

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

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OCT 11 2001

FEDERAL COMMUNICATIONS COMMISSION
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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 /

OPPOSITION TO PETITION FOR RECONSIDERATION

Joe D. Edge
Tina M. Pidgeon
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 842-8812
(202) 842-8465 FAX

John T. Nakahata
HARRIS, WILTSHIRE & GRANNIS, LLP
1200 18th Street, NW, Suite 1200
Washington, DC 20036
(202) 730-1320
(202) 730-1302 FAX

Attorneys for
GENERAL COMMUNICATION, INC.

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SUMMARY

General Communication, Inc. (“GCI”) opposes the Petition for Reconsideration filed by ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. (collectively, “ACS”) in this proceeding. This reconsideration petition is ACS’ latest attempt to use litigation to halt — and to roll back — the emergence of competition in Alaska’s second and third largest cities, Fairbanks and Juneau. After a four year delay since GCI’s first request for interconnection in these cities and with competition launched in Fairbanks and about to launch in Juneau, ACS again asks the Commission to issue a nationwide, preemptive rule that would immediately yield a singular anticompetitive result — to give ACS an excuse to attempt to abrogate its interconnection agreements and unilaterally to terminate interconnection, collocation arrangements, and the provision of unbundled loops and resold services.

The Bureau reasonably declined to issue a nationwide, preemptive, anticompetitive rule to govern the burden of proof in rural exemption proceedings before state public utility commissions. No provision of law or prior FCC order requires the issuance of such a rule that would stymie rather than permit competition. When the Eighth Circuit vacated Sections 51.405(a), (c), and (d) of the Commission’s rules, it nowhere mandated that the Commission hold further proceedings or otherwise suggested that a national rule had to be adopted. Moreover, ACS’ apparent claim that a national rural exemption regulatory regime is necessary for the sake of national uniformity ignores the Commission’s principal conclusion in the Local Competition Order that individual state commissions, rather than national rules, govern the rural exemption.

ACS makes absolutely clear that it has sought a national burden of proof rule so that the Eighth Circuit’s interpretation of Section 251(f) will be binding on all state and federal courts

and state public utility commissions, not just the federal courts of the Eighth Circuit. However, there is no reason for the FCC to use its legislative rulemaking authority to constrain courts and state public utility commissions not bound by the Eighth Circuit's interpretations. The Regulatory Commission of Alaska has conducted an extensive review of ACS' Section 251(f) claims in terminating ACS' rural exemptions, and the Alaska state courts to date have upheld that decision against every legal challenge. There is simply no need for the FCC now to step into what is fundamentally an Alaska dispute, to disrupt competition that is benefiting Alaskans without harm to consumers in any other region of the country.

If the FCC conducts a rulemaking, however, it should comprehensively review the operation of Section 251(f) — not just the burden of proof, and the rulemaking should be conducted with full notice and comment. For example, the FCC should provide guidance as to what constitutes an undue economic burden sufficient to preserve the rural exemption and review how state commission evaluations of a request may be streamlined through the use of prima facie evidence that the conditions for terminating the exemption have been met. Even a burden of proof rule such as the one ACS seeks requires notice and comment, because imposition of such a rule so late in the history of the implementation of the 1996 Act would require detailed consideration of transition issues and consumer interests. Of course, the simplest route to avoid these transition issues would be to deny ACS' petition for reconsideration.

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OPPOSITION TO PETITION FOR RECONSIDERATION

General Communication, Inc. (“GCI”), by its undersigned attorneys, hereby opposes the Petition for Reconsideration filed by ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. (collectively, “ACS”) on September 26, 2001.¹ This reconsideration petition is ACS’ latest attempt to use litigation to halt — and to roll back — the emergence of competition in Alaska’s second and third largest cities. Unfortunately, ACS’ campaign succeeded in delaying GCI’s launch of competitive local choices for Alaskans in Fairbanks and Juneau for over four years, from 1997 until 2001. With competition launched in Fairbanks and about to launch in Juneau, and with GCI designated as an eligible telecommunications carrier in both communities, ACS now asks the Commission to step in and issue a nationwide, preemptive rule that would immediately yield a singular anticompetitive result — to give ACS an excuse to attempt to abrogate its interconnection agreements and unilaterally to terminate interconnection,

¹ ACS acquired Anchorage Telephone Utility, Telephone Utilities of Alaska, Inc., Telephone Utilities of the Northland, Inc., and PTI Communications of Alaska, Inc. For convenience in this pleading, both ACS and its predecessors are referred to as “ACS.”

collocation arrangements, and the provision of unbundled loops and resold services. The Bureau reasonably declined to issue a nationwide, preemptive, anticompetitive rule to govern the burden of proof in rural exemption proceedings before state public utility commissions. The Commission is not compelled by law or prior Commission decisions to issue such a counter-productive rule.

I. BACKGROUND

The saga of telecommunications competition in Alaska shows both the promise of the Telecommunications Act of 1996 (“1996 Act”) and the pitfalls embedded in its rural exemption provision under Section 251(f). Shortly after passage of the 1996 Act, GCI requested interconnection from ACS in its Anchorage study area. In April 1997, GCI requested interconnection from ACS in its Fairbanks and Juneau study areas. GCI entered Anchorage, a non-rural market under the Communications Act, in 1997 and today serves 35 percent of the Anchorage local telecommunications market. GCI is an eligible telecommunications carrier in Anchorage and serves the entire Anchorage market, including the residential mass market.

While competition and consumer choice blossomed in Anchorage, the weeds of ACS litigation choked off competition in Fairbanks and Juneau. Instead of negotiating an interconnection agreement and then competing, ACS chose to assert that under the Section 251(f) rural exemption, it should not be required to negotiate under Section 251(c)(1) to provide interconnection, resold services or unbundled network elements.²

Fairbanks and Juneau are not isolated, small bush communities. Fairbanks, the commercial hub of interior Alaska, has 40,000 telephone lines. Juneau, the state capital, has

² At the time, ACS offered to provide interconnection and resold service, but it refused to provide unbundled network elements.

30,000 telephone lines. If ACS' study areas in Alaska were consolidated — as is the case for most other telephone companies providing statewide service — ACS would not qualify for a rural exemption in any of these communities.³ Indeed, ACS is hardly an under-resourced small carrier: today it is the nation's fourth largest rate-of-return carrier, trailing only ALLTEL, TDS and Century in lines served.

ACS' decision to use the rural exemption to seek refuge from competition in Fairbanks and Juneau kicked off four years of litigation that continues to this day. After negotiations with ACS failed, in September 1997, GCI filed petitions with the former Alaska Public Utilities Commission ("APUC"), the predecessor to the Regulatory Commission of Alaska, to terminate ACS' rural exemptions in Fairbanks and Juneau. In January 1998, the former APUC overrode the recommendations of its staff and denied GCI's petitions, among other things, assigning to GCI the burden of proving the conditions in Section 251(f)(1) for terminating the rural exemption. GCI appealed that decision, and, in March 1999, the Alaska Superior Court vacated the former APUC's decision and held, *inter alia*, that Section 251(f)(1) is silent on the issue of which party should bear the burden of proof in a rural exemption proceeding. The Court then held as a matter of state law that principles of fairness require ACS to bear the burden of proving the conditions for continuing the rural exemption because it controls and possesses the pertinent financial and technical information to make such a determination. The Court remanded the case to the APUC for a new hearing.

Immediately thereafter, ACS filed its first request for a stay of the Alaska Superior Court's remand order, but the Court denied the stay request on April 9, 1999. ACS then filed a

³ ACS serves approximately 330,000 switched access lines in Alaska.

petition for review and a second request for a stay with the Alaska Supreme Court, which the Alaska Supreme Court denied on April 23, 1999.

On remand, the former APUC held extensive evidentiary hearings on June 22-24, 1999 and entered an order terminating the rural exemption of the ACS subsidiaries in Juneau and Fairbanks on June 30, 1999. On July 1, 1999, the RCA assumed control of utility regulation in the state.⁴ On September 7, 1999, the new RCA commissioners filed affidavits attesting to their review of the administrative record in the rural exemption proceeding and then issued an order reaffirming the termination of the rural exemption of the ACS subsidiaries in Juneau and Fairbanks on October 11, 1999. ACS predictably filed an administrative appeal from the RCA's termination order with the Alaska Superior Court.⁵

Once the rural exemption was lifted, only then could GCI begin the process of negotiating an interconnection agreement with ACS under Section 251(c)(1) for Fairbanks and Juneau. However, while the state court appeals of the termination order and interconnection arbitrations were proceeding, the Eighth Circuit Court of Appeals issued Iowa Utilities II.⁶ During the time the Iowa Utilities II mandate was stayed pending further appeals, GCI and ACS completed their arbitration, and the RCA approved an interconnection agreement on October 5, 2000.⁷ The

⁴ The Alaska Legislature abolished the APUC and transferred all of its regulatory powers to the RCA effective on July 1, 1999.

⁵ Telephone Utilities of Alaska, Inc. et al. v. Regulatory Commission of Alaska, et al., Case No. 3AN-99-3494. This case was consolidated with a legal challenge ACS filed to the RCA's decision rejecting a petition that ACS filed immediately following the termination order, in which ACS requested a suspension under Section 251(f)(2) of its obligation to arbitrate UNE terms and conditions. ACS sought to avoid arbitration and instead implement UNE terms and conditions through a tariff filing. The RCA rejected this approach and upheld the arbitration requirements of the 1996 Act. Case No. 3AN-99-3499.

⁶ Iowa Util. Bd v. FCC, 219 F.3d 744 (8th Cir. 2000) ("Iowa Utilities II").

⁷ In the Matter of the Petition by GCI Communication Corp. under 47 U.S.C. §§251 and 252 for the Purpose of Instituting Local Exchange Competition, Consolidated Orders U-99-141(10)/U-99-142(10)/U-99-143(10).

interconnection agreement provides all of the terms and conditions of the interconnection services and network functions that GCI needs to provide full local exchange service to the citizens of Juneau and Fairbanks.⁸ ACS has filed a lawsuit in the federal district court in Anchorage Alaska challenging the RCA's approval of the interconnection agreement.⁹ In the same suit, ACS has also sought collaterally to attack the RCA's order terminating ACS' rural exemption.

Once the Supreme Court denied certiorari with respect to the portion of Iowa Utilities II that addressed the rural exemption, on January 30, 2001, ACS filed a request for an immediate stay of the RCA's termination order. ACS principally argued that under the Hobbs Act,¹⁰ the Alaska Superior Court was bound to follow the Eighth Circuit's interpretation of the 1996 Act on the burden of proof issue and therefore was required to vacate its earlier burden of proof ruling.¹¹

In addition to filing its motions with the Alaska Superior Court, ACS also acted unilaterally to halt implementation of its interconnection obligations. By letter dated January 31,

⁸ GCI plans on providing local service to all citizens in these markets. In fact, the RCA recently approved GCI's petition for eligible telecommunications carrier status for these markets on August 28, 2001. In the Matter of the Request by GCI Communication Corp. for Designation as a Carrier Eligible To Receive Federal Universal Service Support under the Telecommunications Act of 1996 for the Fairbanks, Fort Wainright and Juneau Areas, Order U-01-11(1).

⁹ ACS of Fairbanks, Inc. et al. v. GCI Communication Corp. and Regulatory Commission of Alaska, Case No. A00-0288-CV. This case presently is stayed pending the outcome of an appeal the state has filed with the Ninth Circuit Court of Appeals concerning the district court's rejection of the state's motion to dismiss on sovereign immunity grounds.

¹⁰ 28 U.S.C. § 2342(1). The Hobbs Act vests exclusive jurisdiction in the United States Courts of Appeal to review legal challenges to the FCC's rules and orders. In accordance with federal multi-district court rules, the Eighth Circuit Court of Appeals was selected as the forum to review the consolidated petitions for review of the FCC's Local Competition Order.

¹¹ ACS also argued that the RCA's termination order was defective because of certain references to the FCC's undue economic burden rules, which the Eighth Circuit Court of Appeals also vacated in Iowa Utilities II.

2001, ACS informed GCI that it was “suspending any work” pending the Alaska Superior Court’s ruling on its stay request.¹² The RCA did not authorize this self-help action.

On February 9, 2001, the Alaska Superior Court rejected ACS’ Hobbs Act arguments and denied ACS’ request for a stay holding that Iowa Utilities II “does not require a stay, nor is it persuasive of the merits of a stay.”¹³ The Alaska Superior Court upheld its authority to independently interpret the federal statute for itself subject to review by the Alaska Supreme Court and ultimately review by the U.S. Supreme Court should that Court grant a petition for certiorari.¹⁴ ACS then filed a petition for review with the Alaska Supreme Court, requesting an immediate stay and suspension of the termination order.¹⁵ The Alaska Supreme Court denied the petition for review on May 1, 2001.¹⁶

With its attempts to evade interconnection obligations denied by all levels of the Alaska courts, ACS then filed a petition for rulemaking at the FCC, asking the Commission immediately and without public comment to issue a national rule regarding the burden of proof in Section 251(f) rural exemption cases. GCI opposed that request, as did the Regulatory Commission of

¹² Letter of S. Lynn Erwin, ACS, to Mark Moderow, GCI, dated January 31, 2001 (“ACS Letter”) (attached as Exhibit 1).

¹³ ACS Petition for Rulemaking, Exhibit A. With respect to issues not already decided, the case before the Alaska Superior Court is still pending although briefing is completed and the parties had a final oral argument before the Court on August 16, 2001.

¹⁴ The Alaska Superior Court agreed with GCI that although the Hobbs Act vests the U.S. Courts of Appeals with exclusive jurisdiction to review an FCC rule or order, it does not vest the U.S. Courts of Appeal with exclusive jurisdiction to interpret federal statutes. In the state case, the Alaska Superior Court was not asked to review any FCC rule or order (the FCC burden of proof rule was vacated), and thus, there was no Hobbs Act bar to the state court’s jurisdiction to interpret Section 251(f)(1) for itself.

¹⁵ Petition for Review from the Superior Court of the State of Alaska, Third Judicial District at Anchorage, Telephone Utilities of Alaska, Inc., *et al.* v. Regulatory Commission of Alaska, *et al.*, Supreme Court No. S-10067 (Feb. 20, 2001).

¹⁶ Telephone Utilities of Alaska, Inc., et al. v. Regulatory Commission of Alaska, et al., Order, Supreme Court No. S-10067 (May 1, 2001).

Alaska. On August 27, 2001, the Common Carrier Bureau denied ACS' petition for rulemaking, stating that such a rule would "merely mirror the language of the statutory provision."¹⁷ ACS now seeks reconsideration of that order.

While ACS' petition for rulemaking was pending at the FCC, GCI launched its service in Fairbanks in May, 2001. Because of widespread public dissatisfaction with ACS, GCI was already serving 1,500 lines by early July, 2001. GCI is in the process of constructing collocation facilities so that it can begin to provide facilities-based (UNE-L) service in Fairbanks. In August 2001, the RCA designated GCI as an eligible telecommunications carrier for Fairbanks.

GCI is also preparing to launch its service in Juneau. GCI currently has ordered switches and is coordinating the placement of collocation facilities in two wire centers. In August, 2001, the RCA likewise designated GCI as an eligible telecommunications carrier for Juneau. As long as ACS continues to perform under its RCA-approved interconnection agreement, GCI anticipates launching its Juneau service in the early first quarter of 2002.

II. THE COMMISSION IS NOT REQUIRED TO ISSUE AN ANTICOMPETITIVE NATIONAL BURDEN OF PROOF RULE

No provision of law or prior FCC order requires the issuance of a nationwide, preemptive burden of proof rule that would stymie rather than permit competition. As a threshold matter, even ACS does not argue that the Eighth Circuit's mandate in Iowa Utilities II requires the Commission to adopt a new burden of proof rule. As is plain from the face of the Iowa Utilities II decision and the case history, the court simply vacated Sections 51.405(a), (c), and (d) of the Commission's rules, without any direction that they be replaced.¹⁸ The Eighth Circuit nowhere

¹⁷ ACS of Alaska, Inc., et al., CC Docket No. 96-98, Order, DA 01-1951 at ¶ 8 (rel. Aug. 27, 2001) ("Order").

¹⁸ See Iowa Utilities II, 219 F.3d at 760-62, 765.

mandated that the Commission hold further proceedings, or “contemplate,” “embrace,” or otherwise suggest that a national rule had to be adopted. If the adoption of a new rule were required by the Iowa Utilities II decision, such requirement would be plain on the face of that decision.

In the absence of any court mandate, “the choice made between proceeding by general rule, or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”¹⁹ Indeed, in Iowa Utilities Board, the United States Supreme Court determined in this specific context that the Commission *may* promulgate national rules regarding rural exemptions,²⁰ but the Commission plainly is not *required* to do so. Reversing the Eighth Circuit’s ruling that the Commission had no jurisdiction to promulgate such rules, the Court found that “the 1996 Act entrusts state commissions with the job of . . . granting exemptions to rural LECs” but this assignment “do[es] not logically *preclude* the Commission’s issuance of rules to guide the state-commission judgments.”²¹ The Supreme Court’s ruling thus provides that the Commission’s rulemaking authority under Section 251 of the Act is permissive and discretionary.²²

With no Eighth Circuit mandate for a new rule, ACS is left to argue that the prior adoption of a burden of proof rule requires that a new rule be adopted in its place. According to ACS, “The order departs from the Commission’s First Local Competition Order because it fails

¹⁹ SEC v. Chenery, 332 U.S. 194 (1947); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (“The Commission has substantial discretion as to whether to proceed by rulemaking or adjudication.”).

²⁰ AT&T v. Iowa Util. Bd., 525 U.S. 366, 385 (1999).

²¹ Id. at 385 (emphasis added).

²² This is the case whether the action is taken by the Commission or on delegated authority.

to reestablish a national rule or explain why one is no longer needed.”²³ However, ACS’ apparent claim that a national rural exemption regulatory regime is necessary for the sake of national uniformity does not reflect a faithful reading of the Local Competition Order and ignores the Commission’s principal conclusion that individual state commissions, rather than national rules, govern the rural exemption.

The Local Competition Order did not embrace uniformity for uniformity’s sake, but adopted a burden of proof rule because doing so would be pro-competitive. The only two rules the FCC chose to adopt made clear the FCC’s view that “Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption, suspension or modification.”²⁴ The Commission expressly declined to adopt a panoply of other national rules to govern rural exemption proceedings. Instead, as they had been urged to do by representatives of the incumbent LECs, the Commission left to state commissions the task of determining when and for how long an incumbent LEC would be entitled to a rural exemption.²⁵ Indeed, the Commission concluded that “[f]or the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings.”²⁶ Nowhere did the FCC find, as ACS asserts, “that a uniform set of rules is

²³ ACS Petition for Reconsideration at 6.

²⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16118 (1996)(“Local Competition Order”) (case history omitted . The fact that the Eighth Circuit reversed both these rules does not make the Commission’s observation of Congressional intent any less correct, nor does it obscure the fact that the *Commission’s* intent in adopting rules was to facilitate competition.

²⁵ Id. at 16113 (¶ 1253).

²⁶ Id. at 16112 (¶ 1251).

necessary to assist the states,”²⁷ nor did it find an interest in “uniformity” that nullified “the pro-competitive focus of the 1996 Act.”²⁸

ACS makes absolutely clear that it has sought a national burden of proof rule so that the Eighth Circuit’s interpretation of Section 251(f) will be binding on all state and federal courts and state public utility commissions, not just the federal courts of the Eighth Circuit. ACS now implicitly concedes that the Eighth Circuit’s legal reasoning — as distinct from its judgment vacating the FCC’s rules — is not binding on the Alaska state courts.²⁹ Ironically, ACS now argues on reconsideration that the FCC should issue a national rule extending the Eighth Circuit’s reasoning to all other jurisdictions, because what the Eighth Circuit asserted was the plain meaning of the statute is not, in fact, clear and plain.³⁰ There is no reason for the FCC to use its own legislative rulemaking authority to constrain courts and state public utility

²⁷ See ACS Petition for Reconsideration at 6.

²⁸ Local Competition Order, 11 FCC Rcd at 16118 (¶ 1263).

²⁹ See, e.g., Totemoff v. State, 905 P.2d 954, 963 (Alaska 1995) (holding that the Alaska Supreme Court is not bound to follow the Ninth Circuit’s interpretation of a federal law); State v. Strickland, 683 So.2d 218, 230 (La. 1996); In re Tyrell, 876 P.2d 519, 524 (Cal. 1994); Lamb v. Railway Express Agency, 320 P.2d 644, 646 (Wash. 1958) (“We have held that [federal circuit court] decisions are not binding on us in [the state of] Washington.”). See also Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (“[N]either federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation. In our federal system, a state trial court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.”); Steffel v. Thompson, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring); United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-1076 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971), quoting with approval Iowa Nat. Bank v. Stewart, 214 Iowa 1229, 232 N.W. 445, 454 (1930) (“The federal Circuit Courts of Appeals, and, in respect to federal law, the state courts of last resort are subject to the supervisory jurisdiction of the Supreme Court of the United States. They are, however, as to the laws of the United States, co-ordinate courts....Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law.”); Shapiro, State Courts and Federal Declaratory Judgments, 74 Nw. U. L. Rev. 759, 771, 774 (1979).

³⁰ Referring to the Eighth Circuit’s Iowa Utilities II decision, ACS states, “These holdings are judicial interpretations of the statute that, while derived from its plain meaning, go beyond the mere text of the statute to explain the meaning of the text....” ACS Petition for Reconsideration at 7.

commissions not bound by the Eighth Circuit’s interpretations to follow the Eighth Circuit’s view of Section 251(f)’s non-plain, “plain meaning.”

There is no doubt that the effect of adopting ACS’ proposed rule would be anticompetitive and that it would halt competition in Fairbanks and Juneau, Alaska. ACS has already once sought to use Iowa Utilities II as a pretext for unilaterally halting interconnection.³¹ Alaska courts have considered and rejected no fewer than four requests by ACS for stays relating to the rural exemption, in the process rejecting both ACS’ statutory arguments and its “sky-is-falling” claims of harm.

The Regulatory Commission of Alaska has conducted an extensive review of ACS’ Section 251(f) claims, and the Alaska state courts to date have upheld that review and the RCA’s decision to terminate ACS’ rural exemptions against every legal challenge. There is simply no need for the FCC now to step in to act as a “super court of appeals” in what is fundamentally an Alaska dispute, to disrupt competition that is benefiting Alaskans without harm to consumers in any other region of the country.

III. ANY RULEMAKING SHOULD COMPREHENSIVELY REVIEW THE OPERATION OF SECTION 251(f) AND NOT JUST THE BURDEN OF PROOF, AND SHOULD BE CONDUCTED WITH FULL NOTICE AND COMMENT

ACS’ petition for rulemaking should also be denied because it seeks to have the Commission promulgate an anticompetitive national rule without evaluating whether other rules are also necessary to implement the Act. As GCI’s experience in Fairbanks and Juneau has shown, the process of terminating the rural exemption is laborious — unnecessarily so — and frustrates competition without clear public interest benefits. The FCC cannot adequately

³¹ ACS Letter, Exhibit 1.

evaluate the many, interrelated aspects of the Section 251(f) rural exemption process to determine what areas need new rules and what areas need no rules in the limited, expedited process proposed by ACS. A much more thorough notice-and-comment rulemaking process would be necessary.

Particularly in light of the Eighth Circuit’s vacation of the FCC’s rule regarding “undue economic burden,” state commissions lack any guidance from the FCC as to what constitutes an undue economic burden sufficient to preserve the rural exemption. The Eighth Circuit stated only that state commissions must be allowed to consider the “full” economic impact.³² However, the Eighth Circuit’s decision certainly does not mean that the loss of a single line to competition would constitute “undue economic burden.” In light of the Act’s pro-competitive goals, the test for “undue economic harm” should be quite stringent, and “undue economic harm” may not exist unless the incumbent LEC can show that its financial integrity is jeopardized or its ability to raise future capital is impeded, and that this financial jeopardy cannot be cured simply through increased rates or other compensation.³³ Moreover, the Commission, if it conducts a rulemaking, should also give full consideration to streamlining these adjudications through rules regarding prima facie evidence that the conditions for terminating the exemption have been met. For example, it should be prima facie evidence that companies of a similar or smaller size in areas of similar or more adverse demographic or geographic characteristics have tolerated interconnection and competition without threatening the financial existence of the incumbent LEC. Simply because the incumbent makes less money does not mean that the *public interest* has been harmed. This issue would benefit from examination under notice and comment.

³² Iowa Utilities II, 219 F.3d at 761.

In addition, if it conducts a rulemaking, the FCC should review whether further guidance to state commissions would be helpful in evaluating whether a request is consistent with Section 254. In particular, the Commission should issue a rule clarifying that Section 254(f) does not override the Section 253 prohibition on state actions that create barriers to entry in order to preserve universal service in a manner that is not competitively neutral or consistent with Section 254. Congress clearly envisioned that barriers to entry in the name of preserving universal service would be a last resort, not a first refuge. This issue would likewise benefit from examination under notice and comment.

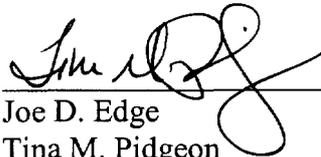
Even a burden of proof rule such as the one ACS seeks requires notice and comment. Imposition of such a rule so late in the history of the implementation of the 1996 Act would require detailed consideration of transition issues and consumer interests. Simply announcing a burden of proof rule would leave open questions such as whether interconnection agreements and therefore service could be discontinued pending further litigation, and whether the fact that competition existed without driving the incumbent into bankruptcy or into abandoning universal service constituted prima facie evidence that competition was neither an undue economic burden nor inconsistent with Section 254. In addition to the legal and policy issues surrounding a rule such as ACS seeks, these transition issues must also be aired before a final rule could be adopted. Of course, the simplest route to avoid these transition issues would be to deny ACS' petition for reconsideration.

³³ See Duquesne Light Co. v. Barasch, 488 U.S. 299, 312 (1989).

IV. CONCLUSION

For these reasons, the Commission should deny ACS Petition for Reconsideration. The Bureau reasonably declined to initiate a rulemaking on the issue of burden of proof in rural exemption proceedings. This decision was squarely within the Commission's and the Bureau's discretion, and is fully consistent with the Local Competition Order. ACS has provided no valid reason for revisiting the decision.

Respectfully submitted,



Joe D. Edge
Tina M. Pidgeon
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 842-8812
(202) 842-8465 FAX

John T. Nakahata
HARRIS, WILTSHIRE & GRANNIS, LLP
1200 18th Street, NW, Suite 1200
Washington, DC 20036
(202) 730-1320
(202) 730-1302 FAX

Attorneys for
GENERAL COMMUNICATION, INC.

Dated: October 11, 2001

EXHIBIT 1



January 31, 2001

Via Regular Mail and Facsimile 265-5676

Mr. Mark Moderow
Corporate Counsel
GCI Communications Corp.
2550 Denali Street, Suite 1000
Anchorage, AK 99503

RE: 3AN-99-3499 Rural Exemption Appeal

Dear Mark:

The Eighth Circuit Court of Appeal's July 18, 2000 ruling and the U.S. Supreme Court's January 22, 2001 denial of GCI's petition for certiorari on the rural exemption issue leaves no doubt that the RCA incorrectly terminated the rural exemptions of the three ACS rural companies. ACS-F, ACS-AK and ACS-N therefore filed a Motion for Immediate Stay with the Alaska Superior Court yesterday.

Given the ACS rural companies' extremely high probability of success in securing the stay, and, ultimately, other relief, it is in the best interests of both GCI and the ACS rural companies to halt any work undertaken as a result of the RCA's improper termination of the rural exemptions. In order to prevent any further wasted effort and expense by any of the parties, the ACS rural companies are suspending any work of this nature until the Alaska Superior Court rules on the Motion for Immediate Stay.

Of course, this suspension does not include work required to facilitate GCI's entry into the rural markets through any other allowable means.

Additionally, if GCI is concerned about the length of time it may take for the Court to rule (which ACS does not believe will be substantial), the ACS rural companies would consider joining a stipulated motion or request to the Court for either an emergency ruling or a ruling by a date certain.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Lynn Erwin". The signature is written in a cursive style and is positioned above the typed name of the sender.

S. Lynn Erwin
Attorney for ACS of Fairbanks, Inc;
ACS of Alaska, Inc. and
ACS of the Northland, Inc.

CERTIFICATE OF SERVICE

I, Colleen A. Mulholland, hereby certify that a copy of the foregoing General Communication, Inc. Opposition to Petition for Reconsideration was delivered to each of the following parties by first-class mail, unless otherwise indicated, on October 11, 2001:

The Honorable Michael K. Powell*
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Room 8-B201
Washington, DC 20554

The Honorable Gloria Tristani*
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Room 8-C302
Washington, DC 20554

The Honorable Kathleen Q. Abernathy*
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Room 8-A204
Washington, DC 20554

The Honorable Michael Capps*
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Room 8-A302
Washington, DC 20554

The Honorable Kevin J. Martin*
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Room 8-C302
Washington, DC 20554

Peter Tenhula*
Senior Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 Twelfth Street SW
Room 8-B201
Washington, D.C. 20554

Kyle Dixon*
Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 Twelfth Street SW
Room 8-B201
Washington, D.C. 20554

Linda Kinney*
Assistant General Counsel
Federal Communications Commission
445 Twelfth Street, S.W.
Room 8-C723
Washington, DC 20554

Dorothy Attwood*
Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street SW
Room 5-C450
Washington, D.C. 20554

Glenn Reynolds*
Associate Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street SW, Room 5-C358
Washington, D.C. 20554

Michelle Carey*
Chief, Policy and Program Planning
Division
Federal Communications Commission
445 Twelfth Street SW
Room 5-B122
Washington, D.C. 20554

Ann H. Stevens*
Associate Division Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street SW, Room 5-C162
Washington, D.C. 20554

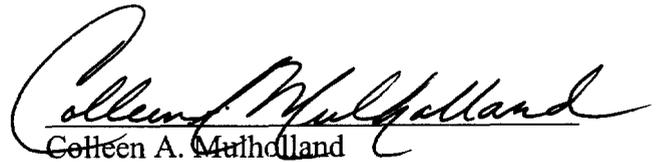
Renee Crittendon*
Attorney Advisor
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Karen Brinkmann
Richard R. Cameron
Latham & Watkins
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004-1304

Leonard A. Steinberg
General Counsel
Alaska Communications Systems
510 L Street
Suite 500
Anchorage, Alaska 99501

The Honorable Nanette G. Thompson
Regulatory Commission of Alaska
701 W. 8th Avenue
Suite 300
Anchorage, Alaska 99501

Ron Zobel
Assistant Attorney General
Office of Attorney General for Alaska
1031 W. 4th Avenue
Suite 200
Anchorage, Alaska 99501



Colleen A. Mulholland

*Hand delivery