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14 December 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:

ACS's December 7, 2006 ex parte letter defies all standards of logic and represents nothing more than a last-minute attempt to obtain windfalls that the record does not support and that public policy does not justify.

First, ACS asks the Commission to impose a 10% annual price escalation on any benchmark rate that the Commission sets, purportedly to alleviate ACS's "concern" that a benchmark rate will "invite litigation."¹ But this request actually demonstrates that ACS retains market power sufficient to raise loop prices, thus influencing the prices at which GCI can sell competitive retail services. ACS's request also demonstrates that loop competition is not yet adequate to ensure just, reasonable, and non-discriminatory rates in any relevant product and geographic market. Accordingly, ACS's demand for a 10% annual escalator is further evidence that ACS cannot meet the requirements of Section 10(a)(1) and that unbundling pursuant to 251(c)(3) remains necessary to protect consumers under Section 10(a)(2).

¹ *December 7 Ex Parte Notice of ACS of Anchorage re: Chairman Martin Meeting, WC Docket No. 05-281, at 2 (filed Dec. 7, 2006) ("ACS Ex Parte")*. ACS's demand is particularly egregious considering that the agreed upon Fairbanks rate was part of a unitary settlement including Juneau, which resulted in an average \$2.88 increase over the prior TELRIC rates across both service areas. In Anchorage, ACS apparently is not even satisfied with a \$4.36 (almost 25%) increase over the current Anchorage loop rate of \$18.64.

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Second, ACS asks the Commission to override the change of law provision in the parties' interconnection agreement. There is no reason for the Commission to take such intrusive action. The change of law provision provides an orderly process for both parties to address changes of law – which can benefit either party. This is just another example of ACS using the forbearance process to seek an unjustified windfall.

Third, ACS claims that forbearance is necessary to satisfy “its *need* to negotiate commercial agreements.”² The simple fact that ACS has refused to engage in sustained negotiations belies its professed “need” to reach an agreement. Indeed, six weeks ago, GCI extended to ACS yet another offer, which included UNE rates higher than current TELRIC rates and offered minimum take or pay terms. ACS has refused to even respond. ACS, with its service area-wide facilities footprint, does not *need* a commercial agreement; it simply *wants* to negotiate a commercial agreement, but only after it determines whether the forbearance process will provide a windfall and give it the ability to unilaterally terminate GCI's use of UNEs. It is ACS, not GCI, that lacks incentive to negotiate while this forbearance petition is pending.

Fourth, ACS suggests that it needs to reach a commercial agreement “for reciprocal access to facilities at market-based rates.” Utter nonsense. In the first instance, ACS's “need” for access to [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] GCI loops is hardly comparable to GCI's reliance on [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. ACS would certainly forego access to GCI's handful of loops if given the power to deny GCI access to ACS's loops Anchorage-wide. Furthermore, as GCI has already shown, it is the only one of the two parties that voluntarily offers access to its facilities. Indeed, GCI has not only offered ACS access to its [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] residential lines, but it has gone out of its way to accommodate ACS and made efforts to ensure that ACS can share conduit to which GCI has access.³ The notion that GCI's handful of lines, to which ACS has access on the same rates, terms, and conditions that ACS provides GCI, brings ACS to its knees for negotiation is really just ludicrous.

Fifth, ACS trumpets its “strong economic interest in maintaining GCI as a wholesale customer on ACS's network”⁴ and its desire “to retain the revenue that GCI's UNE leasing generates for ACS.”⁵ In truth, however, ACS has had (and still has) every

² *Id.*, at 1 (emphasis added).

³ See Declaration of Blaine Brown, ¶¶ 19, 21, attached as Ex. J to *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 (filed Jan. 9, 2006).

⁴ ACS Ex Parte at 1.

⁵ *Id.*

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opportunity to keep GCI as a wholesale customer. ACS refuses to do so. ACS is hoping that, through its roll of the forbearance dice, it will receive a consumer-disrupting windfall in the form of the freedom either to capture GCI customers by forcing GCI off leased facilities or to charge GCI rates that are even higher than it could receive through market-based commercial negotiation.

Sixth, ACS asserts that “forbearance will bring the *certainty* that the parties need to reach an agreement.”⁶ This turns logic on its head. A commercial agreement creates certainty. It is this certainty, in fact, that largely motivates GCI to seek a commercial agreement and to voluntarily offer rates higher than current TELRIC rates. Forbearance is much less certain. Indeed, ACS’s thinly-veiled threat of litigation⁷ should the Commission grant inadequate forbearance in the eyes of ACS only underscores the fragility of the forbearance process when compared with a negotiated agreement. In truth, this entire forbearance proceeding, and ACS’s fingers-crossed hopes that the Commission will provide an unjustified and unearned windfall, has blocked efforts to reach what should be a mutually beneficial commercial agreement.

Seventh, ACS’s suggestion that “the Commission should provide adequate guidance to the Regulatory Commission of Alaska (“RCA”) to revisit TELRIC rates for any areas of the Anchorage study area where forbearance is not granted” is bald, self-serving tripe.⁸ ACS claims that such action is necessary because “the current TELRIC UNE rate is based on costs averaged across the study area.”⁹ This is blatant double counting. In addition to seeking a windfall through higher rates in wire centers in which the Commission might grant forbearance – which under ACS’s averaging theory are the low cost wire centers – ACS asks the Commission to pretend that those low-cost wire centers no longer exist so it can obtain higher TELRIC rates in the remaining wire centers. But forbearance would already provide ACS more revenue from the low-cost wire centers, while preserving the scale advantages that come from operating a citywide network. Recomputing the TELRIC rate as if the forbearance wire centers did not exist belies reality, would be economically irrational, and is wholly arbitrary and capricious.

Eighth, ACS’s request for automatic forbearance for those Anchorage markets that are not affected by any relief that is granted in this proceeding is contrary to the statute. Section 160(c) commands the Commission to grant or deny a petition for forbearance within a statutory period. There is no provision for pressing the pause button until circumstances change. ACS can file a new forbearance petition if and when additional

⁶ *Id* (emphasis added).

⁷ *Id.*, at 2 (“ACS is concerned that establishment of a benchmark rate is likely to invite litigation that will inhibit the ability of the parties to negotiate a commercial UNE rate.”).

⁸ *Id.*

⁹ *Id.*

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forbearance becomes appropriate. ACS's request for additional forbearance, in any event, shows that it has no intention of negotiating a commercial agreement with GCI, for such an agreement would moot any additional forbearance requests.

Ninth, ACS misrepresents the *Omaha Forbearance Order* by claiming that the Commission must consider both "both existing and potential competition."¹⁰ ACS hides in an endnote the full reading of the relevant sentence in the *Omaha Forbearance Order*, in which the Commission stated that, in addition to looking at the "facilities-based competition from Cox," its "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."¹¹ This potential competition included specifically the continued availability of access to unbundled loops, the very "potential competition" ACS is attempting to pull from the market.¹² Further, "readily" does not mean that the technology could be deployed over several years. Instead, consistent with the definition of the term "cover" in the *Omaha Order*, "readily could be present" must also mean "able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings."¹³

In all, the Commission should not countenance ACS's efforts to use the Section 160 forbearance process to charge unjust, unreasonable, and discriminatory rates, to erode consumer protection, and to undermine the public interest.

Sincerely yours,



John T. Nakahata
Brita Strandberg
Christopher Nierman
Counsel to General Communication, Inc.

cc: Tom Navin
Julie Veach
Michelle Carey

¹⁰ PowerPoint Presentation attached to ACS Ex Parte at 14 (emphasis excluded).

¹¹ *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, 19446 (¶ 62) (2005) ("*Omaha Forbearance Order*") (emphasis added).

¹² As GCI has previously discussed, the availability of resale in Anchorage does not restrain ACS's ability to charge monopoly rates in those wire centers and product markets where GCI, unlike Cox, has not yet been able to deploy its own facilities.

¹³ *Omaha Forbearance Order*, 20 FCC Rcd at 19445 (¶ 60 n.156).

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