

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

In the Matter of
General Communication, Inc.
Application for a License to Land and Operate
in the United States a Digital Submarine
Cable System Extending Between the
Pacific Northwest United States and Alaska
File No. SCL-LIC-19980602-00008
(Old File No. SCL-97-003)

ORDER ON REVIEW

Adopted: February 1, 2001

Released: February 8, 2001

By the Commission: Commissioner Furchtgott-Roth approving in part, dissenting in part, and
issuing a statement.

I. Introduction

1. The Commission has before it three applications for review of an order of the
International Bureau's Telecommunications Division (Division) granting authority to General
Communications, Inc. (GCI) to land and operate the Alaska United Cable System (Alaska
United). The Applications for Review raise both substantive and procedural arguments. With
respect to the substantive arguments, we have considered the arguments raised in the Applications
for Review and find that the Division staff properly decided the matters before it. Moreover, for
the reasons discussed below, we conclude that none of the Applicants' procedural arguments
warrant revisiting the Division's decision. We therefore deny the Applications for Review and
affirm the Division's decision for the reasons stated therein.

II. Background

2. The Division authorized Alaska United as a non-common carrier submarine fiber
optic cable system, to extend between the Pacific Northwest United States and Alaska. The
Division authorized Alaska United to operate a fiber optic cable system consisting of three
undersea cable segments, with each segment consisting of a pair of fibers in the following manner:
segment 1 extending between south central Alaska and the Pacific Northwest United States;
segment 2 extending between south central Alaska and Juneau, Alaska; and segment 3 extending

1 See General Communications Inc., Application for a License to Land and Operate in the United States a
Digital Submarine Cable System Extending Between the Pacific Northwest United States and Alaska, File No.
SCL-97-003, Cable Landing License, 12 FCC Rcd 18292 (Tel. Div., Int'l Bur. 1997) (GCI Alaska Cable Order).

between Juneau, Alaska and the Pacific Northwest United States.<sup>2</sup>

3. ATU-Long Distance, Inc. (ATU-LD), TelAlaska Long Distance (TelAlaska-LD)/ASTAC Long Distance, Inc. (ASTAC-LD), and Alaska Network Systems, Inc. (ANS) (Applicants)<sup>3</sup> each filed Applications for Review of the Division Order. GCI filed an Opposition to the Applications for Review, and ATU-LD, TelAlaska-LD/ASTAC-LD, and ANS each filed replies to GCI's Opposition.

### III. Discussion

4. Substantive Argument/Non-Common Carrier Status. Applicants' principal substantive argument before the Division (and one that they repeat here) is that GCI should have been required to operate the cable on a common carrier basis in order to prevent certain alleged competitive harms. We agree with the Division's analysis and conclusion that the availability of other telecommunications facilities/service capacity on the route, along with the recordkeeping requirement imposed on the license and the Commission's ability to change the regulatory status of the cable to common carrier, reasonably obviates concerns about the alleged harms raised by Applicants. These factors make it unnecessary for the Commission to require that periodic reporting be made available for public inspection, and not merely upon request by the Commission, as some parties request.<sup>4</sup> We also note that the primary economic argument relied upon in pleadings before the Bureau in opposing the initial grant of the cable landing license on a non-common carrier basis (and what Applicants repeat here) was that there was not, and would not be, sufficient facility/service capacity on the route to allay competitive harms. This key allegation has been proven wrong. Significantly, the Northstar Cable System was, in fact, built and placed into operation, contrary to arguments raised below that the cable would not be placed into service and could not be relied upon in a competitive assessment.<sup>5</sup> The Commission can rely upon both existing and planned facilities/services in making competitive assessments as was done here for the purpose of reviewing whether the applicable law justified a grant of the application. As the Supreme Court has stated: "[a] forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency."<sup>6</sup> We also find

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<sup>2</sup> See *GCI Alaska Cable Order* at paras. 1, 4.

<sup>3</sup> See Application for Review of ATU-Long Distance, Inc., File No. SCL-97-003, filed Dec. 8, 1997 (ATU-LD Application for Review); Application for Review of TelAlaska Long Distance, Inc., and ASTAC Long Distance, Inc., File No. SCL-97-003, filed Dec. 8, 1997 (TelAlaska-LD/ASTAC/LD Application for Review); Application for Review of Alaska Network Systems, Inc., File No. SCL-97-003 (filed Dec. 8, 1997) (ANS Application for Review).

<sup>4</sup> See Telalaska-LD/ASTAC-LD Application for Review at 14-15; ANS Application for Review at 8.

<sup>5</sup> See *Ex Parte* Letter from Phillip V. Permut, Attorney for WCI Cable, Inc., to Elizabeth Nightingale, Federal Communications Commission, International Bureau (Sept. 8, 1999).

<sup>6</sup> *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978) (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

that the Division correctly applied the Commission's longstanding private submarine cable policy, and the court's decision in *NARUC I*<sup>7</sup> in analyzing GCI's initial application.

5. Procedural Arguments/Sufficiency of Record. Applicants also raise issues regarding the sufficiency of the record on which the Division based its decision to grant GCI's license, which, for the reasons discussed below, we find to be without merit.

6. We disagree with ATU-LD's argument that the Division erred in denying its request for a 30 day extension to submit economic evidence to supplement its legal analysis, and in setting the comment cycle for the period it did.<sup>8</sup> Specifically, ATU-LD argues that the Division committed prejudicial error under Section 1.115(b)(2)(v) of the Commission's rules by failing to grant ATU-LD time to present an economist's report on Alaska market conditions.<sup>9</sup> ATU-LD attaches to its application for review the economist's report it had hoped to file prior to the Commission issuing an Order on GCI's application.<sup>10</sup> In addition, ANS argues that the comment cycle was too short and the *ex parte* process was insufficient, particularly in light of alleged misrepresentations by GCI.<sup>11</sup> As the Division noted in denying ATU-LD's request for an extension, the main concern raised in this proceeding is that GCI will have an incentive and ability to engage in anticompetitive conduct by denying competing carriers access to capacity on Alaska United. The Division properly addressed this concern in the Order below, and we agree with the Division's determination that an extension was not necessary. In addition, the Commission's ability to reclassify the cable from non-common carrier to common carrier status, if necessary, will help ensure that GCI does not engage in anticompetitive behavior.

7. We also find no merit in ANS's argument that the record upon which the Division based its decision did not contain the substance of all of GCI's *ex parte* presentations to Commission staff,<sup>12</sup> and that the Division failed to address the serious issue of misrepresentation by GCI.<sup>13</sup> Specifically, ANS asserts that there was no *ex parte* filing in the record memorializing GCI's conversation with International Bureau staff in which it corrected a misrepresentation about the public notice of GCI's application. In response to ANS's argument that there was no public record of an *ex parte* presentation in which GCI corrected the misrepresentation, GCI asserts that no such *ex parte* notification was required because, at the time, GCI was the only party to the

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<sup>7</sup> See *GCI Alaska Cable Order* at paras. 7, 14-15; *Nat'l Ass'n of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630 (D.C. Cir.), (*NARUC I*) cert. denied, 425 U.S. 992 (1976).

<sup>8</sup> See *GCI Alaska Cable Order*, 12 FCC Rcd 18292 at paras. 37-38.

<sup>9</sup> See ATU-LD Application for Review at 4-7.

<sup>10</sup> See *id.*, Attachment 4, Affidavit of William E. Taylor.

<sup>11</sup> See ANS Application for Review at 3.

<sup>12</sup> See *id.* at 4-5

<sup>13</sup> See *id.* 2-4.

proceeding.<sup>14</sup> We agree with GCI that no *ex parte* notification of GCI's correction of the misrepresentation (which, in any event, dealt with a fact that was in the Commission staff's own knowledge) was required because, at the time, GCI was the only party to this proceeding.<sup>15</sup> The record does not reflect the exact date on which GCI communicated with Commission staff to correct GCI's misstatement concerning the issuance of a public notice announcing the filing of its application. Nevertheless, GCI's communication preceded the issuance of the public notice announcing the filing of its application and, in turn, the filing of Alascom's and ATU-LD's comments in this proceeding on October 3, 1997. With the filing of these comments, GCI was required to comply with the disclosure requirements of Section 1.1206.<sup>16</sup>

8. We also find no merit in ANS's allegation that there is no documentation in the public record regarding meetings between GCI and International Bureau staff at which proposed reporting conditions were discussed. ANS generally argues that GCI failed to file summaries of *ex parte* presentations with the Commission for inclusion in the public record, and specifically asserts that there is no documentation in the public record regarding meetings between GCI and Division staff at which proposed reporting conditions were discussed.<sup>17</sup> GCI responds that it indeed served all parties to the proceeding with copies of each of its written submissions to the Division and filed memoranda summarizing the substance of all oral *ex parte* meetings that were not already reflected in its written filings.<sup>18</sup> We conclude that GCI did not violate the Commission's *ex parte* rules. The filed reports of that meeting at which ANS and other interested parties were present indicate that possible conditions had been previously discussed.<sup>19</sup> Indeed, possible conditions had been an issue raised by ATU-LD at the outset, in its comments on GCI's application,<sup>20</sup> and they had also been addressed in GCI's reply comments.<sup>21</sup> Thereafter, GCI made

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<sup>14</sup> See GCI Oppositions to Applications for Review at 18-20.

<sup>15</sup> See 47 C.F.R. § 1.1206 (a), note 2 (stating that, "[i]n a permit-but-disclose proceeding involving only one 'party,' as defined in § 1.202(d) of this subpart, the party and the Commission may freely make presentations to each other and need not comply with the disclosure requirements of paragraph (b) of this section.").

<sup>16</sup> See 47 C.F.R. § 1.1202(d) (1997) (defining a "party" to a proceeding).

<sup>17</sup> See ANS Application for Review at 4-5. ANS asserts that it learned of such meetings at a November 3, 1997 *ex parte* meeting to which ANS and others were invited by Division staff. ANS asserts: "[a]t [the November 3 meeting], as reflected in filed reports of that meeting, the staff stated that meetings had been held with representative[s] . . . of GCI [and that a]mong the matters discussed were proposed reporting conditions." See *id.* at 4.

<sup>18</sup> See GCI Opposition to Applications for Review at 20 and n.75, citing 47 C.F.R. § 1.1206(b)(2).

<sup>19</sup> See, e.g., Letter from Alan Fishel, representing Alaska Northstar Communications, LLC, to William Caton, Acting Secretary, Federal Communications Commission, File NO. SCL-97-003 (Nov. 4, 1997); Letter from Francis Young, representing Alaska Network Services, to William Caton, Acting Secretary, Federal Communications Commission, File NO. SCL-97-003 (Nov. 4, 1997).

<sup>20</sup> See Comments of ATU-LD, File No. SCL-97-003, filed Oct. 3, 1997, at 6-7 (ATU-LD Comments to GCI Application).

an oral *ex parte* presentation concerning this matter and filed the necessary summary of its presentation.<sup>22</sup> In that filing, GCI summarized arguments delivered in its oral presentation and stated that "[a]ll other points raised by counsel to GCI are reflected in GCI's written filings in this proceeding."<sup>23</sup> The *ex parte* rules require disclosure of an oral presentation only to the extent that it contains data or arguments not already reflected in a party's written filings.<sup>24</sup> Because ANS has made no showing of any new information concerning the imposition of conditions in this proceeding, and because GCI otherwise has complied in all respects with the *ex parte* rules, these contentions warrant no further consideration.

#### IV. Conclusion

9. For the reasons discussed above, we deny Applicants' Applications for Review and affirm the Division's decision below.

#### V. Ordering Clauses

10. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 4(j) of the Act, 47 U.S.C. §§ 154(i), 154(j), and Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), that the Applications for Review filed by ATU-Long Distance, Inc., TelAlaska Long Distance/ASTAC Long Distance, Inc., and Alaska Network Systems, Inc. Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>21</sup> See Reply Comments of GCI, File No. SCL-97-003, filed Oct. 6, 1997, at 7-9.

<sup>22</sup> See Notice of Oral *Ex Parte* Presentation by GCI, File No. SCL-97-003, filed Oct. 31, 1997.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> See 47 C.F.R. § 1.1206(b)(2).

**STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH  
APPROVING IN PART AND DISSENTING IN PART**

*Re: General Communications, Inc. Application for a License to Land and Operate in the United States a Digital Submarine Cable System Extending Between the Pacific Northwest United States and Alaska, Order on Review, File No. SCL-LIC-19980602-00008 (rel. February 2, 2001).*

Perhaps the most troubling aspect of today's decision is that it took three years for the Commission to reach it. Parties are entitled to the expectation that their Commission business will be resolved in a prompt manner. By any measure, today's order fails that test. Indeed I wish to apologize personally to GCI, ATU-Long Distance, Inc., TelAlaska Long Distance/ASTAC Long Distance, Inc., and Alaska Network Systems, Inc. They deserved better treatment from their government. Going forward, it is my hope that the Commission will move aggressively to devote the resources necessary to insure that parties have their claims handled in a reasonable time.

As for the merits, I respectfully dissent in part from today's item. It has been my longstanding view that the Commission lacks authority over undersea cable landing licenses.<sup>1</sup> The Cable Landing License Act (CLLA) provides that "[n]o person shall land or operate in the United States any submarine cable directly or indirectly . . . connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States."<sup>2</sup> As I have stated before, I do not believe the president is permitted to delegate this authority to an independent agency, such as the FCC. Nevertheless, I concur with today's decision to the extent that it concludes that GCI did not violate the *ex parte* rules.

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<sup>1</sup> See Statement of Commissioner Harold Furchtgott-Roth Concurring in Part and Dissenting in Part, *GTE Corporation and Bell Atlantic Corporation, Applications for Transfer of Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum and Order*, CC Docket No. 98-184 (rel. June 16, 2000); Dissenting Statement of Commissioner Harold Furchtgott-Roth, *Review of Commission Consideration of Applications under the Cable Landing Licensing Act*, IN Docket No. 00-106 (rel. June 8, 2000); Public Statement of Commissioner Harold Furchtgott-Roth, *Re: Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/Statements/sthfr932.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr932.html) (July 9, 1999).

<sup>2</sup> 47 U.S.C. § 34.