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

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In the Matter of)
)
Request for Review by)
Unicom, Inc. of Decision of)
Universal Service Administrator)

Docket Nos. 96-45 and 97-21

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

PETITION FOR REVIEW

UNICOM, INC.

William K. Keane
Elizabeth A. Hammond

ARTER & HADDEN LLP
1801 K Street, NW
Suite 400K
Washington, D.C. 20554
(202) 775-7100

Its Counsel

October 9, 2001

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SUMMARY

Unicom, Inc. (“Unicom”) is a telecommunications carrier providing interexchange and cellular services in Western Alaska. In December 2000, Unicom submitted a complaint to the Universal Service Administrative Company (“USAC”) Rural Health Care Division with respect to funding requests by Yukon-Kuskokwim Health Corporation (“YKHC”). Unicom maintained that YKHC failed to comply with the Commission’s competitive bidding requirements and failed to apply a Native American preference to its procurement as required by Federal law.

USAC, in its decision, concluded that YKHC complied with the Commission’s competitive bidding rules inasmuch as YKHC posted FCC Form 465 and waited 28 days before letting a contract. In addition, USAC found that YKHC had complied with Commission Rules regarding “other procurement requirements” despite YKHC’s failure to apply Native American preferences on the grounds that YKHC certified compliance and USAC “lacks the ability or authority to make an independent assessment.”

Unicom submits that USAC’s ruling is in error. USAC failed to follow Commission Rules and policy with respect to the Commission’s competitive bidding requirements and USAC disregarded evidence contradicting YKHC’s self-certification with respect to YKHC’s obligation to award a Native preference in its procurement.

From the record Unicom submitted to USAC, it is clear that YKHC did not engage in competitive bidding prior to awarding a contract. YKHC deprived two competitors (Unicom and AT&T/Alascom) of critical information while providing one competitor (GCI, the competitor to which YKHC awarded its contract) with all the information it needed. Such action is contrary to the Commission’s competitive bidding requirements. USAC erred in finding otherwise.

USAC’s also erred in failing to hold that YKHC violated the Commission’s requirement that Rural Health Care Program applicants comply with other procurement requirements, such as

federally-mandated Native American preferences. Native American preferences are mandated under (1) the Alaska Tribal Health Compact, to which YKHC is a party, (2) the Indian Self-Determination Education Assistance Act, with which YKHC must comply, and (3) YKHC's own procurement regulations. USAC's determination that it "must rely primarily on the certification" of YKHC is unsustainable in light of Unicom's substantial evidence that YKHC failed to comply with applicable "other procurement requirements."

For these reasons, Unicom requests that the Commission review USAC's decision and find that YKHC violated the Commission's competitive bidding rules and policies.

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To: The Commission

PETITION FOR REVIEW

Unicom, Inc. (“Unicom”), by its counsel, hereby requests that the Commission review *de novo* the attached decision of the Universal Service Administrative Company (“USAC”).¹ The USAC decision raises important questions concerning the efficacy of the Commission’s competitive bidding requirements, as well as the harmonization of Rural Health Care Program (“RHCP”) administration with other federal laws. Commission review will provide guidance to applicants seeking funds under the RHCP (and Schools and Libraries Program), and to prospective bidders seeking to provide services to Program applicants.² Accordingly, for the reasons stated herein, review should be granted.

¹ Due to the importance of the issues presented for this and other USAC funding program decisions, the full Commission should exercise its discretion to consider this Petition.

² Given the *de novo* review contemplated by the Rules, Unicom hereby incorporates by reference its filings of December 14, 2000, February 16, 2001 and February 20, 2001 in this matter. These filings contain additional details with respect to the matters raised by Unicom.

I.

INTRODUCTION

Unicom is a telecommunications carrier providing interexchange and cellular services in Western Alaska. Its affiliate, United Utilities, Inc. (“UUI”) is a local exchange carrier certified by the Regulatory Commission of Alaska to provide telephone service to 58 remote villages located in the Alaskan Bush. Unicom and UUI are ultimately owned and controlled by Sea Lion Corporation and Togiak Natives Limited, Native Village corporations organized under the Alaska Native Claims Settlement Act of 1971. 43 U.S.C. 1601 *et. seq.*

II.

BACKGROUND

A. Unicom’s Complaint

In December 2000, Unicom submitted a letter of complaint to USAC’s Rural Health Care Division (“RHCD”) regarding Funding Year 1998 and 1999 requests by Yukon-Kuskokwim Health Corporation (“YKHC”).³ Unicom raised two basic issues: (1) that YKHC had failed to comply with the Commission’s competitive bidding requirements; and (2) that YKHC had failed apply a Native American preference to the procurement as required by the Alaska Tribal Health Compact to which YKHC is a party, by the Indian Self-Determination and Education and Assistance Act, 25 U.S.C. §450 *et. seq.*, and by YKHC’s own procurement regulations.

³ Unicom also raised objections with RHCD with respect to any Funding Year 2000 (7/01/00-6/30/01) decisions, which might then be pending. On September 27, 2001, RHCD issued two Funding Commitment Letters (“FCLs”) to YKHC in the aggregate amount of \$181,556.45. Unicom requests that the Commission consider the issues raised herein with respect to these two letters, and any subsequently issued FCLs for Funding Year 2000.

With respect to issue (1), Unicom detailed the ways in which YKHC failed to provide basic information -- including terms of service, bandwidth requirements and even a date by which proposals were due -- to Unicom and at least one other potential bidder, AT&T/Alascom. In particular, in July 1999, YKHC filed forty-nine (49) Form 465s for posting on the RHCD website. Full "T-1" service was requested for two out of the forty-nine clinics designated in those Forms; for the other forty-seven (47), YKHC sought only "fractional T-1 service."⁴

After reviewing the posting of YKHC's Form 465s, Mr. Chuck Russell, Executive Vice President of Unicom, contacted Ms. Rebecca Grandusky, then-Chief Information Officer, YKHC to obtain basic information necessary to submit a bid, such as terms of service, bandwidth desired and a proposal deadline. Ms. Grandusky responded to this inquiry by simply restating the same brief description of information provided on the Form 465s and referring Mr. Russell back to the RHCD website. Thereafter, in January 2000, Mr. Steve Hamlen, President of Unicom, met with Mr. Gene Peltola, Chief Executive Officer of YKHC, to underscore Unicom's desire to provide service and obtain information necessary for preparing a bid. Mr. Peltola did not provide Mr. Hamlen with specific information; instead, he asked Mr. Hamlen for information on the RHCP program.

Unbeknownst to Mssrs. Hamlen and Russell, and even while Unicom was diligently attempting to obtain information, Mr. Peltola had signed a contract with General Communications, Inc. ("GCI") on December 1, 1999. Contrary to the description of services specified on the Form 465s, the contract called for GCI to provide full T-1 satellite service, but only between Bethel (YKHC's main facility) and eight of the forty-nine Villages posted. The GCI contract referenced none of the fractional T-1 service specified in nearly all of the Form

⁴ See December 14, 2000 letter to Mr. Mel Blackwell, Vice President, External Communications and Rural Health Care Division at p. 2 ("December Letter").

465s. Nor did it reference the other forty-one (41) Villages that were the subject of the posting. Likewise, the GCI contract provided for a five-year term. In other words, the December 1, 1999 contract does not cover the locations and services requested by YKHC in the Funding Year 1999 Form 465s.

By failing to engage in meaningful competitive bidding, YKHC threatens to waste scarce RHCP funds to the detriment of other applicants. In particular, Unicom observed that had YKHC simply purchased these services through AT&T/Alascom and UUI local exchange carrier tariff rates, it would have saved approximately \$1.4 million over the 5-year term of the contract.⁵

With respect to issue (2), Unicom observed that under the Alaska Tribal Health Compact (“ATHC”), YKHC is required to afford Indian preference in procurement. The ATHC provides:

Section 2-Indian Preference in Employment, Contracting and Sub-Contracting. The Co-Signers will comply with the Indian and Alaska Native preference provisions of sections 7(b) and 7(c) of the Indian Self-Determination and Education Assistance Act, as amended. The parties agree that any Co-Signer may comply with any Indian or Alaska Native preference established by their respective Tribes, including preference based on tribal affiliation.⁶

Section 7(b) of the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. § 450 *et seq.*, establishes a system of preferences intended to benefit, *inter alia*, Alaskan Native-owned businesses like Unicom. Section 7(b) is not limited to Federal contracts or grants from the Bureau of Indian Affairs or Indian Health Service, the agencies traditionally involved with programs benefiting Indians. Moreover, Section 7(b) preferences are not restricted to

⁵ See Unicom’s December Letter at p. 4. and Unicom’s February 16, 2001 letter to Mr. Mel Blackwell at p. 7-8 (“February Letter”).

⁶ ATHC, Art. V § 2 (Amended and Restated October 1, 1998).

services and programs where Indians are the only beneficiaries.⁷ Rather, Section 7(b) requires that Indian preference be applied in connection with “any other Act authorizing Federal contracts with grants to Indian organizations or for the benefit of Indians” 25 U.S.C. § 450e(b)(emphasis added).

Further, the Commission has expressly held that the universal service provisions of Section 254 of the Telecommunications Act of 1996 are intended to benefit underserved populations including, in particular, Native Americans in rural Alaska.⁸ Rule 54.603(a) prescribes that selection of telecommunications carriers under the RHCP is subject to “other procurement requirements” such as the ATHC and Section 7(b) of ISDEEA. Indeed, YKHC’s own “Procurement Policies and Procedures” require the award of Native Preferences. *See* Exhibit 8 to Unicom’s December Letter at 42-43. Thus, YKHC erred in failing to apply a Native preference in the procurement.

B. USAC’s Decision

On September 6, 2001, USAC responded to Unicom’s complaint.⁹ With respect to issue (1), USAC concluded that YKHC had complied with the Commission’s competitive bidding requirements. It so held on the grounds that FCC regulations do not require rural health care providers to supply potential bidders with information beyond that provided on FCC Form 465

⁷ *See Alaska Chapter, Associated Gen Contractors of America v. Pierce*, 694 F.2d 1162 (9th Cir. 1982) (holding Section 7(b) applies to funds provided by the Department of Housing and Urban Development).

⁸ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 00-208 (rel. June 30, 2000) (adopting measures “to promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska Native tribal lands”).

⁹ Letter from D. Scott Barash, Vice President and General Counsel of USAC, dated September 6, 2001 (“Letter”). A copy of USAC’s letter is attached hereto as Exhibit A.

and posted to the RHCD website (*Letter* at p. 7). Moreover, the letter determined that YKHC’s information on its Form 465s was “sufficient information about the services sought . . . so that prospective bidders could contact YKHC . . . and provide bids for services.” *Id.*

With respect to issue (2) (the Native preference issue), the letter held that YKHC had complied with state, local and other procurement laws. At the same time, however, USAC stated:

RHCD lacks the ability or authority to make an independent assessment of whether a health care provider has in fact complied with “any additional and applicable state, local or other procurement requirements” . . . [but], should RHCD become aware of a finding or decision by an appropriate authority that state, local and other applicable laws were violated . . . RHCD would deny funding and/or make appropriate adjustments (*Letter* at p. 8.)

USAC stressed, in particular, that “YKHC has both certified that it has complied with all applicable procurement law and has provided additional information in support of its certification” *Id.*

This Petition for Review has followed.

III.

ARGUMENT

The USAC ruling contravenes basic principles of administrative law in two respects: (1) the USAC ruling fails to follow Commission Rules and policy; and (2) USAC ignored evidence contradicting YKHC’s self-certification of compliance, a certification upon which USAC placed material reliance.

A. YKHC Failed to Comply with Commission Competitive Bidding Policies

Based on the record developed by Unicom, it is clear that there was no meaningful competition for the service contract awarded by YKHC. Unicom (and AT&T/Alascom) were deprived of critical information, while GCI was not. When Chuck Russell of Unicom asked for a

“request for proposal or any description of the services you would like [Unicom] to quote,” he got nothing -- other than another referral to the posting: No bandwidth for specific locations, no term over which the services were to be provided, not even a deadline for proposals.

GCI, on the other hand, appears to have obtained all the information it needed: GCI apparently was aware that YKHC wanted, or would accept, full T-1 service -- not fractional T-1s as the Form 465 represented. GCI was aware that YKHC was interested in, or at least willing to accept, service to only eight communities, not forty-nine as the Form 465s had represented. And, GCI was aware that YKHC wanted, or was willing to accept, a five-year deal.¹⁰ YKHC’s Form 465s did not disclose this, nor was Unicom (or AT&T/Alascom) otherwise clued in. Because of the significant variances between YKHC’s posted request for services and the GCI contract -- as well as GCI’s admission that the eight Villages for which it submitted were the “sites of importance to YKHC”¹¹ -- GCI clearly was privy to information to which Unicom was not.

Section 53.603 of the Commission’s Rules establishes requirements for “Competitive Bidding.” The Commission requires the completion of a Form 465 containing summary information about the services requested and the posting of that Form on the RHCD website. According to the FCC, the Form 465 contains information “sufficient to enable service providers to identify potential customers” with the important qualification that “necessary additional information contained in an RFP” would be made available to interested service providers upon request.¹² None of that “necessary additional information” was made available to Unicom.

¹⁰ See December Letter at p. 6.

¹¹ See GCI letter of January 25, 2001 to Mr. Mel Blackwell (emphasis added).

¹² See *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, CC Docket 96-45, 13 FCC Rcd 5318, 5412 (December 30, 1997) (emphasis added).

Furthermore, the Commission has held that if an applicant does not provide each prospective bidder with “information of the same type and quality,” it deprives bidders of the chance to “prepare a cost-effective proposal, thereby failing to achieve the intended goals of the competitive bidding process.”¹³ Here again, GCI was obviously privy to information that YKHC elected to withhold from Unicom and AT&T/Alascom. Plainly, YKHC violated the essence of the Commission’s competitive bidding program.¹⁴

The USAC letter bases its contrary holding on the view that YKHC duly posted Form 465s, waited the requisite 28 days before signing the contract with GCI, and provided “sufficient information” about the locations and services it was requesting.

There are a number of errors in USAC’s analysis:

It is undisputed that Unicom attempted to open a dialogue with YKHC as contemplated by the Rules. It is also undisputed that at no time did YKHC reveal to Unicom that it was willing to entertain bids at variance from its postings, e.g., for fewer Villages than all forty-nine, for a term longer than one year, or for full T-1 service rather than fractional T-1 service. Finally, the letter does not take issue with Unicom’s position that it was prejudiced by this lack of information. Thus, the information provided by the Form 465s is not “sufficient.”

¹³ *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.; Federal-State Joint Board on Universal Service*, Order, FCC 00-167, 2000 FCC Lexis 2698 (May 23, 2000) (emphasis added).

¹⁴ If all this were not enough (which it is), the fact is that YKHC’s own procurement regulations require that it “shall furnish identical information to all prospective bidders.” Yukon Kuskokwim Health Corporation, Procurement Policies and Procedures, April 15, 1993, Section V.C.3(a) attached as Exhibit 8 to Unicom’s December Letter. Among other things, the regulations also require “the widest possible dissemination” (*id.* at Section I.B.32.) so as to ensure “to the maximum extent feasible, free and open competitions.” *Id.* at Section I.B.3. While YKHC has argued that it is free to ignore its regulations, these arguments are without merit for the reasons stated at pp 8-11 of Unicom’s February Letter.

USAC nevertheless states that YKHC “responded in a timely fashion to Unicom’s questions with as much detail as YKHC thought necessary to open a dialogue and obtain the services it sought” (*Letter* at p. 7) (emphasis added). In effect, what the USAC letter does is convert the requirement of a dialogue into a monologue: Under USAC’s view, an RHCP applicant can apparently choose to ignore efforts by prospective bidders to discuss its needs. But if this be so, what is the purpose to requiring an applicant to wait 28 days after a posting before entering into a contract? And what is the point to Commission statements that interested carriers are entitled “to know what services are being requested” if applicants like YKHC are free to sign contracts at material variance from what was previously posted? (*Letter* at p. 6.)

Internal contradictions like these are the antithesis of reasoned decision-making. They represent the sort of arbitrary and capricious action that administrative law is designed to check.¹⁵ For these reasons, the USAC decision should be reviewed and rectified so as to require YKHC to engage in meaningful competitive bidding.

B. USAC Erred in Not Resolving YKHC’s Failure to Comply with Other Procurement Requirements

USAC’s letter is in error for a second reason as well: Failure to hold that YKHC violated Rule 54.603(a)’s requirement that RHCD applicants comply with “state, local or other procurement requirements” (emphasis added). It is clear that Native American preferences are within the scope of Rule 54.603(a). These preferences are mandated under the ATHC and ISDEAA, with both of which YKHC must comply. The law applies to non-Indian agencies.¹⁶ Moreover, the Commission has affirmed expressly that the universal service provisions of

¹⁵ See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (stating that courts should intervene when the agency has not taken a hard look at the salient problems and has not engaged in reasoned decision-making).

¹⁶ See footnote 7 *supra*.

Section 254 of the Telecommunications Act are intended to benefit all underserved populations, including rural Alaska Native villages.^{17, 18}

USAC's rationale for not resolving this issue is that it "must rely primarily on the certification" of the applicant that it has complied with applicable procurement laws and that it "lacks the ability or authority to make an independent assessment of whether a health care provider has in fact complied with 'any additional and applicable state, local or other procurement requirements.'" (*Letter* at p. 8.)

USAC cites no authority for the proposition that it may not resolve such issues. Rather, having been charged by the Commission with the administration and dispensation of billions of dollars in federal subsidies, USAC abdicates its responsibilities when it fails to make determinations such as these, determinations critical to the lawful administration of the program.

The notion that USAC may ignore evidence contradicting an applicant's self-serving certifications compounds this error -- particularly where, as here, the applicant has made several inconsistent representations in the course of this matter.¹⁹ Failure to consider material like this is another reason for review.²⁰

¹⁷ See also February Letter at pp 10-14.

¹⁸ YKHC's own procurement rules also require provision of Indian preferences. These requirements are detailed on pages 42 and 43 of the procurement regulations and obligate YKHC to, *inter alia*, provide prospective bidders with specific information concerning Indian Preference in the award of YKHC contracts. Unicom notes that "Indian Preference" is not the sole criterion in YKHC's regulations under which contracts are to be awarded. Rather, Indian ownership is intended to be one factor among several under which competing applicants are evaluated.

¹⁹ On the contrary, USAC is bound not to rely on a party's self-certification when there are facts which may give rise to inference contradicting the certification. *Cf. Cohen v. Commissioner*, 148 F.2d 336 (2d Cir. 1945). See February Letter at pages 8-10, 13 detailing these conflicts.

²⁰ As to the relevance of the ISDEAA, this issue entails legal research and conclusions only. If USAC is of the view that it is not able to resolve the relevance of such matters on its own, then it should reach out to other agencies with expertise in the area and secure the appropriate answer before acting on the application.

Finally, the notion that USAC might award a remedy later, if a ruling should be secured from some other body, is equally unavailing. It would be far too late for Unicom to secure any meaningful relief: Contracts will have long since been let, and opportunities lost.

IV.

CONCLUSION

The Commission should not tolerate procurement practices which render Rule 54.603's insistence on competitive bidding meaningless. The Commission should clarify that posting a FCC Form 465 is merely the starting point in a valid competitive bidding procedure for RHCP applicants and that applicants are required to provide all bidders with material information not found on the Form 465s. The Commission also must require compliance with the applicants' own bidding procedures, as well as other federal laws such as the Indian Self-Determination Education Assistance Act. Anything else undermines Commission Rule 54.603, "Competitive Bidding Requirements," to the great detriment of the public interest in fiscally prudent administration of the multi-billion dollar Rural Health Care (and Schools and Libraries) Programs.

For the foregoing reasons, Unicom respectfully requests that the Commission review the USAC decision and direct that agency to evaluate YKHC's funding requests consistent with the points made herein.²¹

Respectfully submitted,

UNICOM, INC.

By: Elizabeth Hammond

William K. Keane
Elizabeth A. Hammond

ARTER & HADDEN LLP
1801 K Street, NW
Suite 400K
Washington, D.C. 20554
(202) 775-7100

Its Counsel

October 9, 2001

²¹ In the meantime, until the Commission has acted on this Petition and finality has attached, funding of YKHC's proposals should be deferred pursuant to Rule 54.725.

EXHIBIT A

Decision of the Universal Service Administrative Company



Universal Service Administrative Company

D. Scott Barash
Vice President & General Counsel
sbarash@universalservice.org

BY FEDERAL EXPRESS

September 6, 2001

William K. Keane
Arter & Hadden, LLP
1801 K Street, NW
Washington, DC 20006

Lloyd Benton Miller
Sonosky, Chambers, Sachse, Miller & Munson
900 West Fifth Avenue, Suite 700
Anchorage, AK 99501

Gerard J. Waldron
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

Martin M. Weinstein
GCI Regulatory Attorney
2550 Denali Street
Anchorage, AK 99503-2751

RE: Unicom, Inc. Complaint regarding Yukon Kuskokwim Health Corporation

Dear Mr. Keane, Mr. Miller, Mr. Waldron, and Mr. Weinstein:

On December 14, 2000, counsel for Unicom, Inc. (Unicom) submitted a letter to the Rural Health Care Division (RHCD) of the Universal Service Administrative Company (USAC) requesting that RHCD withhold funding from the Rural Health Care Universal Service Support Mechanism for services requested by the Yukon Kuskokwim Health Corporation (YKHC) for Funding Years 1998 and 1999 until Unicom's allegations are investigated. Unicom alleges that in the process of contracting with General Communications Inc. (GCI) for telecommunications services, YKHC failed to comply with Federal Communications Commission (FCC or Commission) competitive bidding requirements or YKHC's internal procurement policies, and failed to allow for Native American preferences as required by the Alaska Tribal Health Compact (ATHC) and the

Indian Self-Determination and Education Assistance Act (ISDEAA). *See* Letter from William K. Keane to Mel Blackwell (Dec. 14, 2000)(*Unicom December 14, 2000 Letter*).

YKHC responded to Unicom's December 14, 2000 letter in a letter dated January 26, 2001. *See* Letter from Lloyd Benton Miller and Gerard J. Waldron to Mel Blackwell (Jan. 26, 2001)(*YKHC January 26, 2001 Letter*). GCI responded to Unicom's December 14, 2000 letter in a letter dated January 26, 2001. *See* Letter from Martin M. Weinstein to Mel Blackwell (Jan. 26, 2001)(*GCI January 26, 2001 Letter*).

Unicom replied to YKHC and GCI's response letters in a letter dated February 16, 2001. *See* Letter from William K. Keane to Mel Blackwell (Feb. 16, 2001)(*Unicom February 16, 2001 Letter*). Finally, YKHC responded to Unicom's reply in a letter dated March 8, 2001. *See* Letter from Lloyd Benton Miller and Gerard Waldron to Mel Blackwell (Mar. 8, 2001)(*YKHC March 8, 2001 Letter*).

This letter constitutes USAC's response to Unicom's initial letter of complaint and the parties' subsequent communications with USAC concerning this matter.

Background

Funding Year 2

Between July 19 and July 22, 1999, RHCD posted 49 FCC Forms 465 (Description of Services Requested and Certification Form) submitted by YKHC. On these Forms 465, YKHC sought either T-1 service (Clara Morgan Sub-Regional Clinic and Yukon-Koskokwim Delta Regional Hospital) or fractional T-1 service (all other named YKHC village clinics) for Funding Year 2. In addition, in response to question 41 of the FCC Form 465 ("Are there any local procurement rules the HCP is required to follow?"), YKHC stated that "State regs require purchase of services through the LEC, also location requires purchase of satellite services."

On January 10, 2000, RHCD received eight (8) FCC Forms 466 (Funding Request and Certification Form) corresponding to the villages of Nunapitchuk (HCP 10175), Quinhagak Clinic (HCP 10179), John Afcan Memorial Clinic (HCP 10182), Toksook Bay Clinic (HCP 10188), Hooper Bay Clinic (HCP 10197), Mekoryuk Clinic (HCP 10209), Clara Morgan Sub-Regional Clinic (HCP 10214), and Yukon-Koskokwim Delta Regional Hospital (HCP 10217). On these FCC Forms 466, YKHC requested funding for T-1 satellite and local loop service for each village clinic to connect to Yukon-Koskokwim Delta Regional Hospital in Bethel, Alaska, and to connect Yukon-Koskokwim Delta Regional Hospital to Anchorage, Alaska.¹ Along with the FCC Forms

¹ An additional FCC Form 466 was received for 768K Frame Relay service between Koskokwim Delta Regional Hospital and Anchorage, Alaska. That pre-existing service was expected to be replaced by the T-1 service, and is not relevant to this discussion. On February 4, 2001, RHCD issued a Funding Commitment Letter for HCP 10217's Frame Relay service.

466, YKHC submitted a five-year contract signed December 1, 1999 by YKHC, and December 8, 1999 by GCI, for T-1 services at these sites.

On March 23, 2000, RHCD issued Funding Commitment Letters approving the funding requested in the seven (7) FCC Forms 466 for the villages.² Shortly thereafter, RHCD posted information regarding these seven (7) funding commitments on the USAC website. This posting on the USAC website indicated the Health Care Provider Name, Funding Commitment Letter Date, and Support Amount. During the ensuing months, YKHC did not file FCC Forms 467 (Connection Certification) to indicate that services were being received at these sites. RHCD subsequently learned that T-1 service had not been initiated by the close of the funding year, on June 30, 2000. Consequently, USAC disbursed no funds for these seven sites for Funding Year 2.

Funding Year 3

Between May 12, 2000 and June 16, 2000, YKHC posted 49 FCC Forms 465 from these same sites requesting services for Funding Year 3. In these Forms 465, YKHC sought services, "to transmit patient health care data and medical images for health aide to physician consultations." On August 31, 2001, eight (8) FCC Forms 466 (Funding Request and Certification Form) corresponding to the villages of Nunapitchuk (HCP 10175), Quinhagak Clinic (HCP 10179), John Afcan Memorial Clinic (HCP 10182), Toksook Bay Clinic (HCP 10188), Hooper Bay Clinic (HCP 10197), Mekoryuk Clinic (HCP 10209), Clara Morgan Sub-Regional Clinic (HCP 10214), and Yukon-Koskokwim Delta Regional Hospital (HCP 10217) were received by RHCD. On these FCC Forms 466, YKHC requested funding for T-1 satellite and local loop service for each village clinic to connect to Yukon-Koskokwim Delta Regional Hospital in Bethel, Alaska, and to connect Yukon-Koskokwim Delta Regional Hospital to Anchorage, Alaska.³ Along with the FCC Forms 466, YKHC submitted the same five-year contract signed December 1, 1999 by YKHC, and December 8, 1999 by GCI, for T-1 services at these sites.

Arguments of the Parties⁴

Unicom argues that in regard to the Funding Year 2 funding requests, YKHC violated the FCC's competitive bidding requirements because YKHC failed to provide Unicom with information necessary for it to formulate a bid and because YKHC failed to comply with its own internal procurement regulations. Unicom further argues that YKHC violated its own procurement regulations because it failed to provide identical information to all prospective bidders and did not provide notice of the issuance of a request for proposals

² Because Yukon-Koskokwim Delta Regional Hospital was requesting support for both T-1 and 768K Frame Relay service, which exceeded the FCC's T-1 limit on support, a Funding Commitment Letter was not issued for HCP 10217 pending resolution of which service should be supported.

³ An additional FCC Form 466 was received for 768K Frame Relay service between Koskokwim Delta Regional Hospital and Anchorage, Alaska.

⁴ In its letter, GCI echoes YKHC's arguments and describes its role in the bidding process. See GCI January 26, 2001 Letter.

(RFP). In particular, Unicom complains that YKHC did not inform Unicom that YKHC sought satellite-based service, that YKHC would accept full T-1 service, that it would accept a contract for fewer than the 49 sites, and that it wanted a five-year contract. Unicom states that it has filed a formal protest with YKHC, and requests that RHCD defer making any funding decision pending the resolution of this protest. Finally, Unicom argues that YKHC failed to follow federal and local requirements that it allow for Native American preferences. *See Unicom December 14, 2000 Letter.*

According to exhibits provided by Unicom, YKHC appears to have sent an e-mail message to Unicom, AT&T and GCI on September 17, 1999 requesting quotes for satellite data services in regard to the posted Forms 465. *See Unicom December 14, 2000 Letter*, Exhibit 1). Unicom replied to this email stating that it could “provide a quote for facilities based satellite services.” The date of this reply message does not appear to be indicated. *See id.* A YKHC employee replied by e-mail to Unicom on September 30, 1999, stating:

[T]he request for proposals is on the Internet RHCC site. I have requested T1 from each village back to Bethel. The FCC only has tariffs for 128KB or T1, so I chose the T1. I was told by the FCC that I needed to choose a long distance carrier first and then contact the LEC for billing. If you are qualified to provide the long distance service, I would be happy to entertain your bid.

See id. A Unicom employee replied to this e-mail message on October 5, 1999, stating:

I guess I need some help. I've looked on the internet at the RHC site . . . and reviewed the FCC Form 465. The Bethel 465 lists T-1 and the village 465s list fractional T-1. I can't find a request for proposal or any description of the services you would like the IXC's to quote. Am I looking in the wrong place? Could you send me a description of the services you would like quoted?

See id. YKHC's representative replied on October 5, 1999, stating:

You are looking at the correct site. I am requesting a T-1 or fractional t-1 depending on the site. The T-1 and fractional T-1 will connect each site to Bethel WAN.

See id. The subject line for each of these e-mails is “Satellite Service.” (*See id.*)

In response to Unicom's contentions, counsel for YKHC asserts that USAC should dismiss Unicom's letter with prejudice because it was not filed within 30 days of the Administrator's Funding Year 2 commitment decision, because it lacks the basic elements of an administrative filing, because Unicom cannot complain if it never submitted a bid, and because YKHC fully complied with the FCC's bidding

requirements. In regard to the merits of the allegations, YKHC responds that it fully complied with applicable FCC regulations. YKHC states that it submitted the Forms 465 for posting on or around June 17, 1999, that these FCC Forms 465 indicated that it sought some kind of T-1 service from YKHC's main facility in Bethel to its village clinics, that more than 28 days after the FCC Forms 465 were posted, it received two bids – one from AT&T dated October 20, 1999, and one from GCI dated October 11, 1999, and that it selected GCI, the lowest bidder, on December 8, 1999. YKHC denies that it provided information to GCI that it refused to provide to Unicom. YKHC states that GCI submitted a five-year bid on its own initiative. *See YKHC January 26, 2001 Letter.*

YKHC further responds that, as a private corporation, it is not legally required to comply with its internal procurement policies, and that assuming *arguendo* that it is required to comply with these policies, it did so. YKHC states that it has specialized procurement procedures that it follows for telecommunications procurements, and that it followed these procedures in this case. YKHC states that these are the procedures applicable to telecommunications procurement, not the procedures cited by Unicom. Finally, YKHC argues that ISDEAA does not, as a matter of law, apply to contracts involving universal service support because the Telecommunications Act of 1996 was not enacted for the benefit of Indians. *See id.*

In its reply, Unicom acknowledges that YKHC is correct that its December 14, 2000 letter cannot be considered an appeal of RHCD's March 23, 2000 funding commitment decisions. Unicom contends, however, that the December 14 letter should be considered by RHCD as it makes its funding commitment decisions in regard to Funding Year 3 support requests. Unicom further responds that its failure to submit a bid is directly attributable to YKHC's failure to provide Unicom with adequate information, and so YKHC cannot assert that Unicom lacks standing to make its complaint if YKHC failed to provide it with information. Unicom also notes that AT&T did not consider its submission to YKHC to be a "bid." Unicom argues that RHCD is free to consider its letter under informal FCC practice. Unicom further responds to YKHC's assertion that it is not required to follow its internal procurement policies and procedures and that ISDEAA does not apply to the contract at issue. *See Unicom February 16, 2001 Letter.*

Analysis

Unicom's December 14, 2000 letter and subsequent correspondence concerning this matter have presented USAC with an unusual situation. FCC regulations provide that "[a]ny person aggrieved by an action taken by a division of the Administrator" may seek review of that decision "within thirty (30) days of the issuance of the decision. 47 C.F.R. § 54.719(a), (b). RHCD issued its Funding Year 2 commitment decisions on March 23, 2000. Unicom's letter is dated December 14, 2000. Unicom admits that its complaint is untimely in regard to the Funding Year 2 funding commitment decision letters issued on March 23, 2000. In any event, Unicom's allegations concerning Funding Year 2 are moot. YKHC did not submit any Forms 467 pursuant to the Funding Year 2 commitment letters issued by RHCD. Consequently, while RHCD did approve funding in regard to

the Funding Year 2 Forms 466 that were submitted by YKHC, USAC did not disburse any Funding Year 2 support.

Unicom seeks to renew its complaint, however, in regard to any Funding Year 3 decisions currently pending before RHCD. No funding commitments have been issued for Funding Year 3 at this time, and so Unicom's claims regarding Funding Year 3 are arguably not yet ripe for review by USAC. Unicom's December 14, 2000 letter and subsequent correspondence are plainly not a request for review within the meaning of 47 C.F.R. § 54.719 and we are not treating its letter as a request for such review. However, USAC's ability to consider alleged improprieties in the competitive bidding process is not strictly limited by the procedures and time frames delineated in the appeals regulations at 47 C.F.R. § 54.719.⁵ Rather, FCC regulations governing the provision of universal service support for rural health care providers at 47 C.F.R. §§ 54.601 – 54.625, taken together with USAC's obligation to protect the universal service support mechanisms from fraud, waste and abuse, *see* 47 C.F.R. § 54.717, give USAC the authority to investigate any allegation of program rule violations that are brought to its attention at any time. *See, e.g.*, USAC Website Notice Regarding Whistleblower Hotline at <http://www.rhc.universalservice.org>. As a result, USAC investigates allegations of program rule violations that are brought to its attention and takes appropriate action in response to the results of that investigation, ranging from denial of funding requests to referrals to appropriate law enforcement authorities. USAC investigates allegations of improprieties at the time they are brought to its attention, particularly when funding commitment decisions are pending.

FCC Competitive Bidding Issues

Governing FCC regulations require that, except under limited circumstances not relevant here, all FCC Forms 465 received by RHCD be posted on its website for 28 days. Participating health care providers also must carefully consider all bids received before making commitments with the selected telecommunications carrier(s). *See* 47 C.F.R. § 54.603(b)(3). This website posting contemplated by FCC rules:

may be as formal and detailed as the health care provider desires or as required by any applicable federal or state laws or any other requirements. The request shall contain information sufficient to enable the carrier to identify and contact the requestor and to know what services are being requested. The posting of a rural health care provider's description of services will satisfy the competitive bidding requirement for the purposes of our universal service rules. We emphasize, however, that the submission of a request for posting under our rules is not a substitute for any additional and applicable state, local or other procurement requirements.

⁵ FCC regulations at 47 C.F.R. § 1.41 govern informal proceedings before the FCC, and consequently are inapplicable to USAC.

See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, FCC 97-157 ¶ 686 (rel. May 8, 1997) (*Universal Service Order*). The health care provider is further required to certify that it selected the most cost-effective method of providing service, and to submit copies of any bids received in response to its Form 465. See 47 C.F.R. § 54.603(b)(4).

In regard to the Funding Year 2 funding requests, YKHC clearly complied with the requirement that it wait 28 days after its Form 465 was posted before making a commitment to a telecommunications carrier. The Forms 465 at issue here were posted between July 19 and July 22, 1999. The Forms 466 were submitted to RHCD on January 10, 2000. The contract between YKHC and GCI was signed by the final party on December 8, 1999.

Unicom contends that YKHC failed to provide Unicom with the information it needed to formulate a bid because it was not provided with an RPF, actual bandwidth for specific locations, term, or a deadline for proposals. The facts as presented do not support Unicom's contention. Although Unicom argues to the contrary, see *Unicom December 14, 2000 Letter* at 5, FCC regulations do not require rural health care providers to provide an RFP or other specific document in addition to the information provided on FCC Form 465 and posted to the RHCD website. Nor do FCC regulations require that health care providers establish a deadline for receiving proposals. In regard to the Funding Year 2 funding requests, RHCD reviewed the FCC Forms 466 and 468 at issue and determined that they satisfied the program's competitive bidding requirements. In particular, RHCD determined that the posted Form 465s provided sufficient information about the locations where telecommunications service was sought, and what YKHC wanted to accomplish so that prospective bidders could contact YKHC to discuss their telecommunications needs and provide bids for services. Implicit in RHCD's determination is that there was no competitive bidding violation in regard to GCI's decision to respond to eight, rather than all 49, of the Form 465s that YKHC posted, nor in the contract's five-year term.

The e-mail correspondence provided by Unicom supports RHCD's determination that YKHC complied with the competitive bidding requirements of the Rural Health Care Support Mechanism. The correspondence indicates that YKHC sought bids from Unicom, AT&T and GCI, and that it responded in a timely fashion to Unicom's questions with as much detail as YKHC thought necessary to open a dialogue and obtain the services it sought. Furthermore, no program violation inheres in GCI's decision to respond to only eight of the 49 Forms 465, nor to propose a five-year term to the contract.

State, Local, or Other Procurement Requirements

Unicom further argues that YKHC violated the Commission's requirement that health care providers comply with any applicable state, local or other procurement requirements because YKHC failed to comply with its own internal procurements policies and procedures and because YKHC failed to allow for Native American preferences as required by the Alaska Tribal Health Compact (ATHC) and the Indian Self-

Determination and Education Assistance Act (ISDEAA). *See Unicom December 14, 2000 Letter* at 8-9.

In the *Universal Service Order*, the FCC established two components to the competitive bidding requirements of the Rural Health Care Support Mechanism. As discussed above, the first component, the 28-day posting requirement and the contents of the posting, is contained in the FCC regulations, and in reviewing funding requests, RHCD determines whether the health care provider has complied with these competitive bidding requirements. There is no allegation that YKHC did not comply with this requirement. The second component of the program's competitive bidding requirements is that a health care provider must comply with "any additional and applicable state, local or other procurement requirements." *See Universal Service Order* ¶ 686. To review compliance with this requirement, RHCD must rely primarily on the certification of a responsible official of the health care provider that the entity seeking support has "satisfied all of the requirements herein," including the requirement that the health care provider has complied with applicable procurement law. *See FCC Form 466 (Health Care Providers Universal Service Funding Request and Certification Form)*, Block 9. RHCD lacks the ability or authority to make an independent assessment of whether a health care provider has in fact complied with "any additional and applicable state, local or other procurement requirements." *Universal Service Order* ¶ 686. However, should RHCD become aware of a finding or decision by an appropriate authority that state, local and other applicable laws were violated in regard to this funding request, RHCD would deny funding and/or make appropriate adjustments to a funding commitment decision. We have not been informed of any such finding as of the date of this letter. We also note that YKHC has both certified that it has complied with all applicable procurement law and has provided additional information in support of its certification that its competitive process complied with applicable procurement law. *See YKHC January 26, 2001 Letter* at 6-12; *YKHC March 8, 2001 Letter* at 2. RHCD has been informed that YKHC has rejected Unicom's complaint that YKHC failed to comply with its own applicable internal requirements. Unicom is, of course, free to pursue any alternative legal remedies that are available to it.

Conclusion

This letter sets forth USAC's response to the allegations made by Unicom in its December 14, 2000 letter and subsequent correspondence based upon the facts known to USAC at this time. YKHC's Funding Year 3 requests for funding are currently pending before RHCD. RHCD will be making a funding commitment decision in regard to those funding requests shortly, and that decision will be consistent with the determinations contained in this letter. At that time, any person aggrieved may seek review by USAC or the FCC of RHCD's action. *See* 47 C.F.R. § 54.719.

Sincerely,

D. Scott Barash
Vice President and General Counsel

by:


Kristy L. Carroll
Assistant General Counsel

cc: Mark G. Siefert, Deputy Chief, Accounting Policy Division, FCC Common Carrier Bureau

CERTIFICATE OF SERVICE

I, Yvette Morgan, hereby certify that the foregoing "Petition for Review" was served this 9th day of October, 2001, by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

D. Scott Barash, Esq.
Vice President & General Counsel
Universal Service Administrative Company
Suite 600
2120 L Street, NW
Washington, D.C. 20037

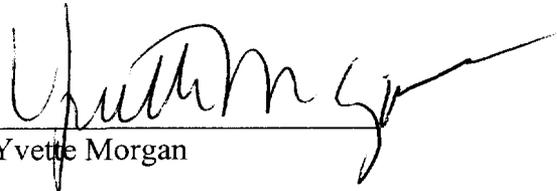
Valerie Davidson, Esq.
General Counsel
Yukon-Kuskokwim Health Corporation
829 Chief Eddie Hoffman Highway
Bethel, Alaska, 99559

Lloyd Benton Miller, Esq.
Sonosky, Chambers, Sachse,
Miller & Munson
900 West Fifth Avenue, Suite 700
Anchorage, AK 99501

Gerard J. Waldron, Esq.
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Martin M. Weinstein, Esq.
GCI Communications Corporation
2550 Denali Street
Anchorage, AK 99503-2571

Tina M. Pidgeon, Esq.
Drinker Biddle & Reath LLP
1500 K Street, NW
Washington, DC 20005


Yvette Morgan