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August 16, 2002

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket No. 96-98

Dear Ms. Dortch:

General Communication, Inc. ("GCI"), a competitive eligible telecommunications carrier that provides service in Fairbanks and Juneau, Alaska in direct competition with ACS of Alaska, Inc., ACS of Fairbanks, Inc. and ACS of the Northland, Inc. (collectively "ACS"), hereby responds to ACS' ex parte letter dated August 1, 2002.¹ ACS mischaracterizes the Bureau's order as confirming that the Eighth Circuit's legal reasoning is "controlling."² The Regulatory Commission of Alaska's brief to the Alaska Supreme Court does not show that a national rule on burden of proof in 251(f) rural exemption proceeding is necessary, nor does it contradict the RCA's arguments to the Commission. To the contrary, what ACS' pending appeal to the Alaska Supreme Court shows is that there is no reason for the Commission to proceed with a rulemaking process to issue a national rule whose purpose and effect would be to interfere with the Alaska Supreme Court proceeding and provide ACS with a justification for disconnecting GCI customers in Fairbanks and Juneau, and depriving residential and business consumers in those areas of the benefits of competition.

ACS has repeatedly argued that, under the Hobbs Act, the Eighth Circuit's legal reasoning for vacating the Commission's previous rural exemption burden of proof rule is binding on all other federal and state courts. This expansive reading of the Hobbs Act is, however, not justified by the law. What the Hobbs Act does is to give the Circuit Courts of Appeals exclusive review of petitions for review of the FCC's orders.³ In accordance with the Hobbs Act, the Eighth Circuit's judgment vacated the former FCC rules 51.405(a), (c), and (d) nationwide. Thus, there is no longer a nationwide FCC rule on the burden of proof.

¹ Letter of Karen Brinkmann, Esq., to Marlene Dortch, dated August 1, 2002, CC Docket No. 96-98.

² *Id.* at 3.

³ 28 U.S.C. § 2342.

The Hobbs Act does not, however, confer exclusive jurisdiction to the federal circuit court of appeals to interpret federal statutes. The Hobbs Act, for example, does not elevate the legal reasoning of the Eighth Circuit Court of Appeals to be binding, rather than persuasive, authority for the Alaska Supreme Court in the latter's review of the RCA's rural exemption decision. In the absence of any explicit statutory directive to the contrary, the law of Our Federalism is clear: as Justice Thomas succinctly summarized in a concurrence in *Lockhart v. Fretwell*, 506 U.S. 364, 373 (1993), "neither 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. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."⁴ ACS points to no provisions of the Hobbs Act overturning this long accepted law of federalism and, of course, there are no such provisions in the Hobbs Act.

Furthermore, ACS in its petition overstates the significance of the U.S. Supreme Court's denial of GCI's petition for certiorari of the Eighth Circuit's opinion on the burden of proof issue in rural exemption proceedings. It is hornbook law that the Supreme Court's denial of certiorari is not in any way a substantive decision on the merits of the Eighth Circuit's interpretation of Section 251(f)(1). *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995). The only effect of the Supreme Court's denial of certiorari is that the Eighth Circuit's mandate vacating the FCC's Rule is left undisturbed.

The RCA's legal brief to the Alaska Supreme Court in essence made exactly these points. This was not a change of position for the RCA, nor does it contradict in any way what the RCA had previously told the Commission. What the RCA has consistently told the Commission is that it should refrain from issuing rules that "could interfere with ongoing proceedings before the Alaska courts, and have the effect of disrupting competition that has been initiated in Alaska cities in accordance with the requirements of the Telecom Act."⁵

ACS has open avenues of legal recourse to vindicate its view that the Eighth Circuit's legal reasoning with respect to Section 251(f) is correct, rather than the Alaska Superior Court's. That precise legal question is currently pending before the Alaska Supreme Court, in the case in which the RCA submitted the legal brief to which ACS now objects. The Supreme Court of Alaska, if it reaches the question of burden of proof, will decide whether the Eighth Circuit's reading, the Alaska Superior Court's reading or some other reading of Section 251(f) is correct. If the Alaska Supreme Court upholds the Alaska Superior Court and the RCA by concluding that the Alaska Superior Court's interpretation of 251(f) is correct and that the Eighth Circuit was wrong, then ACS can seek review in the United States Supreme Court.

⁴ *Accord United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-6 (7th Cir. 1970), *quoting with approval Iowa National Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930)("The federal Circuit Courts of appeals, and in respect to federal law, the state courts of last resort are subject to the supervisory jurisdiction of the Supreme Court of the United States. They are, however, as to the laws of the United States, co-ordinate courts. . . .Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law."); *Totemoff v. State*, 905 P.2d 953, 963-964 (Alaska 1995)(holding that the Alaska Supreme Court is not bound to follow the Ninth Circuit's interpretation of federal law).

⁵ Comments of the Regulatory Commission of Alaska, dated November 9, 2001, CC Docket 96-98 ("RCA November 9, 2001 Comments").

In addition, the Alaska Supreme Court could decide that the issue of the burden of proof issue is essentially moot because both parties submitted evidence to the RCA, which the RCA then reasonably weighed in reaching its decision. This, in fact, was the conclusion of the Alaska Superior Court when it reviewed the RCA's determination that the rural exemptions for Fairbanks and Juneau should be lifted.⁶

This illustrates that the RCA was correct when it told the Commission that granting ACS' petition for rulemaking would be "premature."⁷ The better course is clearly for the Commission to reject ACS' petition for reconsideration and to let this matter run its course in the Alaska Supreme Court and, if necessary, the United States Supreme Court.

The law is clear that in the absence of a rule, which is the current status quo, "the Commission has substantial discretion as to whether to proceed by rulemaking or adjudication." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). Nothing in the Eighth Circuit's decision mandates that the Commission issue additional rules.

As the RCA observed in its opposition to ACS' petition for reconsideration, "ACS's purpose in its Petition for Reconsideration is not a genuine attempt to establish a 'national rule.' Rather, it is aimed directly at influencing pending litigation in Alaska."⁸ Moreover, as the RCA concluded, "ACS's ultimate goal is forestalling the advent of competition."⁹ Competition is now present and growing in Fairbanks and Juneau. There is no reason for the Commission to take actions that would disrupt existing competitive service in Alaska.

In accordance with FCC rules, a copy of this letter is being filed electronically in the above-captioned docket.

Sincerely,


John T. Nakahata
Counsel to General Communication, Inc.

c: William Maher, Chief, Wireline Competition Bureau
Jeff Carlisle, Deputy Chief, Wireline Competition Bureau
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Chris Libertelli, Legal Advisor, Office of Chairman Powell
Dan Gonzalez, Senior Legal Advisor, Office of Commissioner Martin
Matthew Brill, Legal Advisor, Office of Commissioner Abernathy
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⁶ *Telephone Utilities of Alaska, Inc. et al. v. Regulatory Comm'n of Alaska*, Case Nos. 3AN-99-3494, 3AN-99-3499, Decision and Order at 9 (Nov. 26, 2001), filed as an attachment to Letter of John T. Nakahata, Counsel to GCI, to Magalie Roman Salas, Secretary, FCC, dated Dec. 7, 2001, CC Docket No. 96-98.

⁷ Comments of the Regulatory Commission of Alaska, dated April 17, 2001, CC Docket No. 96-98.

⁸ RCA November 19, 2001 Comments at 2.

⁹ *Id.* at 4.