

October 1, 2002

EX PARTE – Via Electronic Filing

Ms. Tamara Preiss
Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ACS of Anchorage, Inc., and ACS of Fairbanks, Inc., Petition for
Declaratory Ruling and Other Relief Pursuant to Sections 201(b) and
252(e)(5) of the Communications Act, WC Docket No. 02-201

Dear Tamara:

On behalf of General Communication, Inc. (“GCI”), I am writing to provide new information concerning ACS’s allegations and to address several issues raised during our meeting with you and Margaret Dailey on September 18, 2002.

The Opposition of GCI, filed on August 20, 2002, provides a detailed factual rebuttal to ACS’s characterization of the proceedings pending before the Regulatory Commission of Alaska (“RCA”). A complete and accurate understanding of the proceedings before the RCA is essential because ACS has asked the FCC to preempt the RCA purportedly “for failure to act to carry out its responsibilities” under the statute.¹ Recently Paul Olson, the arbitrator appointed by the RCA for the Anchorage arbitration, wrote to David Shoup, counsel for ACS, and Mark Moderow, counsel for GCI, to correct the record concerning several of ACS’s allegations.

ACS has repeatedly maintained that a “pre-hearing conference, which the RCA ordered to take place ten days following the adoption of the Fairbanks and Juneau interconnection agreements, never occurred,” and further, “despite repeated requests for a schedule to resolve the matter, the RCA has failed to calendar a hearing in this proceeding.”² Mr. Olson has refuted ACS’s allegation that the pre-hearing conference did not occur as required. In an e-mail to counsel dated September 19, 2002, Mr. Olson explains: “I do not want anyone to have a mistaken belief that arbitration pre hearing conferences were not held or scheduled.” Specifically, he notes that the Fairbanks arbitration concluded on October 5, 2000, that on October 10, 2000, he scheduled a pre-arbitration conference for the Anchorage proceedings to be

¹ See 47 U.S.C. § 252(e)(5).

² ACS Petition at 11, 21.

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held on October 19, 2000, and that the conference did occur as scheduled. Further, Mr. Olson provides documentary evidence, in the form of a series of e-mails between counsel and the arbitrator, *that a subsequent pre-hearing conference was cancelled at ACS's request, and that ACS made no further scheduling requests to him as arbitrator.* I have attached this set of e-mails for the record.

During our meeting on September 18, a question arose concerning another of ACS's "characterization" of the facts. In its Emergency Petition, ACS represents that the interconnection agreement arbitrated in 1996 and approved on January 15, 1997, "does not specify a termination date."³ This is true. However, in a footnote, ACS continues: "The agreement establishes wholesale discount rates up to December 31, 1999. It is silent regarding what rates apply after 1999."⁴ ACS is attempting to use a three-year ramp-up in wholesale discount rates to imply uncertainty as to the wholesale rates that would apply after the ramp-up. But there is no uncertainty about the continuity of the rates pending further action by the state commission: the state commission's order clearly explains that it adopted ATU's proposed "phased-in approach with a rate of 8.7 percent in year one, 17.4 percent in year two, and 26.1 percent in year three *and thereafter.*"⁵ Accordingly, the 26.1 percent rate was set to apply starting in year three and continuing until new rates were established by the RCA to replace these rates, which the parties agreed were temporary. A copy of this order is enclosed.⁶

In addition, in a September 25 *ex parte* filing ACS suggests that "the RCA continues to thwart the progress of [the Fairbanks] litigation by claiming sovereign immunity." As I noted in my *ex parte* filing of September 20, 2002, the State of Alaska and ACS had an agreement – which the RCA signed – concerning ACS's federal district court appeal of the RCA's Fairbanks interconnection decision that would have permitted the litigation to proceed. Since our meeting, GCI learned that ACS has attempted to back out of that agreement with the State of Alaska. The RCA told the U.S. Court of Appeals for the Ninth Circuit in oral argument yesterday that it remains willing to allow ACS to substitute the individual commissioners in order to proceed under *Ex parte Young*.

More significant than the who-shot-who of the on-and-off settlement is that ACS is asking the FCC to preempt the RCA based upon ACS's own questionable litigation decisions. Although ACS's initial complaint named the individual commissioners as well as the RCA, its amended complaint names only the RCA as defendant. Since it filed its amended complaint, and particularly in light of the Supreme Court's decision in *Verizon v. Pub. Serv. Comm'n of*

³ ACS Petition at 10-11.

⁴ ACS Petition at 11 n.33.

⁵ Order U-96-89(8) at 8 (emphasis added). ATU was the predecessor to ACS.

⁶ *Order Resolving Arbitrated Issues*, RCA Docket U-96-89, Order No. 8, December 16, 1996. See also pages 3, 16-17, and 29 ("All prices adopted pursuant to this Order are temporary in nature and will require a full study based upon a cost methodology to be determined by this Commission.")

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Maryland,⁷ ACS has made no attempt to add the individual commissioners as parties in their official capacities under *Ex parte Young*.⁸ At oral argument in the Ninth Circuit yesterday, ACS's counsel had no clear response to the judges' inquiry as to why ACS was not willing to proceed under *Ex parte Young*. Apparently, rather than cure its litigation position, ACS prefers to charge the RCA with obstruction for exercising its right to raise a constitutional defense.

Turning to the decisional issue before the Commission, ACS has posited a number of theories in support of its requested relief – preemption of the RCA and establishment of interconnection rates by the Commission. In particular, ACS alleges that the interim rates set by the RCA violate the Commission's rules, sections 251 and 252 of the Communications Act, and Articles 5 and 14 of the U.S. Constitution. Notably, however, the only statutory basis for FCC rate-setting jurisdiction that ACS cites is section 252(e)(5); thus all of ACS's claims must be dismissed if the Commission decides that ACS has failed to establish that the RCA has failed "to act to carry out its responsibility under [section 252] in any proceeding or other matter under this section."⁹

The general rule under section 252(c)(2) is that the "State commission shall . . . establish any rates for interconnection, services, or network elements according to subsection (d) of this section." With the exception of section 252(e)(5), the statute does not give specific rate-setting authority for interconnection, unbundled network elements, and services for resale to the FCC, although the Commission does have the authority to establish national rules governing the methodology used by the states to set rates.¹⁰ Nor can the Commission's *Local Competition First Report and Order* be read to assert ratemaking authority in contradiction of the statute's express terms.¹¹

⁷ *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 122 S.Ct. 1753 (2002) (finding federal jurisdiction over suit against individual state commissioners alleging violations of federal law) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.") (internal citation omitted). See also *Michigan Bell Tel. Co. v. Strand*, 2002 U.S. App LEXIS (6th Cir. 2002) (declining to reach issue of sovereign immunity and finding jurisdiction pursuant to *Ex parte Young* over suit to enjoin state commissioners from alleged violation of federal law).

⁸ 209 U.S. 123 (1908).

⁹ 47 U.S.C. § 252(e)(5).

¹⁰ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384-385 (1999) (holding "the Commission has jurisdiction to design a pricing methodology" and finding that "[i]t is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.") (emphasis added).

¹¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-86, 11 FCC Rcd 15499 (1996) ("*Local Competition First Report and Order*"). As discussed in GCI's Opposition at 37-38, a clear reading of paragraphs 733-739 of the *Local Competition First Report and Order* is not that the Commission asserted ratemaking jurisdiction, but rather that it acknowledged a party's right to seek review of whether specific application of the general

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ACS attempts to bootstrap its allegations that the RCA's interim rates violate various rules, statutory and constitutional provisions into a foundation for the Commission to conclude that the RCA has "failed to act to carry out its responsibility" under section 252, and thus for the FCC to preempt the RCA and don the RCA's ratemaking functions. Yet as GCI well established in its Opposition, the legal or factual bases for a state commission's ratemaking decision simply are not a grounds for preemption under section 252(e)(5). The Commission has repeatedly and consistently held that an assessment of a state commission's "failure to act" for purposes of federal preemption under section 252(e)(5) does not include substantive review of the legal merits of the state commission's decisions. For example, in *Global NAPs/Massachusetts*, the Commission upheld bureau action on delegated authority denying a petition for preemption, noting that the Bureau "correctly declined to examine the underlying reasoning" of the state commission's decision.¹² The Commission expressly observed that the statutory grant of preemption authority in section 252(e)(5) does not focus on the validity of state commission decisions.

In the instant case, ACS's petition must be denied because there has been no "failure to act" by the RCA. Finding no basis for preemption in the statutory language -- and therefore no basis for the Commission to obtain ratemaking authority -- the entirety of the petition will be disposed of and the Commission need not address ACS's allegations about the legality of the interim rates. Indeed, because the section 252(e)(6) provides for exclusive review of state commission arbitration decisions in federal district court, the Commission *cannot* rule on the merits of the interim rates.

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

Sincerely,



John T. Nakahata
Counsel to General Communication, Inc.

Attachments

cc: Margaret Dailey, WCB

methodology in its case would be unjust. ACS does not request a waiver of the TELRIC methodology -- nor does it assert that its application to ACS is unjust or contrary to the rule's purpose.

¹² *In the Matter of Global NAPs, Inc., Petition for Preemption of Jurisdiction of Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Order on Review, 16 FCC Rcd 4976 (2001) at ¶ 4.