

3 AAC 52.355. SCOPE OF COMPETITION. (a) The extent to which interexchange carriers may construct facilities for use in the origination and termination of intrastate interexchange telephone service is specified as follows:

(1) All interexchange carriers are permitted to construct facilities and use those facilities in the provision of intrastate interexchange telephone service in the NNX designations set out by order of the commission in the locations of Adak, Anchorage, Barrow, Bethel, Chugiak, Cordova, Deadhorse, Delta Junction, Dillingham, Eagle River, Eielson Air Force Base, Fairbanks, Ft. Greeley, Ft. Wainwright, Glennallen, Haines, Healy, Homer, Juneau, Kenai, Ketchikan, King Salmon, Kodiak, Kotzebue, Nome, North Pole, Palmer, Petersburg, Seward, Sitka, Soldotna, Talkleetna, Unalaska, Valdez, Wasilla, Willow, and Wrangell. A location served by a remote unit from one of these locations as of 3/16/91 is also considered a part of that location and is incorporated in the NNX designations set out by order of the commission.

(2) In a location not listed in (1) of this subsection, only the incumbent carrier is permitted to construct facilities and use those facilities in the provision of intrastate interexchange telephone service.

(3) The commission will, in its discretion, amend (1) of this subsection to reclassify a location in the state based on a determination that traffic density and other relevant factors require reclassification.

(b) Retail competition in the provision of intrastate interexchange telephone service, through resale of services from another carrier authorized to provide intrastate interexchange telephone service, is permitted throughout the state, regardless of whether traffic originates or terminates in a location where the construction and use of facilities is limited to the incumbent carrier. (Eff. 3/16/91, Register 117)

Authority: AS 42.05.141(a) AS 42.05.221 AS 42.05.720(4)
AS 42.05.151(a) AS 42.05.711(d)

EXHIBIT B

1016 West Sixth Avenue, Suite 400
Anchorage, Alaska 98501
(907) 276-6222; TTY (907) 276-4533

1 1) GCI must submit a list of no more than 50 sites
2 selected for the demonstration project to the Commission by
3 January 1, 1996;

4 2) GCI may not discontinue service to any of the
5 demonstration sites where service is commenced absent Commission
6 approval;

7 3) GCI, ALASCOM, INC. d/b/a AT&T ALASCOM (AT&T
8 Alascom), and the Commission Staff (Staff) shall coordinate to
9 establish reporting requirements to be submitted to the Commission
10 during the two-year demonstration project;

11 4) GCI, AT&T Alascom, and Staff shall submit
12 recommended reporting requirements for Commission approval within
13 30 days of the date of this Order;

14 5) If the discontinuance of service to any site is
15 approved by the Commission, GCI shall either redeploy the
16 equipment utilized in providing such service to another site or
17 obtain the maximum salvage value of said equipment;

18 6) GCI may be held financially responsible by the
19 Commission for all reasonable and necessary costs incurred by
20 local exchange companies to interconnect with GCI's equipment that
21 are not recoverable through access charge revenues;

22 7) the costs of the demonstration project shall be
23 borne exclusively by GCI, and any risk associated with the
24 demonstration project shall be borne by GCI shareholders; and
25
26

1 8) GCI must notify all potential customers served by
2 this demonstration project of the conditional nature of the Com-
3 mission's approval in a notice approved by Staff.

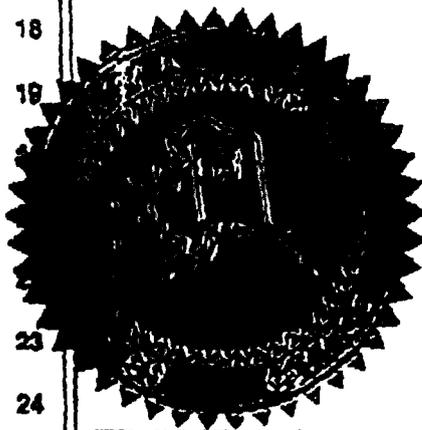
4 Further details explaining the Commission's overall
5 decision and rationale in this matter will be addressed in a
6 subsequent substantive order in Docket U-95-38.¹

7 ORDER

8 THE COMMISSION FURTHER ORDERS, That, the application of
9 General Communication, Inc., for a waiver of 3 AAC 52.355(a) and
10 approval of a 50-site demonstration project is granted, subject
11 to the conditions identified in this Order.

12
13 DATED AND EFFECTIVE at Anchorage, Alaska, this 9th day of Novem-
14 ber, 1995.

15 BY DIRECTION OF THE COMMISSION
16 (Commissioner Dwight D. Orngquist
17 concurring in result, separate statement to follow;
18 Commissioner James E. Carter, Sr., dissenting,
19 with separate statement to follow,
20 nunc pro tunc, with substantive order.)



21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

¹Given other regulatory business, the Commission was unable to complete its detailed substantive order prior to the retirement of Commissioner James E. Carter, Sr., on November 10, 1995.

EXHIBIT C

MEMORANDUM

August 22, 1997

To: Chairman Cotten
Commissioner Hanley
Commissioner Ornquist
Commissioner Cook
Commissioner Posey

From: Lori Kenyon, ^{JK}Common Carrier Specialist

Re: R-97-1 GCI Request Re: 3 AAC 52.355
Restrictions on Construction

Recommendation

Staff recommends that the Commission conclude that 3 AAC 52.355 is unenforceable as it is preempted by the Telecommunications Act of 1996 (the Act). The Commission should investigate repeal of 3 AAC 52.355.

I. Background

On February 10, 1997, General Communication, Inc. (GCI) filed a petition requesting a declaratory ruling that 3 AAC 52.355 was invalid and will not be enforced as it is contrary to the Telecommunications Act of 1996 (the Act). Section 3 AAC 52.355 prevents interexchange carriers other than Alascom, Inc. d/b/a AT&T Alascom (Alascom) from constructing facilities in many rural areas of the State. Section 253 of the Act states in part that "No State ... may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." GCI interprets Section 253 as invalidating 3 AAC 52.355. Others commenting on this matter oppose GCI's position.

As an alternative or supplement to the requested declaratory ruling, GCI seeks waiver of 3 AAC 52.355 for all carriers. GCI does not seek repeal of 3 AAC 52.355 at this time as repeal would directly affect several other existing rules or tariffs.

On March 21, 1997, the Commission released a public notice seeking comments and legal briefs on the issue raised by GCI. To date the following entities have filed comments, reply comments, and/or supplemental filings in this docket:

Alascom, Inc. d/b/a AT&T Alascom (Alascom)
Alaska Telephone Association (ATA)
ATU-Long Distance, Inc. (ATU-LD)
GCI
TelAlaska, Inc. (TelAlaska)
United Utilities, Inc. (UUI)

Main Position of the Commentors:

GCI: 3 AAC 52.355 is invalid under Section 253(a) and (b) of the Act. This matter is a legal issue and not a policy issue. Criticisms of GCI's operations and engineering practices are irrelevant to the legal issue of whether all carrier should be prohibited from constructing in rural areas.

ATA, TelAlaska, UUI: 3 AAC 52.355 is in the public interest and may be preserved under Section 253(b) of the Act. Policy issues must be evaluated when reviewing GCI's request. GCI's operations and practices raise public interest issues. Alascom's wholesale tariff is inadequate.

Alascom: Does not object to eliminating 3 AAC 52.355 if its obligations as a carrier of last resort and as the dominant carrier are shared with its competitors. Existing regulations and policies may require revision if 3 AAC 52.355 is eliminated.

ATU-LD: Does not object to eliminating 3 AAC 52.355 provided certain side issues are addressed including the ability of Alascom and GCI satellite networks to "talk" to one another.

A detailed summary of the position of each entity is provided as Attachment A.

II. Discussion

Section 253(a) of the Act prevents the Commission from setting barriers to a carrier's ability to provide telecommunications services:

Section 253(a): No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Section 253(b) of the Act provides exceptions to 253(a) stating that:

Section 253(b): Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(emphasis added).

Under Section 253(d) of the Act, the Federal Communications Commission may preempt the enforcement of any state regulation that violates Sections 253(a) or (b):

Section 253(d): If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Staff Analysis

Staff concludes that 3 AAC 52.355 violates Section 253(a) of the Act as the state regulation prevents carriers from offering facilities based services to customers in most rural areas of Alaska. For example, the state regulation effectively prohibits carriers from offering carrier's carrier services (i.e., wholesale services) or services requiring special features or functions not available through Alascom. A literal reading of Section 253(a) would therefore appear to prohibit 3 AAC 52.355 unless the state regulation is found as an allowable exception under 253(b).

Staff's review indicates that 3 AAC 52.355 is not competitively neutral (a requirement of 253(b)) as only Alascom may build facilities while all other carriers' services are restricted to resale in select areas of the state. The state regulation would therefore not be an allowable exception under 253(b). Given the above, Staff concludes that 3 AAC 52.355 is preempted by the Act and should not be enforced.

Whether public interest reasons exist for preserving 3 AAC 52.355 is irrelevant to the legal issue. In any event allegations concerning GCI's operations and Alascom's wholesale services are not directly relevant to the issue of whether all nondominant carriers should be prevented from building facilities in select rural areas. If problems specific to a carrier exist as claimed by the commentors, then preserving 3 AAC 52.355 would not appear to remedy the situation. It would be better to address such problems directly.

As a last point, this recommendation does not address the policy issues which were the basis for creation of 3 AAC 52.355 (e.g., prevention of uneconomic duplication of facilities, universal service concerns). If 3 AAC 52.355 is eliminated, the Commission may wish to review whether it is necessary to a) adjust or create other regulations to accommodate the loss of 3 AAC 52.355 or b) seek preservation (or repeal) of the existing federal rules similar to 3 AAC 52.355 that prohibit construction in rural areas of Alaska.

In conclusion, Staff recommends that the Commission issue a declaratory ruling that 3 AAC

52.355 has been preempted by the Act and does not intend to enforce the regulation. The Commission should then investigate how best to repeal 3 AAC 52.355.

Federal Requirements

The Federal Communications Commission (FCC) has restrictions similar to those of 3 AAC 52.355 and limits construction of duplicate satellite earth station facilities in most areas of rural Alaska. If 3 AAC 52.355 is found invalid, the market may observe little change as a result of the FCC's continuing restriction.

Miscellaneous Issues

Staff recommends that the Commission grant the various motions of commentors to accept late filings. (See Attachment A for details regarding these motions).

Summary of Filings**Attachment A*****1) GCI Initial Brief (May 1, 1997)***

On May 1, 1997, GCI filed its initial brief in support of its position. GCI cited the FCC's First Report and Order in CC Docket No. 96-98, released 8/8/96, which states:

The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote the efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the price and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies to open their networks from competition, the 1996 Act requires telephone companies to open their networks to competition.

GCI reiterated that 3 AAC 52.533 is preempted by 47 USC §253(a) of the Act. GCI claimed that one of the principle goals of the Act was to promote increased competition in all telecommunication markets. GCI also stated that under one federal decision, it was concluded that Section 253(a) proscribed "State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality".¹ The FCC struck down the decisions of two cities that denied a franchise to an entity proposing to provide local exchange service. The cities contended in part that duplicate facilities were uneconomical.

GCI cited another example where the FCC rejected a decision by the Connecticut Dept. of Public Utility Control (CDPUC) where CDPUC prohibited all entities other than local exchange carriers from providing pay telephone service as it was not competitively neutral.²

GCI argued that while the Act permitted States to impose requirements to protect universal service, public safety and welfare, continued quality of services, and safeguard of the rights of consumers, any such restrictions must be competitively neutral. GCI contended that the

¹GCI reference: Classic Telephone, Inc., Memorandum Opinion and Order, Docket No. CCBPOL 96-10 (October 1, 1996), p. 14.

²GCI reference: New England Public Communications Council, Memorandum Opinion and Order, Docket CCBPol 96-11 (December 6, 1996).

restriction in 3 AAC 52.355 was not competitively neutral. GCI further contended that the Supreme Court had explained that the Constitution provided Congress with the power to preempt state law. Under Section 253(d) Congress gave the FCC authority to preempt state laws that were contrary to 253(a).

2) Other Comments - (March 1 to May 1, 1997)

Alascom Comments

On March 11, 1997, Alascom filed comments on this matter stating that nothing in the Act invalidated Alaska's limited prohibition on facilities-based competition and that the issue raised by GCI should be carefully considered as it impacted universal service, access charges, local markets, the deployment of new technology, and carrier of last resort policy. "[I]t would be fundamentally unfair as well as intellectually inconsistent to embrace competitive, facilities-based entry on one hand yet force AT&T Alascom to serve on the other."³ Alascom stated that the issue should be addressed through a rulemaking proceeding under AS.05.151 and not as a waiver of regulations.

On May 1, 1997, Alascom filed supplemental comments on this matter, raising additional policy issues including: a) if the facilities ban is lifted, what will be the fairest method to ensure service to low-density, high-cost areas by competing carriers? b) Should the obligation to serve be "allocated"? If so, how? c) Should the Commission restrict market exit? d) How should the Commission and Legislature make competitive entry more attractive in low-density, high cost areas? What new subsidies are needed and how should they be administered? (Alascom cited options on this point.) d) To what extent should local rates increase to cover high costs of serving some area (such as Chisana or McCarthy) "where uneconomic, high-cost service is being extended by means of heavy access charge and USF subsidization?"⁴

Alascom asserted that it would not be fair for it alone to serve as the carrier of last resort if the facilities restriction was lifted as strain from margins reduced by competition would be felt by Alascom's customers. Alascom supported GCI's request so long as simultaneously Alascom's obligation as the dominant carrier and carrier of last resort under 3 AAC 52.390(c) were appropriately modified and "shared" with its competitors. Alascom argued that it would be unfair and anticompetitive to lift the facilities restriction without a concomitant reevaluation of what it meant to be dominant and to be the carrier of last resort in a competitive marketplace.

³Alascom comments of 3/11/97 at 2.

⁴Alascom 5/1/97 comments at 3.

ATA Comments

On April 25, 1997, the Alaska Telephone Association (ATA) filed comments opposing GCI's request stating that it was contrary to the public safety and welfare, and not mandated by the Act. ATA also requested the Commission suspend or terminate the GCI demonstration project, and investigate GCI's construction and reporting practices.

ATA contended that GCI had engineering and operational problems with its sites, such as fires explosions. ATA questioned whether the explosions were an indirect result of reduction in GCI operation costs through cross-training employees. GCI was accused of disregarding public safety "both in the design of its facilities, and its attempt to cover up the danger."⁵

ATA argued that GCI had selectively referenced Section 253(a) of the Act in support of its position, but ignored Section 253(b) which states:

Nothing (emphasis added) in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

ATA in part argued that a) universal service and reasonably affordable rates may be at risk to the extent that duplicating facilities in rural locations leads to higher costs and higher rates; b) GCI's planned network involved unproven technologies; c) "It would be imprudent to undermine ...universal service without an equally well-grounded assessment of the economic and operational results of facilities-based competition in those segments of the market where it will be allowed under the regulations".⁶ ATA also referenced a past Commission order concluding that facilities based competition was not in the public interest.

ATA argued that GCI did not intend to pay local carriers the costs to interconnect its system with their networks as required under U-95-38(9). ATA stated that as of December 31, 1996, GCI's project was 60% over budget while only 34 of the 56 sites were in service.⁷ A further waiver of 3 AAC 52.355 must consider the probable effects of the cost over-runs.

ATA raised issues that Alascom's wholesale tariff was not updated to reflect its use of DAMA technology and was not unbundled. "Potential competitors cannot compare the economic

⁵ATA 4/25/97 comments at 8.

⁶ATA 4/25/97 comments at 3-4, quoting "10 APUC, 1.3 AAC 52.355, pages 410-413."

⁷ATA states that the original projected capital costs were \$12.3M and that as of 12/31/96, GCI had spent \$19.6M.

feasibility of installing duplicative facilities with providing service through Alascom's facilities unless Alascom unbundles its network and services."⁸ When the Commission resolves the wholesale issue and potential competitors can evaluate the economics of resale versus facilities based services, then ATA believed an informed decisions on duplicative facilities could be made.

Exhibit A: Affidavit of James Rowe's visit to Shungnak.

ATU-LD Comments

On March 14, 1997, ATU-Long Distance, Inc. (ATU-LD) filed comments stating that while it neither endorsed nor opposed the legal arguments presented by GCI, the Commission should a) take the necessary steps to ensure that state and federal policies that limit build out in rural areas are properly aligned, b) approve GCI's request only once GCI and Alascom have come forward with plans to achieve interoperability of their respective satellite networks or persuaded the Commission that such a requirement is not in the public interest, and c) clarify whether it was the Commission's intent to limit overlap of Demand Assigned Multiple Access (DAMA) systems on a village-by-village basis.⁹ ATU-LD does not believe that the Commission should constrain competitors from freely locating their facilities.

ATU-LD noted that Alascom's and GCI's respective DAMA systems will not "talk" to each other as they are from different vendors. ATU-LD argued that the above incompatibility issue was raised when the Commission evaluated GCI's 50 Site demonstration project and that lifting the facilities limitation will effectively short circuit the demonstration objectives. "Clearly, the existence of wholesale services based on the deployment of technically incompatible networks will result in a perpetuation of double hop calling and a low quality of service for ATU-LD's rural retail customers".¹⁰ ATU-LD argued that even if both GCI and Alascom had statewide networks, resellers would be forced to choose between one or the other to avoid incurring double hop connections.

Comments of TelAlaska

On May 1, 1997, TelAlaska filed comments that for the most part mirrored those of ATA, in regards to GCI's demonstration project, the explosions, public safety concerns, cost overrun

⁸ATA 4/25/97 comments at 6.

⁹ATU-LD referenced U-95-38(10), page 18, lines 4-8, where it states: "As a matter of policy, the Commission has determined that it makes sense for a greater number of locations to have access to the DAMA technology (through services by either GCI or Alascom) than to have competing DAMA projects in the same communities."

¹⁰ATU-LD 3/13/97 comments at 5.

concerns, and local carrier cost recovery. TelAlaska included additional assertions regarding the GCI explosions and concern for public safety. TelAlaska stated that public safety problems with GCI facilities gives the Commission the right to prevent GCI from operating in the Bush. TelAlaska also claimed GCI's had a pending rate increase which indicated that the DAMA project was increasing intrastate toll rates.

TelAlaska stated that GCI's petition was premature and was based on a misreading of the Act. TelAlaska cited section 253(b) of the Act as allowing the Commission to regulate competitive entry in order to preserve universal service; reduce costs; maintain the incumbent facility based carrier's incentive to maintain or upgrade its facilities; promote public welfare and safety; promote quality service; and safeguard consumer rights. TelAlaska made a distinction from GCI's "ability to provide service" and its ability to construct facilities. TelAlaska also argued that the Commission had the right to prohibit construction of duplicate facilities under AS 42.05.810(c)

TelAlaska claimed that Alascom's wholesale rates were above retail rates and artificially high, and therefore conditions were not competitively neutral, and GCI had incentives to build duplicate, uneconomic facilities. "[C]ompetitive neutrality can be created by causing AT&T Alascom to price wholesale services at a discount from retail rates....This would bring Alaska into full compliance with the Act without the construction of uneconomic facilities."¹¹

TelAlaska requested the Commission to a) launch an independent investigation to determine whether all DAMA sites were safe and in compliance with state and federal safety laws, b) consider expanding the reporting requirements of GCI, and c) not allow expansion of the GCI project until the Commission had evaluated impacts (e.g., cost overruns).

Comments on United Utilities, Inc.

On May 1, 1997, United Utilities, Inc. (UUI) filed comments opposing GCI's petition stating that the petition cannot be granted as the Commission had not addressed the public interest issue involving GCI's DAMA facilities in rural Alaska. UUI argued that GCI's demonstration project was "incomplete"; had endangered public safety; and would likely experience significant cost overruns. UUI also asserted that GCI did not have safe or satisfactory back up power thus lessening quality of service, and GCI was involved in interconnection disputes with ASTAC and TelAlaska. Given the above, UUI argued the Commission to follow through on its own plans to obtain information and evaluate GCI's project. Section 253(b) of the Act requires the Commission to evaluate public interest issues.

UUI argued that the Commission must also remove barriers to entry related to Alascom's facilities and sale of services (U-96-31 and U-96-81), raising most of the same issues as ATA.

¹¹TelAlaska comments at 10.

UUI argued that GCI failed to address the Commission's authority under Section 253(b) to control duplication of facilities. UUI quoted the Commission concerning issues raised by GCI's demonstration project. UUI cited many of the issues raised by ATA regarding GCI's project and adds that GCI was designing and implementing an interim solution to the problem of its earth stations exploding. UUI stated that the Commission needs to investigate GCI's project and issue a report that addressed the public interest issues.

3) GCI Reply (May 19, 1997)

On May 19, 1997, GCI filed reply comments stating that its request raised a question of law and not of policy at the state level. Policy had already been established by Congress as expressed in the Act. Policy issues raised by the commentators in this matter did not affect the legal issue presented. GCI stated that it was not a matter of whether GCI may install facilities in rural Alaska, but a question of whether any fit, willing, and able interexchange carrier would be allowed to construct such facilities.

GCI stated that only three legal arguments were presented on this matter:

1) Section 253(b) Arguments: ATA, UUI and TelAlaska contend that 3 AAC 52.355 was allowed by section 253(b). GCI contends that as 3 AAC 52.355 was an outright prohibition on any carrier except Alascom to build interexchange facilities, it was not competitively neutral and therefore not allowed under section 253(b).

2) Resale Arguments: Others argue the restriction was valid because it allows other carriers to resell the services of Alascom. GCI stated that the ability to resell does not cure the prohibition on the ability to construct. The Act preserved the "ability of any entity to provide any interstate or intrastate telecommunications service." GCI argued that if a carrier can only resell Alascom's services, it was not providing the service itself, only passing along the service provided by Alascom. Furthermore, the carrier was limited to providing those services available from Alascom. GCI argued the Act protected other carriers' ability to provide "any" telecommunication service, not simply the services already provided by Alascom. GCI cited examples of where it believed Alascom facilities could not provide a customer's need. In any event, GCI claimed UUI and TelAlaska contradict their arguments by also claiming that carriers cannot successfully resell Alascom services.

3) AS 42.05.810(c): TelAlaska argued that the Commission had the right to prohibit construction of duplicate facilities under AS 42.05.810(c). GCI contends that this argument ignores the Telecommunications Act and requirements that state law conform to the Act.

GCI also responded to policy arguments. GCI confirmed that the FCC had a restriction similar to 3 AAC 52.355, but believed that the restriction was no reason for Commission to defer action. Addressing the issue at the Commission level prior to a decision at the FCC was consistent with past Commission action taken in Docket U-95-38.

GCI contended that the safety issue (which it claimed was an inaccurate attack by ATA, TelAlaska, and UUI) was not relevant to the legal issue, though the Commission has authority to adopt rules that ensure public safety. GCI argued that the restriction prohibits all facilities, regardless of how safe, no matter who wishes to install them, and therefore is contrary to the Act.

GCI stated that it was impossible to interconnect the Alascom and GCI systems as proposed by ATU-LD. "Even if GCI and Alascom were installing the exact same DAMA equipment from the same manufacturer, the system would not be interoperable unless GCI and Alascom were both using the same satellite."¹² GCI also argued that dual systems provided redundant satellite capacity, which would be beneficial if either satellite experienced problems.

In response to ATU-LD's request for clarification, GCI claimed Order U-95-38(9) at p. 32 stated that the Commission determined not to restrict the locations in which Alascom can install DAMA facilities.

GCI asserted if the restriction was eliminated, then GCI would not be required to provide advance notice of where it would build, and there was less likelihood that Alascom would pre-build in the same location ("copy cat strategy").

It was argued that Alascom's policy issues were irrelevant to the legal issue and that it would be better to address the policy issues once the underlying market structure issue was addressed.

GCI clarified that its alternative request for waiver of 3 AAC 52.355 would be for the entire industry and not GCI.

In response to TelAlaska, ATA, and UUI comments, GCI asserted that a) historically Alascom had upgraded its facilities when GCI entered a new community, Alascom's upgrade was focussed on the 56 sites where GCI installed DAMA, b) competition had lead to reduced toll rates, c) most of the allegations regarding the GCI DAMA system were false, d) GCI had acknowledged that the explosion in Shungnak was very serious, e) There was only one explosion at Nondalton, f) There was never a fire at Shishmaref, g) GCI's DAMA project was not 60% over budget and commentor's analysis of GCI cost overruns amounted to an apples and oranges comparison, h) GCI's installations were virtually 100% complete, with some sites not on line due to interconnection issues with the LECs, and i) GCI installations would soon have back up safety systems that go beyond any code requirements.

¹²GCI Reply, 5/19/97, at 8.

4) Other Reply Comments (May 19, 1997 to May 29, 1997)

Alascom Reply

On May 19, 1997, Alascom filed reply comments on this matter. Alascom stated that 3 AAC 52.355 was part of a basic package of regulations (3 AAC 52.350-.399) and that if 3 AAC 52.355 was changed, then the remaining parts must also be re-examined. Alascom had no objection to removing the facilities restriction, provided it was done in concert with other regulatory changes to be competitively neutral and with appropriate support for the Bush.

Alascom addressed comments of UUI that Alascom tariffs had created an entry barrier, by stating that the issue should be addressed in Dockets U-96-31 and U-96-81, and not in R-97-1. Alascom stated that GCI, King Salmon Communications, Inc. and ATU-LD had entered the statewide market using Alascom's tariff.

TelAlaska Reply & Motion to accept late filing

TelAlaska requests the Commission accept its late reply of May 29, 1997, in response to GCI.

In its May 29th filing, TelAlaska asserted that GCI did not properly warn all affected villages of the potential for explosions at its sites. Any mistakes by TelAlaska regarding GCI being over budget were based on Mr. Duncan's testimony. TelAlaska stated that GCI filed a tariff request to increase its "Great Rate" program from \$.18 to \$.28 per minute. It was also asserted that GCI was raising the first minute rate in some bands to \$.59.

5) Supplemental and Miscellaneous Filings (June 1, 1997 and later)

Supplemental Comments of ATU-LD

On June 9, 1997, ATU-LD filed supplemental comments in which it stated that even if the Commission elected to consider this case on the very narrow legal issues which GCI urged, there were still substantial policy considerations which must be addressed. ATU-LD claimed one issue was the lack of interoperability between Alascom and GCI DAMA systems. ATU-LD asserted that Alascom and GCI both supported interoperability as an issue to be addressed at some time (See Docket U-94-113).

ATU-LD stated that its issue regarding statements made by the Commission in Order U-95-38(10) regarding overlapping DAMA sites were not addressed by inconsistent statements found in U-95-38(9). The Commission should reconcile the two orders.

Supplemental Comments of ATA & Request to accept late filing

ATA requests that the Commission accept its June 11, 1997, reply comment to GCI's Reply of

May 19, 1997. ATA stated that regardless of GCI's statements, public safety was clearly a part of Section 253(b) and the Commission had a duty to address the issue.

GCI Opposition to TelAlaska Motion to accept late filing

On June 9, 1997, GCI filed opposition to TelAlaska's motion to accept late reply comments as TelAlaska had not demonstrated any justification for an exception to the established schedule and TelAlaska's comments did not add any accurate information to the record.

GCI Motion to Strike ATU-LD Supplemental Comments and GCI Opposition to ATA Motion

On June 18, 1997, GCI filed its opposition to the ATU-LD and ATA filings, arguing that the filings were late, repetitive, and irrelevant.

ATU-LD Opposition to Motion to Strike

On June 25, 1997, ATU-LD filed its opposition to GCI's motion to strike ATU-LD Supplemental Comments. ATU-LD stated that this was a rulemaking proceeding and as such, the technical rules normally associated with an adjudicatory docket did not apply. If the Commission grants GCI's motion to strike, then ATU-LD requests that its filing be construed as a Petition to Open a Docket of Investigation.

EXHIBIT D

State of Alaska
Department of Law

DATE: August 22, 1997

FILE NO.:

TEL. NO.: 269-5206

SUBJECT: Subject: R-97-1
GCI Request for a Declaratory
Ruling on 3 AAC 52.355

FROM: Ron Zobel 
Assistant Attorney General
Fair Business Practices Section-Anchorage

I have reviewed the memorandum (dated 8/22/97) from Lori Kenyon on GCI's request for a declaration that 3 AAC 52.355 is preempted by Section 253 of the federal Communications Act, as amended by the Telecommunications Act of 1996, 47 USC Sec. 253.

I concur in the conclusion reached by her and advanced by GCI that the Act preempts the prohibition on facilities based competition in the areas designated in the regulation. There is very little that needs to be added to her analysis. Section 253(a) states very clearly that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The "[n]o State...statute or regulation...or other legal requirement" language would obviously apply to this regulation. Prohibiting anyone other than "the incumbent carrier...to construct facilities and use those facilities in the provision of intrastate interexchange telephone service" (3 AAC 52.355) would appear to be precisely the kind of regulation the statute is intended to preempt. Implied preemption issues are sometimes difficult but in a case of explicit preemption, as considered here, there is little room for argument as to what subsection (a) means.

The argument that has been made that section 253(b) qualifies this prohibition, as applied to 3 AAC 52.355, ignores the condition that any of the purposes listed in section 253(b) (universal service, public safety, quality of service, consumer rights) must be accomplished on a "competitively neutral basis." The regulation on its face allows one carrier to construct facilities and use them and therefore the regulation cannot be saved

by section 253(b). Furthermore, if section 253(b) were to be interpreted to save this regulation, the exception will have swallowed the rule of section 253(a). We must presume that Congress did not intend to establish a rule in one subsection and virtually repeal it in the next.

The more difficult legal question is how the Commission should proceed if it agrees that its regulation is invalid.

A "waiver" procedure, or more correctly, an exemption under AS 42.05.711(d) does not appear to be the appropriate method in this circumstance for two reasons. First, that section requires a finding that the regulation is not in the public interest. This implies a fact finding process where evidence would show that a "class of utilities" or "utilities" should be exempted because it is not in the public interest. Second, an exemption implies that the regulation still applies to someone and that an exception needs to be made. In this instance, the "exemption" would be a repeal of the regulation. This would be a repeal not in accord with the Administrative Procedure Act (APA), AS 44.62, and in particular the provisions in Article 4 (AS 44.62.180-290) of the act containing the procedure for "adoption, amendment, or repeal of a regulation...", e.g. AS 44.62.400 (contents of notice). The Public Utilities Commission Act states the APA "applies to regulations adopted by the commission." AS 42.05.161.

Under the general powers of the Commission, it appears appropriate for the Commission to recognize that the regulation is preempted by federal law and that any attempt to enforce it would be met by a successful defense. AS 42.05.161 qualifies the Commission's power to adopt regulations with the phrase "not inconsistent with the law..." This includes federal law. For these reasons if the Commission agrees with staff and this memorandum that the regulation is invalid, it should issue an order declaring the regulation invalid, state that the Commission does not intend to enforce it, and initiate a regulations docket to repeal 3 AAC 52.355 and cross references to it. Any unforeseen difficulties that would be caused by the repeal could be considered in that docket.

RZ:mgh

EXHIBIT E

[Pages Pertaining to Bush Earth Station Prohibition Only]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF ALASKA

THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners:

Sam Cotten, Chairman
Alyce A. Hanley
Dwight D. Ornquist
Tim Cook
James M. Posey

ALASKA PUBLIC UTILITIES COMMISSION
1016 WEST SIXTH AVENUE, SUITE 305
ANCHORAGE, ALASKA 99501

PUBLIC MEETING

August 27, 1997
9:00 o'clock a.m.

R & R COURT REPORTERS

810 N STREET
277-0572/Fax 274-8982

1007 WEST THIRD AVENUE
272-7515

ANCHORAGE, ALASKA 99501

