

November 28, 2012

BY ELECTRONIC FILING

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

Re: Applications of GCI Communication Corp., ACS Wireless License Sub, Inc., ACS of Anchorage License Sub, Inc., and Unicom, Inc. for Consent to the Assignment of Licenses to Alaska Wireless Network, LLC
WT Docket No. 12-187 and WC Docket No. 09-197

Dear Ms. Dortch:

GCI Communication Corp. (“GCI”) and Alaska Communications Systems Group, Inc. (“ACS”) met with the Wireline Competition Bureau (“WCB”), Wireless Telecommunications Bureau (“WTB”), and Office of General Counsel (“OGC”) on October 15, 2012 to discuss the pending Assignment of License applications and the associated Petition for Declaratory Ruling in the above-captioned dockets. GCI and ACS focused on the public interest benefits of ensuring that both of the Eligible Telecommunications Carriers (“ETCs”) involved in the Alaska Wireless Network, LLC (“AWN”) infrastructure sharing transaction remain eligible for universal service support. In this meeting, the WCB requested supplemental information in support of the rulings requested in the Petition for Declaratory Ruling.¹ Specifically the WCB requested additional support for the requested rulings that:

- ACS Wireless, Inc. (“ACS Wireless”) and GCI will have access to AWN’s spectrum in order to qualify for Mobility Fund universal service support or any future universal service mechanism that requires spectrum access, and
- ACS Wireless and GCI, both of which are currently designated as Eligible Telecommunications Carriers (“ETCs”) by the Regulatory Commission of Alaska, will continue to provide wireless services over their own facilities for purposes of qualifying as ETCs for universal service support.²

¹ *ACS Wireless License Sub, Inc. and ACS of Anchorage License Sub, Inc., Application for Assignment of License to The Alaska Wireless Network, LLC, Petition for Declaratory Ruling, WT Docket No. 12-187 (filed Aug. 10, 2012) (“Petition”).*

² *See Petition at 8.*

ACS and GCI respond here to the request for additional support, supplementing the Petition for Declaratory Ruling.

Access to Spectrum Requirement

The Commission's requirement that carriers have access to spectrum in order to receive support from the Mobility Fund is a new condition adopted in the *USF/ICC Transformation Order*.³ There is little guidance, in the *Order* or elsewhere, regarding the FCC's application of the "access to spectrum" requirement. The *USF/ICC Transformation Order* is best interpreted as imposing a functional test: Does the prospective bidder have the ability to use spectrum assets necessary to construct and deliver the auctioned services within the time periods contemplated by the auction? It should not matter whether access is maintained through a license, lease, binding contract, or otherwise. Indeed, as direct and indirect parents of AWN, respectively, ACS Wireless and GCI will continue to meet any spectrum access test after consummation of the AWN infrastructure sharing transaction and transfer of their current spectrum holdings to their subsidiary. Moreover, AWN will be bound by a Facilities and Network Use Agreement ("FNUA") to provide GCI and ACS Wireless with wholesale access to its spectrum.

Prior to the Mobility Fund Phase I auction, the Wireless Bureau determined that both GCI and ACS Wireless to have access to spectrum "in a frequency band that can support 3G or better services,"⁴ designating both as qualified bidders.⁵ At that time, GCI held the licenses in the Cellular and Broadband PCS bands directly or through its wholly-owned subsidiary Unicom.⁶ ACS Wireless Inc. held licenses in the Cellular, Broadband PCS, and AWS bands indirectly through its sister subsidiaries of ACS, ACS Wireless License Sub, Inc. and ACS of Anchorage License Sub, Inc.⁷ The question posed by the Petition for Declaratory Ruling then is

³ See *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and LinkUp, Universal Service Reform— Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17797, 17799-801 ¶¶ 386, 393-399 (2011) ("*USF/ICC Transformation Order*"); see also 47 C.F.R. § 54.1003(b).

⁴ *USF/ICC Transformation Order*, at 17,797 ¶ 393.

⁵ See *Mobility Fund Phase I Auction: 52 Bidders Qualified to Participate in Auction 901*, Public Notice, DA 12-1456, 27 FCC Rcd 10919, Attachment A (2012)(listing both ACS Wireless, Inc. and GCI Communication Corp. as qualified bidders).

⁶ See Description of the Proposed Transaction & Public Interest Statement, FCC Form 603, Exhibit 1 at 7 ("Public Interest Statement").

⁷ See Public Interest Statement at 5. See generally *Mobility Fund Phase I Auction Scheduled for September 27, 2012, Notice and Filing Requirements and Other Procedures for Auction*

whether the assignment of the licenses respectively from GCI, Unicom, AWS Wireless License Sub, and ACS of Anchorage License Sub to The Alaska Wireless Network, which will be a subsidiary of both GCI Communication Corp. and ACS Wireless, Inc.,⁸ somehow negates access to that same spectrum. In the context of an infrastructure sharing agreement with a perpetual FNUA under which GCI and ACS Wireless are obligated to purchase wholesale services from AWN and under which AWN is obligated to provide its parent ETCs with wholesale services, it would be irrational to conclude that GCI and ACS Wireless somehow had lost access to spectrum in the Cellular, Broadband PCS, and AWS Bands. In fact, the opposite will have occurred, as each will have access to greater spectrum in those bands, and that spectrum will be more efficiently utilized.

In the *USF/ICC Transformation Order*, the Commission made clear that an ETC could have access to spectrum without itself being the licensee. Certainly, all entities that “hold a license authorizing use of appropriate spectrum” have “access to spectrum.”⁹ The Commission also held that “the spectrum access requirement can be met by leasing appropriate spectrum, prior to an auction, covering the relevant geographic area,” provided that access is retained for at least five years from the date of the award of Phase I support.¹⁰ The Commission even allowed that a lease contingent upon obtaining support in the auction would be sufficient to satisfy the spectrum access requirement.¹¹ To the extent that there was any question, the May 2 Public Notice explains that if the licensee of spectrum relied upon for the auction is a different party from the applicant, then the applicant is also required to provide the licensee name and describe the relationship between the applicant and the licensee providing access.¹² Thus, if the applicant does not itself hold the necessary license, but instead relies on the licenses of an affiliate or some other licensee (such as a spectrum lessor), it can still meet the access to spectrum requirement, provided it discloses the nature of the relationship and how it obtains access.

It is important to recognize that control of a license or a portion of licensed spectrum, rather than the ability to use spectrum, is not a necessary component of the access to spectrum requirement. The Commission, for example, permitted all spectrum leases to establish access to spectrum. However, not every spectrum lease rises to the level of a transfer of control. Indeed, the Commission streamlined its test for transfer of control in the context of spectrum leasing and rural infrastructure sharing in order to permit some leases and sharing arrangements to be entered into without prior Commission approval, provided that the licensee retained effective working

901, Public Notice, DA 12-641, 27 FCC Rcd 4725, 4754-55, 4770 ¶¶ 96, 167-168 (2012) (“May 2 Public Notice”).

⁸ See Public Interest Statement, Appendix C (AWN Ownership (Post-Closing)).

⁹ *USF/ICC Transformation Order*, at 17799 ¶ 394.

¹⁰ *Id.*

¹¹ See *id.* at 17,799 ¶ 395.

¹² See May 2 Public Notice, at 4770 ¶ 167.

control.¹³ Under these types of spectrum manager leases, the lessee does not have direct accountability to the Commission in the first instance for compliance with Commission rules; instead, the lessor-manager does.¹⁴ The lessee, however, “must cooperate fully with any investigation or inquiry conducted by either the Commission or the licensee, allow the Commission or the licensee to conduct on-site inspections of transmission facilities, and even suspend operations under certain conditions.”¹⁵ The *USF/ICC Transformation Order* does not exclude lessees of spectrum manager leases from meeting the “access to spectrum” requirement.

For GCI and ACS Wireless, their access to spectrum is established through the FNUA with their jointly-owned subsidiary AWN.¹⁶ In every meaningful sense, the transaction will give the parties the same access to the spectrum that they own today. Moreover, each of the parties will enjoy access to and beneficial use of additional spectrum (that which is contributed by the other party) to which it would not have access but for the transaction. Under the FNUA, AWN is obligated to provide GCI and ACS Wireless with wholesale wireless services that each of those ETCs will then use to offer retail wireless services to their respective customers. AWN will do so using the Cellular, Broadband PCS and AWS licenses that GCI and ACS contribute to AWN

¹³ See e.g., *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services; 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services; Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum & the Widespread Deployment of Wireless Services, & to Facilitate Capital Formation*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, 19141 ¶115 (2004) (“Under this standard, the licensee (or spectrum lessee) remains responsible for ensuring compliance with the Communications Act and all applicable policies and rules. This responsibility includes maintaining reasonable operational oversight with respect to any activities relating to the infrastructure sharing arrangement so as to ensure that the operator of the facilities complies with all applicable technical and service rules, including safety guidelines relating to radiofrequency radiation. In addition, the licensee must retain responsibility for meeting all applicable frequency coordination obligations and resolving interference-related matters, and must retain the right to inspect the facility operations and to terminate the infrastructure sharing arrangement to ensure compliance.”) (“2004 Order”); see also *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20629 ¶ 51 (2003) (adopting “a new set of criteria for determining *de facto* control based on the licensee exercising effective working control over the use of any spectrum it leases, as opposed to direct control of the facilities themselves.”) (“*Spectrum Leasing Order*”).

¹⁴ See *Spectrum Leasing Order*, 18 FCC Rcd at 20651 ¶101.

¹⁵ *Spectrum Leasing Order*, 18 FCC Rcd at 20652 ¶ 104.

¹⁶ The FNUA will be executed by the parties at close, and is Exhibit J to the AWN Operating Agreement.

at close. Pursuant to the FNUA, AWN must endeavor to provide functionalities and overall services to both GCI and ACS Wireless that are capable of meeting the FCC's and/or Regulatory Commission of Alaska's requirements for services offered by CETCs providing mobile service.¹⁷ That agreement can only be terminated for specified causes, and otherwise lasts in perpetuity—well beyond the Commission's minimum five year requirement.¹⁸ The FNUA thus gives both GCI and ACS the ability to utilize Cellular, Broadband PCS and AWS spectrum to meet the requirements of the Mobility Fund.

Accordingly, just as applicants in the Mobility Fund Phase I auction were permitted to participate on the basis that they had access to spectrum through an affiliate or any kind of spectrum lease, so too should the Commission declare that ACS Wireless and GCI have access to spectrum through AWN. As the Commission has previously observed, "Infrastructure sharing should be encouraged because of the potential for savings in capital costs for construction of facilities necessary to deploy wireless services, and for the improved or enhanced coverage in rural and other areas that otherwise may not be economical for providers to offer without some form of sharing."¹⁹ In furtherance of this policy, the Commission should find that ACS Wireless and GCI will have access to spectrum via their joint ownership of AWN, a facilities-sharing subsidiary that holds licenses for spectrum and provides each of ACS Wireless and GCI with contractual access to such spectrum.

ETC "Own Facilities" Requirement

Following consummation of the AWN transaction, neither ACS Wireless nor GCI will have direct title to the facilities over which they will provide wireless services. Instead, ACS Wireless and GCI will provide service using physical facilities owned by their jointly-owned subsidiary, AWN. ACS Wireless and GCI have already provided detailed information on how they will jointly own AWN, and through this joint ownership, each use their jointly-owned facilities to provide wireless service. Therefore the Commission should find that both ACS Wireless and GCI will retain the ability to offer supported services over their "own" facilities as required by section 214 of the Communications Act of 1934, as amended,²⁰ and, thus, can continue receiving phased down competitive eligible telecommunications carrier ("CETC") universal service support.

Both GCI's indirect 66.7% ownership of AWN, and ACS Wireless's 33.3% direct ownership of AWN constitute ownership within the plain meaning of Section 214(e). The fact that this ownership is joint, rather than sole, makes no difference. Section 214(e) does not require that an ETC's solely "own" its facilities. Through their membership interests in AWN,

¹⁷ See FNUA § 3(b)(xix)

¹⁸ See FNUA § 6.

¹⁹ 2004 Order, 19 FCC Rcd at 19139 ¶112.

²⁰ See 47 U.S.C. § 214(e)(1)(A).

GCI and ACS both indirectly own the facilities being utilized to provide their ETC services, and thus are “offer[ing] the services that are supported by Federal universal service support mechanisms . . . either using [their] own facilities or a combination of [their] own facilities and resale of another carrier’s services”²¹

Furthermore, the Commission has long held that the Section 214(e)(1) “own facilities” requirement “does not refer to facilities ‘owned by’ a carrier,” but rather the term “reasonably could refer to property that a carrier considers its own, such as unbundled network elements, but to which the carrier does not hold absolute title.”²² As the Commission has previously observed:

“the word ‘own’ – as well as its numerous derivations – is a ‘generic term’ that ‘varies in its significance according to its use’ and ‘designate[s] a great variety of interests in property. The word ‘ownership’ is said to ‘var[y] in its significance according to the context and the subject matter with which it is used.’ The word ‘owner’ is a broad and flexible word, applying not only to legal title holders, but to others enjoying the beneficial use of property. *Indeed, property may have more than one ‘owner’ at the same time, and such ‘ownership’ does not merely involve title interest to that property.*”²³

In addition, the FNUA contractually requires ACS Wireless and GCI to procure their underlying services from their jointly-owned subsidiary AWN,²⁴ and that AWN must operate, maintain, upgrade, enhance, integrate, and expand a wireless network for their use that is competitive with other wireless networks. The FNUA further requires AWN to develop wholesale service plans that are competitive with other providers and to provide functionalities

²¹ *Id.*

²² *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8865 ¶ 159 (1997) (“*Universal Service First R&O*”). Notably, as the parties explained in the Petition, “[e]ach of GCI’s and ACS Wireless’s post-transaction ownership interests in the facilities contributed or subsequently acquired by the facilities-sharing company is at least as substantial as the interests in unbundled network elements (‘UNEs’) that are held by competitive local exchange carriers, which the Commission has long found constitute ‘own facilities’ for purposes of Section 254(e)(1)(A).” Petition at 10-11. There should be even less doubt as to whether the parties will use their own facilities as compared to competitive local exchange carriers that have been found to be using their own facilities through UNEs. “[T]he wireless facilities at issue here will have been owned in full by either GCI or ACS Wireless prior to the transaction” and “[o]nce contributed to AWN, the facilities will continued [sic] to be owned, albeit through the joint venture, and will be available on an equal and non-discriminatory basis to both ACS Wireless and GCI.” Petition at 11.

²³ *Universal Service First R&O*, 12 FCC Rcd at 8865 ¶158 (subsequent history omitted) (emphasis added).

²⁴ See FNUA § 2(i).

and overall services to each of GCI and ACS Wireless that are capable of meeting the FCC's and/or Regulatory Commission of Alaska's requirements for services offered by CETCs providing mobile service.²⁵

ACS Wireless and GCI have also spelled out in the Facilities and Network Use Agreement mechanisms to ensure that their jointly-owned subsidiary, AWN, assists each of them to meet the Commission's administrative requirements of ETCs, to direct all high cost funding to AWN so that it can be used for the provision, maintenance, and upgrading of facilities and services used by ACS Wireless and GCI to provide their ETC services, as required by Section 254(e) of the Communications Act, and to apportion liability between each of the entities in the event of an error that leads to a violation of Commission rules. Specifically:

- Section 3(xix) of the FNUA requires the AWN to cooperate with GCI and ACS Wireless in preparing requests for High Cost support, and with such reports, data and document requests and audits as may be required. With respect to Lifeline, AWN is required to provide ACS Wireless and GCI with any information it possesses that may be necessary for the ETCs to file requests for Lifeline support, as well as such reports, data and document requests and audits as may be required.
- Section 5(d) of the FNUA contractually commits both ACS Wireless and GCI to pay to AWN all High Cost support attributable to the retail sale of AWN services. Both agree to make commercially reasonable efforts to arrange direct remittance from USAC to AWN. (Lifeline support remains with each of the parent ETC entities.)
- Section 27(a) requires AWN to indemnify either ETC for any overpayments of High Cost support that must be refunded to USAC or the U.S. Treasury, as well as any forfeitures that result from AWN errors in preparing line counts or other information for the FCC or USAC.
- Section 27(b) requires the ETC parents, ACS Wireless and GCI, to indemnify AWN against any forfeitures resulting from the ETC's acts or omissions rather than AWN's, and also any decrement in High Cost support that results, *inter alia*, from the ETC's failure to provide accurate customer billing address, line type, or other line count information, to submit required line count information, or to cooperate with any FCC or USAC audit or investigation.

Together, these contractual provisions ensure that ACS Wireless and GCI can meet their commitments and obligations as ETCs, using the facilities and services procured from their jointly-owned subsidiary, while at the same time ensuring that universal service funding is used for its intended purposes, and that all participants are incented to comply with all FCC and RCA ETC regulations. As CETCs, ACS Wireless and GCI will be fully accountable to the FCC, and

²⁵ See FNUA §§ 3(b)(i), (xiii), (xix).

subject to audit and examination as necessary. To the extent USAC needs information from AWN, the transaction documents require AWN to supply that information to its CETC parents. At the same time, AWN is contractually required to indemnify its parent CETCs for any errors or omissions that AWN makes with respect to universal service. This means that AWN must use due care when assisting its CETC parents with the preparation of high-cost line counts and any other required reports, or when responding to any audits. Similarly, however, because the CETC parents retain responsibility for their own acts or omissions, as well as overall responsibility to the Commission, both GCI and ACS Wireless must continue to ensure that their line count filings are accurate and that they take all necessary and reasonable steps to comply with the Commission's rules, and to cooperate with any audits or investigations.²⁶

GCI and ACS Wireless therefore respectfully ask the Commission for a declaration that the network transmission and switching facilities contributed by either of them to AWN under this facilities-sharing arrangement, as well as facilities subsequently acquired by AWN, will be deemed GCI's and ACS Wireless's "own facilities" for the purposes of Section 214(e)(1)(A).

* * *

Please contact the undersigned should any questions arise concerning this filing.

Respectfully submitted,

/s/

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²⁶ See Petition at 12-13.