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December 21, 2004

Kate Giard, Chairman
Regulatory Commission of Alaska
701 West Eighth Avenue, Suite 300
Anchorage, Alaska 99501

*Re: United Utility's Request For Supplemental Funding
Under Rural Alaska Broadband Internet Access Grant
Program*

Dear Ms. Giard:

I am writing on behalf of GCI Communication Corp. d/b/a General Communication, Inc. d/b/a GCI ("GCI") to provide comments in response to the Commission's Notice Of Request For Supplemental Internet Grant Funding. The Notice solicits comments concerning United Utility Inc.'s ("UUI") request, dated September 28, 2004, to amend its grant award under the Rural Alaska Broadband Internet Access Grant Program to include an additional \$4,661,000 to supplement the approximately \$2.5 million awarded to it in August 2004. The original grant money was awarded to UUI to fund the deployment of broadband Internet service through the construction of multiple microwave towers in the villages of Eek, Cheforanak, Kipnuk, Kongiganak, Kwigillingok, Lower Kalskag, Newtok, Nightmute, Tununak, Tuntutuliak, and Upper Kalskag.

UUI's request for an additional \$4.6 million, thus converting its original bid of \$2.5 million to deploy broadband facilities into a bid of approximately \$7.1 million, is a substantial and material modification of the original bid. The projected cost of the UUI's microwave towers project apparently has gone up 184 percent from the time UUI submitted its bid in November 2003 and subsequently received notice of its grant award from the Commission in August 2004. Granting UUI's request for supplemental funds under these circumstances would be improper.

In the Commission's "Rural Alaska Broadband Internet Access Grant Program Grant Application Guide," the Commission has set forth the guidelines for competitively and impartially awarding grant money under the Rural Alaska Broadband Internet Access Grant Program. The costs of a project are a significant factor among the evaluation factors the RCA's Evaluation Committee considers. Specifically, the construction and start-up costs represent 20 points and maintenance costs/discussion represent another 20 points among the maximum possible 100 points.¹ A request by a grant recipient to change its award to cover significantly greater project costs from those upon which the RCA's Evaluation Committee made its initial award determination, in effect, constitutes a new and materially different bid. Under conventional competitive bidding practice, however, material amendments to a competitively bid contract are not allowed.

Under the state procurement code, for example, the Alaska Supreme Court has explained that generally a government contract that is competitively bid "cannot be materially amended because that is tantamount to forming a new contract, which should be accomplished by starting all over again with competitive bidding." *McKinnon v. Alpetco Company*, 633 P.2d 281, 287 (Alaska 1981). The reason for this rule is to "guard against circumvention of competitive bidding requirements," which are "designed to ensure that government obtains the most favorable terms possible in its contracts, and to protect the public from the possibility of favoritism, fraud, and corruption on the part of public officials." *Kenai Lumber Company, Inc. v. LeResche*, 646 P.2d 215, 220 (Alaska 1982).

The same principles underlying the rule against material amendments to a competitively bid contract under the state procurement code should apply with equal force to the Commission's award decisions under the Rural Alaska Broadband Internet Access Grant Program. As discussed, costs are a major factor in the Commission's competitive bidding criteria under this program. Furthermore, the integrity of the RCA's competitive bidding process under the Broadband Program would be undermined if a grant recipient could obtain a grant award on the basis of low costs set forth in a bid, but then subsequently obtain an amendment of the award to cover almost triple the costs. UUI must not be

¹ GCI notes that UUI's supplemental request focuses on additional construction costs for its project, but conspicuously does not discuss additional maintenance costs. GCI finds it hard to believe that the factors causing a significant increase in construction costs would not also cause an increase to maintenance costs.

permitted to materially amend its original bid; rather, it should be held to the terms of its original bid.²

If, however, UUI cannot perform under the terms of its original bid, the RCA should cancel the original grant award for 9 of the villages and rebid for the remaining two villages. Subsequent to the RCA's award of grant money to UUI in August 2004, GCI has deployed facilities to provide broadband service to: Chefornak, Eek, Nightmute, Tuntuntuliak, Tununak, Kipnuk, Kongiganak, Kwigillingok, and Newtok.³ Under the statutory terms of the federal grant in 7 U.S.C. § 1926, grant money cannot be used to fund the deployment of broadband service in rural communities that have access to the Internet through local dial-up or broadband connection.⁴ The Commission's Guidelines appropriately

² There is no unfairness in holding UUI accountable to the terms of its bid. The Commission should note that UUI began the build-out of its network **before** it received the grant award from the Commission in August 2004. UUI's Supplemental Funding Request at 2. UUI obviously has been planning this network build-out with or without grant money from the Commission.

³ GCI's deployment of broadband service to these communities should come as no surprise to the Commission. Since 2001, GCI has been building out and delivering Internet service to rural villages throughout Alaska. In June of 2001, Ron Duncan, GCI's President and CEO, made the commitment that the Company would deliver high-speed Internet service to all of the rural communities in Alaska where it has facilities and serves customers. In its November 2003 application to the Commission, GCI discussed this commitment and provided the Commission with a listing of all of the communities where GCI was then currently providing Internet service to rural consumers and planning to deploy additional facilities to provide Internet service to rural consumers. See GCI Application dated November 3, 2003 at 12-13.

⁴ The statute states:

Notwithstanding subparagraph (C), the Secretary may make grants to state agencies for use by regulatory commissions in states with rural communities *without local dial-up Internet access or broadband service* to establish a competitively, technologically neutral grant program to telecommunications carriers or cable operators that establish common carrier facilities and services which, in the commission's determination, will result in long-term availability to such communities of affordable broadband services which are used for the provision of high speed Internet access.

incorporate this statutory restriction.⁵ The restriction wisely serves to direct grant money to the villages that truly need the subsidies for the deployment of Internet service. Moreover, this restriction prevents unfair subsidization of competition in locations where a carrier has invested to provide Internet service on its own dime and at its own risk.

In view of GCI's deployment of broadband service to these 9 villages, they no longer are "eligible communities" under the RCA's Rural Broadband Program. Thus, if UUI cannot perform under the terms of its original bid, the grant award for these nine villages should be canceled. Under no circumstance, should the RCA grant additional money to UUI for these villages in light of GCI's deployment of broadband service there. Indeed, granting additional money to UUI to construct microwave towers for the deployment of broadband service not only would violate the statutory restriction discussed above and the policies underlying the restriction, but also would be a terribly wasteful and unreasonable use of the grant money. Why would the Commission want to grant additional funds to cover the significantly greater costs of UUI's project when GCI is already deploying broadband Internet service to these villages without any subsidies? Grant money should be spent more wisely for the villages that truly need the subsidy consistent with the statutory restriction discussed above.

With respect to the villages of Lower Kalskag and Upper Kalskag, the Commission should conduct a rebid if UUI cannot perform under the terms of its original bid. GCI has not deployed broadband service to these communities as of today, and thus, they remain eligible for grant money under the statute. Rebidding the contract for these communities would be wise. From the numbers that appear in the Commission's notice, it is abundantly clear that UUI is over-spending (and, no doubt, over-building),⁶ and that other carriers are able to provide broadband

47 U.S.C. § 1926(a)(20(E)) (emphasis added).

⁵ With respect to "Eligible Communities," the Guidelines explain, "Communities whose residents currently have access to the Internet through local (toll free) dial-up Internet providers or broadband connection regardless of the quality of the connection are not eligible for this program." RCA Guidelines at 3.

⁶ It is clear to GCI that UUI's efforts to obtain millions of dollars from the RCA under this grant program to build multiple microwave towers is not simply for the purpose of providing Internet service. Let's be realistic. UUI is attempting to obtain grant money under this program to subsidize the construction of a network that it will use to provide other telecommunications services such as long distance service in competition with GCI.

service to villages at considerably less cost. For example, GCI has received approximately \$1.5 million to deploy broadband service to 12 eligible rural communities, which represents approximately \$125,000 of grant money per community. Yukon Telephone Company was awarded approximately \$117,000 to deploy broadband service to Tynonek. UUI, on the other hand, now wants the RCA to give it approximately \$7.1 million to deploy broadband service to 11 communities, which is approximately \$645,000 per community. It is evident that UUI's costs per community to deploy broadband service far exceed the costs per community of GCI or Yukon Telephone to provide broadband service to similar rural Alaska villages. These numbers are telling. They demonstrate the need and wisdom of rebidding so that the Commission truly chooses the most efficient and least cost carrier to provide subsidized broadband service. If the Commission does not rebid for these two communities, the result would be to unjustly reward UUI, which glaringly appears to be the most expensive and inefficient carrier among those listed in the Commission's notice.

In sum, GCI urges the Commission to deny UUI's request for supplemental funding. UUI should perform under the terms of its original bid, and if it cannot do so, the Commission should cancel the grant award for the nine villages where GCI is now providing Internet service (*i.e.*, Chefornak, Eek, Nightmute, Tuntuntuliak, Tununak, Kipnuk, Kongiganak, Kwigillingok, and Newtok) and conduct a rebid for the remaining two villages (Lower Kalskag and Upper Kalskag). This course of action most reasonably furthers the goals of the program, maintains the integrity of the Commission's bidding process under the program, and respects the restriction under the statute.

Respectfully submitted,



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