

BOSTON
BRUSSELS
CHICAGO
FRANKFURT
HAMBURG
HONG KONG
LONDON
LOS ANGELES
MILAN
MOSCOW
NEW JERSEY

Latham & Watkins
ATTORNEYS AT LAW
www.lw.com

NEW YORK
NORTHERN VIRGINIA
ORANGE COUNTY
PARIS
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

October 16, 2002

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: WC Docket No. 02-201; Ex Parte Submission

Dear Ms. Dortch:

We are submitting this letter on behalf of Alaska Communications Systems, Inc. (“ACS”) in response to certain representations by counsel for General Communication, Inc. (“GCI”) in their *ex parte* submissions filed in WC Docket No. 02-201¹ on September 20, 2002, October 1, 2002 and October 3, 2002. GCI continues to mischaracterize the facts with respect to the UNE rate proceedings both in Fairbanks and in Anchorage.

1. Fairbanks Proceeding

In GCI’s September 20, 2002 submission and in its October 1, 2002 submission, GCI’s counsel erroneously assumes that the Regulatory Commission of Alaska (“RCA”) and ACS actually entered into an agreement to substitute the individual commissioners for the State of Alaska in order to proceed under *Ex Parte Young* in the federal district court review of the RCA’s Fairbanks interconnection decision.² The parties attempted to negotiate the terms of such an agreement, but had not reached closure at the time of GCI’s September 20, 2002 filing. Subsequently, the parties were unable to agree on the terms the settlement.

¹ *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 (filed July 24, 2002) (“Petition”).

² See GCI *ex parte* filing in WC Docket No. 02-201 on October 1, 2002 at 2; GCI *ex parte* filing in WC Docket No. 02-201 on September 20, 2002.

Ms. Marlene Dortch
October 16, 2002
Page 2

GCI was invited to participate in discussions with ACS and the RCA concerning the resolution of the pending Ninth Circuit appeal, but declined to do so. As GCI was not at the negotiating table, the accuracy and reliability of its representations concerning those discussions should be suspect. In fact, GCI's position that it would not join in a settlement of the Ninth Circuit appeal, and its insistence that it reserve its rights to raise all procedural as well as substantive objections to proceeding in district court under the *Ex Parte Young* doctrine contributed to the inability of the parties to close the deal.

Additionally, ACS has filed a response to the Ninth Circuit's Order to Show Cause, which relates to the substitution of individual commissioners and which GCI filed as its October 3, 2002 *ex parte* submission. ACS's brief in response to the Order to Show Cause is attached hereto. In its brief, ACS identifies numerous arguments made and remedies requested originally in the federal court action that ACS would be required to forego in proceeding under *Ex Parte Young*. Given the limitations on its remedies against the individual commissioners, ACS had a rational basis for choosing not to proceed in federal district court under *Ex Parte Young*.

In any case, even if the district court were to begin review of the UNE rates in dispute, it is highly unlikely that the RCA would receive any guidance on applying the TELRIC methodology before October 2003, when the Fairbanks interconnection agreement expires and new UNE rates must again be put in place.³ Therefore, ACS urges the Commission to preempt the RCA and set UNE rates for Fairbanks in accordance with TELRIC because the RCA has refused to do so.

Alternatively, if the Commission finds that the RCA properly applied the TELRIC methodology, ACS requests that the Commission take this opportunity to review the confiscatory effect of the UNE rates in Fairbanks developed pursuant to the RCA's methodology. In a recent speech to U.S. Telecom Association, Rep. Tauzin (R. La.) admonished the FCC's UNE pricing rules as "violative of the Constitution" because they are confiscatory.⁴ The UNE rates set by the RCA are exactly the type of confiscatory rates that Rep. Tauzin was referring to. ACS urges the Commission to take this opportunity to review the UNE rates set by the RCA and the damaging effects of such rates to facilities-based competition.

³ See ACS Reply Comments filed in WC Docket 02-201 on August 27, 2002 at 16 (describing the ineffectiveness of relief offered under section 252(e)(6)) ("Reply Comments").

⁴ See *TR Daily*, September 30, 2002.

Ms. Marlene Dortch
October 16, 2002
Page 3

2. Anchorage Proceeding

GCI contends in its October 1, 2002 *ex parte* submission that the parties indisputably intended the 1997 interconnection agreement for Anchorage to continue on a temporary basis until the RCA established new UNE rates compliant with federal law.⁵ The parties expected the Alaska Public Utilities Commission to establish these new UNE rates within two to three years. However, it has now been almost 6 years since the RCA declared the UNE rates to be temporary, and almost 3 years since ACS petitioned the RCA to establish TELRIC-compliant UNE rates in Anchorage.⁶

GCI continues to attempt to lay blame on ACS for the RCA's delay in establishing new UNE rates and submits statements by the arbitrator indicating that pre-hearing conferences were cancelled by ACS and that ACS made no further scheduling requests to the arbitrator. As ACS described in its Reply Comments, however, ACS justifiably made repeated efforts to convince the RCA to apply properly the TELRIC methodology in determining UNE rates.⁷ GCI again attempts to distract the Commission's attention from the RCA's blatant disregard for the FCC's mandate that UNE prices reflect the ILEC's actual forward-looking costs based on the location of the carrier's wire centers. GCI's accusations that ACS is to blame for scheduling delays demonstrate that GCI expects ACS simply to proceed with an arbitration applying improper standards and tacitly to submit to the RCA's refusal to set TELRIC-compliant UNE rates.

The facts, as set forth by ACS in its Petition and Reply Comments, illustrate the RCA's neglect of ACS's requests that it review a cost model other than the FCC Synthesis Model, and its complete failure to move the arbitration process forward since January 24, 2002, when ACS first requested the arbitration of TELRIC-based UNE rates in Anchorage.⁸

The Commission should preempt the RCA in the Anchorage proceeding because the RCA has failed to arbitrate forward-looking, cost-based UNE rates within a reasonable time, as required by the Commission's rules. As ACS stressed in its Reply Comments and in its *ex parte* submissions in this docket, if the Commission does not preempt the RCA in the Anchorage proceeding, then any "action" a state takes under the color of section 252 will be viewed as

⁵ See GCI *ex parte* filing in WC Docket No. 02-201 on October 1, 2002 at 2.

⁶ See *Order Resolving Arbitrated Issues*, RCA Docket U-96-89 (8) at 29 (December 16, 1996); *see also*, Reply Comments at Exhibit A, Chronology.

⁷ See Reply Comments at 4-7.

⁸ See Petition at 10-12, 21-22; Reply Comments at 4-7.

Ms. Marlene Dortch
October 16, 2002
Page 4

sufficient, whether or not it complies with the statutory and FCC pricing rules, or whether or not it ever ultimately sets any rates at all.⁹

* * * * *

If you have any questions regarding this submission, please do not hesitate to call one of us at (202) 637-2200.

Respectfully submitted,

/s/ Karen Brinkmann

Karen Brinkmann

Elizabeth R. Park

⁹ See Reply Comments at 13-14; ACS *ex parte* filing in WC Docket No. 02-201 on September 25, 2002; ACS *ex parte* filing in WC Docket No. 02-201 on September 20, 2002.