

record with regard to this issue alone does not persuade us that there is sufficient competition for retail or wholesale enterprise services.<sup>148</sup>

54. The record evidence does not enable us to find that wholesale or retail special access services in the Anchorage study area have high supply elasticity. Although ACS makes a variety of claims about the availability of competitive access networks in Anchorage, as discussed above, we have not been able to estimate special access market shares or the availability of competitive facilities to particular buildings.<sup>149</sup> We also have not been able to determine a reliable estimate of retail enterprise market shares generally. Moreover, it appears that the existing enterprise competition relies to a significant extent on wholesale inputs from ACS, including special access services.<sup>150</sup> Given our conclusions below about the insufficiency of ACS's proposed conditions,<sup>151</sup> we cannot assume the continued availability of such inputs on prices, terms, and conditions to allow competitors to increase their supply in response to attempts by ACS to exercise market power in the event we were to forbear from dominant carrier regulation of ACS's special access services generally.

55. *Firm Cost, Size, Resources.* As explained above, 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 the Anchorage study area, which impacts our ability to make findings here, particularly with respect to whether ACS incurs sufficiently lower costs than its competitors regarding the provision of special access services.

### 3. Forbearance Analysis for Dominant Carrier Regulation

#### a. Switched Access Services

56. ACS asks "to be regulated under 'the same regime under which competitive LECs currently operate,'" similar to the forbearance regime that the Commission granted Qwest for mass market switched access services in the *Qwest Omaha Order*.<sup>152</sup> ACS asserts that it should be treated like any other competitive LEC in the Anchorage market based on the high level of competition and elasticity of customer demand.<sup>153</sup> Specifically, ACS seeks forbearance from dominant carrier regulation, comprising rate-of-return regulations, certain related tariffing and pricing rules, and section 214 discontinuance and transfer of control requirements. If granted forbearance from this regulation, ACS proposes to meet certain conditions that provide "further assurance that the interests of both consumers and competition will be promoted."<sup>154</sup> Among other things, ACS agrees to cap at current levels all interstate switched

<sup>148</sup> ACS Petition at 41-42.

<sup>149</sup> See *supra* text accompanying note 145.

<sup>150</sup> See, e.g., ACS June 29, 2007 *Ex Parte* Letter at Exh. D.

<sup>151</sup> See *infra* note 250.

<sup>152</sup> ACS Reply at 12 (citing *Qwest Omaha Order*, 20 FCC Rcd at 19435, para. 41).

<sup>153</sup> See, e.g., ACS Petition at 2. ASC seeks the opportunity to compete on the same terms as competitive LECs for switched access customers "through freedom from a prescribed rate structure and the ability to file tariffs on one-day's notice without cost support, on the condition that ACS cap its access rates at current levels and does not detariff switched or special access services." ACS June 29, 2007 *Ex Parte* Letter at 2. ASC states that it does not seek permissive detariffing of any common carrier services; it agrees to continue to file tariffs for switched access services, including contract tariffs, effective on one day's notice. *Id.* at 2, 5. ACS also agrees to exit the NECA pool. See ACS Reply at 13.

<sup>154</sup> ACS June 29, 2007 *Ex Parte* Letter at 1.

access rates, including the SLC, “such that ACS will be unable to increase the price of any individual access service.”<sup>155</sup> ACS agrees to be subject to a ceiling for terminating interstate switched access rates as are competitive LECs, which is similar to the ceiling that the Commission imposed on Qwest in the *Qwest Omaha Order*.<sup>156</sup> ACS asserts that it “is willing to accept downward-only pricing flexibility” in order to help it design competitive offerings and better serve its customers.<sup>157</sup>

**(i) Section 10(a)(1) – Charges, Practices, Classifications, and Regulations**

57. We find that the criteria of section 10 are satisfied with respect to the requested relief for ACS’s mass market and enterprise switched access services, subject to the conditions discussed below. First, our forbearance analysis under section 10(a)(1) requires that we determine whether enforcement of the regulations at issue is not necessary to ensure that charges, practices, classifications, or regulations for those services are not unjustly or unreasonably discriminatory.<sup>158</sup> In its petition, ACS argues broadly that certain dominant carrier regulation of interstate switched access services, including end-user charges, is no longer necessary to ensure that ACS’s rates and practices are just, reasonable and not unreasonably discriminatory, and that ACS therefore satisfies the criteria of section 10(a)(1) of the 1996 Act.<sup>159</sup> More specifically, it contends that the Anchorage telecommunications market has become highly competitive and that ACS lacks market power.<sup>160</sup> Further, ACS argues that the high level of competition for switched access services in the mass market and enterprise market will ensure that ACS’s charges and practices remain just and reasonable and warrants forbearance from dominant carrier regulation of switched access services.<sup>161</sup>

58. *Rate-of-return and Tariffing Forbearance for Switched Access Services.* Based on the significant competition ACS faces for both mass market and enterprise switched access services and on the conditions described below, we conclude that enforcement of dominant carrier rate-of-return regulations and certain related tariffing and pricing rules is not necessary to ensure that ACS’s charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory with regard

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<sup>155</sup> *Id.* at 2. ACS asserts that it will be unable to seek an increase in rates based on changes in costs or earnings. *Id.* ACS further asserts that if the “downward-only pricing flexibility” relief it seeks through forbearance is granted, it would not be able to raise some rates by decreasing others, its “rates would be divorced from its costs, and the earnings review requirement for rate of return carriers would no longer be necessary.” *Id.* at 6. We note, however, that ACS is still subject to the statutory requirement that its rates be just and reasonable. 47 U.S.C. § 201. If ACS’s rates are challenged, it may be necessary for the Commission to consider its costs and earnings in assessing the reasonableness of its rates.

<sup>156</sup> ACS June 29, 2007 *Ex Parte* Letter at 2, 4; ACS Petition at 50 (citing *Qwest Omaha Order*, 20 FCC Rcd at 19434-35, paras. 40-41); *see also* ACS Reply at 3.

<sup>157</sup> ACS June 29, 2007 *Ex Parte* Letter at 2, 6.

<sup>158</sup> *See* 47 U.S.C. § 160(a)(1).

<sup>159</sup> *See* ACS Petition at 29-45.

<sup>160</sup> *See, e.g., id.* at 29.

<sup>161</sup> *Id.*; *see also* ACS Reply at 11.

to end users and access customers.<sup>162</sup> Accordingly, we forbear from those regulations with respect to switched access services.

59. We adopt certain conditions on this grant of forbearance to address the special problem of carrier's carrier charges, where all LECs have monopoly power over the rates that they charge carriers wishing to terminate calls to their end user customers. In the *CLEC Access Charge Reform Order*, the Commission found that interexchange carriers are subject to the monopoly power that all competitive LECs wield over access to their end users, and that carriers' carrier charges cannot be fully deregulated.<sup>163</sup> In addition, section 254(g) requires interexchange carriers to geographically average their rates and thereby to spread the cost of both originating and terminating access over all their end users. Consequently, because interexchange carriers are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs.<sup>164</sup> As a result, the Commission imposed a permissive detariffing regime through section 61.26 that permits the filing of tariffs on one day's notice without cost support (and presumes the access charges that competitive LECs charge their carrier customers to be just and reasonable) where the rates are at or below a benchmark that is "the rate of the competing ILEC."<sup>165</sup> Competitive LECs are subject to mandatory detariffing of any rates that exceed that benchmark.<sup>166</sup> The Commission does not otherwise regulate the rates charged pursuant to any other arrangement that competitive LECs may reach with interexchange carriers.

60. To ensure that our forbearance today does not result in rates that are unjust or unreasonable by virtue of the problems identified in the *CLEC Access Charge Reform Order*, and in light of the "unique nature" of the access market in Anchorage,<sup>167</sup> we condition this forbearance upon: (1) ACS's capping at current levels all of its interstate switched access rate elements, including those charged to carriers and end-users,<sup>168</sup> and (2) ACS's compliance with the same regime under which competitive LECs currently operate, with the exception that ACS must file tariffs for switched access and end-user rates, which may be done on one day's notice,<sup>169</sup> and cannot charge rates higher than the rate ceilings we adopt

<sup>162</sup> Specifically, we forbear from applying the following rules only to the extent they apply to dominant carrier switched access and end-user rates and on the condition ACS complies with provisions applicable to nondominant carriers: 47 C.F.R. §§ 1.773(a)(iii), 61.38, 61.54, 61.58, 61.59, 63.03(b)(2), 63.71, Part 65, Part 69, Subparts A and B.

<sup>163</sup> *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 38.

<sup>164</sup> *Id.* at 9935-36, para. 31.

<sup>165</sup> *Id.* at 9925, para. 3; *see also* 47 C.F.R. § 61.26.

<sup>166</sup> *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 40.

<sup>167</sup> *Id.* at 9938, para. 39.

<sup>168</sup> We cap each rate element so rates for some services may not be raised to recapture revenue lost from other services. *See* ACS June 29, 2007 *Ex Parte* Letter at 4. However, we decline to require ACS to cap the rates for its special construction tariffs, which ACS explains are based on "time and materials" charges that have no preset rates. *See id.* at 2 n.1. We find that a cap on special construction tariffs would be difficult to administer in light of the manner in which ACS's special construction rates are determined, and is unnecessary as a condition to satisfy the criteria of section 10, particularly in the switched access market given the ubiquity of ACS's network facilities.

<sup>169</sup> ACS may also file tariffs on seven or 15 days' notice and receive deemed lawful treatment for those rates, similar to competitive LECs.

as conditions in this order. Thus, ACS will be subject to a ceiling on terminating interstate switched access rates similar to the benchmark that the Commission imposed on Qwest pursuant to section 61.26 of the Commission's rules.<sup>170</sup> Accordingly, we extend to ACS the current benchmark that applies to all of its competitors – ACS's tariffed rate as of June 30, 2007 – which will also serve as the benchmark for other LECs operating within ACS's service territory in the Anchorage market.

61. In addition, based on the unique circumstances in the Anchorage market, we grant ACS forbearance from the rate-of-return regulation that applies to ACS's mass market and enterprise switched access services in Anchorage, subject to certain additional conditions. First, as a condition of this relief, ACS may not seek rate increases from the Commission under the rate-of-return framework, which we believe ensures that ACS no longer will have the ability to seek rate increases based on underearnings.<sup>171</sup> Second, we require ACS to continue to file all contract offerings as contract tariffs, as GCI suggests.<sup>172</sup> We agree with GCI that such a requirement will help maintain the transparency, and facilitate the evaluation, of ACS's rates and offerings.<sup>173</sup> As GCI observes, "[r]ate-of-return carriers are currently prohibited from offering switched . . . access services pursuant to individual customer contracts."<sup>174</sup> The transparency associated with ACS's contract tariff filings will aid the evaluation of its compliance with the other conditions of this order, including the requirement that the rates for ACS's switched access services not increase above current levels. Finally, we reject GCI's argument that ACS should not be allowed to obtain deemed lawful treatment of its tariffed rates.<sup>175</sup> Deemed lawful status is available to all LECs, including competitive LECs, that meet the requirements of section 204(a)(3) of the Act, and GCI has shown no reason why deemed lawful status should not apply in the case of ACS.<sup>176</sup> Given these conditions, we find that continued application of dominant carrier tariff filing requirements is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory charges and practices.

62. Further, because ACS's special access services and services outside of the Anchorage study area will remain subject to rate-of-return regulation, we need to ensure that the allocation of common costs assigned to ACS of Anchorage and its affiliates located outside of Anchorage does not disadvantage ACS customers in any area. ACS proposes the following to maintain the allocation of common costs assigned to ACS of Anchorage and its affiliates at current levels:

The regulated joint and common expenses assigned to ACS of Anchorage as a percentage of regulated joint and common expenses assigned to all commonly owned ACS ILECs will not be lower than in Calendar Year 2005. USF Data Collections reports used to compute Study Area Cost per Loop for each ACS LEC study area will be provided to GCI for the sole purpose of computing the percentage of joint and common expenses

<sup>170</sup> *Qwest Omaha Order*, 20 FCC Rcd at 19435, para. 41; ACS Petition at 50.

<sup>171</sup> ACS June 29, 2007 *Ex Parte* Letter at 2.

<sup>172</sup> See Letter from Brita D. Strandberg, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 3 (filed June 6, 2007) (GCI June 6, 2007 *Ex Parte* Letter). We note that ACS agrees to this condition. ACS June 29, 2007 *Ex Parte* Letter at 5.

<sup>173</sup> See GCI June 6, 2007 *Ex Parte* Letter at 3.

<sup>174</sup> *Id.* at 3 n.4 (citing Multi-Association Group (*MAG*) *Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Carriers and Interexchange Carriers*, 19 FCC Rcd 4122, 4143-44 (2004)).

<sup>175</sup> See GCI Comments at 29.

<sup>176</sup> See 47 U.S.C. 204(a)(3).

assigned to ACS of Anchorage. This percentage will be computed annually by dividing the sum of "Total Corporate Operations" (FCC Part 32 accounts 6710 and 6720, currently line 565) plus total "General Support Expense" (FCC Part 32 Account 6120, currently line 350) for Anchorage (SAC 613000) by the sum "Corporate Operations Expense" and "General Support Expense" for all ACS LEC study areas (ACS-Anchorage, 613000; ACS of the Northland-Sitka, 613020; ACS of the Northland-Glacier State 613010; ACS of Alaska-Greatland, 613022; ACS of Alaska-Juneau, 613022; ACS of Fairbanks 613008). If the calculation for any given year shows that the percentage of "Corporate Operations Expense" and "General Support Expense" assigned to ACS of Anchorage has decreased below the 2005 percentage, joint and common expenses in the final access cost studies and USF submissions for all other ACS study areas will be adjusted downward proportionately. The downward adjustment will be of a magnitude that a re-computation of the USF Data Collection reports using the adjusted numbers would bring the percentage of joint and common expenses assigned to ACS of Anchorage up to the 2005 ratio.<sup>177</sup>

We adopt this proposal as a condition of this order to address concerns that ACS might recover costs disproportionately from customers in other areas of Alaska.

63. *Discontinuance and Streamlined Transfer of Control Forbearance.* For all mass market and enterprise switched access services, we find that continued application of our dominant carrier discontinuance rules is not necessary to ensure that ACS's charges, practices, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory so long as discontinuance of service by ACS is subject to the Commission's discontinuance rules for nondominant carriers.<sup>178</sup> We conclude that subjecting ACS to a 60-day automatic grant period for discontinuance of service, and a 30-day comment period for affected customer notice, is not necessary under section 10(a)(1), where GCI and other competitive LECs are subject to a 30-day automatic grant period and 15-day comment period. Where such a significant share of customers have selected carriers other than ACS, we find that continuing to impose more onerous discontinuance requirements on ACS is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory charges and practices. As a condition of this forbearance and to ensure the criteria of section 10 are satisfied, we require ACS to comply with the discontinuance requirements that apply to nondominant carriers.<sup>179</sup> For similar reasons, we forbear from

<sup>177</sup> ACS July 25, 2007 *Ex Parte* Letter at 2.

<sup>178</sup> 47 C.F.R. § 63.71(a)(5), (b)(4), (c).

<sup>179</sup> *See id.* § 63.71. We note that ACS also proposes to condition forbearance from dominant carrier regulation of its special access services generally on ACS being prohibited from withdrawing any currently available interstate access service absent GCI's approval. *See* ACS July 25, 2007 *Ex Parte* Letter at 3 ("If GCI is using any interstate access service that ACS wishes to discontinue, ACS will leave that service in place and fulfill new orders for that service for GCI at the then-effective rate until GCI chooses to discontinue the service."). We further note that GCI asserts that this condition, in conjunction with the other conditions in the record, would be sufficient to ameliorate its concerns about special access forbearance. *See* Letter from John T. Nakahata, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-109 at 2 (filed July 30, 2007) (GCI July 30, 2007 *Ex Parte* Letter). Nonetheless, we do not find that condition sufficient or appropriate to address the concerns discussed above that lead us to conclude that the requested special access forbearance does not satisfy section 10. In particular, even if the additional proposed condition addresses the concerns of GCI, it does not address ACS's other special access customers. Thus, we find it insufficient, even in conjunction with other conditions in the record, to satisfy any of the prongs of section 10(a) with respect to ACS's special access services generally. Moreover, the condition would appear to favor GCI over other competitors, which we find inconsistent with the public interest under section 10(a)(3).

applying our streamlined transfer of control rules to ACS as a dominant carrier, conditioned upon treatment of ACS as a non-dominant carrier under these rules.<sup>180</sup>

(ii) Section 10(a)(2) – Protection of Consumers

64. The second criterion under section 10 requires that we assess whether enforcement of the Commission's dominant carrier regulations as they apply to mass market and enterprise interstate switched access rates, including end-user charges, is not necessary for the protection of consumers.<sup>181</sup> ACS asserts that it satisfies the criteria of section 10(a)(2) because the "high level of facilities-based competition in Anchorage and the continued regulation of ACS's rates and practices" will protect consumers.<sup>182</sup> In particular, ACS asserts that, in addition to competition, requirements other than dominant carrier regulation, such as sections 201 and 202 of the Act, are sufficient to protect consumers from any carrier attempting to charge unreasonable rates.<sup>183</sup> It further argues that forbearance from certain dominant common carrier regulation would allow ACS greater flexibility with respect to its pricing and service offerings that would benefit consumers.<sup>184</sup> Moreover, ACS asserts that its proposal to cap at current levels all switched access rates and accept downward-only pricing flexibility will further protect consumers.<sup>185</sup>

65. For many of the same reasons that led us to conclude that section 10(a)(1) is satisfied, we also conclude that section 10(a)(2) is satisfied with regard to a limited set of dominant carrier regulations, comprising rate-of-return regulations, certain related tariffing and pricing rules, and section 214 regulation.<sup>186</sup> Most notably, in light of GCI's capture of [REDACTED] residential access lines compared to ACS's [REDACTED] residential access lines,<sup>187</sup> and GCI's [REDACTED] enterprise switched access lines compared to ACS's [REDACTED] business retail switched access lines,<sup>188</sup> continuing to subject ACS to these requirements does not enhance consumer protection. Also critical to our finding that consumers will not be harmed is the condition requiring ACS to cap all of its switched access rates at current levels on an "absolute" basis for each rate element, rather than on an averaged basis. Thus, consumers will be protected by this downward-only pricing flexibility for ACS, and there will be no opportunity for the rates of some elements to be raised to recapture revenue lost from other

<sup>180</sup> 47 C.F.R. § 63.03(b)(2).

<sup>181</sup> 47 U.S.C. § 160(a)(2).

<sup>182</sup> ACS Reply at 23; *see also* ACS Petition at 45-51.

<sup>183</sup> *See* ACS Reply at 24. Section 201 of the Act mandates that carriers engaged in the provision of interstate or foreign communication service provide service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable. 47 U.S.C. § 201. Section 201 also empowers the Commission to require physical connections with other carriers, to establish through routes, and to determine appropriate charges for such actions. *Id.* Section 202 states that it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to any person or class of persons. *Id.* § 202.

<sup>184</sup> ACS Petition at 2-3.

<sup>185</sup> *See* ACS June 29, 2007 *Ex Parte* Letter at 4, 6.

<sup>186</sup> *See supra* paras. 58, 63.

<sup>187</sup> *See supra* para. 39.

<sup>188</sup> *See supra* para. 43.

services.

(iii) Section 10(a)(3) – Public Interest

66. The third criterion of section 10 requires that we determine whether forbearance from applying our dominant carrier regulations for switched access services and end-user charges, including our rate-of-return regulations, related tariffing and pricing requirements, and our section 214 transfer of control requirements, is consistent with the public interest.<sup>189</sup> In making this determination, the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.<sup>190</sup> ACS argues that “asymmetric regulation is hobbling the ability of ACS to compete with its more than evenly matched competitor in GCI.”<sup>191</sup> ACS, for example, argues that it faces burdensome dominant carrier tariffing requirements, like those that applied to Qwest prior to the relief granted in the *Qwest Omaha Order*.<sup>192</sup> ACS argues that a grant of forbearance relief is in the public interest because it will promote competitive market conditions by allowing ACS greater flexibility in its price and service offerings, “likely triggering better price and service offerings from GCI.”<sup>193</sup>

67. Consistent with our findings in the *Qwest Omaha Order*, we conclude that forbearing from our dominant carrier regulations that apply to interstate switched access rate elements, including those charged to both carriers and end-users, is consistent with the public interest.<sup>194</sup> Specifically, we find that such forbearance will enhance the vigorous competition that has emerged in the Anchorage market and will serve the public interest. Accordingly, we no longer apply to ACS the dominant carrier regulations that apply to interstate switched access and end-user services, including our rate-of-return regulations, related tariffing and pricing requirements, and our section 214 requirements.<sup>195</sup> We believe that ACS will price its mass market and enterprise interstate switched access services competitively without this level of burdensome regulatory oversight because it is subject to sufficient competition.<sup>196</sup> Further, as the Commission stated in the *Qwest Omaha Order*, in environments that are competitive for end users, applying dominant carrier regulations limits a carrier’s “ability to respond to competitive forces and,

<sup>189</sup> 47 U.S.C. § 160(a)(3).

<sup>190</sup> *Id.* § 160(b).

<sup>191</sup> ACS Petition at 52.

<sup>192</sup> *Id.* (citing *Qwest Omaha Order*, 20 FCC Rcd at 19437, para. 46 nn.116-17). ACS states that the 15-day tariff notice requirement that applies to it gives competitive LECs the opportunity to respond to ACS’s filed rate or service changes or to get to market first with a new price or service offering before ACS tariff becomes effective. *Id.* ACS further states that this loss of the “first mover advantage” deprives ACS “of any incentive to file for reduced prices because GCI always can beat it to the market,” thus depriving consumers of the benefits of greater competition. *Id.*

<sup>193</sup> *See, e.g.*, ACS Shelanski Decl. at 14.

<sup>194</sup> 47 U.S.C. § 160(a)(3).

<sup>195</sup> Congress has directed us to consider, in making our determination under section 10(a)(3), whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. *See* 47 U.S.C. § 160(b). As discussed above, our forbearance from applying certain dominant carrier regulation to ACS will enhance the vigorous competition in the Anchorage market.

<sup>196</sup> *See supra* para. 65.

therefore, its ability quickly to offer consumers new pricing plans or service packages.”<sup>197</sup> Similarly, forbearance in these circumstances will help ACS compete more vigorously and offer consumers more choice and prices that respond to market forces.

68. We also do not believe that reduced regulation will harm competition or consumers. Significantly, as discussed above, we have found that the ceiling we impose on individual switched access rate elements as a condition of our forbearance provides protection against the possibility that competition might be harmed. Market pressures, moreover, created by GCI and other competitors, will force ACS to price its interstate exchange access services competitively, or face further loss of market share for these services.<sup>198</sup> As a result of ACS’s substantially diminished market position in Anchorage, rate-of-return regulation and related rules, such as section 61.38 which requires the provision of cost support for rate changes, no longer serve their intended regulatory purpose with respect to interstate switched access and end-user rates in Anchorage, and thus this level of burdensome regulation is not consistent with the public interest.<sup>199</sup>

69. We agree with GCI, however, that to ensure that the increased regulatory parity between ACS and competing carriers such as GCI is in the public interest, it is necessary to adopt certain additional conditions on ACS, besides the ceiling on individual rate elements. First, we condition our grant of forbearance on ACS’s not participating in the NECA pooling process and tariffs for the Anchorage study area.<sup>200</sup> As a member of the NECA common line pool, ACS would receive payment of its costs from NECA irrespective of the amount that ACS actually collects from its customers.<sup>201</sup> We agree with GCI that permitting ACS to remain in the NECA pool with regard to Anchorage would provide an implicit subsidy unavailable to its competitors and at odds with ACS’s request to end rate-of-return regulation.<sup>202</sup> We also note that ACS does not object to this condition.<sup>203</sup>

70. Second, we condition ACS’s receipt of ICLS. In the *MAG Order*, the Commission created the ICLS mechanism to compensate rate-of-return carriers for the interstate loop costs that they could not otherwise recover due to the cap on the SLCs that rate-of-return carriers assess on their end-user customers.<sup>204</sup> ACS seeks forbearance from the SLC caps applicable to rate-of-return carriers.<sup>205</sup> Upon

<sup>197</sup> *Qwest Omaha Order*, 20 FCC Rcd at 19437, para. 47.

<sup>198</sup> We again rely on the benchmark condition described above to correct for the fact that the access service market otherwise does not allow competition to discipline rates.

<sup>199</sup> 47 C.F.R. § 61.38.

<sup>200</sup> ACS requests forbearance from section 69.3(e)(9) of the Commission’s rules to allow it to exit the NECA pool for the Anchorage study area but to keep its remaining study areas in the NECA pool. ACS July 25, 2007 *Ex Parte* Letter at 2; see 47 C.F.R. § 69.3(e)(9) (requiring that a telephone company and its affiliates participate in the NECA common line tariff pool with respect to all study areas). We find that to avoid disruption to customers in ACS’s study areas outside Anchorage and because a condition of the forbearance granted by this order requires ACS to exit the NECA pool for the Anchorage study area, there is good cause to waive this rule. 47 *id.* § 1.3; see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), cert. denied, 409 U.S. 1027 (1972). We thus deny as moot ACS’s request that we forbear from application of this rule.

<sup>201</sup> GCI Comments at 24.

<sup>202</sup> *Id.* at 24-25.

<sup>203</sup> ACS June 29, 2007 *Ex Parte* Letter at 8.

<sup>204</sup> *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge* (continued....)

grant of its forbearance request, ACS would no longer be subject to the SLC caps, and would therefore be able to fully recover its common line costs from its end users, negating its eligibility to receive ICLS. ACS, however, has agreed to cap its interstate switched access rates, including its SLCs, at their current levels.<sup>206</sup> Given that ACS's SLCs will be capped at their current levels, thereby precluding ACS from increasing these rates to recover its interstate loop costs, we believe that it is consistent with the purpose of the ICLS mechanism to permit ACS to continue to be eligible to receive ICLS. ACS will remain eligible to receive ICLS only so long as its SLCs remain capped at current levels.<sup>207</sup>

71. ICLS is provided to both rate-of-return ETCs and competitive ETCs in a study area based on the incumbent LEC's embedded costs.<sup>208</sup> After the grant of its forbearance request becomes effective, ACS will no longer be required to calculate its common line revenue requirement per study area pursuant to Part 69 of the Commission's rules.<sup>209</sup> Therefore, ACS's ICLS amounts will no longer be calculated in the same manner as is ICLS for other rate-of-return regulated incumbent LEC ETCs pursuant to section 54.901(a).<sup>210</sup> GCI has proposed, and ACS has agreed, that, as a condition of granting its forbearance request, ACS's ICLS amounts would be set at the current competitive ETC per-line level.<sup>211</sup> After grant of the forbearance request, all ETCs in ACS's Anchorage study area, including ACS, would receive ICLS at the same per-line support amounts. We find that ACS's ICLS shall be set at the per-line level of ICLS

(Continued from previous page)

*Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, 19667, para. 128 (2001) (MAG Order).*

<sup>205</sup> 47 C.F.R. § 69.104. Section 69.104 is in subpart B of the Commission's Part 69 rules. 47 C.F.R. Part 69, Subpart B. ACS seeks forbearance from subparts A and B of the Commission's Part 69 rules. ACS Petition, App. A at 5.

<sup>206</sup> ACS June 29, 2007 *Ex Parte* Letter at 2 (stating that "all regulated interstate access rates will be capped at current rate levels, such that ACS will be unable to increase the price of any individual access service").

<sup>207</sup> The Commission has adopted ACS's commitment to cap its interstate switched access rates, including its SLCs, as a condition of forbearance. ACS's SLC caps, therefore, cannot be eliminated or modified absent future Commission action.

<sup>208</sup> 47 C.F.R. § 54.901.

<sup>209</sup> *Id.* § 54.901(a) (providing that ICLS for rate-of-return ETCs is based on their common line revenue requirements per study area, minus certain enumerated amounts).

<sup>210</sup> *Id.*

<sup>211</sup> GCI Reply Comments at 26; ACS Reply Comments at 13; 47 C.F.R. § 54.901(b). ACS requests forbearance from the revenue requirement calculations in section 54.901(a) of the Commission's rules, and from section 54.903 of the Commission's rules, to the extent it requires ACS to file FCC Forms 508 and 509. ACS July 25, 2007 *Ex Parte* Letter at 4; see 47 C.F.R. §§ 54.901(a), 54.903 (requiring rate-of-return carriers to file FCC Form 508 - ICLS Projected Annual Common Line Revenue Requirement, and FCC Form 509 - ICLS Annual Common Line Actual Cost Data Collection). We find that, because a condition of the forbearance granted by this order requires ACS to receive ICLS at the existing per-line rate, rather than based on the rate-of-return regulated carrier requirements in section 54.901(a), there is good cause to waive these rules. 47 C.F.R. § 1.3; see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), cert. denied, 409 U.S. 1027 (1972). We thus deny as moot ACS's request that we forbear from application of these rules.

provided to competitive ETCs on the effective date of this order subject to Commission modification in its universal service reform proceedings.<sup>212</sup>

72. We note that our grant of ACS's forbearance petition in no way alters its obligation to contribute to the universal service fund.<sup>213</sup> After grant of its request, to the extent that ACS chooses to no longer assess federal end-user subscriber line charges, ACS must identify the interstate portion of fixed local exchange service revenues for universal service contribution purposes.<sup>214</sup> ACS states that it will impute the tariffed SLC rates when calculating its universal service contributions.<sup>215</sup> As discussed above, as a condition of this forbearance grant, ACS's SLC rates will be capped. ACS will be able, however, to reduce its tariffed SLC rates, thereby reducing the amount it contributes to the universal service fund.<sup>216</sup> To preclude ACS from using its forbearance grant to significantly reduce its universal service contribution amounts, therefore, ACS shall use the June 30, 2007, residential and single-line business SLC rate and the multi-line business SLC rate to calculate the interstate end-user revenues on which its universal service contributions are based. In addition, we note that section 54.712 of the Commission's rules dictates the manner in which contributors to the universal service fund are permitted to recover their contributions from end users.<sup>217</sup>

73. We believe that this conditional forbearance from dominant carrier regulation in Anchorage will serve the public interest by increasing the regulatory parity among providers of mass market interstate exchange access services in that market. As a result of our decision today, the playing field between ACS and GCI will be leveled to the extent ACS will no longer be subject to dominant carrier regulations for its mass market and enterprise interstate switched access services. In light of the competitive findings above, we believe this outcome is warranted and serves the public interest.<sup>218</sup>

#### **b. Mass Market Broadband Internet Access Transmission Services**

74. We find that the criteria of section 10 are satisfied with respect to the requested conditional relief for ACS's mass market broadband Internet access transmission services, conditioned upon ACS filing, and having approved by the Commission, a description of how it will address the cost allocation implications of this forbearance before it exercises this relief. In the *Qwest Omaha Order*, the Commission granted Qwest forbearance from rate-of-return and tariffing requirements for mass market broadband Internet access transmission services.<sup>219</sup> Subsequent to the adoption of the *Qwest Omaha Order*, the Commission released its *Wireline Broadband Internet Access Services Order*, which, among

<sup>212</sup> We note that the per-line ICLS amount must be based on actual common line cost and revenue data pursuant to section 54.903(a)(4) of the Commission's rules. 47 C.F.R. § 54.903(a)(4). Because the effective date of this order falls during the last two quarters of the calendar year, the per-line ICLS in Anchorage is based on the actual common line cost and revenue data filed by ACS on December 31, 2006. *Id.* Therefore, we find it appropriate to set ICLS support at this rate.

<sup>213</sup> See 47 C.F.R. §§ 54.706; 54.709.

<sup>214</sup> See Telecommunications Reporting Worksheet, FCC Form 499-A, Instructions at 25 (2007).

<sup>215</sup> ACS July 25, 2007 *Ex Parte* Letter at 4.

<sup>216</sup> See 47 C.F.R. § 54.709 (contributions to the universal service fund are based on end-user telecommunications revenues).

<sup>217</sup> See *id.* § 54.712.

<sup>218</sup> See *supra* para. 65.

<sup>219</sup> *Qwest Omaha Order*, 20 FCC Rcd at 19435, para. 42.

other things: (1) determined that wireline broadband Internet access service is an information service; (2) concluded that the wireline broadband Internet access services market is an evolving market characterized by emerging intermodal and intramodal competition; and (3) held that facilities-based wireline broadband Internet access service providers were free to offer the transmission component of wireline broadband Internet access service on either a common carrier or non-common carrier basis, if they chose. Consequently, the *Wireline Broadband Internet Access Services Order* effectively supplants the need for relief for these services like that granted in the *Qwest Omaha Order*, at least for price cap carriers.<sup>220</sup>

75. With respect to rate-of-return carriers, the Commission likewise granted relief from tariffing requirements for wireline broadband Internet access transmission services. However, with respect to rate regulation, and the ability to offer wireline broadband Internet access transmission services on a non-common carrier basis, the Commission further observed in the *Wireline Broadband Internet Access Services Order* that “all rate-of-return carriers that have participated in this proceeding have stated that they wish to continue offering broadband transmission service as a Title II common carrier service.”<sup>221</sup> Thus, the Commission did not address cost allocation issues for rate-of-return carriers that, as a practical matter, are a prerequisite to a carrier’s availing itself of the ability to offer the transmission component of wireline broadband Internet access services on a non-common carrier basis.<sup>222</sup> Rather, the Commission held that “[i]n the event that an earnings determination is needed for some ratemaking purpose,” as would be the case under rate-of-return regulation, “the affected carrier will have to propose a way of removing the costs of any non-Title II services from the computation.”<sup>223</sup> This was necessary because the Commission found that, although carriers were allowed to offer wireline broadband Internet access transmission service on a non-common carrier basis, for accounting purposes the activities of incumbent LECs associated with these offerings would continue to be treated as regulated under Part 64 of the Commission’s rules.<sup>224</sup> Thus, unless there likewise is an appropriate allocation of a rate-of-return carrier’s costs for the non-common carrier provision of DSL transmission service, those costs could be recovered through increases in the rates for other interstate special access services that remain subject to rate-of-return regulation.

76. Although the *Wireline Broadband Internet Access Services Order* was not principally conducted as a section 10 forbearance proceeding, the Commission concluded in that order that “the reasons that persuade us not to require that the transmission component of wireline broadband Internet access service be offered as a telecommunications service under Title II also persuade us that application of the tariffing provisions in Title II is ‘not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory’ within the meaning of section 10(a)(1).”<sup>225</sup>

<sup>220</sup> We note that although the *Wireline Broadband Internet Access Services Order* was adopted before the *Qwest Omaha Order*, the *Wireline Broadband Internet Access Services Order* relief did not take effect until November 16, 2005, which was after the *Qwest Omaha* forbearance statutory deadline. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 70 Fed. Reg. 60222 (Oct. 17, 2005).

<sup>221</sup> *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14927, para. 138.

<sup>222</sup> See *id.*

<sup>223</sup> *Id.* at 14927, para. 137.

<sup>224</sup> *Id.* at 14926, para. 135.

<sup>225</sup> *Id.* at 14902, para. 91.

77. The Commission went on to hold in the *Wireline Broadband Internet Access Services Order*, that “[t]he need to attract end user and ISP customers also makes clear that tariffing ‘is not necessary for the protection of consumers’ within the meaning of section 10(a)(2).”<sup>226</sup> In particular, the Commission found that regulatory relief would better enable carriers to offer innovative service arrangements than would be the case if tariffing obligations applied.<sup>227</sup>

78. Finally, in the *Wireline Broadband Internet Access Services Order*, the Commission concluded that regulatory relief for broadband Internet access telecommunications offerings is in the public interest within the meaning of section 10(a)(3) because it gives carriers greater freedom in how they offer broadband Internet access transmission as a telecommunications service, promoting competitive market conditions.<sup>228</sup>

79. We find no basis in the record for reaching a different conclusion here, and likewise find that the criteria of section 10 are met. We note that the evidence indicates that ACS already faces significant intermodal competition for broadband Internet access services today. Although the analysis of the market for broadband Internet access service does not hinge on static market share data, we note that the evidence regarding the Anchorage market supports the finding of significant intermodal broadband Internet access competition, with ACS possessing [REDACTED] of the broadband Internet access services market.

80. As discussed above, however, before a carrier may exercise the regulatory relief (beyond relief from tariffing obligations) granted in the *Wireline Broadband Internet Access Services Order*, the Commission identified an additional issue – cost allocation – that would need to be addressed by providers, such as rate-of-return carriers, for which an earnings determination is used for ratemaking purposes. We find that ACS has not addressed the cost allocation concerns here, given the continued rate of return regulation of its special access services, as well as its services outside of the Anchorage study area. Consequently, we require as a condition of forbearance that ACS file, and have approved by the Commission, a description of how it will address the cost allocation implications of this forbearance before it exercises this relief.<sup>229</sup> Our evaluation of ACS’s proposed cost allocation for these services thus will help to ensure that the rates for special access services will continue to be just and reasonable.

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<sup>226</sup> *Id.* at 14902, para. 92.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 14902, para. 93.

<sup>229</sup> To comply with this requirement in the event ACS intends to offer these services directly on a non-common carrier basis, ACS must file with the Commission a detailed description of the methods it will use to ensure that the costs and revenues of its wireline broadband Internet access transmission operations are excluded from the ratemaking calculations for those services that are still subject to Title II regulation. In particular, ACS must address in its filing how it will allocate relevant costs between those services it will offer on a non-Title II basis and those services that remain subject to Title II regulation. Additionally, ACS shall identify in its cost support for all future interstate tariff filings, the costs and revenues it has removed from its interstate ratemaking computations for those of its wireline broadband Internet access transmission services that are classified as regulated for cost allocation purposes, but are not subject to Title II regulation as a result of this forbearance relief. In particular, without deciding here what an appropriate allocation would be, any allocation of costs and revenues proposed by ACS should not result in an increase in special access rates due to the relief granted herein. Alternatively, if ACS chooses to offer wireline broadband Internet access transmission on a non-common carrier basis through a nonregulated affiliate, it must comply with the affiliate transactions rules for any transactions it has with that affiliate in connection with those transmission services. See 47 C.F.R. § 32.27.

81. We note that ACS does not seek, nor do we grant in this order, forbearance from section 254(k) of the Act as it applies to ACS's mass market broadband Internet access services. That section provides that "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition, and that "[t]he Commission, with respect to interstate services, . . . shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." We find that specifying ACS's responsibility prior to it availing itself of the forbearance relief for wireline broadband Internet access transmission service is necessary to fulfill section 254(k)'s mandate that the Commission "shall" ensure that telecommunications carriers comply with the requirements of section 254(k). We further observe that, were such legal obligations not to apply to ACS, forbearance would not be warranted.<sup>230</sup> Rather than denying such forbearance relief,<sup>231</sup> we find it consistent with the deregulatory goals of section 10,<sup>232</sup> and

<sup>230</sup> As an initial matter, we find that the forbearance sought by ACS would not be in the public interest under section 10(a)(3) absent this action by ACS. We find that the *Wireline Broadband Internet Access Services Order*'s framework struck the appropriate balance between deregulation, in light of the competition in the emerging market for wireline broadband Internet access services, and the mandates of section 254(k). See generally *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd 14853. Although the evidence in this proceeding is consistent with the findings in the *Wireline Broadband Internet Access Services Order*, we find no basis in this record to deviate from that framework with respect to the necessity of addressing cost allocation issues before providers, such as rate-of-return carriers, for which an earnings determination is used for ratemaking purposes could avail themselves of regulatory relief. Thus, in light of the Commission's prior determination that its *Wireline Broadband Internet Access Services Order* framework struck the proper public interest balance, including both the relief granted and its identification of the cost allocation concerns that must be addressed, we find that deviation from that framework would not be in the public interest. *Fones4all Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, WC Docket No. 05-261, Memorandum Opinion and Order, 21 FCC Rcd 11125, 11132-22, para. 14 (2006) (concluding that it would not be in the public interest for the Commission to forbear from its unbundling rules where the petitioner had not presented any new evidence or change in circumstances that would warrant revisiting the Commission's carefully calibrated balancing test under section 251(d)(2)(B) to determine the appropriate amount of unbundling). We likewise find that, absent this action by ACS, ACS's requested forbearance does not satisfy sections 10(a)(1) or (a)(2). As noted above, because ACS's wireline broadband Internet access transmission revenues are treated as regulated for accounting purposes, they would be included as part of a ACS's special access revenues for purposes of rate-of-return calculations, and thus an allocation would be necessary. Therefore, absent an appropriate allocation of the carrier's costs for wireline broadband Internet access transmission service, those costs could be recovered through increases in the rates for other interstate special access services that remain subject to rate-of-return regulation. Such rates would not be "just and reasonable" as required by section 10(a)(1) to justify forbearance, and the increased rates would harm consumers, including wholesale customers that rely on those special access inputs for their retail services, in contravention of the standard in section 10(a)(2).

<sup>231</sup> Such denial would necessitate that ACS file one or more additional forbearance petitions until such time as ACS, or other commenters, provide an adequate basis in the record for the Commission to address the cost allocation issues in that proceeding. Of course, ACS is free to do so, if it so chooses.

<sup>232</sup> 47 U.S.C. § 160. See, e.g., *AT&T v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006) ("Critical to Congress's deregulation strategy, the [1996] Act added section 10 to the Communications Act of 1934."); *2000 Biennial Regulatory Review*, IB Docket No. 00-202, Notice of Proposed Rule Making, 15 FCC Rcd 20008, 20010, para. 1 (2000) ("The major purpose of the 1996 Act is to establish 'a pro-competitive, deregulatory national policy framework' designed to make available to all Americans advanced telecommunications and information technologies and services 'by opening all telecommunications markets to competition.' Congress empowered the Commission with an important tool to realize this goal in Section 10 of the Act.") (citations omitted).

with Commission precedent,<sup>233</sup> to clarify this legal precondition for ACS to avail itself of the forbearance for its DSL transmission service.<sup>234</sup>

**c. Regulation of Special Access Services**

82. ACS also seeks conditional forbearance from dominant carrier tariffing and rate-of-return pricing regulation for its interstate special access services as a whole.<sup>235</sup> We are not persuaded by the record evidence that the standards of section 10 are satisfied with respect to such services. Therefore, we deny ACS's request for the conditional forbearance it seeks for its interstate special access services at this time.

83. As an initial matter, we note that, although ACS contends that the relief it seeks is consistent with the *Qwest Omaha Order*, the Commission in that order denied Qwest forbearance from dominant carrier regulation as it applies to any of Qwest's special access services. Specifically, the Commission denied that aspect of Qwest's petition because it found that "Qwest ha[d] not provided sufficient data for its service territory for the entire MSA to allow [the Commission] to reach a forbearance determination under section 10(a) for the enterprise market," which the Commission in that order took to include all special access services.<sup>236</sup> Similarly here, we find that ACS has not provided sufficient data to convince us that granting ACS the conditional relief it seeks for special access services would be consistent with each of the standards of section 10.<sup>237</sup> In particular, the data submitted do not enable us to conclude that there is sufficient competition with respect to interstate special access services generally, nor to conclude that forbearance would be justified under section 10 notwithstanding our inability to make such a finding.

84. In conducting our forbearance analysis, and consistent with the Commission's prior decisions, we examine the status of competition in the retail and wholesale markets.<sup>238</sup> As described above, the available data do not allow us to calculate precise market shares for retail special access services in the Anchorage study area.<sup>239</sup> More significantly, although the record contains general information about the scope of GCI's facilities deployment,<sup>240</sup> as discussed in greater detail above, those

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<sup>233</sup> See, e.g., *Qwest Communications International, Inc. and U S WEST, Inc., Applications for Transfer of Control, Memorandum Opinion and Order*, CC Docket No. 99-272, 15 FCC Rcd 5376, 5407, para. 64 (2000) (approving the proposed merger between Qwest and U S WEST subject to the condition that the merger could not be consummated until the issuance by the Commission of a subsequent order stating that the proposed divestiture [of Qwest's interLATA assets and services within the U S WEST region] results in a merger that complies with section 271).

<sup>234</sup> For these reasons, we find that this holding is not at odds with section 10's statutory deadline. See 47 U.S.C. § 160(c).

<sup>235</sup> See *supra* para. 20.

<sup>236</sup> See *Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50; see also *id.* at 19428, para. 22 n.66 (stating that all special access services are addressed in the enterprise section).

<sup>237</sup> However, unlike the *Qwest Omaha* proceeding, for the reasons explained elsewhere in this order, we are able to grant ACS the relief it seeks regarding enterprise switched access services. See *supra* Part IV.D.3.a.

<sup>238</sup> See *ACS UNE Order*, 22 FCC Rcd at 1974, paras. 26-27; see also *Qwest Omaha Order*, 20 FCC Rcd at 19447-52, paras. 65-72; *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505, para. 21 (considering the wholesale market in conjunction with the retail market given the nature of relief requested).

<sup>239</sup> See *supra* at paras. 50-Error! Reference source not found..

<sup>240</sup> See *supra* at Part IV.D.2.d.

data do not enable us to adequately determine market shares.<sup>241</sup> The absence of such market share evidence to use as a starting point for our analysis significantly hinders our ability to analyze on this record whether there is sufficient competition for interstate special access services throughout the Anchorage MSA.<sup>242</sup> This has implications for retail enterprise services provided using special access inputs, as well. Although the data on the record do not permit us to draw definitive conclusions based on market shares for retail special access services, the record suggests that a substantial amount of retail competition is based on special access inputs from ACS.<sup>243</sup>

85. Thus, in contrast to the relief from dominant carrier regulation granted in the *Qwest Omaha Order* and granted elsewhere in this order, we are unable to rely on the findings of our competitive analysis to justify forbearance from dominant carrier regulation of special access services. However, although the traditional market power inquiry informs our forbearance analysis, the inability to fully perform such an analysis is not necessarily dispositive in and of itself.<sup>244</sup> Rather, we proceed to evaluate the evidence in the record to determine if forbearance nonetheless is justified in this particular instance under the specific factors identified in section 10. As explained above, ACS has proposed certain forbearance conditions, such as capping its prices for special access services at current rates, that it contends are sufficient to satisfy the criteria of section 10 and entitle it to forbearance relief. In this case, however, we find such evidence insufficient to demonstrate that forbearance from dominant carrier regulation is warranted.<sup>245</sup>

86. As explained above, ACS has proposed capping tariffed special access rates, and continuing to tariff special access services (albeit on the same basis as competing carriers) as conditions of granting forbearance from dominant carrier regulation pricing and tariffing regulation of ACS's special access services as a whole.<sup>246</sup> It claims that these proposed conditions are sufficient to satisfy the criteria of section 10 and entitle it to forbearance relief. We are not persuaded, however, that the conditions proposed by ACS are sufficient to ensure that ACS's rates and practices would be just, reasonable, and not unjustly or unreasonably discriminatory as required to satisfy section 10(a)(1).

87. First, assuming *arguendo* that the conditions ACS proposes would be sufficient to ensure that the rates for ACS's interstate special access services would be just and reasonable, ACS would still have the incentive and ability to increase its rivals' costs by manipulating the terms and conditions under which

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<sup>241</sup> See *supra* text accompanying note 145.

<sup>242</sup> We recognize that market share data are not the sole evidence considered as part of the traditional market power analysis. See, e.g., *AT&T v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (criticizing the Commission's failure to consider factors in addition to market share). However, an evaluation of market share data typically is the starting point for, and a important component of, that analysis.

<sup>243</sup> See, e.g., ACS June 29, 2007 *Ex Parte* Letter at Exh. D (showing that GCI and AT&T Alascom each purchase [REDACTED] wholesale special access circuits from ACS [REDACTED]). We note that the record is virtually silent regarding the extent to which AT&T Alascom has deployed its own special access facilities.

<sup>244</sup> As the Commission stated in the *Qwest Omaha Order*, although it "look[s] to the Commission's previous caselaw on dominance for guidance," the traditional market power inquiry does not "bind [the Commission's] section 10 forbearance analysis." *Qwest Omaha Order*, 20 FCC Rcd at 19423-25, paras. 14, 17 n.52.

<sup>245</sup> We note that elsewhere in this order, we find that similar proposed conditions, in conjunction with evidence suggesting that ACS lacks market power for the relevant services, warrant forbearance from dominant carrier regulation. See Part IV.D.3.a.

<sup>246</sup> See ACS June 29, 2007 *Ex Parte* Letter at 1-2; see also *supra*, para. 56.

it offered and provisioned such services.<sup>247</sup> ACS's proposed condition, while it precludes it from increasing tariffed special access rates, does not protect against any non-price ability to raise rivals' costs, and thus does not fully ameliorate competitive concerns.

88. Second and relatedly, we find ACS's proposal that it continue to tariff its special access services, but on one day's notice, to be insufficient to ensure that the rates, terms, and conditions of ACS's special access tariffs will be just, reasonable, and not unjustly or unreasonably discriminatory.<sup>248</sup> Specifically, with a one-day tariff notice period, the Commission would be unable to ensure that ACS did not include unreasonable or discriminatory terms in its tariffs. Where the Commission has allowed the filing of tariffs on one day's notice it has been predicated on evidence of competition, which the Commission expected to constrain the carrier's behavior.<sup>249</sup> The lack of a comparable competitive showing here, combined with the concerns expressed above regarding ACS's incentive and ability to engage in non-price discrimination to raise its rivals' costs, leads us to conclude that ACS's proposal to tariff its special access services on one day's notice is not sufficient to ensure that its special access practices are not unjust, unreasonable, or unjustly or unreasonably discriminatory. Thus, we are not persuaded that ACS would no longer have the ability to raise rivals' costs by virtue of its proposed conditions.

89. As support for our conclusion, we also note that none of the commenters in this proceeding support ACS's conditional request for forbearance to the extent it applies to special access services as a whole, notwithstanding that ACS's largest competitor in the enterprise market – GCI – supports the conditional forbearance relief we grant in this order for switched access and other services.<sup>250</sup> This

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<sup>247</sup> See, e.g., *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5234-35, para. 54 (concluding that, given the Commission's assumption for purposes of that proceeding that Qwest continued to possess exclusionary market power by virtue of its local network, it could have the incentive and ability to engage in non-price discrimination against competitors absent the conditions adopted in that order and other remaining regulatory requirements).

<sup>248</sup> See, e.g., ACS June 29, 2007 *Ex Parte* Letter at 5.

<sup>249</sup> See, e.g., *Tariff Filing Requirements for Non-Dominant Carriers*, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6756, para. 23 (2003) (holding that in light of "significant competition that has developed since the adoption of the Commission's Competitive Carrier decision, advance scrutiny of the interstate tariffs of nondominant carriers is unnecessary to protect the public interest . . . because by definition nondominant carriers cannot exercise market power, unlawful tariffs should be rare"), *vacated on other grounds*, *Southwestern Bell v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *Nondominant Tariff Filing Order*, 10 FCC Rcd at 13653-54, paras. 3-4 (reinstating tariff filing on one day's notice).

<sup>250</sup> See, e.g., GCI Comments at ii-iii (opposing all special access relief and stating that "GCI does not oppose all, or even most, of ACS's request for relief with respect to switched access services"); Sprint Nextel Reply at 2-3 (arguing that forbearance is unwarranted because ACS retains market power over special access services necessary for competitors to provide their own retail services); Time Warner Telecom Comments at 10-11 (noting the insufficiency of the data regarding special access services and arguing that even if such insufficiencies are overlooked, forbearance is unwarranted for special access services given competitors dependence on ACS for wholesale special access inputs). Moreover, as GCI notes, in contrast to the switched access context, UNEs are frequently not available as an alternative for wholesale special access services. See GCI Comments at 12 (stating that use restrictions on UNEs limit their utility as a special access replacement); GCI June 6, 2007 *Ex Parte* Letter at 1-2 (same); see also 47 U.S.C. § 51.309(b) (stating that a requesting telecommunications carrier may not access UNEs for the exclusive provision of interexchange services or CMRS services). Late in the proceeding, GCI stated that if the Commission would adopt all of the conditions ACS proposed, GCI would not object to the requested forbearance, including for special access. GCI July 30, 2007 *Ex Parte* Letter at 2. We have not adopted each of the conditions GCI proposed. In particular, we do not adopt a condition ACS proposes to condition forbearance from (continued....)

reinforces our conclusion that the competitive concerns raised by ACS's conditional forbearance request preclude a finding that dominant carrier pricing and tariffing regulations are not necessary to ensure that ACS's special access services are offered on a just, reasonable, and not unjustly or unreasonably discriminatory basis under section 10(a)(1).

90. For similar reasons, we also conclude that ACS has not demonstrated that these requirements are not necessary for the protection of consumers under section 10(a)(2). To the extent that ACS retains the ability to raise rivals' costs through the provisioning of its special access services, end-user prices may rise, and consumers may be harmed as a result.<sup>251</sup> We find that the dominant carrier regulations at issue are still necessary to ensure competition in this market and ultimately to protect consumers.

91. Finally, ACS has not demonstrated that the requested forbearance relief is consistent with the public interest, as required by section 10(a)(3).<sup>252</sup> In considering whether the requested relief is consistent with the public interest, section 10(a)(3) requires us to consider whether the requested relief "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."<sup>253</sup> We find that granting ACS relief from dominant carrier regulation with respect to its provision of special access services would not enhance competition in the Anchorage study area as contemplated in section 10(a)(3), but would likely reduce competition. As explained above, the record indicates that ACS could engage in non-price discrimination even if the Commission accepted ACS's proposed conditions.<sup>254</sup> We are not willing, nor are we able under the Act, to forbear from dominant carrier regulations when to do so would be inconsistent with the public interest and would not promote competitive market conditions. Thus, we find that ACS has not made the required showing, and we therefore deny its request.

92. We therefore deny ACS's Petition to the extent it seeks conditional forbearance from the dominant carrier regulation that applies to interstate special access services. For the reasons explained above, we are unable to find on the present record that ACS has satisfied any of the three criteria of section 10 with respect to its requested relief for interstate special access services.

#### **E. Requested Forbearance Relief Similar to Forbearance Granted Verizon by Operation of Law**

93. In addition to ACS's request for similar forbearance relief to that granted in the Qwest Omaha Order, ACS also seeks relief comparable to that granted to Verizon by operation of law on March

(Continued from previous page) \_\_\_\_\_  
dominant carrier regulation of its special access services generally on ACS being prohibited from withdrawing any currently available interstate access service absent GCI's approval. *See supra* note 179. As GCI explained, if the Commission were "unable to adopt each of the conditions to the forbearance requested by ACS, then for all the reasons previously set forth in detail in this record, GCI's opposition to the grant stands." GCI Aug. 10, 2007 *Ex Parte* Letter at 2.

<sup>251</sup> 47 U.S.C. § 160(a)(1), (2). *See, e.g.*, Sprint Nextel Reply at 3.

<sup>252</sup> 47 U.S.C. § 160(a)(3).

<sup>253</sup> *Id.* § 160(b).

<sup>254</sup> *See supra* para. 87.

19, 2006.<sup>255</sup> Specifically, as noted above, 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.<sup>256</sup> ACS seeks the ability to offer all these services on a non-common carrier basis.<sup>257</sup> ACS states that it 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.’”<sup>258</sup> As discussed below, we grant in part ACS’s request for forbearance from certain dominant carrier and Computer Inquiry obligations for specified existing enterprise broadband services.<sup>259</sup> As with the broadband forbearance discussed above, we condition this forbearance on the requirement that ACS must file, and have approved by the Commission, the cost allocation analysis described above, specifying how it will address the cost-shifting concerns arising from this forbearance action in light of its continuing to offer other interstate special access services on a rate-of-return basis.<sup>260</sup>

## 1. Dominant Carrier Regulation

### a. Charges, Practices, Classifications, and Regulations

94. Section 10(a)(1) of the Act requires that we analyze whether the application of dominant carrier regulation to any broadband services ACS offers or may offer in Anchorage is necessary to ensure that the “charges, practices, classifications, or regulations . . . for [] or in connection with [those] . . . telecommunications service[s] are just and reasonable and are not unjustly or unreasonably discriminatory.”<sup>261</sup> Our section 10(a)(1) analysis takes into account the effect of dominant carrier regulation on ACS’s rates and practices by considering the overall marketplace for the services for which relief is sought and the customers that use them.<sup>262</sup> As discussed below, we conclude that it is appropriate to forbear from dominant carrier regulation as it applies to these services. In particular, mandating that ACS, but not its nondominant competitors, comply with requirements that directly limit the ability of customers to secure the most flexible service arrangements for the ACS-specified broadband services is unnecessary to prevent unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions for these services.

95. We begin our analysis by looking at the existing broadband services identified by ACS – Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services. These types of services are high-speed, high-volume services that

<sup>255</sup> ACS Petition at 6; *see also* Verizon-Related News Release, *supra* note 4; Verizon Forbearance Petition; Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter; Verizon WC Docket No. 04-440 Feb. 17, 2006 *Ex Parte* Letter.

<sup>256</sup> ACS June 29, 2007 *Ex Parte* Letter at 7; ACS July 25, 2007 *Ex Parte* Letter at 4-5.

<sup>257</sup> ACS June 29, 2007 *Ex Parte* Letter at 2 n.2 & 7.

<sup>258</sup> *See* ACS Petition at 7; ACS June 29, 2007 *Ex Parte* Letter at 7.

<sup>259</sup> Specifically, we grant ACS this relief for its interstate Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services and otherwise deny ACS’s request for relief similar to that granted Verizon through operation of law. GCI states that “the scope of relief requested by Verizon is not clear,” and thus asks that we deny ACS’s request on that basis. GCI Motion to Dismiss at 4. We find instead that these circumstances counsel in favor of analyzing and clearly addressing ACS’s request in the present Order.

<sup>260</sup> *See* GCI Reply at 2; *see also supra* Part IV.D.3.c (denying forbearance relief for certain special access services).

<sup>261</sup> 47 U.S.C. § 160(a)(1).

<sup>262</sup> *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505, para. 21.

enterprise customers, including some wholesale customers, use primarily to transmit large amounts of data. Specifically, ACS's Transparent LAN, Transparent LAN Lite, and LAN Extension Networking Services use fiber optic or copper facilities to provide high-speed, Ethernet-based, point-to-point or multi-point interconnectivity for LANs and wide area networks (WANs).<sup>263</sup> Similarly, ACS's Video Transmission Services provide high-speed transmission links for teleconferencing, video jukeboxes, and programming distribution.<sup>264</sup> We find insufficient information to precisely define the existing boundaries for ACS's broadband transmission services offerings, and we thus focus our analysis on the services ACS identified in the record here generally.<sup>265</sup>

96. We note that the relief we grant ACS in Anchorage excludes TDM-based, DS-1 and DS-3 special access services,<sup>266</sup> and that such special access services for other incumbent LECs likewise remain rate regulated, regardless of the specific geographic market.

97. We find that a number of entities currently provide enterprise broadband services.<sup>267</sup> With respect to the Anchorage study area specifically, we note the presence of GCI as a competitor in the enterprise market<sup>268</sup> as well as AT&T, which the evidence indicates is a significant provider for such services nationwide.<sup>269</sup>

98. We recognize that the record in this proceeding does not include detailed market share information for particular enterprise broadband services in the Anchorage MSA. However, we note that other available data suggest that there are a number of competing providers for these types of services and the marketplace appears highly competitive.<sup>270</sup> Moreover, as we discuss below, we find that competitors

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<sup>263</sup> See ACS Tariff FCC No. 1, §§ 7.10.1; 7.11.1; ACS July 25, 2007 *Ex Parte* Letter at Exh. C.

<sup>264</sup> See ACS Tariff FCC No. 1, § 7.6.1; ACS July 25, 2007 *Ex Parte* Letter at Exh. C.

<sup>265</sup> See, e.g. *AT&T/BellSouth Order*, 22 FCC Rcd at 5698, para. 65 (explaining that the Commission was unable to define the precise boundaries of relevant transmission service markets due to insufficient evidence).

<sup>266</sup> ACS excludes "traditional TDM-based special access services used to serve business customers, such as DS1 and DS3 special access circuits," from the scope of its broadband relief request. ACS July 25, 2007 *Ex Parte* Letter at 4-5.

<sup>267</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5708, para. 82; *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *Verizon/MCI Order*, 20 FCC Rcd at 18474-75, para. 76; *Qwest Section 272 Sunset Forbearance Order*, 20 FCC Rcd at 5244, para. 30; see also *Verizon WC Docket No. 04-440 Feb. 7, 2006 Ex Parte Letter at 7-9*.

<sup>268</sup> See, e.g., ACS Petition at 40-44; GCI Comments at 19; ACS Reply, Statement of Mark Enzenberger, Exh. D.

<sup>269</sup> See ACS June 29, 2007 *Ex Parte* Letter at 3 (stating ACS faces significant competition from GCI and other providers of broadband services in Anchorage); *Verizon WC Docket No. 04-440 Feb. 7, 2006 Ex Parte Letter at 7*. We do not have data that allow us to evaluate more precisely AT&T's market shares for these or other services in the Anchorage study area. See *supra* Part IV.D.2.d.

<sup>270</sup> See, e.g., *Verizon WC Docket No. 04-440 Feb. 7, 2006 Ex Parte Letter at 7 n.13* (citing a June 2005 analyst's estimated market shares for "primary" providers of enterprise data services: AT&T 35%, MCI 28%, Sprint 12%, ILEC 7%, Other 19%); *id.* at 7 n.14 (citing a June 2005 analyst's estimated market shares for "secondary" providers of enterprise data services: Sprint 31%, AT&T 16%, ILEC 16%, MCI 6%, Qwest 6%, Other 25%); see generally *id.* Attach. 2 (November 2003 analyst report estimating market shares of top providers of services to large enterprise customers: AT&T 26%, MCI 14%, Sprint 8%; and forecasting anticipated market shares for subsequent years). Although these data are not ideal, for example because they predate the recent BOC/interexchange carrier mergers, and the underlying information and methodologies are not available, as noted above, we do not give significant weight to such static market share information in any event.

either are providing, or readily could enter to provide, these services within Anchorage. In light of these factors, we do not find it essential to have such detailed information and would not give significant weight to static market share information in any event.<sup>271</sup>

99. We also observe the sophistication of the enterprise customers that tend to purchase these types of services. The Commission consistently has recognized that customers that use specialized services similar to the existing ACS-specified services demand the most flexible service offerings possible, and that service providers treat them differently from other types of customers, both in the way they market their products and in the prices they charge.<sup>272</sup> These users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts.<sup>273</sup> This shows that such customers are likely to make informed choices based on expert advice about service offerings and prices and thus suggests that these users also are likely to be aware of the choices available to them.<sup>274</sup> The Commission has further found that the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own facilities where possible, and to carry the traffic of these customers over the suppliers' own networks.<sup>275</sup> These services equate to substantial telecommunications expenditures for large enterprise customers, which supports the notion that these customers will continue to deal at the most sophisticated level with the providers of these services. Smaller enterprise customers, whose telecommunications requirements do not warrant the deployment of new facilities, tend to purchase less sophisticated services.

100. We recognize, of course, that the marketplace for enterprise broadband telecommunications services in the Anchorage study area is more modest than many other parts of the country as a whole, both in terms of enterprise customers' demands and in terms of the services the competing providers offer to meet those demands. We believe, however, that the customers that would typically purchase Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services within Anchorage, like enterprise customers in other parts of the nation, are the type of sophisticated purchasers of communications services that would be more than willing to switch service providers to obtain lower prices and/or improved service.<sup>276</sup> Many enterprise

<sup>271</sup> See, e.g., *Worldcom/MCI Order*, 13 FCC Rcd at 18036-37, paras. 17-18; see also *DOJ/FTC Horizontal Merger Guidelines*, § 1.521 ("Market concentration and market share data of necessity are based on historical evidence. 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.").

<sup>272</sup> See, e.g., *AT&T/BellSouth Order*, 22 FCC Rcd at 5699, para. 66; *SBC/AT&T Order*, 20 FCC Rcd at 18323, para. 60; *Verizon/MCI Order*, 20 FCC Rcd at 18465, para. 60; *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; 1998 Biennial Regulatory Review - Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61, 98-183, Report and Order, 16 FCC Rcd 7418, 7426, para. 17 (2001); *AT&T Reclassification Order*, 11 FCC Rcd at 3306, para. 65 (citing *Competition in the Interstate, Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5887, para. 39 (1991)).

<sup>273</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5708-09, paras. 81-82; *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, paras. 74-75; see also *Verizon/MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

<sup>274</sup> See *AT&T/BellSouth Order*, 22 FCC Rcd at 5708-09, para. 82; *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; see also *Verizon/MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

<sup>275</sup> *Triennial Review Order*, 18 FCC Rcd at 17063, para. 129.

<sup>276</sup> See, e.g., *Verizon WC Docket No. 04-440 Feb. 7, 2006 Ex Parte Letter*, Attach. at 3.

customers, moreover, have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences. Other enterprise customers, including most of the enterprise customers in the Anchorage study area, have more regional or localized operations. But even the limited number of enterprise customers in Anchorage that might demand services of these types are able to solicit telecommunications services from other potential providers.<sup>277</sup>

101. We further find that competitors can readily respond should ACS seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for its Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services. Even in situations where competitors do not have the option of self-deploying their own facilities or purchasing inputs from carriers other than the incumbent LEC, potential providers may rely on special access services purchased from ACS at rates subject to price regulation.<sup>278</sup> In this regard, we note that the relief we grant ACS in this order excludes TDM-based, DS-1 and DS-3 special access services.<sup>279</sup> Moreover, as we discuss in more detail below, competing carriers are able economically to deploy OCn-level facilities to the extent that there is demand for such services within the Anchorage study area.<sup>280</sup>

102. We reject Time Warner Telecom's assertion that TDM-based loops cannot in many instances be used to provide packetized broadband services to enterprise customers.<sup>281</sup> We find that assertion to be inconsistent with Time Warner Telecom's public statements that Time Warner Telecom can "cost-effectively deliver . . . Ethernet [services] to customers anywhere," even "where it may be uneconomical" to build facilities connecting Time Warner Telecom's network to the customers' premises.<sup>282</sup> Indeed, we observe that Time Warner Telecom has been able to compete in the provision of Ethernet services by relying on special access TDM loops (in addition to its own facilities).<sup>283</sup> We also

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<sup>277</sup> See, e.g., ACS Petition at 41-42.

<sup>278</sup> See, e.g., Sprint Nextel Reply at 2; Broadview Reply, Attach. 1 at 25-26 (noting the use of incumbent LEC special access services as inputs to competing enterprise broadband services); Verizon WC Docket No. 04-440 Feb. 7, 2006 *Ex Parte* Letter at 14.

<sup>279</sup> Indeed, we do not grant ACS forbearance for TDM-based, DS1 and DS3 special access services or for other of its special access services more generally. *Supra* Part IV.D.3.c; *infra* para. 110. We note that the cost allocation conditions imposed on the forbearance relief granted for wireline broadband Internet access transmission service and enterprise broadband services will help the Commission to ensure that the rates for these inputs remain just and reasonable. Moreover, the rate regulation that will continue to apply to ACS's special access services provides protection against unreasonable rate increases by requiring carriers that seek rate increases to justify such increases by providing cost and other supporting data in the tariff review process. ACS bases its petition on the contention that the market for access services in the Anchorage study area is competitive and, in particular, on its need to be able to offer lower rates to meet competition. Accordingly, if ACS should seek to raise its generally available tariffed rates for its TDM-based special access services, such a filing would be reviewed with particular scrutiny.

<sup>280</sup> See *infra* para. 105.

<sup>281</sup> Time Warner Telecom Comments at 13-15; see also Broadview Reply, Attach. 2 at 7-8.

<sup>282</sup> *Time Warner Telecom and Overture Networks Provide Ethernet Anywhere*, Time Warner Telecom Press Release (June 6, 2006), available at <http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf>.

<sup>283</sup> Specifically, Time Warner Telecom cites two declarations filed in the AT&T/BellSouth merger proceedings. See Time Warner Telecom Comments at 12-15 (citing Letter from Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. Reply Decl. of Graham Taylor (Taylor WC Docket No. 06-74 Reply Decl.); Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, Attach. Reply Decl. of Parley C. Casto (Casto WC Docket No. 06-74 Reply (continued....))

are unpersuaded by Time Warner Telecom's concern that reliance on TDM special access inputs gives rise to service or performance problems that hinder competition.<sup>284</sup> We agree that this argument is undercut by the fact that providers have been successfully competing for Ethernet services customers by relying on TDM inputs.<sup>285</sup> In addition, we observe that all ways of obtaining transmission capacity have trade-offs, including purchasing transmission services at wholesale and self-provisioning network transmission facilities, and we anticipate that competitors will explore various options in seeking to provide enterprise broadband services. For example, obtaining wholesale TDM special access circuits and providing the Ethernet electronics can enable providers to exercise greater control over the traffic carried on those circuits.<sup>286</sup> Further, any transmission services typically are offered in fixed capacity increments, which may not be the precise capacities particular customers prefer.<sup>287</sup> Finally, to the extent that commenters have a desire for expanded access to section 251 UNEs under the Commission's generally applicable unbundling rules, we find it more appropriate to consider such concerns in the context of an industry-wide proceeding applicable to all similarly-situated carriers, rather than in the context of a forbearance proceeding.<sup>288</sup>

103. In light of these findings, we conclude that dominant carrier tariffing and pricing regulation of ACS's Transparent LAN Service, Transparent LAN Service Lite, LAN Extension Networking Service, and Video Transmission Services is not necessary to ensure that ACS's rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory. The competitive conditions persuade us that the contribution of tariffing requirements, and the accompanying cost support and other requirements, to ensuring just, reasonable, and nondiscriminatory charges and practices for these services is negligible. The Commission has recognized that tariffs originally were required to protect consumers from unjust, unreasonable, and discriminatory rates in a virtually monopolistic market, and that they become unnecessary in a marketplace where the provider faces significant competitive pressure.<sup>289</sup>

104. For the same reasons, we find that continuing to subject ACS to dominant carrier (Continued from previous page) \_\_\_\_\_ Decl.). These declarations indicate that Time Warner Telecom, among others, can use TDM special access services to offer retail Ethernet services. *See* Taylor WC Docket No. 06-74 Reply Decl. at para. 9 ("To the extent that TWTC has been able to deploy Ethernet services at retail in AT&T's region, it has done so using 1) its on-net facilities; 2) TDM loops purchased from AT&T; and 3) an extremely limited number of competitive facilities.") *cited in* Time Warner Telecom Comments; Casto WC Docket No. 06-74 Reply Decl. at para. 10 ("Numerous Ethernet providers, including TWTC, AT&T, and others, offer retail Ethernet services" by using "basic DS1 or DS3 special access circuits.").

<sup>284</sup> *See, e.g.*, Time Warner Telecom Comments at 14-15.

<sup>285</sup> *See, e.g.*, Casto WC Docket No. 06-74 Reply Decl. at para. 22.

<sup>286</sup> *See id.*

<sup>287</sup> For example, Time Warner Telecom notes that it would need to obtain two DS3s to provide a 50 Mbps Ethernet loop because DS3s provide approximately 45 Mbps of bandwidth. Time Warner Telecom Comments at 14. However, Ethernet supports data transfer rates in specific increments of 10 Mbps, 100 Mbps, and 1 Gbps. *See* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY, 363, 364 (22nd ed., 2006). Thus, depending upon the capacity of service desired by a particular customer, it could well be necessary to purchase excess capacity of a wholesale Ethernet service, as well.

<sup>288</sup> *See, e.g.*, Broadview Reply, Attach. 2 at 7-8; *see also* 47 C.F.R. §§ 1.401-1.407 (providing for petitions for rulemaking).

<sup>289</sup> *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20738-68, paras. 14-66 (1996) (*LXC Forbearance Order*).

regulation in regard to its existing, identified non-TDM-based, packet-switched broadband services therefore is no longer appropriate in light of the market conditions. Such regulation is not necessary to ensure that ACS's charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as ACS is subject to the same regulatory obligations as its nondominant competitors that provide these services.<sup>290</sup>

105. We also find that ACS faces sufficient competitive pressure, either from actual or potential competitors, in its provision of the existing ACS-specified services because competing carriers are able to economically deploy OCn-level facilities to compete with ACS's offerings to the extent that there is demand for such services within the Anchorage study area. Specifically, we find, consistent with the Commission's findings in the *Triennial Review* and the *Triennial Review Remand Orders*, that, to the extent there is a demand for fiber loops at OCn capacity within that study area, competitive carriers such as GCI will be able to economically deploy these facilities to meet that demand.<sup>291</sup> We further find, consistent with this precedent, that OCn-level facilities produce revenue levels that can justify the high cost of loop construction.<sup>292</sup> Our precedent also makes clear that large enterprise customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.<sup>293</sup> Thus, we find it no longer appropriate to subject ACS to dominant carrier regulation for its specified, existing non-TDM-based, optical services.

106. Given the costs associated with dominant carrier regulation, we find that customers would benefit by our granting ACS relief from that regulation as it applies to the existing ACS-specified broadband services. In particular, the Commission has long recognized that tariff regulation may create market inefficiencies, inhibit carriers from responding quickly to rivals' new offerings, and impose other unnecessary costs.<sup>294</sup> We find that continuing to apply dominant carrier regulation to ACS's existing broadband services would have each of these effects. Specifically, tariffing these services reduces ACS's ability to respond in a timely manner to its customers' demands for innovative service arrangements tailored to each customer's individualized needs.<sup>295</sup> In addition, by mandating that ACS provide advance notice of changes in its prices, terms, and conditions of service for these services, tariffing allows ACS's competitors to counter innovative product and service offerings even before they are made available to the public. In contrast, detariffing of these services will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers' ability to obtain service arrangements that are specifically tailored to their individualized needs. Moreover, relief from advance notice requirements and cost-based pricing requirements would enable ACS to respond quickly and creatively to competing service offers. We find that tariff regulation simply is not necessary to ensure that the rates, terms, and conditions for the existing ACS-specified broadband services are just, reasonable, and not unjustly or unreasonably discriminatory. The better policy for consumers is to allow

<sup>290</sup> See *Qwest Omaha Order*, 20 FCC Rcd at 19434-35, paras. 39, 42. As stated above, we expect ACS to make a showing that adequately addresses cost shifting concerns arising from this forbearance action in light of its continuing to offer other interstate special access services on a rate-of-return basis.

<sup>291</sup> *Triennial Review Order*, 18 FCC Rcd at 17169, 17221, paras. 315, 389 (finding that requesting carriers are not impaired without OCn or SONET interface transport); *Triennial Review Remand Order*, 20 FCC Rcd at 2634, para. 183.

<sup>292</sup> *Triennial Review Order*, 18 FCC Rcd at 17169, para. 316.

<sup>293</sup> *Id.*

<sup>294</sup> See, e.g., *AT&T Reclassification Order*, 11 FCC Rcd at 3288, para. 27.

<sup>295</sup> See *IXC Forbearance Order*, 11 FCC Rcd at 20760-61, para. 53.

ACS to respond to technological and market developments without the Commission reviewing in advance the rates, and terms, and conditions under which ACS offers these services.<sup>296</sup>

107. We find that eliminating these requirements would make ACS a more effective competitor for these services, which in turn we anticipate will increase even further the amount of competition in the marketplace, thus helping ensure that the rates and practices for these services overall are just, reasonable, and not unjustly or unreasonably discriminatory. Forbearing from dominant carrier regulation of the ACS-specified broadband services will permit customers to take advantage of a more market-based environment for these highly-specialized services and allow petitioners the flexibility necessary to respond to dynamic price and service changes often associated with the competitive bidding process. In such a deregulated environment, the Commission's enforcement authority, along with market forces, will serve to safeguard the rights of consumers. ACS will continue to be subject to sections 201 and 202 of the Act in its provision of its existing specified broadband services, which, among other things, mandate that ACS provide interstate telecommunications services upon reasonable request and prohibit it from acting in an unjust or unreasonable manner or otherwise favoring itself in the provision of "like" services provided to unaffiliated entities.<sup>297</sup>

108. However, as with forbearance for wireline broadband Internet access transmission, discussed above, we find that forbearance from pricing regulation of these enterprise broadband services has implications for ACS's special access services generally, which remain subject to rate-of-return regulation.<sup>298</sup> In particular, the ratemaking process must account for the fact that, for example, the costs and revenues associated with ACS's provision of these services no longer should be included in its interstate rate-of-return calculations. ACS has not submitted a proposal for how these cost allocation issues would be addressed, nor do we find any other basis in the record for addressing these concerns. Thus, as with wireline broadband Internet access transmission service, discussed above, we condition forbearance on ACS filing, and having approved by the Commission, the cost allocation analysis described above, specifying how it will allocate its costs associated with the provision of the specified enterprise broadband services for ratemaking purposes.<sup>299</sup>

109. We also find that continued application of our dominant carrier discontinuance rules to

<sup>296</sup> See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27012-13, para. 22 (2002) (*SBC Advanced Services Forbearance Order*).

<sup>297</sup> 47 U.S.C. §§ 201-02. Specifically, we forbear from the following requirements with regard to ACS's provision of the specified existing broadband services within the Anchorage study area: (1) section 203 of the Act to the extent it requires ACS to file tariffs for these services as offered within that study area; and sections 61.31-61.38 of our rules to the extent they require ACS to file tariffs for these services as offered within that study area. See *LXC Forbearance Order; Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15014 (1997); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999); 47 C.F.R. §§ 61.31-61.38 (tariffing requirements for dominant carriers).

<sup>298</sup> See, e.g., GCI Reply at 2 (stating that "unlike price cap regulation, rate-of-return regulation allows [incumbent LECs] to cross-subsidize and 'shift nonregulated costs to regulated services' with potentially disastrous consequences for competition" and that ACS "fails to even mention the potential for cost-shifting").

<sup>299</sup> For the same reasons discussed in the context of wireline broadband Internet access transmission service, we find that, absent this legal requirement, we would deny ACS's request for forbearance based on these cost allocation concerns. Thus, we likewise find that this is consistent with the statutory deadline imposed by section 10.

ACS's existing specified broadband services is not necessary to ensure that the charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as ACS is subject to the same treatment as nondominant carriers in relation to these services.<sup>300</sup> We conclude that subjecting ACS to a 60-day automatic grant period for discontinuance of its existing specified broadband services, and a 30-day comment period for notice to affected customers, is not necessary under section 10(a)(1), where nondominant carriers providing those same services are subject to a 30-day automatic grant period and 15-day comment period. However, to maintain sufficient customer protection and ensure the justness and reasonableness of ACS's practices in connection with these services, we predicate this finding upon ACS's compliance with the discontinuance rules that apply to nondominant carriers in the event it seeks to discontinue, reduce, or impair any of the non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services for which we grant relief.<sup>301</sup> Similarly, we forbear from applying our domestic streamlined transfer of control rules to ACS as a dominant carrier of these services, conditioned upon treatment of ACS as a nondominant carrier for these services.<sup>302</sup>

110. We disagree with commenters that argue that forbearance should be denied because ACS controls bottleneck special access facilities and services that its competitors must access in order to provide their own broadband services.<sup>303</sup> As an initial matter, those commenters' concerns generally arise from the fact that ACS requested far greater forbearance relief than we grant in this order.<sup>304</sup> Here, we

<sup>300</sup> 47 C.F.R. §§ 63.03(b)(2), 63.71(a)(5), (b)(4), (c).

<sup>301</sup> *Id.* § 63.71; see *Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43.

<sup>302</sup> See *Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43. Specifically, we forbear from applying sections 63.03, 63.19, 63.21, 63.23, and 63.60-63.90 of our rules to ACS's provision of the specified existing broadband services within the Anchorage study area to the extent that, and only to the extent that, ACS would be treated as a dominant carrier under these rules for no reason other than its provision of those services within that study area. 47 C.F.R. § 63.03 (procedures for domestic transfer of control applications); *id.* §§ 63.60-63.90 (definitions, rules, and procedures that apply to the discontinuance, reduction, outage, and impairment of services). To the extent that ACS otherwise would be treated as a dominant carrier under these rules, that treatment shall continue. See *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5235-39, paras. 55-62.

<sup>303</sup> Time Warner Telecom Comments at 2, 11-15 (arguing that ACS still controls certain bottleneck facilities necessary to serve enterprise customers); GCI Comments at 4 (claiming that forbearance would injure competition in the retail market for broadband services because ACS would be able to engage in a price squeeze on customers that rely on its special access facilities); Broadview Reply at 4 (claiming that "ACS's dominance over the transmission facilities needed to provide end users competitive broadband services is unquestionable"); Sprint Nextel Reply at 2 (arguing that ACS controls the access services necessary to compete in the wholesale and enterprise markets).

<sup>304</sup> See, e.g., Time Warner Telecom Comments at 5 n.7 ("For purposes of this opposition, the Joint Commenters assume the most expansive interpretation of ACS's request for relief with respect to the market for broadband transmission services provided to the enterprise market: that ACS seeks relief from Title II and dominant carrier regulation for both its packetized and TDM based broadband services sold to both retail and wholesale enterprise customers in the Anchorage MSA."); GCI Comments at 3-4 (stating that "ACS claims to seek forbearance from regulation of broadband services 'consistent with that granted to Verizon Telephone Companies,' but fails to acknowledge that, unlike Verizon, ACS simultaneously seeks forbearance from regulations of its circuit-switched special access transmission facilities"); Broadview Reply at 4 (stating that "any current retail competition in Anchorage exists at the mercy of regulatory requirements that ensure that competitors have access to *wholesale* inputs that currently only ACS can make available in the vast majority of locations throughout Anchorage"); Sprint Nextel Reply at 2 (noting that ACS's request for forbearance is "far broader than the limited forbearance granted to Qwest in the Omaha MSA and broader than the forbearance sought by Verizon and deemed granted last March").