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MEMORANDUM

February 18, 2018

SUBJECT: Broadband Internet Regulations
(Work Order No. 30-LS1211\A)

TO: Representative David Guttenberg
Attn: Seth Whitten

FROM: Allison M. Laffen 
Legislative Counsel

Attached is the above mentioned bill draft based on your request to provide the Regulatory Commission of Alaska (RCA) with regulatory authority over broadband Internet. I have the following drafting comments.

RCA Authority. As I mentioned in my conversation with Mr. Whitten on February 16, 2018, it appears that the RCA has sufficient authority under current law to regulate broadband Internet service providers.¹ Based on my conversation with Mr. Whitten and my understanding that the RCA authority over broadband internet is in dispute, the bill draft amends the definition of "public utility" or "utility" under AS 42.05.990(6) to clarify that the furnishing of telecommunications services includes broadband Internet service. The bill draft includes a definition of "broadband internet access" based on the material you sent and the definition of "broadband internet access" in AS 15.13.040 (m) (I) (A) (ii).

Federal preemption. As I discussed with Mr. Whitten, RCA regulation of broadband Internet may raise federal preemption concerns.

The Alaska Supreme Court has noted that "[u]nder the Supremacy Clause of the federal

¹ See AS 42.05.990(6)(B), defining "utility" to include an entity that furnishes "telecommunications service to the public for compensation." AS 42.05.990(13) defines "telecommunications" as "the transmission and reception of messages, impressions, pictures, and signals by means of electricity, electromagnetic waves, and any other kind of energy, force variations, or impulses whether conveyed by cable, wire, radiated through space, or transmitted through other media within a specified area or between designated points." It is my understanding that this definition includes broadband Internet services. The RCA also directly regulates telecommunications utilities under AS 42.05.145 and 42.05.860.

constitution, state laws that interfere with federal laws are invalid." *Allen v. State*, 203 P.3d 1155, 1161, n. 12 (Alaska 2009), *quoting State v. Dupier*, 118 P.3d 1039, 1049 (Alaska 2005). The Court has summarized federal preemption law as follows:

There is a presumption against federal preemption of state law, and preemption doctrine "enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." Additionally, "[w]here co-ordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes," . . . "the case for federal pre-emption becomes a less persuasive one." But where state law comes into conflict with federal law, the Supremacy Clause of the United States Constitution dictates that state law must always yield.

There are three major types of federal preemption of state law: "express," "field," and "conflict" preemption. Express preemption occurs when Congress explicitly declares an intent to preempt state law in a particular area. . . .

Field preemption is the term used when the federal law governing a particular area is so comprehensive and so complete that Congress is said to have completely occupied a field, leaving no room for state law. We "will not infer an intent to occupy the field where Congress has left some room for state involvement." . . .

Conflict preemption occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." . . .

Allen v. State, 203 P.3d 1155, 1160 - 1161 (Alaska 2009) (citations and footnotes omitted).

The bill draft clarifies the regulatory power of the RCA to include broadband Internet; the RCA will still not be able to regulate any area that is preempted by federal law. For example, one area of note due to recent changes in federal regulations, is "net neutrality." On December 14, 2017, the FCC adopted an Order reversing "net neutrality" regulations. The Order states:

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

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requirements for any aspect of broadband service that we address in this order.^[2]

An attempt by the RCA to reinstate the very rules or requirements that the FCC intends to preempt by the Order would likely be unconstitutional. I am not an expert on federal Internet regulations and would be unable to advise you on every possible area of Internet regulation that may be preempted by federal law, you may want to consult with the RCA or an expert on federal Internet regulations.

If I may be of further assistance, please advise.

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Attachment

² *Declaratory Ruling, Report and Order, and Order: In the Matter of Restoring Internet Freedom*, WC Docket No. 17 - 08, Page 109, available at http://apps.fcc.gov/edocs_public/attachmatch/DOC-347927A1.pdf.