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December 6, 2006

VIA ELECTRONIC FILING

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

Re: *Ex Parte* Notice of Alaska Communications Systems Group, Inc.

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

Dear Ms. Dortch:

On December 5, 2006, Leonard Steinberg and David Eisenberg of Alaska Communications Systems Group, Inc. ("ACS"), and Karen Brinkmann, Elizabeth Park and Anne Robinson of Latham and Watkins LLP, met with Commissioner Adelstein and Scott Bergmann, legal advisor to Commissioner Adelstein, to discuss the above-referenced proceeding.

During the meeting, ACS described the extensive facilities-based local exchange competition in Anchorage. ACS's primary competitor, General Communication, Inc. ("GCI"), has cable, fiber and wireless local loop facilities that extend into each of the wire centers in the Anchorage study area and can potentially serve both business and residential customers in a commercially reasonable amount of time. Although Elmendorf Air Force Base and Fort Richardson chiefly contain self-provisioning military bases, GCI has facilities in both areas.

ACS also pointed out several "red herring" issues that GCI has raised in its recent *ex parte* filings. First, all carriers routinely deploy service during the winter months and can do so by temporarily laying cable on the ground and using aerial facilities. Thus, a 3-6 month transition period is sufficient. Second, operational issues, such as multiline hunting, are switching issues and not relevant to UNE loop provisioning. Third, inside wiring access is rarely an issue, as under the Commission's order, customers own their own wiring. The airport—the only example GCI provides of an instance in which ACS controls the wire—is a unique circumstance.

Finally, ACS expressed its willingness and its need to negotiate commercial agreements with GCI for reciprocal access to facilities at market-based rates and to retain the revenue that GCI's UNE leasing generates for ACS. A grant of forbearance from ACS's UNE obligations in Anchorage would lead to meaningful negotiations. Moreover, forbearance will encourage both ACS and GCI to continue to invest in their respective network facilities in Anchorage. Given the significant level of current and future facilities-based competition, market forces will ensure that consumers will continue to be protected and that the public interest will be served.

Attached are copies of materials provided at the meeting. Please contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

/s/

Karen Brinkmann

Counsel to ACS of Anchorage, Inc.

Enclosures

cc: Commissioner Adelstein
Scott Bergmann

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ACS
ALASKA COMMUNICATIONS SYSTEMS

ACS of Anchorage, Inc. UNE Forbearance Petition, WC Docket No. 05-281

December 2006 FCC Meetings

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The Facts Support the Requested Relief

- GCI is the dominant retail service provider
- GCI has its own last mile connections throughout the market, including:
  - Extensive coaxial cable and facilities
  - Wireless local loop, microwave and copper
  - Coverage of all customers in all wire centers
- GCI is rapidly moving from UNEs to its own facilities even while its market share continues to grow

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Omaha Precedent Supports Forbearance

- There are two service sectors -- mass market and enterprise
- Anchorage is even more competitive than Omaha
  - GCI has switching, transport and loop facilities that reach a substantial portion of the customers in all 5 of ACS's wire centers
  - GCI is the bigger company, with more resources than ACS, an established brand, and strong customer relationships
  - Wireless and VoIP providers also compete independent of ACS
  - All customers benefit from study area-wide price competition

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GCI Does Not Require UNEs to Compete

- GCI's network reaches all customers today
- GCI can serve business customers with high capacity needs the same ways other cable-based carriers do, or rely on its extensive fiber network
- GCI does not rely on ACS NIDs, Inside Wire, or Subloops
- GCI can and does provision facilities through the winter months

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Network Access Arrangements Will Be Negotiated By the Parties On Market Terms

- ACS has no desire to lose the revenue associated with leasing facilities to GCI
- ACS has agreed to UNE access in other markets
- ACS will continue to behave in a just and reasonable manner
- ACS seeks reciprocal rights to GCI's network, where customers are not covered by ACS facilities
- Each will have an incentive to offer commercially reasonable rates, terms and conditions for the use of its facilities

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Forbearance Will Serve the Public Interest

- Forbearance will give all competitors in the market greater incentives to invest in network facilities and offer innovative services
- An expeditious transition period of 3 to 6 months will facilitate ongoing negotiations of market-based network access arrangements between ACS and GCI
- ACS respectfully requests that the Commission's order be effective upon adoption

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ACS of Anchorage, Inc. UNE Forbearance Petition, WC Docket No. 05-281

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ACS Requests Substantially Similar Relief to That Requested by Qwest in Omaha, and the Same Legal Standard Applies

- The law requires that Section 251(c)(3) unbundling obligations be lifted in the absence of evidence that a reasonably efficient CLEC would be "impaired" without access to UNEs under Section 251.[1]

- The Commission expressly held that forbearance from Section 251(c)(3) can be granted in the absence of the criteria established in the *UNE Triennial Review Remand Order,*[2] and the *Qwest Omaha Order* is the first example of such forbearance, though "each case must be judged on its own merits" under the Section 10 criteria.[3]

- In the *Qwest Omaha Order* the Commission ruled that Section 251(c) has been "fully implemented"[4] and granted forbearance from Section 251(c)(3) based on the "facilities-based competition [sufficient] to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a)."[5]

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ACS Requests Substantially Similar Relief to That Requested by Qwest in Omaha, and the Same Legal Standard Applies (continued)

- "[F]acilities-based competition, combined with the other competition [such as resale] made possible by [the FCC's] rules, suffices to satisfy the section 10(a) criteria…."[6]

- Forbearance is justified where a competitor is "willing and able within a commercially reasonable time" to provide service to a significant portion of end-user locations without relying on the ILEC's UNEs (the exact numbers need not mirror the Omaha market).[7]

- The competitor's network need not "neatly map" to the ILEC's wire center or service area boundaries, nor cover 100% of the customers, in order to justify forbearance in that area.

- The Commission did not have sufficient evidence of VoIP or wireless-based competitors to consider them relevant to the *Qwest Omaha Order*, but took into account other evidence of intermodal competition,[8] and since that time has acknowledged the significance of wireless and VoIP competition in the local exchange market.[9]

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ACS Requests Substantially Similar Relief to That Requested by Qwest in Omaha, and the Same Legal Standard Applies (continued)

- Competition is "the most effective means" of ensuring that ACS's "charges, practices, classifications and regulations" will be "just and reasonable, and not unjustly or unreasonably discriminatory" (Section 10(a)(1)):[10]
  - Relevant evidence includes both existing and potential competition.[11]
  - Evidence of competition includes not only a CLEC's present customers but also its current marketing efforts, growing market share, possession of the facilities necessary to provide additional services, technical expertise, economies of scale and scope, sunk investment in network infrastructure, and established presence or brand in the market.[12]
  - Evidence of competition need not include any significant alternative sources of wholesale inputs for carriers, if there is a high level of retail competition that does not rely on the ILEC's facilities.[13]

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ACS Requests Substantially Similar Relief to That Requested by Qwest in Omaha, and the Same Legal Standard Applies (continued)

- Section 251(c)(3) obligations are not necessary to protect consumers for similar reasons, due to substantial competition in the local exchange and exchange access markets (Section 10(a)(2)).[14]

- The relief of unbundling obligations will help promote and enhance competition, and therefore is in the public interest (Section 10(a)(3)):[15]

  - Relieving the ILEC from Section 251(c)(3) obligations will increase regulatory parity in the market, thereby encouraging the competitors to deploy additional facilities as well as negotiate with each other to maximize use of their networks.[16]

  - Relieving the ILEC from unnecessary obligations under Section 251(c)(3) is appropriate where the costs outweigh the benefits (*i.e.,* where the competitor does not lack the scale and scope economies to compete efficiently in the local exchange and access markets).[17]

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The Anchorage Market Is Comparable To the Omaha Market In Most Significant Respects

- ACS faces a facilities-based competitor that dominates the other market segments (broadband, cable, long-distance), has captured about half of the local exchange and exchange access market, and has the present capability to serve a substantial portion of its local exchange and exchange access customers over its own facilities.
  - GCI's residential market share exceeds that of ACS, and GCI's brand saturates the market, as the largest residential provider of local and long-distance voice services, high-speed data services, and video services.
  - GCI actively markets to business customers, and has succeeded in capturing significant business customers without relying on ACS UNEs.

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The Anchorage Market Is Comparable To the Omaha Market In Most Significant Respects (continued)

- Most business customers in Anchorage can be served over DS0 capacity lines, and thus, forbearance analysis should be based on two product market categories: residential and business.
- GCI's facilities-based presence is not limited to certain parts of Anchorage but is evident throughout the wire centers in the market.
- Like Qwest, ACS has demonstrated the ability to offer UNEs or UNE equivalents on commercially reasonable terms.
- ACS has the incentive to negotiate with GCI for commercial access to UNEs; like Qwest, ACS would prefer that a GCI customer be served using ACS's facilities (and receive some revenue from that customer, via GCI) to having that customer use GCI's network exclusively (and receive no revenue whatsoever from that customer).

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To the Extent They Differ, The Anchorage Local Exchange Market Is Even More Competitive Than The Omaha Market

- GCI has significant market share among enterprise customers, including success with a number of the largest customers in the market, and its extensive facilities-based coverage extends throughout the geographic market, including to all the major business districts.

- ACS has demonstrated that GCI uses diverse technologies to serve both residential and business customers over its own facilities throughout the market, including:
  - GCI's own Class 5 switch;
  - GCI's DLPS, fiber and copper facilities; and
  - GCI's wireless technologies, for local loops and point-to-point transport

- Further, to the extent GCI elects UNEs it uses only ACS loops; it has not requested transport or other UNEs in this market
  - GCI does not use unbundled ACS transport in Anchorage;
  - GCI does not use unbundled sub-loops or NIDs where it uses its own loop facilities;
  - GCI does not use special access as a substitute for UNEs, though special access services are available from ACS

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To the Extent They Differ, the Anchorage Local Exchange Market Is Even More Competitive Than the Omaha Market (continued)

- GCI has not demonstrated there is any wire center it cannot "reach" within a commercially reasonable amount of time.

- In addition to being the monopoly cable service provider, GCI has been an established Competitive Access Provider since before the 1996 Telecom Act, is the dominant broadband telecommunications provider in the market and, with AT&T-Alascom, is one of the two primary long-distance telecom service providers in Anchorage; hence, GCI enjoys extensive network facilities, brand recognition, an entrenched customer base, and considerable scale and scope economies, not only in the residential market but in the enterprise market as well.

- As the largest communications company in Alaska, GCI has the resources to serve the entirety of Anchorage in a commercially reasonable amount of time, despite the fact that it has chosen to adopt a short-term UNE strategy.

- The percentage of customers GCI serves using any UNEs from ACS is steadily declining even while GCI's overall market share (both residential and business) is growing.

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To the Extent They Differ, the Anchorage Local Exchange Market Is Even More Competitive Than the Omaha Market (continued)

- Significant intermodal alternatives also are offered in Anchorage by independent providers; as the Commission has recognized, wireless services are effective substitutes for ILEC local exchange services and should be considered when evaluating intermodal competition.

- Anchorage consumers benefit from competitive pricing that is consistent throughout the market, regardless of whether or not GCI serves a customer in a particular neighborhood
  - ACS offers its local exchange and exchange access services at rates that are averaged across the entire study area
  - ACS markets its services uniformly throughout the relatively small geographic footprint of the study area – consumers in every wire center are offered the same services at the same prices

- ACS does not have market power and cannot cause GCI to raise prices by increasing UNE rates.

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Market Incentives Will Ensure that ACS Will Continue To Offer Services To Consumers and Competitors at Just, Reasonable and Non-Discriminatory Rates

- Enforcement of unbundling obligations are not necessary to protect consumers in Anchorage because substantial and entrenched facilities-based competition disciplines rates for both residential and business customers throughout the study area.

- ACS would prefer to keep the revenue from GCI's use of the ACS network rather than lose all revenues from a customer that has selected GCI as its local exchange carrier; therefore, ACS has an incentive to negotiate reasonable rates for competitive access to ACS's network. (Indeed, such negotiations are ongoing.)

- GCI has exclusive facilities-based access to some customers; therefore, ACS has an incentive to negotiate mutual network access arrangements with GCI.

- ACS is no longer the dominant provider of telecommunications services in Anchorage; therefore, it is in the public interest to allow ACS to gain an equal bargaining position to GCI and to encourage negotiation of market-based terms for facilities access.

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Regulatory Safeguards Also Will Ensure That ACS Will Continue To Offer Services at Just, Reasonable and Non-Discriminatory Rates

- Section 271 does not apply to ACS, and nothing in the forbearance statute nor in the *Qwest Omaha Order* limits forbearance from UNE obligations to BOCs.
- In the *Qwest Omaha Order*, the Commission explicitly granted forbearance relief from Section 251(c)(3) and the corresponding checklist items in 271.
  Other regulatory safeguards remain.
  - Sections 201 and 202 require interstate carriers to offer just and reasonable terms (incorporated for the BOCs through other items in the Section 271 competitive checklist).
  - The regulatory protections established in Sections 201 and 202 of the Communications Act will bind ACS; thus, ACS will continue to be subject to obligations to provide interstate services at just, reasonable and non-discriminatory rates, terms and conditions.
  - Other Section 251(c) obligations, including those related to resale, also remain in effect.
  - The Regulatory Commission of Alaska has made clear that it has jurisdiction to investigate any concerns about retail rates that may be unreasonable.
- As in the *Qwest Omaha Order*, the Commission should require no more than that rates, terms and conditions be just and reasonable, under current market conditions.

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GCI Has Failed To Show Impairment Or Harm To Consumers or Competition

- GCI has never demonstrated that it is incapable of reaching a substantial portion of Anchorage customers over its own facilities within a commercially reasonable period of time.
  - GCI has publicly affirmed that its network deployment decisions are based solely on financial considerations, not on technical or operational infeasibility.
  - GCI's estimates of customers "covered" by its network facilities lack sound economic foundation:
    - GCI's calculation assumes that once its facilities "pass" a customer, it still will only serve customers using its own facilities at the rate it historically served customers over its own facilities. GCI provides no basis for the reasonableness of this assumption.
    - GCI's calculations unreasonably conclude that some customers passed and actually served on its own facilities are not "covered" by GCI's facilities.
    - GCI's estimates of the reach of its facilities fails to account for GCI's multiple modes of entry.
    - GCI's estimated coverage of "locations" is based on factors that have no correlation to the type of service demanded -- *i.e.*, GCI does not accurately identify where different types of customers are located, so it cannot predict whether its facilities are adequate to reach particular customers.
    - GCI identifies locations as "covered" based on GCI's own definition of profitability.
    - It appears that GCI's methodology and assumptions show that GCI can cover substantially all of the lines in Anchorage using its own facilities.

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GCI Has Failed To Show Impairment Or Harm To Consumers or Competition (continued)

- The evidence offered by GCI also fails to account for "both existing *and potential* competition" including:
  - GCI's marketing efforts,
  - the steady growth in GCI's market share, both business and residential,
  - GCI's possession of the facilities and technical expertise necessary to provide additional services (GCI claims superior technology),
  - GCI's impressive economies of scale and scope relative to those of ACS,
  - GCI's considerable sunk investment in network infrastructure, and
  - GCI's established presence and brand recognition among customers throughout the Anchorage market.

- The D.C. Circuit makes clear that the burden is on GCI to demonstrate it would be impaired without continued access to UNEs under Section 251. In the absence of such evidence, the Commission must relieve ACS of these obligations.[18]
- Nothing in the record shows precisely where GCI's facilities are today, but nothing suggests that the terms and conditions offered to customers GCI does not reach today are different from those offered to customers that GCI serves on its own facilities.[19]

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GCI Has Failed To Show Impairment Or Harm To Consumers or Competition (continued)

- Technological solutions exist to deliver DS1s over cable facilities without reliance on UNEs:
  - ACS has documented the solutions that are available to resolve the technological or operational difficulties that GCI cites (such as insufficient upstream capacity, inability to provide multiline hunt or clocking services, and incompatibility of DLPS with PBXs or certain alarm systems).
  - None of these problems relates to the availability of loop facilities, and all can be solved by GCI's ongoing investment in its own network.
- GCI does not explain why it needs to provide DS1 over cable; fiber is a better technology for business service, and GCI does not describe the demand for DS1 capacity.
- The difficulties that GCI cites with respect to its business customers refusing to divulge the intended use of GCI's services does not constitute impairment.
- The seasonal construction delays of which GCI complains affect ACS and other providers alike, but are not bars to competitive entry;[20] ACS has documented several work-around strategies that GCI and ACS both employ in this market.

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The Operational and Technical Considerations That GCI Raises Are Far Outweighed By the Benefits of Forbearance

- Market-driven competition is the most effective means of ensuring that ACS's charges, practices, classifications and regulations will be "just and reasonable, and not unjustly or unreasonably discriminatory."

- Past experience demonstrates that ACS has ample incentive to negotiate reasonable terms for access to its network, "to ensure that its network is used to optimal capacity," to minimize revenue loss from customers switching to GCI service.[21]

- Forbearance will give GCI incentive to negotiate with ACS, just as the likelihood of reinstatement of the rural exemption in Fairbanks and Juneau drove GCI to the negotiating table in 2004.

- Forbearance also will give both GCI and ACS added incentive to invest in network facilities and innovate, as intended by the Commission and the Act.

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ACS Requests That the Commission Grant Its UNE Forbearance Petition

- The record in this proceeding demonstrates that the Section 10 requirements for forbearance have been met.
- A three- to six-month transition period is all that is needed in this case, given GCI's well-established network, growing market share, vast resources, current rate of deployment, and ongoing negotiations with ACS to conclude a network access agreement.
- ACS requests that the Commission make its Order effective upon adoption, and release its order in this proceeding on an expedited basis to provide certainty to the parties as they negotiate market-based access to UNEs.

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End Notes

[1] *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (affirming *In the Matter of Unbundled Access to Network Elements*, Order on Remand, 20 F.C.R. 2553 (2005)).

[2] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2541, ¶¶ 37-39 (2004).

[3] *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 ¶¶ 2, 14 (2005) ("*Qwest Order*").

[4] *Id.* at ¶ 51.

[5] *Id.* at ¶ 61.

[6] *Id.* at ¶ 64.

[7] *Id.* at ¶¶ 64, 69.

[8] *Id.* at ¶ 65.

[9] *Verizon Communications Inc. and MCI Inc., Application for Approval of Transfer of Control*, FCC 05-184. Memorandum and Order, at ¶¶ 84-97 (2005); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer and Control*, FCC 05-183, Memorandum Opinion and Order, ¶¶ 85-90 (2005) (finding that VoIP and mobile wireless service were substitutes for wireline local service).

[10] *Qwest Order* ¶ 63 (quoting *Petition of U.S. WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U.S. WEST Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 14 FCC Rcd 16525, 16270 (1999)).

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End Notes (continued)

[11] *Id.* at ¶ 62 ("Our decision today also is based on other actual and potential competition, which we find either is present, or readily could be present, in 100 percent of Qwest's service area in the Omaha MSA.").

[12] *Id.* at ¶ 66.

[13] *Id.* at ¶ 67.

[14] *Id.* at ¶ 73.

[15] *Id.* at ¶ 75.

[16] *Id.* at ¶¶ 78, 81.

[17] *Id.* at ¶¶ 76-77.

[18] *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003).

[19] *Qwest Order* ¶ 69 n.187.

[20] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("To rely on cost disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad, even in support of an initial mandate, to be reasonably linked to the purpose of the Act's unbundling provisions.").

[21] *Qwest Order* ¶ 81.

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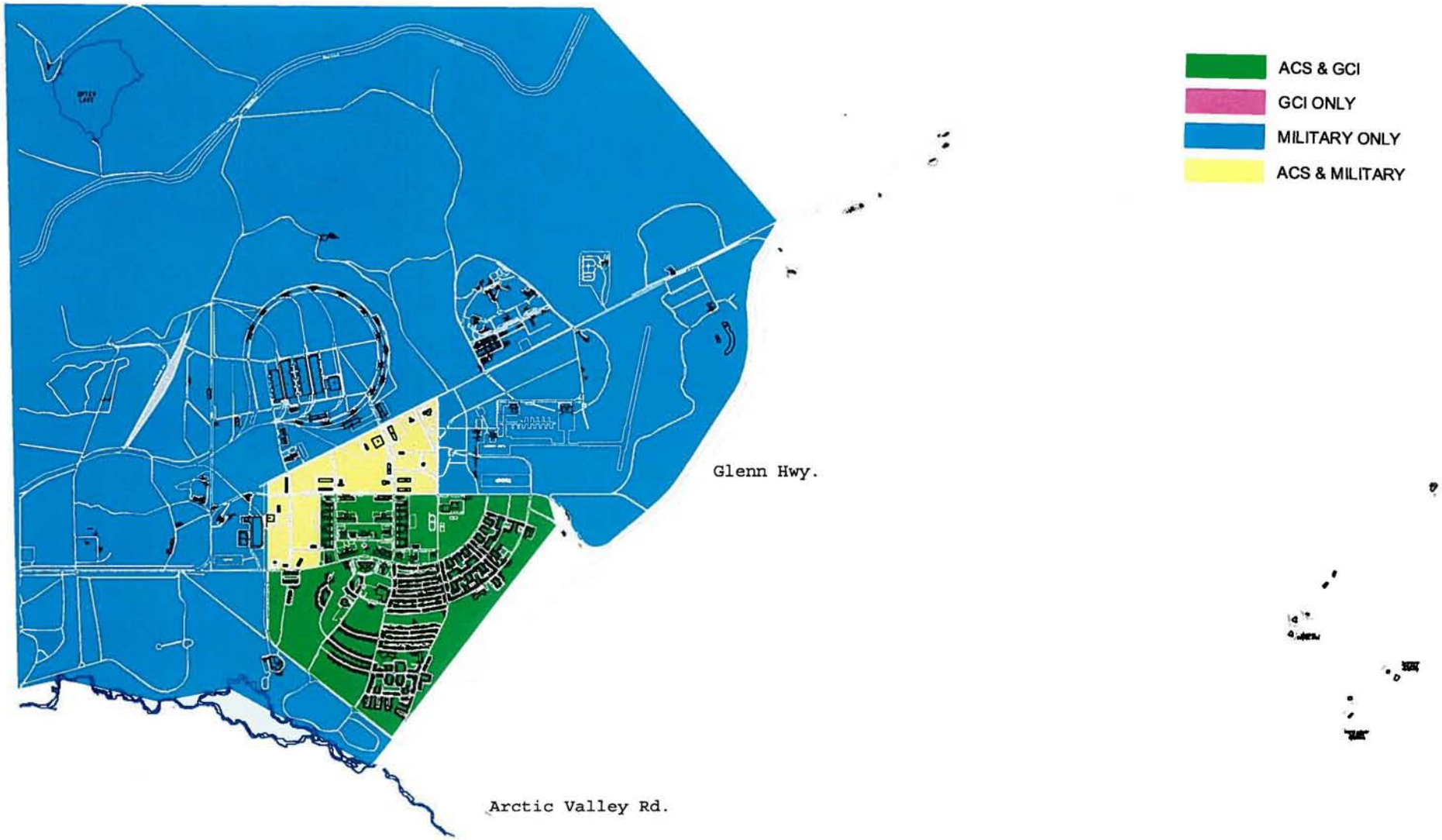
Fort Richardson



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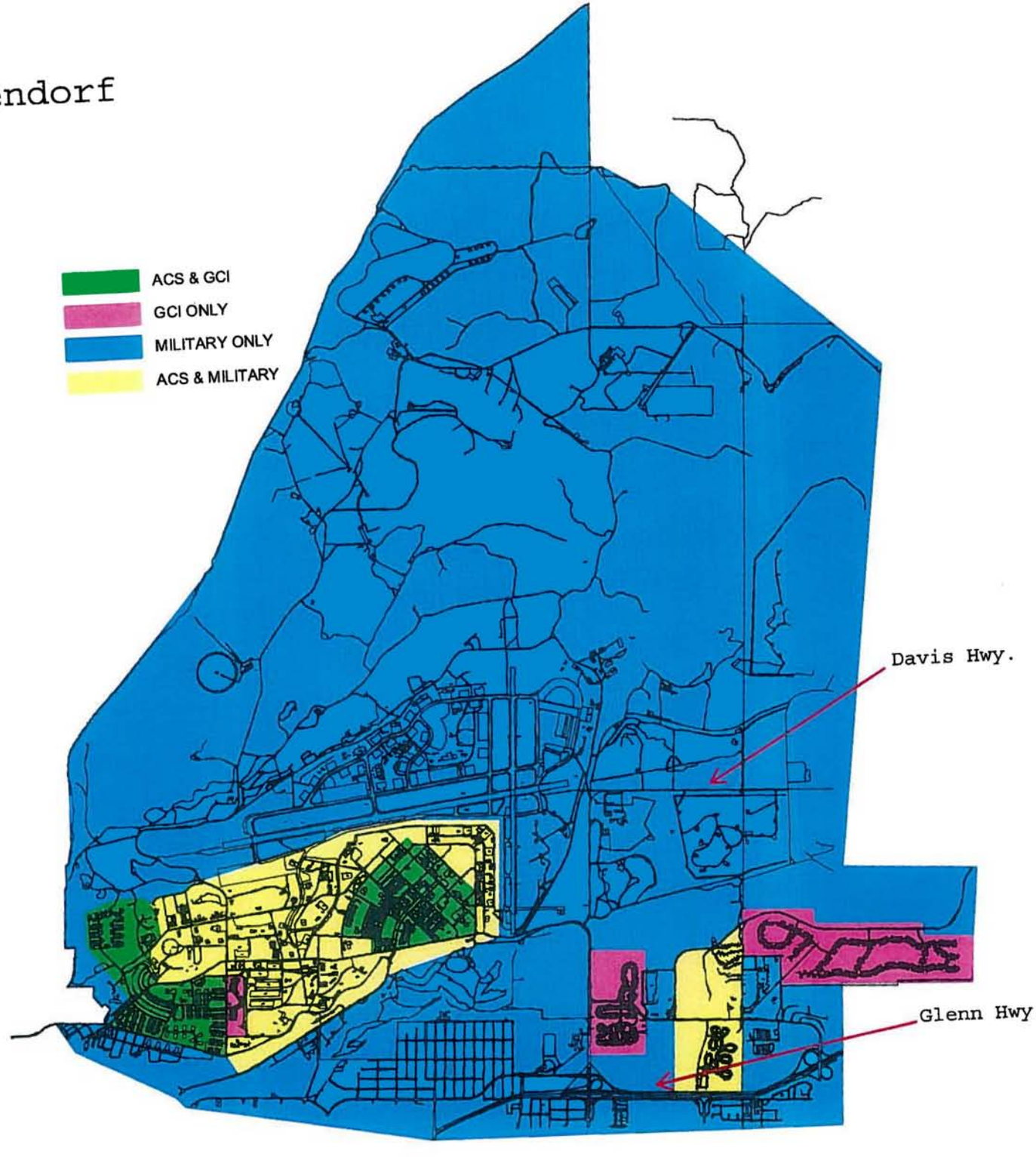
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