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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
General Communication, Inc.	)	CC Docket No. 98-4
	)	
Petition for Preemption	)	
Pursuant to Section 253 of	)	
the Communications Act of 1934	)	

To: The Commission

REPLY COMMENTS

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SUMMARY

General Communication, Inc. ("GCI") urges the Commission to preempt the enforcement of Section 52.355 of Title 3 of the Alaska Administrative Code to the extent that the regulation prohibits non-incumbent carriers from constructing and operating facilities to provide intrastate long distance services in certain locations in the State of Alaska. Section 52.355 provides that facilities-based long distance competition in Alaska is permitted only in the geographic areas specified in the regulation, and that the incumbent provider — now AT&T Alascom — holds a monopoly on facilities-based long distance service in all other locations. As GCI demonstrated in its Petition, the regulation is inconsistent with the terms of Section 253(a) of the Communications Act and it is not saved by Section 253(b). For these reasons, the Commission must preempt the enforcement of Section 52.355 pursuant to Section 253(d).

Seven parties filed comments on GCI's Petition, with AT&T Corp. and MCI Telecommunications Corporation agreeing that the Alaska regulation cannot be sustained under Section 253. The other commenters generally defend Section 52.355. For example, two of the parties who oppose GCI's Petition argue that Section 52.355 is not inconsistent with Section 253(a) on the theory that it is not a complete prohibition on facilities construction, but rather is a "presumption against" the entrance of facilities-based competitors. In fact, however, Section 52.355 "prohibits" the ability of new entrants to provide facilities-based

competitive intraexchange service in specific Alaska locations until the Alaska Public Utilities Commission ("APUC") formally amends the regulation to provide otherwise. The regulation also "has the affect of prohibiting" competitive entry because, unlike the incumbent carrier, non-incumbent providers must petition the APUC to redesignate a location as suitable for competition before they may enter the market. Plainly, this is not a fair and balanced legal and regulatory environment.

Moreover, none of the commenters opposing GCI's Petition demonstrate that Section 52.355 is saved under Section 253(b) of the Communications Act. The regulation makes a clear distinction between the rights of the incumbent intrastate long distance provider and new entrants such as GCI, requiring new entrants to succeed in having the APUC amend Section 52.355 before they may build their own facilities. AT&T Alascom faces no such requirement. In addition, though Section 52.355 permits new entrants to resell the incumbent's service, forcing new entrants to rely on the incumbent and its facilities limits their ability to distinguish themselves on the basis of service or price. This is not competitively neutral.

The Alaska regulation also is not necessary to achieve the public interest goals stated in Section 253(b). Specifically, though certain of the commenters complain at length that competition in the Alaska bush will mean higher rates for rural customers, Alaska and federal law require interexchange rates to be geographically averaged so that rural customers do not pay

more than urban customers. There is also no reason why the APUC cannot develop balanced rules to address universal service or public safety in the Alaska bush. A ban on competitive facilities is hardly necessary to accomplish these goals.

Other commenters point to the existence of the Commission's own bush earth station policy in support of Section 52.355, arguing that the decisions underlying the federal policy must sustain the Alaska regulation as well. Yet, Section 253 clearly outlaws state or local statutes or regulations that violate its terms and directs the Commission to preempt the enforcement of any such provision. Section 253 makes no exception for state regulations with federal analogues, nor does it give the Commission any discretion with regard to state regulations that are inconsistent with its terms.

Finally, it is clear that immediate preemption is warranted in this case. Section 52.355 is not competitively neutral, so the APUC's ongoing study of the effects of competition does not bear on the continued validity of the regulation under federal law. Though the APUC has a plain record on which to declare Section 52.355 to be unenforceable, it is clear that the agency will not act soon to remove the prohibited regulation. More than two years have passed since the Telecommunications Act of 1996 became law, and there is no reason to continue to delay the implementation of its provisions in Alaska. Thus, GCI urges the Commission to declare Section 52.355 to be unenforceable pursuant to Section 253(d).

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REPLY COMMENTS

General Communication, Inc. ("GCI"), by its attorneys, submits these Reply Comments in response to the Commission's Public Notice in the captioned proceeding.[1]

I. INTRODUCTION

On January 21, 1998, GCI filed a Petition for Preemption pursuant to Section 253 of the Communications Act of 1934[2] urging the Commission to preempt the enforcement of Section 52.355 of Title 3 of the Alaska Administrative Code[3] to the extent that the regulation prohibits non-incumbent carriers from constructing and operating facilities to provide intrastate long distance services in certain locations in the State of Alaska. Section 52.355 provides that facilities-based long distance competition in Alaska is permitted only in the geographic areas specified in the

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[1] DA 98-140 (rel. Jan. 28, 1998).

[2] 47 U.S.C. § 253.

[3] 3 AAC § 52.355.

regulation, and that the incumbent provider — now AT&T Alascom[4] — holds a monopoly on facilities-based long distance service in all other locations. Unless and until the APUC chooses to "reclassify a location in the state based on a determination that traffic density and other relevant factors require reclassification,"[5] only the "incumbent carrier is permitted to construct facilities and use those facilities"[6] to provide service in that location.

In its Petition, GCI demonstrated that Section 52.355 is inconsistent with the terms of Section 253(a) of the Communications Act. On its face, subsection 52.355(a)(2) prohibits a broad class of entities from providing intrastate interexchange telecommunications service in areas where AT&T Alascom has exclusive State authorization to provide service, thereby preserving the very intrastate service monopoly that Section 253 was meant to eradicate. GCI also demonstrated that Section 52.355 is not saved under Section 253(b). Section 253(b) maintains the authority of States to impose requirements 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, provided that the requirements imposed are (1) "competitively neutral" and (2)

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[4] As noted below, AT&T Corp. ("AT&T") filed comments here in support of GCI's Petition for Preemption.

[5] 3 AAC § 52.355(a)(3).

[6] Id., § 52.355(a)(2).

"necessary" to accomplish those goals.[7] Section 52.355 satisfies neither requirement, and it is not safeguarded from preemption under federal law.

Despite this patent conflict with the requirements of Section 253, however, the Alaska Public Utilities Commission ("APUC") has permitted Section 52.355 to remain in effect. GCI first asked the APUC to declare the regulation unenforceable in September, 1996, but the APUC did not respond. Accordingly, GCI formally petitioned the APUC to nullify Section 52.355 in February, 1997, and the APUC decided in August, 1997, to postpone further consideration of repealing the regulation while it studied the policy implications of competition in the affected locations. Then, in December, 1997, the APUC once again declined to act on Section 52.355 until it had determined that competition was viable in the protected areas. Yet, in enacting Section 253 of the Communications Act, Congress already has settled the policy questions being studied in Alaska. Accordingly, GCI turned to the Commission to preempt the enforcement of Section 52.355 pursuant to Section 253(d).

Seven parties responded to the Commission's Public Notice of GCI's Petition. AT&T and MCI Telecommunications Corporation each support GCI's Petition, agreeing that Section 52.355 cannot be sustained under the terms of Section 253 of the Communications Act. In contrast, the APUC, the Alaska Telephone Association ("ATA"), Bristol Bay Telephone Cooperative, Inc. ("Bristol Bay"),

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[7] 47 U.S.C. § 253(b).

TelAlaska, Inc., and Arctic Slope Telephone Association Cooperative, Inc. ("TelAlaska/ASTAC"), and United Utilities, Inc. ("United") each oppose GCI's Petition. Arguing variously that Section 52.355 is an important and necessary regulation for the Alaska bush, that the APUC is still considering whether to enforce the regulation, and that this Commission's related bush earth station policy buttresses the legality of the Alaska regulation, these parties contend that the Commission should leave Section 52.355 in place to permit the APUC to address the matter when it feels the time is right. Yet, Section 52.355 is neither consistent with the terms of Section 253(a) nor preserved by Section 253(b), so there is nothing left for the APUC to consider under Section 253. For the reasons demonstrated below, the regulation should be declared unenforceable without delay.

II. SECTION 52.355 IS INCONSISTENT WITH SECTION 253(a)

As a threshold matter, Bristol Bay and TelAlaska/ASTAC suggest that Section 52.355 is not inconsistent with Section 253(a). Section 253(a) provides that "[n]o 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."[8] According to Bristol Bay:

> Section 52.355 does not impose a prohibition on GCI's ability to provide any interstate or intrastate telecommunications service. Rather, Section 52.355 requires only that a good cause showing be made before possibly wasteful or duplicative facilities be

[8] 47 U.S.C. § 253(a) (emphasis added).

> constructed in the most remote communities of the Alaskan "Bush" . . . .[9]

And, TelAlaska/ASTAC argues that the regulation "is not a complete prohibition but is simply a presumption against the construction of duplicate facilities in remote and rural locations in Alaska."[10] Despite these arguments, though, Section 52.355 is inconsistent with the requirements of Section 253(a).

First, Section 52.355 specifically "prohibits" the ability of GCI and other non-incumbent long distance providers to provide facilities-based intrastate interexchange service in areas not enumerated in the regulation. Significantly, under the terms of the Section 52.355 itself, there may be no competitive long distance entry in a protected location unless the APUC formally amends the regulation to permit service in that location by a company other than the incumbent. Until such a formal amendment is made, Section 52.355 expressly prohibits the construction of facilities by new entrants.

Second, Section 52.355 "has the effect of prohibiting" the ability of GCI and other non-incumbent long distance providers to provide facilities-based intrastate interexchange service in areas not enumerated in the regulation. According to the Commission, Section 253 "requires us to preempt not only express restrictions on entry, but also restrictions that indirectly

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[9] Bristol Bay Comments at 3. See also id. at 9.

[10] TelAlaska/ASTAC Comments at 6.

produce that result."[11] Thus, in determining whether a regulation "has the effect of prohibiting" the ability to provide a telecommunications service, "we consider whether the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[12]

In this case, it cannot reasonably be said that Section 52.355 represents "a fair and balanced legal and regulatory environment."[13] The Alaska regulation does not permit potential competitors to construct facilities in a protected location unless they are able to convince the APUC that competition is warranted there. The incumbent intrastate interexchange service provider faces no such hurdle.[14] Indeed, prior to entering a

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[11] Public Utility Commission of Texas et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, Memorandum Opinion and Order, FCC 97-346, ¶ 41 (rel. Oct. 1, 1997).

[12] California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206 (1997). See also id. at 14209; Public Utility Commission of Texas at ¶¶ 3, 220; TCI Cablevision or Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief, Memorandum Opinion and Order, FCC 97-331, ¶ 98 (rel. Sep. 19, 1997); Petition of Pittencrief Communications, Inc., for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, Memorandum Opinion and Order, FCC 97-343, ¶ 32 (rel. Oct. 2, 1997).

[13] Cf. Texas Public Utilities Commission at ¶ 220 (finding that enforcement of a Texas tariff provision effectively precluded new entrants from offering the same services as the incumbent).

[14] As TelAlaska/ASTAC itself wrote in its Comments, "Alaska's regulatory scheme governing intrastate interexchange service is comprised of one set of rules for the incumbent

market as a facilities-based competitor, Section 52.355 requires a new entrant to lay its competitive strategy before the APUC and other carriers in the hopes of having the regulation amended in time to enter the market efficiently, and there is still no guarantee that the APUC will authorize competition. All the while, the incumbent and its resellers are given formal notice of the new entrant's strategic development plans before those plans can ever be implemented.[15]

In enacting Section 253 of the Communications Act, Congress made the national policy determination that competition and competitive neutrality are to be fostered on the state and local level. According to the Conference Committee report accompanying the Telecommunications Act of 1996, the goal of Congress was:

> to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans <u>by opening all telecommunications markets to competition</u> . . . .[16]

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dominant carrier, and another set of rules for competitors." TelAlaska/ASTAC Comments at 14 n.9. TelAlaska/ASTAC used this remark to preface a discussion of the burdens placed on the incumbent under Alaska law, though the point is clear with regard to the impact of Section 52.355 on new entrants as well.

[15] The effects of this handicap are quite real. For example, in 1995, GCI petitioned the APUC for authority to conduct a 50-site communications demonstration project in the Alaska bush using an efficient demand-assigned multiple access ("DAMA") based satellite system. After the demonstration project was approved, AT&T Alascom began upgrading to DAMA-based satellite systems at bush locations across Alaska, including at nearly all of the 50 sites named by GCI.

[16] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

Yet, more than two years after Congress made that policy determination, Alaska still retains a ban on facilities-based long distance telecommunications competition. To be certain, the enforcement of Section 52.355 has "the effect of foreclosing entry by one competitor while allowing another to enter,"[17] which is precisely what Congress meant to abolish in enacting Section 253.

III. NO PARTY DEMONSTRATES THAT SECTION 52.355 IS PROTECTED UNDER SECTION 253(b)

Separately, none of the parties opposing GCI's Petition demonstrate that Section 52.355 is protected under Section 253(b) of the Communications Act. As noted above, Section 253(b) preserves the authority of States to impose requirements 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, provided that the requirements imposed are (1) "competitively neutral" and (2) "necessary" to accomplish those goals. Section 52.355 satisfies neither requirement.

A. Competitively Neutral

Only the APUC and TelAlaska/ASTAC address the matter of competitive neutrality in a substantive fashion in their

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[17] Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13102 (1996), pet. for review pending, City of Bogue, Kansas and City of Hill City, Kansas v. FCC, No. 96-1432 (D.C. Cir. filed Nov. 22, 1996).

comments,[18] though neither show that Section 52.355 qualifies. Initially, the APUC turned the competitive neutrality requirement inside out. Pointing to its carrier-of-last-resort requirements, the APUC argues that if the enforcement of Section 52.355 was preempted, "AT&T Alascom's ability to fairly compete in markets statewide would be compromised and competitive neutrality thwarted."[19] Later, following a different approach, the APUC argues that:

> no evidence has been provided that 3 AAC 52.355, as it has been applied, will harm competitive neutrality while the APUC investigates issues. Under existing rules competitors can still serve statewide through lease of facilities and resale, possibly more profitably then *[sic]* if they were to build their own facilities.[20]

Finally, the APUC suggests that Section 52.355 actually is competitively neutral because "nothing prevents a carrier from

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[18] Bristol Bay and United simply state that Section 52.355 is competitively neutral, Bristol Bay Comments at 1; United Comments at 14 n.10, though neither even attempts to show how this is so. For its part, rather than argue that Section 52.355 is competitively neutral, the ATA just criticizes GCI:

> GCI is not requesting of this Commission a competitively neutral playing field. GCI wants the freedom to choose which communities to enter while AT&T Alascom is bound to serve every community. GCI's aggressive corporate policy of cream skimming the local market will be no different in the intrastate long distance market.

ATA Comments at 4 (footnote omitted).

[19] APUC Comments at 10. In contrast, AT&T filed Comments here in support of GCI's Petition.

[20] Id. at 11. See also id. at 14 ("insufficient evidence exists that 3 AAC 52.355 has not been applied in a competitively neutral manner"); id. at 16 ("no entity has documented specific, material competitive harm caused by the way 3 AAC 52.355 has been applied in Alaska").

seeking approval from the APUC to construct facilities if it believes that resale is not a viable option."[21] For their part, TelAlaska/ASTAC argue simply that "Alaska's regulation promotes competition by mandating interexchange competition through resale throughout the State of Alaska and by allowing the construction of duplicate interexchange facilities in communities which contain over 90 percent of the total number of access lines in the State of Alaska."[22]

In fact, Section 52.355 is not competitively neutral. According to the Commission, "At the very least, this mandate of competitive neutrality requires the [State] to treat similarly situated entities in the same manner."[23] Section 52.355, however, makes a clear distinction between the rights of the incumbent intrastate long distance provider and new entrants such as GCI. New entrants are limited to providing service through resale unless and until the APUC formally amends Section 52.355 to include a location among those suitable for facilities-based competition. AT&T Alascom faces no such limitation. Though new entrants may ask the APUC to reclassify a given location as

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[21] Id. at 12. See also id. at 15 ("all carriers have the option of requesting the APUC to approve construction in rural Alaska").

[22] TelAlaska/ASTAC Comments at 12 (citation and footnote omitted). Similarly, the APUC argues that it rules "were designed as a whole to support competition in a fair manner while protecting the public interest. Overall, these regulations have been successful in that AT&T Alascom faces stiff competition . . . ." APUC Comments at 4.

[23] Classic Telephone, 11 FCC Rcd at 13101-02.

suitable for competition, the very fact that such a petition must be filed is evidence of the competitive bias implemented by Section 52.355. Quite plainly, Section 52.355 does not treat all intrastate interexchange service providers in a similar fashion.

Moreover, despite the arguments of the APUC and TelAlaska/ ASTAC that resale opportunities might be attractive to some new or existing service providers does not mean they are a reasonable substitute for meaningful competitive equality. In a resale environment, it is virtually impossible for new entrants to distinguish themselves from the incumbent facilities-based provider with new or unique service offerings. Price competition also is restricted by the common underpinning of the incumbent's costs.[24] In the end, resale of an incumbent's service creates the illusion of competition without generating the benefits of real competition, which is precisely the result of Section 52.355. Instead of encouraging competitors to deploy new telecommunications technologies in Alaska, Section 52.355 forces new entrants into a dependence on the incumbent and its facilities. This is not competitively neutral.

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[24] As the Commission wrote in its Local Competition Order:

> The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service. The ability of a reseller to differentiate its products based on price is limited, however, by the margin between the retail and wholesale price of the product.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15667-68 (1996).

B. Necessary to Achieve the Public Interest Goals Stated in Section 253(b)

Three of the parties opposing GCI's Petition argue extensively that Section 52.355 is necessary and important to preserve universal service and public safety and that the Commission should not preempt enforcement of the regulation while the APUC is studying the feasibility of competition in the protected Alaska locations. Yet, as demonstrated above, Section 52.355 is not competitively neutral, and the Commission has ruled that "[t]he lack of competitive neutrality is . . . dispositive standing alone."[25] On this basis, the enforcement of Section 52.355 may be preempted without further analysis. Nevertheless, GCI responds here to the arguments that Section 52.355 is "necessary" to achieve the public interest goals stated in Section 253(b) to demonstrate that the Alaska regulation is precisely the type of overbroad state regulation that Congress meant to abolish with Section 253.

The APUC contends that Section 52.355 is necessary to preserve and protect universal service, arguing that:

> Access to high quality, affordable long distance services is . . . indispensable for the economic and physical well being of individuals in Alaska. If AT&T Alascom's ability to provide carrier-of-last-resort service is compromised as a result of revoking 3 AAC 52.355, then universally available toll service may be compromised.[26]

Furthermore, according to the APUC:

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[25] Silver Star Telephone Co., Inc., Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15660 (1997).

[26] APUC Comments at 5.

> Alaska's existing universal service mechanism may not provide adequate support for toll services if 3 AAC 52.355 is eliminated and market share, per-minute-system costs, and revenue resources in the market change. . . . All resellers as well as AT&T Alascom would be competitively and financially affected (possibly to differing degrees) if the existing universal support mechanism is inadequate.[27]

As a result, the APUC declares, "[t]he provisions of 3 AAC 52.355 remain necessary under §253(b) until appropriate universal service and public safety concerns can otherwise be addressed."[28]

The ATA offers a similar argument, reasoning that "Section 52.355 was not crafted as a protectionist measure for Alascom, but as a necessary regulatory safeguard to protect the consumers in rural Alaska from telecommunications rates so high that access would be unaffordable."[29] Finally, TelAlaska/ASTAC state repeatedly that "the Alaska Commission has concluded that 3 AAC 52.355 is necessary to preserve and promote universal service"[30] and argue that competitive service will generate higher costs, for which reason "the Alaska Commission concluded that the locations where duplicate interexchange facilities are allowed should be presumptively limited in order to preserve and advance universal service."[31]

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[27] Id. at 6 (footnote omitted).

[28] Id. at 7.

[29] ATA Comments at 4.

[30] TelAlaska/ASTAC Comments at 10. See also id. at 4; id. at 10; id. at 11; id. at 12-13.

[31] Id. at 7.

Putting aside the fact that Section 52.355 is not competitively neutral, an outright ban on — or "presumption against" — competition is not "necessary" to achieve the public policy goals articulated by the APUC and other commenters. For example, the APUC, the ATA, and TelAlaska/ASTAC complain at length that rural customers will face higher rates for telecommunications services if competition is introduced to the areas protected by Section 52.355. Yet, the APUC's own regulations require that "[t]he retail rates for message telephone service of each interexchange carrier must be geographically averaged,"[32] which means "rates that use the same tariff provisions and rate schedules to apply to all message telephone service communications of the same distance, regardless of the originating and terminating points of the communication."[33] Separately, Section 254(g) of the Communications Act mandates geographic rate averaging for interstate communications.[34] As a result, rural customers served by a carrier in Alaska will not face higher rates than the urban customers served by that carrier in Alaska even if the effect of competition was to raise costs in the bush.

Moreover, to the extent that the APUC believes that its "existing universal service mechanism may not provide adequate

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[32] 3 AAC § 52.370(a).

[33] Id., § 52.399(3).

[34] 47 U.S.C. § 254(g).

support for toll services,"[35] it is incumbent upon the agency to amend its rules to provide support as needed for all carriers, not just the carrier chosen by the APUC to provide service. Should the APUC desire to address public safety matters, it may propose standards for the safe and efficient operation of facilities in the areas about which it is concerned. The APUC should not, however, be permitted to justify the continued enforcement of a competitively slanted regulation such as Section 52.355 by relying on concerns that are capable of being addressed without a "presumption against" competition. To hold otherwise would mean that the Section 253(a) prohibition of barriers to entry has been swallowed by the Section 253(b) exception. At bottom, Section 52.355 is not necessary to safeguard the people of Alaska.

IV. THE COMMISSION'S BUSH EARTH STATION POLICY DOES NOT CHANGE THE OUTCOME UNDER SECTION 253

The APUC, Bristol Bay, TelAlaska/ASTAC, and United also point to the Commission's bush earth station policy in support of Section 52.355. As GCI noted in its Petition, beginning in 1975, the Commission effectively established that multiple earth station facilities were not necessary in each of the Alaska bush communities.[36] When the Commission issued a final order regarding its policy on service to the Alaska bush in 1984, it confirmed the earlier decision to license only one carrier to own

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[35] APUC Comments at 6.

[36] See RCA Global Communications, Inc., Memorandum Opinion and Order and Authorization, 56 FCC 2d 660, 689 (1975).

and operate earth stations in the bush region.[37] In 1990, GCI petitioned the Commission to begin a rulemaking to alter or abolish its policy regarding the construction of competing earth stations in rural Alaska.[38] The Commission received comments and reply comments in that proceeding, but it has not issued an order on GCI's petition.

In its comments in this proceeding, the APUC relies on the Commission's policy in defense of Section 52.355, arguing that:

> the Commission restricted construction of duplicate satellite earth station facilities in rural areas of Alaska. As this federal policy is still in place, the Commission itself must deem it premature to immediately lift the facilities restriction in rural areas. The provisions of 3 AAC 52.355 is merely the APUC's version of this federal policy.[39]

On this basis, the APUC writes, "Allowing the APUC to complete its investigation will provide the Commission a better record from which to ultimately evaluate its own facilities restriction policy, if it chooses to do so."[40] TelAlaska/ASTAC and United also argue that Section 52.355 is supported by the Commission's own determinations in connection with its bush policy and by the existence of the bush policy itself.[41]

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[37] Policies Governing the Ownership and Operation of Domestic Satellite Earth Stations in the Bush Communities in Alaska, Final Order, 96 FCC 2d 522 (1984).

[38] See RM-7246.

[39] APUC Comments at 12-13.

[40] Id. at 13.

[41] See TelAlaska/ASTAC Comments at 4 ("3 AAC 52.355 is supported by a longstanding and well-developed record"); United Comments at 11 (Section 52.355 "parallels a long-established

Separately, Bristol Bay suggests that the Commission already has decided not to preempt the Alaska regulation, implying that the Commission is estopped from reaching a different conclusion here. Bristol Bay relies on a footnote in a February 1997 Order in which the Common Carrier Bureau referenced Alascom's citation of Section 52.355 in support of an argument regarding the definition of bush areas.[42] According to Bristol Bay, "Alascom squarely placed 3 AAC 52.355 before this Commission. . . . [and] if this Commission had any thought that the Act implicitly preempts Section 52.355, it would surely have said something to that effect."[43] Bristol Bay and the other commenters are wrong, however.

First, it cannot be denied that Section 253(a) outlaws any "State or local statute or regulation"[44] that constitutes a barrier to entry under that provision. If the Commission determines that a state or local statute or regulation violates Section 253(a) and is not preserved by Section 253(b), then "the Commission shall preempt the enforcement of such statute,

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policy of the FCC's own — one that has been on the books for nearly a quarter-century").

[42] See Bristol Bay Comments at 7 (quoting Alascom, Inc., Cost Allocation Plan for the Separation of Bush and Non-Bush Costs, Memorandum Opinion and Order and Order on Reconsideration and Order Approving Cost Allocation Plan, 12 FCC Rcd 1991, 1996 n.40 (Com. Car. Bur. 1997) ("Alascom CAP Order")). See also TelAlaska/ASTAC Comments at 4 n.2 ("This Commission has recognized [Section 52.355] as recently as 1997").

[43] Bristol Bay Comments at 7-8.

[44] 47 U.S.C. § 253(a).

regulation, or legal requirement"[45] pursuant to Section 253(d). This statutory language is mandatory. Section 253 does not safeguard state regulations with federal analogues, nor does it give the Commission the discretion to leave in place state regulations that violate its terms. Thus, even if the Alaska and federal bush provisions had common policy underpinnings, those policy underpinnings would not rescue Section 52.355 from lacking competitive neutrality, which is fatal in a Section 253 analysis. At bottom, the fact of the Commission's bush earth station policy has no bearing on the outcome of this matter under Section 253.

Second, Bristol Bay's suggestion that the FCC has already decided against preempting Section 52.355 is without merit. As a threshold matter, the order cited by Bristol Bay was issued by the Common Carrier Bureau, not the Commission.[46] More importantly, it cannot reasonably be argued that the Bureau's footnoted reference to Section 52.355 for the purposes of a definitional comparison constitutes a Commission determination "on the continuing vitality of 3 AAC 52.355"[47] under Section 253 or operates as some constructive estoppel to such a review by the Commission today. Indeed, if it did, it is probably news to the Commission. Section 253(d) authorizes the Commission to make a preemption determination only after "notice and an opportunity

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[45] Id., § 253(d) (emphasis added).

[46] See Alascom CAP Order, 12 FCC Rcd at 1991, 2014.

[47] Bristol Bay Comments at 7.

for public comment,"[48] neither of which was provided in connection with the drafting of subject footnote by the Common Carrier Bureau. In fact, Section 253 is not once mentioned in the entirety of the Alascom CAP Order. Plainly, this Bureau order on an unrelated issue does not take the place of a substantive Commission review of Section 52.355, and — like the Commission's bush earth station policy — it has no bearing on the outcome of this matter under Section 253.

V. IMMEDIATE PREEMPTION IS WARRANTED

Finally, though Section 52.355 is inconsistent with the terms of Section 253(a) of the Communications and is not saved by Section 253(b), four of the commenters in this proceeding argue that the Commission should not preempt the Alaska regulation at this time. Instead, the APUC, the ATA, TelAlaska/ASTAC, and United contend that the Commission should leave the matter in the hands of the APUC while it continues to study the policy implications of competition in the affected locations in Alaska. Otherwise, they say, action against Section 52.355 would be premature.

For example, discussing its review of GCI's petition below, the APUC writes:

> the APUC found the record in its proceeding inadequate to decide the 3 AAC 52.355 issues and decided to further investigate. For example, one key piece of information

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[48] 47 U.S.C. § 253(d). See also Classic Telephone, 11 FCC Rcd at 13091 ("section 253(d) directs the Commission to rule on a petitioner's preemption request after public notice and an opportunity for comment on a particular State or local requirement").

> not available was current data regarding the GCI 50-site DAMA demonstration project. That project data, together with AT&T Alascom data, would provide some indication of the effects of lifting 3 AAC 52.355 and what actions the APUC should take to reform its interexchange market and subsidy mechanisms.[49]

The APUC adds that it "is in the process of review and may ultimately revoke the very rule for which preemption is sought."[50]

Similarly, the ATA argues the preemption now is inappropriate because "[t]he expert Alaskan agency that deals with telecommunications issues said it needed more information before it could give a decision regarding lifting the restriction on duplicative intraexchange *[sic]* long distance facilities in the Bush."[51] For their part, TelAlaska/ASTAC insist that "[t]he FCC should, as a matter of federal-state comity, allow the Alaska Commission the opportunity to rule on whether to enforce or set aside 3 AAC 52.355."[52] And United argues that "it is clear that the APUC is moving responsibly and deliberately to harmonize its policies, including Section 52.355, with the Telecom Act. . . . All in all, this is no more than an instance where one particular party is unhappy with the pace of regulatory reform in a particular state . . . ."[53] For these reasons, the ATA,

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[49] APUC Comments at 13-14.

[50] Id. at 16.

[51] ATA Comments at 5.

[52] TelAlaska/ASTAC Comments at 13.

[53] United Comments at 8-9.