

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| GENERAL COMMUNICATION, INC., |) | |
| Complainant, |) | |
| |) | |
| v. |) | EB-00-MD-016 |
| |) | |
| ALASKA COMMUNICATIONS SYSTEMS |) | |
| HOLDINGS, INC. and ALASKA |) | |
| COMMUNICATIONS SYSTEMS, INC. |) | |
| d/b/a ATU TELECOMMUNICATIONS d/b/a |) | |
| ANCHORAGE TELEPHONE UTILITY, |) | |
| Defendants. |) | |

ORDER

Adopted: March 29, 2001

Released: April 4, 2001

By the Commission:

1. In this Order, we grant the limited Request for Stay filed by ACS of Anchorage, Inc. (f/k/a Alaska Communications Systems, Inc., d/b/a ATU Telecommunications d/b/a Anchorage Telephone Utility) (“ACS”).¹ The stay is conditioned on ACS’s payment of an amount equal to the damages that the Commission ordered ACS to pay to complainant General Communication, Inc. (“GCI”), including prejudgment interest, into an interest-bearing escrow account.²

2. ACS seeks to stay the effectiveness of only the damages aspect of our January 24 Order, in which we found that ACS exceeded its permissible rate of return for the 1997-1998 monitoring period.³ On February 7, 2001, ACS filed a petition for review of the January 24 Order

¹ ACS of Anchorage, Inc. (f/k/a Alaska Communications Systems, Inc.) Request for Stay, File No. EB-00-MD-016 (filed Feb. 28, 2001) (“Request for Stay”).

² *General Communication, Inc. v. Alaska Communications Systems Holdings, Inc., et al.*, Memorandum Opinion and Order, FCC 01-32 (rel. Jan. 24, 2001) (“January 24 Order”) at ¶ 77.

³ In our January 24 Order, we required ACS: 1) to pay GCI \$2,765,371, plus prejudgment interest, within 90 days; 2) to modify its monitoring report for the period in question; and 3) until otherwise ordered, to allocate to the intrastate jurisdiction for separations purposes the costs of carrying internet service provider (“ISP”) traffic, and to count each minute of an intraoffice call as two dial equipment minutes (“DEMs”). January 24 Order at ¶¶ 77-79. ACS does not seek to stay the latter two aspects of the January 24 Order. Request for Stay at 3.

with the United States Court of Appeals for the District of Columbia Circuit. ACS requests that the stay remain in effect until the Court of Appeals resolves its petition for review.⁴ GCI opposes ACS's stay request, arguing primarily that ACS has failed to show the requisite irreparable harm.⁵ Moreover, although GCI argues generally that it (GCI) will be harmed if it does not receive its damages award pending resolution of ACS's appeal, GCI offers no specific evidence of any such harm.⁶

3. In an analogous case, we stayed the effectiveness of a refund order pending an appeal of the order, conditioned on the movant's payment of the refund amount into an interest-bearing escrow account.⁷ Although we generally apply a four-part test in determining whether to grant a stay request,⁸ we declined to follow that test strictly in *VITELCO*, because we concluded that all parties' interests were protected by the movant's payment of an amount sufficient to cover the refund awarded into an interest-bearing escrow account.⁹ Similarly, federal courts stay the payment of damages awards as a matter of right pending an appeal if the stay applicant posts an appropriate bond.¹⁰

4. Consistent with our prior precedent and with the general rule in federal court, we grant ACS's Request for Stay, conditioned on ACS's payment of an amount equal to the damages award, including prejudgment interest, in an interest-bearing escrow account pending the Court of

⁴ Request for Stay at 1, 9.

⁵ Opposition of General Communication, Inc. to the Request for Stay of ACS of Anchorage, Inc., File No. EB-00-MD-016 (filed Mar. 15, 2001) ("GCI Opposition") at 4-5.

⁶ GCI Opposition at 7. GCI does not contend, for example, that its ability to provide services will in any way be affected if it does not receive the damages award on the date originally ordered by the Commission.

⁷ *Virgin Islands Telephone Corporation Tariff F.C.C. No. 1 Switched and Special Access Rate Adjustments*, 7 FCC Rcd 4235, 4236-37, ¶ 13 (1992) ("*VITELCO*").

⁸ See, e.g., *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 123, 124, ¶ 6 (1992) (stating that parties may obtain a stay if they establish that: 1) they are likely to succeed on the merits on appeal; 2) they would suffer irreparable injury absent a stay; 3) a stay would not substantially harm other parties; and 4) a stay would serve the public interest (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified, *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

⁹ *VITELCO*, 7 FCC Rcd at 4236-37, ¶ 13; see also *Heritage Cablevision Associates of Dallas, L.P. And Texas Cable TV Association, Inc. v. Texas Utilities Electric Company*, 8 FCC Rcd 373, 374, ¶ 14 (Comm. Carr. Bur. 1993) (effectively staying a requirement that defendant refund amounts to complainant and requiring defendant to pay the refund amounts into an interest-bearing escrow account pending resolution of defendant's appeal). This does not mean that applicants for stays of other kinds of Commission decisions are relieved of the burden of meeting the traditional four-part test for a stay.

¹⁰ See, e.g., *American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 87 S.Ct 1, 3 (1966) (holding that a party taking an appeal from a federal district court is entitled to a stay of a money judgment as a matter of right if the party posts a bond in accordance with F.R.C.P. 62(d)).

Appeal's resolution of ACS's petition for review.¹¹ This will protect the interests of GCI in ensuring that adequate funds are available to it, including interest, should ACS not prevail on appeal.¹²

5. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, that ACS's request for stay is GRANTED, conditioned on ACS filing with the Commission within fourteen days of the release of this order verified proof that ACS has placed the amount of the damages award set forth in the Commission's January 24, 2001 Order, including prejudgment interest, in an escrow account accruing interest at prevailing market rates. The stay will remain effective pending resolution by the Court of Appeals of ACS's Petition for Review of the Commission's January 24 Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹¹ GCI's contention that the Commission has refused to grant stays despite offers to place funds into escrow is not persuasive. GCI Opposition at 8. In one of the two decisions GCI cites to support its argument, there is no indication that the stay movant offered to place any funds in escrow. *Investigation of Equal Access Date Elements Filed Pursuant to Waivers of Part 69*, Memorandum Opinion and Order, 1988 FCC LEXIS 658 (Comm. Carr. Bur. 1988). The second decision involved a request to stay the effectiveness of a new rule governing price-cap carriers. Only two of many affected carriers offered to place funds into escrow to account for the potential amounts they would have to pay customers once the new rule into effect. None of the other carriers affected by the new rule made the same offer to protect the interests of their affected customers. *Price Cap Regulation of Local Exchange Carriers*, Order, 10 FCC Rcd 11979, 11985 (1995).

¹² We emphasize that, by granting the limited Request For Stay, we do not agree with ACS that ACS is likely to prevail on the merits on any of the issues ACS addresses in its Request for Stay. Request for Stay at 4-7. However, because we have decided to grant the stay for other reasons, it is not necessary to address ACS's substantive arguments in this Order.