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March 29, 2018

The Honorable Sam Kito III
Chair, House Labor and Commerce Committee
State Capitol, Barnes 124
Juneau, AK 99801

RE: HB 384 An Act relating to the Regulatory Commission of Alaska and broadband Internet regulations

Dear Chairman Kito and Members of the Committee,

We are writing to express our opposition to HB384 and provide information regarding the authority federal and state regulators have over broadband service.

Support for an Open Internet

ATA member companies have been steadfast in their commitment to an open internet. We do not and will not impair our customers' access to lawful internet services or content. The Federal Communications Commission recently restored the light-touch regulation that allowed the internet to flourish for over 20 years. To the extent additional rules are needed to guarantee that customers will continue to be in charge of their online experience, we support bi-partisan federal legislation and will continue to work with Alaska's delegation to achieve this result.

Federal Preemption

Under Democratic and Republican leadership, the FCC has unequivocally asserted its jurisdiction over broadband internet access service, noting that "it is well-settled that Internet access is a jurisdictionally interstate service." The FCC expressly prohibits state and local governments from adopting their own separate requirements, including specifically preempting, "any so-called 'economic' or 'public utility-type' regulations."[1] HB384 directly conflicts with this federal preemption by defining providers of broadband internet access as public utilities for purposes of the Regulatory Commission of Alaska, the body which imposes public utility-type regulation on Alaska's utilities.

States' Role

States have a role in oversight of broadband internet access service under existing law. The FCC describes that role as a valued partnership, stating, "We appreciate the many important functions served by our state and local partners, and we fully expect that the states will 'continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints' within the framework of this order."[2] The states are also expressly authorized to continue to designate eligible telecommunications carriers, administer rights-of-way, and adopt state universal service policies.

[1] See Restoring Internet Freedom Order at paragraphs 194-204.
[2] Id.

The state already has an important role in broadband oversight. The RCA has authority to protect consumers and participate in the broadband landscape under existing federal law and regulation. Attempting to expand that role to broad-based, utility-style regulation is clearly preempted.

Cost of Expanded RCA Regulation

Disregarding federal preemption for a moment, expanding state authority by imposing traditional, utility-style regulation on broadband service would still be inadvisable due to the cost. HB384 would add a new layer of regulatory activity and unavoidable cost to both the state and Alaska's broadband providers. The RCA would require additional staff and expertise to develop initial rules and support ongoing regulation. And broadband providers would find themselves grappling with a substantially increased burden of regulatory cost, uncertainty, and delay; all of which deter investment in broadband infrastructure.

ATA members currently support a significant burden of regulatory oversight from both federal and state regulators. We comply with hundreds of regulatory requirements annually touching virtually every aspect of our businesses and diverting resources away from investment in networks. Adding a new layer of regulation would only exacerbate that burden and further divert scarce resources away from serving Alaskans.

Federal law and regulation clearly defines an important role for the Regulatory Commission of Alaska regarding broadband internet access and also clearly preempts state action to impose utility-style regulation as HB384 attempts to do. Adding new layers of regulatory obligation and burden to the state and industry during difficult economic times is inadvisable. We respectfully express our opposition to this bill.

Respectfully submitted,

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Dear Chairman Kito and Members of the Committee,

Thank you for the opportunity to comment on HB384. I am writing to express Alaska Communications' opposition to the bill. It is not sound public policy for the following reasons.

HB384 would amend AS 42.05.990(6) to classify as a "public utility" any entity furnishing "telecommunications service, including broadband Internet access, to the public for compensation." This amendment to permit state regulation of broadband Internet access service (BIAS) directly contradicts existing law and public policy in a number of respects:

The Federal Communications Commission (FCC) has ruled that BIAS is not a "telecommunications service" but rather is an "information service" within the meaning of the federal Communications Act.[1] The FCC concluded that this is the best reading of the definitions set forth in the statute, and public policy considerations strongly weigh in favor of the information service classification as well.[2] In so doing, the FCC returned BIAS to the status it originally had when the FCC classified it as an information service in 2002 (BIAS provided by cable television operators),[3] 2005 (BIAS provided by wireline telecommunications providers),[4] 2006 (BIA provided over power lines),[5] and 2007 (BIAS provided by mobile wireless service providers).[6] Through these FCC decisions, all BIAS effectively was classified as "information services" regardless of the technology platform. The FCC's reading of the statute was affirmed by the U.S. courts of appeals up to and including the U.S. Supreme Court.

As a policy matter, the FCC has found that, from the outset, Congress intended for BIAS to be free from regulation as a "telecommunications service" and the costs imposed by such regulation. As early as 1998 the FCC concluded that applying common carrier or "telecommunications service" regulation to BIAS would "seriously curtail" the regulatory

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1 *Restoring Internet Freedom,* Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) ("Internet Freedom Order").

2 *Id*. ¶20.

3 17 FCC Rcd 4798 (2002), *aff'd Nat'l Cable & Telecom's Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005).

4 20 FCC Rcd 14583 (2005), *aff'd Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007).

5 21 FCC Rcd 13281 (2006).

6 22 FCC Rcd 5901 (2007).

freedom deemed necessary to the development of "enhanced services," as information services formerly were known.[7]

The FCC continues to interpret federal law as requiring preservation of a "vibrant and competitive free market" for BIAS "unfettered by Federal or State regulation" such as existed for Internet services when Congress first incorporated mention of them in the Communications Act, in 1996.[8]

The FCC has determined that, through nearly 20 years of development as a non-telecommunications service, BIAS providers invested heavily in U.S. networks extending some 355 million fixed and mobile Internet connections to the American public, resulting in roughly 91 percent of U.S. household having access to high-capacity broadband capability as of 2016.[9] Those numbers continue to grow as service providers extend broadband to unserved locations using FCC "Connect America Fund" support. Indeed, the FCC expressly concluded that classification as an "information service" will help incentivize BIAS providers "to expand coverage to underserved areas" such as rural parts of the nation.[10]

In contrast, the FCC concluded that imposing "telecommunications service" regulation on BIAS would impose "considerable social cost, in terms of foregone investment and innovation," without delivering any discernable benefit to the public.[11]

While FCC policy favored more heavy-handed "telecommunications" regulation of BIAS for a brief period from mid-2015 to 2017, the FCC recently ended this experiment, concluding that the claims of harm alleged by proponents of such regulation often had been "exaggerated," and actual occurrences of harm had proven to be "sparse."[12] In general the FCC takes a dim view of prophylactic regulation imposed in the absence of evidence that such regulation is justified as serving the public interest, the benefits outweighing the costs.[13] Further, the FCC noted that any potential bad actors may be dealt with under existing antitrust and consumer protection laws, further obviating the need for heavy-handed telecommunications utility regulation.[14]

The FCC has concluded that peremptory regulation of BIAS as a "telecommunications service" categorically is not justified. The FCC calls such regulation "a solution in search of a

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7 *Internet Freedom Order*, ¶9, *citing* FCC Report to Congress, 13 FCC Rcd 11501 (1998) ("Stevens Report").

8 *See Internet Freedom Order*, ¶¶58, 63.

9 *See id.* ¶86.

10 *Id*. ¶106.

11 *Id*. ¶87.

12 *Id.* ¶¶87, 116.

13 *See, e.g., id.* ¶116 (telecommunications regulation is intrusive, and therefore requires a showing of "actual harms").

14 *Id.* ¶¶87, 116. The FCC also requires BIAS providers to comply with Internet disclosure rules.

problem."[15] In the *Internet Freedom Order*, the FCC therefore preempted state regulation of the type proposed in HB384:

> We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.[16]

Without limitation, the FCC specifically preempted "public utility-type" regulation at the state or local level, finding such regulation could "pose an obstacle to or place undue burden on the provision of broadband Internet access service."[17] Because intrastate and interstate communications travel over the same Internet connection, state "telecommunications service" regulation cannot be applied to intrastate Internet traffic without also affecting interstate traffic.[18] It would be impossible or impracticable for a BIAS provider to comply different rules to interstate or intrastate communications over the Internet.[19] Moreover, nothing in the federal law suggests that Congress intended states to have independent authority over BIAS or have the ability to countermand federal policy.[20]

In addition, please note that unlike most states, there is no internet access point in Alaska. Rather, the nearest internet access point for Alaska internet traffic is Seattle. Consequently, there can be no doubt that internet access is interstate in nature, and therefore subject to federal jurisdiction, not state jurisdiction.

In short, the state may not impose regulation that is inconsistent with the FCC's policy classifying BIAS as an information service and not a telecommunications service. Nor may the state regulate interstate broadband internet access service.

Sincerely,

Leonard A. Steinberg
Senior Vice President, Legal, Regulatory & Government Affairs & Corporate Secretary

15 *Id.* ¶¶87, 109.
16 *Id.* ¶195.
17 *Id.*
18 *Id.* ¶200.
19 *Id.* ¶198.
20 *Id.* ¶204