

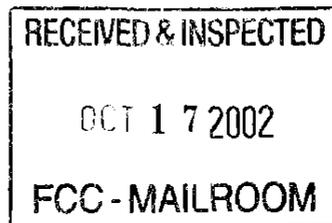
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
REGULATORY COMMISSION OF ALASKA

ORIGINAL

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EX PARTE OR LATE FILED

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington D.C. 20554



Re: WC Docket No. 02-0201, Ex Parte Communication from the Regulatory Commission of Alaska

Dear Ms. Dortch:

On September 27, 2002 I met with Jordan Goldstein, counsel to Commissioner Michael Copps. I responded to questions from Mr. Goldstein about ACS' Pre-emption Petition. In this letter I provide a summary of that meeting.

As in our written filing, I reiterated the RCA's position asking the Commission to deny ACS' Emergency Petition for Declaratory Ruling. The facts of this case do not meet the standard set in 252(e)(5) for preemption, and the Commission should not act. There is no emergency and the RCA has not failed to act.

We opened our interconnection proceeding in January 2000 when ACS asked us to revise UNE rates last developed in 1997. The parties agreed that because we were revising existing prices rather than setting them for the first time the timelines of Section 252 did not apply.¹ Much of the activity since has focused on ACS' requests to change the model we used to set UNE prices elsewhere in the state. After review we granted ACS' petition for interim rate relief, and increased rates to the extent ACS proved itself likely to prevail in order to protect ACS' interests while *the* case proceeded.

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¹ ACS expressly agreed that the TCA deadlines did not apply to ACS' request to revise the Anchorage UNE prices because it was a request to revise, not set original prices. See Comments of the Regulatory Commission of Alaska at p. 18, quoting ACS counsel Kevin Callahan.

The extensive record in the Anchorage interconnection proceeding evidences our diligent efforts to set forward looking prices, and the motions that delayed the conclusion.² The record is described in the brief filed our behalf, and whatever additional detail you may require is available upon request.' An unnecessary pre-emption is likely to further delay a final order.

ACS argues that the RCA failed to act in the Fairbanks and Juneau arbitration for a different reason. ACS' construes the RCA's assertion of its 11th amendment rights as the failure to act. After the Supreme Court issued its decision last term in *Verizon v. Maryland Public Service Comm'n*,⁴ it was clear that federal court challenges to state commission decisions made under section 252 could be brought against state commissioners individually and in their official capacities under the *Ex parte Young* doctrine.'

Given this decision, the RCA and ACS agreed to settle the appeal by allowing a substitution of defendants in federal court,' thereby avoiding the expense and time of pursuing the appeal and argument before the 9th Circuit. After having made the agreement, negotiated its drafting and forwarded it to the RCA for signature, ACS refused to sign it, and cited this case to the FCC as an example of the RCA's recalcitrance. Assertion of its sovereign rights is not failure to act, and the RCA has acted in good faith to resolve the matter after the legal standard became clear, so that the merits can be heard. The 9th Circuit panel quickly identified the source of delay during oral argument and issued a show cause order.'

The RCA has acted to set UNE prices. If ACS had not insisted that the RCA adopt a different pricing model, the Anchorage pricing docket would have been concluded over a year ago. If ACS had signed the negotiated settlement agreement, their federal court appeal of the RCA's Juneau and Fairbanks pricing decisions would be proceeding on the merits.

² The most recent example of our recognition of the inpldcl of ACS' litigation strategy on the timing in this case is found in an order addressing the model issue. "Nonetheless, we are willing to use the ACS-AN approach if the parties are given adequate opportunity to fully understand and correct it. In that regard we believe it is necessary to point out that ACS-AN, which has strenuously advocated for the use of this manual and potentially time consuming approach, is also the party that has been equally strenuous in arguing for a quick resolution of this docket. If ACS-AN is willing to live with the delays inherent in using this model, we are willing to accommodate their request that it be used in this proceeding. We rely on ACS-AN's representations, during the course of the hearing and the workshop, of its willingness to devote the time and resources necessary to fix the model." RCA Order U-96-89(26)(July 29, 2002) at p. 5.

¹ Comments of the Regulatory Commission of Alaska filed August 19, 2002.

⁴ 122 S.Ct 1753 (2002).

⁵ However, the Supreme Court did not answer the question of whether the 11th Amendment barred suits from being brought in federal court against a state commission itself.

⁶ The RCA's commissioners were to be substituted as defendants for the RCA, which was to be dismissed.

⁷ Oral argument was held before the 9th Circuit on September 30, 2002. During the argument, the RCA made it clear it was willing to allow the federal court action to proceed as an *Ex parte Young* action. ACS refused to agree. See Exhibit A, attached. (9th Circuit Court of Appeals October 3, 2002 Order to Show Cause).

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Marlene H. Dortch

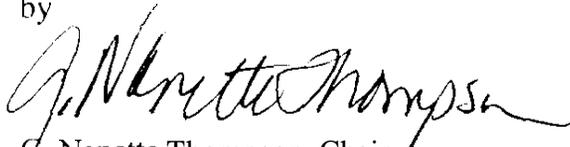
October 9, 2002

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Congress gave state commissions the responsibility of balancing the Act's twin goals of universal service and competition. The RCA has worked hard to meet that challenge. ACS' request to have the FCC intervene in the state's process to modify the result would set a dangerous precedent. If this petition is granted, the FCC is likely to see similar requests from incumbents across the nation that are unhappy with their state commissions' efforts to set UNE prices.

Sincerely,
REGULATORY COMMISSION OF ALASKA

by



G. Nanette Thompson, Chair

GNT/jmg

CC: Karen Brinkman, Mark Moderow, Steve DeVries

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 03 2002

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ACS OF FAIRBANKS, INC.; ACS OF
ALASKA, INC.; ACS OF THE
NORTHLAND, INC.,

Plaintiffs - Appellees,

v.

GCI COMMUNICATION CORP., d/b/a
General Coinmunication, Inc.,

Defendant,

and

REGULATORY COMMISSION OF
ALASKA.

Defendant - Appellant.

No. 01-35344

D.C. No .CV-00-00288-A-HRH
District of Alaska, Anchorage

ORDER TO SHOW CAIJSE

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ACS OF FAIRBANKS, INC.; ACS OF
ALASKA, INC.; ACS OF THE
NORTHLAND, INC.,

Plaintiffs - Appellants,

v.

GCI COMMUNICATION CORP., d/b/a

No. 01-35475

D.C. No, CV-00-00288-HRH
District of Alaska, Anchorage

General Communication, Inc.;
REGULATORY COMMISSION OF
ALASKA; G. NANETTE THOMPSON,
BERNIE SMITH, PATRICIA M.
DeMARCO; JAMES S. STRANDBERG;
WILL ABBOTT,

Defendants - Appellees.

Before: **B. FLETCHER, McKEOWN and TALLMAN, Circuit Judges**

Counsel for the Regulatory Commission of Alaska (RCA) offered at oral argument to allow the individual commissioners to be reinstated as parties to this action in substitution for RCA. Counsel acknowledged that the doctrine of Ex parte Young, 209 U.S. 123 (1908), permits suit against the commissioners in their official capacities. We hold that the federal courts have jurisdiction under 28 U.S.C. §1331 to entertain such a suit against the commissioners. See Verizon Md., Inc. v. Public Serv. Comm'n of Md., et al., 122 S.Ct. 1753, 1758 (2002).

The parties shall show cause if they have any good reason why we should not order the substitution of the commissioners and the dismissal of RCA as a party. Were this to be done, “[w]hether [RCA] waived its immunity is [a] question we need not decide, because . . . even absent waiver, [ACS] may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of Ex parte Young, 209 U.S. 123 (1908).” Verizon at 1760.

Absent a **showing** of good cause to the **contrary**, the case would be **remanded to the district court**, and **the order of the district court dismissing RCA's motion would be vacated**. The **district court would be directed to reinstate the individual commissioners as parties and proceed to a determination of the merits**.

The parties shall respond within 10 days of the date of this order.