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December 13, 2002

BY ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition for Rulemaking by ACS of Alaska, Inc., ACS of Fairbanks, Inc. and ACS of the Northland, Inc. [collectively, "ACS"] 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 (CC Docket No. 96-98) – Petition for Reconsideration of ACS (FCC Public Notice Rep. No. 2508, rel. Oct. 19, 2001) – Notice of *Ex Parte* Communications in CC Docket 96-98

Dear Ms. Dortch:

This is to inform the Commission of *ex parte* communications concerning the above-captioned petition for reconsideration on December 12, 2002. Lynn Erwin of ACS and I met with Eric Einhorn of the office of Commissioner Adelstein and reiterated the arguments raised in the petition and the other pleadings on the record, including the public interest in having the FCC codify the rule on burden of proof in rural exemption termination cases, and the need for prompt Commission action on ACS's petition for reconsideration. We also discussed the procedural history of this matter, as described in the attached chronology.

We believe that these communications are exempt from *ex parte* restrictions pursuant to Section 1.1204(b)(2) of the Commission's rules, as they concern a petition for rulemaking. We note that the Commission's Public Notice of the ACS petition for reconsideration, cited above, was silent as to the applicability of the *ex parte* rules to this proceeding. Nevertheless, we are filing this notice in duplicate in the interest of full disclosure. Please direct any questions concerning this matter to me.

Very truly yours,

Karen Brinkmann

Enclosure

cc: Eric Einhorn, Office of Commissioner Adelstein

ACS Rural Companies' Efforts to Correct the Burden of Proof in Rural Exemption Termination Cases

May, 1996. Telecommunications Act language allows State Commissions to terminate rural exemptions only if it makes the determination that the CLEC request for interconnection, services or network elements is bona fide and is not unduly economically burdensome, is technically feasible, and is consistent with §254 universal service principals.

August, 1996. FCC Order holds a national rule is necessary, makes regulations placing the burden of proof on the ILEC. Regulation is appealed, and GCI gets intervenor status to support FCC burden of proof regulation.

July 18, 1997. 8th Circuit invalidates burden of proof regulation on grounds that FCC lacks authority to issue such rules.

October 23, 1997. Alaska Public Utilities Commission (APUC) assigns burden of persuasion to GCI, burden of production on ACS Rural Companies (f/k/a PTI Companies).

January 8, 1998. After holding hearing and taking evidence, APUC denies GCI's request for termination of the rural exemptions.

February, 1998. GCI appeals decision to Alaska Superior Court, primarily arguing that placing the burden of persuasion on GCI was legal error.

1998. ACS Rural Companies' appellee brief supports APUC decision that correctly assigned the burden of proof to GCI .

January 25, 1999. U.S. Supreme Court reverses 8th Circuits decision that FCC lacked authority to issue the rural exemption burden of proof and other rules. *AT&T v. Iowa Utilities Bd*,. 525 U.S. 366 (1999). On remand, merits of regulation addressed by parties.

March 4, 1999. Alaska Superior Court reverses the APUC on sole ground that under state law the burden of persuasion should not have been on GCI.

March 15, 1999. ACS Rural Companies petition the Alaska Supreme Court to review this decision before APUC has to apply it. Alaska Supreme Court denies discretionary review.

June 22-24, 2000. APUC follows Alaska Superior Court instructions, placing entire burden of proof on ACS Rural Companies in hearing.

June 30, 2000. APUC terminates the rural exemptions on the last day of the APUC's existence. Subsequently, ACS Rural Companies move the RCA for reconsideration.

October 11, 1999. Regulatory Commission of Alaska (RCA) affirms the APUC finding, but issues much lengthier ruling, interpreting Section 251.

November 11, 1999. ACS Rural Companies appeal ruling to Alaska Superior Court, specifically listing the assignment of the burden of proof as point on appeal.

April 17, 2000. ACS Rural Companies file their appellate brief, indicating disagreement with Court's & RCA's assignment of the burden of proof.

July 18, 2000. 8th Circuit specifically invalidates FCC regulations that place burden of the proof on the ILEC and incorrectly define the unduly economically burdensome standard. *Iowa Utilities II*, 219 F.2d 744, 759-60 (2000).

October, 2000. GCI and others appeal the 8th Circuit's decision to U.S. Supreme Court arguing the burden of proof should remain on the ILEC.

November 27, 2000. ACS Rural Companies file their Reply brief, arguing again that the burden of proof was wrongly assigned to the ILEC, stressing 8th Circuit's ruling.

January 22, 2001. U.S. Supreme Court denies petitions for *certiorari* on the burden of proof issue.

January 30, 2001. ACS Rural Companies file a Motion for Immediate Stay, citing the law on the burden of proof as established by the 8th Circuit Court and the denial of GCI's petition for review by the U.S. Supreme Court.

February 6, 2001. ACS Rural Companies file an Emergency Motion for Immediate Stay in order to ensure a timely ruling from the Alaska Superior Court.

February 9, 2001. Alaska Superior Court denies Motion for Immediate Stay with a two sentence order.

February 21, 2001. ACS Rural Companies file a Petition for Review with the Alaska Supreme Court regarding the Alaska Superior Court's denial of the Stay.

February 22, 2001. ACS Rural Companies file a Motion to Vacate in the Alaska Superior Court.

March 5, 2001. ACS Rural Companies file a *Petition for Rulemaking* with the FCC regarding the need for the FCC to reissue its national rule on the burden of proof consistent with the 8th Circuit's ruling.

May 1, 2001. Alaska Supreme Court declines to accept review of denial of stay issue.

April 16, 2001. ACS Rural Companies argue before the Alaska Superior Court for it to vacate the earlier burden of proof ruling and reinstate the APUC's initial ruling, which used the correct burden of proof. Court issues bench denial.

August 16, 2001. ACS Rural Companies argue before the Alaska Superior Court that the burden of proof issue is still of critical concern in their appeal.

August 27, 2001. FCC Common Carrier Bureau issues Order on delegated authority (DA 01-1951) embracing the Eighth Circuit's decision as controlling, but denying ACS's Petition for Rulemaking on the grounds that an FCC rule would be duplicative of the statutory mandate.

September 26, 2001. ACS Rural Companies file a Petition for Reconsideration of the Bureau's August 27 Order, on the grounds that the Bureau incorrectly concluded that the *statute* unambiguously establishes a national rule on burden of proof.

October 11 and November 9, 2001. Opposition by GCI and Comments by the RCA both oppose ACS's Petition for Reconsideration of the Bureau Order; GCI stated a new rule would be anti-competitive, and would interfere in a state (not federal) matter; RCA stated there is "no reason to promulgate a rule that is a redundant statement of a *statutory mandate*."

November 21, 2001. ACS files its Reply to GCI's and RCA's opposition to the Petition for Reconsideration.

November 26, 2001. Alaska Superior Court issues Order affirming the decision of the APUC and RCA terminating the ACS Rural Companies' rural exemption under Section 251(f). Court agrees that the 8th Circuit ruling applies, and that the Alaska commission incorrectly assigned the burden of proof to ACS, but finds this was "harmless" error.

December 26, 2001. ACS Rural Companies appeal the Alaska Superior Court decision, and specifically the ruling regarding burden of proof, to the Alaska Supreme Court.

April 18, 2002. ACS Rural Companies file Opening Appellant Brief and Excerpt of Record with Alaska Supreme Court.

July 3, 2002. RCA and GCI both file Appellee Briefs, defending the RCA's assignment of the burden of proof to the ILEC, defending the lower court's finding of harmless error, and asserting that the burden of proof is not governed by the 8th Circuit's decision in *Iowa Utilities II* in any event.

September 9, 2002. ACS Rural Companies file their Reply Brief and Request to Supplement the Record (with RCA comments before the FCC).

September 17, 2002. GCI files: (1) an opposition to ACS's Motion to Supplement the court record with the RCA's comments filed before the FCC; (2) a motion to strike "new arguments" in ACS's reply brief that the FCC's August 2001 Order preempts state commissions from applying their own burden of proof rules and that GCI is collaterally estopped from presenting argument to the Alaska Supreme Court on burden of proof because it fully litigated that issue before the Eighth Circuit Court of Appeals in *Iowa Utils. Bd. v. FCC*, and (3) a request that it be allowed to file further briefing on ACS's argument that the Hobbs Act and the Multi-District Litigation statutes bind the Alaska Supreme Court to follow the Eighth Circuit's decision on burden of proof.

September 19, 2002. RCA files motion that the court strike ACS's FCC preemption argument, or in the alternative, grant RCA leave to file a supplemental brief.

September 27, 2002. ACS files opposition to the RCA and GCI motions.

October 25, 2002. Alaska Supreme Court issues order allowing the record to be supplemented with the RCA Comments, denying the GCI and RCA motions to strike, and granting the RCA and GCI requests to provide supplemental briefing.

November 18, 2002. GCI and RCA file supplemental briefs.

December 11, 2002. ACS files reply to the GCI and RCA supplemental briefs.

[N.B. Oral argument has not yet been scheduled – December 11, 2002]