

Federal Communications Commission

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION

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

ERRATUM

Released: September 25, 2007

By the Associate Chief, Wireline Competition Bureau:

On August 20, 2007, the Commission released a Memorandum Opinion and Order, FCC 07-149, in the above-captioned proceeding. In this Erratum, we make the following corrections to that document:

1. In footnote 239, we replace "Error! Reference source not found." with the numeral "52."
2. In footnotes 310 and 331, we replace "June" with "July."

FEDERAL COMMUNICATIONS COMMISSION

Marcus Maher
Associate Chief
Wireline Competition Bureau

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MEMORANDUM OPINION AND ORDER

Adopted: August 20, 2007

Released: August 20, 2007

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein concurring in part, dissenting in part and issuing a joint statement.

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I. INTRODUCTION

1. In this order, we address a forbearance petition filed by ACS of Anchorage, Inc. (ACS) on May 22, 2006¹ pursuant to section 10 of the Communications Act of 1934, as amended (Communications Act, or the Act) in which it seeks forbearance from certain statutory and regulatory obligations that apply to it as a former monopoly telephone company.² ACS asserts that it seeks forbearance comparable to: (1) the relief that the Commission granted to Qwest Corporation (Qwest) in the Omaha Metropolitan Statistical Area (MSA);³ and (2) the relief granted to the Verizon Telephone Companies (Verizon) by operation of law on March 19, 2006.⁴ We grant the petition in part, and forbear from applying certain dominant carrier regulation to ACS's provision of interstate switched access services in the Anchorage, Alaska incumbent local exchange carrier (LEC) study area (Anchorage study area or Anchorage). We also grant its request for forbearance for mass market broadband Internet access transmission service and grant in part for certain specified enterprise broadband services that ACS offers in the Anchorage study area ACS's request for forbearance from Title II and *Computer Inquiry* requirements. These grants of

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, WC Docket No. 06-109 (filed May 22, 2006) (ACS Petition or Petition).

² 47 U.S.C. § 160. Section 10 was added to the Communications Act by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

³ ACS Petition at 3; *see also* *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19424-38, paras. 15-50 (2005) (*Qwest Omaha Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

⁴ ACS Petition at 6; *see also* *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services Is Granted by Operation of Law*, News Release, WC Docket No. 04-440 (rel. Mar. 20, 2006) (Verizon-Related News Release); *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 Forbearance Petition); Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 7, 2006) (Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter); Letter from Susanne Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 17, 2006) (Verizon WC Docket No. 04-440 Feb. 17, 2006 *Ex Parte* Letter). Appeals of this result currently are pending in the United States Court of Appeals for the District of Columbia Circuit. *See Sprint Nextel Corp. v. FCC*, Docket No. 06-1111 (D.C. Cir. filed Mar. 29, 2006).

forbearance are subject to certain conditions described below. We otherwise deny ACS's requested relief.

2. More generally, ACS states that it seeks relief similar to that which certain price cap carriers have obtained in previous forbearance proceedings. Its petition, however, raises novel issues because ACS is a rate-of-return carrier, rather than a price cap carrier. In requesting forbearance subject to certain conditions, ACS essentially is seeking to implement an alternative regulation plan for the Anchorage study area. The Commission has identified concerns that must be addressed before rate-of-return carriers' services are deregulated. For example, section 254(k) of the Act states that a telecommunications carrier "may not use services that are not competitive to subsidize services that are subject to competition."⁵ Likewise, in the *Wireline Broadband Internet Access Services Order*, the Commission found that in particular for rate-of-return carriers, treating wireline broadband Internet access transmission services as free from Title II regulation would require the allocation of regulated costs among Title II-regulated and non-Title II regulated services.⁶ Consequently, regulatory relief from pricing regulations presents difficult challenges in the rate-of-return context. These challenges must be addressed regardless of whether such relief from pricing regulation is adopted in the rulemaking or forbearance context to ensure that the relief does not have harmful consequences for ratepayers, as well as for universal service.

3. Based on the exceptional circumstances presented in the record of this proceeding, and the statutory goal of deregulation, we find that granting ACS a portion of the conditional relief it seeks is justified. One critical factor, as discussed below, is the evidence that ACS faces extraordinary facilities-based competition in the Anchorage market. Indeed, we observe that the Regulatory Commission of Alaska (Alaska Commission) itself has granted ACS significant pricing freedom with respect to intrastate rates in light of this competition,⁷ and the Commission likewise previously has granted relief from pricing regulation based on unique factors in Anchorage.⁸ We note that critical to our grant of additional relief are the conditions proposed by ACS and adopted today, which, among other things, will prohibit ACS

⁵ 47 U.S.C. § 254(k).

⁶ See, e.g., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14926-27, paras. 135-38 (2005) (*Wireline Broadband Internet Access Services Order*), petitions for review pending. *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005). The rates of price cap carriers are governed by their price cap index and actual price index calculations, which are unrelated to the carriers' earnings. Additionally, when a price cap carrier exercises pricing flexibility, it is prohibited thereafter from making a low-end adjustment in any portion of its service region. 47 C.F.R. § 69.731. This prohibition limits the ability of such carrier to use a reduction in earnings to increase its price cap index and consequently its rates. We note that, although extremely rare, price cap carriers retain the right to make an above cap filing. *Id.* § 61.45(g). Any such filing would have to be justified with a cost showing that demonstrated a reasonable allocation of regulated costs among the services granted Title II relief in the *Wireline Broadband Internet Access Services Order* and a carrier's other regulated services. See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14927, para. 137.

⁷ ACS Petition at 54.

⁸ *ATU Telecommunications Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission's Rules*, CPD 98-40, Order, 15 FCC Rcd 20655 (2000).

from increasing its interstate rates for switched access services either generally or for specific rate elements, and will require ACS to withdraw from the National Exchange Carrier Association (NECA) pooling functions and NECA tariffs for the Anchorage study area. Moreover, both by virtue of its commitment, adopted as a condition of forbearance, and by virtue of the Commission's forbearance from rate-of-return regulation for ACS in Anchorage, ACS no longer will have the ability to seek rate increases based on underearnings under the rate-of-return framework with respect to the categories of services for which we grant pricing relief. Further, universal service support under the Interstate Common Line Support (ICLS) mechanism for all eligible telecommunications carriers (ETCs) in Anchorage, including ACS, will be distributed on a per-line basis at the current competitive ETC per-line level.⁹ Our decision is also influenced by the fact that General Communication Inc. (GCI), ACS's primary competitor in the Anchorage market, supports ACS's proposal for conditional forbearance from dominant carrier regulation of switched access services, which we adopt today. Each of these factors, in addition to the others discussed below, is critical to our finding that forbearance meets the statutory criteria.

II. SUMMARY OF RELIEF GRANTED

4. In accordance with our responsibilities under the Act, and in light of the evidence and the conditions we adopt in this order, we grant ACS's Petition in part and deny it in part and take the following actions:

- *Interstate Switched Access Services:* We forbear from the application of the rate-of-return, tariffing, discontinuance, and transfer of control regulations that apply to dominant carriers, subject to certain conditions described below.
- *Broadband Internet Access Transmission Services:* We grant ACS forbearance for its broadband Internet access transmission service, subject to a cost allocation condition described below.
- *Interstate Special Access Services:* We deny ACS's Petition to the extent it seeks forbearance from dominant carrier regulation of its interstate special access services generally.
- *Specified Enterprise Broadband Services:* We grant in part and deny in part ACS's request for forbearance from Title II and *Computer Inquiry* requirements for certain interstate enterprise broadband services, subject to certain conditions. In all other respects, ACS's Petition is denied.

5. For the reasons discussed below, we impose the following conditions on our grant of forbearance relief with respect to ACS's interstate switched access services. Specifically, we require ACS to:

- Cap at current levels all of its switched access and end-user rate elements at the benchmark that applies to all of its competitors – ACS's tariffed rate as of June 30, 2007.
- Comply with the interstate access charge rules applicable to competitive LECs, with the exception that ACS must file tariffs for switched access and end-user rates, which may be done on one day's notice,¹⁰ subject to the rate caps identified in this order.

⁹ We also find other conditions to be warranted, as described below.

¹⁰ As explained below, if ACS files tariffs on seven or 15 days notice, it will receive deemed lawful treatment for those rates, similar to competitive LECs.

- File all contract offerings that include charges for switched access and/or end-user services as contract tariffs.
- Comply with our nondominant discontinuance and transfer of control rules.
- Exit the NECA common line pooling process and tariffs for the Anchorage study area.
- Receive universal service support under the ICLS mechanism on a per-line basis at the current competitive ETC per-line level.
- Contribute to universal service based on the June 30, 2007 subscriber line charge (SLC) rates.
- Maintain the allocation of common costs assigned to ACS and its affiliates located outside of Anchorage at current levels.

6. In addition, to avail itself of the granted forbearance relief for mass market and enterprise broadband services, ACS first must file, and have approved by the Commission, a description of how it will properly allocate the costs for these services to address the cost shifting concerns raised by that forbearance.¹¹

III. BACKGROUND

A. Regulatory Requirements

7. Title II of the Act and the Commission's implementing rules impose both economic and non-economic regulation on common carriers. The most extensive regulations are imposed on dominant carriers (*i.e.*, those with individual market power). These carriers are subject to price cap or rate-of-return regulation, and must file tariffs for many of their interstate telecommunications services – on either seven or 15 days' notice – and usually with supporting data.¹² In contrast, nondominant carriers generally are not subject to direct rate regulation and may file tariffs, on one day's notice and without cost support, that are presumed lawful.¹³ In addition, applications to discontinue, reduce, or impair service are subject to a 60-day waiting period for dominant carriers, as opposed to a 30-day period for nondominant carriers.¹⁴ Finally, dominant carriers must follow more stringent procedures under section 214 of the Act for certain types of transfers of control, while nondominant carriers are accorded presumptive streamlined treatment.¹⁵

¹¹ In addition, ACS must comply with our nondominant discontinuance and transfer of control rules with respect to its enterprise broadband services.

¹² See 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, 2188, 2191-92, 2202-03, paras. 19, 31, 40, 67 (1997); see also *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14241, para. 40 (1999) (allowing price cap LECs to file tariffs for new services on one day's notice), *aff'd WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

¹³ 47 C.F.R. §§ 1.773(a)(ii) and 61.23(c); *Tariff Filing Requirements for Nondominant Carriers*, CC Docket No. 93-36, Order, 10 FCC Rcd 13653, 13653-54, paras. 3-4 (1995) (*Nondominant Tariff Filing Order*).

¹⁴ 47 C.F.R. § 63.71(c).

¹⁵ *Id.* § 63.03(b).

8. The Act and the Commission's rules also impose certain regulation on common carriers or LECs generally, regardless of whether they are incumbents or competing carriers, and regardless of their classification as dominant or nondominant. For instance, Title II places a duty on all common carriers engaged in interstate or foreign communication by wire or radio to provide such communications services upon reasonable request and at rates and on terms and conditions that are just, reasonable, and not unjustly or unreasonably discriminatory.¹⁶ In addition, all telecommunications carriers must interconnect directly or indirectly with the facilities and equipment of other common carriers.¹⁷ All LECs, in turn, have a number of additional duties, such as the duty not to impose unreasonable or discriminatory conditions or limitations on resale of their telecommunications services,¹⁸ and the duty to provide competing telecommunications services providers with access to the LECs' poles, ducts, and conduits under just and reasonable rates, terms, and conditions.¹⁹

9. The Act and the Commission's rules impose additional obligations on incumbent LECs or on independent incumbent LECs. Incumbent LECs, in particular, must meet the interconnection, collocation, and other obligations set forth in section 251(c) of the Act and the Commission's implementing rules.²⁰ Independent incumbent LECs, including ACS, moreover, are subject to certain structural separation requirements if they wish to provide in-region, interstate, interexchange telecommunications services other than through resale.²¹

10. In addition to the economic regulation described above, Title II and the Commission's rules subject all common carriers to a variety of non-economic regulations designed to further important public policy goals and to protect consumers. These include requirements that carriers contribute to federal universal service support mechanisms on an equitable and nondiscriminatory basis,²² ensure access to telecommunications services by people with disabilities,²³ meet standards regarding the privacy of their customers' information,²⁴ and facilitate the delivery of emergency services.²⁵ All common carriers, moreover, are subject to a formal complaint process under which any person may complain to the Commission about anything the carrier may do that is contrary to the provisions of the Act.²⁶

11. ACS also is subject to certain *Computer Inquiry* requirements. Specifically, in the *Computer II* proceeding,²⁷ in response to the convergence and increasing interdependence of computer and

¹⁶ 47 U.S.C. §§ 201, 202.

¹⁷ *Id.* § 251(a)(1).

¹⁸ 47 U.S.C. § 251(b)(1).

¹⁹ *Id.* §§ 224, 251(b)(4).

²⁰ 47 U.S.C. § 251(c).

²¹ *See* 47 C.F.R. § 64.1903.

²² 47 U.S.C. § 254(d).

²³ *Id.* § 225.

²⁴ *Id.* § 222(a)-(c), (f).

²⁵ *Id.* § 222(d)(4), (g).

²⁶ *Id.* § 208.

²⁷ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff'd* (continued....)

telecommunications technologies, the Commission established a regulatory framework that distinguished between “basic services” and “enhanced services.”²⁸ The Commission determined that enhanced services were not within the scope of its Title II jurisdiction but rather were within its ancillary jurisdiction under Title I of the Communications Act.²⁹ To protect against anti-competitive behavior, the Commission, pursuant to this ancillary jurisdiction, required facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs governed by Title II of the Act.³⁰ ACS thus must offer the underlying basic service at the same prices, terms, and conditions, to all enhanced service providers, including its own enhanced services operations.³¹ We note that ACS’s *Computer Inquiry* obligations are much less extensive than those imposed on the Bell Operating Companies (BOCs).³²

B. Prior Regulatory Relief

1. Qwest Omaha Order

12. On September 16, 2005, the Commission adopted an order granting in part and denying in part a forbearance petition filed by Qwest, which sought forbearance from certain section 251 and other obligations with respect to Qwest’s operations in the Omaha MSA.³³ In the *Qwest Omaha Order*, the

(Continued from previous page) _____

sub nom. Computer and Comm’ns Indus. Ass’n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) (*CCLIA v. FCC*), cert. denied. 461 U.S. 938 (1983) (collectively referred to as *Computer II*).

²⁸ The Commission defined basic services as the offering of “a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.” *Computer II Final Decision*, 77 FCC 2d at 415-16, 420, paras. 83, 96. Enhanced services, in turn, were defined as services that “combine[] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.” *Id.* at 387, para. 5. In other words, an “enhanced service is any offering over the telecommunications network which is more than a basic transmission service.” *Id.* at 420, para. 97. Although the Commission used the term “enhanced service” in its *Computer Inquiry* decisions and the Act uses the term “information service,” the Commission has determined that “Congress intended the categories of ‘telecommunications service’ and ‘information service’ to parallel the definitions of ‘basic service’ and ‘enhanced service’ developed in [the] *Computer II* proceeding . . .” *Nat’l Cable & Telecomms Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 992-94 (2005) (*NCTA v. Brand X*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11511, para. 21 (1998).

²⁹ See, e.g., *Computer II Final Decision*, 77 FCC 2d at 435, para. 132.

³⁰ *Id.* at 475, para. 231; see *id.* at 435, para. 132 (discussing jurisdictional basis for the Commission’s *Computer II* actions); see also *CCLIA v. FCC*, 693 F.2d at 211-14 (affirming the Commission’s reliance on its ancillary jurisdiction in imposing structural safeguards on AT&T’s provision of enhanced services); *NCTA v. Brand X*, 545 U.S. at 995-97 (describing *Computer II* and stating that the Commission “remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction”).

³¹ See *CCLIA v. FCC*, 693 F.2d at 205; see also *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231. We note that the *Computer II* “unbundling” of basic services requirement is separate and distinct from the obligation, in section 251(c)(3) of the Communications Act, that incumbent LECs to provide access to unbundled network elements (UNEs). 47 U.S.C. § 251(c)(3).

³² See, e.g., *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14866-71, paras. 21-29.

³³ See, e.g., *Qwest Omaha Order*, 20 FCC Rcd at 19416, para. 2; see also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (filed June 21, 2004).

Commission held that section 251(c)(3) had been “fully implemented” nationwide³⁴ and granted Qwest forbearance from Qwest’s section 251(c)(3) unbundling obligations in nine of the 24 wire centers in the Omaha MSA. The Commission premised its relief on the state of competition and the level of competitive facilities deployment in those nine wire centers, as well as the presence of certain other regulatory safeguards, such as continued availability of section 251(c)(4) resale and section 271 access obligations.³⁵

13. Of particular relevance in the instant proceeding, the Commission also granted Qwest forbearance in part from the application of certain dominant carrier regulation in the Omaha MSA. Specifically, the Commission forbore from applying its price cap, rate-of-return, tariffing, and 60-day discontinuance and transfer of control rules to Qwest’s interstate mass market exchange access services and mass market broadband Internet access transmission services in the Omaha MSA.³⁶ The Commission denied forbearance relief with respect to Qwest’s enterprise telecommunications services, because Qwest had failed to provide sufficient information to meet the statutory forbearance criteria.³⁷

2. ACS UNE Order

14. Prior to filing its petition in the instant proceeding, ACS filed a petition with the Commission seeking relief from section 251(c)(3) unbundling obligations similar to that granted to Qwest in the *Qwest Omaha Order*.³⁸ On December 28, 2006, the Commission, in the *ACS UNE Order*, granted in part ACS’s petition for forbearance from section 251 unbundling. Subject to certain specific conditions, the Commission granted ACS forbearance from the obligation to provide unbundled loops and dedicated transport pursuant to sections 251(c)(3) and 252(d)(1) in those portions of its service territory in the Anchorage study area where it found that ACS’s main competitor in the Anchorage study area, GCI, had substantially built out its network.³⁹ First, the Commission granted ACS relief from section 251(c)(3) unbundling obligations and section 252(d)(1) pricing obligations in the five of the 11 wire centers in the Anchorage study area where it found that the level of facilities-based competition by GCI ensured that market forces would protect the interests of consumers and that such regulation, therefore, was unnecessary. Second, as a condition of the order, the Commission required ACS to make loops and certain subloops available in those five wire centers, by no later than the end of the transition period, at the same rates, terms and conditions as those negotiated between GCI and ACS in Fairbanks, Alaska until

³⁴ *Qwest Omaha Order*, 20 FCC Rcd at 19440, para. 53 (concluding that section 251(c) is “fully implemented” because the Commission has issued rules implementing section 251(c) and those rules have gone into effect).

³⁵ See *id.* at 19446, para. 62; see also 47 U.S.C. §§ 251(c)(4) (resale obligation), 271(c)(2)(B) (competitive checklist).

³⁶ See *Qwest Omaha Order*, 20 FCC Rcd at 19424, para. 15.

³⁷ *Id.* at 19426, para. 19.

³⁸ 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, WC Docket No. 05-281 (filed Sept. 30, 2005).

³⁹ *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*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959, para. 1 (2007) (*ACS UNE Order*), *appeals dismissed*, *Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); see also *Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting ACS of Anchorage, Inc. Forbearance Relief in the Anchorage, Alaska Study Area*, WC Docket No. 05-281, Public Notice, DA 07-3041 (rel. July 6, 2007) (*ACS Coverage Public Notice*) (noting that the Commission targeted relief to wire centers where GCI had at least 75 percent coverage).

commercially negotiated rates are reached. Third, the Commission provided for a one-year transition period before the forbearance grant takes effect.⁴⁰ Since that time, ACS and GCI reached an agreement, whereby ACS will continue to provide access to the specified elements in the Anchorage study area for at least five years.⁴¹

3. Prior Broadband Relief

15. In previous orders, the Commission has taken a number of other important steps aimed at easing the regulatory requirements for broadband facilities and services. Specifically, in the *Triennial Review Order*, the Commission determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including fiber-to-the-home (FTTH) loops in greenfield situations, broadband capabilities of FTTH loops in overbuild situations, the packet-switched capabilities of hybrid loops, and packet switching.⁴² In making its determination, the Commission considered, among other things, the directive of section 706 of the 1996 Act that it provide incentives for investment in broadband facilities, and concluded that these facilities should not be unbundled.⁴³ In subsequent reconsideration orders, the Commission extended this same unbundling relief to encompass fiber loops serving

⁴⁰ *ACS UNE Order*, 22 FCC Rcd at 1960, para. 2.

⁴¹ Letter from Karen Brinkmann, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed May 24, 2007) (ACS May 24, 2007 *Ex Parte* Letter); see also Letter from Karen Brinkmann *et al.*, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed June 29, 2007) (ACS June 29, 2007 *Ex Parte* Letter).

⁴² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-53, 17321-23, paras. 272-95, 537-41 (2003) (*Triennial Review Order*), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020, 19022, para. 26, vacated and remanded in part, *aff'd in part*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004), *cert. denied*, *National Ass'n Regulatory Util. Comm'rs v. U.S. Telecom Ass'n*, 125 S. Ct. 313, 316, 345 (2004), *on remand*, *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, para. 12 (2004) (*Triennial Review Remand Order*), *aff'd sub nom.*, *Covad Commc'ns. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁴³ *Triennial Review Order*, 18 FCC Rcd at 17125-27, paras. 242-44. Section 706 states, in pertinent part:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

“Advanced telecommunications capability” is defined . . .

without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

⁴⁷ U.S.C. § 157 nt.

predominantly residential multiple dwelling units (MDUs) and to fiber-to-the-curb (FTTC) loops.⁴⁴ Moreover, in the *Broadband 271 Forbearance Order*, the Commission granted the BOCs forbearance relief from the requirements of section 271 specifically for the broadband elements for which it had granted unbundling relief under section 251.⁴⁵ The Commission applied its section 10 forbearance analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.⁴⁶

16. In the *Wireline Broadband Internet Access Services Order*, the Commission, among other things, generally eliminated the Title II and *Computer Inquiry* requirements applicable to wireline broadband Internet access services offered by facilities-based providers.⁴⁷ The Commission granted this relief for wireline broadband Internet access service and its underlying broadband transmission component, whether that component is provided over all copper loops, hybrid copper-fiber loops, a FTTC or fiber-to-the-premises (FTTP) network, or any other type of wireline facilities.⁴⁸ The Commission's actions did not encompass other wireline broadband services, such as stand-alone Asynchronous Transfer Mode service (ATM), Frame Relay service, Gigabit Ethernet service, and other high-capacity special access services.⁴⁹ The Commission stated that carriers and end users traditionally have used these services for basic transmission purposes and that these services, unlike wireline broadband Internet access services, are telecommunications services under the statutory definitions and thus subject to Title II.⁵⁰

⁴⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856, 15859-61, paras. 7-9 (2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-303, paras. 9-19 (2004).

⁴⁵ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Broadband 271 Forbearance Order*), *aff'd sub nom. EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (*EarthLink v. FCC*).

⁴⁶ 47 U.S.C. § 157 nt.

⁴⁷ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14872-915, paras. 32-111.

⁴⁸ *Id.* at 14860, n.15.

⁴⁹ *Id.*

⁵⁰ *Id.*; see 47 U.S.C. § 153(43), (46). We note that issues relating to this framework are pending before the Commission in a number of proceedings. See, e.g., *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (examining the regulatory framework to apply to price cap LECs' interstate special access services, including whether to maintain or modify the Commission's pricing flexibility rules); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, Public Notice, FCC 07-123 (rel. July 9, 2007); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Incumbent LEC Broadband NPRM*) (examining what regulatory safeguards under Title II of the Act, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband services); *Computer III Further Remand Proceedings: Bell Operating Company Provision of* (continued....)

17. On December 20, 2004, Verizon filed a petition requesting that the Commission forbear from applying Title II common carrier requirements or *Computer Inquiry* rules to Verizon's broadband services.⁵¹ On December 19, 2005, the Commission, pursuant to section 10(c) of the Act, extended by 90 days (until March 19, 2006) the date by which Verizon's petition would be deemed granted in the absence of a Commission decision that the petition fails to meet the standards for forbearance under section 10(a) of the Act.⁵² By their recorded vote, two Commissioners voted for and two Commissioners voted against a Memorandum Opinion and Order granting Verizon's petition in part. Section 10(c) provides that a forbearance petition "shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one year period is extended by the Commission."⁵³ On March 20, 2006, the Commission issued a News Release announcing that the petition had been granted by operation of law.⁵⁴ At that same time, the Chairman and Commissioners issued statements expressing their views on the deemed grant of Verizon's forbearance petition.⁵⁵

IV. DISCUSSION

18. We grant in part and deny in part ACS's petition. In particular, we forbear from applying the dominant carrier rate-of-return, tariffing, discontinuance, and transfer of control regulations for interstate switched access services provided that ACS complies with certain conditions, specified below. We also grant forbearance relief for mass market broadband Internet access transmission services subject to the conditions specified below. We deny ACS's Petition to the extent it seeks forbearance from dominant carrier regulation of special access services. We also grant in part and deny in part ACS's request for forbearance from Title II and *Computer Inquiry* requirements for certain enterprise broadband services subject to certain conditions. In all other respects, ACS's Petition is denied.

(Continued from previous page)

Enhanced Services, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6046, para. 6 (1998) (inviting comment on whether the Commission should eliminate the open network architecture, comparably efficient interconnection, and other *Computer III* requirements).

⁵¹ See Verizon Forbearance Petition at 24. Subsequently, Verizon clarified the scope of forbearance relief that remained pending in light of the relief already granted in the *Wireline Broadband Internet Access Services Order*. See Verizon WC Docket No. 04-440 Feb. 17, 2006 *Ex Parte* Letter; Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter, Attach. 1.

⁵² 47 U.S.C. § 160(c); *Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (WCB 2005).

⁵³ 47 U.S.C. § 160(c).

⁵⁴ Verizon-Related News Release. *supra* note 4.

⁵⁵ Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, *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 (rel. Mar. 20, 2006) (Verizon WC Docket No. 04-440 Martin/Tate Statement); Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon's Forbearance Petition, *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 (rel. Mar. 20, 2006) (Verizon WC Docket No. 04-440 Copps Statement); Statement of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon's Forbearance Petition, *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 (rel. Mar. 20, 2006) (Verizon WC Docket No. 04-440 Adelstein Statement).

A. Forbearance Standard

19. The Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.⁵⁶ In making such determinations, the Commission also must consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."⁵⁷

B. Scope of ACS's Petition

20. As in prior orders, we focus our forbearance analysis on the specific services and legal requirements from which ACS seeks forbearance.⁵⁸ Thus, we begin by identifying the specific relief ACS requests in its petition, including the statutory provisions and the Commission regulations. First, with respect to its interstate switched access services and special access services generally, ACS seeks forbearance from dominant carrier regulations for all of the switched and special access services it offers in the Anchorage study area, and appends a list of those regulations and a summary of those rules.⁵⁹ The Petition states that ACS is not seeking a declaratory ruling that it is nondominant. With respect to mass market broadband Internet access transmission services, ACS further states that it seeks to offer residential digital subscriber line (DSL) transmission service on a non-common carrier basis.⁶⁰

21. Second, ACS seeks relief "consistent with that granted to Verizon Telephone Companies on March 19, 2006," for "broadband services."⁶¹ Specifically, ACS seeks relief from regulation as a common carrier or telecommunications service provider for any packetized broadband services it offers or may offer in Anchorage.⁶² ACS seeks the ability to offer all these services on a non-common carrier

⁵⁶ 47 U.S.C. § 160(a).

⁵⁷ *Id.* § 160(b).

⁵⁸ *Qwest Omaha Order*, 20 FCC Rcd at 19423, para. 14; *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5214, para. 11 (2007) (*Qwest Section 272 Sunset Forbearance Order*).

⁵⁹ ACS Petition at 3, App. A. ACS's Petition states that ACS would continue to be classified as an incumbent LEC in the Anchorage market. ACS further states it is not seeking a declaratory ruling that it is nondominant, but, by virtue of its requested forbearance, ACS nonetheless generally would be subject to the same regulatory treatment as nondominant carriers. ACS Petition at 3-4, App. A at 1. ACS provides two specific examples of the nondominant treatment to which it would be subject: (1) ACS "would accept" a ceiling on terminating interstate switched access rates similar to the ceiling the Commission imposed on Qwest in the *Qwest Omaha Order* under section 61.26 of the Commission's rules; and (2) like Qwest, ACS would be subject to nondominant carrier regulation of service discontinuance and transfer of control. ACS Petition at 4; *Qwest Omaha Order*, 20 FCC Rcd at 19434-36, paras. 39-41, 43.

⁶⁰ ACS June 29, 2007 *Ex Parte* Letter at 6 n.17.

⁶¹ See ACS Petition at 6-7; ACS June 29, 2007 *Ex Parte* Letter at 7-8 & Exh. A at 5; see also Letter from Karen Brinkmann and Elizabeth R. Park, Counsel for ACS Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 4-6 & Exh. C (revising Exhibit C to ACS's June 29, 2007 *Ex Parte* Letter) (filed July 25, 2007) (ACS July 25, 2007 *Ex Parte* Letter). For convenience, we refer to these as "enterprise broadband services."

⁶² ACS June 29, 2007 *Ex Parte* Letter at 7.

basis.⁶³ ACS also seeks forbearance from “the same regulation from which forbearance was sought and granted in the original Verizon petition.”⁶⁴ ACS does not seek relief from universal service contribution obligations “to the extent [it] offers broadband services that remain subject to the obligation to contribute to universal service as ‘telecommunications.’”⁶⁵

22. ACS claims that the services for which it seeks relief fall within the same two categories of services as those for which Verizon sought relief: (1) packet-switched services capable of transmitting at speeds of at least 200 kilobits per second (kbps) in both directions; and (2) non-time division multiplexing-based (non-TDM-based) optical networking, optical hubbing, and optical transmission services having the same transmission speed capabilities.⁶⁶ ACS states that it presently offers the following services within these categories on an interstate basis: Transparent Local Area Network (LAN) Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services.⁶⁷ ACS also states that it may offer in the future the following additional broadband telecommunications services on an interstate basis: Frame Relay Services, ATM Service, Optical Networking Service, Wavelength-Based Transport Service, and Remote Network Access Service.⁶⁸ ACS’s broadband forbearance request encompasses these enumerated existing and planned services as well as any other broadband telecommunication services that ACS might offer in the future in Anchorage.⁶⁹

C. Sufficiency of ACS’s Petition

23. Before we examine the merits of ACS’s Petition, we address certain procedural objections. Certain commenters in this proceeding ask the Commission to dismiss or deny the petition for lack of the

⁶³ *Id.* at 2 n.2, 7; ACS July 25, 2007 *Ex Parte* Letter at 4-6.

⁶⁴ ACS Petition at 6. Although we do not address in this order the scope of the relief granted Verizon through operation of law, we construe this part of ACS’s petition as requesting relief from the *Computer Inquiry* obligations that apply to ACS in connection with any broadband information service it may provide in Anchorage. *Cf.* Verizon Forbearance Petition at 1, 20-23 (seeking relief from the application of *Computer Inquiry* obligations with regard to Verizon’s broadband services).

⁶⁵ *See* ACS Petition at 7.

⁶⁶ *See id.*: ACS June 29, 2007 *Ex Parte* Letter at 7; ACS July 25, 2007 *Ex Parte* Letter at 4-5 (stating that ACS does not seek “enterprise broadband services” forbearance with respect to “traditional TDM-based special access services used to service business customers, such as DS1 and DS3 special access circuits”).

⁶⁷ ACS June 29, 2007 *Ex Parte* Letter at Exh. C, *as revised*, ACS July 25, 2007 *Ex Parte* Letter at Exh. C; ACS Tariff FCC No. 1, §§ 7.6, 7.10, 7.11. Although ACS’s list of its broadband services offerings also includes “Optical Transport Service,” ACS July 25, 2007 *Ex Parte* Letter, Exh. C at 2, these services appears to consist of Shared Sonet Ring Interoffice Transport Services offered at speeds of less than 200 kbps. *See* ACS Tariff FCC No. 1, § 16.4.5. These services therefore fall outside of the scope of ACS’s petition, which seeks broadband relief only for “packetized offerings of at least 200 kbps in each direction.” ACS July 25, 2007 *Ex Parte* Letter at 4.

⁶⁸ *See* ACS June 29, 2007 *Ex Parte* Letter at Exh. C, *as revised*, ACS July 25, 2007 *Ex Parte* Letter at Exh. C.

⁶⁹ *See, e.g.* ACS July 25, 2007 *Ex Parte* Letter at 6 (stating that ACS seeks forbearance with respect to broadband services meeting the definition above “whether offered by ACS now or in the future” and that ACS has listed particular services it may offer in the future “only as examples of types of services for which ACS is seeking forbearance”).

specificity in the relief requested that is necessary to provide commenters with proper notice and allow the Commission to undertake the required section 10 analysis.⁷⁰

24. We decline to reject any aspect of ACS's Petition on the grounds of ambiguity or insufficiency of pleading. No party disputes that ACS's request for forbearance includes certain services, such as mass market switched access services. Rather, the parties' concerns focus primarily on ACS's special access services. As discussed below, we deny ACS's request for forbearance from dominant carrier regulation of its special access services generally, and thus we need not reach the issue of whether the Petition should be denied for lack of clarity.⁷¹ We also reject the criticism of the petition's forbearance request with respect to enterprise broadband services based on the fact that the precise scope of forbearance deemed granted to Verizon was subject to disagreement.⁷² Rather than counseling in favor of denying the petition for lack of clarity, we find that setting forth our analysis below will help clarify the Commission's approach to this issue, although the ultimate outcome is based on the specific facts of the record here.

D. Requested Forbearance Relief Similar to *Qwest Omaha Order*

25. ACS requests conditional forbearance from dominant carrier regulation of its interstate switched and special access services, and contends that such relief would be consistent with the *Qwest Omaha Order*.⁷³ To the extent that ACS seeks relief for mass market switched access services and mass market broadband Internet access transmission services, its request falls within the same category of services for which relief was granted to Qwest. ACS also requests forbearance relief for enterprise switched access services and special access services, and thus seeks forbearance relief that goes beyond that granted in the *Qwest Omaha Order*. For the reasons explained below, the evidence in this proceeding enables us, consistent with the criteria of section 10, to grant ACS the conditional forbearance relief it seeks for both mass market and enterprise switched access and end-user services. We otherwise deny ACS's request for forbearance relief similar to that granted in the *Qwest Omaha Order*.⁷⁴

⁷⁰ See GCI Motion to Dismiss at 1; Time Warner Telecom Comments at 2. Other commenters endorse GCI and Time Warner Telecom's positions regarding the lack of clarity. See, e.g., Sprint Nextel Reply at 1-2 (sharing the concerns of GCI and Time Warner Telecom that the scope of forbearance sought in the Petition is unclear); Broadview Reply at 2 n.5 (concurring in the arguments of GCI and Time Warner Telecom that ACS has not defined the relief it seeks with sufficient precision).

⁷¹ For the reasons described above, we deny GCI's Motion to Dismiss. We therefore do not reach the question of whether a petitioner's subsequent submissions can enlarge the scope of its initial section 10 forbearance petition. We note, however, that, although a forbearance petitioner of course may clarify or narrow the scope of a forbearance request through subsequent submissions, it would raise difficult questions if a forbearance petitioner's subsequent submissions could enlarge the scope of its initial section 10 forbearance petition to include whole categories of additional services like special access if they were not encompassed in its initial petition. See, e.g., ACS May 24, 2007 *Ex Parte* Letter at 2 ("The Petition unambiguously seeks relief as to the Anchorage market"); ACS Reply at 14 (identifying special access services as part of ACS's request for relief); ACS June 29, 2007 *Ex Parte* Letter at 4, 8.

⁷² GCI Motion to Dismiss at 4 (citing ACS Petition, App. A at 5; Verizon WC Docket No. 04-440 Martin/Tate Statement; Verizon WC Docket No. 04-440 Copps Statement; Verizon WC Docket No. 04-440 Adelstein Statement); see also Time Warner Telecom Comments at 2.

⁷³ See ACS Petition at 3-4; ACS Reply at 13-14; ACS June 29, 2007 *Ex Parte* at 3.

⁷⁴ We address separately ACS's request for forbearance relief for enterprise broadband services comparable to what Verizon was granted by operation of law. See *infra* Part IV.E.

26. ACS states that it does not seek a declaratory ruling that it is nondominant.⁷⁵ Nevertheless, we recognize the strong relationship between the statutory forbearance criteria and the Commission's dominance analysis, particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers through dominant carrier regulations.⁷⁶ Specifically, section 10(a)'s mandate to forbear for a "telecommunications service, or class of . . . telecommunications service" in any or some of a carrier's "geographic markets"⁷⁷ closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively. Accordingly, as we evaluate the dominant carrier regulations at issue pursuant to the section 10 standard below, our inquiry is informed by the Commission's traditional market power analysis.⁷⁸

1. Threshold Market Analysis

a. Services for Which Forbearance Is Requested

27. ACS proposes that we focus our analysis on the services that the Commission identified in the *Qwest Omaha Order* -mass market and enterprise market services, with mass market services subdivided into interstate exchange access services and broadband Internet access transmission services.⁷⁹ As discussed in greater detail below, for the purposes of this proceeding, and consistent with the *Qwest Omaha Order* framework,⁸⁰ we separately consider: (1) mass market switched access services; (2) mass market broadband Internet access transmission services; (3) enterprise switched access services; and (4) special access services.

28. *Mass Market.* For the purposes of evaluating Qwest's request for relief from dominant carrier regulation in the *Qwest Omaha Order*, the Commission separately analyzed mass market switched access services and mass market broadband Internet access transmission services.⁸¹ No party challenges the reliance on this precedent, and we adopt the same approach for the instant proceeding.⁸² For the reasons given in the *SBC/AT&T Order* and *Verizon/MCI Order*, we reject ACS's suggestion that we

⁷⁵ See, e.g., ACS June 29, 2007 *Ex Parte* Letter at 3 (stating that ACS has not requested a finding that it is nondominant).

⁷⁶ We are mindful that, when determining whether a carrier has market power in conducting a dominance analysis, the Commission must not limit itself to market share, but instead must look to all four factors that the Commission traditionally considers, or explain its departure from this traditional analysis. See *AT&T v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001). Because we do not undertake a stand-alone market power inquiry in this proceeding, this four-factor test does not bind our section 10 forbearance analysis. See *Qwest Omaha Order*, 20 FCC Rcd at 19425, para. 17 n.52. We therefore reject commenters' arguments to the contrary. See *Time Warner Telecom Comments* at 6.

⁷⁷ 47 U.S.C. § 160(a).

⁷⁸ See *Qwest Omaha Order*, 20 FCC Rcd at 19425, para. 17 n.52.

⁷⁹ ACS Petition at 20-21; *Qwest Omaha Order*, 20 FCC Rcd at 19426-28, paras. 20-22.

⁸⁰ We also separately identify and analyze enterprise broadband services for purposes of our analysis of ACS's request for forbearance comparable to what Verizon was granted by operation of law.

⁸¹ *Qwest Omaha Order*, 20 FCC Rcd at 19427-28, para. 22.

⁸² Unlike prior market power decisions, which included local exchange service and exchange access services in the same product market, here we only examine exchange access services because section 10(a) focuses our inquiry on the target services to which our regulations apply, consistent with the Commission's approach in the *Qwest Omaha Order*. *Id.* at 19427, para. 22 n.64.

should include e-mail and instant messaging in our analysis of mass market services.⁸³ We also decline to include facilities-based voice over Internet Protocol (VoIP) service and wireless service as close substitute products in our analysis, since there is no data in the record that justifies including such services in our analysis. Accordingly, we will separately consider mass market switched access services and mass market broadband Internet access transmission services.

29. *Enterprise Market.* In the *Qwest Omaha Order*, the Commission explained that, because the record in that proceeding did not generally provide a more granular break-down between small and large businesses or other categories, the Commission did not attempt to analyze enterprise services at a more disaggregated level.⁸⁴ In addition, because the Commission found insufficient basis in the record to grant forbearance from dominant carrier regulation of enterprise services, it found that a more granular breakdown was unnecessary. In more recent orders, the Commission has separately analyzed retail enterprise services and special access services.⁸⁵ In addition, we note that commenters argue that there are additional distinct categories of retail and wholesale enterprise services in Anchorage.⁸⁶

30. As an initial matter, consistent with our precedent and the record in this proceeding, we separately analyze enterprise switched and special access services for three reasons. First, the evidence in the record suggests that enterprise customers do not view switched access services and special access services as close substitutes.⁸⁷ Second, certain of the regulations from which ACS seeks forbearance distinguish between switched and special access services.⁸⁸ Third, ACS has proposed different conditions for enterprise switched access services and special access services. The qualified and limited nature of these distinct proposed conditions necessitates distinct evaluation of these services. Separately analyzing enterprise switched access services and special access services also addresses GCI's specific concern that

⁸³ ACS Petition at 22; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18342, para. 91 n.282 (2005) (*SBC/AT&T Order*); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18484, para. 92 n.282 (2005) (*Verizon/MCI Order*).

⁸⁴ *Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50.

⁸⁵ See, e.g., *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, WC 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5678, 5697-98, paras. 28, 63-64 (2007) (*AT&T/BellSouth Order*) (separately analyzing special access services and other enterprise services).

⁸⁶ See, e.g., GCI Comments at 7 (identifying residential service, small business service, and medium and large business telecommunications service as separate retail product markets); *id.* at 11 (arguing that carrier-to-carrier switched access services should be separated from carrier-to-carrier special access services). Although we disaggregate on the basis of service categories here, we reserve the right to grant or deny a section 10 forbearance petition in its entirety based on analysis of an entire class of services as pled. See *Qwest Omaha Order*, 20 FCC Rcd at 19445, para. 61 n.161 ("We are under no statutory obligation to evaluate Qwest's Petition other than as pled . . .").

⁸⁷ For example, GCI contends that from the perspective of a retail customer, switched services and special access services are not fully substitutable. GCI Comments at 7. In addition, participants in this proceeding submitted market share data distinguishing between switched and special access services. ACS May 24, 2007 *Ex Parte* Letter, Attach. at 1-2.

⁸⁸ See generally 47 C.F.R. § Part 69, Subparts C and D (setting forth a separate special access category to which investments and expenses of providing special access are allocated).

it would be inappropriate to treat the enterprise market as a whole.⁸⁹

31. Consistent with Commission precedent, we separately analyze retail special access services and wholesale special access services.⁹⁰ The arguments raised in the record, the data presented by GCI, and the particular characteristics of the Anchorage study area all argue for such a separate analysis. Furthermore, because special access services serve as such an important input for other carriers' provision of retail enterprise services,⁹¹ we believe it is appropriate to analyze separately the extent of competition for wholesale special access services, since the requested relief would implicate wholesale special access services.⁹²

b. Geographic Scope of Analysis

32. ACS seeks forbearance in the area coextensive with the ACS Anchorage incumbent LEC study area.⁹³ ACS submits that consumers throughout the Anchorage study area have access to the same choices of service at the same retail rates.⁹⁴ In the *Qwest Omaha Order*, the Commission explained that it began its forbearance analysis of dominant carrier regulation with the proposed area of relief as the relevant geographic market, unless the record indicated compelling reasons to narrow it.⁹⁵

33. We note that no commenter opposes the use of the Anchorage study area for purposes of evaluating mass market switched access and broadband services. In addition, such an approach is consistent with that taken by the Commission in the *Qwest Omaha Order*, where the Omaha MSA was used for purposes of analyzing mass market switched access and broadband services.⁹⁶

34. With respect to enterprise switched access services, we reject commenters' contention that the Anchorage study area is overbroad for purposes of analyzing enterprise services.⁹⁷ GCI notes that pricing in the business market is customer-specific, and asserts that, if the Commission were to forbear from ACS's obligation to offer section 251 UNEs, different business customers would face different competitive alternatives depending upon the availability of GCI's facilities.⁹⁸ Although the Commission

⁸⁹ GCI Comments at 7-8.

⁹⁰ See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5676, para. 27 (defining wholesale special access services as a product market); *Verizon/MCI Order*, 20 FCC Rcd at 18447, para. 24 (same).

⁹¹ See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5676-77, para. 27 (stating that entities "needing dedicated transmission links essentially have three choices: to deploy their own facilities, to buy special access service from incumbent LECs, or to purchase such service from a competing special access provider"). See also Letter from John T. Nakahata, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 5 (filed Aug. 10, 2007) (GCI Aug. 10, 2007 *Ex Parte* Letter) (explaining that GCI's ability to compete for enterprise customers "is largely dependent on its continued access to the underlying UNE and/or special access facilities").

⁹² We note that ACS also separately seeks different, additional forbearance relief for a subset of its special access services. We analyze that distinct request for relief below. See *infra* para. 94.

⁹³ ACS Petition at 13.

⁹⁴ *Id.*

⁹⁵ *Qwest Omaha Order*, 20 FCC Rcd at 19428, para. 24.

⁹⁶ *Id.*

⁹⁷ See GCI Comments at 9; Broadview Reply at 6.

⁹⁸ GCI Comments at 9.

ultimately granted ACS forbearance from section 251 unbundling obligations in certain wire centers in the *ACS UNE Order*, it targeted that relief to those wire centers where GCI had extensive facilities deployed.⁹⁹ Thus, we do not anticipate that mass market or enterprise switched access customers will face different competitive choices throughout the Anchorage study area by virtue of the forbearance from section 251 unbundling. Likewise, ACS's commitment to offer residential and enterprise switched access services, under terms, conditions, and prices mutually agreed upon between ACS and GCI, is uniform throughout the Anchorage study area.¹⁰⁰

35. With regard to special access services, we believe for several reasons that it is necessary to perform our analysis on a more disaggregated geographic basis.¹⁰¹ First, the Commission has traditionally adopted a building-specific approach to analyzing competition in special access services.¹⁰² Second, the evidence in the record indicates that the availability of competitive facilities varies from building to building.¹⁰³ Third, the evidence indicates that prices for enterprise customers are set on a customer-specific basis. Accordingly, we reject ACS's suggestion that defining the relevant geographic market as less than the entire study area would be inappropriate.¹⁰⁴

c. Marketplace Competitors

36. *Mass Market Switched Access Services.* The record indicates that ACS faces strong competition from GCI for the provision of mass market switched access. GCI first entered the Anchorage service area in 1997, and is in the midst of a multi-phase process of upgrading its cable facilities to

⁹⁹ We also note that the forbearance was conditioned on ACS's continued offering of certain loop and subloop access alternatives. See *ACS UNE Order*, 22 FCC Rcd at 1983-85, para. 39.

¹⁰⁰ ACS May 24, 2007 *Ex Parte* Letter, Exh. Interconnection Agreement at 40. We recognize that the Commission used wire centers as the geographic areas of focus in its analysis of whether granting ACS forbearance from unbundling obligations was warranted under section 10. See *ACS UNE Order*, 22 FCC Rcd at 1967-69, paras. 14-16. As the Commission held in the *Qwest Omaha Order*, when determining whether to grant forbearance from unbundling obligations, that inquiry is informed by our unbundling precedent, rather than our dominant carrier precedent. See *Qwest Omaha Order*, 20 FCC Rcd at 19438-39, para. 50 n.129. The Commission's relevant high-capacity loop and transport UNE obligations are determined on a wire center basis. See, e.g., *Triennial Review Remand Order*, 20 FCC Rcd at 2581-85, paras. 79-85 (analyzing dedicated transport impairment at the "very detailed level" of specific routes between wire centers); see also *id.* at 2619-25, paras. 155-65 (conducting a wire center-based impairment analysis for high-capacity loops). In contrast, the Commission's approach when evaluating forbearance from dominant carrier regulations is independent of the framework used in the Commission's unbundling precedent. For the reasons described above, we do not evaluate data on the wire center basis for purposes of that distinct analysis.

¹⁰¹ These findings apply to our analysis here of special access services as a whole. The evidence persuades us that a different approach is warranted for the narrow subset of special access services addressed under ACS's additional forbearance request below. See *infra* para. 94.

¹⁰² See *AT&T/BellSouth Order*, 22 FCC Rcd at 5678, para. 31; *SBC/AT&T Order*, 20 FCC Rcd at 18307, para. 28; *Verizon/MCI Order*, 20 FCC Rcd at 18449, para. 28.

¹⁰³ GCI Comments at 9-13 (stating that defining a broader geographic market for special access would be inappropriate because UNEs often are not available as a substitute for such services).

¹⁰⁴ ACS Petition at 19. We recognize that in other contexts such as rulemaking proceedings it could be entirely appropriate for the Commission to rely on information regarding broader geographic areas, based on administrability concerns or other factors.

transition customers from UNEs to its own facilities for voice services.¹⁰⁵ Other traditional wireline competitors in the Anchorage study area include AT&T Alascom.¹⁰⁶ AT&T Alascom competes in the mass market solely using resold services obtained from ACS.¹⁰⁷ Although the Commission, in previous orders, has identified facilities-based VoIP providers and wireless carriers as market participants, there are no data in the record that justifies our including such providers in our analysis.¹⁰⁸

37. *Mass Market Broadband Service.* We find that ACS is subject to significant intermodal broadband competition in the Anchorage study area. Most notably, GCI, which offers cable modem service to virtually all mass market customers in Anchorage, is the largest provider of mass market broadband services in the Anchorage market.¹⁰⁹ In addition, ACS claims that AT&T Alascom, Clearwire, and TelAlaska are entering this market by offering broadband services over wireless facilities.¹¹⁰ Although we recognize that providers of wireless broadband services operate in the Anchorage study area, we are unable to make more detailed findings regarding these competitors due to a lack of record evidence indicating the extent and geographic scope of the services they offer.

38. *Enterprise Switched and Special Access Services.* We also find that ACS is subject to significant competition from GCI for enterprise switched access services, but lack record evidence regarding the extent to which GCI or other competitors provide special access service, particularly those that do not rely on ACS's tariffed special access offerings. GCI initially entered the Anchorage market as a long-distance carrier and competitive access provider.¹¹¹ In 1998, GCI completed the construction of its fiber optic network, which is concentrated in the Anchorage midtown and downtown areas.¹¹² GCI has been able to use its network facilities to provide competitive enterprise switched access offerings. Although we recognize GCI as an established competitor in the market for some types of enterprise services, we lack evidence to make any specific findings regarding the extent of GCI's role as a competitive provider of special access services. Although ACS claims that Dobson Cellular and Alaska

¹⁰⁵ GCI Comments, Declaration of Gina Borland (GCI Borland Decl.) Exh. B at 6, 12. GCI's cable plant footprint covers most, but not all, of the ACS Anchorage study area.

¹⁰⁶ ACS Petition at 21.

¹⁰⁷ See GCI Borland Decl. at 3; ACS Petition at 17-18.

¹⁰⁸ See *supra* para. 28.

¹⁰⁹ ACS also contends that Eyecom provides cable service in outlying areas of the Anchorage study area where GCI's broadband cable modem service is not available today, and that there is no reason to believe that Eyecom could not offer broadband service. ACS Petition at 26. We find that ACS does not appear to be subject to significant competition for broadband services from Eyecom, given ACS's admission that Eyecom does not currently offer broadband services and the lack of any record evidence that Eyecom is planning in the near future to provide such services.

¹¹⁰ ACS Petition at 26, 31.

¹¹¹ *Id.* at 14 (stating that GCI deployed "urban and long-haul fiber optic cable to serve the Anchorage enterprise market").

¹¹² GCI Comments, Declaration of Blaine Brown (GCI Brown Decl.) Exh. F at 2; *ACS UNE Order*, 22 FCC Rcd at 1981, para. 36 ("GCI also has deployed a fiber optic network which gives GCI additional capabilities to serve a significant number of additional end user locations in the Anchorage study area with high-capacity or more complex telecommunications services.").

DigiTel provide wireless enterprise switched access services in Anchorage,¹¹³ there are no data in the record that justify our including these providers, or any other providers, in our analysis.¹¹⁴

2. Market Analysis

a. Mass Market Switched Access Services

39. *Market Share.* As the Commission observed in the *ACS UNE Order*, retail competition in the Anchorage study area is robust.¹¹⁵ In its petition, ACS asserts generally that “GCI alone already has won approximately half of the overall exchange access market.”¹¹⁶ To calculate market shares, we make more specific determinations and find that ACS has [REDACTED] residential access lines for no more than a [REDACTED] percent share of the switched access mass market, compared to [REDACTED] residential access lines for GCI.¹¹⁷ Consistent with the *Qwest Omaha Order*, we find that the data ACS and GCI have submitted regarding residential customers are a reasonable proxy for the number of mass market switched access customers served by each carrier.¹¹⁸

40. *Other Factors.* In assessing demand elasticities for mass market exchange access services, we recognize here as we did in the *CLEC Access Charge Reform Order* that competitive carriers serve two distinct customer groups – end users for long distance calls, and interexchange carriers.¹¹⁹ With regard to the end user market, we find the demand elasticity in the interstate exchange access mass market

¹¹³ ACS Petition at 24.

¹¹⁴ See *infra* note 243 (stating that the record is virtually silent regarding the extent to which AT&T Alascom has deployed its own special access facilities).

¹¹⁵ *ACS UNE Order*, 22 FCC Rcd at 1975, para. 28; see also GCI Comments at 6.

¹¹⁶ ACS Petition at 21-22.

¹¹⁷ See ACS June 29, 2007 *Ex Parte* Letter at Exh. D (detailing line numbers as of April 30, 2007); Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at Exh. V (filed July 12, 2007) (GCI July 12, 2007 *Ex Parte* Letter) (detailing residential switched voice lines as of September 2006). Although GCI includes “ACS UNE-L” in its provisioning methods as of September 2006, the Commission has forbore from requiring ACS to unbundle loops in five of the 11 wire centers in the Anchorage study area. We expect that these lines are now provisioned pursuant to the commercially negotiated arrangement ACS and GCI reached, and so continue to count these lines as part of GCI’s market share. Since no carriers other than ACS and GCI provided switched access data on our record, we are unable to calculate market share figures precisely. See GCI Borland Decl. at 3 (stating that AT&T Alascom competes in the residential mass market solely using resold services obtained from ACS, and that although TelAlaska offered service in the Anchorage business market for a brief period, recent inactivity suggests it may no longer do so).

¹¹⁸ *Qwest Omaha Order*, 20 FCC Rcd at 19430, para. 28 n.78. As the Commission explained in the *Qwest Omaha Order* in a similar situation, because the parties submitted their customer data grouped in categories of “residential” customers and “business” customers, and because the economic considerations that lead to the provision of service to a residential customer are similar to the economic considerations that lead to the provision of service to a very small business customer, we find it reasonable to treat the data ACS and GCI have submitted regarding residential customers as a proxy for the number of mass market customers served by each carrier. See *id.*; ACA Petition at 29-30 n.120 (“ACS believes the residential customer information it submits is a reasonable proxy for the mass market.”).

¹¹⁹ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9938, para. 38 (2001) (*CLEC Access Charge Reform Order*).

to be high. The Commission has repeatedly found that residential customers are highly demand-elastic and willing to switch to or from their provider to obtain price reductions and desired features.¹²⁰ Nothing in this record indicates otherwise for mass market customers in Anchorage, and the growth in GCI's residential access line base and corresponding decline in ACS's base support our forbearance determination here. Furthermore, consumers in Anchorage will have the added protection of a cap on their end-user SLCs, which we adopt as a condition of the forbearance we grant ACS. Separately, with regard to the exchange access services ACS provides interexchange carriers, we previously have identified concerns stemming from the terminating access monopoly and interexchange carriers' inability to switch exchange access providers.¹²¹ Thus, as further explained below, to address these concerns, we also adopt certain conditions, including a cap on switched access rates, that will help ensure that our forbearance does not result in rates that are unjust or unreasonable.

41. With respect to supply substitutability, we find that GCI has extensive and modern facilities throughout much of Anchorage, and that its network has sufficient capacity such that GCI could easily expand the number of customers it serves. In addition, network elements unbundled pursuant to section 251(c)(3) remain available in much of Anchorage.¹²² Accordingly, we find that there is adequate supply elasticity in this market for competitors to respond to any price increase ACS might attempt.

42. *Firm Cost, Size, Resources.* The record reveals that ACS's most significant competitor in the Anchorage study area is GCI.¹²³ There is no record evidence to indicate that ACS possesses sufficiently lower costs or superior resources, size, financial strength, or technical capabilities as compared to GCI. GCI is a large business that can provide a suite of mass market switched access services that are reasonably comparable to services provided by ACS.¹²⁴

b. Enterprise Switched Access Services

43. *Market Share.* With regard to market share for these services, we find compelling that GCI has acquired [REDACTED] business switched voice lines in the Anchorage study area, compared to the [REDACTED] business retail access lines that ACS has retained.¹²⁵ As with our mass market switched access analysis, we are unable to calculate market shares precisely, given the lack of data regarding other

¹²⁰ *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3305, para. 63 (1995) (*AT&T Reclassification Order*).

¹²¹ See *Qwest Omaha Order*, 20 FCC Rcd at 19432, para. 33; *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9926-27, paras. 10-11.

¹²² We note that although GCI is now migrating its customers to its own last-mile facilities, GCI relied on UNEs as a way to enter the local exchange marketplace. See GCI Comments at 22 (noting that competition in the Anchorage study area "exists largely due to UNEs"); see also *ACS UNE Order*, 22 FCC Rcd at 1980, para. 36 n.117 (discussing GCI's migration of customers from ACS's facilities to GCI's facilities). We also note that in wire centers where UNEs are not available, ACS remains obligated under the *ACS UNE Order* to make available access to certain loops and subloops.

¹²³ ACS Petition at 14-15.

¹²⁴ See, e.g., ACS June 29, 2007 *Ex Parte* at 11; *ACS UNE Order*, 22 FCC Rcd at 1981-82, para. 36.

¹²⁵ See ACS June 29, 2007 *Ex Parte* Letter at Exh. D (detailing line numbers as of April 30, 2007); GCI July 12, 2007 *Ex Parte* Letter at Exh. V (detailing voice lines as of September 2006 based on the average number of switched voice lines per UNE or wholesale T1 leased from ACS). All figures are based on DS0 voice-grade equivalents.

carriers. Thus, considering just the data for GCI and ACS indicates an approximate [REDACTED] market share for ACS. We find that even this estimated market share suggests that there exists substantial competition for enterprise switched access services.¹²⁶

44. *Other Factors.* As with mass market switched access services, the record in this proceeding does not include data sufficient for us to estimate precisely the own-price elasticity of demand for the relevant services. However, similar to our finding above regarding the mass market, the evidence in the record is consistent with a finding that enterprise switched access customers are highly sensitive to changes in the price of switched access telecommunications services.¹²⁷ Furthermore, as a condition of the forbearance we grant ACS, enterprise customers will have the added protection of a cap on their end-user SLC charges.

45. Also similar to the evidence for mass market customers, with respect to supply substitutability, the record of competition in this proceeding and the other market-opening regulations that remain in place support the finding that supply elasticity is high. With respect to business customers, as with mass market customers, GCI has the ability to serve customers over its own facilities in many instances.¹²⁸ Moreover, in those areas of the Anchorage study area where GCI has fewer facilities capable of being used to provide exchange access services, network elements unbundled pursuant to section 251(c)(3) remain available.¹²⁹

46. *Firm Cost, Size, Resources.* As compared to GCI in relation to the provision of interstate enterprise switched access services, as explained above, there is no record evidence to indicate that ACS possesses sufficiently lower costs or superior resources, size, financial strength, or technical capabilities than GCI as relevant here.

c. Mass Market Broadband Internet Access Transmission Services

47. *Market Share.* We evaluate ACS's request for forbearance for its DSL transmission service consistent with the Commission's findings in the *Wireline Broadband Internet Access Services Order*. In that order, the Commission found that the market for broadband Internet access services is "an emerging market" and that broadband providers would continue to be subject to actual and potential competition by intermodal and intramodal competitors.¹³⁰ The Commission further found that "snapshot data . . . may quickly and predictably be rendered obsolete as this market continues to evolve."¹³¹ Although our

¹²⁶ Particularly in light of the Anchorage enterprise market, where there is modest demand for high capacity services, and the fact that the switched access services supplied to enterprise customers are relatively homogenous, we do not draw distinctions among the enterprise customers with respect to their purchase of switched access services. See, e.g., *ACS UNE Order*, 22 FCC Rcd at 1981, para. 36.

¹²⁷ For example, ACS states that 525 local exchange customers switched to GCI in a single day following an ACS price increase. ACS Petition at 32. See also *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5228, para. 38.

¹²⁸ *ACS UNE Order*, 22 FCC Rcd at 1979-82, paras. 35-36.

¹²⁹ See *id.* at 1972, para. 23.

¹³⁰ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50.

¹³¹ *Id.* Cf. *Application of Worldcom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to Worldcom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18036-37, paras. 17-18 (1998) (*Worldcom/MCI Order*); cf. also Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, § 1.521 (Apr. 2, 1992, revised Apr. 8, 1997) (*DOJ/FTC Horizontal Merger Guidelines*) ("Market concentration and market share data of necessity are based on historical evidence. (continued....)")

analysis does not rely solely on static market share data, we note that the available information regarding the Anchorage market is consistent with the Commission's general conclusions in the *Wireline Broadband Internet Access Services Order*. No party disputes ACS's assertion that GCI is the largest provider of mass market broadband services in Anchorage, and GCI recognizes the significant role that it plays in the retail market generally.¹³² ACS submits estimated data that GCI has an even greater share of the mass market for broadband Internet access services than for switched access. In particular, ACS estimates that GCI has a market share of [REDACTED] percent of this market.¹³³ ACS admits that broadband subscriber data for the Anchorage market is not readily available and has not supported its methodology in making this estimate. Therefore, although we are unable on this record to determine any specific percentage, we note that GCI has not challenged this estimate.¹³⁴ Moreover, the factual conclusions in the *ACS UNE Order* likewise indicate that GCI is the leading provider of broadband Internet access services.¹³⁵

48. *Other Factors.* We find that demand substitutability and elasticity for mass market broadband Internet access services also are high. The record here is consistent with the Commission's findings in recent decisions that customers have the ability and willingness to choose between competing DSL and cable modem services.¹³⁶ In terms of supply elasticity, we find that GCI's entry over the last several years into the broadband market and its current market position indicate that GCI is capable of quickly serving additional customers should ACS attempt to raise the price of its wireline broadband Internet access services. Indeed, as the Commission found in the *ACS UNE Order*, GCI has "market leading broadband facilities."¹³⁷

49. *Firm Cost, Size, Resources.* As compared to GCI in relation to the provision of mass market broadband Internet access transmission services, there is no record evidence to indicate that ACS

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However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.").

¹³² See GCI Comments at 6 ("There is no question that the Anchorage market is currently highly competitive with respect to *retail* services.").

¹³³ ACS Petition at 30-31; ACS Petition, Statement of Robert G. Doucette (ACS Doucette Decl.) Exh. A at 2-3 (detailing market share of ACS's "Mass Market Broadband Connections"); ACS Petition, Statement of Howard A. Shelanski (ACS Shelanski Decl.) Exh. C at 4-5. See also ACS June 29, 2007 *Ex Parte* Letter at 9-10 & Exh. E (submitting that GCI has a [REDACTED] percent market share of the broadband market).

¹³⁴ See ACS July 25, 2007 *Ex Parte* Letter at 7. ACS explains that its estimate of GCI's market share of the broadband market in the Anchorage study area is based on the assumption that market shares on a statewide basis also reflect the relative market shares in Anchorage. See *id.* We find no support for this assumption in the record, nor for other assumptions ACS makes in attempting to disaggregate residential and business broadband customers.

¹³⁵ *ACS UNE Order*, 22 FCC Rcd at 1980, para. 36; see also *id.* at para. 36 n.122 (citing Letter from Karen Brinkman, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2 (filed Dec. 6, 2006) (showing that GCI has approximately twice as many broadband Internet access services lines in Alaska as ACS); Letter from Brad Mutschelknaus and Thomas Cohen, Counsel for XO Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281, Attach. at 3 (filed Dec. 18, 2006) (stating that GCI dominates the broadband Internet access services market in the Anchorage study area)).

¹³⁶ See *Qwest Omaha Order*, 20 FCC Rcd at 19432, para. 34; *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21506, para. 22; *Incumbent LEC Broadband NPRM*, 16 FCC Rcd at 22748, para. 5; *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967, 14029, para. 167 (2005).

¹³⁷ *ACS UNE Order*, 22 FCC Rcd at 1982, para. 36.

possesses sufficiently lower costs or superior resources, size, financial strength, or technical capabilities as relevant here.

d. Special Access Services

50. *Market Share.* We are unable to determine on the record before us the market share for ACS or any other carrier for either retail or wholesale special access services in Anchorage. The Commission found in the *ACS UNE Order* that nothing on the record in that proceeding reflected any significant alternative sources of wholesale inputs for carriers in the Anchorage study area,¹³⁸ and no evidence in the instant proceeding persuades us to conclude otherwise here.

51. ACS states that it “provides a very small number of special access circuits directly to end-user customers,” and explains that it primarily supplies special access circuits as wholesale inputs to other carriers, including ACS’s own long distance, Internet access, and wireless affiliates.¹³⁹ ACS has submitted data showing that, as of May 2, 2007, it provisioned only [REDACTED] voice grade or digital data DS0, [REDACTED] DS1, and [REDACTED] DS3 special access circuits to retail customers.¹⁴⁰ In contrast, ACS provides [REDACTED] voice grade or digital data DS0, [REDACTED] DS1, and [REDACTED] DS3 special access circuits as wholesale inputs to other carriers, including ACS’s long distance, Internet access, and wireless affiliates.¹⁴¹ We place 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.¹⁴² For instance, GCI and AT&T Alascom together purchase approximately [REDACTED] times as many DS0 special access voice and data circuits, and [REDACTED] times as many DS1 and [REDACTED] as many DS3 special access circuits, as ACS sells either at retail or at wholesale to its long distance affiliate.¹⁴³

52. In addition, GCI submits that, of the approximately 5000 business locations in Anchorage, it provides telecommunications services to only about [REDACTED] locations over its own fiber network,

¹³⁸ *Id.* at 1977, para. 30.

¹³⁹ *See* ACS June 29, 2007 *Ex Parte* Letter at 9.

¹⁴⁰ *See id.* at 22.

¹⁴¹ *See id.* at Exh. D. The data above include the intrastate special access circuits GCI purchases from ACS as well as the special access ACS provides to retail customers. Although the Commission’s dominant carrier regulations do not extend to intrastate special access services, those services are relevant to the state of competition for interstate special access services. *See, e.g.*, ACS June 29, 2007 *Ex Parte* Letter at 9 (stating that ACS is unable to determine whether the intrastate special access circuits GCI orders from ACS are used to provide special access services to end-user customers or for wholesale purposes, but that they most likely are used for interexchange access rather than as a substitute for UNEs). Based on the specific data presented on the record, neither our analyses nor conclusions in this order would be different if intrastate data were excluded.

¹⁴² We also note that CMRS carriers typically depend on wholesale special access services to connect their CMRS networks to the wireline telephone network. ACS has not submitted evidence explaining whether the CMRS carriers in the Anchorage study area rely on special access inputs that do not depend either directly or indirectly on ACS’s wholesale special access offerings. *See, e.g.*, ACS June 29, 2007 *Ex Parte* Letter at Exh. D (stating that ACS provides [REDACTED] DS1 special access circuits in the Anchorage study area to CMRS carriers). Relevant to our analysis is that UNEs are not available solely to provide CMRS service. *See* 47 C.F.R. § 51.309(b).

¹⁴³ *See* ACS June 29, 2007 *Ex Parte* Letter at Exh. D.