

**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)	WC Docket No. 06-109
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)	

PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.106 of the Commission’s rules,¹ ACS of Anchorage, Inc. (“ACS”) hereby seeks limited reconsideration of the Commission’s Memorandum and Order, released August 20, 2007, in connection with ACS’s forbearance petition in the above-captioned docket (“Forbearance Petition”).

I. INTRODUCTION AND SUMMARY

The Commission, in its August 20, 2007 Memorandum and Order (“Order”), granted ACS partial forbearance from applying certain dominant carrier regulations to ACS’s provision of interstate switched access services and residential broadband services in the Anchorage, Alaska incumbent local exchange carrier (“ILEC”) study area subject to a number of conditions.² The Order additionally granted forbearance from certain aspects of dominant carrier

¹ 47 C.F.R. § 1.106.

² *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*

regulation and certain Computer Inquiry requirements as applied to specified enterprise broadband services currently offered by ACS.³ The Commission denied any relief with respect to special access services or enterprise broadband services not currently offered,⁴ despite the absence of record opposition from any customer or carrier in the market. The Order specified that ACS's future universal service contributions must be calculated based on a frozen subscriber line charge ("SLC") amount, even if ACS reduces the SLC charged to customers.

In this Petition, ACS seeks reconsideration of three aspects of the Order. *First*, the Commission departed from precedent and overlooked record evidence when it denied forbearance relief from certain dominant carrier regulations as applied to special access services. The Commission applied an unprecedented and unworkable standard for analyzing the special access market, requiring separate analysis of each customer location. The Commission also failed to give appropriate weight to the evidence presented of the competitiveness of the special access market in Anchorage, and rejected ACS's proposal for downward-only pricing flexibility without adequate explanation.

Second, ACS seeks reconsideration of the condition requiring ACS to calculate its Universal Service Fund ("USF") contributions based on a fixed SLC amount, even if its end-user revenues decrease through downward pricing adjustments. ACS believes this aspect of the Order contravenes the statutory requirements that USF contributions be equitable and nondiscriminatory, and departs from the Commission's rules linking USF contribution amounts

Study Area, Memorandum Opinion and Order, WC Docket No. 06-109 ¶ 1 (Aug. 20, 2007) ("*Order*").

³ *Id.*

⁴ *Id.*

to end-user revenues.⁵ ACS requests that the Commission treat ACS the same as its competitors in making USF contributions based on actual end-user telecommunications revenue.

Third, the Commission denied relief from dominant carrier regulation and Computer Inquiry requirements for enterprise broadband services that ACS may offer in the future, without explaining why regulation of ACS as a dominant carrier is necessary to ensure that the charges, practices, classifications or regulations for such services are just and reasonable, or enforcement of dominant carrier regulation is necessary for the protection of consumers or otherwise consistent with the public interest. ACS requests that the Commission extend the relief granted for enterprise broadband services to services that may be introduced in the future.

The Commission has found that ACS faces substantial competition in the Anchorage local exchange and exchange access market,⁶ and that GCI is the dominant provider of broadband services in the market.⁷ The requested relief is needed to enhance competition between ACS and other broadband providers, who offer services that are treated as non-dominant today, as well as non-common carrier services in the Anchorage market. The record is devoid of evidence suggesting that ACS would have any ability to harm customers or competition if the requested pricing flexibility were granted with the conditions proposed by ACS. Therefore, ACS respectfully requests that the Commission grant reconsideration as set forth in this Petition.

⁵ See 47 U.S.C. § 254(b)(4); 47 C.F.R. § 54.706.

⁶ *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 Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 ¶¶ 27, 37 (2007) (“*UNE Forbearance Order*”) (finding retail competition in Anchorage to be robust).

⁷ *Id.* ¶ 36.

II. SUMMARY OF THE ORDER

In the August 20, 2007 Order, the Commission granted ACS partial forbearance from certain dominant carrier regulations. ACS received relief from rate-of return, tariffing, discontinuance, and transfer-of-control regulations that apply to dominant carriers for both mass market and enterprise switched access services.⁸ The Commission granted switched access relief subject to a number of conditions, many of which were proposed by ACS, including capping all interstate switched access rate elements at the June 30, 2007 tariffed rates and compliance with tariffing requirements applicable to non-dominant carriers.⁹ The Commission additionally adopted a condition requiring ACS to continue to contribute to USF based on all interstate end-user telecommunications revenue and to impute its June 30, 2007 residential/single-line business and multi-line business SLC rates in calculating its interstate end-user telecom revenues in the

⁸ The Commission forbore from applying the following rules to the extent they apply to dominant carrier switched access and end-user rates: tariff filing, cost support and rate structure requirements (1.773(a)(iii), 61.38, 61.54, 61.58, 61.59), transfer of control and discontinuance procedures (63.03(b)(2), 63.71), rate-of-return regulation (Part 65), access charge rate and rate structure regulations (Part 69, Subparts A and B). *Order* ¶ 58 n.162; *id.* ¶¶ 58-63.

⁹ *See e.g., id.* ¶ 60 (ACS must cap at current levels its interstate switched access rate elements, including those charged to carriers and end-users (excluding special construction tariffs), and be subject to the same terminating interstate switched access rate benchmark that currently applies to CLECs in the territory (set at ACS's tariffed rates as of June 30, 2007)); *id.* ¶ 60 n.169 (ACS must comply with CLECs' tariffing regime, except that ACS must file tariffs for switched access and end-user rates (it may not withdraw them, as CLECs may); these tariffs may be filed either (a) on 1 day's notice, or (b) on 7 or 15 days' notice, in which case ACS will receive deemed lawful treatment for those rates); *id.* ¶ 62 (ACS must maintain the allocation of common costs assigned to ACS and its affiliates at current levels); *id.* ¶ 69 & n.200 (ACS must exit the NECA pool and withdraw from NECA tariffs for the Anchorage study area, but may keep its remaining study areas in the NECA pool); *id.* ¶ 70 (ACS must cap its SLCs at current levels in order to receive ICLS); *id.* ¶ 71 (ACS's ICLS must be calculated based on the current per-line level as of the effective date of the Order, and all ETCs, including ACS, will receive ICLS at the same per-line support amounts); *id.* ¶ 63 (ACS must comply with the discontinuance requirements and streamlined transfer of control procedures that apply to non-dominant carriers).

future, regardless of ACS's actual SLC rate imposed.¹⁰ The effect of the Commission's decision is that ACS may lower its SLCs but is required to pay into the USF based on imputed revenues, putting ACS at a distinct disadvantage compared to its wireline and wireless competitors.

In the Forbearance Petition, ACS also requested relief from certain dominant carrier regulations as applied to its interstate special access services. ACS proposed that it be regulated as a non-dominant carrier for these services subject to a commitment not to withdraw a service from its tariff without the consent of the affected customer. ACS further proposed to cap special access rates at current levels—thus a grant of ACS's petition in this respect could only give ACS the right to *reduce* special access rates. GCI supported the Forbearance Petition with those conditions.

ACS entered into the record evidence of substantial enterprise competition, including competition in the market for special access services. GCI was not required to provide evidence of its special access customers. However, the Commission denied ACS's requested relief for interstate special access services, concluding that the record evidence did not demonstrate that there was sufficient demand or supply elasticity for retail or wholesale special access services.¹¹

The Commission also denied ACS's request for forbearance from regulation as a "telecommunication service" of its packet-switched, non-ATM-based enterprise broadband services. The Commission granted relief in part from dominant carrier regulation for certain enterprise broadband services currently offered by ACS, subject to a condition to submit for

¹⁰ *Id.* ¶ 72.

¹¹ *Id.* ¶¶ 50-54, 84-85.

Commission approval an allocation of costs for regulated and non-regulated services.¹²

However, the relief granted is specific to the broadband services ACS offers today;¹³ relief was denied for broadband services ACS may offer in the future, contrary to the precedent established by Verizon's deemed granted broadband forbearance petition.¹⁴ In limiting the scope of broadband forbearance in this manner, the Commission offered no explanation as to why ACS should be deemed dominant with respect to broadband services for which it has no market share.

III. THE COMMISSION ERRED IN DENYING THE REQUESTED FORBEARANCE RELIEF FOR SPECIAL ACCESS SERVICES

ACS respectfully requests that the Commission reconsider certain aspects of the Order because reconsideration would promote competition in the Anchorage market and thus would serve the public interest. The Order contains several errors in denying relief from certain

¹² *Id.* ¶ 108. The Commission forbore from (i) section 203 of the Act and sections 61.31-61.38 of the Rules to the extent they require ACS to file tariffs (*e.g.*, complete detariffing relief granted) (*see id.* ¶ 107 n.297), and (ii) sections 63.03, 63.19, 63.21, 63.23, and 63.60-63.90 of the Rules to the extent they apply to discontinuance and transfer of control procedures of dominant carriers (*see id.* ¶ 109 & nn.300-302). ACS will be subject instead to the same treatment as non-dominant carriers for discontinuance and transfers of control. ACS remains subject to the same Title II regulatory obligations (such as universal service contributions and CPNI protection) applicable to other non-dominant telecommunications carriers. *See id.* ¶ 111.

¹³ *Id.* ¶ 95.

¹⁴ *See Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004) (“Verizon Petition”); Letter from E. Shakin to M. Dortch Re: Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket 04-440 (filed Feb. 7, 2006) (“Verizon Feb. 7, 2006 *Ex Parte* Letter”); Letter from S. Guyer to M. Dortch Re: Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket 04-440 (filed Feb. 17, 2006) (“Verizon Feb. 17, 2006 *Ex Parte* Letter”); Letter from D. May to M. Dortch Re: Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket 04-440 (filed Feb. 22, 2006) (“Verizon Feb. 22, 2006 *Ex Parte* Letter”).

aspects of dominant carrier regulation for special access services, each of which is grounds for reconsideration. The Commission committed error by (1) analyzing special access services under an unprecedented building-by-building standard, (2) finding a lack of competition in the market for special access, which is inconsistent with evidence in the record, and (3) rejecting, without sufficient justification, ACS's proposed conditions to protect special access customers and promote competition.

A. The Commission Departed from Precedent in Defining the Geographic Market for Analyzing Special Access Services

In the Order, the Commission denied ACS's requested special access relief based on its belief that the record was insufficient as to the relevant geographic market. The Order stated that a building-specific or customer-specific standard must be employed in evaluating special access competition.¹⁵ This standard is inconsistent with the Commission's precedent and is unworkable as a practical matter. The Commission and the D.C. Circuit have made clear that a building-by-building market definition is administratively unworkable.¹⁶ Indeed, the Commission explicitly rejected this approach to the Anchorage market when previously proposed by GCI.¹⁷ By this Petition, ACS requests that the Commission reconsider this aspect of the Order and instead evaluate the evidence of special access competition in the record on a

¹⁵ *Order* ¶ 35.

¹⁶ *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 545 (D.C. Cir. 2006) (describing an individual approach as "an administrative nightmare, a font of endless litigation, and an ineffective metric of impairment" (citing *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2620-25 (2005))).

¹⁷ *UNE Forbearance Order* ¶ 16 n.54.

study area-wide basis, in the same manner that the Commission considered all of ACS's other service categories.¹⁸

Applying this proposed standard is consistent with the Commission's adoption of an MSA-wide standard for evaluating special access competition in price cap carrier special access pricing flexibility petitions.¹⁹ The Commission's rules provide that pricing flexibility determinations are based on the number of collocated competitors in a wire center and not in specific buildings or customer locations.²⁰ ACS provided wire center-specific information about enterprise competition, even though the appropriate analysis for this type of relief ought to be done on a study area-wide basis.²¹

The Commission cites three merger orders to support its customer-specific basis for analyzing special access competition.²² However, each of the cited proceedings involved a merger of former competitors which could have resulted in *increased* concentration in the market, and in each of these merger orders, the parties made voluntary commitments to address

¹⁸ Order ¶ 32-34.

¹⁹ *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14260 (1999) (asserting that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition"), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

²⁰ *See, e.g.*, 47 C.F.R. § 69.709.

²¹ *See Order* ¶ 34 (granting relief regarding enterprise switched access services on a study-area basis despite GCI's arguments that pricing in the business market is customer-specific).

²² *Order* ¶ 35 (citing *AT&T Inc. and BellSouth Corporation*, Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5678 (2007); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18307 (2005); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18449 (2005)).

the specific concerns raised in the record.²³ No such concerns have been presented in Anchorage. ACS's primary competitor for enterprise customers is GCI, who supports the requested relief with the conditions ACS proposed.²⁴ ACS requests that on reconsideration, the Commission conduct an analysis based on the class of enterprise customers in Anchorage as a whole.²⁵

ACS did offer substantial evidence of GCI's known facilities throughout Anchorage.²⁶ However, it would be impossible for ACS to catalog "the availability of

²³ *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5678 (2007); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18307 (2005); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18449 (2005).

²⁴ *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*, Letter from John Nakahata, Counsel to GCI, to Marlene H. Dortch, WC Docket No. 06-109 (filed July 30, 2007).

²⁵ *E.g. Reply Comments of ACS of Anchorage, Inc., 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, at 3 (filed Sept. 11, 2006) ("ACS Reply Comments"); *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 ¶ 22 & n.63 (2005) ("Qwest Order").

²⁶ *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*, Ex Parte, WC Docket No. 06-109 (filed May 29, 2007) (submission of maps illustrating GCI's fiber facilities known to ACS).

competitive facilities to particular buildings,”²⁷ as the Commission suggests in the Order. As far as ACS is aware, the Commission never requested data on a customer-specific basis from any carrier in the market.²⁸ While ACS provided evidence of many locations of GCI facilities, only individual competitors could provide the detailed location-specific information about their own network capabilities.

ACS met its evidentiary burden consistent with applicable precedent. It would be arbitrary and capricious for the Commission to deny forbearance under Section 10 based on a novel evidentiary standard, and particularly unreasonable where ACS lacks access to the information in questions and the Commission did not request it from the relevant carriers.

B. The Evidence in the Record Is Sufficient to Demonstrate High Levels of Competition in the Special Access Market

In denying ACS’s requested relief from certain dominant carrier regulation of its interstate special access services, the Commission erroneously concluded that there was insufficient evidence of demand or supply elasticity, and insufficient evidence of relative market shares, for retail and wholesale special access services.²⁹ In making these findings, the

²⁷ Order ¶ 54.

²⁸ The Commission requested, and ACS and GCI provided, data on a wire center basis in this record. *E.g. 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, Ex Parte, WC Docket No. 06-109, Ex. D* (filed June 29, 2007) (“ACS June 29, 2007 *Ex Parte*”); *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, Ex Parte, WC Docket No. 06-109* (filed July 12, 2007).

²⁹ Order ¶¶ 50-55, 83-84.

Commission overlooked relevant evidence and reached conclusions directly contrary to the record.

1. The Commission Failed To Follow the Precedent Established in the UNE Forbearance Order and Overlooked Evidence from the Record in this Proceeding

In the Order, the Commission concluded that “a substantial amount of retail competition is based on special access inputs from ACS,”³⁰ and “place[d] particular weight on the evidence that other carriers—in particular GCI and AT&T Alascom—appear to rely heavily on ACS for wholesale special access services.”³¹ The Commission relies, as evidence of this conclusion, on data establishing that GCI and AT&T Alascom purchase more special access from ACS than does ACS’s long-distance affiliate. This range is logical, however, given GCI’s and AT&T Alascom’s positions as the predominant long-distance carriers in Anchorage.³² As ACS explained in the docket, special access is primarily used in the Anchorage market as a wholesale input for interexchange services.³³ But as the Commission found in the UNE Forbearance Order, there is substantial facilities-based competition in the local exchange market in Anchorage.³⁴ The Commission recognized GCI’s “nearly ubiquitous last-mile cable plant” and its fiber optic network, “which gives GCI additional capabilities to serve a significant

³⁰ *Id.* ¶ 84; *see also id.* ¶ 54 (“[I]t appears that the existing enterprise competition relies to a significant extent on wholesale inputs from ACS, including special access services.”).

³¹ *Id.* ¶ 51.

³² *E.g. 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, at 5 (filed May 22, 2006).*

³³ ACS June 29, 2007 *Ex Parte* 9.

³⁴ *UNE Forbearance Order* ¶ 28.

number of additional end user locations in the Anchorage study area with high-capacity or more complex telecommunications services.”³⁵

In the ACS UNE Forbearance Order, the Commission recognized that GCI’s extensive fiber optic network ensures that it can offer high-capacity and complex services to businesses.³⁶ The Commission also that recognized GCI is an effective competitor in the enterprise market, with a substantial market share of enterprise customers in Anchorage.³⁷ Moreover, ACS and GCI’s five-year UNE agreement provides GCI guaranteed access to DS0 and DS1 loops with which to provide special access.³⁸ The Commission should reconsider its findings, because the local access market is substantially competitive.³⁹

The Commission also overlooked evidence in this proceeding of retail competition in the special access market. ACS’s economic expert provided testimony regarding the price elasticity and demand elasticity of enterprise services, which includes special access.⁴⁰ This evidence is directly relevant to the Commission’s special access analysis, even though it is aggregated with enterprise switched services.⁴¹ As explained in ACS’s August 8, 2007 *ex parte* submission, Anchorage carriers serving enterprise customers typically provide a package of

³⁵ *Id.* ¶ 36.

³⁶ *Id.* ¶ 36 & n.121.

³⁷ *See, e.g., id.* ¶ 28.

³⁸ *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, Ex Parte, WC Docket No. 06-109, at 2 (filed May 24, 2007).*

³⁹ *Order* ¶ 52.

⁴⁰ Statement of Howard A. Shelanski in Support of Reply Comments of ACS of Anchorage, Inc. ¶ 11, attached as Exhibit B to ACS Reply Comments.

⁴¹ *Order* ¶ 53.

enterprise services that meets all of the communications needs of the enterprise user.⁴² The record in this proceeding illustrates that competitive facilities are prevalent in Anchorage and that enterprise customers have demonstrated their willingness and ability to change providers, as shown by GCI's success in winning enterprise customers.⁴³

Moreover, retail special access services are provided over the same network facilities as wholesale special access services, which are the same facilities that the Commission found to be competitive in many areas of Anchorage in the UNE Forbearance Order,⁴⁴ and which are now made available throughout Anchorage pursuant to commercially negotiated rates, terms and conditions.⁴⁵ Thus, facilities-based competition in the enterprise market as a whole is relevant to special access competition. Specifically, the Commission's finding that there is substantial competition for enterprise switched access services illustrates that there is also competition for enterprise special access.⁴⁶

Further, the Order erroneously concludes that retail competition in the special access market is less robust simply because the record evidence demonstrated that the market for

⁴² *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, Ex Parte, WC Docket No. 06-109, at 2 (filed Aug. 8, 2007). ("ACS Aug. 8, 2007 Ex Parte")*.

⁴³ *Order* ¶¶ 43-46.

⁴⁴ *UNE Forbearance Order* ¶¶ 28, 30.

⁴⁵ *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, Ex Parte, WC Docket No. 06-109 (filed May 23, 2007).*

⁴⁶ *Order* ¶¶ 43-46.

retail special access services is small.⁴⁷ ACS provides a very small number of special access circuits directly to end-user customers, and GCI is the only carrier that purchases intrastate special access from ACS.⁴⁸ But this does not prove that the retail market is lacking in competition. It merely shows that retail customers have other choices in Anchorage. As noted, the market for enterprise services is intensely competitive, and GCI has been found to have competitive facilities in all of the major business centers in the market.⁴⁹ The very fact that GCI stated in this record that it would not object to ACS's request for forbearance with respect to special access services subject to the conditions proposed indicates the conditions are sufficient to address any competitive concerns that the Commission may have.

Finally, the Order incorrectly overlooks the Commission's holding in the switched access context that ACS has no advantage in terms of size, costs or resources. The Commission asserted that it was unable to determine "whether ACS incurs sufficiently lower costs" in providing special access services.⁵⁰ However, in granting relief regarding mass market or enterprise switched access services, the Commission found "no record evidence to indicate that ACS possesses sufficiently lower costs or superior resources, size, financial strength, or technical capabilities."⁵¹ For the same reasons, and based on the Commission's findings in the UNE Forbearance Order, the Commission should find on reconsideration that ACS does not incur lower costs or have superior resources in providing enterprise special access services.

⁴⁷ *Id.* ¶¶ 52-54.

⁴⁸ ACS June 29, 2007 *Ex Parte* Ex. D.

⁴⁹ *UNE Forbearance Order* ¶ 36 & n.121 (finding that GCI's fiber network covers the end user locations most likely to take services economically provided over fiber).

⁵⁰ *Order* ¶ 55.

⁵¹ *Id.* ¶¶ 42, 46.

2. Market Share Data is Not a Requirement for Forbearance Relief

The Order acknowledges that market share is not essential to this type of petition.⁵² Yet, in denying the requested relief, the Commission cited ACS's inability to provide market share numbers for each special access provider in Anchorage.⁵³ ACS submitted the data it was able to obtain, which established that special access is typically a wholesale input that is used for interexchange access.⁵⁴ As ACS has explained on the record, ACS has no way of determining the ultimate use of special access services purchased by GCI, but GCI did not controvert ACS's conclusion that special access is predominantly a wholesale input.⁵⁵

The Commission should not deny special access relief when market share data is neither legally required nor practically available. Indeed, the Commission has recognized that its goals in granting pricing flexibility to price cap carriers are best served by *not* requiring ILECs to provide market share analyses.⁵⁶ For ACS, it is not merely "administratively burdensome"⁵⁷ to perform market analyses of special access competition—it is simply not feasible. The Commission has sufficient data to analyze the special access market in light of the evidence

⁵² *Id.* ¶ 85 & n.244 (citing *Qwest Order*, 20 FCC Rcd at 19423-25).

⁵³ *E.g. Order* ¶¶ 54, 55, 84.

⁵⁴ ACS June 29, 2007 *Ex Parte* 9 ("Given the relatively low UNE rates in Anchorage and the low number of intrastate special access circuits provided to GCI, it is unlikely that special access is a substitute for UNEs in Anchorage.").

⁵⁵ *Id.*

⁵⁶ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14272 (1999) ("*Pricing Flexibility Order*"); *see also* Order ¶ 84 n.242 (recognizing that market share data is not the sole evidence considered as part of market power analysis).

⁵⁷ *Pricing Flexibility Order*, 14 FCC Rcd at 14272 (noting also that market share analyses "require considerable time and expense, and they generate considerable controversy that is difficult to resolve").

submitted in this proceeding and its findings in the UNE Forbearance Order. Thus, the Commission should reconsider its denial of special access relief consistent with this evidence and the Commission's past findings.

C. The Commission Ignored Significant Precedent in Denying Relief for Special Access Services Subject to a Cap on Special Access Rates and an Obligation to Maintain the Availability of Special Access Services

ACS requests that the Commission reconsider ACS's proposed conditions to cap special access rates at the current levels, and not to withdraw special access services without the consent of the affected customer.⁵⁸ In denying special access relief, the Commission failed to acknowledge that the conditions ACS proposed directly addressed the concerns the Commission cited as a basis for denying special access relief.

In the Order, the Commission specifically cited concerns about special access rates *increasing* if relief were granted.⁵⁹ However, this ignores ACS's proposal to cap its tariffed access rates on an absolute basis.⁶⁰ The Commission also relied on vague concerns regarding non-price competition. The Commission cited no precedent for the idea that non-price factors should be considered in the Commission's determination, nor did the Commission cite any

⁵⁸ GCI is the only carrier that purchases intrastate special access in Anchorage. If the Commission was concerned about discrimination in favor of GCI, it could have extended the prohibition against withdrawing services to any other customer who is buying them. *Order* ¶ 89 & n.250. However, it would have made no sense for ACS to offer to keep services in place for potential customers when it has no knowledge of what services those customers might desire. Thus, ACS suggested that this condition be made specific to its current customer, GCI.

⁵⁹ *Id.* ¶ 88.

⁶⁰ *See, e.g., 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, Ex Parte, WC Docket No. 06-109, at 2 (filed Aug. 20, 2007). ("ACS Aug. 20, 2007 Ex Parte").*

record evidence that ACS, through non-price factors, might be able to “raise rivals’ costs,” or that “consumers may be harmed as a result.”⁶¹ To the contrary, the fact that ACS sought only downward pricing flexibility, and committed not to withdraw any services while it is in use, would ensure that consumers could not be harmed by granting the requested relief. Indeed, ACS’s sole customer for intrastate special access and principal competitor supported grant of this relief, with the conditions described above. Rejecting the requested relief on this basis was arbitrary and capricious.

In addition, the Commission incorrectly asserted that it could only allow filing tariffs on one day’s notice upon a showing of competition, and that ACS’s proposed cap would not provide adequate protection against raising costs.⁶² The Commission has reached the opposite conclusion in other proceedings. For example, in the CLEC Access Charge docket, the Commission found that terminating access providers possess “monopoly power,” but granted them tariffing relief after setting a benchmark for access rates.⁶³ On reconsideration, the Commission should similarly adopt a cap on ACS’s special access rates and grant non-dominant treatment in order to “spur more efficient local competition.”⁶⁴

In the Forbearance Petition, ACS requested pricing flexibility for special access services that is comparable to the Phase II pricing flexibility that price cap carriers are entitled to

⁶¹ *Order* ¶ 90.

⁶² *Id.* ¶ 88.

⁶³ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order, 16 FCC Rcd 9923, 9934-35 (2001) (discussing why terminating access providers may be insulated from the effects of competition); *id.* at 9941 (establishing benchmark rates for CLEC access charges).

⁶⁴ *Id.* at 9925.

seek.⁶⁵ However, an important distinction in the nature of ACS's proposal is that it seeks only downward pricing flexibility, and ACS would have no ability to raise the tariffed rate of any rate element. As ACS explained, this gives customers even more protection than is offered by price cap regulation because ACS would have no right to raise any rate element regardless of inflation or other rate decreases.⁶⁶ Additionally, ACS, as rate-of-return carrier, has never had the type of pricing flexibility that the price cap carriers enjoy. Given the substantial competition in the enterprise service market in Anchorage, special access pricing flexibility is warranted and in the public interest; however, there are no established procedures in the rules for a rate-of-return carrier to obtain such relief in the absence of forbearance.

Furthermore, in light of ACS's proposed conditions that would mandate downward-only pricing flexibility and continued availability of special access services, ACS's request for special access relief does not implicate any of the competitive issues raised in the Commission's price cap special access proceeding.⁶⁷ Unlike the pricing flexibility available to price cap carriers, the special access relief ACS requests would not give rise to claims that pricing flexibility could be used to raise rates, because ACS proposed to cap all rate elements on an absolute basis. Thus, ACS would not be able to raise some rates by decreasing others. Additionally, ACS proposed a condition not to withdraw any tariffed wholesale services currently provided without the customer's consent. Any concerns that may have been raised in the price cap carrier proceeding regarding the availability of wholesale inputs would not apply in

⁶⁵ See 47 C.F.R. § 69.727.

⁶⁶ ACS June 29, 2007 *Ex Parte* 6.

⁶⁷ *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, FCC 05-18 (rel. Jan 31, 2005).

Anchorage if the requested relief were granted.⁶⁸ Moreover, ACS is not a price cap carrier and will not obtain any special access relief from that proceeding.

Granting ACS freedom from the rate structure and pricing rules designed for dominant carriers is warranted and consistent with the public interest in light of the competitive enterprise market, the proposed rate cap, and ACS's offer to continue to make wholesale special access services available when they are in use. In fact, GCI conceded that, with such conditions, it could continue to effectively provide enterprise services.⁶⁹ Therefore, the Commission should reconsider ACS's request for limited non-dominant treatment subject to an absolute cap on special access rates and a guaranty that it will not withdraw special access services without the customer's consent.

IV. USF CONTRIBUTIONS SHOULD BE BASED ON ACTUAL SLC REVENUES, RATHER THAN FROZEN SLC LEVELS

In this proceeding, ACS agreed to cap all tariffed rates and rate elements, and the Commission permitted ACS to reduce the SLC charged to customers.⁷⁰ The Commission's grant of relief subject to the cap is consistent with the downward pricing flexibility that ACS sought in

⁶⁸ Likewise, no concerns have been raised in this proceeding regarding the provision of special access to wireless carriers or with respect to the availability of circuits with capacity greater than a DS1. See Public Notice, *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, FCC 07-123 at 2-3 (rel. July 9, 2007). Such high capacity services are not demanded in Anchorage.

⁶⁹ The Commission notes that GCI's lack of objection was conditioned on the restrictions proposed by ACS. *Order* ¶ 89 n.250. The Commission reasons that because it decided not to enforce a condition prohibiting ACS from withdrawing a special access service absent GCI's approval, GCI actually does not consent to the special access relief requested. *Id.* However, this overlooks a more obvious and reasonable solution. As discussed *supra* note 58, if the Commission was concerned about ACS's proposed condition being potentially discriminatory, it could have required ACS to make available to all CLECs the services they order, and to not withdraw them without the CLECs' consent.

⁷⁰ *Order* ¶ 70.

the Forbearance Petition. ACS stated it would continue to contribute to USF based on its interstate end-user telecommunications revenues.⁷¹ However, without justification, the Commission required ACS to use its current subscriber line charge to calculate its USF contribution going forward, regardless of actual SLC revenues.⁷² Thus, even though ACS's interstate end-user revenues could be reduced through downward end-user pricing, ACS must contribute to USF based on a frozen SLC amount. As a result, ACS could be subject to greater USF contribution obligations than competing carriers with identical interstate end-user telecommunications revenues.

This condition is arbitrary and capricious and contrary to the public interest. As the Order notes, “contributions to the universal service fund are based on end-user telecommunications revenues.”⁷³ Yet the Commission, through this requirement, divorces ACS's USF contribution requirement from actual end-user revenues. As a result, the Commission establishes a disincentive to reducing rates, inhibiting competitive benefits to consumers. Further, ACS's competitors are not subject to such a requirement, and ACS will be disadvantaged vis-à-vis competitors in the market. The Communications Act mandates USF contributions made by providers to be “equitable and nondiscriminatory.”⁷⁴ The Commission

⁷¹ *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, Ex Parte*, WC Docket No. 06-109, at 4 (filed July 25, 2007). (“ACS July 25, 2007 *Ex Parte*”).

⁷² *Order* ¶ 72.

⁷³ *Id.* ¶ 72 n.216; *see also* 47 C.F.R. §§ 54.706, 54.709.

⁷⁴ 47 U.S.C. 254(b)(4).

also ruled that competitive neutrality is an appropriate principle for USF programs.⁷⁵ The condition imposed on ACS is contrary to these core universal service principles and the Commission's rules. In order to apply the contribution mechanism in a competitively neutral manner and consistent with the Commission's contribution rules, the Commission should reconsider the imposition of the condition to contribute USF based on a frozen SLC amount, and instead allow ACS to contribute to USF based on reduced revenues that may result from a reduced SLC.⁷⁶

V. BROADBAND RELIEF GRANTED IN THE ORDER SHOULD APPLY TO ENTERPRISE BROADBAND SERVICES THAT ACS MAY OFFER IN THE FUTURE

In the Forbearance Petition, ACS sought the ability to offer non-TDM, packetized broadband services on a non-common carrier basis. Consistent with the relief granted to Verizon by operation of law, ACS sought relief for this category of services as a whole, applying to both services ACS currently offers and those it may offer in the future.⁷⁷ While the Commission granted certain forbearance relief from dominant carrier regulation for some enterprise broadband services that ACS offers today, it refused to grant relief to qualifying services that ACS might provide in the future. The Commission conceded that “mandating that ACS, but not its nondominant competitors, comply with requirements that directly limit the ability of customers to secure the most flexible service arrangements for the ACS-specified broadband services is unnecessary to prevent unjust, unreasonable, or unjustly or unreasonably

⁷⁵ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801-03 (1997).

⁷⁶ ACS July 25, 2007 *Ex Parte* 4 (explaining that ACS would impute the tariffed SLC rate when calculating its USF contribution).

⁷⁷ *Order* ¶ 93; ACS July 25, 2007 *Ex Parte* 4-5; *See* Verizon Petition; Verizon Feb. 7, 2006 *Ex Parte* Letter; Verizon Feb. 17, 2006 *Ex Parte* Letter; Verizon Feb. 22, 2006 *Ex Parte* Letter.

discriminatory rates, terms, and conditions for these services.”⁷⁸ However, the Commission in the Order inexplicably limited its forbearance to existing services, inconsistent with precedent set by Verizon’s deemed granted relief.

Significantly, the Commission failed to explain why dominant carrier requirements are necessary for future services that fall into the same category of broadband services for which forbearance is justified. Although the Commission stated that it cannot conclude that ACS “will lack market power” for new services,⁷⁹ it provided no explanation as to how ACS could have market power in a new service in a “highly competitive” market where “competitors either are providing, or readily could enter to provide, these services within Anchorage.”⁸⁰

The Commission’s goals of reducing administrative burdens and speeding the introduction of new service offerings would be furthered by applying the Order’s relief to all non-TDM, packetized broadband services offered at speeds greater than 200 kbps in each direction.⁸¹ The Commission specified that “[t]he better policy for consumers is to allow ACS to respond to technological and market developments without the Commission reviewing in advance the rates, terms, and conditions under which ACS offers these services.”⁸² By requiring ACS to petition the Commission separately for every future qualifying service, the Commission has undercut the very policy it aimed to establish. Therefore, ACS respectfully requests that the

⁷⁸ *Order* ¶ 94; *see also id.* ¶ 103.

⁷⁹ *Id.* ¶ 112.

⁸⁰ *Id.* ¶ 98.

⁸¹ *Id.* ¶ 106 (granting relief to “facilitate innovative integrated service offerings designed to meet changing market conditions and [to] increase customers’ ability to obtain service arrangements that are specifically tailored to their individualized needs”).

⁸² *Id.* ¶ 106.

Commission reconsider this aspect of the Order to extend the relief granted for currently provided enterprise broadband services to all high-speed, non-TDM, packetized broadband services that ACS may offer in the future.

VI. CONCLUSION

For the foregoing reasons, ACS urges the Commission to reconsider its Order to the limited extent indicated herein. Reconsideration is necessary in the public interest and to advance the pro-competitive, deregulatory aims of Section 10 of the Communications Act.

Respectfully submitted,

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September 19, 2007

CERTIFICATE OF SERVICE

I, Anne W. Robinson, hereby certify that, on this 19th day of September, 2007, I caused to be served a true and correct copy of the foregoing Petition for Reconsideration by delivering a copy thereof via first class mail to the parties listed below.

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