

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
AT&T Corp. Petition Pursuant to 47 U.S.C.)	WC Docket No. 03-256
Section 160(c) of the Communications Act)	
For Forbearance from Enforcement of)	
Section 204(a)(3) of the Communications Act,)	
As Amended)	
)	

COMMENTS OF GENERAL COMMUNICATION, INC.

General Communication, Inc. (“GCI”) hereby submits these comments in support of the Petition for Forbearance, filed by AT&T Corp. (“AT&T”), which requests that the Commission forbear from enforcing the “deemed lawful” provision of Section 204(a)(3) of the Communications Act. This provision has been applied to insulate rate-of-return carriers from any effective oversight, permitting the retention of millions of dollars in overcharges to interexchange exchange carriers. GCI supports AT&T request to forbear from the “deemed lawful” provision, which has led to unjust and unreasonable rates, failed to protect consumers, and furthered no public interest.

GCI provides local exchange, long distance, and Internet access services to residential and business customers in Alaska. Every incumbent local exchange carrier (“ILEC”) in Alaska is regulated under rate-of-return (“ROR”) regulation at the state and federal levels. The absence of any meaningful earnings in the wake of *ACS v. FCC* has permitted massive overearnings by several ILECs—even those facing local competition. ACS of Anchorage, for example, reported a 35.29 percent interstate ROR in the switched traffic sensitive category of access charges for

2001-2002. The net effect is that GCI has overpaid for interstate access services without any effective recourse.

a. GCI has first-hand experience with the negative effects of “deemed lawful” under Section 204(a)(3), as illustrated by ACS’ long history of overearning. For several years now, ACS has earned an interstate ROR for switched traffic sensitive access services that is far in excess of the Commission-prescribed 11.25 percent. For example, ACS of Anchorage, Inc., posted a cumulative ROR of 35.29 percent for the traffic sensitive category in the 2001-2002 Monitoring Period,¹ and a rate of 30.26 percent for the 1999-2000 Monitoring Period.² In other words, since 1999, ACS of Anchorage has earned approximately *three times* the lawful return prescribed by the Commission, even though the Commission mandated a significant reduction in this subsidiary’s switched traffic sensitive rates after finding that it had improperly included the costs of ISP traffic in its interstate rate base during the 1997-1998 Monitoring Period.³

In fact, ACS has consistently and substantially overearned in the switched traffic sensitive category of interstate access services since 1995. Specifically, ACS’ predecessor (ATU) posted a rate of return of 18.57 percent for the 1995-1996 Monitoring Period, and a rate of return of 32.12 percent for the 1997-1998 Monitoring Period—both substantially in excess of the Commission’s prescribed 11.25 percent rate of return. ACS also exceeded the Commission’s prescription for the 1999-2000 Monitoring Period, with a reported rate of return of 30.26

¹ See Attachment A.

² See Attachment B.

³ See *General Communication, Inc. v. Alaska Communications Systems, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 2834 (2001) (“*GCI v. ACS*”).

percent.⁴ That the Commission appears to have no timely, effective recourse against a recidivist offender like ACS demonstrates that the “deemed lawful” provision is not necessary to ensure just and reasonable rates.

b. In the absence of any ability to ensure just and reasonable access rates, AT&T is correct that “there is no conceivable manner in which continued enforcement of the ‘deemed lawful’ provision of Section 204(a)(3) can be claimed to provide *any* protection to access customers and their end user customers.”⁵ The AT&T analysis demonstrates that access charge customers have been overcharged by at least \$159 million since 2001 alone.

c. Finally, GCI agrees that tariff review and suspension have proven wholly ineffective at producing just and reasonable rates, in the absence of earnings enforcement. Rate-of-return regulated filers are required to set and adjust rates to avoid exceeding the Commission’s rate of return prescription.⁶ Indeed, the Commission described the obligation of a rate of return carrier in the GCI Order:

To comply with [the Commission’s rate-of-return] prescription, rate-of-return carriers estimate their costs of providing exchange access services and project their demand for such services for a two-year period in the future (i.e., the monitoring period or enforcement period). They then file tariffs containing rates for their access services that they believe, given their estimate of costs and demand, will result in earnings within the prescribed rate of return at the end of the two-year forecast period. During the course of the two-year period, rate-of-return carriers must review how their actual costs and demand calculations

⁴ Not only did ACS overearn in the 1997-1998 and 1999-2000 Monitoring Periods, it attempted to conceal its overearnings by allocating ISP costs to the interstate jurisdiction, thereby masking and significantly understating its rate of return for these periods.

⁵ AT&T Petition at 17.

⁶ See *GCI v. ACS*, 16 FCC Rcd at 2836 (citing *MCI Telecom. Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995) (“*MCI v. FCC*”); *Rate of Return Prescription Order*, 1 FCC Rcd at 954), *aff’d in part, vacated in part, and remanded in part ACS v. FCC*, 290 F.3d 403 (D.C. Cir. 2002) (“*ACS v. FCC*”).

compare to their earlier projections, and make rate adjustments, if necessary, to ensure that they do not exceed their prescribed rate of return.⁷

To date, however, the Commission has failed to suspend and investigate any tariff, despite the fact that carriers reporting earnings violations make no adjustment to the rate methodologies and assumptions from prior periods that led to the violations. Indeed, ACS' run of excessive earnings in the switched traffic sensitive category had not compelled it to reduce its local switching rate over a six year period, during which it increased the rate twice.⁸ Only after the Commission recently investigated ACS' rates did ACS file a significantly reduced local switching rate—\$0.011373 to \$0.007840. Whether or not this reduction will fully address the earnings issue on a prospective basis will not be knowable, however, until September 2005, when ACS files its monitoring report for the 2003-2004 period. Against this background, certainly “deemed lawful” certainly is not “necessary” to ensure just and reasonable access rates.

Overearning is not limited either to ACS' Anchorage subsidiary or to interstate access services in the switched traffic sensitive category. ACS' other ILEC subsidiaries, which participate in the NECA pool, also overearn in the switched traffic sensitive category: NECA posted a cumulative ROR of 12.76 percent for the 2001-2002 Monitoring Period.⁹ And both ACS of Anchorage and NECA reported RORs for the common line and special access categories that exceed the 11.25 percent ROR authorized by the Commission.¹⁰

Likewise, overearning by ROR ILECs is not unique to Alaska. As AT&T explains in its

⁷ *GCI v. ACS*, 16 FCC Rcd at 2836 (¶ 5) (internal citations and footnotes omitted) (emphasis added).

⁸ ACS increased its local switching rate in its January 1, 1998 tariff filing and in its July 1, 1998 tariff filing.

⁹ See Attachment C.

¹⁰ See Attachments A, B, and C.

petition, for the 2001-2002 Monitoring Period, “a total of 30 LECs earned a combined total of almost \$160 million in excess of the permissible maximum earnings level,” resulting in “annualized earnings ranging from 11.73 percent to as much as 54.34 percent for special access, and from 11.82 percent to as much as 35.30 percent for switched traffic sensitive access.”¹¹ The almost complete lack of independent oversight of ILEC tariff filing and earnings makes it difficult, if not impossible, to adequately police the ILECs under ROR. Indeed, the “deemed lawful” provision provides ROR ILECs with both the opportunity and the incentive to manipulate their costs and or rates to slide through the abbreviated tariff review process for the benefit of guaranteed retention of unjustified, and perhaps ill-gotten, gains. As AT&T aptly notes, “immunity from damages liability to their access customers creates powerful incentives for LECs to file excessive and discriminatory rates and related terms and conditions on a streamlined basis, secure in the knowledge that most of these unlawful charges will escape sufficient scrutiny during the pre-effectiveness review stage and will take effect without suspension.”¹²

Thus, even when overearnings are subsequently reported, the Commission cannot—as GCI knows first-hand from the ACS decision—order rate refunds or damages if a tariff has been “deemed lawful” pursuant to section 204(a)(3).¹³ Accordingly, if an ILEC tariff is properly filed

¹¹ AT&T Petition at 11, Exhibit 1; *see also Elimination of Rate-of-Return Regulation of Incumbent Local Exchange Carriers; Federal-State Joint Board on Universal Service*, Western Wireless Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers, RM No. 10822, CC Docket No. 96-45 at 28 (filed Oct. 30, 2003) (stating that the ROR ILECs’ interstate overearnings were more than \$218 million in the 2001-2002 period, \$92 million in 1999-2000 and \$121 million in 1997-1998).

¹² AT&T Petition at 4.

¹³ *ACS v. FCC*, 290 F.3d at 412, *affirming in part and reversing in part GCI v. ACS*.

under the *Streamlined Tariff Order*¹⁴ and the Commission takes no action before it goes into effect, then only prospective relief may be available even if the tariff is subsequently found to be unlawful. Given the general timeframe in connection with preparing, filing, and adjudicating formal complaints, GCI estimates that even under the best case scenario, at least six months will pass without any reparations. And in the worst—and most likely—scenario, the injured party will not even have notice of the injury until the final monitoring report for a two-year period is issued, nine months after the period has closed. As AT&T rightly concludes, “by the time the complaint process can run its course, the damage to competition will already have been done, even if the Commission determines that the LEC’s access charges are other tariffed practices are unlawful.”¹⁵ GCI would further add that in the case of reported earnings violations, there is *no* opportunity even to initiate a complaint before the damage has been done. As a result, “even with respect to those incidents of ROR malfeasance that the Commission detects (most likely a small minority), in most cases the Commission may lack authority to order an effective remedy.”¹⁶ Thus, GCI agrees that forbearance from “deemed lawful” is consistent with the public interest.

¹⁴ See *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170 (1997) (“*Streamlined Tariff Order*”).

¹⁵ AT&T Petition at 15.

¹⁶ Western Wireless Petition at 29.

Conclusion

Based on the foregoing, GCI urges the Commission to grant the AT&T Petition for
Forbearance.

Respectfully submitted,

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