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October 18, 2001

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Oral Ex Parte Presentation
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
CC Docket No. 96-98 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

Dear Ms. Salas:

On Wednesday, October 17, 2001, Dana Tindall, Senior Vice President of Legal and Regulatory Affairs for General Communication, Inc. ("GCI"), Martin Weinstein, Regulatory Attorney for GCI, Rick Hitz, Manager of Rates and Tariffs for GCI, John Nakahata, Esq., and the undersigned, counsel for GCI, met with W. Kenneth Ferree, Chief, Cable Services Bureau, Sarah Whitesell, Associate Bureau Chief, Cable Services Bureau, J. Scott Marcus, Senior Advisor for Internet Technology, Cable Services Bureau and Thomas Horan, Legal Advisor, Cable Services Bureau, regarding the above referenced matter. During the meeting, the participants discussed GCI's opposition to the ACS Petition for Reconsideration of the Common Carrier Bureau Order regarding the burden of proof in proceedings to terminate a local exchange carrier rural exemption. In particular, the parties discussed GCI's objection to the implementation of a national burden of proof standard for rural exemption cases. The parties also discussed the issues described on the attached handout, which was provided to each of the Commission participants.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter are being submitted to the Secretary's office and copies are being provided to Mr. Ferree, Ms. Whitesell, Mr. Marcus and Mr. Horan. Please contact the undersigned if any questions arise in connection with this filing.

Sincerely yours,

/s/Joe Dixon Edge

JDE/lsg

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cc (w/o attach): W. Kenneth Ferree
Sarah Whitesell
J. Scott Marcus
Thomas Horan

CHRONOLOGY OF
ACS' EFFORTS TO DELAY AND FRUSTRATE COMPETITION

April 2, 1997	GCI first requests interconnection services from ACS' predecessors for Juneau, Fairbanks and surrounding areas.
September 10, 1997	After negotiations fail, GCI files petitions for arbitration and termination of rural exemption.
October 23, 1997	Former Alaska Public Utilities Commission ("APUC") sets schedule for rural exemption proceeding and assigns burden of proof to GCI.
December 10-12, 1997	Former APUC conducts rural exemption hearings.
January 8, 1998	Former APUC issues order continuing rural exemption.
March, 1998	GCI files appeal with Alaska Superior Court.
March 4, 1999	Alaska Superior Court vacates the former APUC decision and remands matter to agency to reconsider with burden of proof assigned to the ILEC.
April 9, 1999	ACS filed request for a stay of the remand order, but the Court denies this stay request.
April 23, 1999	ACS filed Petition For Review with Alaska Supreme Court, but Court denies the Petition.
June 22-24, 1999	Former APUC conducts remand hearing and assigns burden of proof to ACS' predecessors.
June 30, 1999	Former APUC enters order terminating rural exemption.
July 1, 1999	Regulatory Commission of Alaska ("RCA") assumes control over utility regulation in Alaska.
July 15, 1999	ACS files Petition For Reconsideration of the former APUC order terminating the rural exemption.
October 11, 1999	RCA issues order reaffirming termination of rural exemption and order parties to begin negotiations.
November 1999	ACS files administrative appeal in Alaska Superior Court.
December 8, 1999	GCI petitions the RCA for arbitration.

July 18, 2000	U.S. Court of Appeals for the Eighth Circuit issues Iowa Utilities Board II.
August 24, 2000	RCA approves Arbitrator's decisions.
September 25, 2000	ACS files complaint in federal district court challenging the RCA's Order approving Arbitrator's decisions. Around this time, ACS also files a lawsuit in Alaska Superior Court challenging this order.
October 5, 2000	RCA approves GCI-ACS Interconnection Agreement for Juneau and Fairbanks.
January 30, 2001	U.S. Supreme Court denies GCI's petition for certiorari to review the rural exemption portions of Iowa Utilities Board II.
January 30, 2001	ACS files motion in the Alaska Superior Court requesting an immediate stay of the RCA's termination order.
January 31, 2001	ACS announces that it will no longer abide by the GCI-ACS Interconnection Agreement.
February 9, 2001	Alaska Superior Court denies ACS' request for a stay.
February 20, 2001	ACS files a petition for review in the Alaska Supreme Court requesting a stay of the RCA's termination order.
February 22, 2001	ACS files a motion in Alaska Superior Court requesting the Court to vacate the RCA's termination order.
March 5, 2001	ACS files Petition For Rulemaking with FCC.
May 1, 2001	Alaska Supreme Court denies ACS' petition.
May 16, 2001	Alaska Superior Court denies ACS' motion to vacate.
August 27, 2001	FCC Common Carrier Bureau denies ACS petition for rulemaking.
September 26, 2001	ACS files Petition For Reconsideration of the Common Carrier Bureau's denial of ACS' petition for rulemaking.

ACS Petition for Reconsideration To Establish A Rulemaking on 251(f) Burden of Proof Could Halt Facilities-Based Competition And Should Be Denied

- GCI asks that the FCC deny the ACS Petition For Reconsideration. This reconsideration petition is ACS' latest attempt to use litigation to halt the emergence of competition in Alaska's second and third largest cities, Fairbanks and Juneau.

- The Bureau reasonably declined to issue a nationwide, preemptive, anticompetitive rule to govern the burden of proof in rural exemption proceedings. No provision of law or prior FCC order requires the issuance of a national burden of proof rule for rural exemption proceedings. When the 8th Circuit Court vacated Sections 51.405(a), (c), and (d) of the Commission's rules, it did not mandate that the Commission hold further proceedings or otherwise suggest that a national burden of proof rule had to be adopted. Whether to promulgate a new rule or to proceed through ad hoc litigation is a matter within the "informed discretion" of the FCC. *SEC v. Chenery,* 332 U.S. 194 (1947).

- ACS' claim that a national rural exemption regulatory regime is necessary for the sake of uniformity ignores the Commission's principal conclusion in the Local Competition Order that individual state commissions, rather than national rules, govern the rural exemption. Moreover, the Commission did not previously adopt a national burden of proof rule for rural exemption proceedings to nullify competition, which is precisely what ACS seeks.

- ACS seeks to have the Commission grant it relief that Alaska state courts, exercising their authority to interpret applicable law, have refused to grant. ACS has not demonstrated that it will suffer irreparable harm if the status quo is preserved during the Alaska litigation. Indeed, Alaska state courts, up to and including the Alaska Supreme Court, have denied ACS' requests for a stay of its interconnection obligations in light of the 8th Circuit's second *Iowa Utility Board v. FCC* decision *("Iowa II").*

- As a matter of law, it is only the 8th Circuit's judgment, vacating rule *51.405* that is binding on courts. Although the 8th Circuit's legal reasoning is persuasive precedent, it is not binding on state supreme courts (and therefore inferior state courts), even for states within the geographic boundaries of the 8th Circuit. *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.") Like other states, the Alaska Supreme Court has held that Alaska courts are not bound by federal circuit court interpretations of law. *See Totemoff v. .State, 905* P.2d 954, 963 (Alaska 1995). Until the U.S. Supreme Court rules to the contrary, state courts are may disagree with the 8th Circuit's conclusion about the Act's plain meaning.

- ACS seeks a new national burden of proof rule in order to give it a pretext to refuse to perform under its state-approved interconnection agreements. ACS has attempted to do so in the past, including in January 2001, immediately following the Supreme Court's denial of certiorari of the *Iowa II* decision.

- ACS' one-sided petition for rulemaking should also be denied because it seeks to have the Commission promulgate an anticompetitive national burden-of-proof rule without evaluating other necessary clarifications to the rural exemption process.