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President & CEO

# United Utilities, Inc.



Affiliate of United KUC    Affiliate of Unicom

January 4, 2005

Ms. Kate Giard  
Program Administrator, Rural Alaska Broadband Internet Access Grant Program  
Regulatory Commission of Alaska  
701 West Eight Avenue, Suite 300  
Anchorage, Alaska 99501

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Re: Reply Comments: Supplementary Funding Request, Rural Alaska Broadband Internet Access Grant Program

Dear Ms. Giard:

United Utilities, Inc. (UUI) takes this opportunity to respond to the comments filed with the Regulatory Commission of Alaska (RCA) in response to the RCA's Notice of Request for Supplemental Internet Grant Funding (Notice). Timely approval of UUI's Supplementary Funding Request (SFR) is needed to facilitate the build out of a state of the art Yukon-Kuskokwim (YK) Delta terrestrial telecommunications network. There is no rule, regulation, shortage of funds, contractual or other reason preventing the RCA from granting UUI's SFR.

Medical, educational, not for profit and for profit organizations, State Senator Lyman Hoffman, and individuals throughout the Y K Delta have overwhelmingly expressed their support for UUI's SFR. Organizations filing supportive comments include the Alaska Telecommunications Users Consortium (ATUC), Association of Village Council Presidents, Bethel Native Corporation, Bethel Search and Rescue, Calista Corporation, KYUK Bethel Broadcasting, Inc., Lower Yukon School District, National Science Foundation, Kuskokwim Campus of the University of Alaska, Yukon-Kuskokwim Health Corporation, and Yuut Elitnaurviat, People's Learning Center. Liz Connell from Senator Stevens' office attended UUI's SFR presentation on October 27, 2004 and urged the RCA to approve the SFR. All of these individuals and organizations agree that the YK Delta broadband infrastructure is years behind the Continental United States and that there is a need to "get off of satellites and onto terrestrial infrastructure".<sup>1</sup>

Not surprisingly, three satellite telecommunications service providers (STSPs), GCI, ASTAC, and Village Telecom Management Services, LLC (VTMS), have voiced opposition to UUI's SFR.<sup>2</sup> These STSPs would like to prevent the build out of competing terrestrial facilities. They have conveniently overlooked the long term "sustainable" benefits of a terrestrial network. Besides offering a more robust, reliable, and long term infrastructure for Internet services<sup>3</sup>, a terrestrial network better supports other essential services including telemedicine, distance learning, and public safety activities including search and rescue.

<sup>1</sup> See ATUC Comments, October 27, 2004.

<sup>2</sup> See GCI Comments, December 21, 2004, ASTAC Comments, December 23, 2004 and VTMS Comments, December 23, 2004. All three providers depend on satellite connectivity to deliver services to rural Alaskan communities. None of these providers have announced any future plans to decrease their dependency on satellites.

<sup>3</sup> See page 1 of SFR. By comparison, STSPs regularly experience satellite disruptions. These can be caused by solar flares, inclement weather and other circumstances. See attached article which was published in the *Anchorage Daily News* on Friday, October 1, 2004.

GCI argues in its comments that approval of the SFR is “improper”; that material modifications may not be made to a contract let under a “competitive bidding” process and that approval of the UUI’s SFR would be a wasteful and unreasonable use of the grant money. GCI also makes the argument that the grant should be “re-bid” and that the RCA should not “subsidize the construction of a network that [UUI] will use to provide other telecommunication services ... in competition with GCI”. GCI’s arguments are flawed. In this reply, UUI will point out the faulty arguments and demonstrate why UUI’s SFR should be approved.

The RCA set forth the grant process and the guidelines for awarding the grant funds in the Rural Alaska Broadband Internet Access Program Grant Application Guide (Guide). The Guide prescribed the procedure the RCA would use for the grant award process. The Guide did not call for a “competitive bidding” procurement process but rather an open, competitive grant selection process in which many variables were taken into account including, the eligibility of the applicant, the eligible communities, a comprehensive discussion of the project, and how services would be provided.

Throughout its comments, GCI mistakenly refers to UUI’s grant proposal as a “bid” and asserts that the grant award process was a competitive bidding process. GCI erroneously contends that conventional competitive bidding practices and the state procurement code should apply to the award decisions. Neither the state procurement code nor conventional competitive bidding practices were applicable to the grant process. Accordingly, it is incorrect for GCI to refer to and apply the principles underlying the rule against material amendments to a competitively bid contract in this case.<sup>4</sup> In any event, AS 36.36.850 (b) (1) of the state procurement code exempts grants from the application of the code.<sup>5</sup>

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<sup>4</sup> Even if the RCA did apply competitive bidding principles to determine whether or not the requested amendment is material, the RCA would undoubtedly conclude that the increase in the grant amount is not material. Using the test of “materiality” as established by the court (see *Kenai Lumber Company, Inc. v. LeResche*, 646 P. 2d 215, 221 (Alaska 1982)), the RCA would look at a number of important factors including:

1. **Does the change alter the main purpose of the agreement?** In requesting an amendment and supplementary funding, UUI has not proposed to do anything new that is outside the scope of the original proposal, nor is UUI performing differently than the Department of Community and Economic Development (DCED) originally bargained for. UUI has not proposed a technical change to the project that modifies the purpose of the agreement. The broadband services supplied by UUI remain unchanged. Only the construction budget has increased due to warm permafrost, steel price increases and increased freight charges. Accordingly, the amendment does not amount to a new agreement. (We note that GCI speculates that UUI’s maintenance budget has also increased. The maintenance budget has not increased and therefore it was not necessary to discuss these costs in the SFR.)
2. **Legitimacy of the reasons for the change.** The increases in the construction budget due to warm permafrost, steel price increases and increased freight charges are legitimate reasons for the requested amendment. ASTAC suggests that UUI does not “need” additional funds and requests that DCED carefully review and satisfy itself that the SFR is supported by facts. UUI has adequately substantiated the reasons for the change and provided supporting documentation for the increases. It is unreasonable for ASTAC to imply there is no legitimate need for the funds and for GCI to state that the increases in the budget are the result of “over building” and “over spending”.
3. **Whether the reasons for the change were unforeseen.** As explained in our SFR at pages 1 and 2 the reasons for the requested amendment were unforeseen. UUI could not have foreseen that the subsurface and latent physical conditions in several of the communities would differ so drastically from what was historically found in the region.
4. **The timing of the change.** In accordance with Appendix A, Article 5 of the grant agreement, UUI requested a change as soon as it became apparent that the foundation design had to change and costs had increased.
5. **Whether the agreement contains a clause authorizing amendments.** The agreement itself anticipated future amendments and provided for such changes in Appendix A, Article 5 and Appendix G, Article 2 of the grant agreement. The parties reasonably anticipated the amendments clause would be used.

After grantees were selected in accordance with the procedure set out in the Guide, the successful grantees entered into grant agreements with the Department of Community and Economic Development (DCED). The executed grant agreement governs the administration of the grant with the successful grantee. Therefore, in the absence of any requirement to apply the state procurement code or conventional bidding practices to the grant process, there is nothing that precludes the RCA/DCED from acting in accordance with the terms of the grant agreement with UUI and thus amending the grant agreement with UUI.

The grant agreement is a cost-reimbursement agreement which contemplated budgetary increases in response to factors that were unforeseeable at the time the proposal was submitted. Given the scope of the work under the grant agreement, it is to be expected that modifications will occur. For this reason, the grant agreement makes provision for amendments.<sup>6</sup> Flexibility is needed to respond to needs created by the unknown unusual physical conditions found at the site, and an increase in the grant amount should be forthcoming. Accordingly, the Program Administrator is authorized to make and should grant UUI's SFR.

Such an amendment is in the state's interest and achieves the purpose of the grant program in the most favorable and beneficial manner possible. RCA's goal "is to facilitate **long-term affordable broadband Internet services** in rural Alaska communities where these services do not currently exist."<sup>7</sup> UUI reiterates that its network is a long-term solution which provides improved performance and increased capacity over satellite-based systems.<sup>8</sup> Mr. Greg Moore of ATUC succinctly makes the point that long-term "sustainability means affordable, high speed IP services. Satellite-based services are too expensive: the bandwidth is costly, ground facilities are costly and operations are costly. UUI and DeltaNet are leading the way through deployment of affordable high speed terrestrial services." Further, ATUC comments that "DeltaNet builds on increasing regional demand for broadband and high speed IP services, and **aggregates it into a sensible network which will grow with the region and new, emerging content services.**" (our emphasis). Mr. Carlton Kuhns of Yuut Elitnaurviat reflects on the superior quality of terrestrial services in his comments to the RCA.<sup>9</sup> Mr. Kuhns reports, "...from our current experience, we have found that services delivered terrestrially are more reliable and that latency imposed by a satellite system significantly reduces the quality and reliability of service." Approval of the SFR and an increased investment in UUI's network "is the smart way to invest public money."<sup>10</sup>

GCI also makes the case that if UUI cannot perform under the terms of the original grant award, the RCA should cancel the grant. In response to this argument, UUI reaffirms that it is able to perform and is performing in accordance with the terms of the grant agreement.

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6. **The extent of the change relative to the original agreement.** See 1 above. The only change to the original agreement is a change in the budget/amount of the grant agreement. The amendment does not create a new agreement.

<sup>5</sup> AS 36.36.850 (b) "This chapter applies to every expenditure of state money by the state, acting through an agency, under a contract, except that this chapter does not apply to (1) grants;"

<sup>6</sup> See in particular Appendix G, Article 2.2 which specifically contemplates supplementary funding by DCED. "Any increase to the project's total costs or DCED's portion of the costs requires DCED's prior approval documented with a Grant Amendment."

<sup>7</sup> Program Description.

<sup>8</sup> See page 1 of the UUI SFR.

<sup>9</sup> See Yuut Elitnaurviat Comments, undated.

<sup>10</sup> See ATUC Comments, October 27, 2004.

With regard to GCI's deployment of broadband Internet in nine of the communities that fall under the UUI grant agreement, UUI comments as follows. These nine communities were "eligible communities" at the time the grant agreement was entered into and remain eligible.<sup>11</sup> The fact that broadband service is subsequently made available to a community cannot prevent the project from receiving continued or further funding. It would be inappropriate for the DCED to terminate the agreement. The fact that GCI will provide Internet services does not render the grant agreement void *ab initio*. Further, if the RCA were to terminate a grant at any time simply because competitive broadband services became available in any given community, this would discourage carriers from taking the initial risk to commence an expensive project due to the potential threat that funding might be pulled at a later date after committing a substantial amount of funds to the project. Despite the fact that DCED was aware that GCI intended to deploy broadband to those villages in the future, DCED still awarded the grant to UUI. GCI could have protested the grant award on this basis but chose not to do so. In this regard, unsuccessful applicants were given ten working days from the date of receiving notice that they were unsuccessful to provide the RCA with a written appeal. It is now too late for GCI to argue that UUI should not have received the grant because GCI planned to provide broadband service in those same communities in the future.

GCI, VTMS and ASTAC are competitors of UUI and have an economic incentive to challenge the SFR and UUI's proposed funding increase. GCI asserts that UUI is attempting to obtain more grant money "under this program to subsidize the construction of a network that [UUI] will use to provide other telecommunication services ... in competition with GCI". At the same time GCI has asked the RCA to cancel UUI's grant (although there are no grounds to do so), solicit new proposals from carriers for these sites, and award a new grant to another carrier which may offer to deploy an inferior service for less money. (VTMS makes a similar statement in its own comments.<sup>12</sup>) In order to avoid competition at the nine grant sites, GCI has effectively asked the RCA to take the money away from UUI and make it available to another carrier (i.e. "subsidize" that carrier's network) because it can provide lesser quality broadband for less money. Lower cost does not equate to better efficiency or quality, nor does it assure the state's goals are met. Although the initial cost of the UUI project is higher per site than other carriers, the advantages of the terrestrial network make it a more cost effective solution in the long term. UUI's broadband solution provides the most favorable terms possible to the state and the communities.

ASTAC has suggested the RCA seek a statutory change in the grant program rules, prior to providing any supplementary funds to UUI.<sup>13</sup> 7 USC 1926 (a) (20) (E) establishes the terms and conditions for the use of the grant funds and this statute limits the grants to rural communities which have no local dial-up Internet access or broadband service. The funds cannot be reprogrammed at the whim of the RCA and made available for a use that is not in accordance with the statutory requirements. The grant communities for which UUI is seeking supplementary funds are eligible communities under the existing statute. Ample grant funds remain available to meet the SFR. In the event that the RCA approves UUI's SFR, approximately \$6 million will still be available for use by other eligible grantees. It would be inappropriate to under-fund an existing project that has legitimate needs when enough money is available to meet the SFR, and those of other eligible communities.

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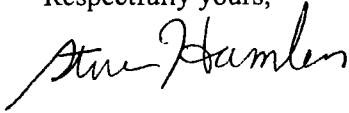
<sup>11</sup> GCI's service is not yet operating in the nine communities. GCI failed to point out the existence of a limited term agreement between GCI and UUI for space and power, operations and maintenance support, and installation of satellite earth stations at the nine locations, which agreement makes it possible for GCI to provide broadband services at these nine locations. The terms of this agreement are confidential but UUI emphasizes the short term nature of this agreement.

<sup>12</sup> VTMS Comments, December 23, 2004.

<sup>13</sup> See page 3 ASTAC Comments, December 23, 2004.

UUI submits that it is in the best interest of the state to approve the SFR as soon as possible. We urge the RCA approve our SFR and thereafter enter into an amendment to the grant agreement in accordance with the SFR. UUI reserves the right to supplement these reply comments after it considers the grant applications and agreements requested in its December 27, 2004 correspondence.

Respectfully yours,

A handwritten signature in cursive script that reads "Steve Hamlen".

Attachment: "Satellite disruptions are expected . . ." Anchorage Daily News

## COMMUNITY PROFILE

### ANCHORAGE

#### **Satellite disruptions are expected during first two weeks of October**

GCI, one of the state's major telecommunications providers, has issued its semiannual warning about possible disruptions in satellite signals caused by solar flares.

The electronic lifeline between orbiting satellites and on-the-ground Alaska technology users may be severed for brief periods in the first weeks of this month, the company said recently.

"The outages could disrupt telephone calls to and from locations within Alaska, the Lower 49 states and international locations," it said in a written statement.

Satellite transmissions of TV programs, Internet data, credit card purchase approvals and pager alerts also may be interrupted.

The outages could last up to 15 minutes. The precise period will vary according to locations of the satellite affected and the earth station. Ground-based connections such as fiber optics and microwave transmissions will not be affected.

Satellite outages occur in October and February-March when Earth moves into a position, relative to the sun, that puts geostationary satellites in a direct line between the sun and their ground antennas.

The outages generally affect satellite-based communications worldwide. Operations with large satellite dishes usually resist the solar noise better than those with small dishes, but all are affected by solar flares.

— *Anchorage Daily News*