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

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| In the Matter of | ) | |
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| Request for Review by | ) | Docket Nos. 96-45 and 97-21 |
| Unicom, Inc. of Decision of | ) | |
| Universal Service Administrator | ) | |

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To: The Commission

**REPLY TO OPPOSITIONS TO PETITION FOR REVIEW**

**UNICOM, INC.**

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December 14, 2001

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## SUMMARY

The arguments raised by YKHC and GCI in opposition are unpersuasive. No amount of window-dressing can cloak USAC's failure to give reasoned consideration to central points raised by Unicom below.

For example, YKHC fails to address the fact -- as USAC failed before it -- that YKHC posted a need for "fractional T-1s" (just how much of "fraction[]" it never said), but then signed a contract for full T-1s. This change cost the Rural Health Care program much more than it need have. This change also violated FCC policy which requires postings "sufficient to enable the carrier to ... know what services are being requested." Universal Service Order, FCC 97-157, 12 FCC Rcd 8776, 9134 at ¶686 (1997).

Likewise, respondents do not explain USAC's failure to hold that YKHC did not engage in the meaningful dialogue required of RHC applicants. According to YKHC (and USAC), its obligations are limited essentially to posting its requirements. Neither party comes to grips with the fact that, rather than "open[ing] a dialogue" with Unicom (USAC letter at 7), YKHC slammed it shut by refusing to answer questions prompted by its posting.

By way of further illustration, respondents' arguments actually reinforce Unicom's point that it was subject to discriminatory treatment in that GCI and AT&T -- but not Unicom -- were told which sites were "of importance to YKHC" for purposes of a possible bid (see below at page 6). This too violated fundamental Commission policies.

USAC places unquestioning reliance on self-certifications by YKHC. Yet it fails to even address material contradictions and inconsistencies in YKHC's statements during the course of this proceeding. This includes telling the Commission it should be treated as a mere "private corporation" not bound by its own fifty-page Procurement Regulations, while telling the D.C.

Circuit that it should be treated as a "federal agency" free of the collective bargaining obligations of the National Labor Relations Act. This, too, represents arbitrary and capricious action.

YKHC's procedural arguments are groundless. Unicom has all the standing it needs as an aggrieved party to lodge its complaint.

Finally, GCI's arguments against the Native American preference are groundless. The Unicom corporate family has a proud record of bringing improved telephony to the Alaska Bush -- an effort expressly recognized in Commission decisions. GCI's cavalier dismissal of the legitimate concerns of Native American-owned firms underscores its status as an absentee owner with market power in Bush telecommunications.

Moreover, the Commission has applied Indian law in the recent past, and should do so again here. And contrary to GCI's contention, Unicom does not seek to convert the preference into some sort of automatic presumption in favor of Native American-owned applicants. Rather, Unicom's Native American ownership should be considered as one relevant factor among others in determining which is the most cost-effective bidder. And for a variety of reasons, including the fact that YKHC would use federal grant moneys as part of the consideration for the services it seeks, YKHC is clearly required to utilize a Native American preference.

For all these reasons, the Commission should review the USAC letter, set it aside, and direct that YKHC conduct competitive bidding in accordance with Commission policy and the points made herein.

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To: The Commission

## REPLY TO OPPOSITIONS TO PETITION FOR REVIEW

Unicom, Inc. ("Unicom"), by its counsel, hereby replies to the Oppositions to Petition for Review filed by Yukon-Kuskokwim Health Corporation ("YKHC") and by GCI Communications Corp. ("GCI"), respectively. As demonstrated herein, the Oppositions are without merit. YKHC should be required to comply with Commission competitive bidding policies and utilize a Native American preference.

## I.

## INTRODUCTION

Despite respondents' arguments, the issues in this case remain straightforward: (1) Is it enough for a Rural Health Care ("RHC") applicant to post a vague and shifting description of telecommunications services desired, wait 28 days, and then sign a contract at variance from its posting without having undertaken a meaningful dialogue with prospective bidders? (2) Is YKHC required to apply a Native American preference by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(e), the Alaska Tribal Health Compact ("ATHC") to which YKHC is a signatory, and YKHC's own procurement regulations?

Unicom submits that the answer is negative in the first case, and affirmative in the second. Respondents' arguments to the contrary are addressed below.

## II.

## DISCUSSION

### A. Respondents' Competitive Bidding Arguments Are Unpersuasive.

YKHC argues that USAC was correct in concluding that it (YKHC) had complied with the Commission's competitive bidding rules. Id. at 10 et seq. It contends, for example, that the Forms 465 did not require that bids be submitted for all 49 sites, or that the Forms disclose a willingness to accept a five-year term. And, insofar as its lack of meaningful dialogue with Unicom is concerned, YKHC argues that USAC was correct in holding YKHC free to respond to Unicom's questions about its needs "with as much detail as YKHC thought necessary to open a dialogue ...." Id. at note 38 quoting from USAC letter at 7. GCI argues to like effect.

Respondents' arguments are unpersuasive, factually and legally. For example, YKHC (and USAC) fail to address the fact that, while YKHC posted Forms 465 requesting "fractional T-1" service (without even specifying what "fraction" of a T-1 it wanted), for each of the Villages, it signed a contract for full T-1 service. See Unicom Petition at 3; and Unicom's December 14, 2000 letter at 3 and Exhibit 3. On a cost basis alone, this represents a material variance: A T-1 satellite circuit costs from $14,000 to 16,000 per month; a "fractional T-1 could

be a very small portion of that depending on just how fractional it is.[1] While the USAC letter mentions this change in passing, at no point does USAC address its significance. This omission is all the more conspicuous given USAC's express reliance on the Commission's requirement that website postings "shall contain information sufficient to enable the carrier to ... know what services are being requested." Id. at 6 quoting from Universal Service Order, FCC 97-157, 12 FCC Rcd 8776, 9134 at ¶ 686 (1997) (emphasis added); see also id. at 9076 (applicants must "submit a complete description of services they seek so that it may be posted for competing providers to evaluate").

USAC's casual dismissal of the variance between the posting and the contract is also at war with USAC's detailed (and previously undisclosed) review and approval of GCI's recent service change. That change entails GCI's substitution of bandwidth-on-demand for a dedicated, always-on circuit. See Exhibit 1 to GCI Opposition. According to GCI, this represents no change in the usable bandwidth available to the customer, and a substantial cost savings to the Rural Health Care ("RHC") program.[2] Nonetheless, USAC undertook a close review, and only after that review declared itself satisfied that the change was acceptable.

By contrast, when GCI and YKHC flipped from "fractional T-1s" in postings to full T-1s in the contract -- a change entailing major additional costs for the RHC program -- USAC hardly

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[1] GCI states that it submitted a bid for T-1 service "because the posted Form 465's stated that YKHC required either fractional or full T-1 service." Id. at 8. However, only two out of the forty-nine Form 465s posted prior to the December 1999 contract specified full T-1s: The YKHC location itself and the Clara Morgan Sub-Regional Clinic. The Forms for all the rest, including all of the clinics at issue in the contract, specified "fractional T-1." In this regard, GCI and YKHC have stressed that each of the Forms is to be viewed on its own merits, not as one package requiring all-or-nothing bids for all 49. See GCI at 8; YKHC at 10.

[2] Thus, YKHC has gone from posting a requirement for fractional T-1s at virtually all sites, to full T-1s at only seven, to shared bandwidth when and as available based on average busy hour usage.

even acknowledges there was a change, much less addresses its significance. The inconsistency is apparent, and underscores USAC's arbitrariness in failing to address the significance of the fractional T-1/full T-1 change. See Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997) (Court found FCC action to be arbitrary and capricious because decision summarily reached conclusion, failed to consider or acknowledge contrary data, and cited no reasonable justification).

Even still, says YKHC, failure to disclose elements of its service proposal can be excused on the grounds that it "left most of the technical details of delivering [telecommunications] services to prospective bidders." Id. at 3; see also id. at 11 ("an HCP can provide a brief description of the services it seeks and leave the technical details up to prospective bidders"); and at 12 ("YKHC simply ... left the technical and other details up to prospective bidders"). But, yet, at the same time, YKHC claims that it "selected GCI because it met YKHC's telecommunications needs at a reasonable price." Id. at 3 (emphasis added).

YKHC seeks to have it both ways: Be relieved of the obligation to dialogue with prospective bidders on the theory that it is too unsophisticated to know what it wants, but insist that it has the absolute right to select one particular bidder on the theory that only that bidder knew what YKHC wanted.

YKHC's argument is preposterous. It amounts to saying that whatever an RHC applicant chooses to say about its needs to potential bidders -- or not say -- is entirely up to the applicant. Such a position makes a farce out of the Commission's competitive bidding rules. If allowed to stand, applicants like YKHC will in effect be given a blank federal check to the great detriment of the RHC program and any semblance of prudent fiscal administration.

Insofar as the lack of dialogue is concerned, the USAC position is no less deficient.[3] The USAC letter states that applicants "can provide as much detail as [they think] necessary to open a dialogue ...." id. at 7. However, far from "open[ing] a dialogue," YKHC closed it. Thus, USAC's bottom line apparently is that an applicant -- when faced with the direct inquiries that its postings are supposed to generate -- can evade the questions.

What is the point to requiring posting and a 28-day waiting period if not to ensure that applicants engage in a meaningful dialogue? Thus even if, for the sake of argument, YKHC were found to have complied with the posting Rule (Section 54.603(b)(1)) and the 28-day Rule (Section 54.603(b)(3)), it would have contravened to the policy behind the Rules. USAC's failure to acknowledge this represents fundamental error.

But yet, says YKHC, Unicom "infers too much from USAC's language," and that "any attempt to judge the response of HCP employees under a strict objective standard would be unworkable ...." Id. at note 38. To the contrary, Unicom's position flows logically from USAC's acceptance of YKHC's conduct in this matter. Moreover, there is nothing "unworkable" in an objective assessment of whether an applicant has complied with Commission guidelines: The Commission engages in evaluations like this all the time. While it might not always be administratively expedient, that is what the agency is commissioned to do. See, e.g., 47 U.S.C. Section 151; 47 U.S.C. Section 205; 47 U.S.C. Section 303.

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[3] After looking at YKHC's postings and finding them lacking key details such as the bandwidth desired, Unicom's Executive Vice President, Chuck Russell, asked YKHC for those details, but was told to go back to the website where he had started. Exhibit 1 to Unicom's December 14, 2000 complaint (a copy is Attachment 1 hereto).

YKHC and GCI characterize Unicom's position as seeking to convert the Commission into a "Board of Contract Appeals" for the telecommunications industry, and that its protest should be resolved by the courts. YKHC at 14; GCI at 13. But these arguments prove far too much. Unicom seeks a determination that this particular applicant failed to properly describe/post its needs and failed to engage in the dialogue envisioned by the Commission when it established the E-rate and RHC programs -- needs which YKHC apparently had no problem recognizing, discussing, and approving in the case of GCI. It would be anomalous indeed for the Commission to hold that an applicant's compliance with FCC policies (as distinct from other contract law claims) involving the dispensation of billions of dollars in federal subsidies administered by the FCC and its creature, USAC, was somehow to be determined by trial courts. Such a prospect would invite chaos for consistent and lawful administration of the RHC program.

GCI, for its part, argues that AT&T submitted a "bid" for the same seven sites as GCI, and that this belies the notion that GCI was privy to inside information (GCI at 6-7 and note 19; see also YKHC at 12).[4]

First of all, neither GCI nor YKHC has ever produced a copy of the so-called "bid," a claim they first raised back in January. Even if they had, the communication they refer to was apparently from Ms. Flowers herself. And Ms. Flowers has made perfectly clear that, "There was insufficient information on the RHCP website, and from YKHC, for AT&T Alascom to actually submit a bid." Exhibit 5 to Unicom's December 14, 2000 complaint (copy supplied as Attachment 2 hereto).

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[4] GCI conceded in its January 25, 2001 letter that it submitted a bid "in selected sites of importance to YKHC." Id. at 4. These same sites became the subject of the contract.

In any event, GCI's argument is revealing for a very different reason. In arguing that AT&T knew the same clinics of "importance to YKHC" as GCI, GCI itself corroborates Ms. Flowers' statement that it was, "in response to a verbal request from YKHC's Chief Information Officer [Rebecca Grandusky]" that AT&T provided T-1 pricing for various sites. Even more importantly, the GCI argument reinforces Unicom's point about YKHC's disparate treatment of the bidders: Unlike GCI, and even AT&T, Unicom was never told which sites were "of importance to YKHC," nor was it even told that T-1 -- not "fractional T-1" -- pricing is what YKHC wanted. Instead, when Unicom tried to get this information from Ms. Grandusky, it was stonewalled.[5]

This kind of behavior is the antithesis of what the Commission has required of RHC applicants. Bidders are to be provided with "information of the same type and quality" since anything less frustrates "the intended goals of the competitive bidding process." Mastermind Internet Services, Inc., 16 FCC Rcd 4028, 4033 (2000). On this score, too, the USAC ruling is contrary to governing principles, and therefore unlawful.[6]

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[5] GCI observes that AT&T Alascom did not file a protest, and that this somehow contradicts Ms. Flowers' statements. Id. Unicom can not say why AT&T/Alascom has not participated. What Unicom does know is that contracts like that let by YKHC are of great importance to a small, Native-owned IXC like Unicom, while the dollar volume of such contracts are miniscule for an entity the size of AT&T. In any event, Ms. Flowers was the designated YKHC Account Representative for AT&T, and AT&T has not disavowed or even "clarified" her statement despite ample opportunity to do so. The fact that AT&T has not participated thus reinforces, rather than undermines, her statements.

[6] GCI attempts to distinguish Mastermind on the grounds that it did not control YKHC's bidding process. Id. at note 35. The record does not support GCI's premise given the fact that GCI -- unlike Unicom -- clearly benefitted from inside information regarding the "sites that were of importance to YKHC." See note 3, supra. In any event, the proposition for which Unicom has cited the case -- non-discriminatory competitive bidding -- is unassailable.

Even still, says GCI, Unicom contacted it in August 1998 seeking information about the use of GCI facilities in order to submit a bid to YKHC, but did not then object about any lack of information as to what YKHC wanted. Id. at 4. However, the fact that Unicom asked questions of GCI concerning its piece of a proposal hardly means that Unicom did not have other questions more properly going to YKHC.[7]

But, says GCI, it was the "least cost bidder." Id. at i. On this, Unicom can agree with respondent: It was indeed the "least cost bidder" -- because it was the only bidder. Moreover, it was the only party to offer term pricing, something AT&T and Unicom would have done had they been told more about YKHC's needs.

In any event, GCI argues, its proposal now costs less than it did before. Id. at note 22; see page 3, supra. Of course, this change was offered only after Unicom had objected that the deal YKHC signed with GCI in December 1999 was wasteful of scarce RHC funds, and that YKHC could have saved money simply by taking tariffed services. See Unicom complaint of December 14, 2000 at 4 and Exhibit 6; see also Unicom's February 16, 2001 reply at 7. While it is gratifying to see GCI bring its costs more in line with fair value, the change illustrates the

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[7] GCI argues that Unicom's February 16, 2001 letter to Mr. Mel Blackwell at USAC incorrectly states that Unicom did not submit a bid in 1998 because it was not then qualified as an eligible telecommunications carrier ("ETC"). Id. at note 13. GCI alleges that this is contradicted by the same August 5, 1998 letter referenced above. GCI is mistaken. The letter in question was from United Utilities, Inc., Unicom's LEC affiliate, not from Unicom. Unicom as an IXC did not become eligible for USF support until November 16, 1999, nearly 15 months after the date of the letter. See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Fourteenth Order On Reconsideration, FCC 99-256 (rel. Nov. 3, 1999) and 64 Fed. Reg. 62,120 (1999).

consequences of the applicant's disregard for the Commission's non-discrimination and dialogue policies.[8]

**B. USAC Erred In Its Unquestioning Reliance on YKHC's Self-Certification.**

YKHC cites USAC's unquestioning reliance on YKHC's self-certification that it complied with the Commission's competitive bidding requirements. Id. at 8. However, as Unicom demonstrated in its Petition, USAC -- faced with contradictions in YKHC's statements on this matter -- simply ignored them.

USAC failed to even address, much less resolve, statements by YKHC's Chief Executive Officer, Gene Peltola, that YKHC would follow its published fifty-page Procurement Regulations in awarding telecom procurements. See Unicom's February 16, 2001 filing at p. 9-10 and Exhibit 3 (a copy of Exhibit 3 is Attachment 3 hereto). It failed to address Mr. Peltola's statements that YKHC would adhere to the Native American preference provisions in those Regulations. Id. And, it failed to address, much less resolve the fact that, while YKHC was maintaining to this Commission that it was a "private corporation" not required to follow its own Procurement Regulations (YKHC letter of January 26, 2001 at 8), it was asserting to the United States Court of Appeals for the District of Columbia Circuit that it "functions ... as an integral part of the United States [Government];" that "it is to be treated as a federal agency;" and that it "essentially 'stands in the shoes' of the United States." See Unicom's February 16, 2001 letter, Exhibit 2 (a copy is Attachment 4 hereto). These statements were made in an effort to get the

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[8] The GCI service change proposal and USAC's ultimate approval thereof were never supplied to Unicom prior to the filing of GCI's Opposition even though the proposal was submitted to USAC during the midst of this litigation. This failure represents a violation of Unicom's due process rights. See Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1997) ("secrecy [is contrary to] fundamental notions of fairness implicit in due process and with the ideal of reasoned decision-making on the merits which undergirds all of our administrative law"). Unicom reserves all rights in respect of this matter.

Court to overturn an NLRB ruling that YKHC is bound to honor the National Labor Relations Act in collective bargaining matters.

YKHC "vehemently denies" any inconsistencies, referencing earlier filings. Id. at note 40.[9] YKHC's denials notwithstanding, USAC's failure to address, much less resolve, these prima facie inconsistencies in YKHC's written submissions -- when viewed in the light of USAC's unquestioning reliance upon YKHC's self-certification that it complied with Commission policies -- is manifest legal error. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (agency required to take a hard look at the salient problems and engage in reasoned decision-making); Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1985) ("The Commission must look into the possible existence of a fire only when it is shown a good deal of smoke; ... [not only] when it is shown the existence of a fire.").

**C. YKHC's Procedural Arguments Are Unavailing.**

YKHC argues that Unicom lacks standing to file its Petition, and that the Petition is untimely.

However, YKHC fails to address the established principle that an "interested party" is not just a disappointed bidder, but also a "prospective offeror" whose direct economic interest is affected "by the failure to award a contract." 48 C.F.R. Section 33.101; see also 31 U.S.C. Section 3551; see San Francisco Drydock, Inc. v Dalton, 131 F.3d 776, 778 (9th Cir. 1997) (party which did not bid nonetheless held to have standing). Unicom was injured by YKHC's failure to

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[9] For example, YKHC attempts to explain away the inconsistency between its representations to the D.C. Circuit and to this Commission on the grounds that its appellate brief was not intending to suggest that it was a "sovereign" entity. Letter of March 8, 2001. But this is beside the point: YKHC can not be a mere "private corporation" if at the same time it claims to be acting as "a federal agency."

comply with Commission policies, which damaged its ability to bid for, and secure, this contract. Thus, Unicom was and is very much an interested party with standing.[10] As GCI itself has said in one of its own E-rate requests for review, Rule 54.719(a) "gives any aggrieved party the right to file an appeal ...." Request for Review of Administration's Decision filed March 29, 2001, at 8.

In any event, the standing argument is irrelevant in light of Unicom's position as a private attorney general seeking to bring to the regulator's attention relevant and material information bearing upon the public's interest in the administration of the regulator's own program. See Applications of Cumulus Licensing Corp., 16 FCC Rcd 1052, fn. 11 (2001). Unicom thus has all the standing it needs to raise its concerns.

Insofar as the timing argument is concerned, USAC itself gives the answer, i.e.

> "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 54 C.F.R. Section 54.719 [footnote omitted] . . . USAC's obligations to protect the universal service support mechanisms from fraud, waste and abuse, see 47 C.F.R. Section 54.717, give USAC the authority to investigate any allegation of program rule violations that are brought to its attention at any time."

USAC Letter at 6 (emphasis added).[11]

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[10] Contrary to YKHC's claim that Unicom did not specify the relief it sought (id. at ii), Unicom asked that the Commission review the USAC decision and "direct that agency to evaluate YKHC's funding requests consistent with the points made herein." Petition at 12. Similarly, the fact that "another vendor [other than Unicom] could be selected on remand" (YKHC's Opposition at 6-7), is irrelevant: The point here is to ensure that YKHC follows procedures consistent with the law.

[11] YKHC did not appeal this ruling (or the implicit holding by USAC that Unicom has standing to register its complaint). Thus, YKHC has waived whatever rights it might have had to contest it.

## D. GCI's Native American Preference Arguments Are Contrary to the Facts and the Law.

GCI argues that the Native American preference provisions of the Indian Self-Determination and Education Assistance Act ("ISDEAA") do not apply to the RHC program.

GCI asserts three reasons for this: (1) a Native American preference would mean that contracts could not be awarded to the most cost-effective bidder; (2) Native American preferences may be unconstitutional; and (3) the RHC program was not established for the "benefit of Indians" (quoting from ISDEAA, Section 7(b), 25 U.S.C. Section 450e(b)).

Preliminarily, however, GCI urges the Commission to take up the Native-American preference issue. It complains that it is being put upon by Unicom and by "pressure" brought to bear upon YKHC to adopt such a preference in its procurement practices. Id. at ii and 2.[12]

The implication that GCI needs "protection" from Unicom is laughable. GCI's total revenue in the year 2000 was $293 million. Unicom and its affiliates combined had revenue of $16 million. GCI has a monopoly in the cable television market in Alaska. In addition, GCI had approximately 62,500 active Internet subscribers as of December 31, 2000. See 2000 SEC Form 10-K. On information and belief, GCI receives the lion's share (in excess of 85 percent) of all e-rate and RHC funds in the State. In short, GCI has very substantial market power in Alaska.

GCI's strident opposition to Native American preferences also betrays an insensitivity to Bush Alaska which is unsurprising given its absentee ownership. The fact is that this Region has among the worst unemployment, poverty and alcoholism rates in the United States. Indeed, the

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[12] YKHC is silent on the Native American preference issue. Previously, YKHC had argued against such preferences. See Letter of January 26, 2001 at 11-12. Having then been confronted with its Chief Executive Officer's prior admissions that preferences would be awarded (see Unicom's February 16, 2001 filing at 9-10 and text above at page 9), it should not be surprising that YKHC has retreated.

unemployment rate in the majority of villages served under the GCI contract is greater than ten percent (10%), and more than thirty percent (30%) of the residents are living in poverty (www.dced.state.ak.us/mra/CF_BLOCK.htm, Economy, Income, Poverty and Employment Statistics). The remainder fare not much better. Id.

Given these conditions, exportation of what scarce economic opportunities there may be for Native-owned firms is unconscionable. Indeed, it was to relieve just such effects that Congress determined that Native American preferences should be awarded by entities like YKHC.[13] And, it is entirely fit and proper that Unicom should seek to prevent the exportation of opportunities from happening.[14]

On the merits GCI's argument is no less deficient. In the first place, the argument presumes that preferences mean that contracts would be awarded entities other than the most cost-effective under Rule 54.603(b)(4). While this may serve rhetorical purposes (it creates a convenient strawman for respondent to slay), it is contrary to the ruling the Commission has been

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[13] Congress repeatedly has enacted various preferences with regard to services to Native Americans. Such preferences date back to the late 1800s. See Morton v. Mancari, 417 U.S. 535, 541, fn. 8. Under the ISDEAA, Congress merely reaffirmed its commitment to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government. See 1974 USCAAN 7775, 7776 (1974).

[14] Unicom's efforts are also fully-consistent with its affiliate's long-standing and active role in seeking to bring improved telephony to the Alaska Bush. Just recently, for example, the Commission commented favorably on United Utilities, Inc.'s innovative steps to increase Native American subscribership via the Lifeline Assistance and Link-Up America programs (more than two-thirds of United Utilities, Inc.'s subscribers have incomes below the poverty line). In particular, the Commission "commend[ed] [Unicom's] efforts and encourage[d] other carriers to undertake similar efforts to comply . . . ." Federal-State Joint Board on Universal Service, Twelfth Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket 96-45, FCC 00-208 (rel. June 30, 2000) (emphasis added).

asked to give. And that ruling, very simply, is that Native American preferences may properly be considered as one factor among several by RHC applicants.[15]

Second. A Native American preference is no more or less "performance-related" (GCI at 12) than any one of the several other factors deemed acceptable for consideration under the Commission's existing Rules. As GCI itself observes, the Commission allows RHC applicants the latitude to consider not just price, but also factors such as environmental objectives. See USF First Report and Order, 12 FCC Rcd at 9134 and note 1803. Consideration of Native American status as one factor among several is at least as much program-related as "environmental objectives." GCI at 12.[16]

In construing compliance with the "cost-effective" requirement, the Commission has sanctioned broad discretion on the part of applicants in considering non-cost factors. The Commission has stated: "that other factors, such as prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives . . . form a reasonable basis on which to evaluate whether an offering is cost-effective." Universal Service Order, 12 FCC Rcd 8776, 9030. Indeed, Rule 54.603(b)(4) states that RHC applicants may consider any factors they "deem relevant."

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[15] GCI asserts that preferences could entail Indian set-asides. Id. at ii. To Unicom's knowledge, however, the conditions precedent for a set-aside are not satisfied in Alaska (the existence of two (or more) qualified Native-owned bidders which would compete between themselves). Thus, Unicom would still be required to bid against mega-carriers like GCI and AT&T/Alascom. And RHC applicants would still be entitled to consider numerous other, non-price factors besides the Native American ownership of a bidder.

[16] GCI argues that Unicom seeks to "avoid competing fairly with GCI." Id. at ii. There is nothing "unfair" about considering, as one relevant factor among several, the Native American-owned status of bidders, any more than that it is "unfair" to seek a diverse workforce at the FCC or at AT&T.

In any event, the Commission has previously determined that the Native American owned status of telecom providers in the Alaska Bush is performance-related. In particular, the Commission was determined that joint ownership of MTS Bush earth stations by local exchange carriers -- as opposed to sole ownership by an absentee carrier -- would result in higher quality service and increased carrier accountability, and would provide incentives for further development of service in the Bush. Policies Governing the Ownership and Operation of Domestic Earth Stations in the Bush Communities in Alaska, Tentative Decision, 52 RR 2d 1193, 1200-01 (1982). Thus, there is no basis to GCI's claim that allowing Native American preferences would "direct an award to providers other than the most cost-effective bidder" (or render YKHC unable to make the requisite certification) -- other than GCI's unsupported assertions that this is the case.[17]

Nevertheless, says GCI, accepting Native American preferences in the RHC program would be tantamount to allowing a mayor to prescreen bidders so as to select only those that he or she deemed acceptable. Id. at 12-13. The problem with GCI's analogy is that Congress has

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[17] The earth station ownership ruling was made in the context of a rulemaking to determine the ownership of MTS earth stations where only one such station per Bush Village was deemed feasible. The Commission currently has this policy premise under review in CC Docket No. 00-46. Regardless of the outcome, however, the relevant point is that the agency recognized and approved a positive link between the Native-American owned status of telecom carriers and "performance" -- indeed performance improvements -- in the Bush.

directed the award of preferences in order to advance nationally-important, judicially-sanctioned objectives; GCI's mayor benefits from no such Congressional determination.[18]

Even still, says respondent, the Communications Act (the "Act") and the RHC program were not adopted for "the benefit of Indians," but rather for the benefit of the population generally. Id. at 15.[19] However, GCI does not assert, nor could it, that Native Americans are not among the intended beneficiaries of the Act and the RHC program -- indeed Native Americans in

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[18] GCI argues that Rule 54.603(a) -- which by its terms allows applicants to consider "any additional and applicable state, local, or other procurement requirements" beyond those set forth in Rule 54.603(b) -- is merely a savings clause intended to indicate that procurement requirements not inconsistent with Rule 54.603(b) are not preempted, and that Rule 54.603(a) has no affirmative content itself. GCI's gloss is contrary to the basic maxim of statutory construction that Rules and laws must be given their plain meaning. See Caminetti v. U.S., 242 U.S. 470 (1916) ("Statutory words are uniformly presumed . . . to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."). It is even contrary to the USAC letter which states that there are "two components" to the competitive bidding Rules, the second of which is applicant compliance with "any additional and applicable state, local, or other procurement requirements." Id. at 8. But even without these problems, its argument remains irrelevant: There is nothing "inconsistent" between consideration of Native American preferences as one factor among several, on the one hand, and Rule 54.603(b), on the other hand.

[19] GCI relies on a state court case, Johnson v. Central Valley School District No. 356, 645 P.2d 1088 (S.Ct. WA 1982) to bolster its argument. However, the decision is inapposite. The court determined that an Indian preference under the ISDEAA did not apply to an applicant for a teaching position on the grounds that "[Section 7(b)] is a general law [and] applies to contracts, and grants generally, whereas [the Indian Education Act] is a special law, providing for grants for specific purposes and upon specified conditions . . . the grant itself contained no provision requiring the school district to prefer Indian applicants over better qualified non-Indians." Id. at p. 1094. Unicom has not asserted that Indian preference should be the sole criterion under which YKHC should award a contract. Moreover, neither the Communications Act nor the Commission's regulations require, for example, that the least cost bidder be selected -- rather the "most cost-effective bidder" which the agency has construed as covering a wide range of variables. See Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, 14 FCC Rcd 13734 (1999). Finally, as Unicom has previously noted, the 9th Circuit, (which includes the State of Washington), has recognized that Indian preferences under Section 7(b) are applicable to funds issued under other Federal Acts. See Alaska Chapter, Associated General 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).

Alaska are the chief beneficiaries of RHC funding. According to the USAC web site nearly seventy percent (70%) of the funding commitments issued in Year 2 were for rural clinics in the State of Alaska where the vast majority of the patients are Native Americans. See USAC 2000 Annual Report, www.universalservice.org/reports/2000/pg36.asp.

Furthermore, Section 7(b) of the ISDEAA broadly applies to "any other act authorizing federal contracts grants to Indian organizations or for the benefit of Indians." 25 U.S.C. Section 450e(b). YKHC is an "Indian organization" as defined in the ISDEAA. 25 U.S.C. Section 450b. The ISDEAA itself authorizes federal grants to entities like YKHC. 25 U.S.C. 450h(b). And YKHC will utilize those federal grants in part to pay for services that would be provided by GCI.[20] It is undisputed that YKHC is federally funded under ISDEAA and other grants and contracts to provide health care to Native Alaskans. The disputed contract uses those funds to purchase full T-1 services to its remote village clinics. Thus, there is a clear nexus between what YKHC seeks to do with its federal contracts and grants, and the requirement that it utilize preferences. Therefore, there is no doubt that the ISDEAA preference applies to the GCI contracts.

Finally, there is no basis to GCI's constitutional argument. GCI does not claim that Native American preferences are unconstitutional, nor could it. The ISDEAA represents the law of the land which neither YKHC nor the Commission is at liberty to ignore. The Commission, recognized this just last year when, in construing Indian law, the agency relied squarely upon the case which GCI seeks to question, Morton v. Mancari, 417 U.S. 535 (1974). See Federal-State

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[20] Under RHC program rules, applicants like YKHC are required to pay a portion of the cost of supported services. See Rule 54.613(a). The discount generally enables an RHC applicant to pay no more than it would if it were located in the nearest urban area.

Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, 15 FCC Rcd 12208, 12221-22 (2000). In any event, the unique trust relationship between federal authority and Native American populations fully supports the Congressional determination to require the award of Native American preferences when tribal organizations like YKHC award contracts using federal dollars.[21]

## III.

## CONCLUSION

YKHC's and GCI's arguments in this matter are without merit. Based on the record in this proceeding, the Commission should hold that YKHC failed to provide basic information as to its desired service, failed to engage in a meaningful dialogue when questioned about its requirements, and failed to treat all bidders in a non-discriminatory fashion. The Commission should further hold that RHC applicants like YKHC are entitled, if not required, to apply a Native American preference. USAC's arbitrary failure to come to grips with these issues was unlawful.

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[21] YKHC argues that USAC's deferral to judicial resolution of Unicom's complaint is "consistent with how the Commission handles allegations against licensees..." Id. at 15 note 47. YKHC is mistaken: When there are allegations of violations of Commission Rules or policies (as distinct from interpretations of state or local contract claims), or misrepresentations to the agency, the Commission resolves the matter itself. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986) as modified by 5 FCC Rcd 3252 (1990). Thus so here.

For the foregoing reasons, Unicom respectfully requests that the Commission review the USAC decision and direct that the YKHC procurement be re-opened and conducted in a manner consistent with Commission policies.

Respectfully submitted,

**UNICOM, INC.**

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