

FCC MAIL ROOM

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

2001 SEP 10 P 3: 19

In the matter of)
)
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 / **REIVED**

ORDER

Adopted: August 27, 2001

Released: August 27, 2001

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this order, we address a petition for rulemaking filed on March 5, 2001 by ACS of Alaska, ACS of Fairbanks, Inc., and ACS of the Northland, Inc. (collectively "ACS").¹ ACS requests that the Commission amend section 51.405 of its rules² to reflect the decision of the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC* concerning the allocation of the burden of proof in rural exemption cases under section 251(f)(1) of the Communications Act.³ For the reasons discussed below, we deny the ACS petition.

II. BACKGROUND

2. Section 251(f) of the Communications Act exempts certain rural telephone companies from the interconnection and unbundling requirements imposed on incumbent local exchange carriers under section 251 of the Act. Pursuant to section 251(f), a state commission may terminate an exemption for a rural telephone company if a bona fide request from a competing carrier for interconnection, services, or network elements "is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)."⁴

3. In August 1996, as part of its implementation of section 251(f), the Commission promulgated section 51.405 of its rules to provide guidelines for state commissions to determine whether

¹ Comments opposing ACS' petition for rulemaking were filed by General Communications, Inc. on April 5, 2001 and by the Regulatory Commission of Alaska on April 17, 2001.

² 47 C.F.R. § 51.405.

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

⁴ 47 U.S.C. § 251(f).

a rural local exchange carrier is entitled to the exemptions, suspensions or modifications set forth in section 251(f).⁵ Rule section 51.405 provided that upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that it should be entitled to continued exemption from the requirements of section 251(c) of the Act.⁶ To justify its continued exemption, or a suspension or modification under section 251(f)(2), the rural telephone company must offer evidence that the application of the requirements of section 251 “would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.”⁷ The Commission reasoned that it was appropriate to place the burden of proof with the rural telephone company rather than the requesting carrier since the rural telephone company was likely in control of the relevant information necessary for the state commission to make a determination as to the request.⁸

4. On July 18, 2000, the Eighth Circuit issued an opinion vacating the Commission’s rule sections 51.405(a), (c), and (d).⁹ The court determined that section 51.405 focused on the statute’s economic burden requirement and disregarded the statute’s companion defenses of technical infeasibility and/or inconsistency with section 254 of the Act.¹⁰ The court also found that the Commission had diluted the broad protection Congress granted to small and rural telephone companies by interpreting the statute’s phrase “unduly economically burdensome” to exclude economic burdens ordinarily associated with competitive entry.¹¹ The court concluded that the statute’s “language looks to the whole of the economic burden the request imposes, not just a discrete part.”¹²

5. The court also disagreed with the Commission’s requirement that the rural telephone company offer evidence to the state commission to prove it is entitled to a continuing exemption. The court determined that the language of the statute; namely, the use of the word “terminate” (rather than “grant”) and the use of the word “until,” suggests that a rural telephone company has a continuing exemption unless demonstrated otherwise by the party making the request.¹³ Accordingly, the court vacated rule sections 51.405(a), (c), and (d) and concluded that the “plain meaning” of the statute requires that the party making a bona fide request under section 251(f) “prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.”¹⁴ The Commission did not appeal the court’s ruling.¹⁵

⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16118 (1996) (“*Local Competition Order*”) (subsequent history omitted).

⁶ 47 C.F.R. § 51.405(a).

⁷ 47 C.F.R. § 51.405(c), (d).

⁸ *Local Competition Order*, 11 FCC Rcd at 16118.

⁹ *Iowa Utilities Bd. II.*, 219 F.3d at 759-762.

¹⁰ *Id.* at 760. (Section 254 of the Act concerns universal service).

¹¹ *Id.* at 761.

¹² *Id.*

¹³ *Id.* at 762.

¹⁴ *Id.*

¹⁵ Several parties did appeal the Eighth’s Circuit’s decision; however, the Supreme Court’s review was limited to other issues. *Petition for Writ of Certiorari, Verizon v. FCC*, 121 S.Ct. 877 (2001) (No. 00-511); *Petition for Writ of Certiorari, WorldCom v. Verizon*, 121 S.Ct. 877 (2001) (No. 00-555); *Petition for Writ of Certiorari, FCC v. Iowa Utilities Bd.*, 121 S.Ct. 878 (2001) (No. 00-587); *Petition for Writ of Certiorari, AT&T v. Iowa Utilities Bd.*, 121

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6. On March 5, 2001, ACS filed a petition for rulemaking (“ACS Petition”) in which it requests that the Commission issue an order adopting a new section 51.405 to implement the Eighth Circuit’s decision in *Iowa Utilities Bd. II* regarding the allocation of the burden of proof in rural exemption cases.¹⁶ ACS claims its request is necessary to ensure nationwide uniformity in the interpretation of section 251(f)(1).¹⁷ ACS states that although it qualifies for the exemptions provided for rural telephone companies under section 251(f) of the Act, the Regulatory Commission of Alaska (the “RCA”) has granted the request of one of its competitors to terminate ACS’ rural exemptions.¹⁸ ACS states that in terminating its exemption under section 251(f), the RCA improperly allocated the burden of proof to ACS to justify its continued exemption and required ACS to meet the “undue economic burden” standards set forth in section 51.405 of the Commission’s rules.¹⁹ ACS asks the Commission to issue an order, without notice and comment, adopting a new section 51.405(a), and requests expedited relief in order to provide clarification in a case it has pending before the Alaska Superior Court on this issue.²⁰ ACS contends that the Alaska authorities’ faulty reliance on the Commission’s interpretation of section 251(f)(1) requires that we adopt “a new rule to ensure that Section 251(f)(1) is correctly and consistently implemented in accordance with the Eighth Circuit’s order in *Iowa Utilities Board II*.”²¹

III. DISCUSSION

7. The Eighth Circuit’s opinion in *Iowa Utilities Bd. II* invalidates rule section 51.405(a) which placed the burden of proof on the rural telephone company to prove its continued entitlement to exemption from the Act’s network sharing requirements. In invalidating section 51.405(a), the court provided explicit guidelines as to the plain meaning of section 251(f)(1) of the Act and the appropriate allocation of the burden of proof. The court left no doubt that the Commission’s rule impermissibly placed the burden of proof on the rural telephone company, emphasizing that the language of the statute “suggests that the rural telephone companies have a continuing exemption that is only terminated once a bona fide request is made, provided the request is not unduly economically burdensome, is technically feasible, and is consistent with § 254.”²² Indeed, the court found that the “[t]he plain meaning of the statute requires *the party making the request* to prove that the request meets the three prerequisites to

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S.Ct. 878 (2001) (No. 00-590); *Petition for Writ of Certiorari, GCI v. Iowa Utilities Bd.*, 121 S.Ct. 879 (2001) (No. 00-602).

¹⁶ ACS Petition at 1.

¹⁷ *Id.* at 10.

¹⁸ General Communications, Inc. (“GCI”), a competitor of ACS, sought termination of ACS’ rural exemption in Fairbanks and Juneau, Alaska and the surrounding areas. As GCI’s petition was initially denied by the Alaska Public Utilities Commission (“APUC”) (the agency predecessor to the RCA), GCI appealed its decision to the Alaska Superior Court which ruled that the APUC had incorrectly assigned GCI the burden of proof. The Alaska Superior Court then remanded the case to the APUC with instructions to place the burden of proof on ACS to justify its continuing exemption. On October 11, 1999, the RCA terminated ACS’ rural exemptions. ACS Petition at 3-4.

¹⁹ ACS Petition at 4.

²⁰ ACS Petition at 1, 5-6. ACS sought partial suspension or modification of the requirements of section 251 from the RCA; however, its petition was dismissed. Accordingly, ACS states that it has engaged in interconnection negotiations and subsequent arbitration with GCI resulting in final orders issued by the RCA affirming those interconnection terms. ACS has filed an appeal of these final orders, as well as the RCA’s order terminating its rural exemptions, in the Alaska Superior Court. ACS also filed a motion for stay of the RCA orders pending its appeal, citing the Eighth Circuit’s ruling in *Iowa Utilities Bd. II*. That motion was denied. ACS Petition at 4-5.

²¹ ACS Petition at 6.

²² *Iowa Utilities Bd.*, 219 F.3d at 762.

justify the termination of the otherwise continuing rural exemption.”²³

8. The decision of the Eighth Circuit is, of course, binding upon this Commission. In light of the Eighth Circuit’s reasoning that the “plain meaning” of the statute is clear, we decline to codify a new rule since such a rule would merely mirror the language of the statutory provision. We do not reach ACS’ arguments with regard to whether the Commission may, in this instance, issue an order amending its rules without notice and comment as these arguments are rendered moot by our decision.²⁴

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to sections 1-4, 251, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 251 and 254, and sections 1.405(d) and 1.407 of the Commission’s rules, 47 C.F.R. §§ 1.405(d) and 1.407, that the petition for rulemaking requested by ACS IS DENIED for the reasons set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Dorothy T. Attwood
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Chief, Common Carrier Bureau

²³ *Id.* (emphasis added).

²⁴ The parties have also raised a number of questions, including jurisdictional issues, which have been posed in a variety of forums. See Letter from Tina M. Pidgeon, Counsel for GCI, to Magalie Roman Salas, FCC (August 23, 2001) and attachment; ACS Petition at 4-5 & nn.11-12. We expressly do not reach the merits of those claims or make any jurisdictional determinations on these issues.