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

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area	)	WC Docket No. 05-281

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 2006 **Released: January 30, 2007**

By the Commission: Chairman Martin and Commissioner Tate issuing separate statements; Commissioners Copps and Adelstein concurring and issuing a joint statement; Commissioner McDowell not participating.

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I. INTRODUCTION

1. Last year, ACS of Anchorage, Inc. (ACS) filed a petition pursuant to section 10 of the Telecommunications Act of 1996[1] seeking forbearance from the unbundling obligations of section 251(c)(3) of the Act and the related pricing standard set forth in section 252(d)(1) for unbundled network elements (UNEs) throughout the Anchorage, Alaska local exchange carrier (LEC) study area (Anchorage study area).[2] Today, we grant ACS forbearance, subject to specific conditions, from the obligation to provide unbundled loops and dedicated transport pursuant to sections 251(c)(3) and 252(d)(1) in those portions of its service territory in the Anchorage study area where a facilities-based competitor has substantially built out its network.[3] While each case must be judged on its own merits, and while we adopt herein no rules of general applicability, the relief we grant today follows, as closely as possible based on the record, the relief we granted Qwest Corporation (Qwest) in the Omaha Metropolitan Statistical Area (Omaha MSA) last year under comparable competitive conditions.

[1] 47 U.S.C. § 160; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq*. In this Order, we use "1996 Act" to refer exclusively to the Telecommunications Act of 1996, and use "the Act" to refer either to the 1996 Act or the Communications Act which the 1996 Act amended.

[2] Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281 (filed September 30, 2005) (ACS Petition or Petition). ACS filed an amended petition on October 6, 2005. Comments were filed in this proceeding by January 9, 2006, and reply comments were filed by February 23, 2006. *See Pleading Cycle Established for Comments on ACS's Petition for Forbearance in the Anchorage, Alaska Local Exchange Carrier Study Area*, WC Docket No. 05-281, Public Notice, 20 FCC Rcd 16307 (WCB 2005); *Wireline Competition Bureau Grants Request for Extension of Time to File Comments on Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Public Notice, 20 FCC Rcd 19341 (WCB 2005). The Wireline Competition Bureau extended the one-year deadline for acting on the Petition by 90 days as provided for in section 10(c) of the Act. *See Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area,* WC Docket No. 05-281, Order, DA 06-1719 (rel. Aug. 25, 2006). On May 22, 2006, ACS filed a second forbearance petition, requesting that the Commission forbear from certain dominant carrier regulation of ACS's interstate access services, and for forbearance from Title II regulation of its broadband services, in the Anchorage study area. *See Pleading Cycle Established for Comments on Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services and From Title II Regulation of its Broadband Services in the Anchorage, Alaska Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Public Notice, 21 FCC Rcd 6565 (WCB 2006). The issues raised in ACS's second forbearance petition are being considered in a separate proceeding.

[3] ACS requests, in the alternative, that if the Commission declines to grant it forbearance from its section 251(c)(3) unbundling obligations and its section 252(d)(1) pricing obligations, that the Commission grant it forbearance from these obligations "with respect to GCI." ACS Petition at 4. For the reasons explained below, we grant ACS the level of forbearance relief we find warranted at the present time in the Anchorage study area, and deny its Petition otherwise. Because we would not grant ACS any greater relief regarding its alternative request than we do its primary request, we deny ACS's alternate request to the extent it is not already granted herein.

2. As discussed in detail below, Commission precedent and the record evidence particular to the Anchorage study area lead us to the decision we reach today.[4] *First*, based on the record in this proceeding, we grant ACS relief from section 251(c)(3) unbundling obligations and section 252(d)(1) pricing obligations in 5 of the 11 wire centers in the Anchorage study area, where the level of facilities-based competition by the local cable operator, General Communication Inc. (GCI), ensures that market forces will protect the interests of consumers and that such regulation, therefore, is unnecessary. *Second*, as a condition of today's Order, we require ACS to make loops and certain subloops available in those wire centers where we grant relief, by no later than the end of the transition period, at the same rates, terms and conditions as those negotiated between GCI and ACS in Fairbanks, Alaska until commercially negotiated rates are reached.[5] *Third*, similar to the *Qwest Omaha* decision, we create a one-year transition period before the forbearance grant takes effect.

II. BACKGROUND

3. The Act includes a number of provisions designed to promote the development of competitive markets, including the unbundling obligations set forth in section 251(c)(3) and the related pricing standards set forth in section 252(d)(1) from which ACS seeks forbearance.[6] The Commission previously has summarized the long and complex history of its unbundling regime since the passage of the 1996 Act.[7] Here, we offer only a brief review of these requirements, which are specifically relevant to our forbearance analysis.

4. *Section 251(c)(3)*. Section 251(c)(3) imposes on incumbent LECs "[t]he duty to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis . . . in accordance with . . . this section and section 252."[8] Congress directed the

[4] ACS requests forbearance in the Anchorage study area. A study area is a geographic segment of an incumbent LEC's telephone operations. *See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*), *adopting Recommended Decision and Order*, 49 Fed. Reg. 48325 (1984); *see also* 47 C.F.R. Part 36, App. The Anchorage study area is the area served by ACS in and around Anchorage, Alaska, and is used to determine universal service support and to allocate costs between the state and interstate jurisdictions for ratemaking purposes. The Anchorage study area includes some areas beyond the political boundaries of the Municipality of Anchorage. *See* ACS Petition at 1.

[5] *See supra* Part III.C.1.b. Such terms and conditions would include, for example, loop provisioning, maintenance and non-recurring charges associated with loop access. ACS must make this offering until it and any requesting carrier, including GCI, reach a commercial agreement replacing these negotiated rates, terms, and conditions.

[6] *See* 47 U.S.C. §§ 251, 252(d)(1).

[7] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 96-98, 98-147, 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16992-17007, paras. 8-34 (2003) (*Triennial Review Order*), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied sub nom*. *National Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313, 316, 345 (2004).

[8] *See* 47 U.S.C. § 251(c)(3); *see also* 47 C.F.R. §§ 51.301-19, 51.321, 51.323 (implementing section 251(c)(3)).

Commission to determine which non-proprietary network elements must be unbundled under section 251(c)(3) after considering, at a minimum, whether access to a non-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.[9]

5. In February 2005, the Commission released the *Triennial Review Remand Order*, in which it revised the list of network elements that must be provided as UNEs.[10] The Commission also modified its unbundling framework by making impairment determinations in part by drawing reasonable inferences about the prospects for competition in one geographic market from the state of competition in other, similar markets.[11] In making such inferences for high-capacity loops and transport, the Commission adopted a wire-center-based analysis that used the number of access lines and fiber collocations in a wire center as proxies to determine impairment for high-capacity loop and dedicated transport UNEs.[12] Rather than initiating a number of separate proceedings to address, case-by-case, situations where the Commission's impairment findings did not perfectly match local market realities, the Commission instead invited incumbent LECs to seek forbearance from the application of the Commission's unbundling rules in specific geographic markets where the requirements for forbearance have been met.[13] The Commission recognized that it could be appropriate to conclude, based on sufficient facilities-based competition, particularly from cable companies, that the state of local competition might justify forbearance from unbundling obligations.[14]

6. *Section 252(d)(1)*. Under section 252(d)(1), UNEs that must be offered pursuant to section 251(c)(3) must be made available at mutually agreed upon rates, or at cost-based rates as determined using the Total Element Long Run Incremental Cost (TELRIC) methodology.[15] The Commission established the

[9] *See* 47 U.S.C. §§ 251(d)(1), (2)(B). For proprietary network elements, the Act directs the Commission to consider whether access to such network elements is "necessary." *See id*. § 251(d)(2)(A). Almost all network elements have been considered "non-proprietary" and analyzed under section 251(d)(2)(B).

[10] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[11] *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2546, para. 22.

[12] *See, e.g.*, *id.* at 2537, para. 5 (discussing enterprise loop impairment).

[13] *Id.* at 2557, para. 39. The Commission's section 251(d)(2) impairment analysis, while instructive in a section 10(a) forbearance proceeding, does not bind the Commission's forbearance review. In a forbearance proceeding, Congress has charged the Commission with determining whether the standards of section 10(a) are satisfied; those standards are not identical to the standards of section 251(d)(2). *Compare* 47 U.S.C. § 160(a) *with* 47 U.S.C. § 251(d)(2).

[14] *Triennial Review Remand Order*, 20 FCC Rcd at 2556-57, paras. 38-39; *see also id*. at 2556, para. 39 n.116.

[15] *See* 47 U.S.C. § 252(d)(1).

TELRIC pricing methodology that state commissions must use to determine what are permissible cost-based rates incumbent LECs may charge for UNEs in the *Local Competition First Report and Order*.[16]

7. *Qwest Omaha Order*. On December 2, 2005, approximately two months after ACS filed its petition in this proceeding, in a case of first impression concerning forbearance from a section 251(c)(3) unbundling obligation, the Commission released an order granting in part and denying in part a forbearance petition filed by Qwest with respect to Qwest's operations in the Omaha MSA.[17] In the *Qwest Omaha Order*, the Commission held that section 251(c)(3) had been "fully implemented" nationwide[18] and granted Qwest forbearance from Qwest's section 251(c)(3) unbundling obligations in 9 of the 24 wire centers in the Omaha MSA due to the state of competition and level of competitive facilities deployment in those 9 wire centers, as well as certain other regulatory safeguards, such as continued availability of section 251(c)(4) resale and section 271 unbundled elements.[19] The Commission concluded that, in areas served by those 9 wire centers, Cox Communications, Inc. (Cox), the local cable operator, had built out "extensive facilities" and was using those facilities to provide service to customers in competition with Qwest.[20] Although Cox leased some wholesale last-mile inputs from Qwest pursuant to voluntary commercial agreements, Cox provided competition to Qwest without accessing UNEs provided by Qwest pursuant to section 251(c)(3).[21] To avoid customer disruption, the Commission adopted a six-month transition period for customers of competitive LECs other than Cox that relied on Qwest's UNEs offered pursuant to section 251(c)(3).[22]

8. The Commission declined to grant Qwest forbearance from its section 251(c)(3) unbundling obligations in the remaining 15 wire centers in the Omaha MSA where Cox's facilities deployment was not as extensive.[23] The Commission also denied Qwest forbearance from certain section 271 obligations, to

[16] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15846-50, paras. 679-89 (1996) (*Local Competition First Report and Order*) (subsequent history omitted) (establishing the TELRIC methodology and asking the states to perform the necessary analysis under this methodology). The Supreme Court upheld this allocation of federal and state jurisdiction, *see AT&T Corp. v. Iowa Util. Bd.,* 525 U.S. 366, 377-86 (1999), and upheld the TELRIC pricing methodology, *see Verizon Communications v. FCC*, 535 U.S. 467 (2002). The Commission has initiated a separate proceeding in which it is comprehensively reviewing TELRIC. *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, 18 FCC Rcd 18945 (2003) (*TELRIC Notice*).

[17] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, 20 FCC Rcd 19415, 19417, para. 2 (2005) (*Qwest Omaha Order*), *appeal pending*, *Qwest Corp. v. FCC & USA*, No. 04-1450 (D.C. Cir. filed Dec. 12, 2005).

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

[19] 47 U.S.C. §§ 251(c)(4) (resale obligation), 271(c)(2)(B) (competitive checklist).

[20] *Qwest Omaha Order*, 20 FCC Rcd at 19444, para. 59.

[21] *Id.* at 19450, para. 69 n.186 (stating that "Cox does not itself rely on Qwest's UNEs to compete").

[22] *Id.* at 19452-53, paras. 73-74.

[23] *Id.* at 19444-45, para. 60.

which Qwest is subject as a Bell Operating Company (BOC).[24] As relevant to our discussion below, specifically, the Commission denied Qwest forbearance from section 271 checklist items 4, 5, and 6, which establish independent obligations to provide unbundled access to local loops, local transport, and local switching,[25] and relied on the continued availability of wholesale access to Qwest's network under section 271 in determining to forbear from section 251(c)(3).[26] The "just and reasonable" standard of sections 201 and 202 governs the rates, terms, and conditions for network elements made available pursuant to checklist items 4 through 6, rather than the section 252(d)(1) TELRIC standard that applies to section 251(c)(3) UNEs.[27]

III. DISCUSSION

9. This Order marks the second time the Commission has addressed whether forbearance from the unbundling provisions of section 251(c)(3) is warranted in light of market conditions in a particular local geographic area. While each forbearance case must be judged on its own merits, and while we adopt herein no rules of general applicability,[28] the decision we reach today is similar in most respects to the decision the Commission reached in the *Qwest Omaha Order*. Most notably, we apply the same analytic framework to

[24] *Id.* at 19460, para. 90; *see also* 47 U.S.C. § 153(4) (defining "Bell operating company").

[25] 47 U.S.C. § 271(c)(2)(B)(iv)-(vi). Section 271(c)(2)(B) of the Act sets forth a fourteen point "competitive checklist" of access, interconnection and other threshold requirements that a BOC must demonstrate that it satisfies before that BOC can be authorized to provide in-region, interLATA services. *Id.* at § 271(c)(2)(B). After a BOC obtains section 271 authority to offer in-region interLATA services, these threshold requirements become ongoing requirements. *Id.* at § 271(d)(6).

[26] *Qwest Omaha Order*, 20 FCC Rcd at 19446-47, 19449-50, 19452, 19455, paras. 62, 64, 67-68, 71, 80.

[27] *Triennial Review Order,* 18 FCC Rcd at 17386-89, paras. 656-64, *corrected by Triennial Review Order Errata*, 18 FCC Rcd at 19022, paras. 32-33. The Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed the Commission's conclusions in the *Triennial Review Order* related to the BOCs' section 271 obligations. *See USTA II*, 359 F.3d at 588-90.

[28] As we explain in greater detail below, this proceeding considers factors unique to the Anchorage study area. *See infra* para. 41. The Commission may reach different conclusions in other markets regarding forbearance from section 251(c)(3) and section 252(d)(1) obligations where the competitive situation differs from the situation in Anchorage. The decision we reach today is based on the present record and our precedent. To the extent the Commission relies on the *Qwest Omaha* decision, it follows the analysis established in that Order that is readily available to the public. We therefore reject arguments predicated on a lack of access to confidential information. *See* Letter from Brad E. Mutschelknaus *et al.*, Counsel for Broadview Networks, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2-3 (filed Dec. 11, 2006) (Broadview Dec. 11, 2006 *Ex Parte* Letter) (contending that interested parties are unable "to address the potential use of the *Qwest Omaha Order* as a 'roadmap' for resolution of the instant petition" or to compare the competitive market in Omaha at the time that order was decided with the competitive market in Anchorage). In reaching this conclusion, we do not prejudge how we might rule on confidentiality issues raised in other proceedings. *See, e.g.*, *id.* at 3 (arguing that the Commission should grant a pending motion to modify the Protective Order in the Qwest Omaha proceeding); *see also* Letter from Brett Heather Freedson, Counsel for Broadview Networks, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. (filed Oct. 11, 2006), *amended by* Letter from Brett Heather Freedson, Counsel for Broadview Networks, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223, Attach. (filed Oct. 13, 2006) (Motion to Modify Protective Order).

our analysis of the level of competition in the Anchorage study area in this proceeding that the Commission applied to its analysis of competition in the Omaha MSA. In each case, the Commission begins by examining the level of retail competition to the incumbent LEC and the role of the wholesale market. The Commission then evaluates the extent to which competitive facilities can and will be used to provide competitive services in each wire center service area where relief is sought. In the *Qwest Omaha Order* and here, the Commission's analysis results in granting the incumbent LEC relief from its unbundling obligations where the level of facilities-based competition ensures that market forces will protect the interests of consumers and that section 251(c)(3) unbundling regulation is, therefore, unnecessary and not in the public interest. Similarly, in each case, the Commission declines to grant the incumbent LEC's forbearance petition in a number of wire center service areas where facilities-based deployment has not developed sufficiently.

A. Forbearance Standard

10. The goal of the Telecommunications Act of 1996 is to establish "a pro-competitive, de-regulatory national policy framework."[29] An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations.[30] Specifically, the Commission must forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[31] In making such determinations, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[32] As part of our forbearance analysis, and consistent with the Commission's prior decisions, we examine the status of competition in the retail market as well as the role of the wholesale market in the Anchorage study area.[33]

[29] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

[30] 47 U.S.C. § 160(a).

[31] *Id*.

[32] *Id*. § 160(b).

[33] As stated above, the Commission has determined that, for purposes of section 10(d), the requirements of section 251(c) are fully implemented nationwide and may be forborne from. *See supra* text associated with note 18; *see also Qwest Omaha Order*, 20 FCC Rcd at 19439-42, paras. 51, 53-56. We therefore reject commenters' requests to revisit the Commission's interpretation of "fully implemented." *See, e.g.*, Covad Comments at 12; McLeodUSA Opposition at 3-4; NuVox Comments at 6 (stating that "with respect to UNEs not de-listed, section 251 is not fully implemented and thus forbearance cannot be granted until the Commission makes a determination of non-impairment for all remaining UNEs consistent with its rules"); Letter from Andrew D. Lipman *et al.*, Counsel for ACN Communications Services, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 4-5 (filed Dec. 11, 2006) (ACN Dec. 11, 2006 *Ex Parte* Letter).

11. Pursuant to our statutory obligations, in this Order, we therefore apply the criteria of section 10 to the regulations and statutory provisions from which ACS seeks relief.[34] We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.[35] Our sole task here is to determine whether to forbear under the standard of section 10 from the regulatory and statutory provisions at issue, and we do not – and cannot – issue comprehensive proclamations in this proceeding regarding non-impairment status in the Anchorage study area.[36]

B. Market Definition

1. Scope of Market Analysis

12. As stated above, under section 10, the "Commission is required to forbear from *any statutory provision or regulation* if it determines that" the criteria of section 10 are satisfied.[37] Therefore, we begin the section 10 analysis with the statutory provisions and regulations from which ACS seeks relief. In this case, ACS seeks relief from the unbundling obligations of section 251(c)(3) and the related pricing obligations of section 252(d)(1), as well as the associated rules.[38] The Commission's unbundling rules that implement section 251(c)(3) require ACS to provide requesting carriers with access to certain categories of facilities when parties are unable to negotiate the terms and conditions of such access. Our analysis therefore involves these categories of facilities.[39] Nevertheless, we decline to formally define product markets pursuant to a market power analysis for purposes of this proceeding as requested by ACS, GCI, or

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[34] *See, e.g.*, *Qwest Omaha Order*, 20 FCC Rcd at 19447, para. 65; *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21505, para. 21 (2004) (*Broadband 271 Forbearance Order*), *aff'd, EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

[35] *See Qwest Omaha Order*, 20 FCC Rcd at 19424, para. 14 n.47. Thus, consistent with past practice, we do not craft any new impairment tests. We therefore reject commenters' suggestions to the contrary. *See, e.g.*, NuVox Comments at 36 (stating that "UNEs cannot be eliminated, however, unless the impairment test of Section 251 is satisfied"); Time Warner Opposition at 5 (arguing that "[t]he Commission must either review the petition under the framework for making impairment determinations adopted in the [*Triennial Review Order*, *Triennial Review Remand Order*] and D.C. Circuit decisions reviewing those orders, or it must explain why it is reasonable to depart from that framework"). In the *Qwest Omaha Order*, the Commission similarly rejected commenters' requests to interpret and apply the section 251(c)(3) impairment standard to its forbearance analysis. *Qwest Omaha Order*, 20 FCC Rcd at 19424, para. 14 n.48.

[36] *See, e.g.*, ACS Petition at 47-48 (arguing that the Commission should make "unimpairment" findings); Letter from Karen Brinkmann *et al.*, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 9-17 (filed Nov. 30, 2006) (ACS Nov. 30, 2006 *Ex Parte* Letter) (arguing that "GCI has not met its burden to prove impairment without access to UNEs").

[37] 47 U.S.C. § 160(a) (emphasis added).

[38] *See* 47 U.S.C. §§ 251(c)(3); 252(d)(1); *see also* 47 C.F.R. §§ 51.301-19, 51.321, 51.323 (implementing section 251(c)(3)); § 51.501 *et seq*. (implementing section 252(d)(1)).

[39] The Commission's unbundling rules impose unbundling obligations for several loop-types, including DS0s, DS1s, and DS3s. *See, e.g.*, 47 C.F.R. §§ 51.319(a)(1) (copper loop, *e.g.,* DS0), 51.319(a)(4) (DS1 loop), 51.319(a)(5) (DS3 loop).

any other participants in this proceeding as we would if we were conducting a traditional dominant-carrier analysis.[40] ACS seeks UNE forbearance relief similar to the UNE relief the Commission granted in the *Qwest Omaha Order*. The Commission did not define product markets for the purpose of its UNE forbearance analysis in the *Qwest Omaha Order*, and nothing in the language of section 10 leads us to depart from this precedent and undertake this aspect of dominant carrier analysis here.[41]

13. Similarly, we reject GCI's proposal that the Commission break up its low-capacity loop unbundling requirements between residential and business customers.[42] In the *Triennial Review Order*, the Commission adopted "loop unbundling rules specific to each loop type," and found that the "unbundling

[40] *See, e.g.*, GCI Opposition, Declaration of David E. M. Sappington (GCI Sappington Decl.) Exh. D at 9-12 (applying the Department of Justice Horizontal Merger Guidelines to local exchange and exchange access services in Anchorage and proposing three relevant product markets); ACS Reply at 13 (citing past Commission merger orders as support for defining product markets). Therefore, we dismiss commenters' arguments that the Commission should adopt product markets for this proceeding or that ACS failed to supply evidence according to the correct product markets. *See, e.g.*, GCI Opposition at 12-19; GCI Sappington Decl. at 12; GCI Opposition, Declaration of Gina Borland (GCI Borland Decl.) Exh. A at 2; NuVox Comments at 2-3; ACS Reply at 12-16; Covad Reply at 6; Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1 (filed Nov. 14, 2006) (GCI Nov. 14, 2006 Different Record *Ex Parte* Letter); Broadview Dec. 11, 2006 *Ex Parte* Letter at 3-4 (arguing that the Commission should go beyond its analysis in the *Qwest Omaha Order* and separately analyze for each product market and each geographic area whether the requirements of section 10 are met). We note that at the time it filed its comments, GCI claimed that there were technical and operational impediments to providing its cable telephone service in the MDU environment, which GCI claimed justified treating MDUs as a separate product market. GCI Opposition at 27; GCI Opposition, Declaration of Gary Haynes (GCI Haynes Decl.) Exh. H at 9; Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 22-24 (filed July 3, 2006) (GCI July 3, 2006 *Ex Parte* Letter). In a more recent filing, however, GCI acknowledges that it now "has equipment that addresses many of the technological problems that previously hampered delivery of [such cable telephone] service to the residential MDU market." Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 3 (filed Aug. 22, 2006) (GCI Aug. 22, 2006 *Ex Parte* Letter).

[41] In determining whether to forbear from certain dominant carrier regulations in the *Qwest Omaha Order*, the Commission found that section 10(a) "closely parallels the Commission's traditional approach under its dominance assessments to product markets and geographic markets, respectively," and used traditional market power analysis, including relevant product market definitions, to inform the Commission's evaluation. *See Qwest Omaha Order*, 20 FCC Rcd at 19425, para. 17. However, because ACS did not seek relief from any dominant carrier regulation in this proceeding, we do not base our analysis on product market definitions. *See, e.g.*, *EarthLink, Inc. v. FCC*, 462 F.3d at 8 (affirming the Commission's interpretation of section 10 to allow the Commission's forbearance analysis to vary depending on the circumstances); Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 5 n.12, 6 n.16 (filed Nov. 28, 2006) (GCI Nov. 28, 2006 *Ex Parte* Letter) (citing to the dominant carrier portion of the *Qwest Omaha Order*). In discussing UNE forbearance and competition in the Omaha MSA, the Commission did refer at various points to the retail market, the wholesale market, the local market, the business market, and the residential market. *Qwest Omaha Order*, 20 FCC Rcd at 19447-52, paras. 65-72. However, the Commission used these constructs in a broader evaluation of competition and as a reflection of how parties submitted data in that proceeding, rather than as steps in a traditional market power review.

[42] *See, e.g.*, Letter from Christopher P. Nierman, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1-2 (filed Nov. 16, 2006); GCI Nov. 28, 2006 *Ex Parte* Letter.

obligations and limitations for such loops do not vary based on the customer to be served."[43] The same was true in the Commission's analysis in the *Qwest Omaha Order*, and remains the best way to structure our forbearance analysis here. We believe that a distinction in relief depending on the nature of the customers remains administratively impracticable and would encourage disputes over whether a particular customer is a residential or business customer.[44] As explained below, any differences in GCI's deployment and capabilities are taken into account in the geographic scope of relief and the loop access condition we impose below.

2. Wire Center Service Area as Geographic Market

14. As in the *Qwest Omaha Order*, we conclude that it is appropriate for us to use the wire center service area as the relevant geographic market.[45] Section 10 of the Act directs the Commission to "forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, *in any or some of its or their geographic markets*, if the Commission determines that" the criteria of section 10 have been met.[46] The D.C. Circuit has affirmed the Commission's interpretation that the scope of relief may vary depending on the circumstances.[47]

15. We reject ACS's request that the Commission consider the entire Anchorage study area as the relevant geographic market.[48] We find that the Anchorage study area is not uniform, and that not every customer in Anchorage has a choice of competitors or faces the same prices.[49] In fact, ACS agrees that

[43] *Triennial Review Order*, 18 FCC Rcd at 1711, para. 210.

[44] *See infra* note 54. *But see* GCI Nov. 14, 2006 Different Record *Ex Parte* Letter at 9 (noting that the Commission could "order product market relief that distinguishes between DS0s for residential and business purposes. Because business lines go through different ordering and provisioning processes than residential lines, both ACS and GCI know whether a particular DS0 is being used for business or residential services.").

[45] *See Qwest Omaha Order*, 20 FCC Rcd at 19445-46, paras. 61-62; *see also* Covad Comments at 18 (stating that ACS fails to acknowledge the Commission's use of wire centers as the relevant geographic market in a section 251 proceeding); GCI July 3, 2006 *Ex Parte* Letter at 14.

[46] 47 U.S.C. § 160(a) (emphasis added).

[47] *See EarthLink, Inc. v. FCC*, 462 F.3d at 8 (stating that section 10, on its face, "imposes no particular mode of market analysis or level of geographic rigor").

[48] To support its Petition, ACS claims that all areas in the Anchorage study area are equally competitive and are subject to uniform retail rates. ACS Petition at 27. ACS also contends that the Anchorage study area is fairly uniform in population, density, topography, and development, and ACS's main competitor, GCI, has deployed copper and cable facilities throughout the area. *See id*. ACS further claims that "every Anchorage customer, business and residential, has a choice of facilities-based providers." *See id*. at 29.

[49] *See, e.g.*, GCI Opposition at 14; GCI Sappington Decl. at para. 36 (stating that "[c]ompetitive conditions vary considerably in different regions of Anchorage, even within individual ACS wire centers"); GCI Opposition, Declaration of William P. Zarakas (GCI Zarakas Decl.) Exhs. V and VI; GCI July 3, 2006 *Ex Parte* Letter at 13-14; NuVox Comments at 16-17; Covad Reply at 5; GCI Nov. 14, 2006 Coverage *Ex Parte* Letter, Declaration of David E.M. Sappington Exh. 3 at 3 (stating that GCI has presented substantial evidence that competitive conditions vary considerably across the 11 National Exchange Carrier Association (NECA) wire centers).

there are substantial topographical and density variations in certain areas of the Anchorage study area, and regarding certain outer, sparsely populated portions of Anchorage states that "O'Malley, Rabbit Creek, Girdwood, Hope and Indian, are difficult to serve, and facilities deployment to these areas costs more than in more densely populated parts of the study area."[50] Moreover, GCI has not uniformly deployed facilities throughout the Anchorage study area. In some wire center service areas, GCI's cable plant is extensively deployed, but in other wire center service areas, GCI has few, if any, last-mile cable facilities, and virtually no last-mile fiber facilities.[51] Notably, GCI is not even the certificated cable operator in Girdwood and Indian areas, which are located to the southeast of Anchorage.[52] Therefore, GCI's ability to use its network to provide telecommunications services varies significantly across the wire center service areas comprising the Anchorage study area.[53]

16. Because conditions vary across the Anchorage study area, we once again find it appropriate to analyze competitive conditions more granularly, by wire center service areas.[54] In particular, the wire center service areas in the Anchorage study area are sufficiently small and discrete to enable us to grant forbearance in the geographic areas where the standards of section 10 are satisfied,[55] without being administratively unworkable, as would be the case with a loop-by-loop (or customer-by-customer) analysis.[56] In the *Triennial Review Remand Order*, the Commission also used wire center service areas to

[50] ACS Reply, Declaration of Thomas R. Meade Exh. D at para. 9.

[51] *See infra* paras. 35-38. In addition to operating a cable system in Anchorage, GCI also has deployed a fiber optic network in much of the Anchorage study area, including all of the wire center service areas where we grant relief. We address GCI's fiber plant below. *See infra* note 121.

[52] GCI Sappington Decl. para. 36; GCI July 3, 2006 *Ex Parte* Letter at 14. We disagree with ACS that the dearth of facilities-based competition in these areas should be of little relevance in our analysis. *See* ACS Nov. 30, 2006 *Ex Parte* Letter at 7 (stating that "[l]ocations where GCI has not extended its facilities are of GCI's choosing, not due to limitations imposed externally").

[53] *See, e.g.*, GCI Sappington Decl. para. 36.

[54] *See Qwest Omaha Order*, 20 FCC Rcd at 19445, para. 61, n.161 (stating that the Commission is "under no statutory obligation to evaluate [a forbearance Petition] other than as pled" but determining to evaluate Qwest's petition on a wire center basis). We are not persuaded by GCI's claim that the appropriate geographic markets should be defined according to where GCI has plant that can be used to serve customers. *See* GCI Opposition at 15 n.42. As we did in the Omaha proceeding, we reject the idea of measuring facilities-based coverage on the basis of individual end users' locations. *Qwest Omaha Order*, 20 FCC Rcd at 19450, para. 69 n.186. First, it would be administratively unworkable. Also, providing a list of every potential customer in the Anchorage study area and disclosing whether GCI is able to use its own network, including its own loop facilities, to provide services that are reasonably comparable to the services available from the incumbent LEC within the foreseeable future is an unreasonable prospect in a competitive market. *Id.* In addition, such an approach would be of limited utility unless updated periodically. *Id*.

[55] *See* ACS Petition at 1, 26-27; *see also* ACS Reply at 5-7; ACS Reply, Declaration of Howard A. Shelanski Exh. G at paras. 4-8; Letter from Thomas Jones and Jonathan Lechter, Counsel for Time Warner Telecom Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 3-4 (filed Dec. 18, 2006).

[56] *See, e.g.*, Covad Comments at 18-19; McLeodUSA Opposition at 9; NuVox Comments at 16-17; Time Warner Opposition at 11; *see also* GCI Opposition at 15; GCI Zarakas Decl. Exhs. V and VI; GCI July 3, 2006 *Ex Parte* Letter at 13-14; Letter from Christopher P. Nierman, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2 (filed Oct. 5, 2006) (GCI Oct. 5, 2006 *Ex Parte* Letter).

determine in which geographic locations high-capacity loop and transport UNEs must be provided under section 251(c)(3).[57] Similarly, in the *Qwest Omaha Order*, the Commission conducted a wire-center analysis to determine whether and where to grant Qwest UNE forbearance relief in the Omaha MSA.[58] We thus find that a wire center approach is consistent with prior orders and appropriately balances the deregulatory aims of section 10 with interests in administrability.

3. Wire Center Boundaries

17. ACS and GCI disagree on the number of wire centers in the Anchorage study area. ACS proposes that, if the Commission uses wire centers in its analysis at all, it count only ACS's 5 host switches as wire centers, whereas GCI proposes that the Commission recognize 12 wire centers.[59] For the reasons explained below, we conclude that the areas served by the 11 wire centers identified by ACS in its NECA tariff are the appropriate geographic areas for our analysis here.[60] These 11 wire center service areas are the areas served by the North, Central, East, West, and South host switches, and the O'Malley, Rabbit Creek, Indian, Girdwood, Elmendorf, and Fort Richardson remote switches.[61]

18. We find that the 11 wire centers listed in ACS's NECA Tariff fit the definition of a "wire center" contained in Part 51 of the Commission's rules, which is the definition of wire center the

[57] *See, e.g.*, *Triennial Review Remand Order*, 20 FCC Rcd at 2581-85, paras. 79-85 (analyzing dedicated transport impairment at the "very detailed level" of specific routes between wire centers); *see also id*. at 2619-25, paras. 155-65 (conducting a wire center-based impairment analysis for high-capacity loops because a building-by-building test would not be administrable).

[58] *Qwest Omaha Order*, 20 FCC Rcd at 19438-39, para. 50, n.129 ("When evaluating whether certain network elements should be made available on an unbundled basis, which implicates issues of economic self-provisioning, the Commission has focused its analysis on wire centers, which also is the approach we adopt today when analyzing Qwest's unbundling obligations arising under section 251 and section 271 of the Act.").

[59] *Compare* GCI Opposition at Exh. E; GCI July 3, 2006 *Ex Parte* at 13-14; GCI Oct. 5, 2006 *Ex Parte* Letter at 2; Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Oct. 10, 2006) (GCI Oct. 10, 2006 *Ex Parte* Letter) *with* ACS Petition at Exh. C; ACS Reply at 29; ACS Reply, Declaration of Kenneth L. Sprain Exh. A at 1; Letter from Karen Brinkmann, Counsel for ACS of Anchorage, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 8 (filed Sept. 8, 2006) (ACS Sept. 8, 2006 *Ex Parte* Letter); Letter from Karen Brinkmann, Counsel for ACS of Anchorage, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1 (filed Sept. 20, 2006) (ACS Sept. 20, 2006 *Ex Parte* Letter).

[60] Under the Commission's NECA rules, each incumbent LEC must provide NECA (established pursuant to part 69 of the Commission's rules) with certain information listed by study area and certain information by wire center in order to allow determination of the study areas and wire centers that are entitled to an expense adjustment. 47 C.F.R. § 36.631.

[61] For purposes of this proceeding, we use the names listed above as the names for the 11 switches and for the 11 wire centers. *See* GCI Opposition at Exh. E (providing a wire center map). As discussed below, we treat the area served by the Hope remote terminal as included in the South wire center service area. *See* Letter from Karen Brinkmann, Counsel for ACS of Anchorage, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2 (filed Nov. 1, 2006) (ACS Nov. 1, 2006 *Ex Parte* Letter) (stating that the Hope remote terminal is switched from the South wire center).

Commission uses in its unbundling rules in a similar context to determine, *inter alia*, when an incumbent LEC must provide a requesting carrier with access to certain network elements.[62] Section 51.5 of the Commission's rules defines a wire center as "the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter."[63] The Appendix to Part 36, in turn, states that a central office is "[a] switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only."[64] We are persuaded that each of the 11 host and remote switches described above satisfies this definition and is capable of terminating and interconnecting subscriber lines and trunks.[65] In addition, using host and remote switches to define the relevant geographic markets is the approach most consistent with our precedent. In the *Qwest Omaha Order*, the Commission counted as distinct geographic markets areas served by host and remote switches.[66]

19. We decline GCI's request to recognize as a distinct geographic market the area served by the Hope remote terminal.[67] GCI acknowledges that Hope does not satisfy the Commission's definition of wire center because the remote terminal located there does not contain sufficient switching functionality to satisfy the Commission's definition of a wire center.[68] As explained above, and consistent with the Commission's precedent, we recognize as separate geographic markets all and only those wire centers that satisfy the Commission's Part 51 definition of a wire center. There are many possible ways to disaggregate

[62] 47 C.F.R. § 51.5 (defining "wire center" and stating that "[t]he wire center boundaries define the area in which all customers served by a given wire center are located"); *see also* GCI Oct. 10, 2006 *Ex Parte* Letter at 2.

[63] 47 C.F.R. § 51.5.

[64] 47 C.F.R. Part 36, App. (defining "central office" and stating that "[t]here may be more than one central office in a building"). A trunk is a "[c]ircuit between switchboards or other switching equipment, as distinguished from circuits which extend between central office switching equipment and information origination/termination equipment." *See id*. (defining "trunks").

[65] ACS argues that we should not base our definition of wire center on the definition of wire center ACS used for purposes of its NECA filings. ACS argues that it identified 11 wire centers in its NECA tariff for "accounting classifications" reasons only. *See* ACS Sept. 8, 2006 *Ex Parte* Letter at 8. However, ACS does not cite to any of the Commission's rules or precedent to support its position that the Commission in this proceeding should recognize only wire centers that contain host switches. The Commission's NECA rules do not distinguish between host and remote switches for defining wire centers, and instead rely on the same definition of "wire center" contained in the Appendix to Part 36 that is referred to in section 51.5. *See* 47 C.F.R. §§ 51.5, 54.5; *see also* GCI Oct. 5, 2006 *Ex Parte* Letter at 2.

[66] According to the Local Exchange Routing Guide (LERG), the Commission treated some of Qwest's remote switches in the *Qwest Omaha Order* as wire centers. *See* GCI Oct. 10, 2006 *Ex Parte* Letter at 3 n.8 (claiming that the LERG shows that the Gretna, Springfield, Valley, Manawa, Crescent, Glenwood, Malvern, Missouri Valley, Neola and Underwood wire centers that the Commission recognized as separate geographic markets in the *Qwest Omaha Order* all are served by remote switches).

[67] *See id.* at 2-3 n.5 (arguing that the competitive alternatives in the area served by the Hope remote terminal are not identical to the competitive conditions in most of the remainder of the area served by the South wire center and that Hope lies entirely outside GCI's cable franchise area).

[68] *See id; see also* ACS Nov. 1, 2006 *Ex Parte* Letter at 2 (explaining that Hope is switched from the South wire center).

geographic markets other than by wire center service areas, such as according to population thresholds, population density, distance from competitive fiber, MSAs, counties, zip codes, and many other possibilities. We choose the Part 51 definition of wire center as a workable bright-line approach. We note that, following our decision today, customers in the Hope area will continue to have competitive alternatives for telecommunications service, such as through resale and through the condition we impose on ACS. As a result, the impact of our decision that Hope does not constitute a separate geographic market is limited.[69]

C. Forbearance from Section 251(c)(3) and Section 252(d)(1) Requirements

20. We conditionally grant ACS's Petition in part, and forbear from applying to ACS the requirements arising under section 251(c)(3) and section 252(d)(1) to provide unbundled access to loop, copper subloop, and transport elements[70] in certain wire centers in Anchorage based on the development of sufficient facilities-based competition and other factors we explain below.[71] As a result of GCI's investment in network infrastructure in the Anchorage study area, GCI is providing services over its own last-mile facilities to many customers, and is in the process of further upgrading its networks so it will be able to use its extensive last-mile facilities to provide low- and high-capacity services to even more customers.

21. To ensure that the forbearance we grant ACS tracks competitive realities in the Anchorage study area, we tailor ACS's relief to those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a). We grant ACS relief in the North, East, Central, West, and South wire center service areas, which are the only wire center

[69] Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at Exhs. V and VI (filed Oct. 24, 2006) (GCI Oct. 24, 2006 *Ex Parte* Letter).

[70] By "loop and transport elements," we mean all analog, DS0, DS1 and DS3 loop, certain subloop, and dedicated transport network elements that are subject to section 251(c)(3) unbundling. *See* 47 C.F.R. §§ 51.319(a) (loops), 51.319(b)(1) (copper subloops); 51.319(e) (dedicated transport). We expressly do not forbear today from requirements arising under section 251(c)(3) with respect to 911 and E911 databases or operations support systems as defined in sections 51.319(f) and (g) of the Commission's rules. *See id*. §§ 51.319(f), (g). There is no record evidence to support granting ACS forbearance relief from its obligations to provide E911 databases or operations support systems. For the reasons discussed *infra*, we conditionally grant ACS limited forbearance from its obligation to provide unbundled access to certain subloops as defined in section 51.319(b)(1) of the Commission's rules, but deny ACS's Petition to the extent it seeks forbearance from the section 51.319(b)(2) obligation to provide unbundled subloops for access to multiunit premises wiring and from the section 51.319(c) obligation to provide unbundled access to network interface devices (NIDs). 47 C.F.R. § 51.319(b), (c).

[71] ACS seeks relief from section 252(d)(1) only to the extent ACS "chooses" to continue to offer UNEs in Anchorage. Specifically, ACS sought forbearance from the unbundling obligations of section 251(c)(3) of the Act as they apply to ACS's Anchorage study area, and from "the application of the related Section 252(d)(1) pricing standards for UNEs to the extent that ACS chooses to continue to offer UNEs in Anchorage." ACS Petition at 1. For all of the reasons explained in this Order, we expressly find that ACS has satisfied the criteria of section 10 with respect to its obligations under section 252(d)(1) to the extent provided herein. Thus, in today's Order, we forbear from TELRIC pricing in addition to unbundling obligations.

service areas where GCI's voice-enabled cable plant covers at least [**confidential**] percent of the end user locations that are accessible from that wire center.[72]

22. As a necessary condition of this grant of forbearance, we require ACS to continue to provide requesting carriers in these 5 wire centers with access to loop facilities, other than broadband facilities, under rates, terms and conditions reached through new commercial negotiations. Until a commercial agreement is reached, however, ACS must provide GCI with access to loop facilities under the rates, terms and conditions negotiated and agreed to by ACS and GCI in Fairbanks, Alaska.[73] In addition, GCI and other competitive LECs may in all areas of the Anchorage study area continue to compete with ACS by exercising their section 251(c)(4) resale rights, and by relying on the other market-opening provisions under the Act, such as section 251 interconnection rights.

23. We deny ACS's Petition with respect to the Rabbit Creek, O'Malley, Indian, Girdwood, Elmendorf, and Fort Richardson wire center service areas, and find that ACS has not satisfied the criteria of section 10 with respect to these 6 wire center services areas sufficient for us to grant ACS forbearance from its section 251(c)(3) or 252(d)(1) obligations. In these geographic areas, ACS has not demonstrated that it is subject to significant competition that is not largely premised on ACS's wholesale services. Specifically, GCI's voice-enabled cable plant covers less than [**confidential**] percent of the end user locations that are accessible from 4 wire centers, and we have insufficient evidence in the record to determine GCI's coverage in 2 wire center service areas.[74] Forbearing from section 251(c)(3) or section 252(d)(1) of the Act where no competitive carrier has constructed substantial competing last-mile facilities capable of providing telecommunications services is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Anchorage study area.

24. We conditionally grant ACS forbearance from its obligation to provide unbundled access to copper subloops as provided for in section 51.319(b)(1) of the Commission's rules, but deny ACS's Petition to the extent it seeks forbearance from the section 51.319(b)(2) obligation to provide unbundled subloops for access to multiunit premises wiring and from the section 51.319(c) obligation to provide unbundled access to NIDs.[75] We find that in wire center service areas where GCI satisfies our coverage threshold test, granting ACS forbearance from its section 51.319(b)(1) subloop obligations is warranted.

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[72] We explain our use of the term "coverage" below. *See infra* para. 32.

[73] *See* Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Nov. 21, 2006) (GCI Nov. 21, 2006 *Ex Parte* Letter) (providing loop rates applicable in Fairbanks and Juneau); Letter from Christopher Nierman, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281, Attachs. 2-4 (filed Dec. 1, 2006) (providing copies of the interconnection and resale agreements ACS and GCI negotiated and agreed to in Fairbanks).

[74] *See infra* para. 37.

[75] 47 C.F.R. §§ 51.319(b), (c); *see generally Triennial Review Order*, 18 FCC Rcd at 17184-199, paras. 343-58 (discussing subloop and NID unbundling obligations); *id*. at 17193, para. 351 (stating that often there is no alternative inside wiring other than the incumbent LEC's and "in cases where customer premises wire is not part of the incumbent LEC's network, hence not an inside wire subloop, the NID may be the sole means of accessing this customer premises wire").

As discussed throughout this Order, GCI's extensive deployment in these areas convinces us of its ability to deploy such subloop facilities. However, GCI has submitted unrebutted evidence that the criteria of section 10 are not satisfied with respect to ACS's obligation to provide unbundled subloops for access to multiunit premises wiring.[76] Even though the record shows that GCI does not always need access to NIDs, NIDs are often required to access wiring inside multiunit premises, including inside wiring subloops.[77] Lacking substantive record evidence to the contrary, we decline to grant ACS forbearance from its obligations under section 51.319(b)(2) and section 51.319(c) of the Commission's rules.[78]

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

25. We begin by examining the state of competition in the Anchorage study area. Under the standards of section 10(a)(1), our task is to determine whether competition for telecommunications services is sufficiently developed that the section 251(c)(3) obligation to provide unbundled access to loops and transport under prices regulated under section 252(d)(1) is no longer necessary to ensure that ACS's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory" in this market.[79] As the Commission previously has found in the context of its section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably

[76] *See, e.g.*, GCI Haynes Decl. at 5; Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2 (filed Nov. 2, 2006) (GCI Nov. 2, 2006 *Ex Parte* Letter) (stating that forbearance from loop obligations will make "essential access to cost-based subloops, inside wires, and NIDs to ensure that GCI can access buildings and inside wire to serve customers in multitenant environments"); Letter from Karen Brinkmann *et al.*, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1 n.1 (filed Oct. 13, 2006) (ACS Oct. 13, 2006 *Ex Parte*) (acknowledging that ACS provides subloops to GCI when GCI orders UNE loops from ACS because subloops are defined as part of the loop).

[77] *See* GCI Nov. 2, 2006 *Ex Parte* Letter at 2-3; *see also* ACS Reply at 17 (acknowledging that GCI sometimes uses inside wiring and conduit in multiunit buildings even though GCI typically uses its own NID when serving customers over digital local phone service (DLPS)); ACS Nov. 30, 2006 *Ex Parte* Letter, at 17 (stating that if the Commission grants forbearance from inside wire subloops and NIDs, GCI will still have opportunities to negotiate with ACS regarding such network elements).

[78] This is distinguishable from the circumstances in the *Qwest Omaha Order*, where the Commission granted relief from subloop and NID obligations. *Qwest Omaha Order*, 20 FCC Rcd at 19443, para. 57 n.149. In the *Qwest Omaha Order*, the evidence was that the primary competitor (Cox) did not rely on UNEs, including the inside wire subloop and NIDs, at all, nor was there other evidence in the record that there was other reliance on those network elements. We are not persuaded that other provisions of the Act will ensure that GCI has access to end-user customers, and conclude that ACS has not shown that unbundled access to these UNEs are unnecessary to ensure that consumers' interests are protected. *See, e.g.*, ACS Reply at 17 (claiming that "to the extent ACS controls access to the in-building wiring, any telecommunications carrier can gain access to any conduits, ducts and rights-of-way to which ACS has access, pursuant to Section 224 of the Act"). *But see, e.g.*, GCI Nov. 2, 2006 *Ex Parte* Letter at 3 (explaining that section 224 applies to pole, duct, conduit, or right-of-way and does not obligate ACS to provide access to subloops, inside wires, or NIDs).

[79] 47 U.S.C. § 160(a)(1).

discriminatory."[80] For the reasons discussed below, we conclude that competition in portions of the Anchorage study area is sufficiently robust that, under the standards of section 10(a)(1), we can and should forbear from section 251(c)(3) and section 252(d)(1) in those areas subject to the condition we set forth below.

26. In the following subsections, we: (i) examine the level of retail competition and the role of the wholesale market in the study area to determine as a threshold matter whether the Anchorage study area is sufficiently competitive to support forbearance; (ii) examine the extent to which competitive facilities deployment is responsible for this level of competition and how the market would be affected in the absence of access to UNEs; and (iii) expressly condition the relief we grant ACS on the requirement that ACS provide continued access to loops at just and reasonable rates, terms, and conditions in the manner set forth below after ACS is no longer required to provide UNEs in the relevant wire centers. The condition we impose is similar to the obligation that applies to Qwest in the Omaha MSA on which the Commission relied in granting Qwest partial forbearance in that market.[81]

a. Competition in the Anchorage Study Area

27. Consistent with prior forbearance proceedings, we evaluate the Petitioner's request for relief by examining the level of competition in the retail market as well as the role of the wholesale market in the Anchorage study area.[82] Our focus is the competition between ACS and GCI because the evidence in this proceeding indicates that there are no other significant competitors for local exchange or exchange access services in the Anchorage study area.[83]

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[80] *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*; *Petition of U S WEST Communications, Inc., for Forbearance*; *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket Nos. 97-172, 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999).

[81] *See Qwest Omaha Order*, 20 FCC Rcd at 19447, 19466-70, paras. 64, 103-10.

[82] *See Qwest Omaha Order*, 20 FCC Rcd at 19447-52, paras. 65-72; *see also 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). We reject ACS's argument that we need not consider wholesale market competition. ACS Reply at 20; Letter from Karen Brinkmann *et al.*, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 4 (filed April 3, 2006). Competition in the retail market can be directly affected by the level of competition and the availability of inputs in an upstream wholesale market (*e.g.,* DS0 and high-capacity loops). GCI Opposition at 72; GCI Borland Decl. para. 46; GCI Sappington Decl. para. 101; Covad Comments at 15; NuVox Comments at 13-14; Covad Reply at 7-8; Eschelon Reply at 5. Because ACS seeks forbearance for the unbundling obligation for wholesale services, our analysis must consider the effects a grant of the petition would have on consumers of retail services as well as consumers of wholesale services. *See, e.g.*, *Qwest Omaha Order*, 20 FCC Rcd at 19448-49, para. 67.

[83] *See, e.g.*, GCI Oct. 5, 2006 *Ex Parte* Letter at 1 ("In Anchorage, there are only two competitors operating their own local switches – GCI and ACS. GCI is clearly ACS's principal (and only significant) competitor in any of the Anchorage markets."); *see also* ACS Petition at 2-3 (stating that GCI is the only current purchaser of UNEs in the Anchorage study area); ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 1 at 2 (listing [**confidential**]).

(i) Extent of Current Competition

28. Retail competition in the Anchorage study area is robust.[84] According to the data submitted by ACS and GCI,[85] GCI has captured [**confidential**] percent of the residential lines in the Anchorage study area.[86] GCI has also successfully marketed its telecommunications services to business customers and has [**confidential**] percent of the voice-grade equivalent business lines in the Anchorage study area.[87] GCI provides [**confidential**] retail voice-grade equivalent high-capacity switched retail lines, and [**confidential**] retail voice-grade equivalent low-capacity switched retail lines, to business customers in the Anchorage study area.[88] This compares with the [**confidential**] retail voice-grade equivalent switched access lines

[84] ACS claims that the Anchorage study area is among the most competitive telecommunications markets in the country. ACS Petition at 1-2 (stating that GCI currently provides local exchange and exchange access service to approximately half of the Anchorage local exchange market). ACS further contends that GCI is the largest broadband provider in Alaska and that, while GCI currently relies on UNEs and other last-mile wholesale inputs from ACS, GCI has announced plans to convert its local exchange service customer base to its own facilities. ACS Petition at 2.

[85] We primarily rely on ACS's and GCI's most recent data submissions because they have continued to refine their data submissions throughout this proceeding. For instance, the ACS Nov. 1, 2006 *Ex Parte* Letter clarifies and expands information submitted in the ACS Oct. 13, 2006 *Ex Parte* Letter. *Compare* ACS Nov. 1, 2006 *Ex Parte* Letter *with* ACS Oct. 13, 2006 *Ex Parte* Letter.

[86] Based upon staff calculations ACS has [**confidential**] residential retail lines, GCI has [**confidential**] residential retail lines, and other competitive LECs have [**confidential**] residential retail lines in the Anchorage study area. *See* ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 1; GCI Oct. 24, 2006 *Ex Parte* Letter at Exh. V; *see also* ACS Petition, Declaration of Thomas R. Meade (ACS Meade Decl.) Exh. A at 3; ACS Petition, Declaration of David C. Blessing (ACS Blessing Decl.) Exh. E at 7. As we stated above, in accord with our precedent, we do not separate low-capacity loop unbundling requirements by whether the end user is a residential customer or a business customer. *See supra* note 54. Nevertheless, because both ACS and GCI track their data by customer class and submitted data to us disaggregated by customer class and by whether a line is switched or non-switched, our discussion of the data submitted to us also is disaggregated in this manner.

[87] Based upon staff calculations ACS has [**confidential**] business voice-grade equivalent retail lines, GCI has [**confidential**] business voice-grade equivalent retail lines, and other competitive LECs have [**confidential**] voice-grade equivalent business lines. ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 1; GCI Oct. 24, 2006 *Ex Parte* Letter at Exhs. V and VI. The retail market demand for high-capacity services is relatively limited in the Anchorage study area. For example, ACS provides only [**confidential**] retail special access circuits in the Anchorage study area. ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 2 (excluding [**confidential**] special access circuits ACS sells to its long distance, Internet and wireless affiliates).

[88] GCI Oct. 24, 2006 *Ex Parte* Letter at Exhs. V and VI. We reject ACS's contention that the sheer fact of its line loss compels forbearance. *See, e.g.*, ACS Blessing Decl. at 7-8 (discussing ACS's drop in access lines from 1999 to 2006); ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 1. For instance, the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access. *See, e.g.*, Trends in Telephone Service, Industry Analysis Division, Wireline Competition Bureau, 7-1 (June 2005) (noting that the decline of lines provided by wireline carriers might be due to some households eliminating second lines when they move from dial-up Internet service to broadband service).

ACS provisions over high-capacity circuits, and [**confidential**] retail voice-grade equivalent lines ACS provisions over low-capacity circuits to business customers.[89]

29. Apart from competition from GCI, ACS contends that customers in Anchorage can obtain substitutes to ACS's service using commercial wireless services, broadband-based VoIP services and other technologies.[90] Because in this case we lack sufficient data to evaluate the extent of substitution of interconnected VoIP and wireless services in the Anchorage study area, and because the data submitted do not allow us to further refine our analysis, we do not include competition from wireless and interconnected VoIP services in our market analysis.[91]

30. We also examine the state of the wholesale market. We find that GCI's reliance on ACS for wholesale inputs in the Anchorage study area is significant and relevant to our forbearance analysis.[92] Although the retail data above show that GCI has succeeded in attracting a large number of customers in the Anchorage study area, GCI currently relies on ACS's loop elements, including UNE loops, for many of the access lines GCI provides or uses in its retail services. Specifically, in the Anchorage study area, GCI purchases from ACS [**confidential**] resold residential lines, [**confidential**] resold business lines, [**confidential**] UNE DS1 loops, [**confidential**] UNE analog copper and DS0 loops, [**confidential**] voice grade and digital data special access circuits, [**confidential**] DS1 special access circuits, and [**confidential**] DS3 special access circuits.[93] Thus, for example, as of September 2006, GCI was relying on ACS for approximately [**confidential**] percent of the residential lines GCI serves in the Anchorage study area and approximately [**confidential**] percent of the business switched voice lines GCI serves in the Anchorage

[89] *See* ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 1 (clarifying that the [**confidential**] switched access business lines provided over high-capacity circuits are provisioned over [**confidential**] DS1s); *see also* ACS Oct. 13, 2006 *Ex Parte* Letter, Attach. 1. ACS has explained that it does not maintain certain data by wire center. *See* ACS Nov. 1, 2006 *Ex Parte* Letter at 2 and Attach. 1 (stating that ACS does not maintain DS1 UNE loop data by wire center); *see also* Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Nov. 8, 2006) (providing DS1 UNE loop data by wire center).

[90] ACS Petition at 16-17.

[91] *See, e.g.*, ACS Petition at 16 (conceding that it cannot determine with certainty how many customers use wireless telephony as a substitute for wireline service and relying upon general statements by industry analysts projecting wireless competition to grow in the future); ACS Reply Comments at 30 (Vonage and other VoIP providers do not currently offer local numbers in Anchorage.); GCI July 3, 2006 *Ex Parte* Letter at 10 (explaining that GCI's wireless network is limited by terrain, tree cover, and other factors; is not designed to replace UNEs throughout Anchorage or to provide business services; and that GCI would have to embark on a large-scale network redesign, provisioning, and installation process in order to replace a significant number of UNEs with wireless local loops); *see also* CompTel Comments at 9; Covad Comments at 26-27; Eschelon Reply at 6; *Qwest Omaha Order*, 20 FCC Rcd at 19452, para. 72.

[92] GCI Sappington Decl. at 33-34; *see also* CompTel Comments at 2; Covad Reply at 7; *Qwest Omaha Order*, 20 FCC Rcd at 19450, para. 68 n.185 ("Granting Qwest forbearance from the application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance.").

[93] *See* ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 1; ACS Oct. 13, 2006 *Ex Parte* Letter, Attach. 1.

study area.[94] The record does not reflect any significant alternative sources of wholesale inputs for carriers in the Anchorage study area.[95] Thus, continued access to the incumbent's loop facilities is important even in wire centers where there already is extensive competition. Finally, the record shows that GCI self-provisions all of its own transport.[96]

(ii) Competitive Facilities Coverage

(a) Coverage Threshold Test

31. We believe it appropriate to grant forbearance relief only in wire center service areas where a competitor has facilities coverage of at least [**confidential**] percent of the end user locations accessible from a wire center. Our reliance on extensive facilities-based coverage for determining where forbearance is warranted stems from the importance facilities-based last-mile deployment plays in lessening the need for regulatory intervention. As the Commission previously has found, the telecommunications industry is characterized by high fixed and sunk costs, network effects, and economies of scale, among other barriers to entry.[97] When a new market entrant has overcome these barriers by investing heavily enough in its own facilities that it satisfies the last-mile coverage threshold we adopt here, we believe the new entrant has demonstrated a deep commitment to compete vigorously for customers. In areas where competitive last-mile facilities deployment satisfies the coverage threshold we set forth above, we have solid evidence that the competitive entrant in all probability will be able to fulfill those commitments.

32. In the *Qwest Omaha Order*, the Commission explained that a competitor "covers" a location where it uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings.[98] We apply a similar analysis here, and find that GCI covers enough locations to justify conditional forbearance in 5 wire centers.[99] In particular, we find below that GCI "covers" [**confidential**] percent of a wire center service area where it can use its own network, including its own loop facilities, to provide within a commercially reasonable time services that "offer the full range of services that are substitutes for the incumbent LEC's local service offerings."[100]

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[94] *See* GCI Oct. 24, 2006 *Ex Parte* Letter at Exh. VI. As of November 2005, GCI relied on ACS for approximately [**confidential**] percent of the [**confidential**] non-switched DS1 circuits GCI provides at retail in the Anchorage study area. *See* GCI Zarakas Decl. Exh. II.

[95] *See, e.g.*, ACS Meade Decl. at paras. 4-9; ACS Oct. 13, 2006 *Ex Parte* Letter, Attach. 1; *see also supra* note 83.

[96] ACS states that neither GCI nor any other carrier in Anchorage orders UNE transport from ACS. ACS Nov. 1, 2006 *Ex Parte* Letter at 2.

[97] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd 17035-41, paras. 85-91.

[98] *Qwest Omaha Order*, 20 FCC Rcd at 19444, para. 60 n.156 (clarifying that coverage applies to Multiple Tenant Environment (MTE) locations even if the building owner has not already granted the carrier the right to provide service within that particular building).

[99] *See infra* Part III.C.1.a(ii)(b).

[100] *Qwest Omaha Order*, 20 FCC Rcd at 19444, 19446, paras. 60 n.156, 62.

33. Our coverage threshold is a product of line-drawing. A significantly higher threshold would, in effect, mandate that GCI's network must neatly map to ACS's wire center service area boundaries as a precondition of granting ACS forbearance relief. A facilities-based competitor such as GCI that does not compete solely through reliance on UNEs is unlikely to pattern the architecture of its network on wire center service area boundaries.[101] Furthermore, if we were to require GCI's network to cover 100 percent of the area served by a wire center before granting ACS forbearance in that wire center, GCI would be able to prevent ACS from obtaining forbearance relief (and, despite its migration of most customers from UNEs to its own facilities, may have the incentive to do so) by declining to "cover" only a relatively small percentage of potential customers in each wire center service area.[102]

34. We disagree with GCI's claim that the development of extensive facilities in a wire center service area is not sufficient reason to forbear from ACS's UNE obligations because ACS has been granted the flexibility by the Regulatory Commission of Alaska (RCA) to deaverage its rates.[103] GCI contends that, because ACS knows where GCI's facilities are located, ACS will be able to charge individual customers not covered by GCI's facilities more than customers who are covered by GCI's facilities.[104] We are not persuaded by these arguments for several reasons. First, the specific coverage threshold we select in this Order is based primarily on GCI's extensive cable plant deployment. We are not persuaded that ACS can identify exactly where GCI is capable of providing service over its cable plant in all areas, which limits ACS's ability to impose prices, terms and conditions on the remaining [**confidential**] percent or less of customers in a wire center service area that are less favorable than the offerings available to the other customers in that wire center.[105] Second, ACS and GCI agree that the RCA will continue to have authority to regulate ACS's rates.[106] Although we believe that the extensive competition in the Anchorage study area

[101] GCI Borland Decl. at para. 28 (stating that GCI's cable plant footprint does not cover the entirety of the ACS Anchorage study area).

[102] If we were to require that GCI's network must cover 100 percent of the end user locations in a wire center service area before granting ACS's forbearance in that wire center, ACS would only be entitled to forbearance relief in [**confidential**] wire centers today, despite the fact that GCI provides mass market services to [**confidential**] and relies heavily and increasingly on its own facilities to do so. *See* GCI July 3, 2006 *Ex Parte* Letter, Declaration of Alan Mitchell (GCI July 3, 2006 *Ex Parte* Mitchell Decl.) Exh. 1.

[103] GCI Opposition at 10-11.

[104] GCI Nov. 14, 2006 Different Record *Ex Parte* at 3, 6.

[105] GCI has submitted evidence that ACS is aware of the outlines of GCI's fiber plant, even though there is no evidence that ACS also knows where GCI's splice points are located or knows other detailed information about GCI's fiber facilities. *See* GCI Nov. 14, 2006 Different Record *Ex Parte* Letter at 3 n.12 (citing a map of GCI's fiber network ACS submitted to the record). However, neither GCI nor ACS contends that ACS has detailed knowledge of where GCI's cable facilities are located – facilities that GCI uses to compete by providing telecommunications services reasonably comparable to those offered by ACS.

[106] *See, e.g.*, GCI July 3, 2006 *Ex Parte* Letter, Declaration of G. Nanette Thompson (GCI July 3, 2006 *Ex Parte* Thompson Decl.) at para. 8 (agreeing that it is "technically accurate" that the RCA has authority to regulate rates and practices). The RCA is competent to address the issues over which it has jurisdiction and we therefore decline ACS's invitation to provide guidance to the RCA regarding what steps it should take following our decision today. *See* Letter from Karen Brinkmann, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 3 (filed Dec. 8, 2006) (ACS Dec. 8, 2006 *Ex Parte* Letter) (requesting the Commission to provide guidance to the RCA to revisit TELRIC rates in certain areas of the Anchorage market); *see also* Letter (continued….)

will not permit the emergence of anticompetitive pricing practices, if ACS were to engage in anticompetitive price discrimination, we have no reason to doubt that the RCA would be adequately equipped to address such problems.[107] Third, our grant of forbearance to ACS is conditioned on ACS continuing to offer to GCI unbundled access to loop elements at commercially negotiated prices.[108] Therefore, even if ACS were to charge a particular customer a supra-competitive price because that customer, though located in a wire center service area where GCI has extensive last-mile deployment, is not located near GCI's last-mile facilities, GCI would still be able to serve that customer using loops purchased from ACS at commercially reasonable prices. Our condition therefore helps ensure continued robust competition in the Anchorage study area and is itself a check on ACS engaging in supra-competitive pricing. Finally, if we accepted GCI's reasoning that the mere possibility of price discrimination should preclude forbearance, we would not be able to grant forbearance relief in any wire center service area where GCI covers less than 100 percent of the end user locations in that wire center service area.[109] As we discuss above, we do not believe such a high threshold coverage test is warranted.

(b) Application of Coverage Test to the Anchorage Study Area

35. In 5 wire center service areas, which includes the downtown area in Anchorage,[110] we find that GCI's voice-enabled cable plant covers more than [**confidential**] percent of the end user locations that are accessible from those wire centers.[111] As noted above, we also find that GCI has deployed a fiber optic

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from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 3 (filed Dec. 14, 2006) (arguing that ACS seeks higher UNE rates in what it claims are high-cost areas while also benefiting from higher UNE rates in what it claims are low-cost areas).

[107] *See* GCI July 3, 2006 *Ex Parte* Thompson Decl. at para. 8 (stating that under current RCA rules, the RCA may act to deny or modify price changes if a complaint challenging ACS's prices is filed, and explaining that the RCA no longer conducts rigorous rate reviews of ACS's prices before they go into effect due to the extent of local competition).

[108] *See infra* para. 39. As discussed below, the Commission establishes default rates based on the rates ACS and GCI negotiated in Fairbanks until GCI and ACS reach an agreement to replace those rates, terms, and conditions.

[109] GCI claims that both GCI and ACS currently engage in customer-specific pricing for business customers in the Anchorage study area, and that ACS also recently obtained similar pricing flexibility for residential services. *See, e.g.*, GCI Nov. 14, 2006 Different Record *Ex Parte* Letter at 3, 6 (citing ACS's representations submitted in a different proceeding of customer specific pricing in Anchorage); *see also id.* at 6 n.30 (discussing residential pricing flexibility). If we were to accept GCI's arguments that the possibility of price discrimination exists for any customer who is not covered by GCI's facilities, and that such possibility should preclude forbearance in the entire wire center service area where that customer is located, we would have to deny forbearance in any wire center service area where even a single customer is not covered by GCI's facilities.

[110] *See* ACS Sept. 20, 2006 *Ex Parte* Letter, Attach. (providing the Commission with a map created by ACS technicians called "GCI Fiber Network in Anchorage").

[111] *See supra* para. 32 (defining coverage). *See, e.g.*, GCI July 3, 2006 *Ex Parte* Mitchell Decl. Exh. 1; Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Nov. 14, 2006) (GCI Nov. 14, 2006 Coverage *Ex Parte* Letter) Declaration of Alan Mitchell (GCI Nov. 14, 2006 Coverage *Ex Parte* Mitchell Decl.) at Exhs. 1-3; *see also* Letter from Karen Brinkmann *et al.*, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-
(continued….)

network "over which it provides high-capacity services to customers with sufficient demand and proximity to this network" in all 5 wire center service areas where we afford forbearance today.[112] Lastly, we find that GCI has fiber and equipment collocated at each of the 5 wire centers where we conditionally grant ACS forbearance.[113]

36. We disagree with GCI that its inability immediately to transition all of its customers to its own network demonstrates that it does not "cover" sufficient locations to show that the criteria of section 10 are satisfied.[114] GCI argues that it lacks, at this time, the ability to transition all of its customers onto its own network, particularly the subset of customers in Anchorage who demand DS1-type services or other specialized business services,[115] and has also pointed out that the construction season in Anchorage is abbreviated.[116] We recognize that it will take GCI some time to migrate all of its existing customers to its own facilities.[117] GCI nevertheless "covers" the customers it is migrating because it already has invested in the wire center service area sufficient infrastructure to give it the economies of scale and scope necessary to serve those customers. Moreover, because the access condition we adopt below as a necessary condition of forbearance will permit GCI to remain on ACS's network at rates, terms and conditions that are commercially reasonable, we are comfortable that GCI's service to customers will not be disrupted as GCI

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281 at 9-17 (filed Dec. 15, 2006) (ACS Dec. 15, 2006 *Ex Parte* Letter), Attach. at 2-3 (arguing that GCI's coverage is sufficient to grant forbearance despite various difficulties GCI claims it faces in providing service).

[112] GCI Zarakas Decl. at para. 5.

[113] *See, e.g.*, ACS Petition, Declaration of Howard A. Shelanski Exh. D at 7, 9.

[114] *See, e.g.*, GCI Nov. 14, 2006 Coverage *Ex Parte* Letter at 2, *passim* (arguing that, although GCI's last-mile cable facilities "pass" a large number of end user locations, GCI can only be said to "cover" a [**confidential**] of locations in each of the small business and enterprise product markets and [**confidential**] percent of the homes after a one-to-two year transition period); *see also supra* Part III.B.1 (rejecting GCI's product market analysis); ACN Dec. 11, 2006 *Ex Parte* Letter at 1-2.

[115] *See, e.g.*, GCI Opposition at 28-29; GCI July 3, 2006 *Ex Parte* at 24-29; GCI Nov. 14, 2006 Different Record *Ex Parte* Letter at 2-3, 5-6; GCI Nov. 14, 2006 Coverage *Ex Parte* Letter at 5-6, 9-11.

[116] *See, e.g.*, GCI July 3, 2006 *Ex Parte* Letter at 21 (stating that GCI can perform node modifications and replace buried drops only during the shortened construction season); GCI Aug. 22, 2006 *Ex Parte* Letter Exh. 2 at 9 (stating that "the plant upgrades themselves are seasonal" but the "the conversions once the plant is upgraded are not terribly seasonal").

[117] GCI claims that it historically has been able to convert approximately [**confidential**] percent of the residential lines within the areas served by a node within about one year of a node upgrade. GCI Nov. 14, 2006 Coverage *Ex Parte* Letter at 14. GCI also states that by the end of 2006, it already will have converted approximately 30,000 of GCI's lines to DLPS. *See* Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1 (filed Nov. 7, 2006) (GCI Nov. 7, 2006 *Ex Parte* Letter). GCI currently serves a total of [**confidential**] residential retail lines and [**confidential**] retail business lines. *See supra* para. 28. While GCI claims that it historically has been able to convert a smaller percentage of its business customers to its own facilities, it also has submitted evidence that [**confidential**]. *See* GCI Nov. 14, 2006 Coverage *Ex Parte* Letter, Declaration of Jonathan P. Wolf at 7 (GCI Nov. 14, 2006 Coverage *Ex Parte* Wolf Decl.).

completes its work of migrating its customers from ACS's facilities onto GCI's own last-mile facilities.[118] We also disagree with GCI's arguments that it cannot yet provide every kind of service ACS can provide at all locations and therefore does not satisfy the coverage threshold we adopt in this Order. There is limited retail market demand for high-capacity telecommunications services in the Anchorage study area,[119] and GCI has nearly ubiquitous last-mile cable plant where we grant relief, and has submitted evidence that it can use these facilities to serve the telecommunications needs of most customers in these areas.[120] Moreover, GCI also has deployed a fiber optic network which gives GCI additional capabilities to serve a significant number of additional end user locations in the Anchorage study area with high-capacity or more complex telecommunications services.[121] We therefore find that GCI is able to provide over its own

[118] *See, e.g.*, Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1-2 (filed Dec. 6, 2006) (GCI Dec. 6, 2006 *Ex Parte* Letter) (arguing that granting ACS forbearance from all UNE access obligations would be disruptive to competition in Anchorage and would harm Anchorage customers). GCI anticipates moving all of its customers to its own facilities as quickly as it can. *See* GCI July 3, 2006 *Ex Parte* Letter at 16. GCI has credibly demonstrated that it perceives financial and business incentives to reduce "as fast as possible its dependence on ACS-provided UNE loops." *See, e.g.*, GCI July 3, 2006 *Ex Parte* Letter at 17 stating that GCI is "motivated to move off of ACS facilities wherever it can as quickly as it can because of the costs GCI can avoid and the customer service benefits of serving a customer entirely over GCI facilities").

[119] *See, e.g.*, ACS Dec. 15, 2006 *Ex Parte* Letter, Attach. at 5 ("Businesses in Anchorage are relatively small, and most can be served using DS0 capacity lines."); Letter from Brad Mutschelknaus and Thomas Cohen, Counsel for XO Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281, Attach. at 3 (filed Dec. 18, 2006) (XO Communications Dec. 18, 2006 *Ex Parte* Letter) (stating that the business market in Anchorage is "more DS0 oriented"); ACS Sept. 8, 2006 *Ex Parte* Letter at 17 (stating that "there are very few customers in Anchorage that require multiple DS1 and higher capacity lines"); ACS Reply Comments at 18 (noting that GCI has acknowledged that its enterprise customers do not purchase capacity higher than DS1s); ACS Sept. 8, 2006 *Ex Parte* Letter, Declaration of Charles L. Jackson at 5. ACS provides only [**confidential**] retail voice-grade equivalent switched access lines over high-capacity circuits while it provides [**confidential**] retail voice-grade equivalent lines over low-capacity circuits to business customers. *See* ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 1. In addition, ACS provides only [**confidential**] retail special access circuits in the Anchorage study area. *See id*., Attach. 2 (excluding [**confidential**] special access circuits ACS sells to its long distance, Internet and wireless affiliates).

[120] *See, e.g.*, GCI Nov. 14, 2006 Coverage *Ex Parte* Mitchell Decl. Exhs. 1-3 (showing that GCI expects its cable plant node upgrades to be completed in the 5 wire center service areas where we grant relief by the end of 2006). By GCI's own estimates, its cable plant passes approximately [**confidential**] percent of GCI's existing residential lines and approximately [**confidential**] percent of GCI's existing business lines. *See* GCI Zarakas Decl. Exh. 1 at n.1; *see also* GCI July 3, 2006 *Ex Parte* Letter at 15 (stating that GCI has last-mile facilities near approximately [**confidential**] percent of the medium and large business locations in Anchorage); ACS Petition at 27-28 (claiming that GCI's cable plant serves close to the entire Anchorage study area).

[121] Although GCI's fiber network is not deployed as ubiquitously as its cable plant, GCI's fiber facilities nevertheless cover approximately [**confidential**] percent of business locations in the Anchorage study area, which are the end user locations most likely to take services economically provided over fiber. *See, e.g.*, GCI Nov. 14, 2006 Coverage *Ex Parte* Letter at 9. Thus, the mere fact that GCI has historically been able to migrate [**confidential**] DS1 lines to its own cable facilities is not dispositive of whether forbearance is warranted or whether the coverage threshold adopted in this order is satisfied. *See, e.g.*, GCI July 3, 2006 *Ex Parte* Letter, Declaration of Dennis Hardman (GCI July 3, 2006 *Ex Parte* Hardman Decl.) at para. 4 (explaining that

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facilities – including its own market-leading broadband facilities – a suite of telecommunications services that is reasonably comparable to the services provided by ACS in these wire centers.[122] Finally, many of the arguments GCI raises as to why its coverage is more limited than we find above are premised on hurdles that must be crossed by most, if not all, facilities-based providers of telecommunications service, including Cox in the Omaha MSA. For instance, GCI's need to obtain a customer's permission to access the customer premises; to install new drops to the customer's location in certain circumstances; and to demonstrate to third parties (*e.g.,* alarm monitoring companies) that its technology is compatible with theirs, are issues common to all facilities-based telecommunications providers.[123]

37. In addition, we believe it is appropriate to consider the competitive effect of GCI's long-established, concrete, and partially realized plans to fully upgrade its cable system in determining the scope of forbearance relief, at least in those areas where GCI's current deployment is greatest.[124] In light of record evidence of GCI's strong success to date in providing competitive telecommunications services, its technical expertise, its economies of scale and scope, its sunk investments in network infrastructure, its established presence and brand in the Anchorage study area, and its current marketing efforts and emerging success in the enterprise market, we must conclude that GCI poses a substantial competitive threat to ACS for all telecommunications services in the 5 wire center service areas where we grant relief.[125]

38. Unlike the 5 wire center service areas where GCI is concentrating its build-out, we are unable to find that GCI has deployed competitive facilities to the same extent in the 6 wire center service areas where we deny ACS's forbearance request. Currently, GCI's upgraded cable plant and fiber facilities cover less than [**confidential**] percent of the end user locations that are accessible from four wire centers. In particular, by the end of 2006, GCI's cable plant will cover less than [**confidential**] percent of all end-user locations in the Rabbit Creek wire center service area and [**confidential**] percent of all end-user

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commercial deployment of products that would allow GCI to provide DS1 service over its cable plant is likely "a good two years away"); *see also* GCI Nov. 14, 2006 Coverage *Ex Parte* Letter at 2. GCI's fiber facilities overlap to a significant degree with GCI's cable facilities. *See, e.g.*, GCI Mitchell Reply Decl. at para. 13.

[122] For instance, we see no reason why GCI could not satisfy the telecommunications needs of many business customers in Anchorage by offering cable modem service combined with multiple DLPS lines. *See* Letter from Karen Brinkman, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2 (filed Dec. 6, 2006) (showing that GCI has approximately twice as many broadband lines in Alaska as ACS); XO Communications Dec. 18, 2006 *Ex Parte* Letter, Attach. at 3 (stating that GCI dominates the broadband market in the Anchorage study area). We note that GCI could substitute its own cable facilities in certain circumstances where it serves multiple customers over a DS1 loop. For example, as ACS suggests, where GCI serves multiple nearby businesses – each of which requiring voice lines and broadband Internet access – over a multiplexed DS1, GCI could continue to provide service over its own voice and cable modem facilities. *See, e.g.*, ACS Dec. 15, 2006 *Ex Parte* Letter, Attach. at 2.

[123] GCI Haynes Decl. at para. 10; GCI July 3, 2006 *Ex Parte* Letter at 24-25; GCI Nov. 14, 2006 Coverage *Ex Parte* Letter at 6; GCI Nov. 14, 2006 Coverage *Ex Parte* Wolf Decl. at para. 4.

[124] *See infra* para. 41 (discussing GCI's claims that it currently is unable to provide symmetric high-speed service over its cable plant).

[125] We note that GCI has submitted evidence that [**confidential**] through reliance on ACS's last-mile facilities. *See* GCI Nov. 14, 2006 Coverage *Ex Parte* Wolf Decl. at para. 8-9; [**confidential**].

locations in the O'Malley wire center service area.[126] In addition, GCI does not even have franchises to operate cable systems in the Indian and Girdwood wire center service areas.[127] GCI therefore has no coverage in these 2 wire center service areas. Neither ACS nor GCI submitted coverage data for the Elmendorf and Fort Richardson wire center service areas.[128] Although ACS contends that GCI has exclusive access to 3 subdivisions and 2 buildings in the Elmendorf wire center, this representation, against the backdrop of ACS's overall market presence, does not persuade us that GCI's facilities coverage in these two wire centers service areas satisfies the [**confidential**] percent coverage threshold we set forth above.[129]

[126] *See* GCI July 3, 2006 *Ex Parte* Mitchell Decl. at Exh. 1. GCI's node upgrades are not yet complete in the Rabbit Creek and O'Malley wire centers. GCI stated in August 2006 that it expected to "complete the vast majority of node upgrades on its cable network by the end of 2007 and complete node upgrades by the end of 2008, which GCI expects will enable it to serve substantially all of its residential customers over its own facilities by sometime in 2008." GCI Aug. 22, 2006 *Ex Parte* Letter at 1-2. However, GCI more recently has stated that its upgrade is not progressing as quickly as GCI expected due to operational constraints on the speed at which GCI can deploy its facilities. *See* GCI Nov. 7, 2006 *Ex Parte* Letter. We decline to adopt ACS's suggestion that we prospectively grant ACS forbearance relief "automatically" once GCI's facilities deployment in wire center service areas where we do not grant relief today reaches the coverage threshold test relied on in this proceeding. *See* Letter from Karen Brinkmann, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2-3 (filed Dec. 7, 2006) (ACS Dec. 7, 2006 *Ex Parte* Letter). ACS remains free to petition the Commission for further forbearance relief when it believes market conditions warrant such relief.

[127] *See* GCI July 3, 2006 *Ex Parte* Letter at 14 (stating that the Indian and Girdwood areas "fall outside of GCI's cable-certificated area and thus outside of GCI's cable facilities footprint").

[128] GCI generated its coverage data by relying on parcel data extracted from the Municipality of Anchorage geographic information system, which did not include data regarding Elmendorf and Fort Richardson because these wire center service areas are military bases. *See* GCI July 3, 2006 *Ex Parte* Mitchell Decl. at para. 7 n.9.

[129] The Elmendorf and Fort Richardson wire centers serve less than [**confidential**] percent of all access lines in the Anchorage study area. *See id.* According to staff calculations based on the parties' data submissions, GCI serves over its own facilities only approximately [**confidential**] percent of the voice-grade equivalent switched business lines and [**confidential**] percent of the residential lines in the Elmendorf wire center service area, and approximately [**confidential**] percent market of voice-grade equivalent switched business lines and [**confidential**] percent of the total residential voice-grade equivalent lines in the Fort Richardson wire center service area. *See* ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 1; GCI Oct. 24, 2006 *Ex Parte* Letter, Attach. (updating GCI Zarakas Decl. Exhs. V and VI). ACS also provides wholesale special access circuits to other carriers in the Elmendorf and Fort Richardson wire center service areas. *See* ACS Nov. 1, 2006 *Ex Parte* Letter, Attach. 2. ACS contends that it is entitled to forbearance relief in the Elmendorf and Fort Richardson wire center service areas based on GCI's market share in those areas and illustrations of the geographic contours of GCI's facilities – irrespective of the number of end-user locations covered, which is the standard the Commission used to determine coverage in the *Qwest Omaha Order* and which we adopt in this proceeding as a bright-line threshold test. *See* Letter from Karen Brinkmann, Counsel for ACS of Anchorage, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1-2 (filed Dec. 21, 2006). We are unable to discern from ACS's submissions the percentage of end-user locations covered in the Elmendorf and Fort Richardson wire center service areas, and therefore lack sufficient data to grant ACS's Petition in these service areas.

b. Condition of Forbearance

39. Consistent with the *Qwest Omaha Order*, which maintained a section 271 access obligation, we condition our grant of forbearance in the Anchorage study area on the continued availability of loop access. Specifically, we find that a continuing obligation of ACS to provide access to loops and subloops at commercially negotiated rates is necessary to justify the relief we grant ACS today from its section 251(c)(3) and section 252(d)(1) obligations.[130] Therefore, as a condition of granting ACS forbearance from its section 251(c)(3) and section 252(d)(1) obligations, as an ongoing obligation after the transition period expires, we require ACS to provide local "legacy" loop access,[131] including access to the same subloops from which we forbear unbundled from local switching or other services, pursuant to commercially negotiated rates specific to the Anchorage study area.[132] Until such a commercial agreement is reached, we require ACS to provide loop access at the same rates, terms, and conditions negotiated between ACS and GCI in Fairbanks, Alaska for loop and subloop access.[133] We look to the Fairbanks

[130] Because no competitive carrier in the Anchorage study area relies on UNE transport, we see no need to condition our grant of forbearance of UNE transport obligations on a continuing transport unbundling obligation.

[131] *See infra* para. 43 (explaining the meaning of "legacy" loops).

[132] ACS and GCI each argue that it has the willingness and incentive to engage in commercial negotiations in the Anchorage market. ACS has argued throughout this proceeding that it is willing to engage in commercial negotiations for UNE access and has strong incentives to keep receiving revenue from GCI for UNEs. *See* ACS Nov. 30, 2006 *Ex Parte* Letter at 18; *see also* ACS Petition at 3 (stating that if the Commission grants ACS forbearance relief, "ACS has ample incentive to continue offering network elements to GCI on negotiated, market-based terms in order to maintain the revenue stream"); ACS Dec. 7, 2006 *Ex Parte* Letter at 1 (claiming that ACS is willing to negotiate commercial agreements for UNE access and citing ACS's strong economic interest in maintaining GCI as a wholesale customer). GCI also has argued throughout this proceeding that it is willing to negotiate a commercial agreement for UNE access with ACS. *See* GCI July 3, 2006 *Ex Parte* Letter at 19-20 (arguing that due to regulatory uncertainty and GCI's continuing roll-out of its own facilities that GCI has strong incentives to negotiate for continued UNE access in Anchorage); *see also* GCI Opposition at 38-41 (arguing that GCI sought to commercially negotiate UNE rates for Anchorage at the same time the parties negotiated UNE rates for Fairbanks and Juneau); GCI Opposition, Declaration of Blaine Brown at para. 20 (stating that GCI has "gone out of its way to offer ACS use of the few access lines in Anchorage for which GCI is the sole provider"). In light of these mutual representations to the Commission of a willingness to negotiate in good faith, we disagree that a condition to provide UNE access at a specific rate to which both parties have already agreed in other markets until a commercial agreement in this market is reached will result in more litigation. *See* ACS Dec. 15, 2006 *Ex Parte* Letter at 1 (stating that, if the Commission sets UNE rates, it could result in litigation and further uncertainty that might continue for years).

[133] Under the terms agreed to between ACS and GCI, the rate in Fairbanks for a DS0 loop is $23.00 (compared to the Anchorage UNE rate of $18.64), and the rate for a DS1 loop is $87.93 (compared to the Anchorage UNE rate of $86.23). *See* GCI Nov. 21, 2006 *Ex Parte* Letter at 1. *See supra* note 5 (addressing the length of this commitment). Because ACS and GCI each have indicated a willingness and incentive to reach commercial agreement, we reject ACS's request to provide for a ten percent annual increase in the Fairbanks rates as applied to the Anchorage wire center service areas where we grant ACS forbearance relief. *See* ACS Dec. 8, 2006 *Ex Parte* Letter at 2. Such an arbitrary rate of escalation could actually serve as a disincentive to negotiation. Similarly, and for the same reasons, we see no reason to grant GCI's request for a lower "blended rate" based on the weighted average of the rates ACS and GCI agreed to in Fairbanks and Juneau. *See* Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 2 (filed Dec. 20, 2006) (GCI Dec. 20, 2006 *Ex Parte* Letter). Following our decision today, ACS and GCI will be

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agreement because it contains commercially agreed upon rates that should serve as appropriate interim rates until ACS and GCI agree to rates, terms and conditions that are specific to Anchorage. Among the interim "rates, terms and conditions" that will apply in Anchorage are any loop and subloop provisioning intervals, requirements, and penalties, and any non-recurring charges applicable to such provisioning.[134]

40. We believe that in those areas of the Anchorage study area where GCI has deployed facilities capable of supporting competitive local exchange and exchange access offerings to at least [**confidential**] percent of all end users, this condition will help ensure that ACS's "charges, practices, classifications, . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[135] This condition is necessary because ACS, unlike Qwest in the Omaha MSA, is under no compulsion to offer loop access absent this condition.[136] To ensure that our grant of forbearance does not undercut the basis of retail

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free to negotiate for the terms and conditions each seeks, such as providing for ACS's access to GCI's facilities, and establishing differentiated pricing based on geographic, volume or term distinctions that ACS contends have not been achievable in a regulated environment. *See* ACS Dec. 8, 2006 *Ex Parte* Letter at 2.

[134] *See id.* ("Negotiation of the UNE agreement in Fairbanks involved multiple factors, and a single term may not be meaningful outside the context of the entire agreement."). We clarify, however, that to the extent the Fairbanks agreement addresses issues other than UNE access, such as resale obligations, we do not condition forbearance on such terms. *See* Letter from John T. Nakahata, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1 (filed Dec. 4, 2006) (stating that the Fairbanks commercial agreement is a full interconnection agreement that covers access to UNEs, but also, *inter alia*, interconnection, collocation and resale). We believe this condition adequately addresses issues raised by McLeodUSA. *See* Letter from Chris MacFarland, Group Vice President – Chief Technology Officer, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Dec. 15, 2006) (arguing that Qwest's non-recurring charges and special access pricing in the Omaha MSA following forbearance have made it difficult for McLeodUSA to compete in that market).

[135] 47 U.S.C. § 160(a)(1).

[136] *See, e.g.*, GCI Dec. 6, 2006 *Ex Parte* Letter at 3. GCI submitted evidence that ACS previously has been unwilling to negotiate access to unbundled loops in the absence of a regulatory obligation to do so. *See, e.g.*, GCI Opposition at 68-69; GCI Opposition, Declaration of Dana Tindall Exh. B at 9-11; GCI July 3, 2006 *Ex Parte* Letter at 19-20; Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Sept. 27, 2006) (GCI Sept. 27, 2006 *Ex Parte* Letter); GCI Dec. 20, 2006 *Ex Parte* Letter at 1-2 (contending that ACS has been unwilling to negotiate with GCI and has not responded to GCI's latest proposal "which GCI offered seven weeks ago"); *see also* CompTel Comments at 11 (stating that the 271 backstop "is not available in Anchorage and thus the Commission can take no comfort in ACS's aspirations to voluntary provision UNEs in the absence of regulatory compunction"); Covad Comments at 32; GCI Opposition at 49-51; Integra Comments at 3; MTA Reply at 7 (urging the Commission to condition forbearance on assurance of good faith negotiation of commercial rates). GCI argues that, because ACS is not subject to section 271 obligations, the logic of the *Qwest Omaha Order* "requires, at a minimum, that ACS must continue to provide access to loops and transport under section 251(c)(3)." GCI Reply at 19 (claiming that "were the Commission to forbear from section 251(c)(3), as ACS requests, there would remain no statutory requirement of any kind to make unbundled loops available, whether at a TELRIC rate or any other 'just and reasonable' rate"). In the *Qwest Omaha Order*, the Commission determined that it could grant Qwest partial forbearance from its section 251(c)(3) obligations because Qwest would continue to be subject to section 271 obligations to provide unbundled access to its loops and transport elements at just and reasonable prices. *See Qwest Omaha Order*, 20 FCC Rcd at 19446-47, 19449-50, 19452, 19455, paras. 62, 64, 67-68, 71, 80. We agree with USTelecom that forbearance should be available to non-BOC incumbent LECs even though they are not subject to section 271 unbundling obligations. USTelecom Reply at 4-5 (arguing that the "Commission must dispel any notion that non-

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competition that exists in the Anchorage study area, this condition which requires ACS to provide continued loop access is a prerequisite to our grant of forbearance relief. Moreover, in every wire center service area where we grant relief, there are areas where no competitive carrier has deployed its own facilities. Absent the condition we adopt here, we would not be able to conclude that the criteria of section 10 are met.

41. The condition we adopt here assuages any lingering concerns we might have over GCI's arguments that it is unable to provide symmetric high-speed service over its cable plant or otherwise unable to provide particular services to particular customers yet. For example, GCI claims that, in order to provide the full range of services, it needs to complete additional work or implement new standards.[137] We need not adjudicate whether or to what extent these alleged difficulties limit GCI's ability to migrate its customers to its own network, because the competitive backstop we adopt as a condition of today's grant of forbearance ensures that the criteria of section 10 are satisfied and that forbearance is therefore warranted in limited areas of the Anchorage study area.[138] Some of the unique circumstances in the Anchorage study

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RBOC ILECs are not entitled for forbearance from unbundling obligations because they are not subject to section 271"). The condition we impose on ACS to provide access to its loops fully addresses and satisfies GCI's concern and the issue raised by USTelecom. Because the rates, terms and conditions of the commercially negotiated Fairbanks agreement will apply until ACS and GCI reach a commercial agreement in Anchorage, consumers in Anchorage are fully protected and we do not need to make any findings regarding ACS's and GCI's claims that the other party has been unwilling thus far to engage in commercial negotiations with GCI in Anchorage. *Compare* GCI Sept. 27, 2006 *Ex Parte* Letter at 5 (arguing that "[g]iven ACS's demonstrated unwillingness to negotiate with GCI in a commercially reasonable manner, the Commission should conclude that ACS has no intention of making UNEs available at commercially reasonable rates if forbearance is granted") *with* ACS Sept. 8, 2006 *Ex Parte* Letter, Declaration of Thomas R. Meade at paras. 5-9 (arguing that ACS has been unable to reach commercial agreement in Anchorage with GCI because GCI to date has had little incentive to negotiate with ACS).

[137] GCI claims it will need to undertake a "large-scale upgrade of its network capacity before it can provide all of its business customers with DS1 services over its [cable] plant." GCI July 3, 2006 *Ex Parte* Letter at 28 (contending that it will need to "install hundreds of additional amplifiers and upgrade thousands of taps to boost bandwidth capacity"). GCI also claims that upstream bandwidth limits limit its ability currently to provide high-capacity services. GCI July 3, 2006 *Ex Parte* Letter at 28; GCI July 3, 2006 *Ex Parte* Hardman Decl. at para. 7 (stating that in one node in the North wire center, "GCI can support only two DS1 lines over its current [hybrid fiber coaxial] HFC plant before reaching upstream bandwidth limits and freezing other services, including video and Internet"). In addition, GCI contends that, until recently, there was no cable industry standard to support all of the features demanded by enterprise-level telecommunications customers. GCI Haynes Decl. at para. 22 (stating that "while some companies offer proprietary work-arounds to provide DS1 services over DOCSIS cable networks, the reality is that these work-around solutions are cumbersome, expensive and add additional potential points of service failure"); *see also* GCI July 3, 2006 *Ex Parte* Letter at 26 (stating that, on May 12, 2006, CableLabs issued a specification that purports to better support the provision of enterprise services over cable facilities). While GCI claims that CableLabs adopted a standard this year that appears to satisfy its concerns in this regard, we recognize that it will take some time before vendors incorporate this new standard into their products and GCI is able to begin testing these products. GCI July 3, 2006 *Ex Parte* Letter at 26; GCI Opposition, Declaration of Richard Dowling at para. 5. In light of GCI's early adoption of low-capacity cable telephony technology that was not adopted by a sufficient portion of the remainder of the nation's cable operators to remain viable, GCI claims that it is "wary of deploying non-standardized products before they are embraced by the major MSOs, which drive technology adoption." GCI July 3, 2006 *Ex Parte* Letter at 27.

[138] As noted above, our decision today addresses factors unique to the Anchorage study area. *See supra* note 28.

area include that: (a) ACS is subject to competition from a single competitor, GCI, that has been migrating its customers off of UNEs to its own facilities, and that expects in the near future to be finished with its migration in the wire center service areas where we grant relief; (b) GCI does not rely on UNE transport; (c) most businesses in the Anchorage study area purchase only low-capacity services; (d) GCI already has deployed extensive broadband facilities; and (e) due to the unique physical characteristics of the Anchorage study area, new entrants would face unique circumstances in terms of network deployment.

42. Our decision to impose a continuing access obligation on ACS to all requesting carriers as a condition of forbearance finds support in the Commission's decision in the *Qwest Omaha Order*. When the Commission granted Qwest partial forbearance from its unbundling obligations in the Omaha MSA, it declined to grant Qwest the forbearance it also sought from Qwest's section 271 checklist obligations to provide unbundled access to loops and transport at just and reasonable, and not unjustly or unreasonably discriminatory, rates, terms and conditions.[139] Because ACS is not a BOC, it is not subject to the requirements of section 271. The ongoing unbundling obligation we conditionally impose on ACS to provide access to loop facilities mirrors the section 271 checklist obligation the Act imposes on BOCs that have obtained section 271 approval to provide access to these facilities.[140]

43. We emphasize that the scope of the requirements we impose on ACS as a condition of our grant of forbearance is limited to ACS's "legacy" elements, consistent with the BOCs' section 271 obligations today. In accord with our nation's policy goals of trying to provide all carriers with incentives to make broadband investments, we decline to extend the loop access obligation to ACS's broadband elements.[141] Specifically, we do not impose on ACS the obligation to offer access to the broadband elements that the Commission, on a national basis, relieved from section 251(c)(3) unbundling in the *Triennial Review Order*, and subsequent reconsideration orders, and that the Commission also relieved from section 271 unbundling obligations.[142] These elements include FTTH loops, FTTC loops, and the

[139] *Qwest Omaha Order*, 20 FCC Rcd at 19468, para. 106; *see also* Broadview Dec. 11, 2006 *Ex Parte* Letter at 7-9 (arguing that the Commission should deny forbearance relief due to the absence of a regulatory "backstop" like the ongoing section 271(c) access obligations the Commission relied on in the *Qwest Omaha Order*).

[140] *See* 47 U.S.C. § 271(c)(2)(B)(iv)-(v).

[141] *Cf. Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505, para. 21. Specifically, the Commission concluded that "the developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities, leads us to conclude that the contribution of section 271 unbundling requirements to ensuring just and reasonable charges and practices is relatively modest – particularly at the retail level – and outweighed by the greater competitive pressure that would be brought to bear on all providers if the section 271 unbundling requirements were lifted." *Id.* at 21505, para. 21; *see also* 47 U.S.C. § 157 nt (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using regulatory measures that "promote competition in the local telecommunications market" and "remove barriers to infrastructure investment").

[142] In the *Triennial Review Order*, the Commission determined that incumbent LECs have no unbundling obligation under section 251(c)(3) for new fiber construction and for fiber overbuild situations where the incumbent LEC does not retire existing copper loops. *See Triennial Review Order*, 18 FCC Rcd at 17142, para. 273. The Commission made a similar unbundling determination regarding FTTH loops serving predominantly residential multiple dwelling units (MDUs) in the *MDU Reconsideration Order*. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd

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packetized functionality of hybrid loops.[143] We believe that narrowing the scope of the loop access condition in this way is most consistent with the Commission's precedent in this area.

44. The access obligations we impose on ACS as a condition of our partial grant of forbearance, combined with other regulatory wholesale options and tariffed offerings that are available in the Anchorage study area, should be adequate to ensure continued vibrant retail competition in the wire center service areas where we forbear from UNE obligations. In particular, we find that ACS's obligation to continue providing wholesale access to legacy loops in the Anchorage study area at rates, terms and conditions commercially negotiated by ACS and GCI regarding the Anchorage study area – and, until such agreement is reached, at the rates, terms and conditions GCI and ACS negotiated with GCI and agreed to in Fairbanks – in addition to ACS's obligations to provide its services for resale under section 251(c)(4), and ACS's own tariffed wholesale offerings, are sufficient wholesale inputs to preserve and foster a vibrant competitive retail market in those wire center service areas where GCI has deployed its own last-mile facilities to at least [**confidential**] percent of all end users.

45. Furthermore, ACS has the incentive to make attractive wholesale offerings available so that it will derive revenue indirectly from retail customers who choose a retail provider other than ACS for two reasons: (1) GCI's current ability to provide retail competition with its own facilities and the increase in the number of voice grade lines that GCI expects to migrate to its own facilities in the near term; and (2) the very high levels of retail competition that, going forward, will not rely on ACS's facilities – and for which ACS receives little to no revenue.[144] This gives us comfort that for the 5 wire center service areas where we grant relief, section 251(c)(3) and section 252(d)(1) are "not necessary to ensure that the charges,

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15856, 15858, paras. 7-9 (2004). The Commission then determined that that fiber-to-the-curb (FTTC) loops are not subject to a section 251(c)(3) unbundling obligation in the *FTTC Reconsideration Order*. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-303, paras. 9-19 (2004). The Court of Appeals for the D.C. Circuit recently upheld the Commission's decision to forbear under section 10 from enforcing the requirements of section 271 regarding the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent reconsideration orders. *See Broadband 271 Forbearance Order*, 19 FCC Rcd at 21496, para. 1, *aff'd, EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

[143] *See Broadband 271 Forbearance Order*, 19 FCC Rcd at 21504, para. 19.

[144] *See, e.g.*, ACS Nov. 30, 2006 *Ex Parte* Letter at 2 ("ACS would prefer that a GCI customer be served using ACS's facilities to having that customer use GCI's network exclusively, which offers ACS no revenue and only a miniscule reduction in costs."). In similar contexts, the Commission has found additional support in deregulating broadband services through its expectation that the emerging competition from "multiple sources and technologies in the retail broadband market," likely would "pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business." *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21508, para. 26. As it noted at the time, even if the Commission's prediction were wrong that competitive providers of retail broadband services would be able to rely on reasonably priced wholesale broadband offerings, these competitive providers would "still be able to access other network elements to compete in the broadband market." *Id*.

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."[145]

46. For the reasons explained above, we disagree with commenters who contend that facilities-based competition between ACS and an incumbent cable operator results in an impermissible duopoly.[146] As the Commission found in the *Qwest Omaha Order*, a fully competitive wholesale market is not a prerequisite to forbearance.[147] While we recognize above that most of the competition in the Anchorage study area comes from two competitors, the continuing obligation of ACS to provide unbundled access to loops at rates, terms and conditions under mutually agreeable rates, terms, and conditions – with an interim agreement no less favorable than that reached by ACS and GCI in Fairbanks – with permit other competitors to enter the market, thereby reducing the risk of anticompetitive conduct.[148]

47. *Transition Plan*. We adopt a one-year plan for competing carriers to transition UNE loops and subloops in the North, East, Central, West, and South wire centers to alternative facilities or arrangements, including self-provided facilities, or services offered by ACS.[149] We believe that this is sufficient time to allow ACS and GCI, and any other competitive LECs, to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities, obtain other wholesale facilities, or take other actions.[150] We believe that a one-year transition period is

[145] 47 U.S.C. § 160(a)(1).

[146] *See, e.g.*, Covad Comments at 35; CompTel Comments at 10; Integra Comments at 5; TalkAmerica Comments (stating that "UNE loops and transport could disappear forever, anytime there was a success of an ILEC/Cable duopoly); Time Warner Opposition at 22.

[147] *Qwest Omaha Order*, 20 FCC Rcd at 19452, para. 71.

[148] *See Broadband 271 Forbearance Order*, 19 FCC Rcd at 21510, para. 29, *aff'd, EarthLink, Inc. v. FCC*, 462 F.3d at 11 (agreeing with the Commission that consumers sometimes are able to benefit from competition even when a market is comprised of only two competitors).

[149] The Commission previously has adopted transition plans in its various proceedings. *See, e.g.*, *Qwest Omaha Order*, 20 FCC Rcd at 19453, para. 74; *Triennial Review Remand Order*, 20 FCC Rcd 2639-41, paras. 195-98; *see also, e.g.,* 47 C.F.R. §§ 51.319(a)(4)(iii) (establishing DS1 loop transition period), 51.319(a)(5)(iii) (establishing DS3 loop transition period), 51.319(a)(6)(ii) (establishing dark fiber loop transition period); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14855, para. 1 (2005), petitions for review pending, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005).

[150] *See* ACS Dec. 8, 2006 *Ex Parte* Letter at 1 (stating that a 3-6 month transition period is sufficient and that ACS and GCI have a long history of working together to resolve operational issues). We disagree with GCI that a significantly longer transition period is required in Anchorage than the Commission adopted in Omaha in the *Qwest Omaha Order*, and find that the condition we impose today addresses the issues raised by GCI. *See* Letter from John T. Nakahata *et al.*, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Dec. 13, 2006) (GCI Dec. 13, 2006 *Ex Parte* Letter) (seeking a two-year transition in the "residential market" and no forbearance with respect to the "small business and enterprise markets"). In particular, we find that the Fairbanks condition addresses GCI's concern that the "possibility of disruption is much higher in Anchorage than it was in Omaha." *See id.* at 1-2. Moreover, we reject GCI's argument that loops cannot be substituted "Anchorage-wide" within this transition period because the relief we grant ACS is limited to the wire centers that will be fully upgraded as of the end of 2006. *See id.* at 1-2.

appropriate given the severe weather conditions in Alaska that limit the Anchorage construction season.[151] Consequently, carriers have one year from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes.[152] By the end of the one-year period, requesting carriers must have transitioned all of their affected 251(c)(3) network elements to alternative facilities or arrangements. Consistent with the Commission's transition plan in the *Qwest Omaha Order*, competitive LECs may no longer add new UNEs pursuant to section 251(c)(3) in circumstances where the Commission has determined to forbear from a section 251(c)(3) unbundling requirement.[153]

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

48. Section 10(a)(2) requires that we assess whether the section 251(c)(3) obligations and section 252(d)(1) pricing obligations for loop and transport elements are necessary to protect consumers.[154] For reasons similar to those that persuade us that these regulatory obligations are not necessary under section 10(a)(1), we conclude that these regulatory obligations are no longer necessary for the protection of consumers under section 10(a)(2). We are convinced that the condition we adopt today adequately ensures that GCI's customers will not face service disruptions or other consequences resulting from our grant of forbearance inconsistent with section 10(a)(2).[155] Furthermore, we determine that the continued application in the Anchorage study area of the provisions of the Act – other than section 251(c)(3) and section

[151] The Commission granted a six month transition plan in the *Qwest Omaha* decision, however, severe weather conditions did not exist in that market. *See Qwest Omaha Order*, 20 FCC Rcd at 19453, para. 74. *See, e.g.*, GCI July 3, 2006 *Ex Parte*, Declaration of Kevin Sheridan at para. 22 (stating that the construction season extends from late May to September or October depending on the temperatures); GCI Nov. 14, 2006 Coverage *Ex Parte* Wolf Decl. at 5 n.6 (explaining that the Municipality of Anchorage refuses to issue permits to occupy the rights of way – including blocking the street – from approximately October 15 to May 15 and that GCI attempts to use aerial drops where possible but, due to zoning restrictions and municipality preferences, seldom uses them); GCI Dec. 13, 2006 *Ex Parte* Letter at 2 (stating that, due to the shortened construction season in Anchorage, GCI would not be able to begin a transition to its own facilities until May or June – near the end of a six-month transition period). In light of the obstacles GCI has identified, we reject ACS's suggestion that a three- to six- month transition period is warranted. ACS Dec. 7, 2006 *Ex Parte* Letter at 7 (arguing that a three- to six-month transition period is sufficient because GCI during the winter months could lay cable drops on top of the ground or use temporary aerial facilities and then bury these facilities after the construction seasons begins in the spring).

[152] The Commission in the *Qwest Omaha Order* also required affected carriers to modify their interconnection agreements, including completing any change of law processes, by the conclusion of the transition period. *See Qwest Omaha Order*, 20 FCC Rcd at 19453, para. 74. This requirement addresses ACS's concern that the current language in the Anchorage interconnection agreement will pose a barrier to commercial negotiations. *See, e.g.*, ACS Dec. 8, 2006 *Ex Parte* Letter at 2 (stating that the Commission should make clear that forbearance is effective immediately after the end of the transition period and to facilitate negotiation of a commercial agreement).

[153] *Qwest Omaha Order*, 20 FCC Rcd at 19453, para. 74.

[154] 47 U.S.C. § 160(a)(2).

[155] *See supra* para. 39. As explained above, we require as an express condition of our grant of forbearance that ACS continue to provide loops and certain subloops under commercially negotiated rates, terms, and conditions, and until then under the rates, terms, and conditions ACS and GCI have negotiated in Fairbanks, Alaska for loop access. *See* Letter from John T. Nakahata, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281 at 1 (filed Dec. 5, 2006).

252(d)(1) – that are designed to promote the development of competitive markets, in addition to the requirement we adopt in this Order as a condition of our partial grant, will help ensure that customers in the Anchorage study area have competitive choices. Thus, for the reasons we explained above, in those areas of the Anchorage study area where the coverage threshold we set forth above is satisfied, we find that the 251(c)(3) access obligation for UNE loop and transport elements and section 252(d)(1) pricing obligation is no longer necessary to protect consumers in part because sufficient alternative facilities and facilities access obligations exist to ensure competitive market conditions.[156]

3. Section 10(a)(3) – Public Interest

49. We also conclude that relieving ACS from the section 251(c)(3) access obligations and section 252(d)(1) pricing obligations for loop and transport elements, subject to the condition we adopt above, is in the public interest under section 10(a)(3). In making our determination, we conclude that our conditional grant of forbearance to ACS "will promote competitive market conditions."[157] We found above that ACS is subject to a significant amount of competition in the Anchorage study area. The factors upon which we based our conclusions above also convince us that granting ACS forbearance from section 251(c)(3) and section 252(d)(1) obligations for loop and transport elements would be consistent with the public interest under section 10(a)(3) and will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b).[158] Moreover, given GCI's increasing ability to absorb customers over its own last-mile facilities, ACS will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so. Faced with aggressive "off-net" competition from GCI, we predict that ACS will endeavor to maximize use of its existing local exchange network, providing service at retail and at wholesale, in order to minimize revenue losses resulting from customer defections to GCI's service.[159]

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[156] We disagree with those commenters that argue GCI has simply chosen solely for economic reasons to use UNEs. *See, e.g.*, KPU Comments at 10; MTA Comments at 6 (stating, "that the record in the instant proceeding demonstrates that GCI has equal capability to that of Cox to compete with the incumbent provider on a facilities basis, but has elected not to do so for economic reasons"). The record shows that GCI continues to transition its customers from ACS's loops to its own facilities. *See, e.g.*, *supra* note 117 (discussing GCI's migration of customers from ACS's facilities to GCI's facilities).

[157] 47 U.S.C. § 160(b) (stating that "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest").

[158] 47 U.S.C. § 160(b).

[159] To the extent our predictive judgment proves incorrect, carriers can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling. *See Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Rcd 15095, 15099, para. 6 n.25 (2005) (conditionally granting a forbearance petition and stating that if the Commission's "predictive judgment proves incorrect and these conditions prove to be inadequate safeguards, then parties can file appropriate petitions with the Commission and the Commission has the option of reconsidering the forbearance ruling"); *see also Broadband 271 Forbearance Order*, 19 FCC Rcd at 21509, para. 26 n.85; *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services*, CC Docket No. 97-172, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5223-24, para. 19 n.66 (2004) (stating in a forbearance

(continued….)

IV. EFFECTIVE DATE

50. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on December 28, 2006.[160] The time for appeal shall run from the release date of this Order.[161]

V. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), ACS's Petition for Forbearance IS GRANTED to the extent stated and subject to the conditions established herein, and otherwise IS DENIED.

52. IT IS FURTHERED ORDERED that, pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), the Commission's forbearance decision SHALL BE EFFECTIVE on December 28, 2006. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page)
decision that to the extent carriers believe, in the future, that circumstances have changed and discriminatory practices have emerged with respect to these particular routes, they are free to file petitions); *CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998) (upholding the Commission's predictive judgment stating that "[i]f the FCC's predictions about the level of competition do not materialize, then it will of course need to reconsider its sunsetting provision in accordance with its continuing obligation to practice reasoned decision-making").

[160] *See* 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a).

[161] *See* 47 C.F.R. §§ 1.4, 1.13.

APPENDIX

List of Commenters

Comments in WC Docket No. 05-281

Comments	Abbreviation
Alaska Telephone Association	ATA
Covad Communications Group, Inc.	Covad
COMPTEL	CompTel
General Communication, Inc.	GCI
Integra Telecom, Inc.	Integra
Ketchikan Public Utilities	KPU
Matanuska Telephone Association, Inc.	MTA
McLeodUSA Telecommunications Services, Inc. and Mpower Communications Corp.	McLeodUSA
Nuvox Communications, Inc. and XO Communications, Inc.	NuVox
Talk America, Inc.	Talk America
Time Warner Telecom, Inc., Cbeyond Communications LLC, Conversent Communications LLC and CTC Communications, Inc.	Time Warner
United States Telecom Association	USTelecom
Verizon Telephone Companies	Verizon

Replies in WC Docket No. 05-281

Replies	Abbreviation
ACS of Anchorage, Inc.	ACS
Covad Communications Group, Inc., NuVox Communications, Inc. and XO Communications, Inc.	Covad
Eschelon Telecom, Inc.	Eschelon
General Communication, Inc.	GCI
Ketchikan Public Utilities	KPU
Matanuska Telephone Association, Inc.	MTA
Qwest Communications International Inc.	Qwest
Verizon Telephone Companies	Verizon
United States Telecom Association	USTelecom

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281

Today we remove the application of legacy network unbundling requirements on ACS of Anchorage, Inc. (ACS), the incumbent LEC operating in Anchorage, Alaska. This relief is warranted based on the specific market facts before us. These facts demonstrate that General Communication Inc. (GCI) has made a substantial infrastructure investment in the Anchorage study area and has used these facilities to provide competing telephone services to thousands of residential and business customers. As was the case in the Commission's *Qwest Omaha Order*, this success of intermodal competition warrants the Commission's careful exercise of its forbearance authority.

Significantly, however, our grant of forbearance in this item is conditional. Specifically, we require ACS to continue to provide loops at the same rates, terms, and conditions that it is currently offering pursuant to an existing commercially negotiated agreement covering Fairbanks, Alaska. ACS must make this offering until commercially negotiated rates are reached. It is my hope that commercial agreements will quickly be reached.

STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN, CONCURRING

Re: *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, FCC 06-188, WC Docket No. 05-281 (Dec. 28, 2006).

In today's decision, the Commission grants forbearance from certain unbundling obligations in parts of Anchorage, Alaska where a facilities-based carrier has extensively built out its network and taken significant market share from the incumbent wireline provider. While we support the outcome in this order and believe it is clearly superior to an automatic grant of the underlying petition, we have concerns with the analysis in this decision.[1]

The goal of the Telecommunications Act of 1996 is to establish a competitive and de-regulatory telecommunications environment. While today's order reduces regulation by eliminating some incumbent obligations and demonstrates that the Commission can respond to the dynamic marketplace, it is not accurate to depict this as an ideally competitive market. The Commission relies on the intermodal efforts of a single alternative provider to conclude that sufficient competition exists. While we agree that there is especially strong evidence of competition between the incumbent cable and wireline provider in parts of the Anchorage market, we believe the statute contemplates more than just competition between a wireline and cable provider – and that both residential and business consumers deserve more.

We concur also because this decision does not adequately address market differentiations, as between residential and business, making it difficult to conclude which market segments are actually receiving the benefit of emerging competitive choice.

We note that the transition period before the forbearance grant takes effect is longer than in the *Qwest Omaha Order*, which we believe is appropriate given the challenges faced by providers in Alaska and the need to provide a reasonable transition period for business planning purposes. Also, as in the *Qwest Omaha Order*, we believe that the facts in this case are unique and therefore this decision should not be considered generally applicable for future forbearance petitions involving phone providers facing different competitive landscapes, challenges, and market share.

[1] *See also Concurring Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 05-170, WC Docket No. 04-223 (rel. Dec. 2, 2005) (*Qwest Omaha Order*).

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

Re: *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281

Today, we recognize the significant facilities-based competition that exists in the Anchorage market by forbearing from the unilateral network sharing obligations of the incumbent local exchange carrier (LEC) Alaska Communications Systems (ACS). In many ways, the fierce competition throughout Anchorage between ACS and its primary competitive rival General Communications Inc. (GCI) epitomizes the benefits of local significant network investment and facilities-based competition made possible by the market-opening 1996 Act.

I am pleased that today's Order takes seriously the pro-competitive and deregulatory mandates in section 10 of the Act, and applies that statutory standard to the specific market facts to facilitate market-based solutions. When sustainable competition arrives, we must exercise our regulatory humility and transition markets away from the constant touch of government regulation, such as price-setting. Today's Order takes a carefully balanced approach, providing regulatory relief to the incumbent ACS in areas in which GCI has captured significant market share and is capable of serving a significant proportion of the consumers in the market over its own network, but denying relief where the state of facilities-based competitive entry does not yet warrant regulatory forbearance. Accordingly, I support today's Order removing legacy regulations where robust competition has rendered those regulations no longer necessary to maintain a competitive market and protect consumers.