

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Petition to Establish Procedural Requirements)
to Govern Proceedings for Forbearance Under) WC Docket No. 07-267
Section 10 of the Communications Act of)
1934, as Amended)
)

COMMENTS OF ACS OF ANCHORAGE, INC.

ACS of Anchorage, Inc. (“ACS”) hereby submits these comments in response to the Commission’s Notice of Proposed Rulemaking regarding procedural rules to govern consideration of petitions for forbearance under Section 10 of the Communications Act of 1934, as amended (the “Act”).¹ Specifically, ACS urges the Commission to adopt rules that would require competitive providers to submit into the record of forbearance proceedings relevant competitive market share data and information regarding their respective facilities in the market.

ACS has requested and received partial grants of forbearance from Section 251(c)(3) unbundling requirements and from certain dominant carrier regulation in the Anchorage, Alaska, study area.² Through its participation in these proceedings, ACS offers

¹ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Notice of Proposed Rulemaking, FCC 07-202 (rel. Nov. 30, 2007) (“NPRM”).

² *See 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 (2006) (“UNE Forbearance Proceeding”); *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*

valuable, first-hand experience to shape procedures for other forbearance proceedings. During the course of the ACS Forbearance Proceedings, ACS provided specific market share data in support of its petitions. ACS was able to provide estimates of the market shares of other competitors, as well as partial information regarding competitive facilities and services of other providers in Anchorage. However, the Commission did not require the submission of such information from other service providers in Anchorage.

Having complete competitive information regarding the relevant market is critical to providing the basis of the Commission’s decision in forbearance proceedings. Section 10 of the Act requires the Commission to forbear from applying any regulation or provision of the Act if the Commission determines that (i) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory; (ii) enforcement of such regulation or provision is not necessary for the protection of consumers; and (iii) forbearance from applying such provision or regulation is consistent with the public interest.³ The Commission has determined that the existence of a competitive market and a finding that competition will continue after forbearance is granted ensure that each prong of the forbearance standard is satisfied.⁴ Therefore, the Commission should establish procedures that require

Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) (“Non-Dominance Proceeding,” together with the UNE Forbearance Proceeding, the “ACS Forbearance Proceedings”).

³ 47 U.S.C. § 160(a).

⁴ *See e.g., Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), Memorandum Opinion and Order, 19 FCC Rcd 21496, ¶ 24 (2004) (“competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory”); Review of Regulatory Requirements for ILEC Broadband Telecommunications Services, Memorandum Opinion and Order, 17 FCC Rcd 27000 ¶ 24 (“For reasons similar to those that persuade us that tariff regulation is not necessary*

competitors to provide information that is not ascertainable through public filings or that is not readily available to the forbearance petitioner to facilitate its review under the Section 10 forbearance criteria.

In the petitions for the rulemaking in this proceeding, the petitioners propose rules establishing informational requirements for forbearance petitions and specifying the forbearance petitioner's burden of proof.⁵ The Commission may deny a petition that is not adequately justified; however, the Commission should not deny forbearance based on the absence of information over which the petitioner has no control. Therefore, the Commission should adopt rules requiring other carriers in the market to provide information necessary for the Commission to complete its review of the forbearance petition and its evaluation of the market – namely, their own market share data and a description of their competitive facilities.

Imposing informational requirements on the forbearance petitioner alone fails to give the Commission a complete picture of competition in a market. It is arbitrary and capricious to penalize the petitioner for being unable to provide certain market share and competitive facilities information, because competitive providers often are not required to publish such data. Once the petitioner has provided the information in its possession concerning the market, the Commission's rules should require other market participants to round out the data, so the Commission has full and accurate information on which to base its decision.

within the meaning of section 10(a)(1), we also conclude that tariff regulation is not necessary for the protection of consumers"); 47 U.S.C. § 160(b) ("In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services").

⁵ NPRM ¶ 6.

By way of example, in the ACS Forbearance Proceedings, ACS submitted maps of competitive facilities based on the collective knowledge of its technicians and staff working in the field.⁶ Gathering data in this manner is costly and does not guaranty a comprehensive picture of competition in the market. While these maps provided strong support in favor of forbearance in Anchorage, they offered only a partial illustration of the extent of competitive facilities; the competitive providers were not required to supplement the record with their own such data. It is exceedingly difficult and costly for a single carrier to gather comprehensive competitive data, and thus, requiring the petitioner to bear this burden alone in these types of proceedings inhibits the Commission's ability to grant forbearance where it is warranted by a competitive market. The Commission therefore should adopt a mechanism for requiring competitive providers to submit market data.

Furthermore, any procedural rules adopted in this proceeding governing requirements of the forbearance petitioner to submit data should apply also to competitive carriers in the market in a comparable manner. For instance, if the Commission sets a time period for petitioners to submit information on an *ex parte* basis as proposed in the NPRM,⁷ it should likewise adopt a time period for competitors to respond by submitting their own data into the record. If the competitive providers do not respond to a Commission request for market data, the Commission should draw reasonable inferences from such information as may be provided by the forbearance petitioner. In no event should the petitioner be prejudiced by a competitive

⁶ See e.g., *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, Ex Parte*, WC Docket No. 06-109 (filed May 29, 2007) (submission of maps illustrating GCI's fiber facilities known to ACS).

⁷ NPRM ¶ 9.

carrier's failure to submit factual evidence into the record. Because the Act provides that the Commission *must* grant forbearance if the Section 10(a) criteria are satisfied, it is critical for the Commission to base its forbearance decision on the true nature of competition in the relevant market. Therefore, a rule requiring other carriers to submit market data into the record is warranted.

Finally, ACS submits that maintaining the availability of forbearance is important to ensuring that the application of the Act and the Commission's rules comports with the goals of competition in local exchange markets.⁸ Forbearance is particularly appropriate and necessary in the context of Section 251 unbundling because it allows the Commission to tailor relief from unbundling obligations to a particular market. The Commission has acknowledged correctly that the forbearance process is appropriate for identifying markets where competitive conditions warrant an end to the ILEC's unbundling obligations.⁹

⁸ *See id.* ¶ 13.

⁹ *See e.g., In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC 2553 ¶ 39 (2005).*

