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May 17, 2002

VIA ELECTRONIC FILING

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20544

RE: Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187

Investigation of Tariff Filed by ACS of Anchorage, Inc. and the National Exchange Carrier Association; December 17, 2001 MAG Access Charge Tariff Filings, CC Docket No. 02-36, CCB/CPD No. 01-23

Anchorage Telephone Utility, Tariff FCC No. 5, CC Docket No. 00-122

Notice of Oral Ex Parte

Dear Ms. Dortch:

On May 16, 2002, Joe D. Edge and Tina Pidgeon, counsel for General Communication, Inc. ("GCI"), met with John Ingle, Debra Weiner, and Sonja Rifken of the Office of General Counsel regarding pending Petitions for Reconsideration of the Commission's January 31, 1997 Order Implementing Section 402(b)(1)(A) of the Telecommunications Act of 1996 ("Streamlined Tariff Order") issued in CC Docket No. 96-187.

In addition to arguments previously made on the record in this proceeding, GCI urges the Commission to reconsider expeditiously the interpretation of "deemed lawful" so that it may fully consider apparently unintended consequences of the interpretation originally adopted. For example, the Commission did not consider the effect the adopted interpretation would have on the reviewability of the failure to suspend a tariff. Though courts generally have ruled that decisions not to suspend are non-reviewable, such rulings are predicated on the fact that an injured party may be awarded damages if the tariff subsequently is found unlawful.[1] If damages are not available after a tariff has been

[1] See Aeronautical Radio Inc. v. FCC, 642 F.2d 1221, 1248 (D.C. Cir. 1980) (finding that customer protection through the complaint process "alone suffices to render the FCC order non-final and unreviewable"), cert. denied, 451 U.S. 920 (1981); see also Nader v. CAB, 657 F.2d 453, 456 n.10 (D.C. Cir. 1981); Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 240 (D.C. Cir.) (finding that the acceptance of a rate filing has been

"deemed lawful," however, the injury caused by the failure to suspend a tariff that is later found to be unlawful would be irreparable.[2] Thus, the failure to suspend would no longer be an interlocutory decision and would be subject to reconsideration and review. On this basis, GCI sought Commission review of the failure to suspend ACS' June 2000 tariff (CC Docket No. 00-122). As a result, the Streamlined Tariff Order produces a more cumbersome regulatory process, an outcome that is plainly contrary to a statutory provision that, in essence, seeks to simplify the tariff review process.

In addition, as GCI has described in previous filings, at least one carrier has claimed that it is shielded from liability for overearnings for any period in which its tariff was "deemed lawful," a result that the Commission did not indicate in any way was a consequence of the Streamlined Tariff Order. Indeed, under this theory, a party that seeks suspension of would have every incentive to "keep open" a failure to suspend a tariff through subsequent Commission and court challenges throughout the applicable monitoring period to ensure that "deemed lawful" status did not attach to protect overearnings. Again, the result is a more cumbersome regulatory process that plainly was not intended.

A more reasonable interpretation of the statutory language is the alternative interpretation set forth by the Commission in the Notice of Proposed Rulemaking, that tariffs filed on 7- or 15-days notice are presumed lawful, with higher burdens for suspension and investigation, and damages will be available for any period that a tariff subsequently found to be unlawful was in effect.[3] This interpretation gives full effect to the language of the statute and does not produce the regulatory anomalies described above that are in direct conflict with the plain and only apparent purpose of the provision — to simplify the tariff review process.

During the meeting, GCI also reiterated that ACS' request for a stay of any refund that is ordered as a result of the pending ACS Tariff Investigation (CC Docket No. 02-36, CCB/CPD No. 01-23) should be denied, consistent with the reasons stated in GCI's Opposition filed on April 4, 2002. ACS has not made any attempt to demonstrate that it

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characterized as "decid[ing] nothing concerning the merits of the case; it merely reserves the issues pending a hearing"), cert. denied, 449 U.S. 1061 (1980).

[2] MCI initially raised this issue in its comments filed on October 9, 1996 (at 6-8). See also MCI Petition for Reconsideration (CC Docket No. 96-187), filed Mar. 10, 1997 at 10-12.

[3] Indeed, the notion that Congress intended nothing more than to codify the existing legal effect of filed tariffs along with newly prescribed timeframes is wholly consistent with other provisions of the 1996 Act that codified existing requirements or policies. See, e.g., 47 U.S.C. §§ 251(g) & 254(g).

meets the four-pronged standard for stay. Moreover, in the instant case, ACS seeks a stay of any refund that may be ordered in connection with its failure to follow a standing Commission requirement regarding the assignment of ISP traffic costs, which requirement remains in full force and effect.

One copy of this letter is being filed electronically pursuant to 1.1206(b)(2) of the Commission's Rules, 47 C.F.R. § 1.1206(b)(2).

Sincerely yours,

Tina M. Pidgeon

cc: John Ingle
Debra Weiner
Sonja Rifken