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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area	)	WC Docket No. 06-109

PETITION FOR RECONSIDERATION OF TIME WARNER TELECOM, INC.

Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006-1238
(202) 303-1000

September 19, 2007

TABLE OF CONTENTS

Page

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PETITION FOR RECONSIDERATION OF TIME WARNER TELECOM, INC.

Time Warner Telecom, Inc. ("TWTC"), by its attorneys, hereby submits this Petition for Reconsideration of the Commission's order[1] granting in part and denying in part ACS's petition for forbearance in the Anchorage MSA in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

In its decision to forbear from dominant carrier regulation of certain so-called "broadband" services offered by ACS in Anchorage (namely, Transparent LAN, Transparent LAN Service Lite, and LAN Extension Networking Service) in the *ACS Order*, the Commission committed several basic errors. To begin with, in assessing broadband services, the Commission failed to determine whether ACS is dominant in the provision of the broadband services at issue when offered as special access. This is a strange omission since ACS itself offers loop and local

[1] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, WC Docket No. 06-109 (rel. Aug. 20. 2007) ("*ACS Order*").

transport connectivity for Transparent LAN, Transparent LAN Service Lite, and LAN Extension Networking Service as "special access" services in its FCC tariff, and the FCC has treated similar services offered by other ILECs as special access. Furthermore, as the Commission has repeatedly concluded, it is appropriate and necessary to conduct a separate assessment of an ILEC's market power in the provision of local loop and local transport services (separate and apart from an analysis of the services for which loops and local transport are inputs) since those services are the most likely source of an ILEC's ability and incentive to harm consumer welfare by raising rivals' costs and unilaterally increasing prices. Had the Commission separately assessed whether it was appropriate to forbear from dominant carrier regulation of broadband special access services, the Commission would surely have reached the same conclusion it reached with regard to TDM services offered as special access: that ACS continued to have market power over loops and transport needed to provide these services and that forbearance from dominant carrier regulation is inappropriate.

To the extent the Commission discussed broadband loop and local transport connectivity at all in the *ACS Order*, it did so for the purpose of explaining why competitors could rely on TDM special access *in lieu* of packetized or other "broadband" special access. Oddly, in reaching this conclusion, the Commission relied almost exclusively on its assessment of TWTC's ability to use TDM special access in this manner. But TWTC does not even offer service in Anchorage. In any event, there is no basis in TWTC's actual market experience for concluding that TDM special access can be relied on *in lieu* of packetized loops and transport to offer finished packetized services to end user customers on a widespread basis. Reliance on TDM inputs increases TWTC's costs, degrades service quality and increases the complexity of offering Ethernet service. Moreover, as time passes, these problems are likely to get more intractable, not less.

Finally, the Commission's analysis of the broadband services market in Anchorage suffered from still other fundamental flaws. Most obviously, the Commission understandably denied forbearance for TDM special access due to a lack of data on the level of competition in the market. But it then granted forbearance from dominant carrier regulation of broadband service without pointing to any more relevant data than was the case with TDM special access. In addition, the Commission assumed that competitors are more likely to be able to deploy their own loops and transport facilities for purposes of providing packetized services than is the case with TDM services. TWTC's experience outside of Anchorage is that this is not true, and the Commission offered no basis for concluding that it is true in Anchorage.

For all of these reasons, the Commission should revisit its analysis of whether it is appropriate to forbear from dominant carrier regulation of ACS's Transparent LAN, Transparent LAN Service Lite, and LAN Extension Networking Service in Anchorage. It should only grant forbearance if, after correcting the methodological errors described herein, it is clear that ACS has met the Section 10 standard in the relevant geographic area.

II. THE COMMISSION UNREASONABLY FAILED TO CONDUCT A FORBEARANCE ANALYSIS OF PACKETIZED SPECIAL ACCESS SERVICES.

In the *ACS Order*, the Commission decided to forbear from regulating ACS's Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, so-called "broadband services". *ACS Order* ¶¶ 98, 100. It did so without considering whether ACS has the incentive and ability to exploit control over local loop and transport facilities needed by competitors to provide these services in a manner that harms consumers and consumer welfare. The Commission's failure to consider this issue was unreasonable and inconsistent with the requirement that it ensure that continued regulation is unnecessary to protect consumers and is in the public interest. *See* 47 U.S.C. § 160(a).

To begin with, the Commission unreasonably failed to classify ACS's provision of the broadband services at issue over its loop and transport facilities as special access services, as it did with TDM services offered over the same facilities. In fact, ACS offers local connections (most importantly loops and transport) for the purpose of providing the broadband services at issue as "special access" services in its FCC tariff. Section 7 of the ACS FCC Tariff is entitled "Special Access Service." In Section 7.10, ACS offers "Transparent LAN Service" special access; in Section 7.11, ACS offers "Transparent LAN Service Lite" special access service; and in Section 7.10 ACS offers "LAN Extension Networking Service."[2]

Moreover, the Commission has previously categorized similar types of services as special access services. For example, in SBC Communications, Inc.'s (now AT&T's) Petition for Waiver, the Commission acknowledged that, "[a]ccording to AT&T, these services are provided using packet switching equipment and facilities that reach the end user through special access line connections."[3] The Commission accepted the assertion that "OPT-E-MAN is a special access service." *SBC Order* ¶ 8.

The Commission's failure to assess the extent to which ACS controls local loops and transport needed to provide broadband services to businesses caused the Commission to focus on only the services for which such loops and transport are inputs. In so doing, the Commission failed to analyze as a separate product market the loop and transport facilities that are most likely

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[2] *Letter from Karen Brinkmann to Marlene H. Dortch, Exhibit 4, Revised Exhibit C*, WC Docket No. 06-109 (filed July 25, 2007).

[3] *SBC Communications, Inc. Petition for Waiver of Section 61.42*, Order, WC Docket No. 03-250, 22 FCC Rcd 7224, n. 2 (Apr. 20, 2007) (*SBC Order*) (citing *Letter from Thomas F. Hughes, Vice President-Federal Regulatory, Core Business, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission*, WC Docket No. 03-250, at 2 (filed Dec. 22, 2005)).

to give ACS the ability and incentive to raise rivals' costs and harm consumer welfare in the provision of broadband services.

In the 2001 *Broadband Dom/Non-Dom NPRM*,[4] the Commission described the appropriate methodology for assessing an ILEC's market power. There, the Commission recognized the need to investigate each particular broadband product and geographic market to determine if a "carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the *carrier's control of an essential input, such as access to bottleneck facilities*, that its rivals need to offer their [broadband] services." *Broadband Dom/Non-Dom NPRM*. ¶ 28 (emphasis added). The Commission acknowledged that "[h]igh initial investment, economies of scale, access to customers, and the monopoly legacy of the telecommunications networks all contribute to incumbent LEC market power in the local exchange and exchange access market." *Id*. ¶ 29. To the extent that competitors must rely on loop facilities as inputs, the FCC recognized that the dominance/non-dominance inquiry must focus on "the extent to which current statutory and regulatory requirements, including any competitive safeguards" limit the incumbents' ability to raise rivals' costs. *Id*. ¶ 32.

More recently, in the *Qwest Forbearance Order*, when the Commission followed this approach when considering whether to forbear from regulating Qwest's provision of in-region long distance services on an integrated basis.[5] There, the Commission undertook a separate analysis of local connectivity (i.e., special access) and the services for which such local connectivity are inputs. In analyzing the special access market, the Commission concluded that

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[4] *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, ¶ 17 (2001) ("*Broadband Dom/Non-Dom NPRM*").

[5] *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion & Order, 22 FCC Rcd 5207 (2007) ("*Qwest Forbearance Order*").

Qwest continues to be dominant "by reason of its control over these bottleneck access facilities." *See Qwest Forbearance Order* ¶ 47. The Commission concluded that Qwest had not provided adequate evidence to show that "it no longer possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network." *Id.*

Had the Commission separately examined competition in the provision of "broadband" or packetized (the term was used interchangeably in this pleading) special access services in Anchorage, it would have discovered that the market is in fact not competitive. As the FCC and the GAO have found, the ILECs control approximately 95 percent of the facilities necessary to provide TDM and packetized services to enterprise customers.[6] In Anchorage, The FCC found that ACS controls the vast majority of bottleneck special access facilities necessary to serve the enterprise market in Anchorage. ACS provides **[begin proprietary] [end proprietary]** DS1 and **[begin proprietary] [end proprietary]** DS3 "special access circuits as wholesale inputs to other carriers, including ACS's long distance, Internet access, and wireless affiliates." *ACS Order* ¶ 51. Moreover, GCI and Alascom, the two main competitors to ACS in Anchorage "rely heavily on ACS for wholesale special access services" to serve the enterprise market. *Id.* GCI must rely on ACS's wholesale inputs because "of the approximately 5000 business locations in Anchorage, it provides telecommunications services to only about **[begin proprietary] [end proprietary]** locations over its own fiber network." *Id.* ¶ 52. These facts led the Commission

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[6] *See Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, et al.,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 298 n.856 (2003), *subsequent history omitted* ("*TRO*") (stating that both "competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation's commercial office buildings are served by competitor-owned fiber loops"). *See GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 22 (Washington, D.C., Nov. 2006) ("*GAO Report*").

the conclude that, "the competitive concerns raised by ACS's conditional forbearance request preclude a finding that dominant carrier pricing and tariffing regulations are not necessary to ensure that ACS's special access services are offered on a just, reasonable, and not unjustly or unreasonably discriminatory basis." *See ACS Order* ¶ 89. The Commission offered no basis for concluding that a different result was appropriate for packetized or "broadband" special access in Anchorage.

III. THE COMMISSION'S CONCLUSION THAT COMPETITORS CAN RELY ON TDM SPECIAL ACCESS TO PROVIDE PACKETIZED SERVICES WAS BASED ON INCORRECT ASSUMPTIONS

To the extent that the Commission gave any consideration to "broadband" special access facilities, it concluded that competitors could rely on TDM inputs to provide packetized services such as Ethernet. In reaching this conclusion, the Commission relied almost entirely on an analysis of TWTC's ability to rely on TDM special access inputs to provide Ethernet service. But TWTC does not even offer Ethernet service, or any other service for that matter, in Anchorage. In any event, as TWTC has repeatedly explained, it cannot rely on TDM special access service as an input for its Ethernet services in the cities in which it does offer service.

To be sure, there are some circumstances in which TWTC has been able to rely on DS1 or DS3 TDM inputs to provide Ethernet service to off-net locations. TWTC has advertised its ability to do this. But TWTC's ability to rely on DS1 or DS3 TDM inputs to provide Ethernet service to off-net locations is *extremely limited* today *and will become less and less so in the future*. In fact, today, TWTC provides approximately **[begin proprietary] [end proprietary]**. Based on its extensive experience in this area, TWTC believes that it cannot efficiently support a higher percentage of off-net TDM facilities as inputs for Ethernet. The current percentage is likely now as high as it can be. In contrast, legacy TWTC serves approximately 75 percent of its customer locations for all products combined via off-net facilities, virtually all of which are DS1

and DS3 circuits purchased from ILECs. It is clear therefore that reliance on TDM inputs is far more difficult in the provision of Ethernet than is the case with other products.

Accordingly, while *theoretically* TWTC could use such DS1 and DS3 transmission inputs to serve any location (as explained in the TWTC press release cited in footnote 282 of the Order), the pricing and technology realities are such that *in practice* TWTC *cannot* rely on these inputs in the vast majority of cases to provide Ethernet. This is so for several fundamental reasons. *First*, when TWTC purchases TDM transmission facilities to provide Ethernet, it must pay for two sets of electronics: TDM electronics (as part of the TDM circuit) and Ethernet electronics. In addition, TWTC must send an installation engineer to install CPE needed to support Ethernet over TDM. In contrast, where TWTC purchases Ethernet transmission facilities, it only pays for one set of electronics (Ethernet electronics) and it need not send an installation engineer to the customer premises. In addition, reliance on TDM transmission facilities imposes extra, and otherwise unnecessary, integration costs on TWTC.

Second, TDM transmission facilities *are not available* in the transmission increments needed to provide Ethernet. For example, if TWTC wishes to provide a 50 Mbps Ethernet connection via TDM, it must buy at least two DS3s, each of which delivers 45 Mbps of capacity. This is because TDM circuits cannot be provisioned in 50 Mbps increments. As of a result of purchasing two DS3s, therefore, TWTC receives 90 Mbps of capacity, 40 Mbps of which it must pay for but cannot use. In contrast, if TWTC relies on Ethernet transmission facilities purchased at wholesale, Ethernet electronics enable the wholesaler to offer the Ethernet facilities at precisely the capacity levels needed by the retail customer.

In footnote 287 of the Order, the Commission erroneously states that Ethernet supports data transfer rates in specific increments of 10, 100, 1000 Mbps (citing Newton's Telecom Dictionary), and assumes, therefore, that it would be necessary to purchase excess capacity of a

wholesale Ethernet service in the same manner that it is necessary to purchase excess capacity for TDM services. However, Ethernet increments are actually much smaller than the Order indicates, with increments as small as 5 Mbps offered by Qwest and TWTC and increments as small as 1 Mbps for mid-band Ethernet services. In light of this flexibility, Ethernet increments offered by a carrier are based on business decisions, not technical limitations. A consistent mismatch between wholesale and retail Ethernet capacity offerings would only exist if the wholesaler has an incentive to raise its rivals' costs by refusing to provide wholesale Ethernet at capacities that suit wholesale customers' needs. On the other hand, TDM increments are rigid and large because of the limitations in the technology. Therefore, a customer must "overbuy" less Ethernet than TDM.

Third, reliance on TDM transmission facilities creates serious service quality problems. The use of an extra set of electronics, needed to convert TDM into packets, introduces extra potential points of technical failure. Where a circuit experiences technical problems, TWTC must incur the extra delay and expense of determining whether the source of the problem is the TDM electronics before even addressing a problem that may have been caused by its Ethernet electronics. In contrast, reliance on ILEC Ethernet local transmission facilities reduces the number potential points of failure and reduces the time and expense of resolving such problems. For services such as Ethernet that businesses rely upon to deliver critical functionalities, this service quality differential is extremely important.

The FCC's assertion in the *ACS Order* that "obtaining wholesale TDM special access circuits and providing the Ethernet electronics can enable providers to exercise greater control over the traffic carried on those circuits" is simply incorrect. *See id.* Where TWTC attaches Ethernet electronics to a TDM circuit, TWTC has no visibility into the status of the underlying TDM circuit from TWTC's network operations center ("NOC"). Only the ILEC has visibility

into and control over the facility from its NOC. This is critical, since TWTC monitors and controls service quality via its NOC. Absent the ability to do this, TWTC has little meaningful control over the service provided to the customer.

Finally, in the longer term, as Ethernet services evolve, and they are doing so very quickly, it will become more and more difficult to ensure compatibility between TDM transmission inputs and Ethernet finished services. It is inevitable that the service characteristics of Ethernet offered over TDM will become less and less robust than Ethernet provided using Ethernet transmission facilities. For all of these reasons, therefore, there is no basis for the Commission's reliance on TWTC's market experience for the proposition that competitors in Anchorage could somehow rely on TDM special access as a means of offering packetized services on a widespread basis.

IV. THE COMMISSION'S ANALYSIS OF BROADBAND SERVICES SUFFERS FROM OTHER FUNDAMENTAL FLAWS

In addition to its failure to address ACS's control over broadband special access inputs needed to provide packetized and other services classified as "broadband" in the *ACS Order*, the Commission's forbearance analysis of broadband service suffered from at least two other basic flaws. *First*, although the FCC carefully analyzed market data as the basis for its decision not to deregulate TDM special access services, it abandoned the need for any supporting data when deciding to deregulate Ethernet. It did so without any explanation as to why market data was necessary for the TDM analysis but not for the packetized service analysis.

For example, in paragraph 83, after an analysis of the available data, the Commission states that it does not have enough data to support deregulation of TDM special access services. The Commission then cited the Qwest Forbearance Order, in which the FCC denied forbearance for any of Qwest's special access services because "'Qwest ha[d] not provided sufficient

data'…" which the Commission in that order took to include all special access services." *ACS Order* ¶ 83. Similarly, the Commission stated that ACS had not provided sufficient data to conclude that there is sufficient competition in the interstate special access services market to justify forbearance. *Id*. ¶ 84.

In paragraph 98, on the other hand, the Commission recognizes that "the record in this proceeding does not include detailed market share data." The Commission instead relies data that "*suggest* that there are a number of competitive providers for these types of services" and suggests that the market "*appears* highly competitive." *Id*. ¶ 98 (emphasis added). When the Commission again stated in the Order that there is no record evidence of market share in the packetized special access services market in Anchorage, the Commission inexplicably concludes that it is appropriate to deregulate anyway based on a series of assumptions about the retail services market. FCC provides no reasoning here for why insufficient market data is key to refraining from deregulating one area but is easily dismissed when deciding to deregulate another.

Second, in the Order, the Commission assumes that the inherent nature of Ethernet services results in larger revenues than TDM services, and therefore creates an incentive for competitive LECs to build on-net facilities. *Id*. ¶ 99. However, the Order does not support this assumption with revenue data or other analysis. Nor is it likely that it could have. The cost of building a loop does not change based on whether TDM or Ethernet service will be provided to the building via that loop. In both cases, the services ordered by customers in the building must be sufficient to support the cost of building the loop. Nothing about the Ethernet service makes the proposition of building a loop easier, less costly, or less in need of a return on the investment.

TWTC's experience outside of Anchorage is instructive is this regard. TWTC earns **[begin proprietary] [end proprietary]** For example, TWTC charges at retail under a generally

available discount, **[begin proprietary] [end proprietary]** per month in its largest markets for Internet access on a one year term with a DS3 (45 Mbps) of bandwidth. Two such circuits therefore yield **[begin proprietary] [end proprietary]** in revenue for 90 Mbps. In contrast, TWTC charges at retail under a generally available discount across all of its legacy markets, **[begin proprietary] [end proprietary]** per month on a one year term for a 50 Mbps switched Ethernet loop and **[begin proprietary] [end proprietary]** for the cross-connect, amounting to a total of **[begin proprietary] [end proprietary]** for two loops of 100 Mbps total bandwidth. As this example illustrates, there is no basis in the marketplace for concluding that Ethernet service generates greater revenues or lower loop deployment costs. It is therefore no more likely that a competitor could deploy loops to provide Ethernet than is the case when providing TDM-based services.

V. CONCLUSION

For the reasons stated above, the Commission should reconsider its forbearance decision in the *ACS Order*.

Respectfully submitted,

/s/

Thomas Jones
Jonathan Lechter
Karen Henein
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM, INC.

September 19, 2007

CERTIFICATE OF SERVICE

I, Karen Henein, do hereby certify that on this 19th day of September, 2007, I caused to be served a true copy of the foregoing Petition for Reconsideration by delivering copies thereof via overnight-delivery to the following:

ACS of Anchorage, Inc.
Karen Brinkmann
Anne Robinson
Patrick Wheeler
Latham & Watkins, LLP
555 11th Street, N.W., Suite 1000
Washington, D.C. 20004
202-637-2200

GCI Communications, Inc.
John T. Nakahata
Brita Strandberg
Christopher P. Nierman
Harris, Wiltshire & Grannis LLP
1200 18th Street N.W., Suite 1200
Washington D.C. 20036
202-730-1300

Council of the Great City Schools
Michael Casserly
1301 Pennsylvania Avenue, NW, Suite 702
Washington, DC 20004
202-393-2427

CompTel
Mary C. Albert
900 17th Street, N.W., Suite 400
Washington, D.C. 20006
202-296-6650

Cbeyond, Inc.
William Weber
320 Interstate North Parkway, SE
Atlanta, Georgia 30339
678-370-2327

Sprint Nextel Corporation
John E. Benedict
401 Ninth Street, N.W.
Suite 400
Washington, DC 20004
202-585-1910

Broadview Networks et al.
Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
202-955-9600

NENA
James R. Hobson
Miller & Van Eaton, PLLC
1155 Connecticut Avenue, N.W., Suite 1000
Washington, D.C. 20036-4320
202-785-0600

NCTA
Daniel L. Brenner
25 Massachusetts Ave, N.W., Suite 100
Washington, DC 20001
202-222-2300

/s/

Karen Henein