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

In the Matter of	)	
	)	
Anchorage Telephone Utility	)	CC Docket No. 00-122
Tariff FCC No. 5	)	Transmittal No. 108; DA 00-1269

REPLY OF GENERAL COMMUNICATION, INC.
TO OPPOSITION OF ACS OF ANCHORAGE, INC.

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SUMMARY

GCI seeks Commission review of the Competitive Pricing Division's denial of GCI's Petition to Reject or Suspend and Investigate Anchorage Telephone Utility ("ATU") Tariff F.C.C. No. 5, Transmittal No. 108. The ATU 2000 Annual Access Tariff filing reports that it includes in its interstate access rate development "all identifiable Internet Service Provider (ISP) traffic as interstate." The tariff filing raises a substantial question of unlawfulness, because such treatment is plainly contrary to the Commission's exemption of ISP traffic from interstate access charges.

On behalf of ATU, ACS of Anchorage, Inc. ("ACS-A") claims that its treatment of the traffic is consistent with the Commission's decisions on the jurisdictional nature of ISP-bound traffic. In making this argument, ACS-A ignores over 15 years of precedent supporting the exemption of ISP traffic — and its costs — from interstate access charges. Additional precedent on this very issue dictates that the Commission cannot permit selective carrier compliance with the ISP exemption. Just as other carriers were instructed to revise filings where they had recorded ISP traffic and related revenues as interstate, the Commission must require the same of ATU with respect to its access tariff filing.

With no substantive support for its treatment of ISP traffic, ACS-A seeks to avoid review of the Memorandum Opinion and Order, arguing that the Order should not be "second-guessed" and that Competitive Pricing Division's decisions with respect to protested tariffs cannot be reviewed by the Commission. To the contrary, Section 5(c)(4) of the Communications Act requires the Commission to review any action taken on delegated authority, which includes the Division's denial of GCI's petition. In arguing that the Commission cannot "second-guess" the Division's decision, ACS-A ignores that the Commission's delegation of authority is inseparable

from its continuing obligation under Section 5(c)(4) to review decisions issued on such delegated authority. Moreover, Commission decisions and practice plainly provide for review of decisions denying petitions to suspend and investigate tariffs.

ACS-A ultimately argues that the Commission does not have the authority under Section 204(a)(3) to review the Memorandum Opinion and Order because the tariff has become effective. If accepted, this argument imposes an unsustainable construct on Section 204(a)(3). According to the Commission's interpretation of Section 204(a)(3), damages cannot be recovered on a retrospective basis once the tariff is "deemed lawful," even though the tariff may be found to be unlawful in the future. Both these positions — nonreviewability and immunity from damages — cannot coexist without violating due process rights, so one or both positions must be wrong. Indeed, courts concluding that agency decisions to accept or reject tariffs are nonreviewable because they are interlocutory in nature have relied on protection of the petitioner by a subsequent complaint process, so injury to the petitioner is not irreparable if review is refused. If the Commission's interpretation of the phrase "deemed lawful" eliminates the ability to redress unlawful tariffs on a retrospective basis, parties will face irreparable injury as a result of a tariff review decision, with no practical means of procuring relief. Therefore, to the extent that a tariff's being "deemed lawful" is applied to eliminate a customer's recourse thereafter, the decision denying a petition to against a tariff filing necessarily must be reviewable.

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REPLY OF GENERAL COMMUNICATION, INC.
TO OPPOSITION OF ACS OF ANCHORAGE, INC.

General Communication, Inc. ("GCI"), by its undersigned attorneys and pursuant to Section 1.115(d) of the Commission's Rules,[1] hereby replies to the opposition of ACS of Anchorage, Inc. ("ACS-A") to the Application for Review filed by GCI seeking Commission review of the Memorandum Opinion and Order issued by the Competitive Pricing Division ("Division") of the Common Carrier Bureau through delegated authority on June 30, 2000 ("Memorandum Opinion and Order" or "Order").[2]

I. INTRODUCTION

GCI seeks Commission review of the Competitive Pricing Division's denial of GCI's Petition to Reject or Suspend and Investigate Anchorage Telephone Utility ("ATU") Tariff F.C.C. No. 5, Transmittal No. 108 ("Petition").[3] On June 16, 2000, Alaska Communications Systems, Inc. a/k/a ATU submitted its 2000 Annual Access Tariff filing. In the Description and

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[1] 47 C.F.R. § 1.115(d).

[2] 2000 Annual Access Tariff Filings, CC Docket No. 00-122, Memorandum Opinion and Order, DA 00-1487 (rel. June 30, 2000).

[3] Petition of GCI to Reject or Suspend and Investigate, Transmittal No. 108, DA 00-1269 (June 22, 2000).

Justification accompanying the tariff, ATU declared at Section 4.I.D that "[t]his filing reflects all identifiable Internet Service Provider (ISP) traffic as interstate."[4] In its Opposition to the Application for Review, ACS-A did not refute its proclaimed treatment of ISP traffic, nor did it rebut that this treatment of ISP traffic harms GCI by establishing higher rates than justified. Instead, ACS-A held out its treatment of the traffic as "consistent with the Commission's decisions on the jurisdictional nature of ISP-bound traffic,"[5] even though such treatment is contrary to over 15 years of precedent supporting the exemption of ISP traffic — and its costs — from interstate access charges.

ACS-A also urged the Commission not to "second guess" the Division's denial of GCI's petition. Though the Division has not provided any reason for the selective application of the Commission's mandate that ISP traffic be exempt from interstate access charges, ACS-A has suggested that the Division had "sound reasons" for declining to suspend ATU's tariff, citing "significant jurisdictional and policy questions raised by ISP-bound traffic."[6] ACS-A cannot explain how such "questions" have affected the applicability of the ISP exemption, and in choosing to ignore the Commission's mandate, ACS-A simply has substituted its own reasoning for that of the Commission, an approach that has been rejected at least twice. The Common Carrier Bureau required SBC Telecommunications, Inc. ("SBC") and Bell Atlantic to refile ARMIS for classifying ISP traffic as interstate because such treatment did not "comport with

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[4] ATU Tariff F.C.C. No. 5, Transm. No. 108, Description and Justification ("D&J") at 14.

[5] ACS-A Opposition at 2.

[6] Id. at 3.

Commission decisions."[7] Just as SBC and Bell Atlantic were instructed to revise ARMIS filings where they had recorded ISP traffic and related revenues as interstate, the Commission must require the same of ATU with respect to its access tariff filing.

At bottom, refusal to investigate this unlawful tariff will be in direct contradiction with the Commission's mandate of general applicability regarding the treatment of ISP traffic and enforcement actions taken against carriers that have not abided by that mandate. Therefore, the Commission must review the Memorandum Opinion and Order and ensure that the ISP exemption is uniformly applied.

II. THE ATU 2000 ANNUAL ACCESS TARIFF FILING VIOLATES THE COMMISSION'S EXEMPTION OF ISP TRAFFIC FROM INTERSTATE ACCESS CHARGES

ACS-A does not deny that it is violating the Commission's mandate that ISP traffic be exempted from interstate access charges and classified as intrastate. Instead, ACS-A proclaims that "ATU's classification of ISP-bound traffic as interstate is fully consistent with the Commission's decisions on the jurisdictional nature of ISP-bound traffic"[8] and "in line with the Commission's stated view on the nature of this traffic."[9] ACS-A is wrong. The Commission's mandate — which has recently been enforced with other carriers — is that ISP traffic be exempt from access charges and the costs and revenues associated with the traffic be assigned to the

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[7] "Common Carrier Bureau Issues Letter to SBC Regarding its Jurisdictional Separations Treatment of Internet Traffic," Public Notice, 14 FCC Rcd 8178, 8179 (Com. Car. Bur. 1999) ("SBC Enforcement Letter"); "Common Carrier Bureau Issues Letter to Bell Atlantic Regarding Jurisdictional Separations Treatment of Reciprocal Compensation for Internet Traffic," Public Notice, 14 FCC Rcd 13148 (Com. Car. Bur. 1999) ("Bell Atlantic Enforcement Letter")

[8] ACS-A Opposition at 2.

[9] Id. at 2.

intrastate jurisdiction. ACS-A's inclusion of ISP traffic in its interstate access rate development plainly violates that Commission mandate.

ACS-A claims that the allocation of the costs and revenues associated with ISP-bound traffic to the intrastate jurisdiction is "fundamentally inconsistent with the Commission's rulings on the interstate nature of ISP-bound traffic."[10] This argument is a red herring that does not withstand scrutiny. The Commission determined over 16 years ago to exempt traffic to enhanced service providers ("ESPs") — including ISPs — from per-minute interstate access charges,[11] and as a result, the costs and revenues associated with this traffic are assigned to the intrastate jurisdiction.[12] Just three years ago, the Commission reaffirmed this policy because "[m]aintaining the existing price structure for these services avoids disrupting the still-evolving information services industry and advances the goal of the [Telecommunications Act of 1996]."[13] The reviewing Court affirmed this conclusion, holding that "the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to

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[10] Id. at 3.

[11] MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682, 711-22 (1983) ("MTS/WATS Order"), aff'd, NARUC v. FCC, 737 F.2d 1095, 1137 (D.C. Cir. 1984).

[12] See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rulemaking, 4 FCC Rcd 3983, 3987-88 (1989).

[13] Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, 16133 (1997) (footnote omitted), aff'd, Southwestern Bell Tel. Co. v. FCC, 153 F.3d 520 (8th Cir. 1998).

pay the [subscriber line charge] . . ., but not to pay the per-minute interstate access charge."[14] The Commission ISP exemption is a final, effective mandate that applies without exception.[15]

Though ACS-A continues to rely on the Inter-Carrier Compensation proceeding to manufacture otherwise non-existent uncertainty about the issue, Commission orders and subsequent enforcement action make clear that carriers do not have an option in this matter. On May 18, 1999, the Bureau directed SBC to classify traffic bound for ISPs as intrastate rather than interstate.[16] Upon review of SBC's 1997 and 1998 ARMIS filings, the Bureau concluded that SBC's characterization of the ISP-bound traffic of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell as interstate rather than intrastate for separations and reporting purposes "does not comport with Commission decisions."[17] By misclassifying the traffic as interstate, "the associated traffic-sensitive costs are also being identified as interstate" in violation of the Commission's mandate.[18] Similarly, the Bureau directed Bell Atlantic to "correct and refile" its 1998 ARMIS data to reclassify the reciprocal compensation expenses and revenues associated with ISP-bound traffic as intrastate, rather than interstate, because carriers are required to "classify the costs and revenues associated with ISP-bound traffic as intrastate for

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[14] Southwestern Bell, 153 F.3d at 543.

[15] See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3833 (1999) (finding that orders not vacated remain in effect until changed by a subsequent decision); Applications of Ameritech Corp and SBC Communications, Inc., Memorandum Opinion and Order, 14 FCC Rcd 14712, 14917 (1999) (ordering continued compliance with rules in effect until stayed or vacated).

[16] See SBC Enforcement Letter, 14 FCC Rcd 8178.

[17] Id. at 8179.

[18] Id.

jurisdictional separations and reporting purposes."[19] These same standards must be applied also to ACS-A.[20]

ACS-A's reliance on the Inter-Carrier Compensation proceeding is also substantively misplaced. The issue in the Inter-Carrier Compensation proceeding is the compensation due when local exchange carriers participate in the delivery of ISP traffic.[21] Nowhere in the Notice of Proposed Rulemaking, the Intercarrier Compensation Order, or the remand decision does the Commission or the D.C. Circuit conclude that the ISP exemption is no longer in effect. In fact, the Commission summarized the continued applicability of the exemption, stating:

> Although the Commission has recognized that [ESPs] . . . use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. . . . In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes. . . . [and] the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local.[22]

Indeed, ACS-A's reliance on the remand decision in support of its position is puzzling. Though ACS claims the Court "appears to have upheld" the proposition that "based on the end-to-end

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[19] Bell Atlantic Enforcement Letter, 14 FCC Rcd at 13149.

[20] There is no rational basis for treating ATU differently from other local exchange carriers with regard to this issue. See Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (rejecting different treatment by the Commission of similarly situated parties).

[21] Implementation of the Local Competition Provisions in the Telecommunications Ace of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, 3690, 3695-3703 (1999) ("Inter-Carrier Compensation Order"), vacated and remanded by Bell Atl. Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

[22] Inter-Carrier Compensation Order, 14 FCC Rcd at 3691-92 (internal footnotes omitted); see also Bell Atlantic v. FCC, 206 F.3d at 7.

analysis, ISP-bound calls are jurisdictionally interstate,"[23] the issue on remand to the Commission is the proper analysis that should be applied in the first place.[24]

Finally, even if consideration of the ISP exemption was re-opened in the proceeding — and no notice has been given that it would — the result would be prospective. ACS-A, on the other hand, claims an anticipatory, unfounded right to any potential policy change. Based on this novel theory, few rules or policies would be followed or enforceable, as opponents would simply claim "significant jurisdictional and policy questions" when their view on an issue departed from the Commission's. The Commission must reject this baseless attempt to justify ACS-A's violation of the Commission's ISP exemption.[25]

III. ACS-A'S ARGUMENTS TO AVOID COMMISSION REVIEW ARE UNAVAILING

ACS-A seeks to avoid substantive review of the pleadings and Memorandum Opinion and Order by offering dubious procedural arguments for dismissal of GCI's Application for Review. ACS-A argues in turn that the Order should not be "second-guessed" and that the Competitive Pricing Division's decisions with respect to protested tariffs cannot be reviewed by the Commission. The ACS-A focus on denying Commission review — contrary to law and Commission practice — underscores that, on its face, the ACS-A tariff raises a substantial question of lawfulness by treating ISP traffic as interstate in its access tariff development. On

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[23] ACS-A Opposition at 2.

[24] See Bell Atlantic v. FCC, 206 F.3d at 5-6.

[25] Indeed, ATU apparently stands alone in its confusion about the treatment of this traffic. To the best of GCI's knowledge, no other interstate access provider is including ISP minutes in its tariff development.

Commission review, the Commission's orders mandating the ISP exemption and actions to enforce those orders require suspension and investigation of the ACS-A tariff.

A. The Communications Act Mandates Review of Actions Taken on Delegated Authority

ACS-A argues that the Memorandum Opinion and Order is not reviewable by the Commission because "the Bureau appropriately exercised its discretion in deciding not to suspend and investigate ACS-A's access tariff."[26] According to the ACS-A theory, the Competitive Pricing Division — which issued the instant order and considers in the first instance most tariff protests — issues in every instance a final, nonreviewable, nonappealable decision in protested tariff actions. This claim is directly contrary to the Communications Act and Commission practice.

The Commission is authorized pursuant to Section 5(c)(1) of the Communications Act to delegate any of its functions, with the exception of those specified by statute, when necessary for "proper functioning of the Commission" and "prompt and orderly conduct of its business."[27] An order issued under such delegated authority has the same force and effect as a Commission order, unless Commission review is sought under Section 5(c)(4) of the Act.[28] That subsection provides that "any person aggrieved" by an order, decision, report, or action issued on delegated authority "may file an application for review by the Commission . . . and every application shall be passed upon by the Commission."[29] Thus, though the Commission has delegated

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[26] ACS-A Opposition at 1.

[27] 47 U.S.C. § 155(c)(1).

[28] 47 U.S.C. § 155(c)(3).

[29] 47 U.S.C. § 155(c)(4).

"adjudicatory and rulemaking proceedings, including rate and service investigations" to the Common Carrier Bureau,[30] the Commission must still review such decisions upon application by "any person aggrieved," regardless of the matter or nature of the delegatee's decision.

GCI seeks Commission review of the Memorandum Opinion and Order as a "person aggrieved" by such order, issued on delegated authority. The ATU 2000 Annual Tariff Filing presents a substantial question of lawfulness on its face, and the failure to suspend and investigate this patently unlawful tariff harms GCI. ATU has developed its interstate access rates by including the cost of traffic to ISPs, thereby inflating its rate development cost base.[31] Denial of GCI's petition to suspend and investigate this tariff filing continues to harm GCI because it is being charged unlawfully high rates to recover the costs for traffic it does not carry under the tariff. Thus, GCI is entitled to Commission review of the decision under Section 5(c)(4) of the Act.

ACS-A ignores that the Commission's delegation of authority is inseparable from its continuing obligation under Section 5(c)(4) to review decisions issued on such delegated authority. The ACS-A request to dismiss the Application for Review presumes that the Division's decision on delegated authority has the same force and effect as an action taken by the Commission, but ignores the plain limitation on the force and effect of such decisions once an aggrieved party seeks Commission review.[32] Under the ACS-A theory, the Commission essentially cedes its authority upon delegation, but a plain reading of Sections 5(c)(3) and (4)

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[30] See 47 C.F.R. §§ 0.91(a) and 0.291.

[31] GCI Application for Review at 2-3.

[32] See 47 U.S.C. § 155(c)(3).

shows that the ACS-A theory is contrary to law.[33] Pursuant to these sections, any action taken on delegated authority is subject to Commission review.

Finally, Commission decisions and practice plainly provide for review of decisions denying petitions to suspend and investigate tariffs. In implementing Section 204(a)(3) of the Act, the Commission determined that "pre-effective tariff review is required by the statute" and that "eliminating pre-effective tariff review would restrict the opportunity for interested parties to obtain review of potentially unlawful tariffs."[34] The availability of Commission review is routinely invoked as part of this review process when the Competitive Pricing Division denies petitions to reject or suspend and investigate tariffs. For example, in a Public Notice issued on August 10, 2000, the Competitive Pricing Division denied the petition of AT&T Corporation to reject or suspend and investigate Revisions to 2000 Annual Access Filings filed by several price cap local exchange carriers on a streamlined basis.[35] Although the Division concluded that the petitions "did not raise significant questions of lawfulness which require investigation," the Division noted that "[a]pplications for review and petitions for reconsideration of these decisions may be filed within 30 days from the date of this public notice in accordance with Sections 1.115

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[33] ACS-A apparently applies this theory only when it is expedient. Though ACS-A argues that the Division's order is final without review, it dismisses the relevance of the Common Carrier Bureau enforcement actions against Bell Atlantic and SBC's treatment ISP minutes as interstate in recent ARMIS filings because "the full Commission [has not] passed on the letters that the Common Carrier Bureau sent." See ACS-A Opposition at 3 n.9.

[34] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Report and Order, 12 FCC Rcd 2170, 2197 (1997) ("Streamlined Tariff Order"), petitions for recon. pending.

[35] Protested Tariff Transmittals Action Taken, Report No. CCB/CPD 00-19, 2000 FCC LEXIS 4282 (Aug. 10, 2000).

and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.115, 1.106."[36] Like AT&T, GCI filed a petition with the Competitive Pricing Division to reject or suspend and investigate a streamlined 2000 Annual Access filing — ATU's FCC Tariff No. 5 — and that petition has been denied. Accordingly, like AT&T, GCI is now entitled to Commission review of that denial pursuant to Section 1.115 of the Commission Rules and Section 5(c)(4) of the Communications Act.[37]

B. The Memorandum Opinion and Order Is a Reviewable Action

ACS-A also claims that the Application for Review must be dismissed because it is "procedurally defective."[38] ACS-A characterizes the Competitive Pricing Division's denial of GCI's Petition to Suspend and Investigate ATU Transmittal No. 108 as a "decision *not* to suspend and investigate ACS-A's tariff"[39] and with little more discussion of the matter, declares that no reviewable action exists. The ACS argument is without support.

Section 551(13) of the Administrative Procedure Act defines agency action as "the whole or part of an agency rules, order, license, sanction, relief, or the equivalent or the denial thereof, or failure to act."[40] Thus, whether the Memorandum Opinion and Order is characterized as a

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[36] Id.

[37] See also Protested Tariff Transmittals Actions Taken, Report No. CCB/CPD-99-23, 14 FCC Rcd 13102 (1999) (declining to suspend and investigate 1999 Annual Access Tariff Filings); Protested Tariff Transmittals Actions Taken, Report No. CCB/CPD-99-34, 1999 FCC LEXIS 5815 (Nov. 10, 1999); Ex Parte Procedures Established, Public Notice, 13 FCC Rcd 16765 (1998) (establishing ex parte procedures for a complaint proceeding and related application for Commission review of a decision issued by the staff of the Common Carrier Bureau denying a petition to reject or suspend and investigate tariff revisions, to enable the Commission to "fully and expeditiously resolve the Application for Review").

[38] ACS-A Opposition at 3.

[39] Id. (emphasis in original)

[40] 5 U.S.C. § 551(13).

"denial" or a "failure to act," it is a reviewable action. Indeed, the Supreme Court has recognized that the refusal to act could have the same or greater impact on a person as an affirmative act, holding that "any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review [agency action] serves no useful purpose."[41] Relevant to the case at hand, the Court further concluded that "[a]n order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status."[42] The ACS-A effort to distinguish between the denial of a petition to suspend or investigate a tariff filing and any other action likewise "serves no useful purpose."

Finally, ACS's reliance on Heckler v. Chaney to surmise factors that the Division may or may not have considered in rendering its decision is misplaced and misleading.[43] In essence, ACS appears to be suggesting that the Division's decision should not be "second-guessed" because the Division must have considered the factors set forth in Heckler v. Chaney in rendering its decision.[44] However, the Memorandum Opinion and Order does not provide any analysis or reason for the denial of GCI's petition. Thus, it is unclear what factors the Division may or may not have considered in reaching its decision. More significantly, however, the availability of Commission review is not contingent on the factors considered by the Division in rendering its decision. As discussed above, aggrieved parties are entitled by statute to Commission review of decisions made pursuant to delegated authority.

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[41] Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939).

[42] Id. at 142.

[43] See ACS-A Opposition at 1-2.

[44] Id.

C. The ACS-A Request to Dismiss the Application for Review Is Emblematic of the Misinterpretation of Section 204(a)(3)

ACS-A ultimately argues that the Commission does not have the authority under Section 204(a)(3) to review the Memorandum Opinion and Order and suspend and investigate the ATU 2000 Annual Access Tariff Filing because the "time period under Section 204(a)(3) . . . has long passed" such that even if review of the staff decision were appropriate, "the Commission is barred by the Communications Act from granting the relief that GCI requests."[45] The ACS-A argument renders the Communications Act internally inconsistent and is emblematic of the misinterpretation of Section 204(a)(3).

Section 204(a)(3) provides that any charge, classification, regulation, or practice filed by a local exchange carrier on a streamlined basis "shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under [Section 204(a)(1)] before the end of the 7-day or 15-day period, as is appropriate."[46] According to ACS-A, streamlined processing precludes review of an action on delegated authority. This interpretation of the provision is impermissible because it renders Section 5(c)(4) of the Act meaningless and an alternative reading avoids this result.

To the extent that the ACS-A tariff ostensibly has been "deemed lawful" by the failure of the Division to suspend and investigate the tariff,[47] such a finding does not preclude an investigation of the tariff after it has become effective, as suggested by ACS-A. The

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[45] Id. at 4.

[46] 47 U.S.C. § 204(a)(3).

[47] ACS-A Opposition at 4.

Commission has found that "section 204(a)(3) does not mean that tariff provisions that are deemed lawful when they take effect may not be found unlawful subsequently in section 205 or 208 proceedings."[48] Similarly, the Commission may initiate an investigation to consider the lawfulness of a tariff as part of the tariff review process. If Congress had intended to eliminate such Commission review of tariff decisions on delegated authority, then it would have amended Section 5(c)(1) to prohibit delegation of tariff review under Section 204(a)(3) or limited the applicability of mandatory Commission review under Section 5(c)(4). Having taken neither action, the Division's decision denying the Petition to Suspend or Investigate must be reviewable.

Finally, the ACS-A arguments to insulate its defective tariff filing from review are emblematic of the misinterpretation of Section 204(a)(3). ACS-A seeks to use the "deemed lawful" standard as a cloak against any further or future review of its interstate access tariff, arguing that once the seven or 15 days (as applicable) have passed under streamlined review, no party can seek review of the decision not to suspend or investigate.[49] At the same time, however, the Commission's interpretation of Section 204(a)(3) provides that damages cannot be recovered on a retrospective basis once the tariff is "deemed lawful," even though the tariff may be found to be unlawful in the future.[50] Both these positions — nonreviewability and immunity from damages — cannot coexist without violating due process rights, so one or both positions must be wrong.

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[48] Streamlined Tariff Order, 12 FCC Rcd at 2183.

[49] ACS-A Opposition at 4.

[50] Streamlined Tariff Order, 12 FCC Rcd at 2182-83.

Courts concluding that agency decisions to accept or reject tariffs are nonreviewable by courts have found such decisions to be interlocutory in nature.[51] In this respect, the acceptance of a rate filing has been characterized as "decid[ing] nothing concerning the merits of the case; it merely reserves the issues pending a hearing."[52] That is, even if a tariff is permitted to go into effect, the underlying decision typically has been nonreviewable by a court because the petitioner can be protected by a subsequent complaint process, so injury to the petitioner is not irreparable if review is refused.[53] The availability of the complaint process under the Communications Act was indeed central in Aeronautical Radio Inc. v. FCC.[54] In that case, the D.C. Circuit initially ordered the Commission to reject a rate filing because "the agency had been unjustifiably summary in its procedures."[55] On rehearing, the Court declined to review the Commission decision, though its "discontent with the Commission's actions remain[ed]," because affected customers had the protection of the complaint process, which "remedy alone suffices to render the FCC order non-final and unreviewable."[56]

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[51] See, e.g., Nader v. CAB, 657 F.2d 453, 456 n.10 (D.C. Cir. 1981); Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 240 (D.C. Cir.) ("Papago v. FERC"), cert. denied, 449 U.S. 1061 (1980).

[52] Papago v. FERC, 628 F.2d at 240.

[53] See Delmarva Power and Light Co. v. FERC, 671 F.2d 587, 593 (D.C. Cir. 1981) (emphasizing "the significance of the availability of alternative remedies" for petitioners in assessing reviewability of rate acceptance); id. at 594 ("We note, again, that the imminence of a future hearing, and the alternative remedy it provides, undercut both the finality of the Commission's decision and the irreparability of its harm.").

[54] 642 F.2d 1221 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981).

[55] Id. at 1247.

[56] Id. at 1248 (relying on Southern Ry Co. v. Seaboard Allied Mining Corp., 442 U.S. 444 (1979) and Papago Tribal Util. Auth. v. FERC).

Plainly, if affected customers have no recourse to recover damages in the event of an erroneous decision, then under Aeronautical Radio, the balance is tipped in favor of finality and reviewability of tariff decisions. If the Commission's interpretation of the phrase "deemed lawful" eliminates the availability of the complaint process to redress unlawful tariffs on a retrospective basis, parties will "face the prospect of irreparable injury, with no practical means of procuring effective relief after the close of the proceeding," and as a result, they will be entitled to review.[57] Therefore, to the extent that a tariff's being "deemed lawful" under the streamlining process is interpreted to eliminate a customer's recourse thereafter, the decision denying a petition against a tariff filing necessarily must be reviewable.

[57] Papago v. FERC, 628 F.2d at 240.

IV. CONCLUSION

The ATU 2000 Annual Access Tariff filing raises a substantial question of unlawfulness. ATU developed its interstate access rates based on an assignment of costs associated with ISP traffic to the interstate jurisdiction, a practice that is unquestionably prohibited and produces excessive interstate access rates. Though ACS-A's motivation for avoiding Commission review and maintaining its unlawful tariff is apparent, efforts by other carriers to classify ISP traffic as interstate have been rejected, and the same treatment is required here. Therefore, GCI respectfully requests that the Commission reject or suspend and investigate ATU Transmittal No. 108.

Respectfully submitted,

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Dated: August 30, 2000

CERTIFICATE OF SERVICE

I, Tina M. Pidgeon, do hereby certify that a copy of the foregoing Reply of General Communication, Inc. to ACS-A Opposition to Application for Review was delivered via hand delivery and first-class mail, as indicated, to the parties listed below.

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