**Before the**

Federal Communications Commission

Washington, D.C. 20554

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| In the Matter of  Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks  Lifeline and Link Up Reform and Modernization  Connect America Fund | **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)**  **)** | WC Docket No. 14-192  WC Docket No. 11-42  WC Docket No. 10-90 |

Order Denying Petition for Reconsideration

**Adopted: May 10, 2017 Released: May 10, 2017**

By the Acting Chief, Wireline Competition Bureau:

# Introduction

1. General Communication, Inc. (GCI) petitions[[1]](#footnote-2) the Commission to reconsider, in part, one portion of its order granting forbearance from several statutory provisions and rules applicable to incumbent local exchange carriers (incumbent LECs).[[2]](#footnote-3) Specifically, GCI seeks partial reconsideration of the Commission’s decision to forbear nationally from the interexchange equal access and dialing parity requirements as to incumbent LECs, limited solely to that decision’s application to “rural” Alaskan communities—defined by GCI as the areas outside the municipal boundaries of Anchorage, Fairbanks, and Juneau.[[3]](#footnote-4) The Wireline Competition Bureau (Bureau) denies the Petition because GCI, which did not participate in the underlying proceeding, has failed to satisfy the procedural requirements for filing a petition for reconsideration.

# Background

1. The *Order* at issue responds to a petition filed by USTelecom seeking forbearance from six categories of rules applicable to incumbent LECs or subcategories of incumbent LECs, which USTelecom characterized as “outdated” regulations “whose costs far exceed any benefits.”[[4]](#footnote-5) Relevant here, the *Order* forbears from the “application to incumbent LECs of all remaining equal access and dialing parity requirements for interexchange services, including those under section 251(g) and section 251(b)(3) of the Act.”[[5]](#footnote-6) The Commission adopted a “grandfathering” condition allowing incumbent LEC customers who were presubscribed to third-party long distance services as of the date of the *Order* to retain equal access and dialing parity services*.*[[6]](#footnote-7)The Commission forbore from the equal access requirements on a nationwide basis, without geographic exceptions.[[7]](#footnote-8)
2. In its Petition, GCI, participating for the first time in this proceeding,[[8]](#footnote-9) asserts that the *Order* failed to adequately consider the unique equal access needs of rural Alaskans—particularly those in Alaskan bush communities that often lack basic infrastructure integration such as interconnected roads and electric grids.[[9]](#footnote-10) GCI contends the unique needs of these communities should have merited a carve-out from the nationwide scope of the *Order*.[[10]](#footnote-11) Alaska Communications and USTelecom oppose the Petition.[[11]](#footnote-12) Among other things, they assert the Petition should be denied due to GCI’s failure to participate in the underlying forbearance proceeding.[[12]](#footnote-13)

# Discussion

1. GCI’s Petition is procedurally barred because of its failure to present an adequate justification for relying on new arguments and facts in its reconsideration petition.[[13]](#footnote-14) GCI’s Petition relies on facts and arguments that were not previously presented to the Commission. The crux of GCI’s argument is that the *Order* failed to adequately consider the particular long-distance telecommunications needs of rural Alaskans. But neither GCI nor any other party previously presented arguments concerning the specific needs of rural Alaskans to the Commission. In introducing this argument, GCI relies on facts that were not previously in the record. For example, GCI asserts that as many as one-third of Alaskans rely on stand-alone long distance carriers; that several Alaskan communities are incumbent LEC islands that require interexchange carriers (IXCs) just to connect to other Alaskan communities; and that many rural Alaskan communities lack adequate mobile service.[[14]](#footnote-15)
2. A petition for reconsideration that relies on facts or arguments not previously presented to the Commission can only be granted in limited circumstances.[[15]](#footnote-16) Specifically, such a petition can only be granted if: (1) the facts and arguments “relate to events which have occurred or circumstances which have changed since [GCI’s] last opportunity to present such matters to the Commission”; (2) the facts and arguments were “unknown to [GCI] until after [its] last opportunity to present them to the Commission, and [GCI] could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity”; or (3) “[t]he Commission or designated authority determines that consideration of the facts or arguments relied on is required in the public interest.”[[16]](#footnote-17) GCI has failed to demonstrate that any of the limited circumstances provided for in the Commission’s rules have been met; accordingly its Petition is procedurally barred.
3. First, GCI cannot show that the facts and arguments on which it relies have changed following the *Order*. None of GCI’s arguments stem from new events or circumstances that arose after the 14-month-period during which the Commission considered USTelecom’s petition for forbearance.
4. Second, none of the arguments and facts presented by GCI in its petition was unknowable had it exercised ordinary due diligence. Indeed, to the contrary, as a leading provider of communications services in Alaska, GCI was particularly well-positioned to develop its contentions in advance of the Commission’s adoption of the *Order*.
5. Finally, GCI has failed to show that consideration of its new facts or arguments is in the public interest. Ultimately, GCI’s justification for its petition is simply that it “did not anticipate such sweeping national relief.”[[17]](#footnote-18) But Commission decisions cannot stand or fall based on a party’s disappointed expectations, especially a party that, based on those same expectations, opted not to participate in a proceeding.[[18]](#footnote-19) In that regard, it would not serve the public interest for us to countenance refraining from participation in a high-profile proceeding only to raise new arguments after the decision is announced.[[19]](#footnote-20)
6. To further justify seeking reconsideration, GCI asserts that rural Alaska is generally served by small rate-of-return incumbent LECs without interexchange facilities and that there are only three IXCs that connect isolated villages to each other.[[20]](#footnote-21) GCI also contends that “[m]any Alaskan consumers still rely on equal access functionalities. . . and in many cases they have no other option—or at least are less likely to have such an option than the Commission assessed for consumers elsewhere.”[[21]](#footnote-22) Notwithstanding GCI’s failure to raise any of these Alaska-specific arguments in the underlying proceeding, GCI’s arguments have no merit. In fact, the Commission addressed on a nationwide basis the concerns driving GCI’s arguments.[[22]](#footnote-23) In asserting that the facts in Alaska do not warrant forbearance, GCI disregards the Commission’s analysis of the structural changes in the stand-alone long distance market.[[23]](#footnote-24) As the Commission concluded, stand-alone long-distance has long been a “fringe” market, and there is no evidence of growing demand for such services.[[24]](#footnote-25) Similarly, the Commission already considered the impact of its decision on consumer protection and convenience.[[25]](#footnote-26) Indeed, this was the entire rationale for the grandfathering provision in the *Order*.[[26]](#footnote-27)
7. Based on the evidence before it, the Commission evaluated whether to grant forbearance at the national level,[[27]](#footnote-28) and the analysis above therefore is sufficient for the Bureau to reject GCI’s argument that consideration of its new facts or arguments is in the public interest. Nevertheless, the Bureau additionally concludes that GCI’s Alaska-specific arguments fail to warrant a different conclusion. Data show that around the time of the *Order*, interexchange dialing parity played at most a limited role in the Alaskan voice services marketplace. Specifically, “[d]ata from 2013 shows that a meager 4.1 percent of Alaskan households used only a landline telephone, and 10.9 percent used a landline mostly – a total of just 15 percent of households in the state.” [[28]](#footnote-29) GCI even concedes that “[s]ome Alaskan incumbent LECs still have not implemented equal access at all, and others have not implemented equal access in every community they serve.” [[29]](#footnote-30) Insofar as GCI is correct to estimate based on its own subscribers that “at least one-third of Alaskan consumers” in rural areas “still rely on stand-alone long distance carriers,” these individuals will be able to retain their third-party carrier pursuant to the grandfathering provision in the *Order*.[[30]](#footnote-31) And GCI has not shown any evidence of growing demand for standalone long-distance that would significantly differentiate rural Alaska from other parts of the country on a forward-looking basis.[[31]](#footnote-32) The Commission already weighed the “highly limited and declining benefits” of ongoing interexchange equal access and dialing parity against the benefits of “reduc[ing] regulatory burdens and reduc[ing] regulatory asymmetry” and thereby “promot[ing] competitive market conditions,” and it concluded that forbearance was warranted.[[32]](#footnote-33)
8. Further, and as a separate and independent basis for this disposition, insofar as section 1.106 applies to the Petition,[[33]](#footnote-34) GCI has failed to meet its burden to show “good reason” why it was not possible to have participated earlier in the proceeding.[[34]](#footnote-35) Instead, GCI merely claims it did not anticipate and was surprised by the scope of the *Order*.[[35]](#footnote-36) Surprise at the outcome is not a “good reason” excusing non-participation in a proceeding. It was “possible for [GCI] to participate in the earlier stages of the proceeding”; GCI chose not to.
9. In conclusion, the Petition does not warrant consideration by the Commission. Accordingly, the Bureau denies it under delegated authority.[[36]](#footnote-37)

# Ordering ClauseS

1. Accordingly, **IT IS ORDERED**, pursuant to the authority contained in sections 10 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 160 and 405, and 47 CFR §§ 0.91, 0.291, 1.106, and 1.429, that General Communication, Inc.’s Petition for Reconsideration filed January 27, 2016, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith

Acting Chief

Wireline Competition Bureau

1. General Communication, Inc. Petition for Reconsideration, WC Docket Nos. 14-192, 11-42, and 10-90 (filed Jan. 27, 2016) (Petition). [↑](#footnote-ref-2)
2. *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks, Lifeline and Link Up Reform and Modernization, Connect America Fund*, Memorandum Opinion and Order, 31 FCC Rcd 6157 (2015) (*Order*). [↑](#footnote-ref-3)
3. Petition at 1-2; General Communication, Inc.’s Reply to Oppositions to Petition for Reconsideration, WC Docket Nos. 14-192, 11-42, and 10-90, at 1-2 (filed Feb. 16, 2016) (Reply). [↑](#footnote-ref-4)
4. *Orde*r, 31 FCC Rcd at 6158, para. 1 (citing *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, WC Docket No. 14-192 (filed Oct. 6, 2014)). [↑](#footnote-ref-5)
5. *Orde*r, 31 FCC Rcd at 6182, para. 46. [↑](#footnote-ref-6)
6. *Order*, 31 FCC Rcd at 6182, para. 46. [↑](#footnote-ref-7)
7. *Order*, 31 FCC Rcd at 6182, para. 46. [↑](#footnote-ref-8)
8. Petition at 7-8; Reply at 6. GCI does not dispute that it did not participate in the forbearance proceeding. GCI notes that it is a member of the American Cable Association (ACA), which did participate, but it does not argue that ACA’s participation is equivalent to its own participation. *See Cox Cable Communications, Inc.*, Memorandum Opinion and Order, 1 FCC Rcd 561, 563, para. 11 n.9 (1986) (noting that a party participating through a trade association would not necessarily have standing as a party for purposes of section 1.106). [↑](#footnote-ref-9)
9. *See* Petition at 2-7; Reply at 1-4. [↑](#footnote-ref-10)
10. Petition at 8-9; Reply at 2-4. [↑](#footnote-ref-11)
11. Opposition of Alaska Communications, WC Docket Nos. 14-192, 11-42, and 10-90 (filed Feb. 8, 2016) (ACS Opposition); Opposition of the United States Telecom Association, WC Docket Nos. 14-192, 11-42, and 10-90 (filed Feb. 8, 2016) (USTelecom Opposition). [↑](#footnote-ref-12)
12. ACS Opposition at 2-4; USTelecom Opposition at 5. They also contend that (1) rural Alaskans are not substantially different than rural customers elsewhere; (2) the grandfathering condition in the *Order* will adequately protect existing customers; and (3) there is no evidence to indicate growing demand for stand-alone long distance. ACS Opposition at 5-9; USTelecom Opposition at 2-5. Because we find that GCI’s petition is procedurally barred, the Bureau need not reach these arguments. [↑](#footnote-ref-13)
13. 47 CFR §§ 1.106(c), 1.429(b)(1)-(3). [↑](#footnote-ref-14)
14. Petition at 2-4, 9. [↑](#footnote-ref-15)
15. 47 CFR §§ 1.106(c), 1.429(b)(1)-(3). [↑](#footnote-ref-16)
16. *Id.*  [↑](#footnote-ref-17)
17. Petition at 8-9. [↑](#footnote-ref-18)
18. *See Comm. for Cmty. Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984) (“If we were to require the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission’s—and indeed the public’s—interest in finality of licensing decisions would be eviscerated.”). [↑](#footnote-ref-19)
19. *Cf. Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (“Appellant took its chance that the Commission, on the existing record, would [find in its favor]. Now that the decision has gone against it, the appellant wants a chance to persuade the Commission with a supplemental record. We cannot allow [a party] to sit back and hope that a decision will be in its favor and then, when it isn’t, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.”). [↑](#footnote-ref-20)
20. Petition at 2-5. [↑](#footnote-ref-21)
21. Petition at 8-9 (stating that GCI estimates that at least *one-third* of rural Alaskan consumers still rely on stand-alone long distance carriers). [↑](#footnote-ref-22)
22. The Commission, for example, applied an analytical framework appropriate for USTelecom’s argument “that the provisions at issue here are entirely unnecessary in all geographic markets because the changing communications landscape throughout the country has rendered them outmoded and harmful as a general matter.” *Order*, 31 FCC Rcd at 6164, para. 9 (emphasis removed). [↑](#footnote-ref-23)
23. *Id.* at 6185, para. 49 (finding that the record reflects the trend toward all-distance voices services). [↑](#footnote-ref-24)
24. *See id.*; s*ee also* ACS Opposition at 9 (“The Commission’s predictive judgment that ‘few, if any, new customers would choose to presubscribe to stand-alone long distance service’ is valid.” (quoting *Order*, 31 FCC Rcd at 6188, para. 53)); USTelecom Opposition at 5. [↑](#footnote-ref-25)
25. Petition at 10. [↑](#footnote-ref-26)
26. *Order*, 31 FCC Rcd at 6187-89, paras. 52-54. [↑](#footnote-ref-27)
27. *See Order*, 31 FCC Rcd at 6164, 6184-89, paras. 9, 49-54. [↑](#footnote-ref-28)
28. ACS Opposition at 6-7; *see also id.* (stating that “more than half of Alaskan households rely primarily or exclusively on a voice service option that has never offered equal access or dialing parity” (emphasis removed)). [↑](#footnote-ref-29)
29. Petition at 11. [↑](#footnote-ref-30)
30. *Id.* at 9; *see also id.* at 6 (“GCI estimates that it is the presubscribed IXC for perhaps one-third of rate-of-return customers in Alaska.”). [↑](#footnote-ref-31)
31. *Cf.* USTelecom Opposition at 3 (stating that “[c]onsistent with this trend of steadily declining landline usage, the number of new consumers who will have a need or desire to subscribe to a stand-alone long distance service is likely miniscule”). [↑](#footnote-ref-32)
32. *See Order*, 31 FCC Rcd at 6166-87, para. 51. [↑](#footnote-ref-33)
33. GCI submitted its petition pursuant to section 405 of the Communications Act and section 1.106 of the Commission’s rules. *See* Petition at 1 & n.1. [↑](#footnote-ref-34)
34. Section 1.106(b)(1) of the Commission’s rules states that if a petition for reconsideration “is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person’s interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.” 47 CFR § 1.106(b)(1). [↑](#footnote-ref-35)
35. Petition at 7-9; Reply at 6. [↑](#footnote-ref-36)
36. 47 CFR §§ 1.106(b)(1), (c), (p), 1.429(b)(1)-(3), (l). [↑](#footnote-ref-37)