

**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	)	

**REPLY TO COMMENTS TO ACS PETITION FOR RECONSIDERATION**

ACS of Anchorage, Inc. (“ACS”) hereby replies to the Comments filed by General Communication, Inc. (“GCI”)<sup>1</sup> in response to ACS’s Petition for Reconsideration in the above-captioned docket. In its Petition for Reconsideration, ACS seeks a subset of the relief requested in its forbearance petition, subject to the same conditions previously proposed by ACS. Although GCI previously stated specifically that it did not object to the forbearance relief sought by ACS subject to the proposed conditions,<sup>2</sup> it now objects to certain aspects of the relief sought. GCI’s objections, however, are unsupported by the evidence and legal precedent. The Commission should grant ACS forbearance from certain dominant carrier regulations with respect to special access services and future broadband services.

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<sup>1</sup> Comments of General Communication, Inc. on ACS’s Petition for Reconsideration, WC Docket No. 06-109 (filed Oct. 1, 2007) (“GCI Comments”). ACS treats GCI’s Comments as an opposition under Section 1.106; therefore, ACS’s reply is being filed pursuant to 1.106(h), seven days after the last day for filing oppositions. Additionally, for purposes of calculating the filing deadline for reply, ACS treats GCI’s Comments as served by mail because GCI failed to serve ACS properly with a paper copy, as required under Section 1.47(d), and ACS did not agree to accept service in any other form.

<sup>2</sup> GCI *Ex Parte* Letter, WC Docket No. 06-109 (filed Aug. 10, 2007) (“GCI Aug 10 *Ex Parte* Letter”).

**I. COMPETITIVE FACILITIES AVAILABLE IN ANCHORAGE JUSTIFY SPECIAL ACCESS RELIEF SUBJECT TO THE PROPOSED CONDITIONS**

GCI's arguments against ACS's petition for special access relief were related primarily to the availability of UNEs. Indeed, GCI withdrew its opposition to special access relief in this proceeding based on the availability of UNEs and certain conditions proposed by ACS.<sup>3</sup> However, in its Comments, GCI now opposes ACS's requested relief, arguing that the market should be defined more narrowly than the Anchorage study area and that the Commission's findings in its ACS UNE Forbearance Order are unrelated to special access. GCI is on the record withdrawing its opposition to forbearance, apparently satisfied with the conditions proposed by ACS. Its opposition raises no new issues.

GCI argues that ACS would have market power over special access customers to whom GCI does not currently have facilities, and argues that this supports a building-by-building analysis. However, GCI disregards the Commission's finding in the ACS UNE Forbearance Order that such a granular standard is administratively unworkable and unnecessary to protect

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<sup>3</sup> ACS sought relief from the following regulations as applied to both switched and special access services: (a) tariffing and rate structure requirements, and rate regulation in Part 61 and in Part 69, Subparts A and B; (b) tariff filing notice requirements and effective period for changes in Sections 61.58 and 61.59; (c) rate-of-return regulations in Part 65; (d) cost support requirements in Section 61.38; (e) requirements relating to new tariff filings in Section 1.773; and (f) rules for transfers of control and discontinuance of service in Part 63. ACS proposed that as a condition to forbearance: (i) all regulated interstate access rates would be capped at current rate levels such that ACS would be unable to increase the price of any individual access service; (ii) ACS would be required to file tariffs (including contract tariffs), but such tariffs would be effective upon one day's notice; (iii) ACS would be unable to seek an increase in rates based on changes in costs or earnings; (iv) ACS would be unable to seek an increase in universal service support; (v) ACS would exit the NECA pool; (vi) ACS would ensure that the allocation of common expenses assigned to ACS and its affiliates would remain in proportion to current levels; and (vii) ACS would not withdraw currently available interstate access services that are currently ordered by wholesale customers without the customer's consent. *See ACS Ex Parte* Letter WC Docket No. 06-109 (filed June 29, 2007); *ACS Ex Parte* Letter, WC Docket No. 06-109 (filed July 25, 2007).

consumers.<sup>4</sup> The Commission found that, even if business customers receive customer-specific pricing, ACS could not engage in price discrimination because it does not know where GCI's facilities are deployed.<sup>5</sup> While this finding was made in the UNE context, the DS1 loop facilities relied upon to provide special access are the same as those the Commission found to be available on a competitive basis in the UNE proceeding. As ACS argued in its Petition for Reconsideration, based on the available competitive facilities, and the proposed conditions to continue to make special access services available for as long as a competitive carrier in Anchorage orders the service and to cap all rate elements, there is no need to conduct a building-by-building analysis. With these proposed conditions in place, ACS would be unable to raise rates or otherwise discriminate against certain customers in the manner presumed by GCI. The public interest would be served by granting special access relief on reconsideration to allow ACS to compete more effectively against GCI.

GCI's arguments regarding the relevance of the ACS UNE Forbearance Order are entirely inconsistent with the position maintained by GCI immediately prior to the Commission's ruling. Although UNEs and special access are different services, they use the same underlying DS1 facilities, which the Commission has found to be competitively available to provide high-capacity telecommunications services to a significant number of end-user locations in Anchorage.<sup>6</sup> Thus, the Commission's analysis of GCI's competitive facilities in the ACS UNE Forbearance Order is relevant to its analysis of the special access market. Nonetheless, GCI now

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<sup>4</sup> *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 ¶¶ 16, 34, nn.54, 109 (2007) (“*UNE Forbearance Order*”).

<sup>5</sup> *Id.* at ¶ 34.

<sup>6</sup> *Id.* at ¶ 36.

argues that UNEs are unrelated to special access (even though GCI's focus in this proceeding up to the release of the Order was on the availability of UNEs). In fact, GCI's citations to support its arguments in its Comments regarding special access all relate to UNEs and to the statements and data it submitted in the ACS UNE Forbearance docket; none relate directly to special access.<sup>7</sup> Any concerns that GCI raises in its Comments regarding its ability to serve business customers over its own facilities have already been addressed and resolved in the ACS UNE Forbearance Order, the resulting interconnection agreement negotiated between ACS and GCI, and the conditions to forbearance proposed by ACS.

Further, it is unreasonable to assert that ACS has not met its burden of proof because ACS did not seek additional evidence from GCI and other parties.<sup>8</sup> ACS had no authority to require GCI or any other party to produce evidence of market share or customer data in this proceeding. The Commission did not request building-specific market data to determine the special access facilities provided by GCI. ACS would have no way to collect this data in any comprehensive way, and it was unreasonable for the Commission to deny forbearance relief on this basis. ACS nevertheless submitted into the record the anecdotal information it was able to gather, including photographic evidence of GCI's facilities reaching end-user locations and maps of GCI's fiber plant developed based on ACS's observations.<sup>9</sup> In response to a request by the Commission staff, GCI itself only provided wire center data regarding its fiber facilities and

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<sup>7</sup> See GCI Comments at 6 n.15 (citing to GCI enterprise customer data submitted in UNE docket); *see also*, GCI Comments at 4 n.12 (citing to statements of Gina Borland and G. Nanette Thompson attached to GCI's comments to ACS's Forbearance Petition, in which each argues that UNEs must be made available).

<sup>8</sup> See GCI Comments at 7.

<sup>9</sup> See *e.g.*, ACS *Ex Parte* Letter, WC Docket No. 06-109 (filed Sept. 20, 2006).

enterprise customers (originally prepared for submittal in the UNE docket).<sup>10</sup> For GCI now to argue that the Commission must conduct a building-by-building analysis is wholly inconsistent with its previous support for a grant of forbearance as requested by ACS, as well as with GCI's focus throughout this proceeding on UNE availability.

All arguments regarding GCI's access to facilities and ability to compete upon a grant of forbearance are vitiated by GCI's August 10, 2007 *ex parte* letter in which it made clear that it did not oppose ACS's request for relief with respect to switched access, special access and broadband services subject to ACS's proposed conditions. ACS therefore requests that the Commission reconsider non-dominant treatment for special access services, subject to the conditions proposed by ACS.

## **II. THE COMMISSION'S FINDING OF COMPETITION AND GRANT OF FORBEARANCE IN THE ENTERPRISE BROADBAND MARKET IN ANCHORAGE SUPPORTS THE SAME FORBEARANCE WITH RESPECT TO FUTURE BROADBAND SERVICES**

In its Petition for Reconsideration, ACS makes clear that it requests reconsideration of broadband forbearance only to the extent that the non-dominant treatment granted for specified services ACS offers today should be extended to a broader category of enterprise broadband services, namely all high-speed, non-TDM, packetized broadband services that ACS may offer in the future.<sup>11</sup> ACS does not seek any additional forbearance from dominant carrier or other regulation for current broadband services than that already granted in the Order. Further, ACS does not seek any relief that GCI has not already indicated would be acceptable. GCI's opposition to this request presents a belated challenge to the Commission's

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<sup>10</sup> Compare GCI *Ex Parte* Letter, WC Docket No. 06-109 (filed July 12, 2007) (submitting market share data as of September 2006), with GCI *Ex Parte* Letter, WC Docket No. 05-281 (filed Oct. 24, 2006).

<sup>11</sup> ACS Petition for Reconsideration, WC Docket No. 06-109 at 23 (filed Sept. 19, 2007).

finding that the enterprise broadband market in Anchorage is competitive,<sup>12</sup> and is contradicted by GCI's earlier withdrawal of opposition to the petition. Thus, GCI does not present compelling reasons to deny ACS's request for reconsideration.

**A. GCI Has Already Stated That It Can Compete In the Enterprise Broadband Market If Forbearance Is Granted With Respect to Future Services**

As an initial matter, the Commission has found that the market for enterprise broadband services is competitive in Anchorage. In granting partial relief for enterprise broadband services, the Commission relied on evidence of a number of other broadband providers in Anchorage, as well as the nature of enterprise broadband services and customers generally. Notably, the Commission relied on the fact that GCI has built competitive facilities in Anchorage, as well as evidence that other broadband providers are deploying in the market.<sup>13</sup>

GCI has failed to raise any issues regarding its ability to compete for enterprise broadband customers in this proceeding prior to ACS's Petition for Reconsideration. Because GCI's primary focus throughout much of this proceeding was on maintaining access to UNEs, it did not rebut any of ACS's statements or data regarding broadband market share or provide its own estimated market share data. GCI's only discussion of ACS's request for forbearance with respect to broadband services prior to the Commission's Order was in its *ex parte* submissions withdrawing its objection to forbearance subject to ACS's proposed conditions. Notably, in

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<sup>12</sup> GCI argues that the Commission could not make any findings regarding any enterprise broadband services, including those currently offered by ACS. GCI Comments at 9.

<sup>13</sup> *ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, WC Docket No. 06-109 ¶¶ 37, 38 (Aug. 20, 2007) (recognizing that providers of wireless broadband services, such as AT&T Alascom, Clearwire and TelAlaska, operate in the Anchorage study area, and that GCI has constructed its fiber optic network which it uses to provide competitive enterprise services).

these references, GCI states that it “has not historically purchased from ACS any of the relatively limited array of broadband services within the scope of ACS’ request that ACS offers” and that it can “provide similar broadband services on a competitive basis” in light of the UNE agreement and the conditions agreed upon by the parties.<sup>14</sup> GCI’s late attempt to challenge the Commission’s finding of broadband competition is wholly outside of the procedures for reconsideration established by the Commission’s rules. Therefore, the Commission should maintain the broadband relief granted in the Order, and extend such relief to future broadband services, as discussed in ACS’s Petition for Reconsideration.

**B. Forbearance With Respect to Future Services Is Supported by Commission Precedent**

GCI argues that the Commission cannot rely on Verizon’s “deemed granted” petition because it is irrelevant to the requirements for Section 10 forbearance.<sup>15</sup> However, Verizon’s grant by operation of law is consistent with the Commission’s treatment of newly introduced services in other contexts. The Commission has recognized that reduced regulatory obligations for new services provide carriers the incentive to develop and deploy new facilities and services, and that regulation can impede the introduction of new services. For example, in adopting price cap regulation, the Commission acknowledged that tariffing and pricing rules applicable to new services would delay the introduction of new services to the detriment of the public interest. “By definition, a new service expands the range of service options available to

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<sup>14</sup> GCI Aug 10 *Ex Parte* Letter at 5; *see also*, GCI *Ex Parte* Letter, WC Docket No. 06-109 at 3 (filed July 30, 2007) (“GCI will have the ability to provide its own competing enterprise broadband services even to locations where GCI may not have its own loop facilities” based on its access to UNEs and on the proposed conditions).

<sup>15</sup> GCI Comments at 7-8.

consumers.”<sup>16</sup> In that case, the Commission permitted price cap LECs to introduce new services subject to streamlined tariffing procedures to encourage these carriers to innovate and to develop new services.

Similarly, the Commission granted forbearance to mid-sized LECs, both price cap and rate-of-return, from the Part 69 requirements governing the introduction of new exchange access services.<sup>17</sup> The Commission reasoned that because new services may benefit some customers while existing customers continue to purchase existing services if they find the new service rate structure or rate level unattractive, enforcement of certain Part 69 regulations pertaining to new services was unnecessary to protect consumers.<sup>18</sup> Additionally, the Commission held that the public interest is served by the development and implementation of new services and that the Part 69 waivers previously required for new services imposed undue delay, placing incumbent LECs at a competitive disadvantage. “CLECs that have notice of an incumbent LEC’s Part 69 petition may be able to begin offering the service before the incumbent LEC has been granted permission to establish new rate elements for the new service, thus diminishing the incumbent’s incentives to develop and offer new services.”<sup>19</sup>

Consistent with these cases, the Commission should extend the forbearance relief granted to ACS’s future broadband services in order to encourage the development and introduction of new broadband services. As in the case of the Commission’s grant of

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<sup>16</sup> *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 US 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 ¶ 37 (1999).

<sup>17</sup> *Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd 10840 ¶ 11 (1999).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at ¶ 12.

forbearance with respect to Part 69 waivers, due to the competitive environment for broadband services, requiring ACS to seek forbearance from the same dominant carrier regulations that its existing broadband services have received would place ACS at a competitive disadvantage each time it introduces a new broadband service. The fifteen-month timeframe for forbearance for new individual broadband services would hinder ACS's ability to compete with the other broadband service providers in the market who have access to competitive facilities and can deploy new technology just as easily as ACS but without the burdensome requirements of dominant carrier regulation or the need to request forbearance.

ACS argued in its Petition for Reconsideration that there was no evidence that ACS could be dominant in future broadband services that it does not offer today. Verizon supports ACS's request, noting that forbearance from regulatory obligations is particularly appropriate for newly introduced services, because any new broadband services that ACS may offer would provide essentially the same data services, but using different technology.<sup>20</sup> Thus, any new broadband services would compete with the plethora of existing services offered by ACS and its competitors in Anchorage. Existing customer needs would continue to be met by the existing broadband services offered by ACS and its competitors in Anchorage. The dominant carrier regulations, from which the Commission has forborne for existing broadband services, are similarly unnecessary to protect consumers with respect to future broadband services.

Even if the precise future broadband services are not currently identifiable, the existing facilities over which those services would be provided have been found to be competitive. The Commission has already found that these competitive facilities and the nature

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<sup>20</sup> Comments of Verizon on Petitions for Reconsideration, WC Docket No. 06-109 at 2-4 (filed Oct. 1, 2007) ("Verizon Comments").

of broadband services support forbearance with respect to ACS's current broadband services. The Commission's assessment of enterprise broadband services in the Order applies equally to future services. If new facilities are required to deploy these new broadband services, competitive carriers can invest in new facilities just as ACS would. Carriers have the same opportunities to deploy new facilities and offer competitive services based on new technologies.<sup>21</sup>

### III. CONCLUSION

For the reasons set forth in this Reply and in ACS's Petition for Reconsideration, ACS respectfully requests that the Commission reconsider its Order to grant non-dominant treatment subject to ACS's proposed conditions for special access services, and extend the granted forbearance from dominant carrier regulations for enterprise broadband services to all high-speed, non-TDM, packetized broadband services that ACS may offer in the future.

Respectfully submitted,

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/s/ Karen Brinkmann

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October 15, 2007

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<sup>21</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 ¶¶ 272, 275 (2003) (subsequent history omitted).

**CERTIFICATE OF SERVICE**

I, Anne W. Robinson, hereby certify that, on this 15<sup>th</sup> day of October, 2007, I caused to be served a true and correct copy of the foregoing Reply to Comments to Petition for Reconsideration by delivering a copy thereof via first class mail to the parties listed below.

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