

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ACS of Alaska, Inc.,)
ACS of Fairbanks, Inc., and)
ACS of the Northland, Inc.)
)
Petition to Amend Section 51.405)
of the Commission's Rules)
to Implement the Eighth Circuit's)
Decision in *Iowa Utilities Board v.*)
FCC Regarding the Burden of Proof)
in Rural Exemption Cases Under)
Section 251(f)(1) of the)
Communications Act)
)

CC Docket No. 96-98 /

COMMENTS
OF THE
UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association ("USTA") hereby files comments on the Petition for Rulemaking ("PFR") filed on behalf of ACS on March 5, 2001. ACS petitions the Commission to adopt a rule that makes clear that the burden of proof is on competitors seeking to terminate the rural exemption in section 251(f)(1) and the suspension and modification provision set forth in section 251(f)(2) regarding interconnection and access to unbundled network elements ("UNEs") from rural and smaller ILECs.¹ According to ACS, the relief it seeks is necessary to ensure that state commissions apply the proper procedural standards when considering requests by competitors for interconnection and access to UNEs from rural and smaller ILECs. ACS

¹ ACS PFR at 1.

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notes that Alaska state officials and courts have failed to properly apply a federal appeals court ruling which establishes that competitors, not ILECs, bear the burden of proof under section 251(f)(1) and (f)(2).² USTA agrees with the concerns raised in the ACS *PFR*. The Commission, however, can expedite resolution of these issues by immediately issuing a clarifying order.

On remand from the United States Supreme Court's ("Supreme Court") decision in *AT&T Corp. v. Iowa Utilities Board*,³ and in response to arguments raised in briefs filed by USTA *et al.*,⁴ the Eighth Circuit Court of Appeals concluded that section 51.405 of the Commission's regulations violated the Administrative Procedure Act ("APA").⁵ The court vacated the FCC's rule as arbitrary, unreasonable and inconsistent with sections 251(f)(1) and 251(f)(2) of the 1996 Act.⁶ The Commission's regulation provided that incumbent rural telephone companies "must offer evidence" of an "undue economic burden" to "justify continued exemption" from the interconnection obligations of Section 251(c).⁷ The court held that the Commission's regulations in section 51.405 could not survive scrutiny under the APA because the plain language of the regulation eliminated two of the three statutory requirements for denying a competitor's request to

² ACS *PFR* at Exhibit A.

³ 525 U.S. 366 (1999).

⁴ See *Brief for Petitioners United States Telephone Association, The Rural Telephone Coalition, and The Mid-sized Incumbent Local Exchange Carriers* (July 16, 1999)(USTA, with the Rural Telephone Coalition and Mid-size ILECs, jointly petitioned the court to vacate the Commission's section 51.405 regulations).

⁵ *Iowa Utilities Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000).

⁷ 47 C.F.R. §51.405(c)

terminate an exemption.⁸ The court agreed with petitioners USTA *et al.* that the statute permits a State to terminate a rural exemption only where “a request for interconnection, services, or network elements ‘is not unduly economically burdensome, is technically feasible, and is consistent with section 254.’”⁹ The court also concluded that the Commission’s standard of “undue economic burden” was inapplicable to smaller ILECs under the suspension and modification provisions of section 251(f)(2) of the 1996 Act.¹⁰ In addition, the court also rejected the Commission’s attempt to shift the burden to the rural ILEC to prove that it is entitled to a continuing exemption. The Court held that “[t]he plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.”¹¹

The Commission did not directly challenge the ruling of the Eighth Circuit Court of Appeals on these issues. The Supreme Court declined to hear appeals directing challenging the appellate court’s decision on the issues raised in these comments.¹²

An agency may not disregard the existing mandate of a federal court in a case in which the agency was a party litigant: “It is emphatically the province and duty of the

⁸ 219 F.3d at 760.

⁹ 219 F.3d at 761.

¹⁰ *Id.*

¹¹ *Id.* at 762.

¹² On January 22, 2001, the Supreme Court denied *certiorari*. See *Gen. Communication, Inc. v. Iowa Utilities Bd., et al.*, Case No. 00-602; See *Consolidated Brief for the United States Telecom Association and the Rural Telephone Coalition in Opposition* (November 17, 2000)(brief in opposition to petitions seeking review of the Eighth Circuit Court’s decision by the United States Supreme Court).

judicial department to say what the law is."¹³ When a federal appeals court vacates an agency order, the administrative agency is prohibited from enforcing regulations which have been vacated.¹⁴ In *City of Cleveland, Ohio v. Federal Power Commission*, the Court explained the legal impact of issuance of a court's mandate:

The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case, and the higher tribunal is amply armed to rectify any deviation through the process of mandamus. That approach ... may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision. These principles ... indulge no exception for reviews of administrative agencies.¹⁵

After a court has spoken, the Commission is bound to follow that court's mandate, because the Commission "is not a court nor is it equal to [a] court in matters of statutory interpretation."¹⁶ Section 402(h) of the United States Code also provides that "In the event that the court shall render a decision and enter an order reversing the order of the Commission . . . it shall be the duty of the Commission . . . to forthwith give effect" to the court's judgment.¹⁷

With all appeals having been exhausted, the July 18, 2000 ruling of the Eighth

¹³ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁴ See, e.g., *Iowa Utilities Board v. FCC*, 135 F.3d 535, 541-543 (8th Cir. 1998); *City of Cleveland, Ohio v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977).

¹⁵ 561 F.2d at 346.

¹⁶ *Iowa Utilities v. FCC*, 135 F.3d 535, 540 (8th Cir. 1998); *Yellow Taxi Cab Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983).

¹⁷ 47 U.S.C. §402 (h).

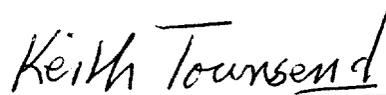
Circuit Court of Appeals on rural and small ILEC issues under section 251(f) is clearly the law of the land. Federal and state agencies and courts are required to implement the decision of the court. The Commission need only issue a clarifying order, consistent with the court's opinion, to guide state commission's on their deliberations under section 251(f) of the 1996 Act as applied to rural and smaller ILECs. By immediately issuing a clarifying order, the Commission will ensure prompt compliance with the court's order, eliminate further confusion among state officials and unnecessary and costly litigation for rural and smaller ILECs and avoid the delay of a Commission rulemaking proceeding.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

March 20, 2001

By:

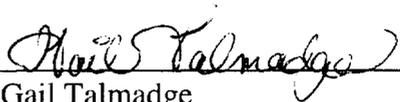


Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
Julie E. Rones

1401 H Street, NW
Suite 600
Washington, DC 20005
(202) 326-7371

CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on March 20, 2001 a copy of *Comments of the United States Telecom*, in CC Docket No. 96-98, was either hand-delivered or sent via U.S. Mail, first-class, postage prepaid, to the persons on the attached service list.


Gail Talmadge

Jane Mago
Acting General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Michelle Carey, Chief, Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Peter Tenhula, Sr. Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Kyle Dixon, Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Sheryl Todd, Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

International Transcription Service, Inc.
1231 20th Street, NW
Washington, DC 20037

Karen Brinkmann
Elizabeth R. Park
Latham & Watkins
555 11th Street, NW - Suite 1000
Washington, DC 20004-1304

Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW – 8th Floor
Washington, DC 20054

Commissioner Susan Ness
Federal Communications Commission
445 12th, SW – 8th Floor
Washington, DC 20054

Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, SW – 8th Floor
Room 8-C302C
Washington, DC 20054

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 12th Street, SW – 8th Floor
Washington, DC 20054