12–19; GCI July 3rd Ex Parte at 14; Sappington Decl. ¶ 31; Sappington Decl. ¶¶ 30-31; Updated Exhibit VIIA; Mitchell Reply Decl.; Updated Exhibits V and VI.

3 *Omaha Forbearance Order,* 20 FCC Rcd at 19417 (¶ 2 n.4).

4 Dowling Decl. (discussing history of GCI's entrance into the local telephone market); Zarakas Decl. (identifying where GCI relies on UNE loops).

5 *Omaha Forbearance Order,* 20 FCC Rcd at 19451 (¶ 69).

6 *See, e.g.*, Statement of Mark Enzenberger ("Enzenberger Statement") ¶¶ 2–3, attached as Exhibit G to *Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109 (filed May 22, 2006) ("ACS Petition II"); Statement of Mitchell Andrew Coon ("Coon Statement"), attached as Exhibit F to ACS Petition II; Borland Decl. ¶ 4; Thompson Decl. ¶¶ 11–12; Reply Declaration of David E. M. Sappington ("Sappington Reply Decl.") ¶¶ 14-15, attached as Exhibit 3 to GCI November 14th Coverage Ex Parte.

7 Cox June 30th Response.

8 GCI Opposition at 20–38; Haynes Decl. ¶¶ 14–23; Brown Decl. ¶¶ 10–19; GCI July 3rd Ex Parte at 20–29; *see also* Sheridan Decl.; Hardman Decl.; GCI November 14th Coverage Ex Parte at 3–8;Zarakas Decl. ¶ 7; Declaration of Jonathan P. Wolf, attached as Exhibit 2 to GCI November 14th Coverage Ex Parte.

KEY RECORD DIFFERENCES IN ANCHORAGE AND OMAHA

Differences in the Enterprise Market

OMAHA	ANCHORAGE
Competitor identified single business market.[1]	Competitor has shown existence of two distinct business markets: small business and enterprise.[2]
Competitor did not rely on UNEs.[3]	Competitor entered market on UNEs (particularly UNE loops) and relies on UNEs to continue to serve many customers in the enterprise market.[4]
Competitive alternatives using special access available to enterprise customers.[5]	Incumbent concedes special access "is not a substitute for UNE loops in the Anchorage Market."[6]
Commission found that competition in a significant portion of a wire center would discipline pricing in the remainder of the wire center.[7]	Both Competitor and Incumbent have significant customer-by-customer pricing discretion in the enterprise business markets.[8] Incumbent has detailed knowledge of the location of Competitor's fiber facilities.[9] As a result, Incumbent can charge higher prices (or fail to discount prices) with less favorable terms and conditions where alternative facilities do not serve a business location.
Competitor capable of providing enterprise services where plant passed the enterprise location.[10]	Upgraded facilities alone often not enough to serve enterprise customers; Competitor has provided extensive record showing that many customers served on UNEs today cannot be served over Competitor's cable or fiber facilities in the near or medium term.[11] Reasons include: • Plant reach (many business locations not on cable or fiber plant and/or require difficult-to-acquire entry facilities). • Lack of an ability to provide enterprise DS1 services over cable plant due to an absence of standard DOCSIS equipment for provision of enterprise DS1 services. • Lack of an ability to provide service to many PBX and key systems due to an absence of standard DOCSIS equipment compatible with PBX and key systems.

	• Absence of sufficient upstream capacity for widespread deployment of high-capacity services. • Difficulty providing multiline hunt and similar services. • Incompatibility with most alarm systems. • Inability to provide transparent transmission path over cable, requiring customer disclosure of intended applications and uses.

1 *Omaha Forbearance Order,* 20 FCC Rcd at 19427 (¶ 22 n.63) ("the evidence submitted into the record . . . often distinguishes between residential and business customers but does not generally provide a more granular break-down between small and large businesses or other categories").

2 Shelanski Decl. ¶ 3 ("I agree that services to mass-market (residential and small business) customers and services to enterprise (medium- and large-business) customers constitute distinct product markets.");GCI Opposition at 12–19; GCI July 3rd Ex Parte at 14; Sappington Decl. ¶ 31; Zarakas Decl; Mitchell Decl.; Updated Exhibit VIIA; Mitchell Reply Decl.; Updated Exhibits V and VI.

3 *Omaha Forbearance Order,* 20 FCC Rcd at 19417 (¶ 2 n.4).

4 Dowling Decl. (discussing history of GCI's entrance into the local telephone market); Zarakas Decl. (identifying where GCI relies on UNE loops).

5 *Omaha Forbearance Order,* 20 FCC Rcd at 19449 (¶ 68).

6 *October 13th Ex Parte Notice of ACS of Anchorage,* WC Docket No. 05-281, at 1 (filed Oct. 13, 2006).

7 *Omaha Forbearance Order,* 20 FCC Rcd at 19451 (¶ 69).

8 See, e.g., Enzenberger Statement ¶¶ 2–3; Coon Statement; Borland Decl. ¶ 4; Thompson Decl. ¶¶ 11–12.

9 *See, e.g.,* Map of GCI Fiber Network, attached to *September 20th Ex Parte Notice of ACS of Anchorage,* WC Docket No. 05-281 (filed Sept. 20, 2006).

10 *Omaha Forbearance Order,* 20 FCC Rcd at 19448 (¶ 66 & n.171).

11 GCI Opposition at 20–38; Haynes Decl. ¶¶ 14–23; Brown Decl. ¶¶ 10–19; GCI July 3rd Ex Parte at 20–29; *see also* Sheridan Decl.; Hardman Decl.; GCI November 14th Coverage Ex Parte at 8–13.

Coverage in Small Business Markets

Wirecenter	Total Locations	% of Small Business Locations Passed by Telephony-Upgraded Cable Plant - Projected End of 2006	% of Passed Locations Expected to Be Served	% of Covered Small Business Locations Based on End of 2006 Upgrades (Excluding Transition Time)
North				
Central				
East				
West				
South				
O'Malley				
Rabbit Creek				
Indian				
Girdwood				
Elmendorf				
Ft. Richardson				
Hope+				

Coverage in Enterprise Business Markets

Wirecenter	Total Locations	% of Enterprise Business Locations Passed by GCI Fiber Plant	% of Passed Locations that Are Expected to be Economically Feasible to Serve	% of Covered Enterprise Business Locations (Excluding Transition Time)
North				
Central				
East				
West				
South				
O'Malley				
Rabbit Creek				
Indian				
Girdwood				
Elmendorf				
Ft. Richardson				
Hope+				

* GCI has no DS1 customers in these wire centers.
+ Hope is served on ACS's network by a DLC served from the South wire center, but lies entirely outside the GCI cable franchise area.

Source: GCI Ex Parte, November 14, 2006

Coverage in Residential Markets

		% of Residential Locations Passed By			% of Residential Locations Covered By	
Wirecenter	Total Locations	Telephony-Upgraded Cable Plant - End of 2005 Construction Season	Telephony-Upgraded Cable Plant - Projected End of 2006	% of Residences Able to be Served Within Two Years	Telephony-Upgraded Cable Plant - End of 2005 Construction Season (customers transitioned as of end of 2006)	Telephony-Upgraded Cable Plant - Projected End of 2006 (customers transitioned as of end of 2007)
North						
Central						
East						
West						
South						
O'Malley						
Rabbit Creek						
Indian						
Girdwood						
Elmendorf						
Ft. Richardson						
Hope+						

+ Hope is served on ACS's network by a DLC served from the South wire center, but lies entirely outside the GCI cable franchise area.

Source: GCI Ex Parte, November 14, 2006