
EXHIBIT B

HRCA, 2002

In the Matter of the Request by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Mediation Regarding Glacier State Study Area Interconnection Disputes with ACS OF THE NORTHLAND, INC. d/b/a ALASKA COMMUNICATIONS SYSTEMS, ACS LOCAL SERVICE and ACS

U-02-18

ORDER NO. 2

Regulatory Commission of Alaska

Aug. 29, 2002.

**ORDER GRANTING PETITION FOR ARBITRATION, APPOINTING ARBITRATOR AND ORDERING
PREHEARING CONFERENCE**

Before Commissioners: Thompson, Chair, Smith, DeMarco, Abbott, Strandberg

BY THE COMMISSION:

Summary

We grant a petition filed by GCI for arbitration with ACS-N for interconnection services and network elements in the Glacier State Study Area pursuant to sections 251 and 252 of the Telecommunications Act of 1996. We appoint an arbitrator and grant a request for a prehearing conference to address scheduling matters to implement our arbitration order.

Background

There is a long history leading up to our approval of the interconnection agreement between GCI [FN1] and TUNI [FN2] (now ACS-N). [FN3] We briefly outline those facts necessary to an understanding of the issues and our decision.

FN1. GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI (GCI).

FN2. Telephone Utilities of the Northland, Inc. (TUNI).

FN3. ACS of the Northland, Inc. d/b/a Alaska Communications Systems, ACS Local Service, and ACS (ACS-N).

In 1997 GCI submitted a broad bona fide request for interconnection services to ACS-N's predecessor, TUNI. [FN4] In September 1997 GCI filed a petition for arbitration with the former Alaska Public Utilities Commission (APUC). The APUC determined that the petition was premature [FN5] because TUNI was a rural telephone company under 47 U.S.C. § 251(f). [FN6] During the rural exemption hearing GCI modified and clarified its request for interconnection services with TUNI by stating its intent to offer services by

interconnection at the North Pole switch and resale throughout the balance of TUNI's service area. [FN7]

FN4. Similar requests were also sent to PTI Communications of Alaska, Inc. and Telephone Utilities of Alaska, Inc.

FN5. Order U-97-82(1), dated September 23, 1997.

FN6. 47 U.S.C. § 251(f) provides exemptions for certain rural telephone companies. Before requiring interconnection, the state commission must waive the rural exemption.

FN7. See Order U-97-82(11)/U-97-143(11)/U-97-144(11), dated October 11, 1999, at 7.

After terminating the rural exemption, we ordered TUNI to negotiate the terms of interconnection with GCI. During negotiations GCI did not ask for prices for a full range of interconnection services throughout the entire Glacier State Study area. [FN8] When negotiations failed, GCI filed a petition for arbitration dated December 8, 1999, seeking interconnection services throughout the Glacier State area including unbundled network elements. [FN9] In its response to GCI's petition for arbitration ACS-N argued that the scope of the arbitration should be limited to GCI's bona fide requests under 47 U.S.C. § 252(f)(1)(A). [FN10]

FN8. GCI's *Motion For Declaratory and Injunctive Relief Regarding ACS-N's Refusal to Negotiate*, filed April 12, 2002 at 5.

FN9. See GCI's *Petition for Arbitration*, filed December 8, 1999, in Docket U-99-143, *In the Matter of the Petition by GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI for Arbitration with Telephone Utilities of the Northland, Inc., under 47 U.S.C. §§ 251 and 252 for the Purpose of Instituting Local Exchange Competition.*

FN10. *Telephone Utilities of the Northland, Inc.'s Corrected Response to GCICC's Petition for Arbitration*, filed January 4, 2000.

During the arbitration GCI only requested the interconnection services that it requested during the rural exemption hearing. GCI did not request and ACS-N did not provide network and cost information for the entire Glacier State Study area that would have enabled the parties to develop prices for a full range of unbundled network element services.

After arbitration, we approved an interconnection agreement between GCI and ACS-N. [FN11] The agreement contains a Fairbanks/Juneau Rate Sheet for network elements. The rate sheet did not include unbundled network element prices for network elements in the Glacier State study area. [FN12] The approved agreement included general terms and conditions. [FN13]

FN11. The interconnection agreement between GCI and ACS-N was one of three interconnection agreements we approved in Order U-99-141(10)/U-99-142(10)/U-99-143(10), dated October 5, 2000.

FN12. The parties in Dockets U-99-141, U-99-142 and U-99-143 used one form agreement

for three separate ACS companies. As a result the interconnection agreement between GCI and ACS-N is identical to the agreements for Juneau and Fairbanks even though the parties did not arbitrate a full range of unbundled network element prices for the Glacier State Study Area.

FN13. These include Definitions, Local Resale, General Interconnection and Operational Requirements, Rights of Way, Local Number Portability, General Business Requirements, Reporting Standards and Remedies and Collocation. Collocation prices were not set for the Glacier State area because TUNI changed the first point of switching from North Pole to Fairbanks. The TUNI decision to change the first point of switching from North Pole to Fairbanks spawned the complaint filed in Docket U-99-81, *In the Matter of the Formal Complaint Filed by GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI Against Telephone Utilities of the Northland Inc., and PTI Communications of Alaska Inc.*

On November 29, 2001, GCI made a bona fide request for negotiations with ACS-N to set prices, terms and conditions for interconnection, network element interconnection (including collocation), notices of change, number portability/dialing parity, rights-of-way and reciprocal compensation for ACS-N's entire Glacier State study area. ACS-N alleged that GCI did not have a right to request any additional interconnection services during the term of the existing interconnection agreement and did not negotiate. [FN14] GCI alleged ACS-N had refused to provide network and cost data necessary for GCI to negotiate and reach an agreement and filed the petition for arbitration. After one hundred thirty-five days passed with no results, GCI filed a petition for arbitration under sections 252 and 251 of the Telecommunications Act of 1996 (the Act) [FN15] on April 19, 2002, and we opened this docket.

FN14. ACS-N responded to GCI's request by letter dated March 21, 2002.

FN15. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

In its response to GCI's petition for arbitration, ACS-N argued that GCI is not entitled to re-arbitrate matters that were previously arbitrated under its 1999 petition for arbitration and are covered by the current interconnection agreement. Because GCI requested unbundled network elements from TUNI in its 1999 petition for arbitration, ACS-N argued the issues were resolved by our order resolving all unresolved issues or by abandonment. ACS-N also argued that GCI couldn't unilaterally shorten or alter the terms of the existing interconnection agreement by requesting a new agreement before expiration of the existing agreement. [FN16]

FN16. *ACS of the Northland, Inc.'s Response to GCICC's Petition for Arbitration* (Response), filed May 14, 2002.

Discussion

This is an issue of first impression; the parties have not cited decisions from other jurisdictions supporting their positions. We are unaware of any other commission decisions deciding this issue. We look to the Act and the regulations implementing the Act for guidance.

In 1996 Congress allowed prospective competitors to offer services by constructing their

own facilities, resale or purchase of unbundled network elements from the incumbent. [FN17] Every telecommunications carrier has a duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers and not to install network features, functions, or capabilities that do not comply with the guidelines and standards in the Act. [FN18] All local exchange carriers have a duty not to prohibit the resale of their telecommunication services, to provide number portability, dialing parity, access to rights of way and reciprocal compensation. Incumbent local exchange carriers (ILECs) have the additional obligation to negotiate in good faith, in accordance with section 252, for interconnection, unbundled access, resale, and notice of changes and collocation. [FN19] The Act does not limit the number or type of interconnection services or network elements a competitive local exchange carrier may request under section 251. The Act further commands us not to do anything that would have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. [FN20]

FN17. 47 U.S.C. § 251.

FN18. 47 U.S.C. 251(a). Incumbent rural telecommunications carriers have these obligations only after the state commission has terminated their rural exemption. The APUC entered an order terminating the rural exemption in the Glacier State Study area on June 30, 1999. After reconsideration we terminated the rural exemption on October 11, 1999. Order U-97-82(11)/U-97-143(11)/U-97- 144(11).

FN19. 47 U.S.C. § 251(c).

FN20. In General. -- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a).

After receiving a request for interconnection services or network elements, the Act provides that the ILEC can negotiate with the competitive local exchange carrier (CLEC) for one hundred thirty-five days. An agreement reached during the initial one hundred thirty-five days need not comply with the standards in section 251(b) and (c). Between the one hundred thirty-fifth and the one hundred sixtieth day (inclusive) after the date on which the ILEC receives a request for negotiation, the carrier or any other party to the negotiation may file a petition with us to arbitrate any unresolved issues.

Under the Act, we must limit our consideration of the petition and any responses to the issues listed in the petition and in the response. [FN21] We must resolve each issue in the petition and the response and conclude the resolution of any unresolved issues not later than nine months after the date on which the ILEC received the original negotiation request. [FN22] Any party's refusal to participate further in negotiations, to cooperate with our arbitrator or to continue to negotiate in good faith in the presence, or with the assistance of our commission, is considered a failure to negotiate in good faith. [FN23]

FN21. 47 U.S.C. § 252 (a) (4) (A).

FN22. 47 U.S.C. § 252 (a) (4) (C).

FN23. 47 U.S.C. § 252 (a) (5).

In its petition for arbitration, GCI listed issues previously discussed and potentially resolved. GCI states that many of the issues described in paragraphs 13-18, 24 and 26-31 have been discussed and agreed by the parties or resolved by arbitration in the previous arbitration between GCI and ACS-N. The arbitration resulted in resale interconnection prices throughout the Glacier State Study area and a binding interconnection agreement approved by us in Docket U-99-143.

ACS-N argues GCI is seeking arbitration on issues already resolved by arbitration in an effort to sidestep or unlawfully interfere with the terms of the existing agreement. ACS-N objects to GCI's actions arguing that the Act "does not allow GCI to unilaterally repudiate the existing interconnection agreement and attempt to force ACS-N into unnecessary and duplicative arbitration when the 'unresolved issues' have been previously arbitrated and resolved." [FN24]

FN24. Response at 8.

We do not interpret GCI's filing so broadly. Any carrier or party to negotiations may file a petition requesting us to arbitrate "any open issues." A party that petitions for arbitration must provide us with all relevant documentation of the unresolved issues, the position of each of the parties on those issues and any other issue discussed and resolved by the parties. [FN25] The issues are unresolved if the parties have not agreed to be bound by the provisions of an existing interconnection agreement. The petitioner under section 252(b) (2) must list all *potentially* unresolved items to have them included in the arbitration. [FN26] We recognize that GCI's list of issues in the petition for arbitration may include some unresolved issues and assign to the arbitrator the task of sorting out the list of issues for arbitration.

FN25. 47 U. S.C. § 252(b) (2).

FN26. 47 U.S.C. § 252(b) (4) (A).

We find that a competitive local exchange carrier may seek additional interconnection elements through negotiation and arbitration during the term of an existing interconnection agreement. It is in the public interest to allow CLECs to seek the means necessary to serve customers and to modify their business strategies to respond to changes in technology and market conditions. We recognize that additional arbitration may be burdensome to the ILEC, but it is at least equally burdensome to the CLEC. While we recognize our obligation to arbitrate unresolved issues, we will not re-arbitrate provisions in an existing agreement if the provisions are compliant with the Act. It is not in the public interest to re-arbitrate or create new agreements to cover resolved issues.

ACS-N argues that because GCI previously requested unbundled network elements from TUNI in its 1999 petition for arbitration, the request was resolved by our order approving the interconnection agreement. [FN27] The argument is that a CLEC, once having requested, petitioned for and listed interconnection elements as unresolved, is stuck with the terms and coverage of the approved interconnection agreement. [FN28] ACS-N argues that it is the Act's aim and intention that CLECs are to be bound by their interconnection agreements

and that CLECs cannot escape the consequences of their negotiations and arbitration. [FN29]

FN27. Order U-99-143(10), dated October 5, 2000.

FN28. Response at 12.

FN29. Response at 13.

It is the agreement approved by us that is binding upon the parties under section 252(a), not negotiations or requests made but not pursued. The only issues that were resolved by our approval of the interconnection agreement are those contained in the interconnection agreement itself. GCI may request interconnection services and network elements that are not provided in the existing interconnection agreement. ACS-N must negotiate and arbitrate in good faith with GCI. [FN30]

FN30. The FCC regulations at 47 C.F.R. § 51.301 list a number of actions or practices that violate the duty to negotiate in good faith.

The cost methodology and model to be used in setting prices for network elements not contained in the existing interconnection agreement for the Glacier State Study area will be the same as that used in Docket U-99-143. [FN31] Consistency dictates that the same model and methodology be used for the term of the existing contract.

FN31. We adopted the FCC synthesis model for use in Docket U-99-143.

The **new** or additional network elements to be arbitrated shall remain in effect during the term of the **existing interconnection** agreement [FN32] and be subject to **renegotiation** under the terms of the **existing** agreement. [FN33]

FN32. The existing agreement expires on October 5, 2003.

FN33. The interconnection agreement requires the parties to commence good faith negotiations at the end of the twenty-sixth month from approval. We approved the agreement on October 5, 2000.

We appoint Paul Olson as the arbitrator in this docket. [FN34] We direct the arbitrator to meet with the parties and set a prehearing conference to discuss a schedule to implement our order granting arbitration.

FN34. Mr. Olson was the arbitrator in Docket U-99-143 and is familiar with the cost methodology and model used and to be used in this docket.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The *Petition for Arbitration* filed by GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI on April 19, 2002, is granted.

2002 WL 32828916 (RCA)

(Cite as: 2002 WL 32828916 (RCA))

2. Paul Olson is appointed as arbitrator.

3. The *Motion for Pre-hearing Conference* filed by GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI on July 19, 2002, is granted.

4. The arbitrator is directed to meet with the parties and set a prehearing conference as soon as the parties' schedules allow.

BY DIRECTION OF THE COMMISSION (Commissioners Patricia M. DeMarco and Will Abbot, not participating, and Commissioner Bernie Smith, Dissenting.)

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