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August 1, 2002

**By Electronic Filing**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, D.C. 20554

Re: *Petition of ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. 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*, Order in CC Docket No. 96-98, DA 01-1951 (Com. Car. Bur., rel. Aug. 27, 2001), *Petition for Reconsideration* filed Sept. 26, 2001–Notice of Ex Parte Communication in CC Docket 96-98

Dear Ms. Dortch:

On behalf of ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. (collectively, “ACS”) we hereby submit these *ex parte* comments and the enclosed materials to supplement ACS’s Petition for Reconsideration in the above-captioned proceeding (the “ACS *Petition for Reconsideration*”). In particular, ACS respectfully requests that the Commission accept into the record in this proceeding the enclosed excerpt from the July 3, 2002 brief of the Regulatory Commission of Alaska (the “RCA”) before the Supreme Court of the State of Alaska.<sup>1</sup>

ACS believes the RCA’s position before the Alaska Supreme Court contradicts its arguments to this Commission. The RCA opposes the FCC’s adoption of a binding national rule on the proper burden of proof in cases to terminate the rural exemption under Section 251(f)(1) of the Communications Act (the “Act”), on the grounds that an FCC rule would be “redundant” of the statutory mandate, which the Eighth Circuit (and now this Commission) have articulated as placing the burden of proof on the party seeking to terminate a LEC’s Section 251(f) rural exemption. Yet the enclosed pages reveal that the RCA continues to urge the Supreme Court of Alaska to ignore the Eighth Circuit’s ruling and place the burden of proof on the rural LEC.

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<sup>1</sup> *ACS of Alaska, Inc., ACS of the Northland, Inc. and ACS of Fairbanks, Inc. v. Regulatory Commission of Alaska and GCI Communication Corp.*, AK Supreme Court No. S-10466, Brief of Appellee Regulatory Commission of Alaska (filed July 3, 2002) (“RCA Brief”) at 23-27.

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### Summary of Proceedings

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 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).<sup>2</sup> One party, General Communications, Inc. ("GCI"), opposed the petition on April 5, 2001, and comments were filed by two other parties, supporting comments by the United States Telecommunications Association ("USTA") on March 20, 2001, and opposing comments by the RCA on April 17, 2001 (the latter did not serve ACS).

ACS's petition for rulemaking stated that, in the absence of an FCC rule, there is no uniform national rule on burden of proof in cases brought to terminate a rural carrier's exemption from certain Section 251 obligations; despite the clear intent of the statute to prevent the imposition of undue burdens on rural carriers, and the Eighth Circuit's definitive interpretation of Section 251(f), the states can incorrectly place the burden of proof on the ILEC, as has been done in Alaska. ACS asked that the Commission adopt a new Section 51.405(a) to implement the Eighth Circuit's decision, 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

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<sup>2</sup> *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).

The Supreme Court denied certiorari on this issue. *General Communication, Inc. v. Iowa Util. Bd.*, 121 S.Ct. 879 (2001); *AT&T Corp. v. Iowa Util. Bd.*, 121 S.Ct. 878 (2001).

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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)).

On August 27, the Common Carrier Bureau issued a decision on delegated authority denying the petition for rulemaking.<sup>3</sup> 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 termination of the otherwise continuing rural exemption."<sup>4</sup> 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 address the suggestion of ACS that the Commission could, in this instance, amend Section 51.405 of the rules without prior notice and public comment. *Id.*

ACS filed its Petition for Reconsideration on September 26, 2001.<sup>5</sup> ACS believes that reconsideration is appropriate because the Bureau failed to address the need for a national rule that would bind all states, and neither the RCA nor GCI raised any credible argument against the adoption of the national rule ACS seeks, nor any credible explanation why the State of Alaska should be exempt from the Eighth Circuit's definitive interpretation of the federal statute (now confirmed by the *Bureau Order* as controlling).

ACS will not repeat its arguments here, but files this *ex parte* letter to bring to the FCC's attention the recent brief filed by the RCA which demonstrates that the RCA is still trying to avoid the Eighth Circuit's mandate in Alaska, even while attempting to dissuade this Commission from adopting a national rule which would bind all the states to consistently implement the statute as interpreted by the Eighth Circuit.

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<sup>3</sup> 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, Order in CC Docket No. 96-98, DA 01-1951 (Com. Car. Bur. rel. Aug. 27, 2001) (the "*Bureau Order*").

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

<sup>5</sup> Petition for Reconsideration of Action in Rulemaking Proceeding, Rep. No. 2508 (rel. Oct. 19, 2001), 66 Fed. Reg. 54009 (Oct. 25, 2001). GCI filed an opposition on October 11<sup>th</sup>, and the RCA filed comments opposing reconsideration on November 9<sup>th</sup> ("*RCA Comments*"); ACS filed a reply on November 21, 2001 ("*ACS Reply*").

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### **The RCA Continues To Take Inconsistent Positions With the FCC and the Alaska Courts**

As set forth in the attached excerpt from the RCA's recent brief to the Alaska Supreme Court, the RCA continues to take the position that Alaska is not bound to follow the Communications Act as interpreted by the Eighth Circuit. In its brief, the RCA cites case law that Alaska need not follow any federal court other than the U.S. Supreme Court, *RCA Brief* at 23-24, knowing full well that the U.S. Supreme Court declined to review the Eighth Circuit's burden of proof ruling, and that the Eighth Circuit's ruling therefore is definitive on this question.<sup>6</sup> The RCA does not acknowledge in its brief to the Alaska Supreme Court either the U.S. Supreme Court's denial of *certiorari* or the *Bureau Order* embracing the Eighth Circuit decision.<sup>7</sup> It urges the Alaska Supreme Court to ignore the Eighth Circuit's holding, and to reinterpret the Act in a manner directly contrary to the Eighth Circuit's opinion, *RCA Brief* at 24-27. Yet the RCA has opposed adoption of an FCC rule to codify the Eighth Circuit's holding, on the grounds that there is "no reason to promulgate a rule that is a redundant statement of a statutory mandate," *RCA Comments* at 2.

The FCC first adopted a rule governing burden of proof precisely because it found the termination of an incumbent carrier's rural exemption, and a consistent application of the burden of proof in such cases, to be of national importance to achieving the goals of the Act. As ACS demonstrated in its Petition for Reconsideration and Reply, the Alaska commission and courts have proven that the Eighth Circuit's opinion cannot by itself achieve national uniformity in the implementation of Section 251(f).<sup>8</sup> If the RCA has its way, the state of Alaska will not follow federal precedent. FCC guidance therefore is both appropriate and necessary to ensure the goals of the Act are achieved. The FCC should not be misled by the implication of the *RCA Comments* that Alaska will follow the statutory mandate without an FCC rule – the RCA evidently has no intention of following the Eighth Circuit in the absence of an FCC rule codifying the Eighth Circuit's interpretation of Section 251(f)(1) of the Act.

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<sup>6</sup> See *ACS Reply*, note 8.

<sup>7</sup> See *Bureau Order* at para. 7.

<sup>8</sup> See, e.g., *ACS Petition for Reconsideration* at note 2. As ACS has previously noted, GCI was a party to *Iowa Utilities Board II*, yet it does not feel bound by the Eighth Circuit's decision, despite the fact that the U.S. Supreme Court denied its petition for *certiorari* on this very issue of the burden of proof in rural exemption cases. See *ACS Petition for Rulemaking* in CC Docket No. 96-98 (Mar. 5, 2001) at 3 and n. 6; *ACS Reply* at 6.

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Accordingly, ACS respectfully requests that this letter and the enclosed material be included in the record of this proceeding, and that the Commission act as quickly as possible to reconsider the *Bureau Order* and adopt a new rule Section 51.405(a) as proposed by ACS.

Very truly yours,

Karen Brinkmann  
Counsel to ACS OF ALASKA, INC., ACS OF FAIRBANKS,  
INC., and ACS OF THE NORTHLAND, INC.

Enclosure

cc: Chairman Michael K. Powell  
Commissioner Kathleen Q. Abernathy  
Commissioner Michael J. Copps  
Commissioner Kevin J. Martin  
Dorothy Attwood, Chief, Wireline Competition Bureau  
Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau  
Sonja Rifken, Office of General Counsel