

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

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)

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

I. Introduction and Summary

ACS of Alaska, Inc. (f/k/a “Telephone Utilities of Alaska, Inc.”), ACS of Fairbanks, Inc. (f/k/a “PTI Communications, Inc.”) and ACS of the Northland, Inc. (f/k/a “Telephone Utilities of the Northland, Inc.”) (collectively “ACS”),¹ by their attorneys, hereby reply to the comments filed by the Regulatory Commission of Alaska (the “RCA”) and the opposition filed by General Communication, Inc. (“GCI”) to ACS’s Petition for Reconsideration in the above-captioned proceeding (the “Petition”). These pleadings demonstrate no basis on which to deny ACS’s Petition and ACS, therefore, respectfully requests that the Commission grant ACS the relief it seeks by adopting a new Section 51.405(a) as follows:

(a) In a bona fide request for interconnection, services, or access to unbundled network elements, the burden of proof shall be on the requesting party to prove to the state commission that the rural telephone company is not entitled, pursuant to Section 251(f)(1) of the Act, to continued exemption from the requirements of Section 251(c) of the Act, including the burden of proving that the application of Section 251(c) as requested would not be unduly economically burdensome, is technically feasible, and is consistent with Section 254 of the Act (other than subsections (b)(7) and (c)(1)(D)).

¹ The three joint petitioners are all rural telephone companies and all are wholly-owned subsidiaries of Alaska Communications Systems Group, Inc.

II. Procedural Background

On March 5, 2001, ACS filed a petition for rulemaking seeking the adoption of a national rule governing the burden of proof in rural exemption termination proceedings pursuant to Section 251(f)(1) of the Communications Act (the “Act”), following the decision by the U.S. Court of Appeals for the Eighth Circuit in *Iowa Utilities Board II* vacating the Commission’s previous rules, 47 C.F.R. §§51.405(a), (c) and (d).² One party, General Communications, Inc. (“GCI”), opposed the petition on April 5, 2001, and comments were filed by two other parties, the United States Telecommunications Association (“USTA”) on March 20, 2001, and the Regulatory Commission of Alaska (“RCA”) on April 17, 2001. ACS was not served by the RCA.

On August 27, the Common Carrier Bureau issued a decision on delegated authority denying the petition for rulemaking.³ The Bureau found that the Eighth Circuit “left no doubt” that the FCC’s prior rule on burden of proof “impermissibly placed the burden of proof on the rural telephone company” whereas the statute “requires the party making the request [to terminate the exemption] to prove that the request meets the three prerequisites to justify the

² *Iowa Util. Bd. v. FCC*, 219 F.3d 744, 762 (8th Cir. 2000) (“*Iowa Utilities Board II*”). The Eighth Circuit held:

We agree with the petitioners that the rule impermissibly places the burden of proof on the ILECs. The statute states that the requirements of §251(c) “shall not apply to a rural telephone company *until*” a request has been made. 47 U.S.C. §251(f)(1)(A) (emphasis added). The use of the word “until” suggests that the rural telephone companies have a continuing exemption that is only terminated once a bona fide request is made, provided the request is not unduly economically burdensome, is technically feasible, and is consistent with §254. [...] The plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption. For the foregoing reasons, we vacate rule 51.405(a), (c), and (d).

³ 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

termination of the otherwise continuing rural exemption.”⁴ The Bureau, however, declined to codify that ruling with a new FCC rule “since such a rule would merely mirror the language of the statutory provision.” *Bureau Order* at para. 8. The Bureau did not reach the question whether the Commission could, in this instance, amend Section 51.405 of the rules without prior notice and public comment. *Id.*

ACS filed its Petition seeking reconsideration on September 26, 2001, and the Commission issued public notice of this Petition on October 19th.⁵ This notice was published in the Federal Register on October 25th. 66 Fed. Reg. 54009 (Oct. 25, 2001). Oppositions consequently were due November 9th and were required to be served on ACS. *See* 47 C.F.R. §1.429(f). GCI filed an opposition and the RCA filed “comments,” both of which were served on ACS by mail. This reply is filed pursuant to Sections 1.429(g) and 1.4(h) of the Commission's rules and is being served on both GCI and the RCA.

III. Neither the RCA Nor GCI Demonstrates Any Basis on Which to Deny ACS’s Petition

A. Adoption of a National Rule Would Serve the Universal Services Goals of the Communications Act Without Threatening Competition in Alaska

Neither the RCA nor GCI raises any credible argument that local competition in Alaska could be seriously threatened by the national rule ACS seeks. By its own admission, in only four years, GCI had won 35 percent of the Anchorage market and, only two months after launching service, already had gained market share in Fairbanks. GCI Opposition at 2, 7. It is folly to assert at this point, as GCI and the RCA do, that ACS could eliminate Alaskan competition, with or without a rural exemption. GCI Opposition at 11; RCA Opposition at 4. In

251(f)(1) of the Communications Act, Order in CC Docket No. 96-98, DA 01-1951 (Com. Car. Bur.) rel. Aug. 27, 2001) (the “*Bureau Order*”)

⁴ *Id.* at para. 7 (*quoting Iowa Utilities Board II*, 219 F. 3d at 762).

either case, ACS will continue to be bound by the general duty to interconnect with GCI under Sections 251(a) and (b), and ACS volunteered to interconnect with GCI and allow resale pursuant to Sections 251(c)(2) and 251(c)(4) of the Act. *See, e.g.*, GCI Opposition at note 2. Further, even if the RCA were to reinstate ACS's rural exemption from the unbundling requirements of Sec. 251(c)(3), no customer would lose service because GCI has not yet ordered any unbundled loops or other network elements in Fairbanks or Juneau. GCI Opposition at 7. Therefore, GCI's hysterical speculation that existing "interconnection agreements and therefore service could be discontinued" if the FCC codifies the Eighth Circuit's ruling has no basis in reality. GCI Opposition at 13.

The lack of a national rule corresponding to the Eighth Circuit's interpretation, however, does pose a threat to universal service in Alaska. The twin goals of the 1996 Act were to promote local competition *and* to protect universal service, particularly in rural areas. Congress understood that rural carriers face higher and more variable costs, less revenue per line, fewer resources and smaller customer bases than larger, non-rural carriers. Section 251(f) and Section 254 of the Act both reflect Congressional understanding of the subsidies implicit in the current rate structure, including both intrastate and interstate access charges, making it difficult or impossible to preserve universal service if rural carriers were required to open their networks to competition prematurely, before issues such as rationalization of rates and disaggregation of support were resolved. Accordingly, the rural exemption set forth in Section 251(f)(1) requires a competitor requesting UNEs first to show that unbundling under section 251(c) is "not unduly economically burdensome, is technically feasible, and is consistent with [federal universal service mandates.]" *See Iowa Utilities Board II*, 219 F. 3d at 762. By placing the burden of

⁵ Petition for Reconsideration of Action in Rulemaking Proceeding, Rep. No. 2508 (rel. Oct. 19, 2001).

proof incorrectly on the ILEC, Alaska (and other states that follow its lead) could easily undermine the high levels of service achieved today only after decades of careful federal policymaking.⁶ GCI's unsupported statement that the FCC adopted its original burden of proof rule to "be pro-competitive," GCI Opposition at 9, is irrelevant, even if true, since that rule was vacated as contrary to the intent of the statute. What is relevant, and the Commission and the courts agree, is that the preservation of universal service is no less important a goal of the 1996 Act than promoting competition.⁷

⁶ Indeed, the first time GCI asked to have the rural exemption terminated in Fairbanks and Juneau, the RCA's predecessor, the Alaska Public Utilities Commission, denied GCI's request, emphasizing exactly this type of balancing that remained to be performed in Alaska. The APUC specifically found "the extent of the economic burden is uncertain until access charge reform and universal support mechanisms can be modified to ensure the predictability of the economic burden." *Petition by GCI Communication Corp. d/b/a General Communication, Inc.*, U-97-143, Order Denying GCI's Petition for Termination of Rural Exemption (Jan. 8, 1998) at Appx. A, p.33. Further, the APUC found: "In a competitive environment, those principles of rate design [which were adopted prior to the introduction of competition, and which departed from true cost-of-service principles and allowed certain low-cost customers to subsidize the rates of high-cost customers, and allowed intrastate and interstate access charges to be used as a source of support for high-cost service areas] need to be examined, and modified, if necessary, to permit competition and maintain the goal of universal service." *Id.* at 35. The APUC further expressed its concern that a new state universal service support program might be necessary "to ensure that rates for local service remain affordable throughout Alaska and to ensure competition is promoted in a manner consistent with the universal service principle of providing all consumers in all areas access to comparable services at comparable rates." *Id.* at 36. Therefore, the APUC concluded, ACS's rural exemption in Fairbanks and Juneau "cannot be terminated until rules and regulations are adopted to guide the competitive entry into rural local exchange markets in a manner consistent with universal service." *Id.* ACS notes that reform of the Alaska local rate structure, which was to have been addressed in state docket R-97-12, has made virtually no progress since the docket was opened. The FCC only recently issued its access charge reform order for rate of return companies with phased implementation scheduled to begin in 2002. State access charge reform and intrastate and interstate universal service program modifications that the APUC found were essential prerequisites to termination of the rural exemption have not yet been completed.

⁷ See, e.g. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order in CC Docket No. 96-98, 11 FCC Rcd 15499, 15506, para. 3 (1996)(describing the competition and universal service goals of the 1996 Act)(subsequent history omitted)(the "*Local Competition First Report & Order*"). See also *Texas Office of Pub. Util. Counsel v. FCC*, ___ F.3d ___, No. 00-60434 (5th Cir. Sept. 10, 2001, slip op., revised Oct. 1, 2001)("In addition to fostering competition in the local telephone service market, the 1996 Act had another key goal of continuing the provision of affordable universal service."); *Alenco*, 201

B. The “Plain Meaning” of Section 251(f) Must Be Made Plain to the Alaska Courts and the RCA

Despite the fact that the Eighth Circuit concluded that the “plain meaning” of Section 251(f)(1) required the party seeking to terminate an incumbent carrier’s rural exemption to bear the burden of proof before the state commission in a proceeding to do so, *Iowa Utilities Board II*, 219 F.3d at 762, neither the RCA nor any Alaskan court has yet come to the same conclusion. The RCA’s argument, therefore, that “[t]here is no reason to promulgate a rule that is a redundant statement of a statutory mandate,” RCA Opposition at 2, is difficult to fathom. As ACS argued in its petition for reconsideration, while the Eighth Circuit found that the intent of the statute is clear, the very actions of the Alaska commission and courts demonstrate that the Eighth Circuit’s opinion alone cannot achieve national uniformity in the placement of the burden of proof under the statute. Indeed, GCI itself was a party to *Iowa Utilities Board II*, and it does not feel bound by the Eighth Circuit’s decision despite the fact that its petition for *certiorari* on this very issue was denied by the U.S. Supreme Court.⁸

The text that ACS proposes would codify the intent of Congress concerning burden of proof under Section 251(f)(1), as interpreted by the Eighth Circuit, and establish the national rule that the Supreme Court, the Eighth Circuit, and the Commission contemplate. As GCI concedes, GCI Opposition at 8, the Supreme Court has already held that the Commission

F.3d 608, 615 (5th Cir. 2000) (“FCC must see to it that *both* universal service and local competition are realized”) (emphasis in original).

⁸ As noted in ACS’s original petition, AT&T and GCI argued that Supreme Court review of the Eighth Circuit’s ruling on burden of proof was of “national importance” (AT&T) and “immensely

has the authority to promulgate national rules regarding rural exemptions, *AT&T v. Iowa Util. Bd.*, 525 U.S. at 385. Furthermore, the Eighth Circuit, in explicating the “plain meaning” of the statute, contemplates and embraces a nationally uniform result. *Iowa Utilities Board II*, 219 F.3d at 762. The Commission, too, has already concluded that a national rule allocating the burden of proof is necessary in the public interest. *Local Competition First Report and Order*, 11 FCC Rcd at 16113, paras. 1253-54. Yet, the Bureau’s Order denying ACS’s Petition did nothing to explain or justify its departure from the Commission’s conclusion in the *Local Competition First Report and Order* that a national rule is necessary.

C. The Commission Should Adopt a National Rule Allocating the Burden of Proof Before Examining Other Rural Exemption Issues

If the Commission believes that additional national rules concerning the meaning of the phrase “undue economic burden” or other statutory terms would be beneficial, as GCI suggests, then ACS has no objection to the Commission’s initiating such a proceeding. *See* GCI Opposition at 11-13. There is no reason, however, to delay the adoption of a national rule allocating the burden of proof in proceedings to terminate such rural exemptions. Unlike any additional rules that the Commission might decide to promulgate under Section 251(f)(1), the Commission has already decided that a national rule concerning the allocation of the burden of proof is necessary and in the public interest, and the Eighth Circuit has spoken clearly as to its interpretation of the statute’s “plain meaning.” The Commission is bound by that interpretation, as the Bureau conceded, and the Commission has no discretion with regard to the substance of

significant” (GCI). *See* ACS Petition for Rulemaking in CC Docket No. 96-98 (Mar. 5, 2001) at 3 and n. 6.

such a rule. *Bureau Order* at para. 8. As ACS noted in its Petition for Rulemaking, in such circumstances, the Commission sometimes has dispensed with notice and comment altogether.⁹

⁹ See ACS Petition for Rulemaking in CC Docket No. 96-98 (Mar. 5, 2001) at 6-8, and cases cited therein (e.g., *Implementation of Section 254(k) of the Communications Act of 1934, As Amended*, 12 FCC Rcd. 6415 (1997) (codifying at 47 C.F.R. §64.901(c), without prior public notice or opportunity to comment, the prohibition under Section 254(k) of the Act against cross-subsidy of competitive services by non-competitive services)).

IV. Conclusion

For the foregoing reasons, ACS urgently requests that the Commission deny the opposition to ACS’s Petition for Reconsideration, and adopt a new Section 51.405(a), with or without prior notice and comment, as follows:

(a) In a bona fide request for interconnection, services, or access to unbundled network elements, the burden of proof shall be on the requesting party to prove to the state commission that the rural telephone company is not entitled, pursuant to Section 251(f)(1) of the Act, to continued exemption from the requirements of Section 251(c) of the Act, including the burden of proving that the application of Section 251(c) as requested would not be unduly economically burdensome, is technically feasible, and is consistent with Section 254 of the Act (other than subsections (b)(7) and (c)(1)(D)).

In doing so, the Commission will effectuate the mandate of the Eighth Circuit and ensure uniformity in the interpretation of Section 251(f)(1) throughout the country, consistent with the Commission’s intent in the *Local Competition First Report and Order*.

Respectfully submitted,

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Certificate of Service

I, Denise Oden, do hereby certify that on this 21st day of November 2001, copies of the foregoing **ACS Reply to Oppositions to Petition for Reconsideration** were served on the following individuals via first class U.S. mail, postage prepaid:

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