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

In the Matter of )  
 )  
General Communication, Inc. ) File No. SCL-97-003  
 )  
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 )

CABLE LANDING LICENSE

Adopted: November 7, 1997

Released: November 7, 1997

By the Chief, Telecommunications Division:

I. Introduction

1. In this Order, we grant the application of General Communication, Inc. ("GCI") under the Cable Landing License Act for authority to land and operate a non-common carrier submarine fiber optic cable system to be called the "Alaska United Cable System" ("Alaska United") extending between the Pacific Northwest United States and Alaska. We reject contentions that GCI should operate the cable system on a common carrier basis.

2. We find that GCI does not plan to offer capacity on a common carrier basis, nor do circumstances warrant imposing such a condition on GCI. We retain, however, the right to change GCI's regulatory status pertaining to the cable system to common carrier should conditions change in the future. In addition, to help us determine whether a change is necessary, we impose a recordkeeping requirement on GCI. We also find that GCI's proposed ownership and operation of the cable system does not make it a "telecommunications carrier" under the Telecommunications Act of 1996 ("1996 Act"), and thus its operation of the cable system is not subject to the requirements imposed by the 1996 Act on telecommunications carriers. Accordingly, we grant GCI's application subject to the conditions listed below.

## II. Application

3. GCI is a company organized and existing under the laws of Alaska. GCI proposes to operate Alaska United as a non common carrier system in which capacity will not be sold or leased indifferently to the user public. GCI plans to construct the cable in the summer of 1998.

4. Alaska United will consist of three undersea cable segments. Each of the three segments will consist of a pair of fibers. Segment 1 will extend between south central Alaska and the Pacific Northwest United States. Segment 2 will extend between south central Alaska and Juneau, Alaska. Segment 3 will extend between Juneau, Alaska and the Pacific Northwest United States. GCI states that the need for fiber optic telecommunications services between Alaska and the Lower 48 United States ("Lower 48") justifies the need for Alaska United in terms of additional capacity, redundancy, security, and restoration. GCI states that Alaska United will significantly expand the fiber capacity connecting the Lower 48 by expanding the range of high speed digital services that will be available in the Alaska market.

## III. Comments

5. The application was placed on public notice on September 26, 1997. Within the pleading cycle, Alascom, Inc. ("Alascom") and ATU Long Distance, Inc. ("ATU-LD") filed comments. GCI filed reply comments to which ATU-LD replied. After the close of the pleading cycle, ATU-LD filed a "Motion for 30 Day Period in Which to File Economic Evidence of Need for Safeguards Against Discrimination," which GCI opposed. We also received and considered many ex parte filings.

6. Pursuant to Section 1.767(b) of the Commission's rules, the Cable Landing License Act, and Executive Order No. 10530, we informed the Department of State of the application. The Department of State, after coordinating with the National Telecommunications and Information Administration and the Department of Defense, stated that it has no objection to issuance of the cable landing license.

## IV. Discussion

### A. Private Submarine Cable Policy

7. GCI requests a license to land and operate a non-common carrier submarine cable system under the Cable Landing License Act and the Commission's private submarine cable policy. In 1985, the Commission adopted its private submarine cable policy to promote competition in the provision of international transmission facilities. Pursuant to this policy, the Commission has granted numerous licenses to land and operate private cable systems.

8. ATU-LD argues that the proposed application should be granted on a common carrier basis. ATU-LD argues that GCI qualifies for such treatment under both the Commission's traditional NARUC I analysis as well as under the 1996 Act. ATU-LD asserts that GCI's description of the

types of services it will offer qualifies GCI as a "telecommunications carrier" under the 1996 Act.

9. Further, ATU-LD contends that alternative sources of capacity are unlikely to be available either in a timely fashion or at reasonable prices. ATU-LD states that it has had "great difficulty" obtaining submarine cable capacity on the existing Alaska Spur submarine cable on the Alaska route and has filed a complaint with the Commission against Alascom, Inc., d/b/a AT&T Alascom, the allocator and a user of the Alaska Spur. ATU-LD also contends that no fiber optic cable exists between the Lower 48 and the parts of Alaska that GCI proposes to serve (i.e., Juneau and Valdez) and that the satellite and terrestrial alternatives to fiber provide inferior quality and remain priced at a premium. ATU-LD also argues that if the Commission grants GCI's application on a non-common carrier basis, the Commission should detail the conditions under which service can be provided.

10. A number of other commenters agree with ATU-LD. They argue that GCI, as a carrier in Alaska, has the incentive and ability to engage in discriminatory practices. To ensure fair competition on this route, the Commission should either regulate GCI as a common carrier or apply certain safeguards.

11. There is no dispute in the record that additional capacity is needed on this route. GCI argues, however, that this fact alone does not require common carrier regulation of the proposed cable system. GCI states that the Commission has previously determined the benefits of non-common carrier submarine cable facilities in the Alaska telecommunications market at the time it authorized the Alaska Northstar cable system. GCI argues that no reasons exist for the Commission to change the determinations about the Alaska route that it recently made. GCI contends that the Commission has a clear policy of the rights, duties, and obligations of non-common carrier submarine cable operators. GCI also states that it does not qualify as a "telecommunications carrier" under the 1996 Act because it intends to make capacity on Alaska United available only to a "significantly restricted class of users." Finally, GCI argues that it must receive an authorization that "places [GCI] in the same competitive position" as Alaska Northstar Communications, L.L.C. ("ANC"), the licensee of another non-common carrier cable on this route. If not, GCI argues it could suffer financial harm.

12. In determining the appropriate regulatory status of the proposed cable, our first inquiry is whether GCI would be acting as a "telecommunications carrier" under the 1996 Act. The 1996 Act defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Thus, we must determine in this case whether GCI will offer a telecommunications service for a fee to such class of users as to be "effectively available directly to the public."

13. The legislative history of the 1996 Act indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services. The 1934 Act defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire . . . ." The Commission's rules define a "communication common carrier" as "any person engaged in rendering communication for hire to the public" and the courts, including NARUC I, have held that the indiscriminate offering of a service to the public is an essential element of common carriage. Thus, we look to precedent to determine if GCI will provide a telecommunications service for a fee to such class of users as to be "effectively available directly to the public."

14. In the NARUC I decision, the court applied a two-part test to determine when an operation should be classified as common carrier: "[W]e must inquire, first, whether there will be any legal compulsion . . . to serve [the public] indifferently, and if not, second, whether there are reasons, implicit in the nature of . . . [the] operations to expect an indifferent holding out to the eligible user public." Thus, for the second prong, we must determine whether GCI will make capacity available to the public indifferently.

15. In examining the first prong of the test, the Commission generally has focused on the availability of alternative common carrier facilities in assessing whether to require that a proposed cable be offered on a common carrier basis. For example, in granting a non-common carrier cable landing license in the Optel decision, the Commission noted the availability of numerous terrestrial, microwave, and satellite common carrier facilities that provided cross-border services between the United States and Canada.

16. We have recently concluded that there is sufficient availability of capacity on the proposed route of Alaska United. South central Alaska is served by the Alaska Spur of the North Pacific Cable ("NPC") system, circuits on the Telstar 303 and Aurora 2 satellites, and terrestrial microwave service. Also, we recently granted two licenses to ANC for the Northstar Cable System ("Northstar") and the Northstar Cable System -- Extension ("Northstar Extension"). The Northstar will land in the Pacific Northwest United States, Juneau, and another point in south central Alaska. The Northstar Cable System -- Extension will operate between Whittier and Valdez, Alaska. Northstar has a planned capacity of approximately 5 Gbps.

17. We do not find adequate record evidence to alter our determination about the current and planned capacity on the proposed route of Alaska United. Commenters did argue that it is unclear "when or if [the Alaska Northstar cable system] will be constructed." In light of the record in this proceeding, we believe this argument is speculative and not a basis to alter our previous finding. ANC, the cable landing licensee for the Northstar cable system, has recently filed its precise landing points for the Northstar Extension. In its letter, ANC states that "[t]he installation of the Northstar Cable System - Extension is presently scheduled for late-January 1998." Accordingly, because of the sufficient availability of circuits, both actual and planned, along the proposed route of Alaska United, there is no public interest reason to require that it be operated on a common carrier

basis.

18. Regarding the second prong of the test, GCI states that capacity will not be sold indifferently to the user public. Instead, GCI states that it will make "individualized decisions in particular cases, whether and on what terms to deal," and will not undertake "to carry for all people indifferently." Thus, there is no reason to expect that capacity in the proposed cable system would be held out to the public indifferently.

19. Accordingly, we conclude that it is appropriate to license Alaska United on a non common carrier basis. In response to ATU-LD's argument that the details of providing non-common carrier service should be outlined, we do not see the need in this proceeding to once again detail the conditions when they are already articulated in several previous Commission decisions.

20. We emphasize that our decision to grant this cable landing license to GCI on a non-common carrier basis is predicated in part upon the current and planned facility alternatives on the route. Because of these alternatives, carriers and users will have viable choices other than GCI's proposed system when seeking capacity. Likewise, as the owner of a non-common carrier cable system, GCI will tailor its capacity offerings to individual customers. We note, however, that we always have the ability to change the regulatory status of this cable and any other non-common carrier cables on the same route to common carrier if the public interest so requires. Should conditions change for any reason, and the Alaska United cable becomes a potential bottleneck facility, we can exercise this option. Our ability to change the regulatory status of a non-common carrier cable also remains available for redressing anticompetitive conduct, including any concerns raised about the ability of carriers to obtain capacity on a cable. We can exercise our authority either based on our own motion or a carrier's complaint.

21. Based on the analysis above, we conclude that GCI will not offer capacity in Alaska United to the public on a common carrier basis, and that the public interest does not require that it do so. Accordingly, we find that GCI will not provide a telecommunications service for a fee to such class of users as to be "effectively available directly to the public" and thus will not be a "telecommunications carrier" under the 1996 Act.

## B. Universal Service Obligations

22. ATU-LD argues that GCI's description of its services to be supplied on Alaska United brings the proposed offerings "within the parameters of telecommunications services set forth in Section 54.703(a) which are subject to contribution requirements for the universal service support mechanisms." ATU-LD argues that non-common carriers are obligated to contribute to the universal service programs. ATU-LD also argues that, because one of GCI's senior officials has been named to the body that administers the universal service support mechanisms, GCI must contribute or a serious conflict of interest will arise.

23. GCI replies that the operation of Alaska United does not "come within the ambit of

the Commission's universal service contribution rules" because operation of the cable will be on a non-common carrier, non-retail basis. GCI also notes that universal service will be supported by the retail traffic being carried by the various companies using Alaska United.

24. The issues raised by ATU-LD with regard to the obligation to contribute to the universal service fund are outside the scope of this proceeding. The Commission, in another proceeding, has put in place a universal support system. We note that GCI has filed its Universal Service Worksheet, FCC Form 457, with the Universal Service Administrative Company on September 1, 1997. In the Universal Service Order, the Commission found that all telecommunications carriers that provide interstate telecommunications services and all providers of interstate telecommunications and all payphone service providers must contribute to the universal service fund on the basis of their end-user telecommunications revenues. The Commission specifically found that private service providers that offer interstate services to others for a fee on a non-common carrier basis must contribute to the universal service fund. We note that the Universal Service Order is currently pending on reconsideration and that GCI is subject to all Commission rules regarding universal service contributions.

#### C. Ownership and Landing Points

25. GCI has provided the ownership information required by Sections 1.767(a)(6), 63.18(e)(6), and 63.18(h) of the Commission's rules. The applicant states that GCI, a company organized and existing under the laws of Alaska, will own the entire cable system, including plant and equipment. All officers of GCI are U.S. citizens. Six directors of GCI hold interlocking directorates. With 19.39 percent, only MCI Telecommunications Corporation, a Delaware corporation, owns 10 percent or more of the equity of GCI. GCI has no foreign carrier affiliations. Thus, no foreign ownership concerns are raised by the application, and we find that there is no reason to conduct an effective competitive opportunities analysis or any reciprocity analysis pursuant to Section 2 of the Cable Landing License Act.

26. Consistent with prior decisions, we also find GCI's description that Alaska United will land in the Pacific Northwest, Juneau and south central Alaska to be sufficient to determine whether the proposed cable system would comply with the provisions of the Cable Landing License Act and Commission rules. Pursuant to Section 1.767(a)(5) of the Commission's rules, however, GCI must provide a specific description of the landing locations, including a map, no later than ninety days prior to construction. We condition this license upon final approval of the landing points. The Commission will give public notice of this description, and grant of the license will be considered final unless we issue a notice to the contrary no later than sixty days after receipt of the specific description of the landing points.

#### D. Safeguards

27. ATU-LD contends that GCI provides local and long-distance common carrier, cable television, and data communications services to more than 100,000 customers throughout Alaska. ATU-LD also contends that GCI is the monopoly cable television provider in the major Alaska

markets and that direct broadcast satellite ("DBS") is not a viable alternative. ATU-LD argues that monopoly cable television ratepayers as well as local and long-distance customers should not be burdened with any costs associated with the construction and operation of Alaska United. ATU-LD therefore requests that the Commission condition grant of GCI's authorization on a number of safeguards.

28. ANC argues that unless adequate safeguards are in place, GCI could overcharge its cable, long-distance, or common carrier customers and could therefore undercharge the customers of its cable system to the detriment of competitors. ANC argues that the Commission should require structural (i.e., those proposed by ATU-LD) or non-structural (i.e., a separate set of accounts and separate financial books and records) safeguards. ANC argues the greater protection would come from structural separation. A number of other entities agree that the Commission should impose safeguards to prevent anticompetitive conduct, including cross-subsidization. Alaska Network Services, Inc. ("ANS"), along with other commenters, argues that we should impose on GCI the same conditions that commenters argue we imposed on AT&T Submarine Systems, Inc. ("AT&T-SSI") in granting its cable landing license.

29. GCI responds that its cable television and common carrier operations have no bearing on the construction and operation of Alaska United. Moreover, GCI argues that its cable television operations are governed by an extensive statutory and regulatory framework, and its long-distance services are regulated as non-dominant.

30. We decline to impose the requested conditions on GCI. The mere fact that GCI provides other telecommunications services does not warrant separation safeguards, particularly because GCI is regulated as non-dominant in its provision of telecommunications services. In granting other non-common carrier submarine cable landing licenses, we have not imposed structural separation requirements. We also note that we did not impose on AT&T-SSI proposed conditions that a party argued would prevent anticompetitive conduct.

31. At the time of our AT&T-SSI Order, AT&T-SSI was an affiliate of AT&T Corp. In response to assertions in that record that AT&T-SSI could discriminate in favor of its common carrier affiliates, AT&T-SSI stated that "all customers, whether affiliated with AT&T-SSI or not, would be charged the current market price for capacity in the proposed system." AT&T-SSI also stated that "failure to do so would violate the Commission's affiliate transaction and IRU rules."

32. In finding that AT&T-SSI could operate the system on a non-common carrier basis, we noted that notwithstanding AT&T-SSI's ability as a non-common carrier to discriminate among customers, AT&T-SSI did not have sufficient incentive to engage in anticompetitive conduct because of the availability of competitive alternatives to AT&T-SSI's cable system. In addition, we declined to impose a condition that would have required AT&T-SSI to sell capacity to all common carriers at the same per circuit rate charged to affiliated carriers and on a nondiscriminatory basis. We also declined to require AT&T-SSI to file all agreements with affiliated AT&T carriers with the Commission and serve copies on all facilities-based carriers and to cost justify rates charged to third



parties. We found that such conditions were not justified and stated that if we did impose such conditions we would be ruling, in effect, that the cable system should be operated on a common carrier basis, a finding that was contrary to our analysis.

33. In order to improve our ability to monitor for any anticompetitive activity on Alaska United, however, we will impose a recordkeeping requirement on GCI. We order GCI to maintain complete records including the percentage of circuits conveyed on the cable, to whom capacity is sold and on what terms and conditions. These records must be made available to the Commission upon request. This condition, combined with our ability to change the regulatory status of this cable, as discussed above, addresses the anticompetitive concerns of the commenters.

#### E. Environmental Impact

34. ATU-LD argues that because GCI has not yet determined the specific landing points for Alaska United, it is not appropriate for the Commission to conclude that the requested authorization would not significantly affect the environment. Therefore, ATU-LD requests that the Commission condition its approval to require GCI to make appropriate submissions regarding environmental impacts when GCI identifies the final landing points.

35. GCI responds that under Section 1.767(a)(5) of the Commission's rules, GCI will file a specific description of the landing points of Alaska United no later than 90 days prior to construction of the cable facility. GCI also states that it will comply with all federal and state environmental regulatory requirements in connection with obtaining final approval for the landing points.

36. Based on the information provided by the GCI and pursuant to the Commission's procedures implementing the National Environmental Policy Act of 1969, we conclude that the grant of the requested authorization would not significantly affect the environment. Consequently, at this time GCI is not required to submit an environmental assessment, and this application is categorically excluded from environmental processing. As stated above, however, we condition this license upon final approval of the landing points. If necessary, we will address significant environmental impacts after GCI identifies the final landing points.

## F. Timing

37. Some concern was expressed in the record about the opportunity for comment in this proceeding. On October 24, 1997, ATU-LD filed a motion requesting a 30 day extension "in which to submit economic evidence supplementing its legal analysis." ATU-LD argues that it needs more time to develop evidence that GCI has an economic incentive to charge discriminatory rates. GCI responds that ATU-LD, as well as other commenters, have had an ample opportunity to present their arguments.

38. We deny ATU-LD's request. The main concern raised in this proceeding is that GCI will have the incentive and ability to engage in anticompetitive conduct by denying competing carriers access to capacity on Alaska United. Our recordkeeping requirement combined with our ability to reclassify the cable from non-common carrier to common carrier status, if necessary, will help ensure that GCI does not engage in antidiscriminatory behavior. Accordingly, we do not believe that granting ATU-LD's motion is necessary.

## V. Conclusion

39. We grant GCI's application for authority to land and operate a non-common carrier fiber optic submarine cable extending between the Pacific Northwest United States and Alaska, subject to the conditions listed below.

## VI. Ordering Clauses

40. Consistent with the foregoing and pursuant to the Cable Landing License Act and Executive Order 10530, we hereby GRANT AND ISSUE General Communication, Inc. a license to land and operate the Alaska United Cable System, a non common carrier cable system consisting of submarine fiber optic submarine cables (with an initial system capacity of 2.5 Gbps and a potential system capacity of 10 Gbps) extending between south central Alaska and the Pacific Northwest United States, south central Alaska and Juneau, Alaska, and Juneau, Alaska and the Pacific Northwest United States. This grant is subject to all rules and regulations of the Federal Communications Commission; any treaties or conventions relating to communications to which the United States is or may hereafter become a party; any action by the Commission or the Congress of the United States rescinding, changing, modifying, or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable system within the territorial waters of the United States of America, its territories and possessions, and upon its shore shall be in conformity with plans approved by the Secretary of the Army, and the cables shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus for the purpose of protecting and safeguarding the cables from injury or destruction by enemies of the United States of America;

(3) Neither this license nor the rights granted herein shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(4) The Licensee shall notify the Commission in writing of the precise locations at which the cable will land no later than ninety days prior to commencing construction of the cable landing station at those locations. The Commission will give public notice of the filing of these descriptions, and grant of this license will be considered final unless the Commission issues a notice to the contrary no later than sixty days after receipt of the specific description of the landing points;

(5) The Licensee shall maintain complete records of the percentage of circuits conveyed on the cable system, to whom capacity is sold, and on what terms and conditions. The Licensee shall make these records available to the Commission upon request;

(6) The Commission reserves the right to change the regulatory status of the cable system to common carrier in the future if it finds the public interest so requires;

(7) The Commission reserves the right to require the Licensee to file an environmental assessment or environmental impact statement should it determine that the landing of the cables at those locations and construction of necessary cable landing stations would significantly affect the environment within the meaning of Section 1.1307 of the Commission's procedures implementing the National Environmental Policy Act of 1969; this license is subject to modification by the Commission upon its review of any environmental assessment or environmental impact statement that it may require pursuant to its rules;

(8) The Licensee shall maintain no less than a 50-percent ownership interest and voting control share in the portion of the cables located in the U.S. territorial waters and 100-percent ownership in the cable stations in the United States and in the U.S. land portion of the cables from the stations to the U.S. beach joint of the submerged portion of the cables;

(9) The Licensee shall, by application, obtain Commission approval prior to the sale or transfer to a foreign entity of five percent or more in the aggregate of direct ownership in the licensee;

(10) This license is revocable by the Commission after due notice and opportunity for hearing pursuant to Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. 35, or for failure to comply with the terms of the authorizations;

(11) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service, and this license shall expire 25 years from such date, unless renewed or extended upon proper application, and, upon expiration of this license, all rights granted under it shall be terminated; and

(12) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of the cable landing license.

41. IT IS ORDERED THAT the "Motion of ATU-Long Distance for 30 Day Period in Which to File Economic Evidence of Need for Safeguards Against Discrimination" IS DENIED.

42. This Order is issued under Section 0.261 of the Commission's rules, 47 C.F.R. 0.261, and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules, 47 C.F.R. 1.106, 1.115, may be filed within 30 days of the date of public notice of this order (see 47 C.F.R. 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell  
Chief, Telecommunications Division  
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