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December 8, 2006

EX PARTE

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

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

Dear Ms. Dortch:

On December 7, 2006, representatives of Time Warner Telecom Inc., Cbeyond, Inc. (“Cbeyond”) and One Communications Corp., (“One”) met with Commission staff to discuss matters related to the above referenced docket. Thomas Jones of Willkie Farr & Gallagher LLP, Julia Strow of Cbeyond and Greg Kennan of One met separately with Michelle Carey, Legal Advisor to Chairman Martin and Scott Deutchman, Legal Advisor to Commissioner Copps. These parties also met with Scott Bergmann, Legal Advisor to Commissioner Adelstein, and intern Chris Reichman. Jonathan Lechter of Willkie Farr & Gallagher LLP attended the meetings with Messrs. Deutchman, Bergmann and Reichman. The attached presentation formed the basis of the discussion.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), a redacted copy of this notice and presentation is being filed electronically in the above referenced proceeding. A confidential version has also been filed with the secretary.

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Sincerely,
/s/

Thomas Jones

Attachment

cc: Chris Reichmann
Scott Bergmann
Scott Deutchman
Michelle Carey
Janice Myles

**THE FCC SHOULD DENY THE ACS PETITION FOR FORBEARANCE
TO THE EXTENT IT SEEKS THE ELIMINATION OF UNES NEEDED TO
SERVE BUSINESS MARKETS**

(Dec. 7, 2006)

**I. THE COMMISSION MUST CONTINUE TO USE WIRE CENTERS AS THE
RELEVANT GEOGRAPHIC MARKET FOR PURPOSES OF UNE FORBEARANCE
PETITIONS**

A. In the *TRRO* and *Omaha* Orders, the FCC concluded that wire centers were the appropriate geographic markets for determining whether UNEs should be retained. The Commission flatly rejected the use of larger geographic areas (such as ACS's proposal to use its Anchorage study area) because such broader areas "can encompass urban, suburban and rural areas, each of which presents different challenges to competitive LECs seeking to self-deploy high-capacity loop facilities . . . An impairment determination that applies to a geographic zone of this size is therefore likely to overestimate or under-estimate impairment." *TRRO* ¶ 164.

B. There is no basis from departing from this standard in Anchorage:

1. GCI states that it can only reach new customers within 80 feet of its fiber or HFC network. ACS states that it is 400 feet. Either way, it is clear that competition in one location in Anchorage is not a basis for inferring the potential for competition in a nearby location.

2. ACS has virtually complete freedom to price discriminate between individual customer locations in which there is or is not an alternative source of loop connectivity. This is true at the retail and wholesale levels, leaving ACS free to price squeeze competitors and to engage in other forms of strategic pricing.

3. The limited geographic scope of GCI's addressable market combined with ACS's freedom to price discriminate mandate the use of a geographic market that is at least as granular as a wire center.

C. The Commission must actually apply the wire center test in this proceeding, and must not rely on network coverage data that is averaged across multiple wire centers. Reliance on averages in fact forecloses a wire center-by-wire center analysis.

**II. THERE IS NO BASIS IN THE RECORD FOR GRANTING ACS'S PETITION IN
ANY ANCHORAGE WIRE CENTER FOR LOOPS AND TRANSPORT NEEDED TO
SERVE BUSINESS CUSTOMERS**

A. In the *Omaha Order*, the Commission relied heavily on the extent to which Cox was ready, willing and able to serve customers in particular wire centers. GCI's own data show that it not ready, willing and able to serve business customers in a high enough percentage of locations within any wire center to justify forbearance in Anchorage.

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B. GCI's fiber network cannot serve a sufficient percentage of enterprise customers (those demanding 8 or more switched business lines or who require higher capacity lines such as DS1s):

1. GCI states that its fiber network "passes" (i.e., comes within 80 feet of) no more than **[proprietary begin] [proprietary end]** of enterprise customers in any wire center

2. GCI states that it is ready, willing and able to use its fiber network to serve only **[proprietary begin] [proprietary end]** of the total enterprise customers it serves (both on-net and on-net); also, according to GCI, it is ready willing and able to serve only **[proprietary begin] [proprietary end]** of the enterprise locations that its network passes

3. This means that GCI's network "covers" (enables GCI to be ready, willing and able to serve over its own facilities) no more than **[proprietary begin] [proprietary end]** of the enterprise customers in any Anchorage wire center.

C. GCI's HFC network does not reach small business customers (those demanding fewer than 8 switched business lines)

1. GCI states that its HFC network passes **[proprietary begin] [proprietary end]** of the small businesses in most Anchorage wire centers

2. GCI states that, even after it completes its network upgrade, it will be ready, willing and able to use its HFC network to serve no more than **[proprietary begin] [proprietary end]** of the small business customers its network passes in any particular wire center.

3. Accordingly, GCI states that its HFC network will "cover" no more than **[proprietary begin] [proprietary end]** of the small businesses in any Anchorage wire center

III. AT BEST, ANCHORAGE BUSINESS CUSTOMERS FACE A DUOPOLY, WITH NO EVIDENCE OF COMPETITION FROM CARRIERS USING SPECIAL ACCESS; FORBEARANCE MUST THEREFORE BE DENIED

A. Although the Commission relied on Cox's network coverage in the *Omaha Order*, the Commission was careful not to rely on the presence of only one competitor in a particular location as the basis for forbearance; a duopoly was clearly not enough to justify forbearance. *See Omaha Order* ¶ 71 ("we disagree with commenters who contend that forbearing from application of unbundling obligations to Qwest will result in a duopoly"). Instead, in addition to competition from a cable entrant, the Commission relied on "actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under section 251(c) and section 271 from which we do not forbear." *Id.* The Commission also relied on the presence of competition from competitors using special access in Omaha. *See id.* at ¶ 68. The

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Commission found that these factors “minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct.” *Id.*

B. The Commission cannot rely on these factors to “minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct” in Anchorage.

1. There are no “established competitors” in the local market other than GCI in Anchorage.
2. ACS is a not a BOC and is therefore not subject to 271 unbundling obligations.
3. There is no evidence in the record that any party relies on special access to any significant degree to compete in the local market. For example, ACS has openly admitted that “it is unlikely that GCI is using special access in the Anchorage study areas as a substitute for UNEs on a significant scale.” ACS Oct. 13 *ex parte*. Moreover, AT&T apparently only uses special access to provide long distance service.