

June 29, 2005

Mr. Thomas Navin
Chief
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20036

*Re: Request for Clarification of Clerical Changes and for Direction to USAC, CC
Docket 96-45*

Dear Tom:

On behalf of General Communication Inc. (“GCI”), I am submitting this letter to ask that the FCC or the Bureau direct USAC to withdraw certain informal policy guidance that USAC has provided, and instruct USAC that the FCC has not modified certain provisions of the Fourth Order on Reconsideration in CC Docket 96-45, 13 FCC Rcd. 5318 (1997) (“*Fourth Order on Reconsideration*”), in which the FCC expressly ordered that when a CETC captures an ILEC subscriber and serves that subscriber entirely using the CETC’s own, non-UNE facilities, the incumbent LEC no longer receives the universal service support attributable to that customer. Furthermore, GCI requests that the Commission further correct the correcting amendment to rule 54.307 that was published in the Federal Register on June 22, 2004, 69 Fed. Reg. 34601 (“*June 22, 2004 Federal Register Notice*”), and reinstate the last sentence of section 54.307(a)(4), which was erroneously deleted by clerical changes made either in the Ninth Report and Order in CC Docket 96-45, 14 FCC Rcd. 20432 (1999), or in the *June 22, 2004 Federal Register Notice*. Alternatively, the Commission should rescind the *June 22, 2004 Federal Register Notice* because it lacked legal authority to issue that notice without following the rulemaking procedures set forth in 5 U.S.C. 553.

Background

Unless the Commission and/or Bureau act, USAC’s pronouncements regarding both the proper interpretation of the Commission’s rules and orders, as well as the timing and manner in which these rules have been implemented, will likely become the subject of litigation before the Regulatory Commission of Alaska later this summer. GCI has been seeking to negotiate an interconnection agreement with the Matanuska Telephone Authority (“MTA”), a rural LEC that lost its rural exemption pursuant to Section 251(f)(1)(C) when it began providing video

programming.¹ MTA, however, has now filed a petition for suspension and modification, *inter alia*, of its Section 251(c)(3) duty to provide access to unbundled network elements.² Based on MTA's petition and statements made by MTA, GCI believes that MTA will argue that suspension of Section 251(c)(3) unbundling is necessary because MTA would, under the yet-to-be-implemented rule 54.307(a)(2), lose universal service support when GCI serves a customer using UNEs, but that the FCC's rules no longer clearly state that MTA would lose such support when and if GCI were to serve the same customer over GCI's own, non-UNE, facilities.

In the course of its discussions with MTA, MTA produced to GCI the attached e-mail that MTA had received from staff of the FCC's Inspector General's office (OIG), apparently in response to an e-mail from MTA to OIG and USAC. That e-mail transmitted what the IG's office characterized as a "policy response" from USAC, and also contained the underlying request from MTA. The e-mail from OIG to MTA, which includes USAC's e-mail to OIG dated September 17, 2004 ("*September 17, 2004 e-mail*"), is attached as Exhibit A.

Argument

1. USAC's "Policy Response" was Procedurally Improper, and Should Therefore be Formally Withdrawn.

The Commission's rules clearly set limit USAC's authority: "The Administrator [USAC] may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission." 47 C.F.R. 54.702(c). USAC's e-mail in response to MTA's inquiry appears to violate this limitation in several respects.

First, as reflected in MTA's e-mail dated September 14, 2004 to OIG and USAC, MTA sought "clarification" as to "how USF support is disbursed to carriers in study areas that have both facilities-based and non-facilities-based competitors who have been designated competitive eligible telecommunications carriers (CETCs)." (Exhibit A). However, by the terms of rule 54.702(c), USAC may not entertain such requests for clarification.

Second, USAC's response does not appear to limit itself either to describing current practice or current rules (which, as discussed further below, is incorrectly or incompletely summarized), but its response extends to what the Commission and USAC will do in the future.

¹ See Request by GCI Communication Corp. d/b/a General Communication Inc. and d/a GCI for Local Interconnection with Matanuska Telephone Association, Inc. pursuant to 47 U.S.C. § 251 and 252, Order Requiring Negotiations, Regulatory Commission of Alaska, Consolidated Order U-04-20(4)/U-04-47(2) (February 18, 2005).

² See Matanuska Telephone Association d/b/a MTA's Petition For Suspension And Modification Of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 Matanuska Telephone Association's Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 Regulatory Commission of Alaska, Docket U-05-046, (May 27, 2005).

USAC, for example, states that it is currently designing a form to collect additional data, and that “Once USAC has the required data to perform the calculation, USAC will calculate support according to the UNE constraint on an on-going basis and adjust support paid on a retro-active basis.” (Exhibit A). This response prejudged at least three policy decisions by the Commission or the Bureau: (1) to submit a new CETC data collection form to OMB for approval (which the Commission later did); (2) to then proceed to implement 54.307(a)(2) without waivers; and (3) to do so retroactively rather than prospectively. Even if USAC had received some guidance from Commission staff, a clear statement should have noted the potential for the Commission, at some point in the future, to undertake waivers and to decide the timing of implementation.

Accordingly, the Commission and/or the Bureau should direct USAC to withdraw and repudiate its *September 17, 2004* e-mail to OIG.

2. To the Extent USAC Stated that an ILEC Would Not Lose USF Support When a CETC Captures an ILEC Customer, That Statement was Legally Erroneous, and USAC Should be Instructed As to Existing Law.

MTA’s September 14, 2004 e-mail to USAC and OIG asked for clarification about “how USF support is disbursed to carriers in study areas that have both facilities and non-facilities based competitors who have been designated” as CETCs.³ MTA asserted that it “receives the same USF support, in total, it received prior to the wireless CETC entrance into its service area,” but that it would lose universal service support in the event that the CETC served end users using UNEs.⁴ USAC confirmed MTA’s interpretation of rule 54.307 as “correct.” However, USAC’s legal conclusion was incorrect because USAC ignored paragraph 84 of the *Fourth Order on Reconsideration* in Docket 96-45, in which the Commission expressly held that “if an incumbent LEC loses a customer to a competitive eligible telecommunications carrier, the incumbent LEC will lose some or all of the per-line level of support that is associated with serving that customer.”⁵ In that Order, the Commission ruled that when a CETC captures an ILEC subscriber and serves that subscriber entirely using the CETC’s own, non-UNE, facilities, “the incumbent LEC will lose the support it previously received that was attributable to that customer.”⁶

Neither USAC nor the Commission may lawfully ignore paragraph 84 of the *Fourth Order on Reconsideration*, in which the Commission granted a reconsideration petition filed by GCI. Although the rule language specifically added to 54.307(a)(4) – which stated, “The amount of universal service support provided to such incumbent local exchange carrier shall be reduced by an amount equal to the amount provided to such competitive eligible telecommunications carrier” – subsequently disappeared from rule 54.307, the Commission never withdrew or overruled the *Fourth Order on Reconsideration*. Indeed, it had no lawful opportunity to do so.

³ Exhibit A at 5.

⁴ *Id.*

⁵ *Fourth Order on Reconsideration*, 13 FCC Rcd. at 5367.

⁶ *Id.* at 5368.

When the FCC adopted its Ninth Report and Order in Docket 96-45, 14 FCC Rcd. 20432, in November 1999, it redrafted 54.307(a). When it did so, it dropped from what became new section 54.307(a)(3) the sentence added to 54.307(a)(4) by the paragraph 84 of the *Fourth Order on Reconsideration*.⁷ Nothing in that order, however, indicated that Commission was repudiating the actions it expressly took in the Fourth Report and Order. The Ninth Report and Order (paras. 90-92) generally reaffirmed the Commission's approach to portability, and it expressly addressed only hold-harmless funding.⁸ Furthermore, the Ninth Report & Order adopted the High Cost Model support mechanism for non-rural carriers, and did not address issues related to High Cost Loop Support or Local Switching support for rural carriers. Thus, there was no basis on which the Commission could even have reconsidered the portability portion of the Fourth Order on Reconsideration, even had it chosen to do so.⁹

Adding to the confusion, when the Commission published the Ninth Report and Order in the Federal Register, it added an ellipsis to indicate that the then-existing paragraph (54.307(a)(4)) was preserved, including the sentence added pursuant to paragraph 84 of the *Fourth Order on Reconsideration*. The ellipsis gave public notice that the FCC was not addressing the rule established pursuant to paragraph 84 of the *Fourth Order on Reconsideration*, because it expressly preserved that sentence. Last summer, however, the FCC issued a Federal Register notice correcting its 1999 Federal Register notice to delete the ellipsis that preserved paragraph (a)(4) of rule 54.307.¹⁰ But the clerical elimination of the ellipsis cannot have been a legal action to overturn the *Fourth Order on Reconsideration* either, as it was taken without notice and opportunity for comment, and was presented as nothing other than a clerical correction.

All of this adds up to the following conclusion: the Commission has not repudiated paragraph 84 of the *Fourth Order on Reconsideration*, so it remains good law. USAC must implement paragraph 84 of the *Fourth Order on Reconsideration* unless the Commission orders otherwise. Accordingly, the Commission or the Bureau should instruct USAC that it must implement paragraph 84 of the *Fourth Order on Reconsideration*. It is important to note that the Commission cannot certify ILEC payments in violation of paragraph 84 as proper payments.

3. The Commission Should Clerically Correct 54.307(a)(3) to Reinsert the Last Sentence of the Prior Version of 54.307(a)(4) or Rescind the June 22, 2004 Federal Register Notice.

To eliminate the unnecessary confusion that has resulted from a series of clerical errors, the Commission should issue another clerical correction of 54.307. In that correction, it should reinsert as the last sentence of 54.307(a)(3) the sentence added pursuant to paragraph 84 of the

⁷ See *Federal-State Joint Board on Universal Service*, Ninth Report & Order, 14 FCC Rcd. 20432, Appendix C (1999).

⁸ See *Id.* at 20480-1.

⁹ Although NECA's annotated rules describe the FCC as having "amended" 54.307 to delete paragraph (a)(4), that statement is nothing more than the characterization of FCC orders by an interested party, with no legal effect.

¹⁰ See June 22, 2004 Federal Register Notice.

Fourth Order on Reconsideration, which read, “when a competitive eligible telecommunications carrier receives support for a customer pursuant to Section 54.307(a)(4) the incumbent LEC will lose the support it previously received that was attributable to that customer.” As discussed above, it is apparent that this language was inadvertently dropped in the Ninth Report & Order, then preserved in the Federal Register publication by the addition of an ellipsis, until last year’s deletion of the ellipsis without further explanation. As the Commission never had legal authority consistent with the Administrative Procedures Act to drop this sentence from the rules, restoring it by acknowledging the series of clerical errors is the only proper course of action. Because the Commission is simply correcting past clerical codification errors, it may make these clerical corrections without further notice and comment.¹¹

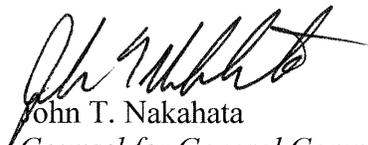
At a minimum, the Commission should rescind the June 2, 2004 Federal Register Notice. That notice could not lawfully have overturned paragraph 84 of the *Fourth Order on Reconsideration*, and deleting the corresponding provision of rule 54.307 leads to unnecessary confusion and may mislead some parties in to believing that the Commission did overturn paragraph 84.

* * *

Accordingly, GCI asks that the Commission or the Bureau:

- Direct USAC to withdraw certain informal policy guidance that USAC has provided;
- Instruct USAC that the FCC has not modified certain provisions of the Fourth Order on Reconsideration in CC Docket 96-45, 13 FCC Rcd 5318, in which the FCC expressly ordered that when a CETC captures an ILEC subscriber and serves that subscriber entirely using the CETC’s own, non-UNE, facilities, the incumbent LEC no longer receives the universal service support attributable to that customer.
- Correct the correcting amendment to rule 54.307 that was published in the Federal Register on June 22, 2004, 69 Fed. Reg. 34601, and reinstate the last sentence of section 54.307(a)(4), which was erroneously deleted by clerical changes made either in the Ninth Report and Order in CC Docket 96-45, 14 FCC Rcd. 20432, or in the *June 22, 2004 Federal Register Notice*.
- In the alternative to correcting the amendment, rescind the *June 22, 2004 Federal Register Notice* because the Commission lacked legal authority to issue that notice without following the rulemaking procedures set forth in 5 U.S.C. 553.

Sincerely,


John T. Nakahata
Counsel for General Communication, Inc.

¹¹ See 5 U.S.C. §553(b)(3)(B)(stating that the notice and comment procedures of Section 553 do not apply when the agency “for good cause” finds that “notice and public procedure thereon” are “unnecessary.”)