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supports the Commission's proposal set forth in the *NPRM*. Moreover, the RCA says that it shares the Commission's belief that facilities-based MTS competition in Alaska Bush communities will produce public interest benefits and will also establish an incentive for Alascom to operate more efficiently.<sup>10</sup>

8. The same arguments advanced by the RCA are made by GCI, which provides specific examples of how competition between it and Alascom has benefited the Alaska Bush communities with improved telecommunication efficiency and new service offerings. According to GCI, the first and perhaps most significant technological improvement was the implementation of its Demand Assigned Multiple Access (DAMA) satellite transmission system, which allows bandwidth to be used more efficiently. Before the introduction of DAMA, GCI explains that all channels were assigned exclusively to a certain community and could not be used for other communities.<sup>11</sup> GCI adds that DAMA also eliminates the need for a "double hop" configuration. Double hop refers to a call that requires two satellite hops to complete. The earth station technology that was used before DAMA was introduced required all traffic to or from an Alaska Bush location to first be transmitted to a satellite, then to Anchorage, Fairbanks or Juneau for switching, even for calls not destined for those markets, and then transmitted a second time to a satellite for transmission to the call's final destination. This resulted in signal delay and frequency echo, rendering facsimile transmission unreliable and data transmission impossible.<sup>12</sup> Finally, GCI states that the success it has achieved with DAMA has caused Alascom to upgrade many of its Alaska Bush earth station facilities to digital DAMA technology.<sup>13</sup>

9. On the service side of the equation, GCI points out that greater facilities efficiency has enabled telemedicine to be offered in Alaska Bush communities. In those Alaska Bush communities where telemedicine is now available, GCI states that a village medical practitioner is able to provide a doctor in a regional center with detailed information regarding a patient's symptoms, medical history, and images, *e.g.*, of skin problems, trauma, lacerations, to aid the doctor in formulating a diagnosis of the patient's condition and in determining whether the patient should be flown to Anchorage, at a cost that sometimes exceeds \$20,000. Accordingly, unnecessary expenses can be avoided. More importantly, however, GCI states that satellite-provided telemedicine capabilities enable a doctor in a regional center to guide a local medical practitioner to provide both routine and emergency medical care.<sup>14</sup> GCI further notes that it has also provided reliable Internet connection for schools and libraries in nearly all of the Alaska

<sup>10</sup> See RCA Comments at 2-5.

<sup>11</sup> See GCI Comments at 5-6.

<sup>12</sup> *Id.* at 6-7.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 8-9.

Bush communities it serves.<sup>15</sup>

10. Along with improved service and service offerings, GCI says all customers in Alaska have benefited significantly from decreased long-distance rates since it entered the market. Due to the general rate reductions, GCI says many Bush customers now have an incentive to abandon high "basic" rates and opt for less-expensive calling plans that save them money. Notwithstanding these improvements, GCI contends that lifting the Alaska Bush Policy completely will result in the Alaska Bush realizing the full benefits of competition in both intrastate and interstate MTS service.<sup>16</sup>

11. Alascom and AT&T also support repeal of the Alaska Bush Policy. Alascom and AT&T contend, however, that other deregulatory actions, which they requested in a March 10, 2000 Petition, "are indivisible aspects of the [Alaska] Bush Policy" and thus, must be acted upon simultaneously.<sup>17</sup> In the March 10, 2000 Petition, Alascom and AT&T requested, among other relief, that the Commission eliminate structural separation and tariffing requirements under which Alascom has been providing certain carrier-to-carrier services in Alaska.<sup>18</sup> In addition, on January 7, 2003, Alascom filed a petition for waiver from the requirement that it annually file revised cost-based rates for these carrier-to-carrier services.<sup>19</sup> Alascom and AT&T point out in these petitions that Alascom now must disaggregate all of its service costs within Alaska by location, resulting in more than 900 separate cost points. Alascom and AT&T contend that no other carrier has ever been forced to provide a service based upon stand-alone location-specific costs. The present tariff requirements, they submit, impose unwarranted competitive regulatory burdens that are preventing Alascom from providing its customers with improved service.<sup>20</sup> These petitions are under consideration in separate dockets.<sup>21</sup>

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<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 9-11.

<sup>17</sup> Alascom and AT&T Comments at 1. See also Public Notice, *Pleading Cycle Established for Comments on AT&T and Alascom Petition for Structural and Other Regulatory Relief*, DA 00-603, CC Docket No. 00-46, March 17, 2000.

<sup>18</sup> The services are the transport and switching services by which Alascom transmits interexchange carriers' traffic to and from Alascom's points of interconnection with Alaska local exchange carriers in both Alaska Bush and non-Bush communities. See *Integration of Rates and Services for Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands*, Final Recommended Decision, 9 FCC Rcd 2197, 2204 (Joint Board 1993) (FRD), adopted and modified, Memorandum Opinion and Order, 9 FCC Rcd 3023 (1994) (*Alaska Market Order*). Alascom provides these services under its Tariff FCC No. 11.

<sup>19</sup> See Public Notice, *Pleading Cycle Established for Alascom, Inc., Petition for Waiver of the Commission's Rules Regarding Its Annual Tariff* FCC No. 11, WC Docket No. 03-18, DA 03-169 (Jan. 21, 2003).

<sup>20</sup> Alascom and AT&T Comments at 3.

12. The need for the Alaska Bush Policy is over. As was noted in the *NPRM*, the "Alaska Bush Policy is an isolated exception to the Commission's interstate MTS open-entry policy."<sup>22</sup> It was based on the assumption that authorizing more than one earth station in a Alaska Bush community would be duplicative and thus needlessly expensive, since a single earth station is sufficient to accommodate all the calls placed to or from the community. The GCI experience has demonstrated that the concern underlying the Alaska Bush Policy is no longer warranted. GCI has provided us with what we believe to be a preview of the public interest benefits that will be realized by allowing open-entry, facilities-based competition in the provision of interstate MTS in Alaska Bush communities. We believe that by eliminating the Alaska Bush Policy, citizens of the Alaska Bush communities will benefit from improved telecommunications services provided by both Alascom and its competitors at lower prices. For these reasons, we eliminate the Alaska Bush Policy.

13. Finally, we note that this proceeding was established for the limited purpose of considering the elimination of the Alaska Bush Policy. Consequently, we decline to address at this time other potential changes to our regulatory requirements for Alaska. In particular, because, as indicated above, eliminating the Alaska Bush Policy would promote important public interests, we decline to defer this deregulatory step pending our consideration of Alascom's and AT&T's March 2000 and January 2003 petitions.

#### IV. CONCLUSION

14. For the reasons set forth on the record in this proceeding, we abolish the Alaska Bush Policy, thus eliminating the restriction on facilities-based competition in the Alaska Bush.

#### V. PROCEDURAL MATTERS

15. *Final Regulatory Flexibility Analysis.* The Final Regulatory Flexibility Analysis for this Report and Order, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in the Appendix.

#### VI. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the Alaska Bush Earth Station Policy, formally adopted by the Commission in *Policies Governing the Ownership and Operation of Domestic Satellite Earth Stations in the Bush Communities in Alaska*, Final Decision, 96 FCC 2d 522 (1984) IS DISCONTINUED.

<sup>21</sup> See *supra* notes 17 and 19 and accompanying text.

<sup>22</sup> *NPRM*, 17 FCC Rcd at 2979.

17. IT IS FURTHER ORDERED that the Commission's Consumer and Government Bureau, Reference Information Center, *SHALL SEND* a copy of this *Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX

## FINAL REGULATORY FLEXIBILITY CERTIFICATION

18. The Regulatory Flexibility Act of 1980, as amended (RFA)<sup>23</sup> requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."<sup>24</sup> The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>25</sup> In addition, the term "small business" has the same meaning as "small business concern" under the Small Business Act.<sup>26</sup> A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field or operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>27</sup>

19. The Report and Order repeals a regulatory policy that prevented companies from obtaining licenses to operate earth stations in rural Alaska that would carry telephone calls between users in certain Alaskan communities and users in other states if such service was already available in those communities via facilities provided by an established carrier. Because the Report and Order does not impose any regulatory burden, we certify that it will not have a significant economic impact on a substantial number of small businesses. The Commission will send a copy of the Report and Order, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>28</sup> In addition, the Report and Order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the Federal Register.

<sup>23</sup> See 5 U.S.C. § 603. The FRA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>24</sup> 5 U.S.C. § 605(b).

<sup>25</sup> 5 U.S.C. § 605(6).

<sup>26</sup> 5 U.S.C. § 605(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after the opportunity for public comment, establishes one or more definitions of such term that are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register

<sup>27</sup> Small Business Act, 15 U.S.C. § 632 (1996).

<sup>28</sup> 5 U.S.C. § 801(a)(1)(A).

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

VOICES FOR CHOICES; AT&T )  
COMMUNICATIONS OF ILLINOIS, INC.; MCI )  
METRO ACCESS TRANSMISSION SERVICES, )  
LLC; and ASSOCIATION FOR LOCAL )  
COMMUNICATIONS SERVICES, )

Plaintiffs, )

vs. )

03 C 3290 )

ILLINOIS BELL TELEPHONE CO., INC. d/b/a )  
SBC Illinois; AMERITECH CORP. d/b/a SBC )  
Midwest; and EDWARD C. HURLEY, ERIN M. )  
O'CONNELL-DIAZ, LULA M. FORD, MARY )  
FRANCES SQUIRES, and KEVIN K. WRIGHT, )  
in their capacities as Commissioners of the Illinois )  
Commerce Commission and not as Individuals, )

Defendants. )

MEMORANDUM OPINION

CHARLES P. KOCORAS, Chief District Judge:

This matter comes before the court on a motion for temporary restraining order or preliminary injunction brought by Plaintiffs Voices for Choices, AT&T Communications of Illinois, Inc. ("AT&T"), MCI Metro Access Transmission Services, LLC ("MCI"), Associations for Local Telecommunications Services, McLeodUSA Telecommunications Services, Inc., TDS Metrocom, LLC, Mpower

Communications Corp. d/b/a Mpower Communications of Illinois, Citizens Utility Board, Talk America Inc., XO Illinois, Inc., Globalcom, Inc., and Forte Communications, Inc. Plaintiffs bring the motion against Defendants Illinois Bell Telephone Co., Inc. d/b/a SBC Illinois and Ameritech Corp. d/b/a SBC Midwest (collectively "SBC") and against Illinois Commerce Commission ("ICC") commissioners Edward Hurley, Erin O'Connell-Diaz, Lula Ford, Mary Frances Squires, and Kevin Wright. For the reasons set forth below we grant the motion.

#### BACKGROUND

On May 9, 2003, the Illinois legislature, with the governor's signature, enacted sections 13-408 and 13-409 to Illinois' Public Utilities Act. Plaintiffs contend that these new provisions, sections 408 and 409, violate the Supremacy Clause of the U.S. Constitution, U.S. CONST. art. VI, § 1, because they conflict with the Federal Telecommunications Act of 1996 (the "FTA"), 47 U.S.C. § 251-261, and related FCC regulations. Thus, a thorough explanation of the purpose and framework of the FTA is necessary. In *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 2000), Circuit Judge Ripple provides just such a thorough explanation:

Congress enacted the 1996 Telecommunications Act "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and

encourage the rapid deployment of new telecommunications technologies." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996). The Act "fundamentally restructures local telephone markets" by transforming the "long-standing regime of state-sanctioned monopolies" into a competitive market. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S. Ct. 721, 142 L.Ed.2d 835 (1999). Congress recognized that, even after the removal of regulatory restrictions on competition, significant economic barriers would remain to block entry into local telephone markets. Prospective market entrants would face the cost of duplicating an incumbent provider's local network infrastructure. To remove this economic barrier, the Act essentially requires incumbent local exchange carriers ("LECs") [such as SBC] to share their networks with competitors [such as Plaintiffs]. Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at wholesale rates and resell those services to retail customers. *See* 47 U.S.C. § 251 (Supp. II 1996).

Section 252 sets out the process by which incumbent LECs and prospective carriers establish interconnection agreements. First, incumbent LECs and prospective carriers must negotiate in good faith to reach voluntary interconnection agreements. At any time during the negotiations, a party may ask the appropriate state commission to participate as a mediator in the negotiations. *See id.* § 252(a)(2). If negotiations prove unsuccessful, subsection 252(b) provides for compulsory arbitration of any open issues. During the period from the 135th to the 160th day after an incumbent LEC receives a request for negotiation, any party to the negotiation may petition the state commission to arbitrate any open issues. *See id.* § 252(b)(1). Sections 251 and 252 establish certain standards that the state commission must follow in resolving open issues by arbitration and in imposing conditions on the parties. The state commission is also bound by Federal Communications Commission ("FCC") regulations issued pursuant to § 251.

Subsection 252(e) requires any interconnection agreement reached by negotiation or arbitration to be submitted to the state commission for approval and specifies the grounds on which a state commission can reject an agreement. Specifically, state commissions may reject

negotiated interconnection agreements only if the commission finds (1) that the agreement discriminates against a carrier that is not a party to the agreement or (2) that implementation of the agreement (or a part thereof) would be inconsistent with "the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A). A state commission may reject an arbitrated interconnection agreement only if the agreement (or part thereof) (1) does not meet the requirements of § 251 and its implementing regulations or (2) fails to meet the pricing standards set forth in subsection 252(d). *See id.* § 252(e)(2)(B).

Subsection 252(e)(5) further provides that, if a state commission fails to carry out any of its responsibilities under § 252, then the FCC must assume responsibility for the proceeding and act for the state commission in carrying out its functions. An implementing regulation to § 252 provides that a state commission "fails to act" for purposes of subsection 252(e)(5)-- thus prompting the FCC to step in and assume the state commission's responsibilities--if it fails to respond within a reasonable time to a request for mediation or a request for arbitration, or if it fails to complete an arbitration within the established time limits. *See* 47 C.F.R. § 51.801(b). A state commission will not be deemed to have failed to act, however, if it merely fails to approve or reject an agreement within the established time limits. *See id.* § 51.801(c). In such a case, the agreement will be deemed approved. *See* 47 U.S.C. § 252(e)(4) (Supp. II 1996).

Therefore, subsections 252(e)(1), (e)(4), and (e)(5), taken together and read in conjunction with the FCC regulations, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in the state commission's place.

...

The Act provides that federal district courts have exclusive jurisdiction to review FCC or state commission actions relating to interconnection agreements. In subsection 252(e)(4), Congress expressly eliminated state court jurisdiction to review actions of state commissions in approving or rejecting agreements under § 252. Moreover, subsection 252(e)(6), titled "Review of State commission actions," provides that, whenever a state commission fails to act, the exclusive remedies for that

failure to act will be proceedings by the FCC and any judicial review of the FCC's actions. Subsection 252(e)(6) also provides that, "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252].

*Id* at 328-329.

In setting rates for the lease of network elements (in an arbitrated dispute rather than a freely negotiated agreement), the state commission must take into account the incumbent LEC's cost of providing the elements on a "forward-looking" basis only. 47 C.F.R. § 51.505. The FCC calls this the "total element long-run incremental cost" or TELRIC. 47 C.F.R. § 51.505(a)(1). The TELRIC "of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." 47 C.F.R. § 51.505(b)(1). In calculating the TELRIC, the incumbent LEC's embedded costs may not be considered. 47 C.F.R. § 51.505(d)(1). "Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts". *Id*. In other words, incumbent LECs can only recover costs that an efficient provider would incur in providing the network elements irrespective of the costs of their actual practices.

SBC is an incumbent LEC that owns and operates local telecommunications network infrastructure in Illinois. Under the FTA, SBC is required to lease access to its infrastructure, also called unbundled network elements or UNEs, to competing LECs "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title." 47 U.S.C. § 251(c)(3). Section 252 contemplates the formation of interconnection agreements between incumbent LECs and competing LECs that govern the rates on which competing LECs lease UNEs from the incumbent LECs. Interconnection agreements may be reached through negotiation between the parties or through arbitration at the state commission, here the ICC, (or the FCC if the state opts out of the FTA framework). 47 U.S.C. § 252(a)-(b). SBC, having failed to negotiate higher UNE rates with the competing LECs, initiated an ICC arbitration. Before the ICC could make a final determination, however, the Illinois legislature enacted section 408. Section 408 abated the ongoing ICC arbitration and instructed the ICC to institute a new proceeding to adjust UNE rates based on specific instructions contained in section 408. 220 ILCS 5/13-408. Section 408 further instructs the ICC to adjust the UNE rates by June 9. 220 ILCS 5/13-408(c). The specific instructions are to adjust rates based on changes to two criteria: fill factors and depreciation. 220 ILCS 5/13-408(a)-(b).

A fill factor is a measure of the percentage of an incumbent LEC's network capacity that is actually used. For example, a fill factor of 60% means 60% of the network capacity is being utilized while 40% remains idle. Fill factors are considered in setting UNE rates because the incumbent LEC must recover the costs of actual fill and idle fill. Again, for example, at an approved fill factor of 60%, UNE rates are set to allow an incumbent LEC to recover its costs for five telephone lines for every three lines that are leased. The rationale for this is that the cost in providing three lines to a competing LEC includes the cost of two idle lines for a total of five lines. Under TELRIC, fill factors are supposed to be based on the most efficient use of the network on a forward-looking basis. 47 C.F.R. § 51.505(b)(1). The Illinois legislation, however, instructs the ICC to employ fill factors based on SBC's actual fill, rather than on the fill of an efficient incumbent LEC. 220 ILCS 5/13-408(a).

Depreciation is a more familiar term. In setting UNE rates, the ICC must employ economic depreciation costs that are "efficiently incurred" and cannot consider embedded costs. 47 C.F.R. § 51.505(c)(1) and (d)(1). Thus, like fill factors, depreciation must be based on a hypothetical efficient incumbent LEC's practices rather than SBC's actual practices. The Illinois legislation, however, instructs the ICC to employ the depreciation costs that SBC reports in its books of accounts as submitted to the SEC. 220 ILCS 5/13-408(b).

Plaintiffs contend that the Illinois legislation violates federal law and, if not enjoined by June 9, will cause them irreparable injury for which no adequate remedy at law exists.

#### LEGAL STANDARD

Plaintiffs have moved for a either a temporary restraining order or a preliminary injunction. Since both sides have been heard fully on the merits of the motion, both in writing and orally, in an *inter partes* fashion, we treat the motion as one for a preliminary injunction. In any event, "[t]he standards for a temporary restraining order and a preliminary injunction are identical." *Frederick Atkins, Inc. v. Carson Pirie Scott & Co.*, 1999 WL 1249342, \*1 (N.D. Ill. Dec. 13, 1999). To be entitled to a preliminary injunction, Plaintiffs must demonstrate:

- (1) that [they have] a reasonable likelihood of success on the merits of [their] claim;
- (2) that no adequate remedy at law exists;
- (3) that [they] will suffer irreparable harm if the preliminary injunction is denied;
- (4) that the irreparable harm [they] will suffer without preliminary injunctive relief outweighs the irreparable harm the nonmoving party will suffer if the preliminary injunction is granted; and
- (5) that the injunction will not harm the public interest.

*Id* (citing *Platinum Home Mortgage Corp. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 726 (7th Cir. 1998)).

## DISCUSSION

### I. Preliminary Injunction

#### A. Likelihood of Success on the Merits

The Illinois legislation conflicts with federal law in several respects. The legislation orders the ICC to determine fill factor and depreciation costs based on SBC's actual fill and depreciation as accounted to the SEC. FCC Rule 51.505 clearly bars any such emphasis on the incumbent's actual practices. 47 C.F.R. § 51.505. Under TELRIC, element costs can only be based on a hypothetical efficient provider's costs determined on a forward-looking basis. *Id.* The FCC rule instructs the ICC to look at a hypothetical efficient provider's costs rather than SBC's actual costs. 47 C.F.R. § 51.505. The Illinois legislature then tells the ICC to use SBC's actual costs as the most reasonable projection of a hypothetical efficient provider's costs. 220 ILCS 5/13-408(a)-(b). Thus, section 408 completely reads out the hypothetical efficient provider standard from TELRIC. The Illinois legislation has, by fiat, rendered TELRIC irrelevant with respect to two key factors in the rate setting exercise.

As the FTA is designed to foster competition, it is not surprising that a delegation of federal authority to a state commission, with all of its attendant experience in these matters, was made to perform the adjudicatory function with respect to interconnection agreements. Possessed of professional staffs and expertise,

it was the logical unit of state government to play the key arbitral role when agreements were not forthcoming. Not coincidentally and, in addition to their expertise, proceedings are conducted in an adversarial process designed to permit all interested parties the opportunity to make their own respective cases and oppose their adversaries' positions. The FTA expressly designates these state commissions and agencies and not state legislatures to perform the arbitral function.

With due respect, it cannot be said that the Illinois General Assembly is possessed of comparable expertise and experience in these rate setting matters and arbitrations. Nor can it be said that the history of the Illinois legislation under challenge reflects the procedural rights and safeguards which generally attend hearings before state commissions. No record need be made of reasons legislators may have for the particular exercise of their ballot privileges. In contrast, the orders reflecting the results of the Illinois Commerce Commission are earmarked by the evidence considered, presentations made by parties, and the reasons for Commission decisions. It is little wonder that the state commissions which are charged with similar duties in state rate-setting matters were those the federal government saw fit to empower in hearing and resolving federal issues. A clear usurpation of authority took place here in a way neither authorized nor contemplated by the FTA when the Illinois Legislature decreed fill and depreciation rates, matters heretofore determined by the ICC.

In Section 252 of the FTA, Congress delegated arbitral powers to state commissions, not to the states themselves. 47 U.S.C. § 252. Specifically enumerated is the state commission's power to "establish any rates for interconnections, services, or network elements". 47 U.S.C. § 252(c)(2). For FTA purposes, state commission is defined as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41). It is undisputed that the ICC is the state commission in Illinois to which the FTA grants the rate-making powers under section 252.

The Illinois legislation displaces much of the ICC's rate-making authority and substitutes its own. 220 ILCS 5/13-408(a)-(b). SBC maintains that, because the ICC is a creature of the legislature, the legislature is free to usurp the ICC's powers. SBC cites case law for the propositions that all of the ICC's "power is derived from the legislature" and that the ICC's primary task is "to do what is reasonably necessary to accomplish the [Illinois] legislature's objective." (SBC Opp. at 16 (citing *Business and Prof'l People for Pub. Interest v. Illinois Commerce Comm'n*, 585 N.E.2d 1032, 1039 (Ill. 1991), and *Abbott Labs. v. Illinois Commerce Comm'n*, 682 N.E.2d 340, 347 (Ill. App. Ct. 1997).) Neither of the cases SBC cites dealt with the telecommunications industry or the ICC's role under the FTA. The ICC's rate-making authority with

respect to the rates an incumbent LEC may charge competing LECs for use of UNEs, is derived from Congress, not the Illinois legislature; the ICC's task is to accomplish Congress' objective in enacting the FTA. *MCI Telecommunications*, 222 F.3d at 341 ("Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the *federal regulatory function* delegated to them by the *federal government*") (emphasis added). Additionally, section 252(e)(4) of the FTA demonstrates that Congress was bestowing federal, as opposed to state, rate-making powers onto the various states' commissions. Section 252(e)(4) decrees that state courts have *no jurisdiction* to review their own state commissions' actions in approving or rejecting interconnection agreements. 47 U.S.C. § 252(e)(4). Clearly, the ICC's rate-making power in this context is derived from Congress, and not from the Illinois legislature. As such, SBC's argument that that which giveth can take away falls by the wayside.

In section 252, the FTA mandates the procedure for determining UNE rates, whether conducted by the ICC at Illinois' option or by the FCC should Illinois decline the option. Under section 252, parties may freely negotiate, and enter into, interconnection agreements. 47 U.S.C. § 252(a). If the parties fail to resolve any or all issues, a party may petition the ICC for arbitration of those "open issues". 47 U.S.C. § 252(b)(1). The Illinois legislation completely circumvents this procedure by

(1) undermining the FTA's contemplation of a 134-day period of voluntary negotiation by allowing SBC to go straight to the legislature,<sup>1</sup> and (2) resolving contested issues in SBC's favor without arbitration. Not only does the Illinois legislation circumvent the arbitration procedure contemplated by the FCC, it actually abated just such an arbitration that was ongoing at the time the legislation was enacted. 220 ILCS 5/13-408(c). Moreover, it is of no moment that the Illinois legislation decrees that the sham ICC proceeding that it directs to take place "be deemed" an arbitration for FTA purposes. *See* 220 ILCS 5/13-408(c) A state legislature cannot prevent federal court review of actions governed by a federal statute by decreeing that the federal statute has been honored.

Having the issues resolved in their favor by the legislature rather than in an ICC arbitration allowed SBC to avoid its burden of proof under FCC regulation 51.505. Not only is an incumbent LEC required to arbitrate contested element rates, it carries the burden of proof in demonstrating that a rate it seeks does "not exceed the forward-looking economic costs of providing the element, using a cost study that complies with the [TELRIC] methodology . . ." 47 C.F.R. § 51.505(e). The Illinois legislation

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<sup>1</sup> This did not actually occur here. SBC did not go to the legislature until after the negotiation period ended and the arbitration proceeding had begun. Nevertheless, upholding this legislation would necessarily condone going straight to the legislature at any time and, therefore, would undermine the 134-day period of voluntary negotiation.

commands the ICC to set fill factor and depreciation rates without arbitration and regardless of whether SBC can or does meet its burden of proof under 47 C.F.R. § 51.505(e).

To summarize, the Illinois legislation which added sections 13-408 and 13-409 to the Illinois Public Utilities Act clashes with federal law embodied in the 1996 Telecommunications Act and related regulations in the following material ways:

1. The methodology to be used in federal rate determinations is eviscerated – TELRIC is effectively repealed;
2. The incumbent LEC no longer has a burden to prove its rates, terms and conditions are just and reasonable;
3. The proceeding mandated to take place and “deemed” to be an arbitration is, in truth, specious and hollow;
4. The will of the Legislature, reasoned or otherwise, displaces the expertise of the ICC;
5. Procedural safeguards, designed to insure fairness in rate-setting exercises, are eliminated; and
6. The absence of a record of proceedings in two key areas renders impossible meaningful federal judicial review.

For all of the foregoing reasons, we find Plaintiffs have a strong likelihood of success on the merits of their Supremacy Clause claims.

B. No Adequate Remedy at Law & Irreparable Injury

Plaintiffs argue that they will be irreparably harmed in a manner for which they have no adequate remedy at law if the ICC implements new rates as directed by the Illinois legislation. We agree. The substantially higher rates, which are projected to go into effect June 9, will immediately effect all lines leased by competing LECs in excess of 35,000. Under section 409, there is a two year stay of increased rates for the first 35,000 lines that each competing LEC leases. 220 ILCS 5/13-409(a). Only MCI and AT&T lease more than 35,000 lines—they will be immediately effected by the rate hikes. The remaining Plaintiffs are relatively smaller competitors that will be allowed to retain temporarily the same rates at their present size because they lease less than 35,000 lines. Nevertheless, the smaller competing LECs are clearly discouraged from expanding beyond 35,000 lines. Thus, to the extent the smaller competing LECs are capable of expanding beyond 35,000 lines, they will have to choose between forgoing the expansion or proceeding with the expansion and paying higher rates. Either way, they suffer irreparable harm. Additionally, the larger competing LECs may have to leave the Illinois local telephone market while the smaller competing LECs could suffer a worse fate. Of course, SBC vehemently attacks these predictions. Even if we

take SBC's factual allegations—that the competing LECs are making windfalls under the present pricing scheme and will continue to get by with profitable margins under the proposed rate hikes—as true, the competing LECs will still suffer an injury for which no remedy exists if the rates are permitted to increase and are later invalidated upon a full disposition of this case on the merits. In such a scenario, we are unaware of any cause of action that will be available to the competing LECs to recoup the excess portion of the rates which they paid SBC once it is established that the rates were invalidly adjusted. Although SBC claims to have offered to “true up” the difference in rates should the Illinois legislation ultimately be overturned, SBC fails to convince us that this offer translates into a cause of action that would ensure Plaintiffs an adequate remedy at law. (According to Plaintiffs, the offer to “true up” has only been made in SBC’s brief in opposition to the present motion, and there is no guarantee that SBC will adhere to its word.)

C. Balancing the Harms and the Public Interest

Enjoining Defendants from implementing the Illinois legislation will harm SBC less than Plaintiffs would be harmed if we denied the motion. First, SBC will be permitted to pursue rate changes under the provisions of the FTA as always—we are not enjoining rate changes generally, only rate changes as directed by the Illinois legislature. Secondly, SBC may move this court to set an appropriate bond to protect

its financial interests should the Illinois legislation ultimately be found valid. On the other side of the coin, if we deny the motion, at least two of the Plaintiffs will be forced to pay significantly higher rates immediately, monies which may never be recoverable even if the Illinois legislation is ultimately invalidated. Additionally, Plaintiffs may feel compelled to freeze their investment and advertising in the Illinois market, and the smaller competing LEC's may withdraw from the market altogether.

The public interest factor also weighs heavily in favor of enjoining the legislation. The legislation is anti-competitive. It will make it harder for competitors to compete with SBC. Less competition means less choices for consumers, and less choices for consumers ultimately leads to higher prices.

## **II. Power to Hear This Case**

*Defendant ICC commissioners oppose this motion on non-substantive grounds only. They contend that they are immune from suit because they are acting (or will act) in a legislative nature and that the suit is not yet ripe. These issues are entwined with one another and will be dealt with together.*

First, there is clearly no 11th Amendment immunity available to the commissioners with respect to the allegations that the legislation violates federal law. *MCI Telecommunications*, 222 F3d at 343-44 (holding that states that voluntarily choose to have their state commission, rather than the FCC, regulate FTA matters

implicitly waive 11th Amendment immunity). The commissioners do not rely on 11th Amendment immunity but rather on what has been termed legislative immunity in a string of cases beginning with *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). The idea behind this doctrine is that state legislatures and their subordinate legislating bodies cannot be enjoined from legislating. *Id* at 229-30. State laws can certainly be invalidated and/or enjoined (for good reason) once passed in final form but the federal courts cannot keep watch on state legislatures to prevent them from passing invalid laws in the first instance. *Id*. This is where the ripeness issue becomes entwined. The commissioners argue that since the rates have not yet been set, there is no final legislation to invalidate. To enjoin the ICC from carrying out its rate-making function, it is argued, would intrude on state legislating, which is immune from suit until complete.

Under *Prentis*, rate-making is a legislative function, and the states are immune from suit during the legislative process. *Id* at 226, 232. In *Prentis*, several railroad companies sought to enjoin the Virginia State Corporation Commission from publishing or taking further steps to enforce a certain order fixing passenger rates on trains. *Id* at 216. The railroad companies alleged that enforcing the rates would deprive them of property without due process in violation of the 14th Amendment. *Id*. Under Virginia law, before the order fixing the rates could go into effect, the Virginia

commission had to give notice (by four weeks' publication in a newspaper) of the substance of the contemplated action and of a time and place when the commission would hear objections and evidence against it. *Id* at 224.

*Prentis* and its progeny do not apply to the present suit for two reasons. First, by enjoining the ICC commissioners, we are not interfering with a state legislative process. Even if the ICC had any real discretion to set rates in light of the Illinois legislation, the ICC would not be acting as a *state* rate-making body but as a *federal* rate-making body. See *MCI Telecommunications*, 222 F.3d at 341 ("Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the *federal regulatory function*" of setting rates) (emphasis added).

Secondly, unlike in *Prentis*, in the present case federal law has already been violated. In *Prentis*, the railroads sought to enjoin further steps toward the implementation of fixed passenger rates which they believed would be unconstitutional. *Prentis*, 211 U.S. at 216. Thus, at the time the railroads sued, no violation of federal law had occurred. In the present situation, several provisions of FTA and FCC Rule 51.505 have already been violated by the Illinois legislation. Even though the ICC has not set any rates, the Illinois legislature has already abated an ongoing federal rate-making arbitration and made findings of fact in favor of SBC without requiring SBC to meet its burden of proof on these issues. Additionally, the

ICC is in the midst of a procedurally unauthorized rate-making proceeding. Furthermore, it is clear from the ICC administrative law judges' proposed order that the ICC intends to set UNE rates in violation of TELRIC. Unlike in *Prentis*, there remains no time and place when and where the ICC will hear objections and evidence against the proposed order.

### CONCLUSION

The Plaintiffs claim that the Illinois legislation sought to be enjoined is special interest legislation of the rankest sort, designed solely to benefit the incumbent local telephone monopolist in Illinois and twelve other states. It has been called a legislative fix to the sponsors' fear that the ICC might not agree with their view of the issues. The Plaintiffs assert that having only SBC's interests in mind necessarily retards and impedes the competitive climate, and departure from the market of some of SBC's competitors is likely to follow.

SBC, on the other hand, claims that it has, in fact, been subsidizing its competitors and that this Court's focus should be on the fairness of rates produced by the legislative change and not the manner in which the result is ordained. The fundamental problem with SBC's position is twofold. Its direct appeal to the Illinois legislature for rate relief is expressly contrary to federal law. If the ICC should act niggardly toward SBC in a way inconsistent with relevant evidence, the appeal must

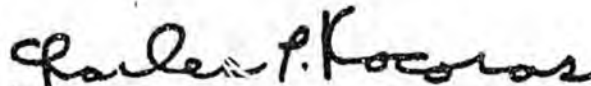
be to the Federal District Court and not to the legislators of the state in which it may hold sway.

Additionally, the legislative process can be both inelaborate and unscientific when compared to the adjudicatory procedures mandated by state commissions in the conduct of their business. The ICC, and this Court, are perfectly capable of determining whether SBC has been forced to subsidize its competitors in some unlawful way such that its own competitive abilities have been compromised. There is no evidentiary or procedural record of like kind in legislative considerations, so there is no present basis to test SBC's thesis that it has been shortchanged lo these many years. The beauty of administrative and judicial proceedings include, among other things, standing to those who may be affected and an opportunity to be heard.

None of this discussion is intended to denigrate the legislative process, for the benefits produced by our system of government are obvious to all. But when a federal statute is enacted to expressly preempt a field and procedural mechanisms are elaborately set forth, state acts inconsistent with either the substantive or procedural federal law cannot stand. The rate issues which underlay the Illinois legislation have been declared by federal law to be adjudicatory in nature, not legislative. The action of the Illinois General Assembly in declaring the method by which fill factors and

depreciation rates are to be determined are an intrusion into federal law and are clearly inconsistent with it. As such, they cannot stand and must be enjoined.

Based on the foregoing analysis, we grant the motion. Defendants are preliminarily enjoined from implementing sections 13-408 and 13-409 of Illinois' Public Utilities Act (220 ILCS 5/13-408 and -409).



Charles P. Kocoras  
Chief Judge  
United States District Court

Dated: June 9, 2003

16

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August 12, 2003

## VIA FEDERAL EXPRESS

Regulatory Commission of Alaska  
701 West Eighth Avenue  
Suite 300  
Anchorage, Alaska 99501

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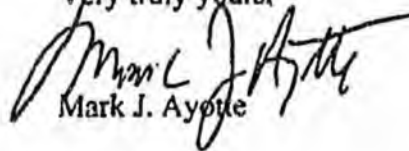
**Re: In the Matter of the Commission Review of Rules and Regulations  
Governing Telecommunications Rates, Charges Between Competing  
Telecommunications Companies, and Competition in Telecommunications  
Commission Docket No.: R-03-3**

Dear Sir or Madame:

Please find enclosed for filing in the above matter the original and ten (10) copies of the Reply Comments of Dobson Cellular Systems, Inc. in Response to the Rural Coalition's Comments and Proposed Regulations. Also find enclosed an electronic copy of the document in MS Word format.

If you should have any questions regarding the enclosed, please contact me at the above number.

Very truly yours,

  
Mark J. Ayotte

MJA/  
Enclosures

cc: Herbert Kenney (w/enclosure)  
Heather H. Grahame (w/enclosure)

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STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners:

Mark K. Johnson, Chair  
Kate Giard  
Dave Harbour  
James S. Strandberg  
G. Nanette Thompson

In the Matter of the Commission Review of )  
Rules and Regulations Governing )  
Telecommunications Rates, Charges )  
Between Competing Telecommunications )  
Companies, and Competition in )  
Telecommunications )

R-03-3

Case 19-00003-03

REPLY COMMENTS OF DOBSON CELLULAR SYSTEMS, INC.  
IN RESPONSE TO THE RURAL COALITION'S COMMENTS  
AND PROPOSED REGULATIONS

I. INTRODUCTION

1. Dobson Cellular Systems, Inc. ("Dobson") submits the following comments in response to the Notice of Inquiry ("Notice") of the Regulatory Commission of Alaska ("Commission") dated June 11, 2003. Specifically, Dobson submits these comments in opposition to the Comments and Proposed Regulations filed by the Rural Coalition on July 16, 2003.

2. Dobson is an Oklahoma based company who began providing commercial mobile radio services ("CMRS") in Alaska in January 2000 and is now the largest wireless service provider in the State. Dobson's licensed service areas are in Alaska Rural Service Area ("RSA") 1, Alaska RSA2, Alaska RSA 3, and the Anchorage Metropolitan Service Area ("MSA"). Dobson's licensed areas cover approximately 91% of the population of the State.

1           3.     On July 11, 2003, Dobson filed its Application for Designation as a Carrier  
2 Eligible to Receive Federal Universal Service Support under the Telecommunications Act of  
3 1996 and Petition for Redefinition of Certain Rural Service Areas ("Application"). Dobson's  
4 Application is currently pending before the Commission in Docket No. U-03-48.

5           4.     As a CMRS provider, the Federal Communications Commission ("FCC") has  
6 determined that Dobson is not "a local exchange carrier" under state or federal law. *In the Matter*  
7 *of Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, CC  
8 Dockets 96-98 & 95-185, FCC 96-325, ¶ 1004 (rel. Aug. 8, 1996). Therefore, Dobson takes no  
9 position regarding the Commission's review of its Local Exchange Competition Rules (3AAC  
10 53.200 - 53.299), since the resulting rules will not be applicable to CMRS providers. Dobson's  
11 reply comments are limited to the Rural Coalition's proposed "New Universal Service Fund  
12 Regulations" ("ETC Rules") set forth in Section II of Exhibit A to its comments.  
13  
14

15           5.     Although couched in terms of eliminating the dominant/non-dominant carrier  
16 distinction present in the Commission's existing Local Exchange Competition Rules based on the  
17 designation of multiple eligible telecommunications carriers ("ETC") within a service area, the  
18 Rural Coalition has simply used this docket as a springboard to promote its unduly burdensome  
19 and anti-competitive proposed ETC Rules.  
20

21           6.     The Commission should not endorse the Rural Coalition's dubious effort to expand  
22 the scope of this proceeding beyond issues of landline local competition and should not entertain  
23 any proposed universal service regulations in the context of this proceeding. Rather, the  
24 Commission should consider the development of competitive ETC rules, if at all, only after a  
25 Notice of Inquiry or Notice of Proposed Rule Making that gives clear notice that such rules will  
26 be considered and affords all interested parties adequate notice and an opportunity to respond.  
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## II. DOBSON'S COMMENTS

A. **The Rural Coalition's Proposed ETC Rules Should Not Be Considered In This Proceeding**

1. **The Rural Coalition Failed To Meet The "Increased Burden Of Persuasion" Required to Obtain Consideration Of Its ETC Rules**

7. Pursuant to the Notice in this matter, the Commission sought comment directed toward the nine legislative policies set forth in HB0111 and its existing telecommunications regulations governing local exchange carriers. Notice at 2. The Commission also required any commentator seeking consideration of issues beyond the scope of HB0111 to meet an "increased burden of persuasion" in order to invoke the Commission's administrative review. *Id.* at 4 & 6. Moreover, the Commission specifically directed that any commentator submitting newly proposed regulations shall provide the rationale and policy reasons supporting each proposal. *Id.* at 3.

8. Despite these clear dictates, the Rural Coalition's submittal is devoid of any supporting legal authority or policy arguments supporting its proposed ETC Rules. Therefore, the Commission should not expend its administrative resources addressing the Rural Coalition's conclusory and arbitrary ETC Rules in this proceeding.

2. **Many of The Rural Coalition's Proposed ETC Rules Are Unsound and Contrary To Federal Law**

9. More importantly, the Commission should not consider the Rural Coalition's proposed ETC Rules because they are in many respects contrary to sound policy, the Telecommunication Act of 1996 (the "Act") and FCC regulations and Orders.

1                   a.     **The Commission Is Bound By Federal Statutes And FCC Regulations**  
2                                   **When Designating A Federal ETC**

3                   10.    Pursuant to Section 214(e)(2) of the Act, Congress delegated to State regulatory  
4 commissions the authority to designate federal ETCs for purposes of eligibility to receive support  
5 from the universal service funds:

6                   A State commission shall upon its own motion or upon request designate a  
7 common carrier that meets the requirements of paragraph (1) as an eligible  
8 telecommunications carrier for a service area designated by the State commission.  
9 Upon request and consistent with the public interest, convenience, and necessity,  
10 the State commission may, in the case of an area served by a rural telephone  
11 company, and shall, in the case of all other areas, designate more than one  
12 common carrier as an eligible telecommunications carrier for a service area  
designated by the State commission, so long as each additional requesting carrier  
meets the requirements of paragraph (1). Before designating an additional eligible  
telecommunications carrier for an area served by a rural telephone company, the  
State commission shall find that the designation is in the public interest.

13                  47 U.S.C. § 214(e)(2). Stated otherwise, Congress deputized the State commissions to make the  
14 initial determination as to whether an applicant meets the requirements to be designated as a  
15 federal ETC. Notwithstanding this limited delegation of authority, the State commissions must  
16 act consistent with federal law and the FCC's promulgated regulations and standards in  
17 considering an application for federal ETC designation. Yet, the Rural Coalition's proposed ETC  
18 Rules go far beyond the Commission's authority delegated by Section 214(e). State commissions  
19 are in no position to change, modify or add to the federally-established criteria for ETC  
20 designation.  
21 designation.

22                  11.    Nor can a State commission impose such burdensome procedural or substantive  
23 rules in designating federal ETCs so as to frustrate the Act's twin goals to both preserve universal  
24 service and to promote competition. *See In the Matter of Federal-State Joint Board on Universal*  
25 *Service, CC Docket 96-45, Comments of the Regulatory Commission of Alaska at 11 (Aug. 30,*  
26 *2002) (The FCC's "stated historic policy has been to promote the dual goals of universal service*  
27 *and market competition.") A simple review of the Rural Coalition's proposed ETC Rules*  
28 and market competition.") A simple review of the Rural Coalition's proposed ETC Rules

1 demonstrates they are designed to burden the application process and render it virtually  
2 impossible for any competitive ETC to achieve designation.

3 **b. Because The Rural Coalition's Proposed ETC Rules Are Largely**  
4 **Contrary to Federal Law They Must be Rejected**

5 12. Set forth below are just some of the examples by which the Rural Coalition's  
6 proposed ETC Rules run afoul of the Act, FCC regulations and prior decisions of the FCC. This  
7 list is not exhaustive, but rather illustrates the lack of reasoned analysis throughout the Rural  
8 Coalition's proposals.

9  
10 **(1) Proposed Rule 53.360(b)(2)(A) – demonstration of a "concrete**  
11 **intent" to serve the entire service area within a "reasonably**  
12 **short period of time"**

13 13. As established by the FCC, an applicant for federal ETC designation is not  
14 obligated at the application stage to prove that it can provide service throughout its requested  
15 service areas. Rather, an applicant must only show that it has an intent and ability to serve once  
16 designated, and to make a commitment to meet reasonable requests for service over time. To  
17 hold otherwise creates a barrier to entry. *In the Matter of Federal-State Joint Board on Universal*  
18 *Service Western Wireless Corporation Petition for Preemption of an Order of the South Dakota*  
19 *Public Utilities Commission, Declaratory Ruling, CC Docket 96-45, FCC 00-248, 15 FCC Rcd at*  
20 *15175 (rel. August 10, 2000) ("Declaratory Ruling") ("A telecommunications carrier's inability to*  
21 *demonstrate that it can provide ubiquitous service at the time of its request for designation as an*  
22 *ETC does not preclude its designation as an ETC. To do so would have the effect of prohibiting*  
23 *new entrants from providing telecommunications service.")*

24 14. Indeed, an applicant for ETC designation must be given the same reasonable  
25 opportunity to develop its network as that afforded the incumbent local exchange carrier:

26 We find the requirement that a carrier provide service to every potential customer  
27 throughout the service area before receiving ETC designation has the effect of  
28 prohibiting the provision of service in high-cost areas. As an ETC, the incumbent

1 LEC is required to make service available to all consumers upon request, but the  
2 incumbent LEC may not have facilities to every possible consumer. We believe  
3 the ETC requirements should be no different for carriers that are not incumbent  
4 LECs. A new entrant, once designated as an ETC, is required, as the incumbent is  
5 required, to extend its network to serve new customers upon reasonable request.  
6 We find, therefore, that new entrants must be allowed the same reasonable  
7 opportunity to provide service to requesting customers as the incumbent LEC,  
8 once designated as an ETC. Thus, we find that a telecommunications carrier's  
9 inability to demonstrate that it can provide ubiquitous service at the time of its  
10 request for designation as an ETC should not preclude its designation as an ETC.

11 *Id.* (emphasis added).

12 15. Accordingly, this Commission cannot impose a heightened burden of persuasion  
13 requiring proof of a "concrete intent" to serve with a "reasonably short period of time" as  
14 proposed by the Rural Coalition. To the contrary, the ETC applicant must be afforded the same  
15 opportunity as the incumbent to develop its network over time and to address service requests on  
16 a case-by-case basis.

17 (2) **Proposed Rule 53.360(b)(2)(C) – demonstration of "financial**  
18 **wherewithal" to provide the supported services throughout the**  
19 **service area**

20 16. There is no provision in the Act or FCC regulations establishing a financial  
21 competency test to be met prior to designation as a federal ETC. Indeed, the incumbent ETCs –  
22 including the members of the Rural Coalition – were not required to meet any financial fitness  
23 standard prior to obtaining their ETC designations. Thus, rather than promoting regulatory parity  
24 as the Rural Coalition suggests, this provision is plainly discriminatory and intended to prevent  
25 designation of any competitive ETCs within the Coalition members' service areas.

26 17. In addition, the Rural Coalition's proposed standard – *i.e.*, "financial wherewithal"  
27 – is so ambiguous as to be incapable of application and should not be adopted by the Commission  
28 in any event.



1 presumed. Additionally, the Commission's rules provide that  
2 "cellular service is considered to be provided in all areas, including  
3 dead spots . . . ." Because "dead spots" are acknowledged by the  
4 Commission's rules, we do not agree with the Alabama Rural LECs  
that finding current "dead spots" in RCC Holdings' network  
demonstrates that RCC Holdings is not "willing or capable of  
providing acceptable levels of service" throughout its service area.

5 *In the Matter of Federal State Joint Board on Universal Service RCC Holdings, Inc. Petition for*  
6 *Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area In*  
7 *the State of Alabama*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 02-3181 (rel.  
8 Nov. 27, 2002) (emphasis added). One week later, the FCC issued a nearly verbatim opinion in *In*  
9 *the Matter of Federal State Joint Board on Universal Service Cellular South License, Inc.*  
10 *Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed*  
11 *Service Area In the State of Alabama*, Memorandum Opinion and Order, CC Docket No. 96-45,  
12 DA 02-3317 (rel. Dec. 4, 2002).

14 19. Accordingly, because the Commission cannot establish rules contrary to the FCC's  
15 controlling interpretations of federal law, it must similarly reject the Rural Coalition's effort to  
16 insinuate a ubiquitous coverage requirement as part of an ETC proceeding. *See, e.g.,*  
17 *Consolidated Tel. v. W. Wireless Corp.*, 637 N.W.2d 699, 707 (N.D. 2001) ("Unless the FCC's  
18 rulings and regulations have been appropriately challenged in the proper federal forum, we are  
19 not at liberty to review the FCC's statutory interpretation even if we doubted its soundness, and  
20 we must apply the rulings and regulations as written.")

22 (4) **Proposed Rules 53.360(b)(2)(G) and 53.360(c)(3)(A)(xi) –**  
23 **certification of use of universal service fund support**

24 20. While not directly contrary to federal law, the Rural Coalition's proposed rule  
25 53.360(b)(2)(G) is simply redundant and unnecessary as part of an ETC application process.  
26 Under FCC Rules 54.313 and 54.314, every designated ETC is obligated to annually certify to the  
27 FCC and the Universal Service Administrative Company ("USAC"), that all federal universal  
28

1 service support will be used only for the provision, maintenance, and upgrading of facilities and  
2 services for which the support is intended, consistent with section 254(e) of the Act. 47 C.F.R. §§  
3 54.313 & 54.314.

4 21. Proposed rule 53.360(c)(3)(A)(xi) impermissibly seeks to expand this certification  
5 obligation to include a requirement that the ETC applicant publicly disclose its specific business  
6 plans relating to the development or expansion of its network and/or use of the universal service  
7 funds to subsidize rate cuts. This requirement, at the very least, infringes on an ETC applicant's  
8 proprietary business plans. At its worst, the proposed rule is plainly anti-competitive as providing  
9 the ETC applicant's direct competitors – including the incumbent LEC members of the Rural  
10 Coalition – with an unfair business advantage.

11  
12 **(5) Proposed Rule 53.360(c)(3)(A)(viii) – requiring explanation of**  
13 **all agreements the applicant has with long distance carriers,**  
14 **including the provision of "equal access"**

15 22. Like many of the Rural Coalition's rules, proposed rule 53.360(c)(3)(A)(viii) is  
16 plainly anti-competitive as it purports to require full disclosure of non-public agreements between  
17 the ETC applicant and interchange carriers ("IXCs"). More importantly, the proposed rule  
18 ignores the fact that the FCC has rejected an "equal access" requirement under Section 214(e)(1)  
19 and FCC Rule 54.101(a)(7) for any ETC. On reconsideration, the FCC more recently again  
20 declined to require any federal ETC to provide equal access and deferred consideration of the  
21 issue pending resolution of its *Portability Proceeding*. *In the Matter of the Federal-State Board*  
22 *on Universal Service*, CC Docket 96-45, FCC 03-170 at 14-15 (rel. July 14, 2003). Moreover,  
23 Congress has specifically exempted CMRS providers from any requirement to provide equal  
24 access to long distance carriers. 47 U.S.C. § 332(c)(8). The FCC specifically recognized that this  
25 might mean incumbent landline carriers would be subject to different regulatory requirements  
26 than other carriers. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket  
27  
28

1 No. 96-45, FCC 97-157, Report and Order, ¶ 79 ("*Universal Service Order*") (rel. May 8, 1997)  
2 ("[C]ompetitive neutrality does not require that, in areas where incumbent LECs are required to  
3 offer equal access to interexchange service, other carriers receiving universal service support in  
4 that area should also be obligated to provide equal access.") Consequently, the Rural Coalition's  
5 proposed regulation is contrary to federal law.  
6

7 **(6) Proposed Rule 53.360(c)(3)(B)(ii) – requiring detailed analysis**  
8 **of unserved/underserved rural areas and build out plans**

9 23. The Rural Coalition's proposed ETC Rules become even more burdensome and  
10 anti-competitive when a federal ETC applicant seeks designation within a rural service area, like  
11 those areas served by the Coalition members themselves. For example, attempting to bootstrap  
12 various extra-regulatory requirements under the guise of the "public interest" analysis required by  
13 47 U.S.C. § 214(e)(2), the Rural Coalition's proposed rule 53.360(c)(3)(B)(ii) goes well beyond  
14 any showing required by the FCC or any State commission to date. Indeed, under the FCC's  
15 well-reasoned public interest analysis, the competitive benefits of designating a competitive ETC  
16 in a rural service area are presumed to be in the public interest absent a showing that such benefits  
17 will be outweighed by some real, demonstrable harm to the consumer.  
18

19 24. In December 2000, the FCC for the first time conducted a "public interest"  
20 analysis under Section 214(e)(6),<sup>1</sup> resulting in the designation of a wireless provider – Western  
21 Wireless – as an additional ETC in certain rural service areas in Wyoming. This decision  
22 represents the FCC's binding interpretation of federal law concerning the public interest standard  
23 under Section 214(e).  
24  
25

26 \_\_\_\_\_  
27 <sup>1</sup> Section 214(e)(6) sets forth standards for ETC designation by the FCC that are identical to the  
28 standards for State commissions under Section 214(e)(1)-(2). The FCC proceeds under Section  
214(e)(6) when a State commission does not have jurisdiction to proceed under Section 214(e)(2).

1           25. First recognizing that the "public interest" under Section 214(e) involves the  
2 balancing of the benefits of competition against any demonstrated detriments to universal service,  
3 the FCC stated:

4           Public Interest Analysis. We conclude that it is in the public interest to designate  
5 Western Wireless as an ETC in Wyoming in those designated service areas that are  
6 served by rural telephone companies. Western Wireless has made a threshold  
7 demonstration that its service offering fulfills several of the underlying federal  
8 policies favoring competition. We find that there is no empirical evidence on the  
9 record to support the contention that the designation of Western Wireless as an  
10 ETC in those designated service areas served by rural telephone companies in  
11 Wyoming will harm consumers. In fact, we conclude that those consumers will  
12 benefit from the provision of competitive service and new technologies in high-cost  
13 and rural areas.

14           We note that an important goal of the Act is to open local telecommunications  
15 markets to competition. Designation of competitive ETCs promotes competition  
16 and benefits consumers in rural and high-cost areas by increasing customer choice,  
17 innovative services, and new technologies. We agree with Western Wireless that  
18 competition will result not only in the deployment of new facilities and  
19 technologies, but will also provide an incentive to the incumbent rural telephone  
20 companies to improve their existing network to remain competitive, resulting in  
21 improved service to Wyoming consumers. In addition, we find that the provision  
22 of competitive service will facilitate universal service to the benefit of consumers  
23 in Wyoming by creating incentives to ensure that quality services are available at  
24 "just, reasonable, and affordable rates."

25           Although we recognize the substantial benefits of competition to consumers, we  
26 conclude that additional factors may be taken into consideration in the public  
27 interest examination required by section 214(e)(6) prior to the designation of an  
28 additional ETC in an area served by a rural telephone company, such as whether  
consumers will be harmed. In so doing, we recognize that Congress expressed a  
specific intent to preserve and advance universal service in rural areas as  
competition emerges.

\*\*\*

29           We reject the general argument that rural areas are not capable of sustaining  
30 competition for universal service support. We do not believe that it is self-evident  
31 that rural telephone companies cannot survive competition from wireless  
32 providers. Specifically, we find no merit to the contention that designation of an  
33 additional ETC in areas served by rural telephone companies will necessarily  
34 create incentives to reduce investment in infrastructure, raise rates, or reduce  
35 service quality to consumers in rural areas. To the contrary, we believe that

1 competition may provide incentives to the incumbent to implement new operating  
2 efficiencies, lower prices, and offer better service to its customers. While we  
3 recognize that some rural areas may in fact be incapable of sustaining more than  
4 one ETC, no evidence to demonstrate this has been provided relating to the  
5 requested service areas. We believe such evidence would need to be before us  
6 before we could conclude that it is not in the public interest to designate Western  
7 Wireless as an ETC for those areas served by rural telephone companies.

8 *In the Matter of Western Wireless Corporation Petition for Designation as an Eligible*  
9 *Telecommunications Carrier In the State of Wyoming, CC Docket No. 96-45, DA 00-2896,*  
10 *Memorandum Opinion and Order ("Wyoming Order") ¶¶ 16-22 (rel. Dec. 26, 2000) (footnotes*  
11 *omitted) (emphasis added).*

12 26. Thus, contrary to the Rural Coalition's urging, the Commission cannot under the  
13 pretext of a public interest analysis require an applicant for ETC designation to support its  
14 application with the type of burdensome market studies advocated by the Rural Coalition.

15 (7) Proposed Rule 53.360(c)(3)(B)(iv) – requiring demonstration  
16 that applicant's provision of advanced services will be made  
17 available at "reasonable cost"

18 27. Likewise, proposed rule 53.360(c)(3)(B)(iv) goes well beyond any FCC or State  
19 commission determination in seeking to bootstrap an "affordability" test under the pretext of a  
20 public interest analysis. This proposed requirement must be rejected because "affordability" is  
21 not a statutory criterion for ETC designation under the plain language of Section 214(e)(1), and  
22 the FCC has rejected any attempt to expand the list of criteria necessary for ETC designation:

23 [W]e find that these provisions dictate that a state commission must designate a  
24 common carrier as an eligible carrier if it determines that the carrier has met the  
25 requirements of section 214(e)(1) . . . . The statute does not permit [the FCC] or a  
26 state commission to supplement the section 214(e)(1) criteria that govern a  
27 carrier's eligibility to receive federal universal service support.

28 *Universal Service Order* ¶ 135 (emphasis added).

29 28. Moreover, the affordability principle is identified in 47 U.S.C. § 254(b)(1), where  
30 Congress directed the Joint Board and FCC (not a State commission) to consider the principle of

1 "quality services . . . at just, reasonable, and affordable rates" in defining the scope of services  
2 considered to be "universal." The FCC did just that in defining the list of supported services set  
3 forth in FCC Rule 54.101(a). Yet, affordability is not a criterion for ETC designation under  
4 Section 214(e)(1) and, therefore, cannot be considered as part of an ETC application under the  
5 guise of a 214(e)(2) "public interest" analysis.  
6

7 (8) Proposed Rule 53.360(c)(6)(A)(i)-(v) – generally imposing  
8 discriminatory obligations and requirements specific to CMRS  
9 providers

9 29. The Rural Coalition's proposed ETC Rules targeted specifically toward CMRS  
10 providers are even more objectionable from both a legal and policy perspective. The proposed  
11 rules seek to discriminate against a certain technology in complete opposition to the FCC's stated  
12 principals of competitive and technological neutrality.  
13

14 30. To promote competition and preserve and advance universal telecommunications  
15 services, the FCC adopted an express policy of competitive and technological neutrality:

16 A principal purpose of Section 254 is to create mechanisms that will sustain  
17 universal service as competition emerges. We expect that applying the policy of  
18 competitive neutrality will promote emerging technologies that, over time, may  
19 provide competitive alternatives in rural, insular, and high cost areas and thereby  
20 benefit rural consumers.

21 *Universal Service Order* ¶ 50 (emphasis added). The FCC has described its policy of  
22 "competitive neutrality" as follows:

23 Universal service support mechanisms and rules should be competitively neutral.  
24 In this context, competitive neutrality means that universal service support  
25 mechanisms and rules neither unfairly advantage nor disadvantage one provider  
26 over another, and neither unfairly favor nor disfavor one technology over another.

27 *Id.* ¶ 47 (emphasis added). Reinforcing the principle of technological neutrality in the promotion  
28 of universal service, the FCC has also explained:

By following the principle of technological neutrality, we will avoid limiting  
providers of universal service to modes of delivering that service that are obsolete  
or not cost effective. The Joint Board correctly recognized that the concept of

1 technological neutrality does not guarantee the success of any technology  
2 supported through universal service support mechanisms, but merely provides that  
3 universal service support should not be biased toward any particular technologies.  
4 We anticipate that a policy of technological neutrality will foster the development  
5 of competition and benefit certain providers, including wireless, cable, and small  
6 businesses that may have been excluded from participation in universal service  
7 mechanisms if we had interpreted universal service eligibility criteria so as to  
8 favor particular technologies.

9 *Id.* ¶ 49 (emphasis added).

10 31. Moreover, the Commission must remain mindful of the Act's prohibition against  
11 state regulation of the entry or rates of CMRS providers (47 U.S.C. § 332(c)(3)(A)), which the  
12 Rural Coalition's proposed ETC Rules appear to invite in the form of requiring specific tariff,  
13 service quality and build-out requirements, as well as an ill-defined "catch-all" provision (*i.e.*,  
14 proposed rule 53.360(c)(6)(B)).

15 **c. The Rural Coalition's Proposed ETC Rules Would Unreasonably**  
16 **Delay Competitive Entry**

17 32. Lastly, the Commission must reject the Rural Coalition's suggestion that the  
18 designation of a competitive ETC be made contingent on the incumbent LEC's opportunity to first  
19 eliminate implicit subsidies — something that should already be occurring as the implicit  
20 subsidies are supplanted by explicit universal service support.

21 33. Indeed, pursuant to the Rural Coalition's proposed ETC Rules 53.360(e)(1)-(5), the  
22 incumbent LEC is vested with discretionary power to unreasonably delay the designation of a  
23 competitive ETC in its service area while the incumbent LEC develops cost studies, applies for  
24 modification of its rates and then prosecutes its application — presumably in a contested case  
25 proceeding as the proposed rules contemplate full consideration of "affordability concerns" that  
26 may result from the rate adjustments. *See* Proposed ETC Rule 53.360(e)(5). Consequently, the  
27 incumbent LEC could substantially delay competitive entry in its service area. The Commission  
28 should obviously not endorse such an anti-competitive result.

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**III. CONCLUSION**

34. For the forgoing reasons, the Commission should reject the Rural Coalition's self-serving invitation to convert this proceeding into an ETC rulemaking docket. In any event, the Commission should decline to consider the Rural Coalition's proposed ETC Rules as it has plainly failed to meet the "increased burden of persuasion" necessary to invoke the Commission's administrative review of its existing ETC Rules. Moreover, the Rural Coalition's proposed ETC Rules are so riddled with defects that the Commission simply cannot afford the rules full consideration within the limited scope and timeframes of this proceeding.

Respectfully submitted,

Dated: August 12, 2003

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1  
2 STATE OF ALASKA

3 THE REGULATORY COMMISSION OF ALASKA

4 Before Commissioners:

Mark Johnson, Chair  
Dave Harbour  
Kate Giard  
James S. Strandberg  
G. Nanette Thompson

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6  
7  
8 In the Matter of the Commission Review of )  
9 Rules and Regulations Governing )  
10 Telecommunications Rates, Charges )  
11 Between Competing Telecommunications )  
12 Companies, and Competition in )  
13 Telecommunications )

R-03-03

14 REPLY COMMENTS OF GCI

15 Introduction

16 On June 16, 2003, initial comments were submitted in this matter by  
17 ACS<sup>1</sup>, AT&T Alascom<sup>2</sup>, ATA<sup>3</sup>, the Rural Coalition, and GCI<sup>4</sup>. GCI submits these  
18 comments in reply to the comments of ACS, AT&T Alascom, ATA, and the Rural  
19 Coalition.

20 Discussion

21 I. Reply to ACS.

22  
23 <sup>1</sup> "ACS" includes ACS of Anchorage, Inc., ACS of Fairbanks, Inc., ACS of Alaska, Inc., ACS of the  
24 Northland, Inc., and ACS Long Distance, Inc.

25 <sup>2</sup> "AT&T Alascom" is Alascom, Inc.

26 <sup>3</sup> "ATA" is the Alaska Telephone Association.

27 <sup>4</sup> "GCI" is GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI.

1  
2 **A. General.**

3 The comments of ACS echo its familiar themes: UNE rates are too low,  
4 competition is unfair, and markets should be instantly deregulated as soon as  
5 competition is authorized. GCI will address each of ACS' specific contentions  
6 and proposals below. While—as set forth in its initial comments--GCI agrees that  
7 in many instances regulation of ACS should be relaxed in competitive markets,  
8 ACS' proposals go too far, too fast.  
9

10 As a general matter, GCI believes that ACS consistently misinterprets  
11 the intent of the Legislature. ACS generally interprets the provisions of HB 111 as  
12 endorsing the proposals that it put forth during the past legislative session and as  
13 mandating that the Commission adopt regulations that reverse course on previous  
14 decisions. In doing so, ACS ignores the specific statutory provision stating that  
15 "the legislature does not take a position on the propriety of existing commission  
16 rulings or regulations." (Section 2(d) of HB 111).  
17

18 Additionally, in many instances the specific principles set forth by the  
19 Legislature in HB 111 are completely contrary to ACS' positions. In these  
20 instances, ACS simply ignores the specific language of the legislation. For  
21 example, Principle 5 simply states that "competition among telecommunications  
22 companies shall be encouraged." ACS stands that principle on its head and argues  
23 that the principle really means that "the 'rural exemption' must not be casually set  
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aside" and that "competition may put many desired outcomes at risk." (ACS  
Comments, p 14, 15)

The point of this general discussion thus far is that the Commission  
should not be under any misconception that it is compelled to adopt the proposals  
of ACS and it should not feel bullied by ACS' threat to obtain the relief it seeks  
from the legislature, through CSHB 106, if it does not get such relief in this  
proceeding.<sup>5</sup> Instead, the Commission should simply evaluate all of the proposals  
based on their substantive merits and consistency with the actual requirements of  
HB 111.

Another general matter that must be addressed concerns ACS' overall  
financial condition and the effects that competition has had on ACS. In its  
comments ACS makes a number of implicit allegations that current competitive  
policies must be changed because they threaten ACS' financial viability. ACS  
states, for example, that "in the context of this docket, perhaps the most persuasive  
argument is that competition will not survive if ILECs do not survive" (ACS  
Comments, p. 17); "ongoing competition turns on the financial health of the  
infrastructure provider" (ACS Comments, p. 31); and, "current policies could  
result to a return to a monopoly when CLECs gain 100% market share." (ACS  
comments, p. 11). These ACS comments are consistent with more specific

<sup>5</sup> See ACS Comments, p. 4-5. As indicated in GCI's initial comments, many of the provisions of CSHB 106  
are clearly preempted by federal law.

1 allegations that ACS has made in other contexts that competition threatens its  
2 ongoing financial viability.  
3

4 GCI has engaged an expert who is thoroughly familiar with Alaskan  
5 telecommunications and with corporate finance to evaluate these claims. The  
6 affidavit of Gregory F. Chapados is attached. Mr. Chappados' qualifications are  
7 of the highest order. Born and raised in Fairbanks and educated at Harvard, Mr.  
8 Capados served as Chief of Staff for Senator Ted Stevens and was actively  
9 involved in telecommunications policy at the time. Mr. Chapados also served as  
10 the principal advisor to President Bush (Senior) on telecommunications policy,  
11 holding the office of Assistant Secretary of Commerce for Communication and  
12 Administration and Administrator of the National Telecommunications and  
13 Information Administration. Since leaving public service Mr. Chapados was  
14 senior vice president of Crown Media, Inc., and is now a Managing Director of  
15 an investment banker based in Dallas, Texas.  
16  
17

18 As is clearly set forth in Mr. Chapados affidavit, ACS' financial  
19 condition has steadily improved over the past several years and ACS has not been  
20 significantly harmed by competition. ACS has actually become dramatically more  
21 efficient as a result of competition, as one would expect. Furthermore, ACS just  
22 announced a major new financing package. In sum, Mr. Chapados affidavit  
23 demonstrates that ACS' claims of financial ruin are clearly no more than "crying  
24 wolf."  
25  
26

1 Mr. Chappados also addresses another claim often made by ACS, that it  
2 cannot afford to invest in telecommunications facilities. (See ACS Comments, p.  
3 15-17.) As Mr. Chappados sets out, ACS continues to invest significantly in  
4 telecommunication facilities in Alaska. ACS continues to maintain large cash  
5 reserves that are available for investment.  
6

7 Thus, the second point of this general discussion is that the Commission  
8 should not be under any misconception that it needs to change existing policies in  
9 order to save ACS from financial ruin. ACS remains a viable company and, to the  
10 extent it has suffered harm, most of that harm has been self-inflicted.  
11

12 GCI now turns to the various specific proposals set forth in ACS'  
13 comments.  
14

15 **B. Policies #2 and #7, UNE Rates and Fill Factors.**

16 **1. ACS' Suggestions on How to Set UNE Rates Are Misguided  
and, If Adopted, Would Violate FCC Pricing Rules.**

17 In its comments, ACS claims that the RCA has not properly  
18 implemented the FCC's TELRIC principles in the past, and, therefore, has not set  
19 fair UNE rates in prior arbitrations. Based on this premise, ACS offers various  
20 suggestions to the Commission on how it should implement TELRIC in the future  
21 to set UNE rates that, at least in ACS' view, would be fairer. GCI disagrees both  
22 with ACS' premise and its suggested changes. Collectively, the changes proposed  
23 by ACS would gut the FCC's TELRIC construct, for instance, by imposing  
24 "applicable state laws" and "industry standards" that may or may not be consistent  
25  
26

1 with TELRIC, and by allowing ACS to recover its uneconomic embedded costs  
2 through UNE rates in direct contradiction to the FCC's requirement that such  
3 embedded costs not be considered.  
4

5 ACS begins its TELRIC discussion by claiming that the RCA's "prior  
6 interpretation of TELRIC principles and the application of the RCA's  
7 "hypothetical carrier" standard do not produce fair payment by user carriers." ACS  
8 Comments, p. 18. ACS argues that the RCA's past UNE rate decisions are flawed  
9 because of the Commission's reliance on a "hypothetical carrier" standard rather  
10 than a "hypothetical network" standard. Apart from a difference in terminology,  
11 GCI fails to understand what prior error ACS is trying to correct. The FCC's Rule  
12 51.505(b)(1)<sup>6</sup> requires state commissions to set UNE rates based "on the most  
13 efficient telecommunications technology currently available and the lowest cost  
14 network configuration given the existing location of the incumbent LEC's wire  
15 centers." This rule is the heart of the FCC's TELRIC pricing standard. It is  
16 unimportant whether one semantically refers to the efficiency standard that  
17 underlies the FCC's rule either as a "hypothetical network" or a "hypothetical  
18 carrier" standard. What is important, however, is that the RCA follow and  
19 implement the FCC's rule.  
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23 In Order U-96-89(30), the RCA recently granted GCI's motion for  
24 clarification in the Anchorage arbitration confirming that the Commission intends  
25

26 <sup>6</sup> 47 C.F.R. § 51.505(b)(1).

1 to follow (as indeed the Commission must in accordance with the Supreme  
2 Court's decision in *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646 (2002)),  
3 and implement the FCC's standard as promulgated in Rule 51.505(b)(1).<sup>7</sup> With  
4 this clarification, nothing further remains for the Commission to correct or do on  
5 this subject.  
6

7  
8 Next, ACS claims that "it simply makes no sense to use pricing models  
9 that have been expressly discounted by the FCC" to set UNE rates. ACS  
10 Comments, p. 18. This comment implies that the RCA's use of a modified  
11 version of the FCC Synthesis Model to set UNE rates has been improper and that  
12 the Commission should no longer use the modified FCC's proxy model in the  
13 future to generate UNE rates. To be clear, the FCC has not prohibited state  
14 commissions from using a modified version of the Synthesis Model to develop  
15 TELRIC-compliant UNE rates. The FCC developed its Synthesis Model for the  
16 purpose of determining federal universal service support and in that context relied  
17 on nation-wide default cost values rather than company-specific cost inputs to  
18 determine universal service funding for non-rural carriers. Additionally, the FCC  
19 made certain assignments of cost that were immaterial for universal service  
20 funding purposes but are inappropriate for generating UNE rates. Thus, the FCC  
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26 <sup>7</sup> Order U-96-89(30) at 9 (April 14, 2003).

1 cautioned that its Synthesis Model, unmodified, "may not be appropriate for other  
2 purposes, such as determining prices for UNEs."<sup>8</sup>  
3

4 In March 2000, in the context of the ACS-GCI arbitration proceedings  
5 for Juneau, Fairbanks, and the Glacier State Study Area in Consolidated Docket  
6 U-99-141/U-99-142/U-99-143, the Commission hired an independent consultant,  
7 Ben Johnson Associates, Inc., to assist the Commission in its review of the parties'  
8 competing contentions regarding the selection of an appropriate model to set UNE  
9 rates.<sup>9</sup> Ultimately, Ben Johnson issued a report recommending that the FCC's  
10 Synthesis Model be modified and used because it is a neutral platform capable of  
11 generating TELRIC-compliant UNE rates. The Commission selected the FCC  
12 Synthesis Model based on Mr. Johnson's recommendation. The parties, thereafter,  
13 worked together and agreed on a method to modify the FCC Synthesis Model  
14 platform making it capable of generating individual UNE rates. Moreover,  
15 although the FCC's default values were used as a starting point in the Juneau-  
16 Fairbanks-Glacier State arbitrations, either party was free to propose different cost  
17 inputs to the Arbitrator to reflect Alaska-specific costs. Notably, ACS accepted  
18 the overwhelming majority of the FCC default values and chose to contest only a  
19 very small number of the cost inputs during the arbitration proceeding.  
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24 <sup>8</sup> *Federal-State Joint Board on Universal Service: Forward-Looking Mechanism for High Cost Support*  
25 *for Non-Rural LECs*, CC Docket 96-45, Tenth Report and Order, 14 FCC Rcd 20156, ¶ 32 (1999).

26 <sup>9</sup> GCI had proposed a version of the HAI proxy cost model whereas ACS had proposed an early version  
27 of its proprietary ACS cost model.

1           The point is that the FCC Synthesis Model, as structurally modified by  
2 ACS and GCI and populated with arbitrated cost inputs, is capable of generating  
3 fair and reasonable TELRIC-compliant rates. Importantly, no one has ever  
4 proposed that the RCA adopt the FCC default values without critical review and  
5 analysis.  
6

7           Moreover, ACS' comments on the problems with the RCA's past  
8 selection of the modified FCC Synthesis Model overlook the Commission's recent  
9 attempt to accommodate ACS by selecting the ACS proprietary cost model (ACS  
10 Cost v7.2 model) as a process to generate loop rates in the Anchorage Arbitration  
11 in Docket U-96-89.<sup>10</sup> The Commission, however, recognized that ACS'  
12 proprietary model posed a number of considerable challenges:  
13

14           First, the use of a manual network design process is slow,  
15 potentially error prone, and because it relies on the  
16 expertise of individual design engineers, may lack the  
17 uniformity of a model that relies strictly on algorithms. Second, the ACS-AN model will produce only one  
18 category of rate elements – loop rates. Third, the  
19 spreadsheet portions of the model do not yet have a simple  
20 front end for inputs and changes to other factors can be  
21 difficult and time consuming. Fourth, potential  
22 modifications to the model may take considerably more  
23 time than the FCC model would require.<sup>11</sup>

24           Indeed, the ACS proprietary cost model in the Anchorage arbitration proved to  
25 be unwieldy and difficult to modify in a timely manner. The Commission  
26

27 <sup>10</sup> Order U-96-89(26) (July 29, 2002). The Commission adopted the ACS model as a process to allow  
GCI the right to propose structural changes to the platform.

<sup>11</sup> *Id.* at 5.

1 recently abandoned its selection of the ACS cost model and instead has adopted  
2 a new approach that allows parties to propose prices and terms in accordance  
3 with whatever model or models the party chooses.<sup>12</sup>  
4

5 In its comments, ACS also states that the Commission "could use a  
6 wide variety of models and inputs that would produce a range of TELRIC-  
7 complaint rates." ACS Comments, p. 20. As just discussed, the Commission,  
8 indeed, has adopted an approach that will allow each party to propose rates  
9 based on different models. ACS' statement, however, that the Commission  
10 could use a "wide variety" of cost inputs to set UNE rates is misleading.  
11 Although different model platforms can be used to set fair and reasonable UNE  
12 rates, the Commission must scrupulously examine the cost inputs to ensure that  
13 they reflect the forward-looking cost principles under the FCC's TELRIC  
14 standard. The Commission must be scrupulous in its examination and selection  
15 of the inputs otherwise the results using any of the parties' proposed models  
16 would be meaningless and arbitrary. A model is only useful in so far as the  
17 inputs used are meaningful and reasonable - otherwise, one can create a  
18 "garbage in, garbage out" conundrum.  
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22 In its comments, ACS also claims that the cost inputs should be based  
23 on the most efficient technology "actually deployed" by the provider. This  
24 comment is an attempt to revive the Commission's "efficient ILEC" standard,  
25

26 <sup>12</sup> Order U-96-89(35).

1 which the Commission first articulated in Order U-96-89(24) but abandoned in  
2 Order U-96-89(30). The Commission was correct in Order U-96-89(30) when it  
3 concluded that its "efficient ILEC" standard differs from the FCC's pricing  
4 methodology in Rule 51.505(b),<sup>13</sup> which requires state commissions to set UNE  
5 prices based on the most efficient telecommunications technology currently  
6 available in the industry and the lowest cost network configuration while using  
7 the existing location of the LEC's wire centers. By focusing on the technology  
8 actually deployed by the ILEC (as ACS again proposes in its comments) rather  
9 than the most efficient telecommunications technology currently available in the  
10 industry, the Commission's "efficient ILEC" standard potentially could have  
11 preserved more of the ILEC's embedded costs than is permissible under the  
12 FCC's pricing rules. The Commission should reject ACS' attempt to re-visit that  
13 issue again.  
14  
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16

17 Likewise, ACS' comment that the "RCA's UNE pricing policies  
18 should begin with a rebuttable presumption of ILEC efficiency" also  
19 impermissibly differs from the FCC's pricing rules. Under Rule 51.506(e),<sup>14</sup>  
20 the incumbent must bear the burden of proving to the state commission that each  
21 of the UNE rates it proposes complies with the FCC's TELRIC rules. ACS'  
22 suggestion that the Commission start with a rebuttable presumption of ILEC  
23  
24

25 <sup>13</sup> Order U-96-89(30) at 9.

26 <sup>14</sup> 47 C.F.R. § 51.507(e).

1 efficiency would impermissibly shift the burden of proof to the CLEC forcing it  
2 to find and prove the inefficiencies that underlie the ILEC's proposed rates.  
3

4           Additionally, with respect to ACS' broad comments regarding how the  
5 Commission should resolve cost of capital and depreciation expense issues in a  
6 UNE rate proceeding, (ACS Comments, p. 20), GCI simply cautions the  
7 Commission that the FCC's TELRIC rules govern the determination of these  
8 cost issues as well in the setting of UNE rates,<sup>15</sup> and that the burden is on the  
9 ILEC to prove the reasonableness of its proposed forward-looking cost of capital  
10 and depreciation rates.<sup>16</sup>  
11

12           Lastly, GCI wishes to respond to ACS' suggestion that the  
13 Commission consider the ILEC's historical, embedded costs in setting UNE  
14 rates. ACS Comments, p. 21. On this point, it is worth citing some of the FCC's  
15 lengthy discussion rejecting ILECs' claims that embedded costs should be  
16 considered in setting UNE rates:  
17

18           Section 252(d)(1)(A)(i) does not specify whether historical or  
19 embedded costs should be considered or whether only forward-  
20 looking costs should be considered in setting arbitrated rates. We  
21 are not persuaded by incumbent LEC arguments that prices for  
interconnection and unbundled network elements must or should  
include any difference between the embedded costs that have

22  
23 <sup>15</sup> See 47 C.F.R. §§ 51.505(b)(2) & (b)(3).

24 <sup>16</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First*  
25 *Report and Order*, 11 F.C.C.R. 15,499 (1996) ("First Report and Order") at ¶ 702 (wherein the FCC  
26 explains that the current authorized rate of return at the federal or state level is a reasonable starting point for  
TELRIC calculations and "the incumbent LECs bear the burden of demonstrating with specificity that the  
business risks that they face in providing unbundled network elements and interconnection services would  
justify a different risk-adjusted cost of capital or depreciation rate").

1  
2 incurred to provide those elements and their current economic costs.  
3 Neither a methodology that establishes the prices for interconnection  
4 and access network elements directly on the costs reflected in the  
5 regulated books of account, nor a price based on forward looking  
6 costs plus an additional amount reflecting embedded costs, would be  
7 consistent with the approach we are adopting. The substantial weight  
8 of economic commentary in the record suggests that an "embedded  
9 cost"-based methodology would be pro-competitor - -in this case the  
10 incumbent LEC—rather than pro-competition. We therefore decline  
11 to adopt embedded costs as the appropriate basis for setting prices  
12 for interconnection and access to unbundled network elements.<sup>17</sup>

9 ACS' suggestion that the Commission consider ILEC embedded costs would  
10 lead the Commission down an impermissible path of setting rates based on the  
11 ILEC's embedded costs in violation of the FCC's pricing rules.

12 **2. ACS' Discussion On Fill Factors Is Vague and Appears Not**  
13 **To Comply With the FCC's Telric Rules.**

14 At 27-28 in its Comments, ACS offers a few brief but vague  
15 suggestions on how the Commission should determine fill factors when setting  
16 UNE rates. Fill factors refer to the amount of spare capacity in cable sizes that  
17 network engineers include in the network design to accommodate administrative  
18 functions, such as testing and repair, and some amount of near-term growth.<sup>18</sup>

19 These factors have a significant impact on the price of many network elements  
20 because they allow the cost of unused network capacity to be recovered from  
21 current customers for the ILECs' services. A lower fill factor increases the  
22  
23

24 <sup>17</sup> *First Report and Order*, at ¶ 705.

25 <sup>18</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 and *Forward-*  
26 *Looking Mechanism For High Cost Support For Non-Rural LECs*, CC Docket No. 97-160, Tenth Report  
and Order, 14 FCC Rcd 20156 (rel. November 2, 1999) at ¶ 186.

1 amount of spare capacity that the customers – CLECs, in the case of UNEs --  
2 must pay for in the loop rate.  
3

4 In its comments, ACS vaguely suggests that the Commission should  
5 determine fill factors based on “industry design standards” that “comply with  
6 applicable local and state laws.” ACS Comments, p. 27. GCI is unsure what ACS  
7 means by this suggestion. Notably, ACS does not discuss TELRIC or mention  
8 efficiency in its comments. The implication of ACS’ suggestion seems to be that  
9 “industry standards” and “applicable local and state laws” should supersede the  
10 FCC’s TELRIC rules. Importantly, industry design standards by themselves  
11 (which may be decades old) or local and state laws may not reflect current  
12 technological capabilities or the application of economic pricing principles. GCI  
13 simply cautions the Commission to follow the FCC’s TELRIC principles on the  
14 fill factor issue without bias towards claims regarding “industry standards” or  
15 “applicable local and state laws” unless ACS can establish the use of those  
16 standards is appropriate under the TELRIC construct.  
17

18  
19 **3. GCI’S Specific Comments Regarding ACS’ Proposed Changes**  
20 **Regarding UNE Pricing.**

21 In this section, GCI offers its specific comments on ACS’ proposed rule  
22 changes to indicate where GCI expressly disagrees with ACS’ language.  
23 Importantly, GCI recommends that the Commission not adopt any of ACS’  
24 proposed rules. ACS’ proposed rules are largely self-serving and collectively  
25 would gut the FCC’s mandatory TELRIC rules. Furthermore, ACS’ proposed rule  
26

1 changes attempt to convert key issues that must be carefully examined during the  
2 arbitration process into before-the-fact principles that effectively would remove  
3 the issues from the scrutiny of the arbitration process.  
4

5 **ACS PROPOSED RULE:**

6 (a) Unbundled network element prices will be determined in conformance with the  
7 federal Telecommunications Act of 1996, the rules of the Federal  
8 Communications Commission adopted thereunder, and any other applicable state  
9 law.

10 **GCI Comment:** The language in this proposed rule would appear to  
11 impermissibly require the Commission to set UNE prices based on state law even  
12 if state law conflicts with the federal statute or FCC rules.

13 **ACS PROPOSED RULE:**

14 (b) In addition to the requirements prescribed by (a) of this section, the following  
15 additional guidelines will apply to the pricing of unbundled network elements:

16 (1) selecting a pricing model for unbundled network elements, the Commission will  
17 use the FCC's "hypothetical network standard" and will presume the existence of  
18 the most efficient technology actually deployed by the providing company.

19 **GCI Comment:** The language in the first sentence is confusing. The  
20 RCA must follow and implement the FCC's TELRIC pricing rules, including the  
21 standard set forth in 47 C.F.R. § 51.505(b)(1). ACS' language in the second  
22 sentence clearly violates the FCC's rules as discussed above.

23 **ACS PROPOSED RULE:**

24 (2) The Commission will ensure that the unbundled network element pricing  
25 model conforms to industry standard design and construction criteria and adheres  
26 to all applicable state and local laws.

1  
2           **GCI Comment:** This language suggests that the Commission set UNE  
3 prices based on alleged industry standards and state law even if they conflict with  
4 the FCC's TELRIC rules. As discussed above, the Commission must follow and  
5 implement the FCC's TELRIC rules.

6           **ACS PROPOSED RULE:**

7           (3) Unbundled network element prices will be based on the reasonably anticipated  
8 forward looking cost of the company providing the network elements.

9           **GCI Comment:** This language is ambiguous suggesting that some of  
10 ACS' operating inefficiencies be retained when setting UNE rates. Again, the FCC  
11 has already set the pricing standard and rules for UNE pricing, and it is the FCC  
12 language and rules that the Commission must follow.

13           **ACS PROPOSED RULE:**

14           (4) Reasonably anticipated forward looking costs, including but not limited to the  
15 cost of labor and materials, will be determined by using the providing company's  
16 current actual cost adjusted for future charges.

17           **GCI Comment:** This language clearly conflicts with the FCC's  
18 TELRIC rules. This language seeks to preserve inefficient labor costs. Again, all  
19 costs must be determined in accordance with the FCC's TELRIC rules.

20           **ACS PROPOSED RULE:**

21           (5) In setting prices for unbundled network elements, the Commission will use fill  
22 factors that conform to industry standard design and construction criteria and  
23 adhere to all applicable state and local laws. Fill factors should reflect a  
24 reasonable projection of actual total usage of the elements in question.

1  
2 **GCI Comment:** This language is vague and ambiguous and appears to  
3 conflict with the FCC's TELRIC rules as discussed above.

4 **ACS PROPOSED RULE:**

5 (6) Unbundled network element pricing will include a depreciation component that  
6 is based on the actual plant lives of the providing company. Actual plant lives will  
7 reflect the impact of technological change and the effects of competition. It is  
8 presumed that plant lives in competitive markets will be shorter than the ranges  
9 prescribed by the FCC for interstate services. Accelerated depreciation in  
10 competitive markets is deemed reasonable.

11 **GCI Comment:** This language is a clear attempt to set asset lives for  
12 depreciation purposes without regard to the FCC's TELRIC rules and the actual  
13 asset lives of the company's plant. In accordance with the proposed language,  
14 ACS could drive up its allowed expenses by writing plant off on an accelerated  
15 basis without critical evaluation of whether such practice is efficient or realistic.  
16 Moreover, the Commission should not presume shorter asset lives simply because  
17 of competition. UNE purchases by competitors may, indeed, prolong the life of  
18 ACS' plant.

19 **ACS PROPOSED RULE:**

20 (7) In evaluating the cost of capital component for unbundled network element  
21 pricing, the Commission will give consideration to the additional risks confronted  
22 by a providing company that operates in a competitive environment. It is  
23 presumed that application of a competitive risk premium will result in a higher  
24 cost of capital than prescribed by the FCC for interstate services.

25 **GCI Comment:** The language in the second sentence squarely conflicts  
26 with the FCC's rules requiring the ILEC to bear the burden of demonstrating the  
27 reasonableness of its proposed cost of capital adjustments.

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**C. Policy #2, Dominant Carrier Status.**

ACS argues that Policy #2 requires an immediate change to the regulation that declares the incumbent carrier to be the dominant carrier. GCI agrees, and the regulations that GCI proposed in its initial comments include such a change.

The regulation proposed by ACS, however, does much more than change the regulation that declares the incumbent carrier to be the dominant carrier. Instead, ACS' proposed regulation totally eliminates dominant/nondominant regulation in any local exchange market as soon as a CLEC or CETC (presumably even a wireless CETC, including a wireless CETC that is affiliated with the ILEC, such as ACS proposes in Fairbanks) offers service to a majority of consumers in a service area.

As discussed in GCI's initial comments, Policy #2 actually presumes that dominant/nondominant carrier regulation will continue; the legislature simply required a change in the criteria for designation of the dominant carrier. If the legislature had intended to achieve the result ACS seeks, the legislature could have simply stated that no carrier will be designated as dominant in an area opened to competition. The legislature did not adopt such a requirement.

ACS also argues that the fact that GCI did not follow its rate increase in Anchorage proves that ACS does not have market power. That argument is

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simplistic and inaccurate. As developed at length in initial comments, the concept of market power is relatively complex but involves, among other things, whether or not a price increase drives away so many customers as to make the increase not profitable. (GCI Comments, pp. 9-10) Given the fact that ACS retained its rate increase even though GCI did not follow, ACS must have determined that its increase was profitable. Thus, that experience would indicate that ACS did retain market power in Anchorage at that time.

**D. Policy #4, Competitive Service Area.**

In its comments and proposed regulation, ACS recognizes that the definition of competitive service area must be community-specific. GCI agrees, as set forth in initial comments.

GCI disagrees, however, with ACS' proposal that an area should be considered competitive as soon as more than 50% of the customers have a choice of provider, even if no actual competition has begun and even if the "choice" is from a cellular provider that has been designated an "eligible telecommunication carrier", or ETC. Cellular providers, even if designated as an ETC, generally compete against other wireless providers, not against local service providers. Furthermore, under ACS' proposal, even if the wireless ETC were the affiliate of the ILEC, the ILEC would nonetheless be designated as nondominant.

GCI's disagreement with the definition of competitive service is enhanced because, under ACS' proposal, the consequence of the "competitive

1 service area" designation is that the end of dominant/nondominant carrier  
2 regulation; as discussed above, and implementation of "notice tariff" procedures  
3  
4 As set out in GCI's initial comments, the determination of dominant status is much  
5 more complex than whether a theoretical choice of carriers exists for some of the  
6 customers in a service area.

7 **E. Policy #5, Depreciation.**

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9 ACS states that, to the extent that another governmental body has adopted  
10 industry accepted depreciation standards, they should be used as a test for  
11 reasonableness for ratemaking purposes. GCI agrees, and in fact the Commission  
12 has recently used FCC depreciation lives as a factor in determining appropriate  
13 lives for ACS plant. The lives adopted by the FCC, specific to  
14 telecommunications plant and specific to regulatory purposes, are clearly the most  
15 appropriate standards adopted by "another governmental body."  
16

17 However, in its proposed regulations, ACS actually rejects the FCC  
18 depreciation lives, at least for the purpose of establishing UNE rates. ACS' desire  
19 to use standards set by another governmental body, but its rejection of FCC lives  
20 specifically designed for telecommunications plant, is inherently inconsistent.

21 ACS also fails to recognize that Policy #5 specifically refers to the  
22 actual service lives of depreciated equipment. Thus, while ACS wants to  
23 concentrate on "market dynamics" and "technological obsolescence", ACS fails to  
24 recognize that the actual import of Policy #5 is that the actual, experienced lives of  
25

1 equipment in service must be considered by the Commission in setting  
2 depreciation rates.  
3

4 **F. Policy #6, Ratemaking Standards for Incumbents and**  
5 **Competitors.**

6 In its discussion of the process and procedures that should be applied to tariff  
7 filings by carriers, ACS proposes that in competitive areas (defined by ACS as  
8 areas where more than 50% of consumers have a theoretical choice) "notice tariff"  
9 regulations should apply and that in areas with significant competition (defined by  
10 ACS as areas where 75% of consumers have a theoretical choice) service should  
11 be completely detariffed. In addition to GCI disagreement regarding the definition  
12 of "competitive service area" and "significant competition", as discussed  
13 elsewhere herein, GCI also disagrees with the process and procedures proposed by  
14 ACS. Instead, GCI believes that the 30 day notice periods now used in local  
15 markets, and used for over 10 years in long distance markets, are a better  
16 procedure. The existing process and procedures, applied equally to ILECs and  
17 CLECs once appropriate benchmarks have been passed, are appropriate and fully  
18 consistent with the requirements of HB 111. For example, both Policy #3 and #9  
19 recognize that there are certain circumstances in which the Commission should  
20 disallow tariff changes, including both increases and decreases, and even in fully  
21 competitive markets. Even ACS recognizes that there will be some instance  
22 which the Commission should intervene to block a rate change. (ACS Comments,  
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1 p. 31) ACS does not, however, explain how the Commission would be able to  
2 block a rate increase if rates were detariffed and there were no notice, or even if  
3 there were 7 days notice. GCI believes that the Commission would be effectively  
4 unable to exercise its authority (and responsibility) to deny any tariff proposals  
5 under the procedures proposed by ACS.  
6

7  
8 In its consideration of whether either 7 day "notice tariffs" or complete  
9 detariffing should be allowed under any circumstances, the Commission should  
10 consider the nature of the charges that, left to its own discretion, ACS is likely to  
11 implement. Consider, for example, the "Competitive Market Equalization  
12 Charge" that ACS has now proposed be included in its tariff for the Fairbanks and  
13 Juneau markets. This proposed charge is a tax on each and every access line in the  
14 market, even lines served by a competitor and even lines that do not in any way  
15 rely on ACS facilities, with all of the revenue from the tax paid to ACS. ACS'  
16 competitors would be obligated—involuntarily—to collect the tax from its  
17 customers and pass the revenue to ACS. Apparently, ACS thinks such charges are  
18 appropriate and that they can be implemented by tariff. Under ACS' proposed  
19 notice tariff procedures, such a charge could be implemented by ACS upon only 7  
20 days notice and with virtually no possibility of it being rejected by the  
21 Commission. Clearly, the Commission needs to maintain a fair notice period and  
22 the right to review filings in order to block proposals such as ACS' proposed tax.  
23  
24

25 **G. Policy #8, Rate Increases in Competitive Markets.**  
26

1 Policy #8 provides that competitors should be allowed to increase rates  
2 under the same criteria in areas "where significant competition exists". ACS  
3 proposes that significant competition should be found to exist in any area that has  
4 a facilities-based competitor capable of serving 75% of all consumers. As with the  
5 definition of competitive service area, GCI disagrees that the standard for  
6 "significant competition" should be based entirely on the theoretical capability to  
7 service. The very words used by the Legislature—"where significant competition  
8 exists"—imply the actual existence of competition, not simply a capability or  
9 theoretical possibility of competition. For these reasons, GCI believes that the  
10 proposal in its initial comments to define an area where significant competition  
11 exists as an area where the dominant carrier serves less than 80% of the lines is  
12 appropriate and consistent with the Legislative Policy #8.

#### 13 H. Other Matters.

14 In its comments ACS makes various other assertions that require at least  
15 a brief response. For example, ACS complains that, in applying the tariff  
16 regulations for dominant and nondominant carriers, the Commission has routinely  
17 granted waivers to CLECs that it denies to ILECs. ACS cites no actual examples,  
18 and as previously stated elsewhere GCI believes that ACS' perceived difference in  
19 treatment is actually the result of GCI's working with Commission staff to modify  
20 tariff proposals to be acceptable, while ACS attitude is "my way or no way."  
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1 ACS also asserts that "anti-bundling" prohibitions on ILECs are unfair  
2 and have hindered ILEC's ability to compete. However, as ACS has recognized  
3 elsewhere, the ONLY existing restriction on bundling involves the bundling of  
4 local exchange and intrastate interexchange service. Furthermore, as ACS has  
5 also recognized, the existing rules on geographic rate averaging for long distance  
6 rates also effectively precludes bundling of local and long distance service, and  
7 that rule applies equally to ILECs and CLECs. Thus, there is now effectively no  
8 difference in the extent to which ILECs and CLECs are allowed to offer bundled  
9 service.  
10  
11

12 In this regard, ACS proposes to waive application of the rule requiring  
13 geographic rate averaging (3 AAC 52.370(a)) to bundled services including local  
14 and long distance service. (See ACS Proposed 3 AAC 53.290(e), p. 8 of ACS  
15 Exhibit A) Given the fact that ACS offers long distance service primarily in low  
16 cost areas such as Anchorage, Fairbanks, and Juneau, GCI understands why ACS  
17 proposes that the rule requiring geographic rate averaging not apply to bundled  
18 services, since ACS would then be able to "cream skim" in the urban markets.  
19 However, the Commission should clearly understand that ACS' proposal would  
20 effectively eliminate the geographic rate averaging policy. ACS, serving low cost  
21 areas, would be certain to offer low rates in the urban areas. Competitors would  
22 be forced to match those lower rates in the low cost areas. Rural residents,  
23 however, would not have similar rates, and geographic rate averaging would end.  
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1 ACS also proposes that CLECs should be required to offer access to  
2 their networks comparable to the access that ILECs are required to offer. GCI has,  
3 in fact, offered such access to ACS and GCI intends to continue that policy.  
4 However, as a matter of federal law, CLECs cannot be required to unbundled  
5 network access like ILECs. Xxx The only way that this can be accomplished is if  
6 the CLEC is actually designated by the FCC as an ILEC. (47 CFR §51.233: "A  
7 state may not impose the obligations set forth in section 251(c) of the Act on a  
8 LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of  
9 the Act, unless the Commission issues and order declaring that such LECs or  
10 classes or categories of LECs should be treated as incumbent LECs")<sup>19</sup>

13 ACS also claims that current UNE rates "artificially signal CLECs to  
14 rely on a UNE strategy" and "not invest because they lack economic incentive to  
15 do so." (ACS Comments, pp. 16-17.) ACS claims are contradicted by the facts.  
16 GCI is investing significantly in its own alternative loop technology so that it does  
17 not have to rely on ACS loops, which come laden with unsatisfactory and  
18 discriminatory service.<sup>20</sup>

19 As used by in that quote, "Commission" means the FCC, not the state commission.

20 ACS does not seem to know what it wants. At times, ACS complains about the fact that GCI may discontinue use of ACS UNE loops. (ACS Comments, p. 12) At other times, ACS complains that GCI will continue to rely on ACS loops rather than making its own investment. (ACS Comments, p. 16-17) A rationale company would actually encourage GCI to remain on its loops by offering quality service at a good price, a price below GCI's alternative. Instead, ACS does everything it can to drive GCI off its loops, then complains about the consequences.

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2 Finally, GCI will respond briefly to the affidavit of Dr. Lehman attached  
3 to ACS' Comments. There is much in Dr. Lehman's comments with which GCI  
4 agrees.<sup>21</sup> There is no disagreement that, as competition develops, regulation can  
5 give way to market forces. Even Dr. Lehman says this should occur when there is  
6 "sufficient competition." (Lehman affidavit, p. 7) GCI's main difference with Dr.  
7 Lehman is simply one of degree and when the change should occur. GCI's views  
8 are consistent with the longstanding practice of both the FCC and this  
9 Commission, as discussed in GCI's initial comments. Dr. Lehman's view are that  
10 the move to deregulation, based entirely on market forces, should occur  
11 immediately upon the availability of UNEs, even if there is absolutely no actual  
12 competition. (Lehman affidavit, p. 7) GCI simply believes that such a proposal  
13 goes too far, too fast. It is inconsistent with the practices of the vast majority of  
14 regulatory agencies. Furthermore, Dr. Lehman ignores the possibility that the  
15 availability of UNEs—the lynchpin of his analysis—could be eliminated in some  
16 markets. Similarly, ACS in its comments refers to the availability of UNEs are  
17 irrevocably allowing competition. (ACS Comments, p. 5) In both instances, Dr.  
18 Lehman and ACS ignore ACS' continuing appeal of the lifting of the rural  
19 exemption which, if successful, has the potential of eliminating UNEs, and  
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25 <sup>21</sup> Dr. Lehman would, apparently, reject the proposed "Competitive Market Equalization Charge" proposed  
26 by ACS in its rate design proceeding, as he agrees that "Guarantees are not consistent with competition."  
(Lehman affidavit, p. 8)

1 competition, in currently competitive markets. This reality must be considered by  
2 the Commission in any decision to rely on the "irrevocable" forces of competition.  
3

4  
5 **II. Reply to AT&T Alascom.**

6 In its comments, AT&T Alascom concentrates on the application of HB  
7 111 to the interexchange market. AT&T Alascom proposes elimination of its  
8 treatment as a dominant carrier; creation of a new Universal Service Fund to  
9 create incentives for investment in interexchange facilities; and sharing of carrier  
10 of last resort responsibilities.  
11

12 GCI believes that the regulations proposed in GCI's initial comments  
13 adequately address issues regarding AT&T Alascom's designation as the  
14 dominant carrier. The proposed regulation, consistent with Policy #2, would  
15 eliminate the fact that AT&T Alascom is designated dominant solely by virtue of  
16 being the incumbent carrier. The Commission would be required to determine,  
17 within 180 days, whether or not AT&T Alascom should continue to be treated as a  
18 dominant carrier, based on factors specifically set out in the regulation.  
19

20 In reviewing AT&T Alascom's comments on this issue, GCI  
21 recognized, however, that its proposed regulation should be amended somewhat.  
22 As discussed in GCI's comments, determination of market power must be  
23 undertaken in regards to a specific product in a particular market. Therefore, there  
24 is a possibility that a carrier could be designated dominant for some purposes and  
25

1 nondominant for other purposes. The regulations previously proposed by GCI  
2 should be modified to recognize that possibility.  
3

4 In regards to AT&T Alascom's proposed subsidy for interexchange  
5 facility investment, GCI has some difficulty in responding because of the lack of  
6 any specifics provided by AT&T Alascom. In general, GCI disagrees than any  
7 such subsidy program is necessary or appropriate. Furthermore, GCI does not  
8 believe that ACS' proposal is supported by any of the nine specific legislative  
9 policies that are the subject of this document. Therefore, GCI suggest that this  
10 matter not be considered in this Docket.  
11

12 Similarly, GCI has difficulty responding to AT&T Alascom's proposal  
13 regarding sharing of Carrier of Last Resort responsibility because it is so vague.  
14 In theory, GCI is not totally opposed to such sharing. However, GCI again  
15 suggests that this matter not be considered in this docket.  
16

### 17 18 **III. Reply to ATA.**

19 The comments of ATA focus solely on the tariff review standards that  
20 should apply to competitive areas and whether or not any difference should exist  
21 for dominant carriers. In its comments, ATA focuses on the small size of many of  
22 its members.  
23

24 As discussed in initial comments, decisions of the FCC make it clear  
25 that the issue of market power must be addressed for a specific service in a  
26

1 specific geographic area. Therefore, the overall size of a firm is often irrelevant to  
2 the determination of market power. Even an ILEC that is small in relation to the  
3 total size of a CLEC may retain market power over local service in the ILEC's  
4 own geographic service area, based on the factors set out in GCI's proposed  
5 regulation, such as market share.  
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7

#### 8 9 IV. Response to Rural Coalition.

10 The comments of the Rural Coalition fall into two general areas. First,  
11 the Rural Coalition proposes extensive modifications to the Commission's current  
12 rules governing local exchange competition. To some extent, those comments  
13 would have been more appropriately filed in Docket R-02-6, which was  
14 specifically opened to address those regulations. However, the comments also  
15 relate in some instances to the provisions of HB 111 and GCI will therefore  
16 address those comments. Second, the Rural Coalition proposed nine pages of  
17 entirely new regulations focused solely on designation of eligible  
18 telecommunications carriers. Those proposed regulations do not relate to any of  
19 the provisions of HB 111 and, the Rural Coalition did not meet its burden of  
20 persuasion that such matters should be considered in this Docket. In view of the  
21 complexity of the issues associated with ETC designation, consideration of these  
22 matters would substantially increase the scope of this matter and delay its  
23 completion. In accordance with the Commission's statement in Order No. 1 that it  
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1 would not consider additional issues absent special justification, GCI does not  
2 believe that the ETC issues should be considered in this Docket. Furthermore, the  
3 matter of ETC designation is now under consideration in regards to the application  
4 of Alaska Digitel for ETC status in the service area of Matanuska Telephone  
5 Association. Consideration of regulations regarding ETC designation would  
6 benefit from and proceed more smoothly after the Commission had addressed the  
7 issues in that proceeding.  
8  
9

10 The specific proposals of the Rural Coalition resemble, in many  
11 respects, the proposals of ACS. For example, "the Rural Coalition has eliminated  
12 the dominant/nondominant distinction in competitive service areas...." (Rural  
13 Coalition Comments, p. 8) As previously discussed, Policy #2 does not eliminate  
14 the dominant/nondominant distinction, it simply provides that the criteria for  
15 determining which carrier is dominant cannot include incumbency.  
16

17 The Rural Coalition proposes five criteria for the determination of a  
18 competitive service area, which include mere certification of a second carrier,  
19 mere designation of a second ETC, and simple lifting of the rural exemption. (See  
20 Rural Coalition proposed 3 AAC 53.220). Thus, under the Rural Coalition  
21 proposal, an area would be deemed competitive, and the ILEC thus given  
22 nondominant carrier treatment, long before another carrier is actually providing  
23 any service. For example, the Commission lifted the rural exemption in ACS'  
24 Glacier State service area many years ago, but no competitive service is yet  
25

1 offered there. Even in the best of circumstance, it takes a substantial time to build  
2 facilities to provide local service after regulatory approval has been obtained. For  
3 these reasons, the proposals of the Rural Coalition are inconsistent with the  
4 Legislative policy that any definition of competitive service area shall take into  
5 account whether actual competition exists in the area.  
6

7  
8 The Rural Coalition also proposes to change the existing rules regarding  
9 discontinuance, suspension, or abandonment of service in a way that is  
10 inconsistent with HB 111. HB 111 specifically states that the incumbent carrier  
11 remains the carrier of last resort until changed by the Commission. However,  
12 under the Rural Coalitions proposals any local exchange carrier in a competitive  
13 market would be able to discontinue service under the standards previously  
14 applicable to nondominant carriers. (See Rural Coalition proposed 3 AAC  
15 53.230)  
16

17 The Rural Coalition proposes that ILECs operating under a rural  
18 exemption are exempt from the requirement to offer services for resale, even at  
19 retail rates. (See Rural Coalition proposed 3 AAC 53.250). That proposal is  
20 contrary to both state and federal law, both of which require all carriers to allow  
21 resale at retail rates. (Section 251(b) of the Telecommunications Act; AS  
22 42.05.860.  
23

24 The provisions specifically discussed above form the backbone of the  
25 Rural Coalitions proposals to modify the current regulations regarding local  
26

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1 exchange competition. Each of the specific provisions discussed should be  
2 rejected for the reasons stated. Without those provisions, the rest of the proposals  
3 of the Rural Coalition are meaningless and out of context. Accordingly, the  
4 proposals of the Rural Coalition should be rejected in their entirety.  
5

6 Conclusion

7 GCI looks forward to working with the Commission and other parties to  
8 accomplish the directives of HB 111. GCI urges the Commission to promulgate  
9 proposed rules as set forth in GCI's initial comments.  
10

11 DATED at Anchorage, Alaska this 13<sup>th</sup> day of August, 2003.

12 GENERAL COMMUNICATION, INC.

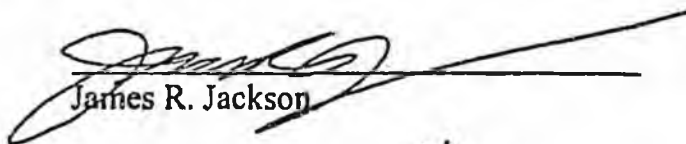
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16 Its: Regulatory Attorney

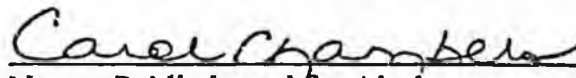
17 VERIFICATION

18 I, James R. Jackson, verify that I believe the statements contained in this  
19 pleading are true and accurate.

20   
21 James R. Jackson

22 SUBSCRIBED AND SWORN to before me this 13<sup>th</sup> day August,  
23 2003.



24   
25 Notary Public in and for Alaska  
26 My commission expires: 4-2-05

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STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners: Mark Johnson, Chair  
Kate Giard  
Dave Harbour  
James S. Strandberg  
G. Nanette Thompson

In the Matter of the Commission Review of )  
Rules and Regulations Governing )  
Telecommunications Rates, Charges Between) Docket R-03-3  
Competing Telecommunications Companies. )  
And Competition in Telecommunications. )  
\_\_\_\_\_ )

AFFIDAVIT OF GREGORY F. CHAPADOS

STATE OF TEXAS )  
 ) ss.  
COUNTY OF DALLAS )

I, Gregory F. Chapados, being duly sworn, deposes and states  
the following:

1. My name is Gregory F. Chapados. I am a Managing  
Director at Hoak Breedlove Wesneski & Co. ("HBW"), an investment  
bank based in Dallas, Texas. The views expressed herein are my own and  
not HBW's. Prior to joining HBW, I served as senior vice president –  
new business development at Crown Media, Inc., a top-20 cable multiple  
system operator with approximately one million subscribers. In the first  
Bush administration, I served as Assistant Secretary of Commerce for

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2 Communications and Administration and Administrator of the National  
3 Telecommunications and Information Administration, which is the  
4 principal advisor to the President on communications policy. Prior to  
5 joining the Commerce Department, I served as chief of staff to Senator  
6 Ted Stevens of Alaska, where I was deeply involved in federal policy  
7 issues related to the development of long distance competition in the  
8 Alaska market. I was born and raised in Fairbanks, Alaska. I received a  
9 B.A. degree in government from Harvard College and a J.D. degree from  
10 Harvard Law School.  
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12 2. The purpose of this affidavit is to provide the Regulatory  
13 Commission of Alaska ("RCA") with information on the finances and  
14 operational performance of Alaska Communications Services Group  
15 ("ACS") that is relevant in the R-03-3 proceeding. In comments filed on  
16 July 16, ACS implies that ACS faces a near-term financial crisis with  
17 portentous statements such as "competition will not survive if ILECs do  
18 not survive" and "competition turns on the financial health of the  
19 infrastructure provider." ACS goes on to assert specifically (i) that the  
20 existing Alaska UNE rates have put ACS at an "unfair competitive  
21 disadvantage" that could lead to ACS' losing "virtually 100%" of the  
22 Anchorage, Fairbanks, and Juneau local telephone markets; (ii) that  
23 "below-cost UNE rates" both hinder ILEC efforts to secure capital for  
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1 investment and discourage ILEC investment in new technology and  
2 infrastructure; and (iii) that the RCA has an obligation to "ensure the  
3 financial health and viability of regulated entities" like ACS. The  
4 following comments compare ACS' gloomy assertions to the on-the-  
5 ground reality of ACS' finances and operational performance.  
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8 3. Despite UNE competition and numerous strategic and tactical  
9 missteps by ACS, ACS' financial condition has steadily improved over the past  
10 several years. In a teleconference announcing its results for the second quarter of  
11 2003 on July 31, 2003, ACS announced the successful public offering of its  
12 directory operation, which generated \$160 million in gross proceeds to ACS.  
13 amortization (otherwise referred to in the financial community as a company's  
14 "EBITDA") ratio to 4.1x, net of cash, from a ratio of nearly 5.0x, net of cash, at the  
15 end of 2000. (EBITDA is a customary measure of the financial performance of a  
16 telecommunication company's business operations.) ACS ended the second  
17 quarter with nearly \$140 million of liquidity (cash and an undrawn \$75 credit  
18 facility). ACS' chief financial officer stated in the Using these proceeds and other  
19 resources, ACS has paid down \$112 million of its debt, a move that has reduced its  
20 total debt/trailing twelve months' earnings before interest, taxes, depreciation and  
21 teleconference that ACS' "liquidity position is excellent" and that the company  
22 presented a "strong credit profile." He also touted substantial improvements in the  
23 EBITDA margins for ACS' local telephone and wireless businesses. Since the  
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1 buyout, ACS' annual EBITDA (as disclosed by ACS in its communications with  
2 investors) has grown substantially from \$111.6 million at the end of 2000 to  
3 approximately \$129.3 million at the end of 2002. This growth in EBITDA, which  
4 reflects a substantial improvement in ACS' local telephone operational  
5 performance in response to competition, would be even higher if ACS were not  
6 funding millions of dollars of losses in poorly performing diversification ventures  
7 such as long distance and Internet services.  
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10 4. Overall, the RCA's implementation of UNE rates has  
11 encouraged local telephone competition without significantly harming  
12 ACS financially or operationally. In fact, UNE competition has led ACS  
13 to dramatically improve the efficiency of its local telephone operations.  
14 Despite its doomsday rhetoric, ACS has not presented, to date, credible  
15 evidence in any forum that it is facing a financial crisis that threatens its  
16 viability. To the contrary, ACS' 10-Q filing for the second quarter of  
17 2003 states that ACS "believes it will have sufficient working capital and  
18 available borrowing capacity under the existing revolving credit facility to  
19 service its debts and fund its operations, capital expenditures and other  
20 obligations over the next 12 months." ACS' chief executive officer and  
21 chief financial officer both certified the 10-Q filing under the Sarbanes-  
22 Oxley Act, which requires a publicly traded company's chief executive  
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officer and chief financial officer to certify the accuracy of the company's quarterly SEC filings.

5. ACS' assertion that it risks losing 100% of the retail local telephone market as a result of UNE pricing is puzzling. GCI has not competed with ACS primarily on price but rather on the basis of bundling and customer service. Its basic local telephone service rates are very close to ACS' except for Anchorage, where ACS unilaterally increased local telephone rates in November 2001 by 24%, a rate increase that GCI declined to match. Despite this massive, self-inflicted wound, ACS retains more than half the local telephone market in Anchorage.

6. The competitive battle in Alaska's local telephone market ultimately will turn more on bundling, customer service, and innovation than on simple price cutting. The RBOCs have acknowledged the importance of bundling and are aggressively using wireless service in their bundling strategies. Despite ACS' statement in its July 31 investor teleconference, that it was winning back local telephone customers with new "bundled DSL, local and long distance service products," ACS has been late to the game both in bundling and in recognizing the key role that its wireless business can play in bundling. In 2000, Goldman Sachs, in an equity research report, noted that ACS had the only statewide wireless network and projected that ACS' wireless market penetration would rise

1 from 15.7% in 1999 to 25% in 2004. As of the end of 2002, ACS'  
2 wireless penetration was only 17.2%, up only one-tenth of a percent from  
3 the previous year's penetration of 17.1% percent. There is no chance that  
4 ACS will meet Goldman's projection. ACS' failure to grow this strategic  
5 business despite its many advantages has nothing to do with the wireline  
6 regulatory regime.  
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9 7. Alaska's UNE rates have not deprived ACS of needed  
10 investment capital. ACS is, of course, correct that unless there is a  
11 prospect of a reasonable return, the capital markets will not provide  
12 capital for an investment, but that scenario is not remotely the case here.  
13 ACS' local telephone business is a valuable asset that generates  
14 substantial and reliable cash flows and has ready access to the capital  
15 markets. In fact, ACS has just announced that it is proceeding on a major  
16 new financing. In conjunction with the issuance of \$175 million in new  
17 senior unsecured notes, ACS plans to enter into a new bank credit  
18 agreement, which includes a \$200 million term loan facility and a \$50  
19 million revolving credit facility. ACS will use the proceeds from this  
20 financing to retire the \$320.7 million outstanding on its existing term  
21 loans.  
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24 8. After the new financing is complete, ACS will have  
25 increased its cash (as well as its total outstanding debt) by more than \$50  
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1 million and will have total liquidity approaching \$170 million (cash plus  
2 the new revolving credit facility of \$50 million). The question naturally  
3 arises: What is ACS going to do with all this liquidity? A possible  
4 answer is found in ACS' previously cited 10-Q filing. ACS states there  
5 that it is looking to refinance its senior secured debt facilities to support  
6 its future growth and "loosen certain restrictive covenants, including with  
7 respect to the payment of dividends." In other words, ACS may soon  
8 decide to pay dividends (potentially a massive, one-time special dividend)  
9 to its shareholders, an action that would primarily benefit ACS' private  
10 equity sponsor, Fox Paine, not ACS' customers. All in all, these are not  
11 the actions or disclosures of a company whose core business is  
12 performing so poorly that it has been frozen out of the capital markets.

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16 9. ACS has not presented any credible evidence that  
17 Alaska's UNE rates have discouraged it from investing in Alaska's  
18 communications infrastructure. Since the beginning of 2000, ACS has  
19 invested more than \$248 million in capital expenditures, including more  
20 than \$62 million in unprofitable long distance, Internet services, and  
21 wireless cable ventures. On July 31, 2003, ACS reaffirmed its intention  
22 to invest \$50 to 60 million in Alaska communications infrastructure this  
23 year. From these facts, one could easily argue that to the extent ACS is  
24 dissatisfied with its financial performance it is not due to a lack of capital  
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2 or access to capital or even an unwillingness to invest capital but is rather  
3 due to an inability to invest capital in a disciplined, return-oriented  
4 manner.

5 10. ACS' argument that the RCA has an obligation to  
6 "ensure the financial health and viability of regulated entities" raises  
7 novel questions. For example, is the RCA required to hold ACS'  
8 management, private equity sponsor, and public debt and equity holders  
9 harmless from the consequences of ACS' strategic and tactical mistakes,  
10 which include the overpriced, over-leveraged buyout that created ACS in  
11 1999 and the unilateral Anchorage rate increase in 2001 that alienated  
12 ACS' customers? If so, who is left to protect the interests of Alaska  
13 consumers? Fortunately, the facts here do not require the RCA to answer  
14 these questions. ACS has yet to provide internal financial analyses,  
15 affidavits, and other materials to prove that its financial health and  
16 viability is at risk. ACS' public equity story, like that of many other  
17 ILECs, may not be ideal, but the fact that its stock is not performing as  
18 well as ACS would like (even though the stock has appreciated more than  
19 100% from the end of March 2003) does not mean that ACS is facing any  
20 sort of crisis that endangers local telephone service in Alaska. It is simply  
21 part of the public equity market risk that ACS' management and private  
22 equity sponsor willingly undertook in the 1999 buyout.  
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