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

In the Matter of	)	
	)	
ATU Telecommunications	)	
Request for Waiver of Sections	)	CPD 98-40
69.106(b) and 69.124(b)(1)	)	
of the Commission's Rules	)	
	)	
	)	
	)	

ORDER

Adopted: October 18, 2000 **Released:** October 26, 2000

By the Commission

I. INTRODUCTION

1. On June 22, 1998, ATU Telecommunications[1] (ATU) filed a petition pursuant to section 1.3 of the Commission's rules[2] seeking a waiver of sections 69.106(b)[3] and 69.124(b)(1)[4] of the Commission's rules relating to the computation of the charge for the local switching rate element and the transport interconnection charge, respectively, in order to permit it to offer term and volume discounts for access to ATU's local switched network.[5] ATU argues that the

[1] When the waiver petition was filed, ATU was owned by the Municipality of Anchorage. It was subsequently sold to Alaska Communications Systems.

[2] 47 C.F.R. § 1.3.

[3] 47 C.F.R. § 69.106(b), which provides:

> The per minute charge described in paragraph (a) of this section shall be computed by dividing the projected annual revenue requirement for the Local Switching element, excluding any local switching support received by the carrier pursuant to section 54.301 of this chapter, by the projected annual access minutes of use for all interstate or foreign services that use local exchange switching facilities.

[4] 47 C.F.R. § 69.124(b)(1), which was replaced by new subsections (b) and (c). Subsection (b)(1) provided:

> For telephone companies not subject to price cap regulation, the interconnection charge shall be computed by subtracting entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signaling transport revenues from the part 69 transport revenue requirement, and dividing by the total interstate local switching minutes.

[5] ATU Waiver Request, CCB/CPD 98-40, (filed June 22, 1998) (ATU Petition).

competition it faces in the Anchorage exchange market is a special and unique circumstance that warrants a waiver.[6] The Municipality of Anchorage (Municipality), the Anchorage Municipal Assembly (Assembly), and the Independent Telephone and Telecommunications Alliance (ITTA), filed comments supporting ATU's petition.[7] General Communication, Inc., (GCI) filed an opposition to the waiver petition.[8] ATU and GCI filed reply comments.[9]

2. By this Order, we conditionally grant ATU's waiver petition. We conclude that, given the level of competition that exists in the Anchorage market, the public interest would be better served by the conditional grant of the requested waiver, rather than by strict adherence to the existing rules.

II. BACKGROUND

3. ATU is the incumbent local exchange carrier serving Anchorage, Alaska, a market of over 180,000 access lines, which constitute approximately one-half the access lines in Alaska.[10] ATU's parent, Alaska Communications Systems, also owns the exchange providers in Fairbanks and Juneau, as well as in some other Alaska locations. ATU is a member of the National Exchange Carrier Association (NECA) common line pool, but files its own traffic sensitive tariffs, separate from its affiliated exchange carriers.

4. GCI and AT&T Alascom provide service as competitive local exchange carriers (CLECs) in Anchorage. GCI provides service via a combination of its own facilities, unbundled network elements (UNEs), and resold ATU services. AT&T Alascom offers exchange service through resale of ATU's local services. GCI and AT&T Alascom also provide interstate and intrastate long-distance service in Alaska. ATU also has a long-distance resale affiliate. Other new entrants, including Alaska Fiber Star, L.L.C., DSL.net, and Level 3 Communications, L.L.C., have filed applications for state certifications, and the first two have initiated interconnection negotiations with ATU. In addition, GCI operates the dominant cable television system in Anchorage and holds PCS and LMDS wireless licenses in Alaska.

A. ATU Petition

5. ATU argues that the Commission should waive sections 69.106(b) and 69.124(b)(1) because the competition it faces in the Anchorage exchange market is a special and unique

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6 *Id.* at 1.

7 Comments of the Municipality of Anchorage, CCB/CPD 98-40, (filed June 13, 1998) (Municipality Comments); Comments of the Anchorage Municipal Assembly, CCB/CPD 98-40, (filed July 14, 1998) (Assembly Comments); Comments of the Independent Telephone & Telecommunications Alliance, CCB/CPD 98-40, (filed July 13, 1998) (ITTA Comments).

8 GCI's Opposition to Petition for Waiver, CCB/CPD 98-40, (filed July 13, 1998) (GCI Opposition).

9 Reply of GCI, CCB/CPD 98-40, (filed July 24, 1998) (GCI Reply); ATU's Reply to Opposition of GCI, CCB/CPD 98-40, (file July 24, 1998) (ATU Reply).

10 ATU Petition at 3.

circumstance that warrants a waiver.[11] ATU also asserts that the public interest would be served by allowing it to offer volume and term discounts, which ATU states, will ultimately lead to lower consumer prices and stimulate greater competition. ATU maintains that it must be able to offer pricing incentives, such as volume and term discounts, in order to maintain its customer base. ATU states that permitting it to offer volume and term discounts will allow it to lower prices for its access services as warranted by competitive conditions in the Anchorage market.[12]

6. ATU indicates that GCI has unrestricted, unbundled access to ninety-five percent of the physical lines in ATU's service area, and that GCI is physically collocated in all seven of ATU's wire centers.[13] ATU also states that it has implemented interim number portability to facilitate competition and GCI has been allocated specific NXX codes for assignment to its local exchange customers.[14] ATU also points to a 1998 decision by the Alaska Public Utilities Commission that granted ATU transitional pricing flexibility for the Anchorage market while the Alaska Commission completed a comprehensive review of the State's telecommunications regulations governing the competitive local exchange market.[15] ATU also cites the Alaska Commission's decision to remove restrictions previously placed on ATU and ATU's long-distance affiliate, because the Alaska Commission found that the public interest would be served by a decrease in regulation due to the level of competition in the local market.[16]

B. Comments

7. Supporting ATU's waiver petition, the Municipality, the Assembly, and ITTA generally assert that the Anchorage local exchange market is competitive.[17] ITTA asserts that the Anchorage marketplace is irreversibly competitive, given the number of competitors and their investments in independent facilities and networks, and the market-opening decisions of the Alaska Commission.[18] ITTA argues that the continued application of sections 69.106(b) and 69.124(b)(1) is unwarranted and disserves the public interest because it deprives Anchorage customers of the benefits of competition.[19]

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11 ATU Petition at 1.

12 *Id*. at 2-4.

13 *Id*. at 3.

14 *Id*.

15 *Id*. at 5-6.

16 *Id*.

17 Municipality Comments at 2; Assembly Comments at 2; ITTA Comments at 2-10. The Municipality and the Assembly also supported the Petition because of the potential impact the waiver request would have had on the value of ATU, which was being sold by the city of Anchorage at the time ATU filed its Petition. *See* Municipality Comments at 1-2 and Assembly Comments.

18 *See generally* ITTA Comments.

19 *Id*.

8. GCI asserts that ATU has impeded competition by failing to implement its obligations under the 1996 Act and obligations under an interconnection agreement signed with GCI pursuant to the 1996 Act.[20] GCI contends that the Commission should deny ATU's waiver request because ATU has failed to address the following issues: (1) lack of network trunking between ATU's and GCI's networks; (2) GCI's access to ATU's operations support systems ("OSS"); (3) non-payment for shared access; (4) non-payment for reciprocal compensation for local traffic; (5) lack of network notification; and (6) an interstate access tariff that restricts competition.[21] GCI maintains that ATU should be denied greater pricing flexibility until these issues have been fully addressed.

C. Replies

9. GCI states that competition is beginning to emerge in the Anchorage market, but argues that it is being delayed and thwarted by ATU.[22] GCI also argues that ATU could drop its access rates under the Alaska Commission's revised rules governing the NECA carrier common line pool or elect to be a price cap carrier if it really wanted to drop access rates to respond to competition.[23]

10. ATU states that GCI does not dispute the presence of facilities-based competition in the Anchorage market.[24] Finally, ATU asserts that GCI is attempting to create a section 271-type proceeding and deter greater competition through regulatory delays.[25]

11. On February 3, 2000, ATU filed an *ex parte* presentation[26] providing updated evidence of the continuing growth of competition in Anchorage based on submissions by GCI and other CLECs to the Regulatory Commission of Alaska. ATU points out that GCI went from zero access lines subscribed and in service at the start of 1997 to approximately 40,667 access lines subscribed and in service by September 1999, approximately one-half of which serve residential customers.[27] In addition, ATU notes that GCI has installed its own Class 5 switch and 122 fiber route miles to serve the Anchorage market.[28] ATU states that it also faces resale competition

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[20] GCI Opposition at 1.

[21] *Id*. at 1-2.

[22] GCI Reply at 2. GCI also argues that the potential sale value of ATU should not have a bearing on the disposition of the waiver request.

[23] *Id.*

[24] ATU Reply at 1.

[25] *Id*. at 2.

[26] Letter from Nandan M. Joshi, Esq., to Magalie Roman Salas, Secretary, FCC, dated Feb. 3, 2000 (ATU Presentation) at 3; *see also*, letter from Nandan M. Joshi, Esq., to Magalie Roman Salas, Secretary, FCC, dated Mar. 1, 2000.

[27] *Id*. at 6.

[28] *Id.* at 5.

from AT&T Alascom, which, according to ATU, provided service as of December 1998 to 10,906 residential customers. Based on this evidence, ATU asserts that the state of competition in Alaska is irreversible.[29]

III. DISCUSSION

12. Under section 1.3, "any provision of the Commission's rules may be waived by the Commission . . . or on petition if good cause therefor is shown."[30] As interpreted by the courts, this requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest."[31]

13. For the reasons discussed below, we find that ATU demonstrates good cause for us to waive sections 69.106(b) and 69.124 (b) and (c)[32] and that it would be in the public interest to grant conditionally ATU's waiver request. As a matter of clarification, we note that in its petition, ATU requested a waiver of section 69.124(b)(1). The Commission had replaced section 69.124(b)(1) with new subsections (b) and (c).[33] Therefore, because the waiver that ATU seeks is essentially designed to permit it to offer volume and term discounts on the total transport interconnection charge, we treat the ATU request as applying to subsections (b) and (c) of section 69.124.

A. Special Circumstances

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29 *Id*. at 10.

30 47 C.F.R. § 1.3.

31 *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (citing *Wait Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

32 47 C.F.R. § 69.124(b) and (c), which provide:

> (b) If the use made of the local exchange carrier's switched access network includes the local switch, but not local transport, the interconnection charge assessed pursuant to paragraph (a) of this section shall be computed by subtracting entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signaling transport revenues, as well as any interconnection charge revenues that the local exchange carrier anticipates will be reassigned to other, facilities-based rate elements in the future, from the part 69 transport revenue requirement, and dividing by the total interstate local switching minutes.
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> (c) If the use made of the local exchange carrier's switched access network includes local transport, the interconnection charge to be assessed pursuant to paragraph (a) of this section shall be computed by dividing any interconnection charge revenues that the local exchange carrier anticipates will be reassigned to other, facilities-based rate elements in the future by the total interstate local transport minutes, and adding thereto the per minute amount calculated pursuant to paragraph (b) of this section.

33 Access Charge Reform, 60 Fed. Reg. 66029-30 (Dec. 17, 1997).

14. The record before us demonstrates that the level of competition in the Anchorage market is sufficient to conclude that special circumstances exist. Since 1997, GCI and AT&T Alascom have been approved to offer local exchange and exchange access services directly in competition with ATU. According to ATU, GCI served 40,667 access lines as of September 1999;[34] while AT&T Alascom served 10,906 access lines as of December 1998.[35] This compares to approximately 141,070 access lines served by ATU as of September 1999.[36] According to ATU, of the 40,667 access lines that GCI served as of September 1999, 19,818 lines, or almost one-half of GCI's access lines, were serving residential customers.[37] Similarly, all of the 10,906 access lines served by AT&T Alascom as of December 1998 were subscribed to residential customers.[38]

15. While AT&T Alascom provides local service solely on a resale basis, GCI provides local service largely through unbundled loops that it has obtained from ATU and through the extensive network that GCI has deployed in the Anchorage area. Of GCI's 40,667 access lines in service as of September 1999, 8,652 were GCI's self-provisioned facilities, 28,773 were ATU UNEs, and 3,242 lines were served through resold services.[39] In addition, GCI has physically collocated its own facilities in all seven of ATU's wire centers, from which GCI has UNE access to 95 percent of ATU's access lines. GCI has installed a Lucent 5ESS switch for its switching function and performs its own trunking using the 122-mile fiber optic ring that it has installed in Anchorage.

16. The regulatory prohibitions on volume and term discounts for switched access services contained in the access charge rules reflect the efforts to control the market power of the incumbent local exchange carriers (LECs) in the early 1980s, when the access charge rules were initially adopted. We find that the level of competition in the Anchorage exchange market exhibited in the present record provides sufficient evidence of special circumstances to warrant further consideration of whether the public interest would be served by a waiver of the Commission's rules to allow ATU to offer volume and term discounts on its local switching and transport interconnection charges. We turn to address that question now.

B. Public Interest

17. Based on the record before us, we find that the public interest would be served by granting ATU a waiver of sections 69.106(b) and 69.124(b) and(c) to permit ATU to offer

[34] ATU Presentation at 7 (citing GCI's reports to the Alaska state commission between September 1997 and September 1999 ("GCI Access Line Reports")).

[35] *Id.* at 9 (citing AT&T Alascom's reports to the Alaska state commission between September 1997 and September 1999 ("AT&T Alascom Access Line Reports")).

[36] *Id.* at 7.

[37] *Id.* at 8 (citing GCI Access Line Reports).

[38] *Id.* at 9 (citing AT&T Alascom Access Line Reports).

[39] *Id.* at 7 (citing GCI Access Line Reports).

volume and term discounts for its local switching and transport interconnection charges, respectively. The Commission has recognized that, as competition develops in the access market, pricing flexibility would be necessary to avoid the potential adverse consequences of applying rules designed for monopolistic conditions to competitive markets. The Commission has recognized that volume and term discounts are generally legitimate means of pricing services to recognize the efficiencies associated with larger volumes and the certainty of longer-term arrangements.[40] Restricting the offering of volume and term discounts in a competitive market could create a pricing umbrella for competitors, thereby depriving customers of the benefits of more vigorous competition and potentially undermining the efficiency goals of the Commission's rules by preventing the incumbent LEC from competing effectively even if it is the low cost service provider.[41] Moreover, to the extent that strict application of the existing rules impedes ATU's ability to compete effectively, upward pressure could be created on rates for less competitive services, including those used by residential customers. The waiver should increase price competition in the Anchorage market, especially for the most competitive segments of the market.

18. In the *Pricing Flexibility Order*, the Commission permitted price cap LECs in a given Metropolitan Statistical Area to offer volume and term discounts on one day's notice[42] if a price cap LEC demonstrates that its "competitors have made irreversible, sunk investments in the facilities needed to provide the service at issue."[43] The Commission determined that a price cap LEC should be allowed Phase I pricing flexibility for, among other things, traffic-sensitive services when it demonstrates that competitors, in aggregate, offer service over their own facilities to at least 15 percent of incumbent LEC customer locations in the Metropolitan Statistical Area. The Commission also allowed price cap LECs pricing flexibility to offer volume and term discounts for dedicated transport and special access services (excluding the channel termination between the LEC end office and the end-user customer premise) if unaffiliated carriers were collocated in fifteen percent of the incumbent's wire centers in a Metropolitan Statistical Area and provided service using their own facilities or unbundled loops.[44] While the policies applicable to price cap LECs are not dispositive of issues relating to rate-of-return LECs, they do offer probative guidance.

19. If ATU were a price cap LEC, it would have met the criteria for a price cap LEC to offer volume and term discounts for local switching offerings and would not have had to file a

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40 Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5200 (1994).

41 Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7454 (1992).

42 Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14234 (1999) (*Pricing Flexibility Order*).

43 *Id*.

44 47 C.F.R. § 69.713(b). Rate-of-return LECs can offer volume and term discounts on transport services under specified conditions, 47 C.F.R. § 69.111(i) and 69.112(f).

waiver petition to be able to offer volume and term discounts for local switching. As described above, GCI is collocated in 100 percent of ATU's wire centers in Anchorage. It has extensive facilities, including a switch, in Anchorage and offers service to Anchorage customers using over 8,000 of its own access lines and over 28,000 unbundled loops obtained from ATU. GCI thus actually provides service to over fifteen percent of the Anchorage market, not just offers service to that amount of the Anchorage market. Although ATU would have met the criteria for a price cap LEC to offer volume and term discounts on local switching, there is no merit to GCI's suggestion that ATU should elect price cap regulation in order to obtain relief from the Commission's rate-of-return rules. Price cap regulation is elective for ATU and such an election is not a requirement for granting a waiver to a rate-of-return LEC.

20. With respect to ATU’s request for a waiver of section 69.124(b) and (c), the Commission has never addressed the issue of volume and term discounts for the transport interconnection charge. The local switching charge and the transport interconnection charge however, are both assessed on local switching minutes of use. Thus, both charges have a similar effect on the exchange access market. Given the level of competition demonstrated in the present record, we find that consistent treatment would serve the public interest by permitting ATU to respond to competitive developments in the Anchorage market, thereby increasing price competition. With the condition we attach to the grant of this waiver request, lower-volume customers will be protected from rate increases.

21. We conclude that it would be unlikely that ATU could drive competitors from the market by pricing its access services below cost. The level of competition that ATU faces from the presence of facilities-based carriers in the Anchorage market would preclude it from being able to recover any initial losses through higher prices in the future. Even if GCI were driven out of the market, its facilities could be acquired by a new entrant who would then be well-positioned to compete against ATU.[45] Furthermore, the level of competition in the Anchorage market makes it unlikely that ATU could lock-up the market and preclude competition from developing further. GCI is a well-established competitor that has had the freedom to offer volume and term discounts while ATU has not. Therefore, customers should benefit from the additional competition that ATU will bring to the market when it can offer volume and term discounts.

22. Because ATU is a rate-of-return regulated carrier, we conclude that we must attach a condition to the waiver. We therefore require ATU at the time it introduces volume and term discounts pursuant to this waiver, and at each subsequent annual filing it makes, to calculate a rate using the requirements of section 69.106(b) and section 69.124(b) and (c). The rate so calculated will be the ceiling rate for that nondiscounted access service offering. Without this condition, ATU, under the rules for rate-of-return LECs, could legally increase rates to access customers that did not qualify for a discount offering. This condition is similar to the requirement that price cap LECs obtaining Phase I pricing flexibility must also maintain their existing rates

[45] *Pricing Flexibility Order*, 14 FCC Rcd at 14264; *see also Incumbent LEC Regulatory Treatment Order,* 12 FCC Rcd at 15818-19 (even if a BOC interLATA affiliate could drive one of the three large IXCs from the market, that IXC's fiber-optic transmission capacity would remain intact, and another firm could buy that capacity at a distress sale and immediately undercut the affiliate's noncompetitive prices).

subject to price caps. ATU should not be adversely affected, because it states in its waiver petition that it has no incentive to raise rates in any segment of its market in order to compensate for revenues lost through volume and term discounts. We also note that section 202 of the Act applies to ATU's access service offerings, which will preclude ATU from offering preferential treatment to its long-distance affiliate.

23. We find that GCI's assertions that ATU has impeded competition in the Anchorage market by failing to implement its obligations under the 1996 Act and obligations under an interconnection agreement signed with GCI do not lead us to conclude that a denial of ATU's petition is warranted. ATU states that since GCI filed its opposition, many of the issues that GCI raised have been resolved. ATU has processed orders from GCI for two DS3 trunks in each of ATU's wire centers to connect ATU's network to GCI's fiber ring.[46] With respect to OSS, ATU has provided competitors with electronic access to customer databases and is upgrading its network to enable electronic access to ordering systems.[47] ATU generally completes orders for wholesale and enhanced services within 24 hours, and fulfills orders requiring network reconfiguration within five business days.[48] In addition, ATU and GCI have resolved their reciprocal compensation issues by entering into a "bill-and-keep" arrangement.[49] Furthermore, ATU has established procedures to ensure that network changes are publicly disclosed in accordance with the Commission's network change notification rules.[50] While ATU admits that all of the outstanding interconnection issues between ATU and GCI have not yet been fully resolved, the level of competition in the Anchorage market and the progress made on resolving the outstanding issues warrants granting ATU the pricing flexibility it seeks. Finally, we conclude that GCI's assertion that ATU's access tariffs are anticompetitive because they assess an entrance facility charge when ATU transfers access traffic to a competitor's network is unrelated to the local competition underlying the waiver request and therefore does not lead us to deny the requested waiver. If GCI wishes to pursue this issue further, it may either petition against one of ATU's tariff filings or file a complaint pursuant to section 208 of the Act.[51]

24. In conclusion, we believe that grant of the ATU petition should bring additional benefits of competition to Anchorage consumers. Accordingly, for the reasons set forth above, we find that grant of the requested waiver, subject to the condition noted herein, will serve the public interest.

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[46] ATU Presentation at 11; Bowman Affidavit at ¶ 3.

[47] Bowman Affidavit at ¶ 4.

[48] *Id*.

[49] *Id*. at ¶ 5.

[50] ATU Presentation at 8; Bowman Affidavit at ¶ 6.

[51] 47 U.S.C. § 208. Parties would be well advised to contact the Market Disputes Resolution Division of the Enforcement Bureau prior to filing a section 208 complaint.

IV. ORDERING CLAUSES

25. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i) and (j) and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j) and 201-205, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the petition for waiver of sections 106 and 124 filed by ATU Telecommunications IS GRANTED Subject to the Conditions Described herein.

26. IT IS FURTHER ORDERED, that the opposition to the waiver request filed by General Communication Incorporated IS DENIED.

27. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release in accordance with 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary