ALASKA LEGISLATURE 2327

HOUSE and SENATE FINANCE COMMITTEE FILES, 2001 - 2002

regulations:

1. Should we adopt a phased certification process for non-complying rural utility systems which allows for conditional approval of an applicant under terms and conditions that assure protections for ratepayers and a commitment to a program to improve utility operations to meet our standards?

2. Should the RCA implement quality of service standards for small water and sewer systems, and if so, what specific standards should be established?

3. Should the RCA implement utility safety standards that would set minimum operations standards? Should this include the National Electrical Safety Code?

4. Are quality of service and utility standards already in place through other agencies that we could adopt?

5. Should we adopt criteria to exempt certain classes of utilities from certification where it can be shown an exemption is in the public interest?

6. Should we adopt criteria to exempt certain classes of certificated utilities from rate regulation where it can be shown such exemption is in the public interest?

7. Should homeowners associations be exempt from economic regulation?

8. Should other classes of certificated utilities be exempt from economic regulation? Which ones and why?

9. What should the requirements be for existing small rural water and sewer utilities to show that they are fit, willing and able to provide utility service?

10. When should small water and sewer utilities adjacent to larger systems be required to consolidate their operations?

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11. Should the RCA set operational standards that would allow utilities to evaluate their ability to meet our certification criteria?

12. Should we consider a self-registration program for classes of utilities we determine to exempt?

13. Should we consider revising our certification process in order to create a separate certification class of small combined water-sewer utility service providers for entities providing both water and sewer utility service that have combined gross annual operating revenues under a prescribed threshold?

14 ¯or utilities that are otherwise subject to economic regulations, should we consider revisions to simplify our ratemaking and reporting requirements for small water and sewer public utilities with gross annual revenues under a prescribed threshold?

15. Should we consider providing a model tariff to assist small water and sewer utilities in the application process?

Certification Application Forms

ADEC regulations require that a small water system submit a Certificate of Public Convenience and Necessity (CPCN) application with the RCA before being

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given a permit to construct a new water system.[22] Our CPCN application form, PU 101, envisions a utility applying to operate a new system. We currently require a substantial showing from the proposed operating utility of financial, technical, and managerial capability. In many cases, however, a developer designs and installs a water or sewer system and then after the homes in the subdivision are sold, creates a homeowners association with representative bylaws for the long-term operation of the system. It is not possible for a developer to complete the PU 101 form in any meaningful manner at the pre-construction approval stage. However, we can determine if the developer's project is in the public interest when designs and calculations are submitted to ADEC for approval. At this stage, the question of attachment to a near-by urban system or already existing system should be addressed, especially with respect to later interconnection standards. Later, when the construction is complete and the developer has sold many homes and has established

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[22] 18 AAC 80.207. CAPACITY. (c) The department will base a determination of financial capacity upon the capability of the owner or operator of a new Class A public water system to provide the financial resources necessary for the consistent production and delivery of water in compliance with this chapter. To assess that capability, the department will examine the owner or operator's revenue sufficiency, credit worthiness, and fiscal controls. The owner or operator of a new Class A public water system shall provide

(1) for a proposed public water system that is a public utility and is not exempt from AS 42.05 under AS 42.05.711 or AS 42.05.712

(A) a copy of the application for the certificate of public convenience and necessity that has been submitted to the Regulatory Commission of Alaska; and

(B) written verification from the Regulatory Commission of Alaska that an application for a certificate of public of convenien[illegible] necessity has been submitted;

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Anchorage, Alaska 99501
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a homeowners association, the fit, willing, and able determination can be made to complete the certification process.

The application for a certificate must be in writing[23] and contain the information we require to make a finding that the utility is, "fit, willing, and able to provide the utility services applied for and that the services are required for the convenience and necessity of the public."[24] Staff has created a proposed form that allows an applicant to provide the basic project information that would allow us to determine public interest. ADEC states it will accept such a public interest finding in its permit approval process under 18 AAC 80.207. We notice this form and invite comments. Commentors should discuss whether we should adopt the proposed form, and consider the following questions :

16. Should we employ a two-step process for new applicants that allows for a public interest finding prior to design and construction and a fit, willing, and able determination prior to the utility beginning operation?

17. Should this apply to all new utilities, or just be an option available for use?

18. Should we maintain the existing PU 101 form as a single step application option?

19. What changes are necessary for the PU 101 form and the new proposed form?

Comments on regulations for public water and sewer systems and the

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[23]*See* AS 42.05.231.

[24]*See* AS 42.05.241. We may, by general order in a general proceeding, adopt appropriate applications forms after notice to interested parties and allowing the receipt of public comments. *Also See* 3 AAC 48.640.

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proposed application form must be filed by 4:30 p.m., July 1, 2002. Reply comments must be filed by 4:30 p.m., July 31, 2002. We request that commentors include a diskette with their comments in IBM compatible text (.txt) format, Word 97 (or earlier) format, or Adobe Acrobat (.pdf) format.

Since this is a notice of inquiry, commentors are not required to serve their comments on the other entities set out on the service list of this Order. We will post copies of all filed comments on our web site.

A public hearing to receive oral comments in this proceeding will be held at 8:30 a.m., August 20, 2002. The hearing is scheduled from 8:30 a.m. – 1:30 p.m., on August 20, 2002, but the time may be extended to accommodate those present before 1:30 p.m. who did not have an opportunity to comment. We request that persons wishing to present oral comment at the hearing submit a statement of that intent by July 31, 2002, but such a statement is not mandatory.

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ORDER

THE COMMISSION FURTHER ORDERS:

1. The notice of inquiry for regulations for public water and sewer systems and the proposed application is issued for public comment.[25]

2. By 4:30 p.m., July 1, 2002, any interested person, including the Public Advocacy Staff, may address the issues and questions set out in the Order, along with comments on the proposed application form attached to this Order as an Appendix. All commentors are encouraged to submit proposed draft regulations with their comments and must include a summary of the comments and a diskette of the comments in IBM compatible text (.txt) format, Word 97 (or earlier) format, or Adobe Acrobat (.pdf) format.

3. By 4:30 p.m., July 31, 2002, any interested person, including the Public Advocacy Staff, may file comments with the Commission in reply to those filed in response to Ordering Paragraph No. 2 of this Order. Commentors are requested to include a diskette of the comments in either IBM compatible text (.txt) format, Word (.doc), or Adobe Acrobat (.pdf) format.

4. A public hearing[26] in this proceeding shall commence at 8:30 a.m., August 20, 2002, in the Commission's East Hearing Room, Room 339, 701 West Eighth Avenue, Anchorage, Alaska, for the purpose of taking public comment on this

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[25]If you are not interested in receiving future orders or notices concerning this subject matter, please e-mail rca@state.ak.us or notify our office by mail or at 1-907-276-6222 and we will take your name off of our mailing list.

[26]If you are a person with a disability who may need a special accommodation, auxiliary aid, or service or alternative communication format in order to participate in this matter, please contact Denise Anderson at 1-907-276-6222 or TTY (continued . . .)

inquiry into regulations for public water and sewer systems and the proposed application form.

DATED AND EFFECTIVE at Anchorage, Alaska, this 30th day of April, 2002.

BY DIRECTION OF THE COMMISSION

(SEAL)

(. . . continued)
1-907-276-4533 by no later than 4 p.m., May 31, 2002, 2002, to make any necessary arrangements.

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inquiry into regulations for public water and sewer systems and the proposed application form.

DATED AND EFFECTIVE at Anchorage, Alaska, this 30th day of April, 2002.

BY DIRECTION OF THE COMMISSION

(SEAL)

Regulatory Commission of Alaska
701 West Eighth Avenue, Suite 300
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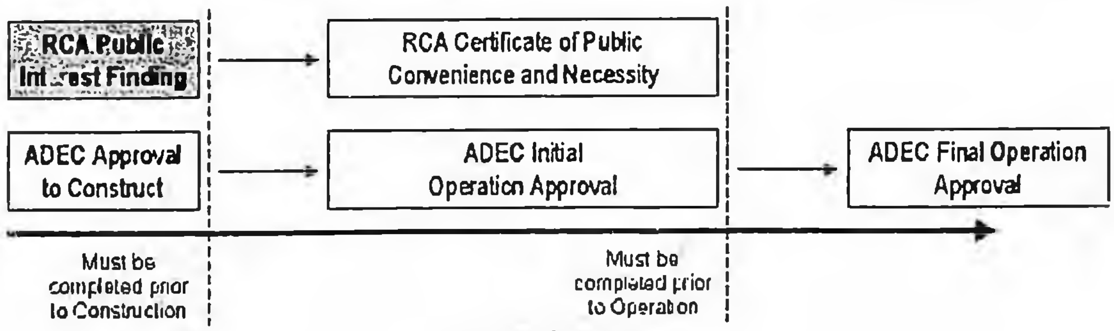
(. . . continued)
1-907-276-4533 by no later than 4 p.m., May 31, 2002, 2002, to make any necessary arrangements.

RCA Form PU xxx

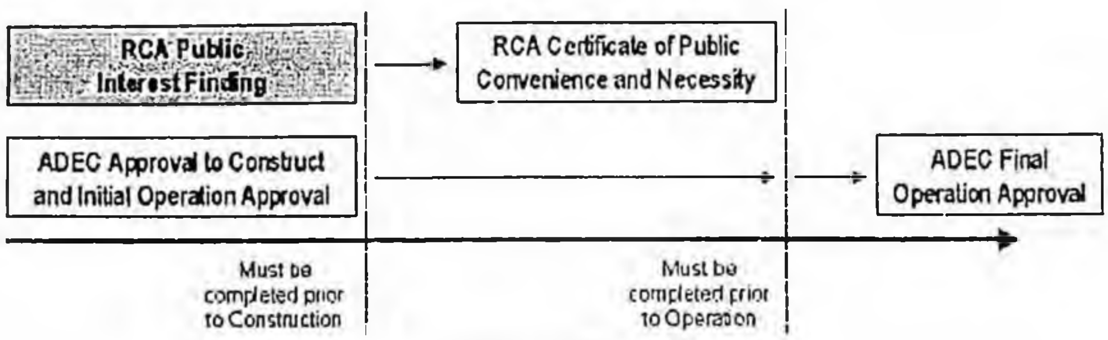
Date Filed: ___________
Docket No: ___________
To be filled out by Commission Staff

Application for an Initial Public Interest Finding for New Public Water or Sewer Systems

This application is intended for future water or sewer utilities that will eventually apply for a Certificate of Public Convenience and Necessity (Certificate) from the Regulatory Commission of Alaska (RCA) and are currently being reviewed by the Alaska Department of Environmental Conservation (DEC) for an Approval to Construct. The illustrations below show the process in which the RCA and DEC applications must be completed for both water and sewer utilities. This application does not grant approval to operate, however it may be referenced within the utility's application for a Certificate, which must be completed and approved prior to providing service to ten or more customers for compensation, in accordance with AS 42.05.221.



Water Systems



Sewer Systems

Part I - General Information:

A. Applicant:

Name: [Click here and type Utility or Applicant Name]

Business Address: [Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

Business Telephone. (____) ____-______

B. Person to be contacted with respect to this application:

Name: [Click here and type Contact Name]

Position: [Click here and type Contact's Position]

Business Address: [Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

Daytime Telephone: (___) ___-____

C. List any other Water Utilities or Entities which you are aware are currently providing similar service in, adjacent, or in close proximity to the area sought by this application[1]:

Name: [Click here and type Utility or Entity Name]

Business Address: [Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

Competiting Area: [Click here and type the Area in which you would be competing]

Name: [Click here and type Utility or Entity Name]

Business Address: [Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

Competiting Area: [Click here and type the Area in which you would be competing]

D. The Applicant is a:

- ☐ Cooperative
- ☐ Individual
- ☐ Homeowner's or Condo Association
- ☐ Limited Partnership
- ☐ Privately-Owned Corporation
- ☐ Municipally-Owned Utility
- ☐ Political Subdivision of the State
- ☐ General Partnership
- ☐ Other: [Click here and Explain what type of entity you are])

Date of Organization (if applicable): [Click here and type Date of Application]

E. List the Owners of Five Percent or more of the Applicant's Equity:

Name: [Click here and type Entity's or Person's Name]

Business Address: [Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

Percent Ownership: [Click here and type the Percent Ownership]

[1] Competing entities are those entities providing, or intending to provide, the same, or substantially the same service or facility to any part of the requested service area.

Name: [Click here and type Entity's or Person's Name]

Business Address: [Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

Percent Ownership: [Click here and type the Percent Ownership]

(continue on an additional attachment if necessary)

F. List all persons or entities which are affiliated interests of the applicant as defined in AS 42.05.720(1) (A)-(G):

Name: [Click here and type Entity's or Person's Name]

Business Address: [Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

Name: [Click here and type Entity's or Person's Name]

Business Address: [Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

(continue on an additional attachment if necessary)

Part II – General Documents:

Applicants must provide the following information in Attachments numbered to correspond to the items below:

A. Benefit to the Public

Explain in detail why the new or additional utility service is, or may be, required for the public convenience and necessity and state why any existing, similar service is insufficient. If a public utility is already certificated to provide service in, adjacent to, or in close proximity to the requested area, please explain why it is not feasible to connect to this system. Within this explanation, the cost of connecting to an existing utility must be compared to the estimated construction, operation, and maintenance costs of the standalone system over a five year period. Also include the number and type of customers[2] by geographic location which the applicant expects to serve. Explain how the customer estimates were derived.

B. Service Area Description and Map

Attach a written service area description that concisely and accurately represents the area requested. The description should be written using Range and Township descriptions, including the applicable Sections, as shown in the following example:

[2] The Commission defines the number of customers as the number of physical service connections.

EXAMPLE SERVICE AREA DESCRIPTION:			
T1S	R3W	Sections:	All
T1S	R2W	Sections:	Those sections and portions of sections North of the Tanana River
T1S	R1E	Sections:	NW1/4, and N1/2 of SW1/4 of 3; S1/2 of 10
T1S	R2E	Sections:	7 through 9; and 13 through 36
(All the above with referen to the Fairbanks Meridian)			

In addition, attach a map clearly showing the boundary of the applicant's proposed service area using a United States Geographical Survey (USGS) topographic map, scale 1:63,360. In cases where the proposed service area is less than one square mile, contact the Commission Engineering Staff for instructions on what type of service area map may be accepted.

Part III – Technical Documents:

At a minimum, an applicant must provide the following information:

A. System Design and installation

Include verificat . t Engineering Plans and/or the Discharge Permit Application have been provided to DEC. Also, attach the names, addresses, and credentials of those responsible for the design and installation of the proposed system.

B. System Description

Water
Include a description of the source(s) of water for the proposed service area, including the quantity available, pumping capacity for each source, reservoir capacity, and the available reserve capacity (in hours) in case of power outages and/or well failure. Also include a description of the treatment necessary to bring the water into compliance with State requirements and the level of operator needed to operate the system.

Sewer
Include a description of the collection system, treatment facilities and the method of disposal of treated effluents for the proposed service area. Also include a description of the effluent receiving environment and the level of operator needed to operate the system.

Part IV – Financial Documents:

A. Sources of Financing

List the sources of the financing for the proposed utility. Include documentation showing that the sources listed will provide the applicant with the required funds. Include the terms and conditions of all loans and equipment contracts that may be relevant. If a portion or all of the plant will be contributed, list the sources and conditions of all on-site and off-site assessments, grants, or other sources of funding.

B. Design and Construction Costs

Include an estimate of the costs to design and install the water system to Alaska Department of Environmental Conservation technical standards. Please break out each line item within the estimate, such as: Design, Well Installation, Physical Plant, Treatment System, etc.

C. Sustainability

Will the utility be fully sustainable through customer revenues? Include substantiation, such as revenue and expense estimates, with your answer. If the system is not anticipated to be sustainable, please identify the source of supplemental funding or subsidy that is anticipated to sustain the utility's operations.

Part V – Filing Instructions

The Application should be filed as one original and ten copies with the RCA. An application is not considered to be complete without the inclusion of the ten copies. The RCA is located in Phillips Tower South at 701 West Eighth Street, Anchorage, Alaska.

Questions about the application and filing requirements can be directed to the Commission Engineering Staff at one of the following numbers:

(907) 276-6222
(800) 390-2782 (outside Anchorage)
(907) 276-0160 (Fax)
(907) 276-4533 (TTY)

Part VI – Authorization

Verification of Application and Authorization of Notice

The undersigned hereby verifies the application and requests the Regulatory Commission of Alaska to grant to applicant a Certificate of Public Convenience and Necessity for the services and service areas set out above.

The undersigned applicant hereby authorizes the Regulatory Commission of Alaska to arrange notice of this application to other utilities and interested persons by publication in newspapers of general circulation in the applicant's proposed service area. The applicant agrees to pay the cost of such publication of notice.

Dated at LOCATION Alaska, this DATE day of MONTH, YEAR.

[Click here and type Utility or Applicant Name]
Name of Applicant

By: ___________________________________
Principal Officer, Partner, or Owner

[Click here and type Name and Title]
Name and Title

[Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

[Click here and type Name of Attorney]
Name of Attorney for Applicant

[Click here and type Street Address or P.O. Box]
[Click here and type City, State, and Zip Code]

SECTION 16

SECTION 16

STATE OF ALASKA

REGULATORY COMMISSION OF ALASKA

Before Commissioners:

G. Nanette Thompson, Chair
Bernie Smith
Patricia M. DeMarco
Will Abbott
James S. Strandberg

In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted under 3 AAC 52.900 – 3 AAC 52.940	R-00-5 ORDER NO. 2

ORDER ISSUING PROPOSED REGULATIONS FOR COMMENT AND ESTABLISHING HEARING AND FILING SCHEDULE

BY THE COMMISSION:

Summary

In this Order we seek comment on proposed amendments to our regulations under 3 AAC 52.900 – 3 AAC 52.940 governing interconnection and joint use (hereinafter, "joint use") of electric and telephone utility facilities. We considered the proposed amendments at our public meeting of January 30, 2002, and determined that the proposed regulations should be noticed for public comment.

Discussion

Our current regulations[1] at 3 AAC 52.900 – 3 AAC 52.940 govern only the joint use by cable television utilities of poles owned by electric and telephone companies if the utilities cannot agree on the terms of the joint use. We propose to

[1]The Commission's cable joint-use regulations were adopted pursuant to a 1985 mandate by the Federal Communications Commission (FCC). *See, In Re: Joint Use of Electric and Telephone Utility Poles and Conduits by Cable Television Utilities*, 8 APUC 285 (1987); *See also* Orders R-85-2(1) and (3).

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Anchorage, Alaska 99501
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proposed regulations and/or whether any other changes to our current or proposed regulations are necessary.

Comments on the regulations must be filed by 4 p.m., May 20, 2002. Reply comments must be filed by 4 p.m., June 20, 2002. We request that commentors include a diskette with their comments in IBM compatible text (.txt) format, Word 97 (or earlier) format, or Adobe Acrobat (.pdf) format.

Since this is a rulemaking proceeding, commentors are not required to serve their comments on the other entities set out on the service list of this Order. Interested persons may request copies of the comments filed in the proceeding from the Commission's Records and Filing Section.

A public hearing to receive oral comments in this proceeding will be held at 8:30 a.m., June 27, 2002. The hearing is scheduled from 8:30 a.m. – 1:30 p.m., on that date, but the time may be extended to accommodate those present before 1:30 p.m. who did not have an opportunity to comment. We request that persons wishing to present oral comment at the hearing submit a statement of that intent by June 30, 2002, but such a statement is not mandatory.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The proposed regulations dealing with the Commission's regulations under 3 AAC 52.900 – 3 AAC 52.940 governing joint use of utility facilities and set out in the Appendix hereto are issued for public comment.

2. By 4 p.m., May 20, 2002, any interested person, including the Public Advocacy Staff, may file with the Commission comments addressing the proposed regulations attached to this Order as an Appendix. Commentors are

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3 AAC 52 is amended to revise the title of Article 7 to read:

ARTICLE 7. [CABLE TELEVISION] JOINT USE OF [ELECTRIC AND TELEPHONE] UTILITY FACILITIES.

3 AAC 52.900 is amended to read:

3 AAC 52.900. APPLICATION AND PURPOSE. (a) The provisions of 3 AAC 52.900 – 3 AAC 52.940 apply to all [ELECTRIC, TELEPHONE, AND CABLE TELEVISION (CATV)] utilities included in the definition of "public utility" in <u>AS 42.05.990</u> [AS 42.05.720].

(b) The purpose of 3 AAC 52.900 - 3 AAC 52.940 is to establish a method for reasonable compensation for joint use when a [CATV] utility **<u>owning a pole</u>** and **<u>a</u>** [ANOTHER] utility **<u>needing to attach to that pole</u>** fail to agree on compensation for joint use of the **<u>pole</u>** [OTHER UTILITY'S POLES]. An agreement for joint use must be filed with the commission. Absent unusual circumstances, the commission will assert its authority over [CATV] joint use only when the utilities disagree on the terms of joint use or a joint use agreement, or when the commission has reason to believe that the utilities are not acting in accordance with the intent of AS 42.05. (Eff. 5/8/88, Register 106; am ___/___/2002, Register ___)

Authority: AS 42.05.151 AS 42.05.311 AS 42.05.321

3 AAC 52.910 is amended to read:

3 AAC 52.910. JOINT USE REIMBURSEMENT. (a) The commission requires reimbursement from **<u>an attaching</u>** [A CATV] utility to **<u>a pole-owning</u>** [AN ELECTRIC OR TELEPHONE] utility for joint use **<u>of a pole</u>**, comprised of the following two elements:

(b) In the formula in 3 AAC 52.910(b), the average net investment per pole is determined by dividing the gross pole investment, less the associated depreciation reserve by the number of poles.

(c) In the formula in 3 AAC 52.910(b), the carrying charge ratio includes the sum of the following:

(1) the depreciation ratio, which**, for poles,** is calculated by multiplying the pole depreciation rate by the ratio of gross pole investment to net pole investment;

(2) the tax ratio, which is the ratio of actual taxes paid, except for income taxes, to total net utility plant investment;

(3) the return on investment ratio, which is the percentage rate of return authorized by the commission, including weighted cost of debt and equity, or the actual return on net plant allowed by a different ratesetting methodology, and a provision for income taxes, if applicable;

(4) the maintenance ratio, which**, for poles,** is the ratio of annual maintenance expense for poles to the net pole investment; for electric utility-owned poles, the maintenance expense is determined by dividing the maintenance expense for overhead distribution lines by net plant investment of the associated overhead distribution lines; and

(5) the administrative expense ratio, which is the ratio of administrative expense to net utility plant investment. (Eff. 5/8/88, Register 106; am __/__/2002; Register ___)

Authority: AS 42.05.151 AS 42.05.311 AS 42.05.321

(3) "maintenance expense" means maintenance expense as defined in the Uniform System of Accounts prescribed in 3 AAC 48.277 for <u>a</u> [AN ELECTRIC OR TELEPHONE] utility, or as defined in a comparable accounting system if in use by the particular [ELECTRIC OR TELEPHONE] utility;

(4) "pole attachment" means any attachment by a [CATV] utility to a pole owned, operated, or controlled by <u>a</u> [AN ELECTRIC OR TELEPHONE] utility; [AND]

(5) "usable space" for pole attachments means the space on a pole above the minimum grade level, as set out in the edition of the National Electrical Safety Code adopted in AS 18.60.580, which can be used for the attachment of wires, cables, and associated equipment;

<u>(6) "attaching utility" means a public utility that attaches its facilities to, or places its facilities on, the pole of another utility; it does not include a utility that attaches to its own poles</u>. (Eff. 5/8/88, Register 106; am __/__/2002; Register ___)

Authority: AS 42.05.151 AS 42.05.311 AS 42.05.321

SECTION 17

STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners:

G. Nanette Thompson, Chair
Bernie Smith
Patricia M. DeMarco
Will Abbott
James S. Strandberg

In the Matter of the Formal Complaint Filed by ROBERT MELLISH Against CRIMSONVIEW HOMEOWNERS' ASSOCIATION, INC.	U-98-151 ORDER NO. 8

ORDER DECLINING JURISDICTION AND DISMISSING COMPLAINT

BY THE COMMISSION:

By bench order, the hearing in this Docket, scheduled for January 4, 2000, was vacated. The parties were notified by telephone on December 2, 1999. The Commission hereby confirms that bench order.

The Commission has reviewed this Docket and finds that the substance of the complaint and issues raised in this Docket do not sufficiently touch upon the regulatory framework developed by the Commission under AS 42.05 to fall within the Commission's jurisdiction.[1]

Background

This matter came to the Commission's attention in the filing of a complaint by Robert Mellish against Crimsonview Owner's Association, Inc. (CVOA).

[1]The Commission is cognizant that this matter has been pending since the Formal Complaint and Request for Declaratory Relief was filed on September 11, 1998. Nevertheless, the Commission has an independent obligation to decline to exercise jurisdiction when convinced it is appropriate to do so.

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Mellish alleged that Crimsonview Subdivision consisted of two phases, Phase I and Phase II. Phase I consisted of 47 lots, one of which was reserved for a community well site to provide a public water supply for the entire Subdivision. Phase II consisted of 22 undeveloped lots. In order to obtain water from the Phase I community well, Mellish sought to have CVOA declared a "public Utility" for the furnishing of water to all lots within the Subdivision, including the undeveloped lots on Phase II.

CVOA asserted it was not a "public utility". If declared to be a "public utility" CVOA argued that it should be exempt from regulation under AS 42.05.711(d).[2] If not deemed exempt, CVOA argued that its service area should be limited to the Phase I area currently receiving water through the Association well.

As originally envisioned, Crimsonview Subdivision was to consist of two phases. In 1984, Phase I (Tract A) was developed into 46 lots for single family residential construction, with one lot being reserved for a community well site. Phase II (Tract B) remained undeveloped but was intended to be part of the subdivision at a later date.

Hugh Adams and Paul Hartig originally owned Tract A and Tract B as one tract of land. Adams and Hartig sudivided the tract into Crimsonview Subdivision and hired an engineering firm to design a community water system for Crimsonview Subdivision. It was the intention of the developers to design a system to provide water to both phases of the development from a single community well and distribution system. Because Phase II was not being developed at the same time as Phase I, the

[2]The Commission may exempt a utility from regulation if it finds that the exemption is in the public interest.

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water supply facilities were to be designed in phases. The community water supply and distribution system was to be maintained and operated by the homeowners association.

On December 19, 1985, the ADEC issued a letter granting final approval to operate the well in the Phase I portion of the system. Since 1985, the water system has been operated to provide water to Tract A of Crimsonview Subdivision.

On October 11, 1985, Adams and Hartig executed a Declaration of Covenants, Conditions, and Restrictions (herein "Declaration"). The Declaration covered all of the subject property described as Crimsonview Subdivision. The covenants, conditions and restrictions ran with the real property and were binding on all parties having any right, title, or interest in the subject property, including their legal representative, successors and assigns.

The community water system was to be maintained by the Declarant (Adams & Hartig) until 50 percent of the lots in Crimsonview Subdivision were sold. At that time, CVOA was to be vested with permanent responsibility to maintain the water system. Funds to operate and maintain the community well and provide for capital improvements were to come from special assessments on each lot. The assessments were to be a continuing lien upon the property and were the personal obligation of each person who was the owner of property at the time the assessment fell due.

Sometime after 1985, Adams and Hartig defaulted on loans secured by Crimsonview Subdivision. Ultimately, ownership of Crimsonview Subdivision (Tracts A and B) was conveyed by the Federal Deposit Insurance Corporation to Rock Partners, L.P.

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On September 27, 1994, Rock Partners, L.P., as a successor to the interests of Adams and Hartig and owner of more than 50 percent of the lots, executed an Amended Declaration of Covenants, Conditions and Restrictions (herein "Amended Declaration"). The Amended Declaration stated it was amending and replacing the original Declaration in its entirety. The property subject to the Amended Declaration was described as Crimsonview Subdivision Phase I. (emphasis added). No mention was made of Phase II or Tract B.

The Amended Declaration also bound all parties having any right, title or interest in the property, including their legal representatives, successors and assigns. Like the original Declaration, "owner" was defined as the record owner, whether one or more persons or entities, of a fee simple title to a lot. "Lot" was defined as the "lots of Crimsonview Subdivision and any additions thereto as may be added pursuant to this Amended Declaration".[3] A special assessment provision to pay the costs of operation and maintenance of the community was also included.[4]

Article 6, Section 6 of the Amended Declaration provides that the covenants may be extended by the Declarant to encompass additions to Crimsonview Subdivision by recording of documents indicating such extension applies, and by amendment to the Amended Declaration. Any additions and owners would be

[3]The definition of "lot" in the Original Declaration was generically the "lots of Crimsonview Subdivision."

[4]Many of the provisions in the Amended Declaration are the same as the original Declaration. Only provisions pertinent to the present dispute are discussed in this Order.

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Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

included as members of CVOA and, as members, would be subject to the terms of the Amended Declaration and Bylaws of CVOA.

Amendments to the Amended Declaration, with one exception[5], may be accomplished by a two-thirds (2/3) vote of the lot owners of the total number of lots existing in the subject property. Amendments may be done at an annual or special meeting called for that purpose.

In 1995, Rock Partners, L.P., sold Tract A (Phase I) to Gary Peterson and Gabriel Peterson. Track B (Phase II) was sold in 1995 to Robert Mellish.[6] Lot 11, Block 1, of Crimsonview Subdivision, the lot on which the community well sits, was transferred from Rock Partners, L.P., to the Peterson's on August 4, 1996 without mention of reservation of water rights for Tract B.

[5]Article 6, Section 7, Responsibility for Maintenance of the Community Water System, was declared to be nonamendable in whole or in part by either the Declarant or [CVOA]. Section 7 provides: "The entire community water system, including pumphouse, shall be properly maintained by Declarant until such time as 50 percent (50%) of the lots in the subdivision are sold. [CVOA], in accordance with Article 2, Section 2, shall then be vested with permanent responsibility for continuing proper maintenance of the community water system, including pumphouse. Proper maintenance of the community water system shall include, but not be limited to, the applicable regulations, advisory opinions, and ordinances promulgated by the Department of Environmental Conservation and the Matanuska-Susitna Borough. These provisions contained in Section 7 are nonamendable in whole or in part by either Declarant or [CVOA].

[6]CVOA states in its answer that Rock Partners, L.P., transferred Phase I to Gary and Gabriel Peterson on May 1995. In his complaint, Mellish states Phase II was sold to him on June 28, 1995. CVOA in its answer states the sale took place on August 14, 1995, without mentioning water rights. While the Commission is unable at this time to determine the exact date of sale, this fact is not necessary for the decision set forth in this Order.

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(907) 276-6222; TTY (907) 276-4533

On December 18, 1996, the CVOA met.[7] Gary Peterson, acting as president of CVOA, explained that 50 percent of the lots had been sold and that a meeting was required. Phase II had not been platted so it was not counted in the 50 percent required for the meeting.

Peterson told CVOA that Phase II would probably begin in the summer of 1997 and that the covenants would apply to Phase II as well.

On February 10, 1997, Gary and Gabriel Peterson transferred the well house lot to CVOA. The quitclaim deed described the property as Lot 11, Block 1, CRIMSONVIEW PHASE I. Water rights were not reserved for Tract B in the deed. Robert Mellish as the owner of Tract B (Phase II), sought to obtain water from CVOA in order to develop his property. On January 28, 1998, in furtherance of the development, Mellish submitted plans to the ADEC to upgrade the CVOA water system in order to expand capacity and provide water service to Phase II. The ADEC, after reviewing the proposal, indicated that before an "Approval To Construct" Certificate could be issued for the proposed upgrades, an owners statement from CVOA would have to be provided to the ADEC. [8] CVOA refused to provide the owners statement.

On September 11, 1998, Robert Mellish filed a formal complaint against CVOA, seeking to have the Commission declare CVOA a public utility for the furnishing of water service to all lots within the Crimsonview Subdivision (Tracts A and B), require CVOA to apply for a certificate of public convenience and necessity and to

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[7]CVOA answer, Exhibit 1.

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order CVOA to construct, at its own cost, system upgrades required for the provision of safe, reliable, and adequate water service to all lots. (including the undeveloped lots of Tract B).

By Order U-98-151(1), dated December 7, 1998, the Alaska Public Utilities Commission (APUC) instituted an investigation into the complaint filed by Robert Mellish.

On January 8, 1998, Mellish filed a Motion for Summary Judgment and Request for Declaratory Relief as to the regulatory status of CVOA. In its motion, Mellish sought to have the Commission declare CVOA to be a public utility, require CVOA to obtain a certificate of public convenience and necessity to operate its water system, require that CVOA's service area include all lots in Crimsonview Subdivision (including lots in Tract B Phase II), order CVOA to issue the Owner's Statement required by ADEC, and require CVOA to construct upgrades and obtain approvals in order to provide safe, reliable, and adequate water service to all lots.

CVOA opposed the Summary Judgment on the issue of whether CVOA was a public utility, arguing that it did not meet the statutory requirements of AS 42.05.141 and definitions contained in AS 42.05.990. Alternatively, CVOA argued that if the Commission found it to be a public utility, it should decline to exercise jurisdiction because the Commission had not issued certificates to and does not regulate other homeowner associations, condominium associations or other private water systems for the mutual benefit of their members. It also argued that exercising jurisdiction

[8]Complaint, Exhibit L.

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would be unwarranted by the regulatory objectives of the APUC, would not be in the public interest, and would raise constitutional implications.[9]

On May 11, 1999, the APUC issued Order U-98-151(2), concluding that CVOA was a public utility. Relying on **Re *Country Lane Estates***, 11 APUC 233 (APUC 1991) as precedent, the Commission found that CVOA fit within the statutory definition of a public utility[10]. The Commission further held that as a public utility, CVOA was subject to the Commission's full regulatory authority set forth in AS 42.05.141 The Commission did not address the issue whether it should exercise its jurisdiction.

On July 12, 1999, CVOA filed a Motion To Dismiss With Prejudice Robert Mellish's Formal Complaint and Request for Declaratory Relief. CVOA sought to have the Regulatory Commission of Alaska (RCA) revisit the issues as the APUC was replaced by the RCA.[11] CVOA requested the RCA to decide as a matter of law or policy that the APUC's decision that CVOA was a public utility was erroneous and that CVOA was not subject to the jurisdiction of the RCA. Alternatively, CVOA argued that

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[9]Crimsonview's Opposition to Motion for Summary Judgment dated January 25, 1999, p 2.

[10]The Commission stated "[b]ased upon its review of the record in this proceeding, the Commission has concluded that Crimsonview is a public utility under the standard established in *Country Lane Estates*. Pursuant to AS 42.05.990(4) a "public utility" or "utility" is specifically defined to include *every corporation whether public, cooperative, or otherwise, that owns, operates, manages, or controls any plant, pipeline, or system for…furnishing water…"* The term "public" is further defined under AS 42.05.990(3)(A) to mean "any group of 10 or more customers that purchase the service or commodity furnished by a public utility..."

[11]When the APUC ceased to exist, the legislature created the RCA to assume the duties performed by the APUC.

Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

if the RCA determined CVOA was a public utility **and** it would not be in the public interest to exempt it from regulation, the RCA did not have jurisdiction or authority to determine as a matter of law whether the public convenience and necessity dictates that CVOA be required to provide service to Tract B. In essence, CVOA argued the RCA should not and could not exercise jurisdiction in this case due to legal issues outside the regulatory authority of the RCA. These issues were similar to the ones raised in CVOA's Opposition to the original Motion for Summary Judgment.[12]

In Order U-98-151(4), dated September 20, 1999, the RCA expressed its opinion that the existing water system in Crimsonview Subdivision should be combined with the water system being installed by Mellish and that the Crimsonview Subdivision/Tract B land area should be included in the area of service for the water system because the inclusion of the entire area will ultimately result in the lowest cost solution for the ratepayer. The Commission felt that in the life of the subdivision, it was best to have one unified water system that could enjoy the maximum economies of scale. Due to concerns of the parties[13] the commission felt resolution through

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[12]Crimsonview argued that by virtue of its declarations and covenants, etc., Crimsonview is only authorized to serve the owners of lots on CRIMSONVIEW SUBDIVISION (Phase I), which are automatically members. As the developer of Tract B is not a member of Crimsonview, he and any successor owners of lots in Tract B cannot be members in the absence of an affirmative vote of two-thirds' members of Crimsonview. Crimsonview asserted that the RCA, under its authority of AS 42.04, could not invalidate the recorded Declarations of Crimsonview, could not force it by injunction to expand Crimsonview to include or encompass Tract B or to force it to issue an owners statement. Crimsonview argued these were issues for a court to decide.

[13]Crimsonview was concerned about a potential failure of their water supply under increased loading and Mellish was concerned about requirements Crimsonview demanded in order to allow him to connect to the water system.

Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

mediation was a more appropriate way to resolve the issues than a public hearing. As the parties had been negotiating in 1998, the Commission ordered Mellish and CVOA to enter into mediation.[14] The Commission withheld consideration of requiring CVOA to file an application for a certificate of public convenience and necessity as well as cost-of-service filings pending completion of the mediation process. As a result of the Commission-ordered mediation, CVOA's Motion to Dismiss with Prejudice was considered moot.

On September 28, 1999, CVOA filed a request for reconsideration of Order U-98-151(4).[15] CVOA alleged that the installation of water mains in Phase II in 1985 was in violation of 18 AAC 80.300 and that improvements made by Mellish were also in violation of 18 AAC 80.300 and the ADEC. CVOA argued that the Commission-imposed expansion of their water system would force CVOA to accept future liability and financial responsibility to operate and maintain an illegal system. It further argued that forced expansion of their water system without the consent of two-thirds of

[14]To facilitate the mediation process the Commission determined that Crimsonview must function as a public utility in its water system operation. The Commission determined that the service area for the utility operation would encompass the original subdivision (now known as Phase I, CRIMSONVIEW SUBDIVISION), and Tract B. The Commission stated it had the latitude to exempt Crimsonview from regulation and it had the intention of doing so, provided Crimsonview and Mellish could successfully negotiate a water supply agreement that offered a uniform tariff for sale of water to all water customers throughout the subdivision.

[15]The request was entitled "Crimsonview Homeowners' Association, Inc., Request For Reconsideration Request For Clarification of Order 4 Objection to Allocated Costs". It was filed by Nelson Elliot as a designated representative of the Crimsonview Owners Association, Inc. (Crimsonview). Crimsonview proceeded pro se as its attorney moved to withdraw with consent on September 30, 1999. The motion to withdraw was granted in Order U-98-151(5), dated October 4, 1999.

Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

Crimsonview Subdivision homeowners would be in violation of or nullify CVOA's Articles of Incorporation. By Order U-98-151(5), dated October 4, 1999, the Commission denied Crimson- view's Request for Reconsideration. It also reaffirmed that CVOA and Mellish must enter into mediation.[16]

On October 4, 1999, CVOA filed a Supplemental Request For Reconsideration of U-98-151(4), stating that the purpose of their nonprofit corporation was to own operate and maintain a community water system for the subdivision. CVOA argued that operation of a "public utility" was beyond the scope and purposes of CVOA, which was limited to functions and services of its members; Mellish was not a member of CVOA and CVOA had no standing to sell water to the public. CVOA stated that until such time as their articles and restrictive covenants were legally amended, CVOA had no intention of operating anything other than a community water system for the benefit of its current members.

On October 13, 1999, CVOA filed a Renewed Request for Reconsideration of Motion for Dismissal with prejudice And Declaratory Relief and Oral Arguments. It also filed a Request for Review of Order 5 For Procedural Error. CVOA asserted that the entire panel was required to rule on a request for reconsideration.

In Order U-98-151(6), the Commission, as a panel, reviewed the filings in this Docket and denied CVOA's Request for Reconsideration. Additionally, as it was apparent to the Commission that CVOA was refusing to mediate, a prehearing

[16]The Commission did not revisit the issues decided on Order U-98-151(4).

Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

conference was ordered to set a hearing date and clarify the issues pending before the Commission.[17] The resulting hearing date of January 4, 2000 was vacated by oral order.

Discussion

When a complaint against a public utility is filed with the Commission, the Commission must make two preliminary determinations. The first is whether the Commission has jurisdiction to hear the issues raised in the complaint. 3 AAC 48.070(c). The second is whether, in accordance with 3 AAC 48 130(f), the complainant has shown good cause for the Commission to institute a formal investigation into the complaint. *Valley Construction Company, Inc. v. Golden Valley Electric Assn., Inc.*, 4 APUC 326 (July 6, 1982).

The jurisdiction of the RCA depends upon the administrative authority conferred upon it by the relevant statutes. *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d. 1027, 1033 (Alaska 1972). Its general powers and duties are contained in AS 42.05.141.[18] The authority of the Commission is not limitless simply because one party is or may be a utility.

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[17]The prehearing conference took place on November 12, 1999, at which time a hearing date of January 4, 2000, was set.

[18]Although AS 42.05.141 has been amended since *Greater Anchorage Area Borough v. City of Anchorage* was decided, the Commissions' powers have essentially remained unchanged. Crimsonview argued the legislature, by amending AS 42.05.141(a) after *Country Lane Estates* was decided, intended to curtail the Commission's authority. In 1995, the legislature deleted the phrase "and the powers of the commission shall be liberally construed to accomplish its stated purposes" from AS 42.05.141(a).

Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

"The essence of the administrative power conferred upon the RCA is regulatory; the Commission is empowered to set rates, promulgate regulations, collect information, process complaints against utilities and the like. The statutory framework, however, does not grant unlimited adjudicatory authority to the RCA. *Greater Anchorage Borough*, 504 P.2d. at 1033. The Commission has previously found that it is appropriate for an administrative agency to pass on the question of its own jurisdiction when there are practical factors to be considered in assuming jurisdiction of particular matters. *Valley Construction Company,* 4 APUC at 330, citing *J.M. Huber Corp. v. Denman*, 367 F.2d 104 (5th Cir. 1966). The Commission has previously held:

> The Alaska Supreme Court has interpreted the essence of the Commission's power to be regulatory. In administering and interpreting AS 42.05 from day-to-day, the Commission has developed the regulatory framework within which it functions. Given the total context of AS 42.05 and the policies the Commission has formulated under it, the Commission believes that complaints are jurisdictional if their substance touches upon the integrity of the regulatory framework as the Commission has developed it. Those complaints which do not affect that integrity need not, and in the Commission's view cannot, be heard by the Commission. The former type of complaint requires agency expertise in the nature of knowledge of the regulatory framework and reference to agency developed policies. The latter type of complaint is better handled by a court in accordance with settled legal principles.

Valley Construction, 4 APUC at 330.[19]

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[19]In *Valley Construction Company, Inc.*, the Commission described the regulatory framework of AS 42.05. "The Alaska Public Utilities Commission Act grants the Commission the authority to regulate utilities through the issuance and continuing oversight of certificates of public convenience and necessity." AS 42.05.221 - 281. It grants the commission comprehensive ratemaking authority. AS 42.05.141(3), AS 42.05.361 - 431, and gives the Commission powers of continuing supervision over a utility's service and facilities, including safety and adequacy of connection and extension. AS 42.05.41(3)(4), AS 42.05-291 – 351. Additionally, it empowers the Commission to continuously oversee a utility's finances and management. AS 42.05.141(4)(5), AS 42.05.441 – 531. *Id.* at 331.

Regulatory Commission of Alaska
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Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

Mellish's request that CVOA be declared a public utility which furnishes water to lots within a subdivision falls within the Commission's authority to regulate utilities through the issuance of certificates of public convenience and necessity. However, the issues presented in this case by CVOA and Mellish as a developer raise significant regulatory and practical considerations when deciding whether to assume jurisdiction or whether to continue to exercise jurisdiction.

This is not a simple certification of a utility and regulation of water service to customers of a utility. The dispute between Mellish and CVOA involves the interpretation and/or construction of real estate transactions, articles of incorporation, covenants, conditions and restrictions governing individual members of a homeowners association. It also involves the enforcement of any decision made by the Commission through the injunctive process of the courts.[20]

An owner of a lot in Phase I (Tract A) is a member of CVOA. Membership in CVOA is mandatory. Although the original Declaration of Covenants and Restrictions covered CRIMSONVIEW SUBIDIVISION in total, the Amended Declaration covered only Crimsonview Subdivision Phase I (Tract A). Only lot owners in Tract A are members of CVOA and Mellish does not own a lot in Tract A. Future lot

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[20]Attempts by the Commission to foster a mediation of this dispute were unsuccessful. Correspondence between the parties leaves no room for doubt that litigation in the courts is inevitable regardless of how the Commission was to decide this dispute if it retained jurisdiction. See letter dated December 17, 1999 from Crimsonview to counsel for Mellish wherein Crimsonview refers to conflicting legal obligations to the Commission and to its members. These are matters that must be resolved by the court.

Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

owners in Tract B can be members of CVOA only if two-thirds of the members of CVOA agree to amend the Declaration to make them members.

CVOA argues that pursuant to its Nonprofit Articles of Incorporation and Amended Declaration of Covenants, Conditions and Restrictions, CVOA is only authorized to serve owners of lots in Phase I (Tract A). Two thirds of the members of the Association, as required by its Declaration, will not consent to provide water to Tract B from the well located on a lot owned by CVOA

The ADEC will not grant an approval to construct upgrades to the water system to provide water to Tract B unless CVOA provides an "owners statement". The members of CVOA refuse to provide the statement.

The Commission does not believe that forcing of individual members of a homeowners association to approve the giving of an "owners statement" or to require a homeowners association to accept new members falls within the regulatory framework outlined in AS 42.05.

The subdivision and declaration disputes of the parties are contractual in nature. They do not require agency expertise in the nature of knowledge of the regulatory framework and reference to agency developed policies. They are issues best resolved by the court.

The Commission has found CVOA to be a public utility. However, the resolution of the underlying dispute between the parties does not fall within the regulatory framework of the Commission.[21]

[21] *See Valley Construction Company, Inc.*, 4 APUC 326 (July 6, 1982)

Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, Alaska 99501
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The Commission declines to exercise jurisdiction in this matter. The Complaint filed by Mellish against CVOA is dismissed and Docket U-98-151 will be closed.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The oral notice given to the parties by the Commission vacating the January 4, 2000 hearing in this matter is affirmed.

2. The Formal Complaint and Request for Declaratory Relief is dismissed for want of jurisdiction.

3. Docket U-98-151 is closed.

DATED AND EFFECTIVE at Anchorage, Alaska, this 21st day of January 2000.

BY DIRECTION OF THE COMMISSION
(Commissioners Patricia M. DeMarco and Will Abbott,
not participating.)

(S E A L)

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SECTION 18

#6

STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners:	G. Nanette Thompson, Chair Bernie Smith Patricia M. DeMarco Will Abbott James S. Strandberg

In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Arbitration with PTI COMMUNICATIONS OF ALASKA, INC., under 47 U.S.C. §§ 251 and 252 for the Purpose of Instituting Local Exchange Competition	U-99-141 ORDER NO. 5
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 ALASKA, INC., under 47 U.S.C. §§ 251 and 252 for the Purpose of Instituting Local Exchange Competition	U-99-142 ORDER NO. 5
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	U-99-143 ORDER NO. 5

ORDER SELECTING FORWARD-LOOKING COST MODEL

BY THE COMMISSION:

Background

On December 8, 1999, GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION INC., d/b/a GENERAL COMMUNICATION, INC., d/b/a GCI (GCI), filed, pursuant to 47 U.S.C. §§ 251 and 252,[1] petitions for arbitration with PTI COMMUNICATIONS OF ALASKA, INC. (PTIC), (Docket U-99-141), TELEPHONE UTILITIES OF ALASKA, INC. (TUA) (Docket U-99-142), and TELEPHONE UTILITIES OF THE NORTHLAND, INC. (TUNI), (Docket U-99-142). In this Order, those utilities will be collectively referred to as "the ACS companies".[2]

By Order U-99-141(1)/U-99-142(1)/U-99-143(1), dated January 27, 2000, (Order No. 1) the Commission directed the parties to file briefs by February 11, 2000, setting out which method or model each party believes should be used to compute forward-looking cost figures for use in developing rates and the reasons in support of using such method or model.

On February 11, 2000, GCI and the ACS companies filed briefs in response to Order No. 1. On February 25, 2000, both parties filed reply briefs.

GCI proposed that the Hatfield model, version HM 5.1, be used to compute forward-looking cost figures for use in developing rates in this arbitration. ACS proposed a cost study methodology created by ACS.

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[1]Sections 251 and 252 were added to the Communications Act of 1934 by the Telecommunications Act of 1966, codified at 47 U.S.C. §§ 151, *et seq.*, hereinafter "the Act".

[2]ACS (Alaska Communications System, Inc.) is the parent company of PTIC,

On February 24, 2000, the Commission hired Ben Johnson Associates, Inc. (BJA), as a consultant to review the parties' briefs and make a recommendation regarding an appropriate cost model to : in this arbitration proceeding. On March 30, 2000, BJA filed its report (Consultant Report), recommending that the Commission select the Federal Communications Commission (FCC) model to use to compute forward-looking cost figures. On March 24, 2000, GCI and ACS filed their comments on the Consultant Report.

Discussion

The Commission has decided that the FCC model recommended by BJA should be used in computing the forward-looking cost figures in this arbitration. The Commission has made this decision based on a number of considerations.

The FCC model, as described by BJA, is familiar to both parties involved in this arbitration and their consultants. It provides a neutral platform and is not subject to attack as being biased in favor of either party.[3]

Selection of the ACS model would place GCI at a time and resource disadvantage, as GCI is not familiar with the model's inner workings. In contrast, the FCC model is publicly available. It has been tested and has been explained by the FCC.

Although the Commission realizes that the output of the FCC model must

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TUA, and TUNI.

[3]BJA, in its report filed March 10, 2000, noted that the HAI model has primarily been funded and supported by interexchange carriers and has a reputation among ILECs as being biased toward excessively low costs. The ACS model was developed by one of the parties to this arbitration.

be converted to produce an unbundled network element output[4], the Commission believes the parties can easily accomplish the conversion. Modifications to the model program should be limited to corrections for unique changes or agreed-upon error corrections.

The Commission has determined that the parties should use the FCC default inputs as a base-line for submissions. These inputs are a neutral representation of national average costs. The parties are free to propose changes or modifications to the default inputs, but all modifications, unless stipulated to by the parties, must be adequately supported with credible evidentiary data.

The Commission believes that the use of actual geocoded customer location is appropriate. This information can be derived from the ACS Martens database. Any disagreements between the parties as to modifications to the model program or input data are to be resolved through arbitration.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The Federal Communications Commission model is to be used to compute forward-looking cost figures for use in developing rates in this arbitration.

2. The Federal Communications Commission default inputs are to be used as a baseline with modifications by the parties in this arbitration.

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[4]The FCC model was designed to produce a universal service output.

3. Disagreements between the parties as to modifications to the model program or input data are to be resolved through the arbitration process.

DATED AND EFFECTIVE at Anchorage, Alaska, this 18th day of April, 2000.

BY DIRECTION OF THE COMMISSION

(S E A L)

SECTION 19

STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners: G. Nanette Thompson, Chair
Bernie Smith
Patricia M. DeMarco
Will Abbott
James S. Strandberg

In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and d/b/a GCI for Termination of the Rural Exemption and Arbitration With PTI COMMUNICATIONS OF ALASKA, INC., under 47 U.S.C. §§251 and 252 for the Purpose of Instituting Local Exchange Competition	U-97-82 ORDER NO. 11
In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and d/b/a GCI for Termination of the Rural Exemption and Arbitration With TELEPHONE UTILITIES OF ALASKA, INC., under 47 U.S.C. §§251 and 252 for the Purpose of Instituting Local Exchange Competition	U-97-143 ORDER NO. 11
In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and d/b/a GCI for Termination of the Rural Exemption and Arbitration With TELEPHONE UTILITIES OF THE NORTHLAND, INC., under 47 U.S.C. §§251 and 252 for the Purpose of Instituting Local Exchange Competition	U-97-144 ORDER NO. 11

ORDER GRANTING RECONSIDERATION AND TERMINATING RURAL EXEMPTION

BY THE COMMISSION:

These cases are before the Regulatory Commission of Alaska (RCA or Commission) on reconsideration of three decisions of the Alaska Public Utilities Commission (APUC) dated June 30, 1999. The APUC terminated the rural exemptions held by TELEPHONE UTILITIES OF ALASKA, INC. (TUA), TELEPHONE UTILITIES OF THE NORTHLAND, INC. (TUNI) and PTI COMMUNICATIONS OF ALASKA, INC. (PTICA) in the Fairbanks and Juneau areas. The PTI companies requested that the Commission reconsider the decision issued by its predecessor agency on the last day of its existence.[1] This Commission entered an order on August 9, 1999, extending the reconsideration period to October 11, 1999, to allow full consideration of the extensive record. *See* Orders U-97-144(10), U-97-143(10), and U-97-82(10). All Commissioners have read the records in these cases and are participating in this decision.[2] *See* AS 42.05.171.

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[1]The APUC ceased to exist as of July 1, 1999. The RCA assumed the duties of that Commission on the same day.

[2]Each of the Commissioners prepared an affidavit stating that he or she has reviewed the record in each of the above-captioned proceedings. Commissioner Thompson (Chair) filed her affidavit on September 7, 1999. Commissioner Strandberg submitted his affidavit on September 22, 1999. On September 23, 1999, Commissioners Smith, DeMarco, and Abbott filed their affidavits.

The APUC decisions issued June 30, 1999, were in response to the Decision and Order dated March 4, 1999, by the Superior Court. GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI (GCI) appealed the APUC's January 8, 1998, Order which was based on an assignment of the burden of proof to GCI and continued the rural exemption. The Superior Court held that the APUC erred when it placed the burden of proof on GCI to establish that termination of the rural exemption would not be unduly economically burdensome, would be technically feasible and would be consistent with the universal service provisions of the Telecommunications Act of 1996 (TCA).[3] Decision and Order, p. 7. Based on the record on appeal, the Superior Court found that GCI had made a *bona fide* request to compete in the PTI companies' service areas. Decision and Order, p. 2.

The Superior Court's decision specifically placed the burden of proof on PTI and listed the APUC's tasks on remand.

> Initially, APUC must obtain all pertinent information from PTI regarding what universal service support mechanisms are available for utilization. APUC must then address each of the three prongs of 47 U.S.C. Sec. 251(f)(1)(A): (1) APUC must determine (under subparagraph (B)) whether each of GCI's requests would create an undue economic burden; (2) APUC must determine if each of GCI's requests are technically feasible; and (3) APUC must

[3]47 U.S.C. §§ 151 *et seq.*

> determine whether each of GCI's requests are consistent with the provisions of Sec. 254.

Decision and Order, p. 7.

Because the third prong of the test "seemed to create the most controversy", the Superior Court offered additional guidance to the APUC.

> For each of GCI's requests, APUC must look closely at how the request will affect Sec. 254(b)(5)—that is, in light of GCI's request, there will be specific, predictable and sufficient Federal and State support mechanisms to preserve and advance universal service. Pursuant to this test, APUC should examine each of GCI's requests to PTI for interconnection services and network elements. All of this must be accomplished cognizant of the intent of the Telecommunications Act to promote competition in the local market.

Decision and Order, pp. 7-8.

On June 22, 23 and 24, 1999, the APUC held a hearing to collect the evidence described by the Superior Court. The APUC issued an order on June 30, 1999, terminating the rural exemption. The decision contained only cursory statements to explain the APUC's reasoning. The APUC's decision did not include a reasoned analysis of the disputed legal, factual and policy issues presented in these cases.

This Commission finds that the APUC did not adequately address the issues listed by the Superior Court or analyze the implications of its order for delivery of telecommunications services in Alaska. Therefore, the Commission grants reconsideration in order to adequately analyze and discuss the important issues presented in these Dockets.

DISCUSSION

This case presents a first request to the RCA to terminate the rural exemption created by the TCA in Alaska. The TCA imposes a duty on all telecommunications carriers to interconnect with the equipment and facilities of other telecommunications carriers. 47 U.S.C. Sec. 251(a)(1). The TCA requires all incumbent local exchange carriers (ILECs) to allow other competitive local exchange companies (CLECs) access to their networks and to provide resale services. 47 U.S.C. Sec. 251(b). It imposes additional duties on ILECs that are designed to promote competition in local exchange markets. 47 U.S.C. Sec. 251(c).

For incumbent rural telephone companies, the TCA creates an exemption from the additional duties imposed under Sec. 251(c) until the state commission has determined that the rural market is well suited for competition. 47 U.S.C. Sec. 251(f)(1)(a). Rural incumbent telephone companies are exempt from the obligations of Section 251(c) until the state commission has removed the rural exemption that renders interconnection obligations inapplicable to those carriers. Because all of Alaska, except Anchorage, falls within the definition of "rural" in the TCA, the RCA's decision in this case has broad implications for the telecommunications market in Alaska.

The intent of Congress in adopting the TCA was to promote competition across America. Because Congress was aware that the issues faced in rural areas were different than those in urban areas, competition would come to areas defined as rural under the TCA only when there was assurance that the advent of competition would not interfere with delivery of services. Congress assigned the state commissions the responsibility of determining that competition would not reduce the quality or unreasonably increase the cost of telephone service before extending the provisions of the TCA to rural areas.

An ILEC in a rural area is not obligated to negotiate, interconnect, allow unbundled access through its network or resell its services at wholesale rates until a prospective competitor has made a *bona fide* request and the state commission has made specific findings. The state commission must determine that the request is not unduly economically burdensome, is technically feasible, and is consistent with the universal service provisions of the TCA. 47 U.S.C. Sec. 251(f)(1)(a).

GCI has three requests for interconnection before the Commission for consideration in this case: PTI Communications of Alaska, Inc. (PTICA; Docket U-97-82);[4] Telephone Utilities of Alaska, Inc. (TUA; Docket U-97-143); and Telephone Utilities of the Northland, Inc. (TUNI; Docket U-97-144).[5] GCI submitted all the requests on April 2, 1997. Alaska Communications Systems, Inc. (ACS), as the result of transactions that occurred after the requests were submitted, now owns all three affected local exchange companies. ACS has maintained the three subsidiaries as separate companies for operating and rate purposes.[6] The Commission evaluated these requests based on the study areas served at the

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[4]GCI's petition concerned termination of the rural exemption and arbitration with the City of Fairbanks d/b/a Fairbanks Municipal Utilities System (FMUS), holder of Certificate of Public Convenience and Necessity (certificate) No. 117. By Order U-96-121(5), the APUC transferred FMUS's certificate to PTI Communications of Alaska, Inc. For the purposes of this proceeding, the utility designated as FMUS in GCI's petition will be referred to as PTICA.

[5]Collectively these utilities are referred to as "the PTI companies" in this Order. Although the evidence varied on some issues in these dockets, it was similar or identical on many more. In instances where just one company is implicated in this Order, that company is specifically identified.

[6]The ACS subsidiaries designated above must file revenue requirements, cost of service and rate design studies no later than July of 2001. *See* Orders U-98-140(7)/U-98-141(7)/-U-98-142(7), p. 22.

time of the request. ACS' subsequent acquisition of other local exchange companies in Alaska did not broaden the scope of the requests.

GCI submitted a request to TUNI for interconnection, services and network elements in its Glacier State study area.[7] That study area includes many communities in different parts of the state: the communities of North Pole, Nenana, Delta Junction and Fort Greely near Fairbanks; Kodiak, including the Coast Guard facility; and Kenai, North Kenai, Soldotna, Ninilchik, Homer and Seldovia on the Kenai Peninsula. Testimony of Gene R. Strid, T-3, Exhibit GRS/TUNI-1, Docket U-97-144 (post-remand proceeding). All of the communities in the TUNI Glacier State study area are accessible by road or marine highway. GCI witness Gene Strid submitted testimony that limited the scope of the request for interconnection to the termination and transport of local traffic at TUNI's North Pole exchange to allow extended area service to customers between Fairbanks and North Pole. Strid stated that market entry in the balance of the TUNI service area would be through resale of TUNI's offerings. Testimony of Gene R. Strid, T-3, pp. 6-8, Docket U-97-144, November 20, 1997. (pre-remand

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[7]GCI has not requested that the rural exemption be lifted in TUNI's Sitka study area.

hearing).[8]

GCI's request to TUA covered its entire service area. TUA serves two FCC study areas. The Juneau-Douglas Telephone Company study area includes Juneau and the surrounding communities of Douglas, Lemon Creek and Sterling. The other TUA study area includes Ft. Wainwright near Fairbanks.

GCI's request for interconnection to PTICA covered the Fairbanks area. This request was to lift the rural exemption in the central Fairbanks area. The scope of this request was not altered during the hearing process. Although GCI and the three PTI companies negotiated to resolve the interconnection issues, the negotiations were not successful. GCI petitioned the Commission for termination of the rural exemption.

BONA FIDE REQUEST

TUNI argued in Docket U-99-144 that GCI did not file a *bona fide* request as required by the TCA because GCI's testimony in the pre-remand hearing indicated that GCI was not seeking unbundled network elements in TUNI's service area. Testimony of Robert A. Smith, T-1, p. 4-6, Docket U-97-144. TUNI's argument assumes that

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[8]The testimony of Gene R. Strid referred to in this reference to the record was submitted in the pre-remand hearing before the APUC. Other testimony referred to in this Order was presented at the post-remand hearing held June 22, 23, and 24, 1999.

a potential competitor must be prepared to enter the market through all of the methods described in the TCA in order to make a *bona fide* request. That assumption is inconsistent with the provisions of the TCA.

The TCA allows a CLEC several options for providing service. A CLEC can build its own facilities or obtain retail resale service from the ILEC (47 U.S.C. Sec. 251(b)), or interconnect with the ILEC and offer service by purchasing unbundled network elements (UNEs) or resell the ILEC's services purchased at wholesale rates. 47 U.S.C. Sec. 251(c). The TCA contemplates that the CLEC will have a choice about the means by which it provides service, and does not require a CLEC to exercise all options.

The exemption section of the TCA describes the scope of a *bona fide* request in the alternative. It lists a "bona fide request for interconnection, services, or network elements." Sec. 251(f)(1)(A) (emphasis added). The word "or" suggests that a request for any one of those four methods of providing service constitutes a *bona fide* request. Therefore, GCI's limitation of the scope of its request to interconnection at the North Pole switch does not render it invalid. GCI's request as modified during the hearing process is for interconnection at one location and resale throughout the balance of TUNI's service area.

ECONOMIC BURDEN

The first element of the Section 251(f)(1)(a) test is that the request to terminate the rural exemption not impose an undue economic burden. The PTI companies argued that lifting the exemption would be economically burdensome, and GCI successfully discredited that assertion. The testimony on this issue intermingled with the testimony on the universal service issue because the PTI companies alleged that the potential loss of universal service support was a part of the undue economic burden.

Robert A. Smith presented testimony for the PTI companies on this issue. He supported his testimony with exhibits and asserted that the result of competition would be economically burdensome. Testimony of Robert A. Smith, T-3, Dockets U-97-82, U-97-143, Exhibits 1 through 12. The Commission finds Mr. Smith's conclusions unpersuasive. His calculations were based on the assumption that GCI would receive an immediate 36% share of the local market. Testimony of Robert A. Smith, T-3, Dockets U-97-82, U-97-143, pp. 27-30. That number is unrealistically high. GCI's actual non-wholesale penetration over the 36 months since competition began in Anchorage only amounts to about 15%. Testimony of F. W. Hitz, III, T-6, Dockets U-97-82, U-97-143, Exhibit FWH-4.

Second, Mr. Smith used the price proposed by GCI for UNE interconnection in its discovery responses. Testimony of Robert A. Smith, T-3, Dockets U-97-82, U-97-143, pp. 25-27. That UNE price is unrealistically low. Staff witness Johnson explained his expectation that any price provided in discovery by the competitor would be low based on the assumption that these rates would be played back to them in negotiations if the exemption were lifted. Testimony of Ben Johnson, T-9, Dockets U-97-82, U-97-143, pp. 16-17. With UNE interconnection prices to be set through an arbitration process, if the parties are unable to agree, it is very unlikely that the PTI companies would conclude that process with agreement by accepting GCI's first offer. If Mr. Smith's exhibits are modified to reflect more realistic market penetration rates and UNE prices, they show little negative economic effect on the incumbent. Reply Testimony of Ben Johnson, T-10, pp. 24-25, Dockets U-97-82 and U-97-143. Ben Johnson's testimony indicates that a range of reasonable assumptions about market share and cost allocation for UNE pricing generate economic impact on TUNI ranging from $500,000 to $14,000. Testimony of Ben Johnson, T-9, Dockets U-97-82, p. 18. Thus, the Commission finds that negotiations regarding appropriate UNE pricing can achieve an acceptable level of economic impact on TUNI.

The ILEC's analysis also fails to take into account that the loss of customers to GCI will reduce the ILEC's costs, and increase its revenues if the CLEC chooses to connect with its customers by purchasing the use of the existing network. GCI witness Frederick Hitz indicated that an efficiency improvement of only 4.7% in the PTICA system, in response to competitive pressure, would offset PTICA witness Smith's estimate of the economic impact. Testimony of Frederick W. Hitz, T-6, Exhibit 7, Docket U-97-82.[9] Given that the PTI companies are likely to respond to competitive pressure with improved system efficiency and more aggressive marketing of their own services, the Commission believes there is a high probability of revenue adjustments of at least this modest scale.

The TCA anticipates that there will be economic impact from the introduction of competition. "In order to justify a suspension or modification . . . of the rural exemption under TCA. . . a LEC must offer evidence that the application of section 251 (b) or 251(c) of the Act would be likely to cause <u>undue</u> economic

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[9]GCI witness F. W. Hitz, III performed a similar analysis in Docket U-97-143. In that Docket, Hitz indicated that an efficiency improvement of only 10.4% in the TUA system in response to competitive pressure would offset TUA witness Smith's estimate of the economic impact. Testimony of Frederick W. Hitz, T-6, Exhibit 7, Docket U-97-143

burden beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. 51.405(d). Congress did not anticipate that there would be no cost to the introduction of competition, only that the cost not be unduly economically burdensome. 47 U.S.C. Sec. 251(f)(1)(a).

The Commission finds that the PTI companies did not meet their burden of proving undue economic burden. The Commission recognizes that there may be some economic burdens associated with the introduction of competition in the PTI service areas. However, there was no persuasive evidence presented in this case that those burdens were undue. The records in these cases show that the ILEC has alternatives for revenue generation, has the opportunity to establish appropriate UNE leasing rates, has overestimated competitive penetration and underestimated the impact of system efficiency improvements The Commission will continue to be involved in the administration of universal service funds and access charges, and will have the opportunity to review the negotiated UNE prices. Therefore, the Commission can continue to insure that the burdens borne by the incumbent carrier in a market where local competition is newly introduced are not too great. The incumbent will likely experience a change in corporate culture that will sustain and in the long run enhance its economic well being.

TECHNICAL FEASIBILITY

None of the parties argued that interconnection was not technically feasible. GCI witness Strid testified that routine inter-office trunking arrangements such as are currently in use for interexchange and extended area service traffic would be used to provide access for local service provision. GCI is not requesting additional specific infrastructure additions to accommodate its proposed service. Testimony of Gene R. Strid, T-3, pp. 4-6, Docket U-97-144. As the party with the burden of proof, the PTI companies had the duty of providing the Commission with evidence on this issue if it asserted technical unfeasibility. 47 C.F.R. 51.5. The PTI companies presented no evidence that technical feasibility posed an obstacle to the interconnection required for GCI to provide local service. Therefore, the Commission finds that technical feasibility is not at issue in this proceeding.

CONSISTENCY WITH UNIVERSAL SERVICE PRINCIPLES

The last element of the test this Commission must apply is consistency with the universal service principles of the TCA. 47 U.S.C. Sec. 254; 47 U.S.C. Sec. 251(f)(1)(A). Among other things, Section 254 enumerates certain universal service principles.

QUALITY AND RATES. - Quality services should be available at just, reasonable and affordable rates.

ACCESS TO ADVANCE SERVICES. - Access to advanced telecommunications and information services should be provided in all regions of the Nation.

ACCESS IN RURAL AND HIGH COST AREAS. - Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high costs areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS. - All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS. - There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

ACCESS TO ADVANCED TELECOMMUNICATIONS SERVICES FOR SCHOOLS, HEALTH CARE, AND LIBRARIES. - Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

47 U.S.C. Sec. 254(b).

The majority of the testimony in this case focused on the fifth principle--specific, predictable and sufficient support mechanisms. The Commission notes that support mechanisms are just one of the universal service principles stated in the TCA. This

Commission will maintain the rural exemption, if a party persuasively demonstrates that terminating the exemption would be inconsistent with Section 254.

Quality and Rates

The first universal service principle has two components. To address the issue of quality, the Commission looks to the record of the DAMA demonstration project. *See* Docket U-95-38.[10] The results of that pilot project on rural competition were improved service quality for the consumers from both the incumbent and competitor. The PTI companies have not provided any persuasive evidence that its service quality will decline or costs will increase if the rural exemption is terminated.

Nor have the PTI companies demonstrated that rates will become unaffordable if the rural exemption is terminated. The Commission protects the customer from unjustified and unreasonable rate increases. Any requests for rate increases will be analyzed and approved only if the increased rate is just and reasonable. Without a cost increase, the ILEC will not be able to justify a

[10]That Docket is entitled *In the Matter of the Request by General Communication Inc., for a Waiver of 3 AAC 52.355(a) and Approval of a 50-Site Demonstration Project.* In that Docket, the Commission waived intrastate regulations prohibiting interexchange (long distance) companies from constructing duplicate facilities in certain rural areas, enabling GCI's interexchange affiliate to construct facilities in areas where such construction would not otherwise be allowed.

rate increase. The evidence presented in this case on potential cost increases was unpersuasive. As a result of terminating the rural exemption and increasing competition, the PTI companies will face increased incentives to reduce costs and rates, making it less likely that they will ask the Commission for a rate increase beyond affordable levels.

Access to Advanced Services

There was no showing by the PTI companies that customers would have any less access to advanced services than they do now if the rural exemption was terminated. The Commission's experience in the Anchorage market was that local competition increased the customer's access to service options and did not degrade access to advanced services. Looking again at Docket U-95-38, the ability of carriers to offer advanced services also increased as the result of the DAMA project, where deployment of improved technology made the links reliable and fast enough to transmit data.

Access in Rural and High Cost Areas

Terminating the rural exemption would allow some of Alaska's rural customers to reap the benefits of an open market. Absent a termination of the exemption, those customers' access is limited to what the incumbent chooses to provide. The advent of competition and the attendant prospect of losing a customer create an economic incentive for the ILEC to improve services. Because prospective competitors must serve an entire study area to be eligible for universal service support, PTI customers may experience improved service throughout the study area. Lifting the rural exemption will increase the economic incentive to the ILEC to give rural customers access to advanced services. The PTI companies have failed to demonstrate that competition will prevent it from offering access to necessary services at rates that are reasonably comparable to rates charged in urban areas.

Equitable and Non-Discriminatory Contributions

All Alaskan customers contribute to the state and federal funds that support universal service. Both PTI and any authorized competitor are required by state and federal regulations to contribute to universal service support funds. These facts will not change as the provider changes. Nor has any party alleged that lifting the rural exemption will lead to discrimination in the assessment of contribution towards the existing state and federal universal service programs. The Commission therefore concludes that terminating the rural exemption is consistent with the equitable and nondiscriminatory contribution principle stated in the TCA.

The Rural Coalition and the PTI companies imply that certain PTI services and customers contribute towards subsidies beyond those associated with the state and federal universal service programs. In order to violate the provisions of Section 254(b)(4), PTI must demonstrate that there was in fact a quantifiable subsidy; that the subsidy was necessary for preserving or advancing universal service; and that payment of the subsidy occurred in an inequitable or discriminatory manner. The Commission believes that these three conditions have not been met.

The Rural Coalition made no attempt to quantify the subsidies in the PTI companies' markets. In any event, if a "subsidy" were embedded in the PTI companies' rates, PTI has not adequately demonstrated that a subsidy is necessary to maintain affordable rates for universal services and not simply used to improve stockholder profits or allow below cost rates for non-universally needed services. The Commission finds that it has not been proven that terminating the rural exemption will lead to an inequitable or discriminatory contribution towards preservation and advancement of universal service.

In order to receive universal service support for serving high cost customers, a carrier must qualify as an eligible telecommunications carrier (ETC). 47 U.S.C. Sec. 214(e). The Commission, upon a showing, can designate a carrier as an ETC that it will offer services throughout the study area[11] for which the ETC designation is sought and advertise the availability of those services. 47 U.S.C. Sec. 214(e)(1). Therefore, in order to receive the benefit of the universal service support, the CLEC must bear some of the burden of serving high cost customers.[12]

The State of Alaska has adopted a state universal service fund mechanism to augment federal universal service funds to assure service to the exceptionally high cost areas of Alaska. *See* Docket R-97-6.[13] While Fairbanks and Juneau are not rural by

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[11]The TCA uses the term service area, and further defines service area as study area for rural companies. 47 U.S.C. Sec. 214(e)(5).

[12]In his dissent to the APUC's June 30, 1999 Order, Commissioner Posey expressed concern that a competitive local exchange company would be able to "cherry pick" and serve only the low cost customers close to the switch equipment, and receive the USF funds for those customer. The flaw in that argument is that the competitor would not be eligible to receive any USF support absent willingness to serve all customers in that study area. It is theoretically possible, but unlikely that a competitor could receive requests for services from only low cost customers. However, the most likely scenario is that a proportionate number of low and high cost customers would choose to switch.

[13]That Docket is entitled *In the Matter of the Consideration of Intrasate Universal Service.*

Alaskan standards, the study areas at issue include these communities along with several that are likely to remain rural for the foreseeable future.[14] Allowing competition to enter the entire PTI service area will ultimately improve service for each study area. The result of the DAMA pilot project was an increase in service quality in rural areas.[15]

Specific and Predictable Universal Service Support Mechanisms

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[14]The FCC froze study area boundaries at the November 15, 1984 levels. Historically, the FCC has allowed study area amendments on a case by case basis, with agreement from the state commission.

[15]This Commission's predecessor, the APUC approved the DAMA project, before Congress adopted the TCA. Distribution of USF funds was not affected by the DAMA project.

The Federal Universal Service Fund provides support for switching costs in study areas with fewer than 50,000 access lines and for loop costs in high cost areas. 47 C.F.R. 54.101.[16] TUNI's Glacier State study area received about $16.4 million in federal universal service support for 1998.[17] Most of the federal support is related to the loop. The study area unseparated cost per loop, compared to the national average, determines the amount of support available to the carrier, based on federal procedures at 47 C.F.R. 36.622 and 631. Under the state universal service fund, established in 1999, the TUNI Glacier State study area receives about $540,000 annually. The level of state support is approximately equal to $.95 per line per month. The TUA Juneau study area receives about $410,000 annually, or $1.40 per line per month, from the state universal service fund. The PTICA Fairbanks study area receives approximately $535,000 annually, or $1.22 per line per month, from the state universal service fund. Together, state and federal funds are explicit and are specific and predictable sources of universal service support.

The PTI companies argue that another source of support is

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[16]Once a competitor enters a study area, the competitor must apply for ETC status. If the application is approved, the CLEC receives support at the ILEC's rate per line, subject to conditions. 47 C.F.R. 306-307.

[17]PTICA received $3.9 million. TUA received $1.4 million. FCC Monitoring Report, CC Docket 98-202, Report No. CC 99-27.

access charges. Access charges are designed to compensate the local exchange carrier for the cost of originating and terminating an interexchange call on its local network. Access charges are reviewed annually for reasonableness by the Commission and by the FCC. They are designed to recover the total access costs as developed under state and federal jurisdictional separations procedures and access charge regulations and procedures.

The state and federal jurisdictional separations and access charge procedures were adjusted to remove implicit universal service support mechanisms. There is no clear evidence that further state or federal universal service subsidies exist in access rates. Rates for universal service in general, have not been shown to be priced below their marginal cost, nor has it been shown that the jurisdictional separations procedures or the access charge procedures are designed to assign more than a fair share of costs to access services. Absent these showings, it has not been adequately demonstrated that access charges are a mechanism supporting universal service.

The Commission recognizes that PTI may face stranded investment to the extent its competitor builds its own facilities to serve the customer. However, the PTI companies have not demonstrated that stranded investment cannot be employed to provide other services, or that losses will not be balanced by increased demand related to competition. In the Anchorage market, growth in access lines increased as customers took advantage of the competitive market.

If the Anchorage market is an indication, then the PTI companies will face competition predominantly through resale of UNEs and other resale mechanisms. PTI will have the opportunity to replace "lost" access charge and local revenues with compensation paid for its resold services and for UNEs. There is no reason to believe the PTI companies will be unable to negotiate fair UNE and resale rates with its competitor. In other words, the ILEC would still be compensated for those used and useful components of its network if the rural exemption were terminated.

It is possible that negotiated interconnection and resale rates may result in a different amount of revenue than currently enjoyed by PTI under its existing monopoly. This is not necessarily proof that there is an internal subsidy that will be lost due to competition. Rather, reductions in revenue streams are a natural, and desirable, consequence of competition at work. If PTI cannot justify or negotiate a UNE and resale rate commensurate to its existing access charge and local revenues, this may be an indication that rates were set too high.

Access to Advanced services for Schools, Health Care & Libraries

Termination of the rural exemption also serves the last specific universal service principle in the TCA. It will not affect funding under the existing federal programs. To the extent that termination of the rural exemption results in an improvement of service quality, schools, libraries and health care institutions will be able to utilize more advanced equipment that the current network does not support.

In conclusion, universal service support will remain specific, predicable and sufficient when the rural exemption is terminated. The Commission acknowledges that under competition PTI may suffer a change in the source of revenues if customers switch to an alternative carrier. However, PTI did not persuasively argue that support mechanisms would not be sufficient to insure that the principles of universal service are served. There was sufficient evidence to persuade the Commission that the potential benefits to customers in these study areas are significant and consistent with the principles of universal service. There was no showing of potential harm to customers. There was no credible evidence or argument that customers would suffer financial or service losses, or that the quality of their service would decline. The potential harm to PTI is speculative, was not clearly defined in an analysis that reflected a range of potential market penetration scenarios and is arguably irrelevant. The TCA requires this Commission to insure that all Alaskans have access to advanced telecommunications services. This Commission believes that granting GCI's petition for termination of the rural exemption in this case opening PTI's study areas to local competition is an important step towards that goal.

CONCLUSION

The Commission terminates the PTI companies' rural exemption because it finds that GCI's request is not unduly economically burdensome, is technically feasible and is consistent with Section 254 of the TCA. The PTI companies must negotiate in good faith with GCI under Section 252 of the TCA.

Under 47 U.S.C. Sec. 251 (f)(1)(B), the parties must begin to negotiate the terms of interconnection within seven days of the date of this order. They must report to the Commission on their progress 30 days from the date of this order. Either party may petition the RCA to arbitrate any open issues 60 days from the date of this order.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The motion for reconsideration filed by Telephone Utilities of Alaska, Inc., Telephone Utilities of the Northland, Inc., and PTI Communications of Alaska, Inc., in these three dockets is granted.

2. The petition to terminate the rural exemptions under 47 U.S.C. Section (f)(1)(A), of Telephone Utilities of Alaska, Inc. (Docket U-97-143); of Telephone Utilities of the Northland, Inc. (Glacier State study area) (Docket U-97-144); and of PTI Communications of Alaska, Inc. (Docket U-97-82), is terminated.

3. The Telephone Utilities of Alaska, Inc., Telephone Utilities of the Northland, Inc., and PTI Communications of Alaska, Inc., must begin to negotiate the terms of interconnection with GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI within seven days of the date of this Order. The parties must report to the Commission on the progress of the negotiations within thirty days of the date of this Order.

DATED AND EFFECTIVE at Anchorage, Alaska, this 11th day of October, 1999.

BY DIRECTION OF THE COMMISSION

(S E A L)

SECTION 20

STATE OF ALASKA

THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners: Sam Cotten, Chairman
Don Schröer
Alyce A. Hanley
Dwight D. Ornquist
Tim Cook

In the Matter of the Petition by GCI COMMUNICATION CORP. for Arbitration under Section 252 of the Telecommunications Act of 1996 with the MUNICIPALITY OF ANCHORAGE d/b/a ANCHORAGE TELEPHONE UTILITY a/k/a ATU TELECOMMUNICATIONS for the Purpose of Instituting Local Exchange Competition	U-96-89 ORDER NO. 8

ORDER RESOLVING ARBITRATED ISSUES

BY THE COMMISSION:

Introduction

By Order U-96-89(1), dated September 17, 1996, the Commission established arbitration procedures to consider the petition for arbitration filed by GCI COMMUNICATION CORP. (GCICC) under Section 252 of the Telecommunications Act of 1996 (The Act).[1] In its petition, GCICC requested arbitration with the MUNICIPALITY OF ANCHORAGE d/b/a ANCHORAGE TELEPHONE UTILITY a/k/a ATU TELECOMMUNICATIONS (ATU) for the purpose of instituting local exchange competition. In that Order the Commission also deter-

[1]47 U.S.C. 151 *et seq.* as amended by The Act.

mined that the arbitrator's recommended decision would be presented to the Commission by December 1, 1996. The Commission determined that it could accept, reject, or modify the recommended decision as part of the arbitration process.

By Order U-96-89(2), dated September 19, 1996, the Commission set out a list of five possible primary arbitrators. By Order U-96-89(3), dated September 25, 1996, the Commission selected Glenn Cravez as the primary arbitrator and granted ATU and GCICC an extension of time to respond to the petition to intervene filed by Alascom, Inc. d/b/a AT&T Alascom (AT&T Alascom).

On October 4, 1996, the Commission issued an oral Bench Order denying AT&T Alascom's petition to intervene. That oral Bench Order was affirmed by Order U-96-89(4), dated November 18, 1996.

By Order U-96-89(5), dated November 22, 1996, the Commission determined that the parties would be permitted to present oral and written comment regarding the arbitrator's recommended decision. The Commission also scheduled a prehearing conference for November 26, 1996, to set a procedural schedule for the presentation of oral and written comments regarding the arbitrator's recommended decision.

By Order U-96-89(6), dated November 29, 1996, the Commission established deadlines for the presentation of oral argument (December 10, 1996), written comments (December 3, 1996), and reply comments (December 5, 1996), regarding the primary arbitrator's recommended decisions. The Commission also determined that the deadline for approval of a final arbitration agreement would be December 15, 1996, and that the Commission, as final arbitrators, would issue a final arbitration agreement by that deadline.

In their separate comments ATU and GCICC both indicated that they did not intend to challenge any of the individual recommendations (awards) of the primary arbitrator. Both parties also acknowledged their understanding that the proposed rates are temporary in nature and will be subject to further review:

> Full studies and future proceedings, in the Courts, before the [Federal Communication Commission (FCC)] and this Commission, will dictate changes in the ultimate structure. (GCICC's Discussion of Identified Issues, December 3, 1996, p. 2.)

GCICC's comments include a review of each issue, including: a summary of each party's position and the arbitrator's award; and a discussion of why the arbitrator's awards as incorporated into the parties' proposed "Interconnection Agreement" would be in compliance with Section 252(c) if approved by the Commission.[2] ATU concurred with GCICC's comments with the exception of the two items (collocation and rights-of-way) discussed below. ATU also stated that subject to further review it believed that the Interconnection Agreement was acceptable.[3]

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[2]ATU stated that it found the Interconnection Agreement to be acceptable, subject to a final review.

[3]On December 12, 1996, GCICC filed an Errata as to Interconnection Agreement, which made corrections to Exhibits A and N of the Interconnection Agreement. GCICC stated that the corrected pages had been discussed with, and reviewed by, ATU.

Despite the parties agreement "to accept the decisions of the primary arbitrator,"[4] they disagreed on the interpretation of two of the primary arbitrator's decisions regarding Issue No. 4 (collocation) and Issue No. 11 (rights-of-way). The disagreement regarding collocation involved what type of equipment can be collocated at ATU's premises. ATU's position is that GCICC is entitled to physical collocation of equipment necessary for interconnection or access to unbundled network elements, but is not entitled to collocate switching equipment or equipment used to provide enhanced services. ATU also stated that GCICC should have the burden to prove that its collocated equipment is not switching equipment within the meaning of 47 C.F.R. 323(c). GCICC replied that ATU should have raised this issue at an earlier date, and, in any case, the equipment is consistent with 47 C.F.R. 323(c).

The disagreement regarding rights-of-way concerned the real property where ATU's wire centers are located. ATU's understanding of the arbitrator's decision was that the real property had been found to have an implied "right-of-way" or easement for GCICC to have access to ATU's distribution network but the physical space and property actually utilized should be no greater than that occupied by ATU's distribution cables and conduit in that location and that usage in that space should be limited to how ATU uses it. GCICC commented that "ATU wishes . . . to interpret this [the arbitrator's decision as reflected in Exhibit J] to retain

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[4]ATU's Comments on Primary Arbitrator's Proposed Decisions, December 3, 1996.

its 'donut' of inaccessible ground and preclude uses consistent with ATU's own uses of its rights-of-way and property." (GCICC's Discussion of Identified Issues, December 3, 1996, p. 19.)

By Order U-96-89(7), dated December 6, 1996, the Commission noted that one of its obligations under The Act, to "provide a schedule for implementation of the terms and conditions by the parties to the agreement" (47 U.S.C. 252(c)(3)), was not resolved under the auspices of the primary arbitrator. As a result, the Commission directed the parties to file, jointly or separately, a proposed implementation schedule.

In its comments in reply to Order U-96-89(7), ATU stated its belief that the wholesale market could be opened for competition upon issuance of a final order by the Commission tentatively scheduled for January 15, 1997, but that commencement of facilities-based competition would have to await Commission action on access charge and universal service reform. GCICC stated that the application of an immediate effective date and the incorporation of the primary arbitrator's awards into the Interconnection Agreement adequately addressed the Commission's statutory requirements regarding an implementation schedule.

Discussion

I. THE PRIMARY ARBITRATOR

The primary arbitrator operated under a "final offer" method of arbitration as detailed in the parties' Agreed Arbitration Model, filed September 30, 1996. This method used written