To: Commissioners

Fr: Common Carrier Staff

Re: Legislative Budget Intent Language: Modernizing Telecommunications Statutes

Date: January 23, 2019

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Overview:

The relevant legislative budget intent language regarding telecommunications modernization reads:

> *It is the intent of the legislature that the Regulatory Commission of Alaska recommend adoption of updated telecommunication modernization regulatory standards in AS 42.05, the Alaska Public Utilities Regulatory Act, and deliver recommendations on how best to modernize outdated statutes to the House and Senate Finance Committees and to the Legislative Finance Division by February 19, 2019.*

This memorandum provides Staff recommendations regarding the Commission's potential response to this budget intent language, including Staff's proposed response to potential telecommunication deregulation efforts that may be brought forward during the current or future legislative session.

Recommendation:

Staff believes the Commission's current statutes provide allow the Commission to use existing rulemaking procedures to address many of Staff's proposals to revamp the Alaska Universal Service Fund (AUSF) as well as the proposals to relieve certificated carriers from economic regulation and Carrier of Last Resort (COLR) designation, where merited. Additionally, Staff contends that retention of robust Commission jurisdiction over intrastate telecommunications service, including otherwise dormant ratemaking authority, remains in the public interest by providing valuable discipline to both monopoly and competitive markets and important information regarding critical network infrastructure located on state lands.

Further, while Staff believes that many of the proposals Staff advanced at the December 12, 2018, public meeting have merit, Staff acknowledges the Commission's recent decision in R-18-001 to create a window of evaluation of the current AUSF until the summer of 2021 that would be undercut if the Commission voiced support for any proposal to the Legislature. Because the Commission's telecommunications jurisdiction is intertwined with the AUSF and other funding sources, including the Commission's obligation to certify the appropriate use of federal high cost support, Staff believes honoring that evaluation window requires the Commission to take a conservative stance on any substantive change to its jurisdiction over telecommunication, at least presently.

In order to preserve the *status quo*, Staff recommends the Commission decline to provide affirmative support to any statutory change that limits or expands the Commission's current jurisdiction to regulate telecommunications service in Alaska, aside from the possible removal of cable television subscriber's statutory opportunity to petition the Commission to assert economic regulation over certificated Cable Television (CATV) service provider currently afforded in AS 42.05.711(k).

Aside from the possible CATV matter, Staff recommends issuing a Commission-authored letter explaining the reasons for declining to advance substantive statutory changes for the Legislature's consideration in light of the recent R-18-001 regulations adoption. However, should the Legislature adopt changes to the Commission's jurisdiction in line with the proposal recently advanced by the Alaska Telecom Association (ATA), Staff recommends immediately opening a rulemaking to add back any of the removed statutory protections, including the obligation to set just and reasonable rates, as conditions for ongoing receipt of Alaska Universal Service Fund (AUSF) support.

Cable Television Subscribers Economic Regulation Petition – Possible Action:

The one area with the strongest basis for statutory change is, in Staff's view, the right under AS 42.05.711(k) to petition the Commission to assert ratemaking authority over a certificated CATV provider. In 2015, the FCC issued the Cable Effective Competition Order,[1] which prohibits economic regulation of a CATV provider unless the relevant franchising authority (here, the Commission) affirmatively demonstrates that the provider has no effective competition. While it is possible that the Commission could be presented with an AS 42.05.711(k) petition that provided the necessary facts to make a "no competition" rebutting the presumptions established by the FCC in its order, Staff believes this possibility is remote. Staff believes that eliminating the subscriber petition clause in AS 42.05.711(k) represents a reasonable statutory housekeeping measure given the inherent difficulty in overcoming the presumption of competition adopted in the FCC order.

On the other hand, to the extent the FCC does not absolutely foreclose economic regulation of a CATV provider, the Commission could reasonably conclude that a possible fact pattern, given Alaska's unique topography and geography, sufficiently demonstrates that satellite or other video programming alternatives do not exist in a particular market. Thus, there is an increasingly remote chance that a subscriber petition could instigate a viable effort by the Commission, as franchising authority, to overcome the FCC's presumption of effective competition and thereby establish economic regulatory authority of a CATV provider. This possibility may serve as a reasonable basis **not** to seek statutory changes to AS 42.05.711(k).

Staff Modernization Proposals Should Be Postponed:

At the December 12, 2018, public meeting, Staff provided a summary power point presentation providing several alternative statutory and regulatory proposals that would "modernize" the Commission's telecommunications jurisdiction and authority to better reflect the increasing importance placed on

[1] *Available at* https://docs.fcc.gov/public/attachments/FCC-15-62A1.pdf.

broadband Internet access service in Alaska. Specifically, these proposals addressed ways to advance broadband Internet access service, especially in rural Alaska, by leveraging state property rights and other subsidies for both funds and service concessions. The proposals would build back a statutory mandate for state Lifeline subsidies for low-income Alaskans for both voice and broadband service. The proposals also (1) revisited the current definition of "rural" Alaska, to the extent such a definition serves as a gateway to access to scarce state funds, to better ensure state-directed dollars are properly and efficiently targeted to areas with the highest need; (2) created rudimentary certification or registration programs for Internet Service Providers (ISPs) as quasi-public utilities that explicitly foreclose economic regulation of any ISP regardless of market position; and (3) created a state program to empower small cooperatives, towns and villages to construct, operate and interconnect their own broadband capable networks.

However meritorious Staff believes these proposals to be, Staff remains cognizant of the Commission's recent decision in R-18-001 that sets up a period of assessment for the AUSF that does not commence until summer of 2021. Staff believes the Commission intended to evaluate the efficacy of the interim reforms to the AUSF adopted in R-18-001, including a surcharge cap and delineation of areas considered sufficiently competitive to forgo certain AUSF supports. Therefore, Staff concludes that formal advocacy of any of their proposals would undermine the Commission's decision establishing a 2021 review period and withdraws any recommendation, explicit or inferred, to advance those proposals for legislative consideration at the current time unless the Commission decides to accelerate the AUSF review window called for in R-18-001.

Potential ATA Deregulation Legislation Undercuts Rationales for R-18-001 Regulations, Including Rate Parity:

By the same token, the proposal by ATA to curtail the Commission's statutory jurisdiction over intrastate telecommunications services should not be formally endorsed by the Commission, at least presently. Staff believes the statutory changes proposed by ATA, if substantially similar to those advanced in SB205 during the 2018 legislative session, would similarly impinge on the Commission ability to fairly and accurately assess the efficacy of its recent AUSF reforms before and during the 2021 reassessment of the AUSF built into regulation at 3 AAC 53.300(d). In the order adopting the R-18-001 regulations, the Commission stated that the "adoption of an interim review of agency rules and the AUSF program will allow time to investigate market structure issues and determine what AUSF subsidy level (if any) is appropriate given existing regulatory oversight levels and market structure conditions."[2]

Staff notes in particular that ATA's proposal to eliminate COLR protections and designations undercuts the decision to use the COLR concept as the basis for ongoing essential network support, which is pegged at 2016 historical COLR and carrier common line support levels with a few exceptions, and substantially tracks the R-08-003 presumptions and justifications for extending AUSF support to designated COLRs serving nascent competitive markets. Additionally, as will be discussed below, the ATA proposals would remove many of the precision tools, short of certification revocation review under AS 42.05.271, that Staff contends are necessary for appropriately regulating how intrastate telecommunications service is

[2] *See* Order R-18-001(5), Order Adopting Regulations, dated October 24, 2018, at 9-10.

provided in all markets regardless of the level of competition, thereby impairing or obviating the Commission ability to access "market structure issues" relevant to how AUSF support is dispersed.

Finally, ATA's proposal would eliminate economic regulation of any telecommunication provider, including interexchange providers currently subjected to 3 AAC 52.372's rate parity requirements, the positive results of which, Staff notes, were that one of the underlying bases cited by Commissioners in R-18-001 for preserving the basic structure of the AUSF. Ostensibly, the blanket ratemaking exemption would preclude the Commission from enforcing reasonable rate parity protections in 3 AAC 53.372, risking the primary gains from R-08-003's access charge reforms. To the extent the Commission concurs that at least some of ATA's modernization proposals are not conducive to an independent evaluation of the R-18-001 regulation revisions called for in 3 AAC 53.300(d), or would otherwise risk a stated objective of those reforms, Staff recommends the Commission demur from endorsing ATA's proposal, at least during the intervening evaluation period.

Further, Staff believes there are public interest concerns regarding the proposed ATA legislation independent from the Commission's interest in setting its own timeline for review of its recent R-18-001 regulation changes. Some of Staff's objections are grounded in the fact that the relief sought by ATA can be more efficiently sought through a regulation petition without resort to substantial, permanent reduction to Commission jurisdiction via statutory change. For instance, ATA would eliminate economic regulation for all local and interexchange carriers regardless of whether those carriers are subject to municipal or cooperative ballot review or operate in a market deemed to be competitive pursuant to a finding by the Commission or the FCC.

ATA's basis for this blanket elimination of ratemaking authority for all telecommunications providers in the state is the fact that intermodal voice competition is increasing throughout Alaska. Staff once again references 3 AAC 53.205, noting that the Commission's existing regulations provide an opportunity for a carrier to petition and the Commission to find any market to be competitive on the basis of "competition by a competitor that is not certificated", i.e., a wireless or VoIP provider. Similarly, all carriers are at least nominally (subject to certain Commission reviews, presumably for discrimination, cost-causer concerns) permitted to reduce rates for telecommunication services without cost support pursuant to 3 AAC 48.315. Given the flexibility already afforded in regulations to declare any telecommunications market to be competitive, and the opportunity for a carrier to unilaterally reduce rates to blunt intermodal competition that may be occurring, Staff believes the Commission should not endorse a statutory change permanently exempting all carriers from economic regulation without an individualized showing.

Staff continues to believe the blanket exemption sought by ATA is overbroad, and carries with it a risk of harm to customers in monopoly markets that may have no actual voice substitutes in addition to the damage it would do to the Commission's IXC rate parity regulations. Staff routinely requests information from wireless eligible telecommunications carriers (ETCs) regarding their progress toward deploying wireless facilities according to commitments made at the time they applied for ETC designation. While the majority of carriers have fully deployed throughout their designated ETC study area, there are certain carriers that have explained their indefinite deployment deferrals on the lack of necessary high cost support. The fact remains that there are scores of communities in Alaska that simply do not enjoy competitive voice alternatives. In the absence of tangible competition from either traditional local

exchange service providers or alternative, intermodal voice providers, the ATA blanket economic regulation exemption for all carriers risks too much.

Staff's Alternative Regulations Fix for Economic Regulatory Relief:

If the Commission concludes economic regulatory relief is merited for some or all carriers, Staff believes the Commission can adequately address that relief through regulations under existing statutes. For instance, the Commission could relax ratemaking protections for any local exchange market where a substantial majority (75%) of potential consumers have access to wireless voice service of reasonable quality. Staff believes the new mapping resources mandated by the FCC should make this demonstration relatively easy and low cost, providing the carrier with flexibility to adjust prices to meet competitive pressure while protecting consumers by ensuring viable alternatives exist if price for local exchange services rise too high.

Staff notes that ATA has supported its blanket exemption by noting that the FCC's reasonable comparability benchmark residential rate ceiling, which ATA noted in its recent presentation is currently set at $45.38/month. So it is true that protections from unwarranted rate increases exist for consumers subscribing to basic residential voice service provided the carrier in question is an ETC and wants to continue receiving federal USF. However, reference to any of the tariffs currently on file from local exchange carriers suggests that carriers offer myriad of business service offerings that in Staff's view would not be subject to the FCC's benchmark rate ceiling. Assuming the primary reason that ATA seeks the statutory relief from economic regulation is to avoid the high cost of proving out each rate element with a cost of service study, the Commission could also consider adopting via regulation a system similar to the simplified rate filing system set up for electric utilities in 3 AAC 48.700-.790. Specifically, the Commission could permit any local exchange company to raise rates for any service not subject to an applicable federal rate ceiling under a set of limiters similar to 3 AAC 48.770: no more than an 8% rate increase over a 12-month period, and no more than 20% rate increase over a three-year period. This would provide an appropriate balance between establishing a cost-effective way for carriers to raise rates to better accord with actual costs and consumer protections for services that may not be subjected to intermodal competition, such as private line service, which cannot be provided by a wireless carrier.

COLR Protections and Designation Remain Important.

Staff continues to see value in COLR designations and the protections they afford consumers. The Commission has eliminated COLR protection for areas where current market conditions support a finding that competition will persist. Where market share and facilities ownership is lopsided in favor of one carrier, COLR designation ensures that (1) the designated carrier knows that continued service is expected in the event that a market upset detrimentally affects the conditions necessary for competition; (2) the designated carrier conducts its current operations, including decisions regarding network facilities upgrade and maintenance with that understanding; and (3) the Commission will not serve as a political lightning rod when trying to decide which carrier must continue to provide service during an emergent situation that causes all carriers in the market to seek discontinuance.

Staff believes reforms to the IXC COLR regulations adopted in R-13-001 established an orderly process whereby a carrier could seek to either transfer COLR designation to another carrier, or seek to eliminate the protections based on a showing of changed market conditions. To the extent the LEC COLR designation rules could benefit from revision, Staff believes a similar set of rules could be adopted to provide carriers with additional clarity on which COLR duties and protections should continue and standards for when a carrier can reasonably be released from those obligations. Staff notes that R-18-001 still compensates LEC COLRs for their designations in substantial part by continuing frozen COLR support as a component of essential network support. Again, the ATA-advocated elimination of COLR designation and protections directly undercuts the justification in the ATA consensus plan largely adopted by the Commission in R-18-001 to continue to provide carriers serving marginal markets with network support to ensure continued adequate service availability. For this reason, the Commission should not endorse the ATA modernization proposal regarding COLR elimination during the interim review period.

Other Statutory Exemptions for Telecommunications Carriers Proposed by ATA are Problematic.

In addition to generally eliminating telecommunication ratemaking authority (AS 42.05.381 – Rates to be Just and Reasonable; AS 42.05.431 – Power of commission to fix rates), ATA's deregulation proposal would also exempt otherwise regulated telecommunications carriers from several important statutory protections common to all public utilities – statutory protections that Staff contends should be preserved. Staff believes that ATA's presentations fail to fully explain the possible implications of their proposed statutory revisions. The following is a list of exempted statutes of particular concern to Staff, along with the probable negative consequences of their implementation:

- AS 42.05.291 – Standards of Service and Facilities.

  Presumably the Commission could not directly order a carrier to improve or replace facilities used to provide intrastate telecommunications service, and would be forced to revoke a certificate if the carrier's facilities degraded or were otherwise obsolete. For instance, if old equipment results in increased service outages, it appears the Commission sole resort would be to revoke a certificate; it could not directly order the carrier to replace the equipment as a reasonable interim measure. This seems inefficient and would likely have a chilling effect on Commission enforcement of quality service expectations imbedded in certificate authority.

- AS 42.05.301 – Discrimination in Services.

  Presumably the Commission could not require a carrier to provide intrastate telecommunications service to similarly situated customers regardless of fact pattern. The Commission likely could not require a carrier to adhere to any standard line extension policy, nor for other exemptions, require that policy to be contained in a tariff.

- AS 42.05.311 and AS 42.05.321 – Joint Use and Interconnection of Facilities and associated disputes.

ATA's statutory proposal includes exemption to both AS 42.05.311 and AS 42.05.321. However, because of a strange drafting anomaly, which apparently builds back in interconnection jurisdiction to any utility otherwise exempt under AS 42.05.711, it appears that carriers would still be obligated to interconnect pursuant to these statutes, and the Commission to force interconnection. The failure to explicitly build into ATA's statutory proposal under the proposed AS 42.05.711 section is a correctable error that would likely avoid unnecessary drafting ambiguity on the role of the Commission as an arbiter of interconnection disputes.

- AS 42.05.365 – Interest on Deposits.

  A carrier likely could require deposits as a condition of service and retain interest earned thereon. Currently all utilities must remit interest on deposits of more than $100.

- AS 42.05.371 – Adherence to Tariffs.

  This exemption has implications to the ability of the Commission's Consumer Protection section to provide services to customers in dispute with telecommunications carriers. Currently complaints are judged based on the content of the then-in-effect tariff provision in question. Staff has concerns that the Commission will have a more difficult, if not impossible, time arbitrating consumer/carrier disputes without the benefit of a standard tariff that can be reviewed publically.

  Further, as discussed, the lack of a tariff means that critical components of telecommunications service such as line extension policies necessary to prevent discrimination in service would not be publically accessible or enforceable.

- AS 42.05.391 – Discrimination in Rates.

  This would mean a carrier could charge similarly situated customers disparate rates for intrastate service and the Commission could not police that conduct or handle a consumer allegation to that effect. For carriers that are cooperatives or that are municipally-owned, customers can take action on discrimination through resort to the ballot box. Private, for-profit carriers would be relatively unfettered to charge rates variably across customer classes without consumer protections from Commission oversight.

  Staff notes wryly that ATA's contention that federal anti-discrimination consumer protections would persist even if the Commission's jurisdiction on this issue were voided by statute is severely undercut by the ongoing partial federal government shutdown which has shuttered the FCC indefinitely. Staff contends there is nothing wrong with maintaining dual state and federal consumer protections, and that in light of recent events, is the only reasonable, conservative, and responsible approach to regulating an industry that the 1996 Telecommunications Act specifically accords dual jurisdiction on interstate/intrastate lines.

- AS 42.05.451 through AS 42.05.501 – Statutes related to how utility records, accounts, and reports for both the utility and any subsidiary must be kept and the Commission's authority to inspect same.

  Staff questions how the Commission can assess carrier fitness in a certificate show-cause setting without the right to access and inspect all pertinent utility records. This is another example of the hollow nature of the residual certificate authority that ATA's statutory reform proposal would have the Commission retain.

- AS 42.05.511 – Unreasonable management practices.

  The Commission could no longer (short of certificate revocation) order a carrier to take interim corrective action to correct an unreasonable management practice, including "payment arrangements with affiliated interests".[3] Yet another example of the hollow nature of the residual certificate authority that ATA's statutory reform proposal would have the Commission retain.

- AS 42.05.551 – Review and enforcement (of Commission orders) – right to seek an injunction to enforce final Commission order.

  Staff will leave it to better legal minds on the practical effect on the Commission's jurisdiction from this proposed exemption. Presumably there are other sources of law that may allow the Commission to enforce an adjudicatory order against a telecommunications carrier. If those sources exist, this proposed exemption injects unnecessary ambiguity. If those sources do not exist, then final orders of the Commission would be unenforceable.

- AS 42.05.561 – Injunctions and monetary sanctions – right to seek injunction and civil penalties for violations of AS 42.05.291 (Standards of service and facilities) provisions and related regulations.

  Staff believes these tools for policing public utility facilities for safety, reliability, and sufficiency are key to ensuring quality of intrastate telecommunications service, and would leave in its place only a direct action on a carrier's certificate, which has obvious detrimental impacts on customers interested in continuing to receive quality service when the carrier providing it can no longer do so for lack of a certificate. In short, Staff finds the certification review procedure to be a last resort, worst case option for policing carriers, and remains concerned that it is both draconian and politically unwieldy tool to use for any substantive defect in service provision that does not give rise to crisis.

- AS 42.05.571 – Civil penalties – (right to seek civil penalties for any other non-.291 violation).

[3] AS 42.05.511(a).

This is yet another example of how limited and ineffectual the Commission's continued jurisdiction over intrastate telecommunications services would be if the ATA proposal were made law. The Commission's sole enforcement tool would remain the unwieldy and politically unsavory certificate revocation proceeding that invariably would harm consumers if ever enforced.

- AS 42.05.651 – Expenses of investigation or hearing.

  Can the Commission continue to assess costs to parties involved in matter involving telecommunications? This question remains despite the fact that ATA's RCC proposal that requires all carriers to pay RCCs regardless of exempt status impliedly acknowledges that the Commission will continue to provide limited regulatory oversight with associated costs. If a particular matter bears on a particular party more than the industry as a whole, or if a telecommunications dispute is found to be caused by one carrier's conduct, presumably the Commission would not be able to assess costs according to benefit or responsibility. This presents an equity issue.

- AS 42.05.661 – Application fees.

  Commission presumably would be prohibited from assessing registration fees to registered IXCs or establishing any other application fees regarding telecommunications going forward.

- AS 42.05.671 – Public records.

  This exemption would ostensibly end the presumption that anything filed with the Commission by a telecommunications provider is a public records and would possibly result in any filing being automatically deemed confidential without any procedure by an interested party to gain access.

- AS 42.05.820 – No municipal regulation.

  IXCs already were exempted from municipal regulation, but the ATA proposal would explicitly add local exchange carriers to the mix. Staff notes many disputes in other states have been cropping up between carriers and local municipalities that seek to impose and enforce regulations over siting, pole attachment, and right-of-way issues regarding network facilities build-out. Staff believes this addition may be used to quash any such disputes initiated by local or municipal regulations.

<u>Conclusion</u>:

Staff notes that ATA has routinely touted the deregulation efforts other states have made. What has not been clear is whether those states have taken the approach of completely deregulating even the least competitive markets within their respective jurisdictions. ATA has not indicated that other states have so limited the enforcement tools available to their utility commissions for whatever jurisdiction those

commissions retain to render that jurisdiction de facto unenforceable. Given the list of risks and concerns highlighted above, Staff cannot recommend Commission endorsement of the ATA modernization proposal.

Instead, Staff recommends the Commission draft a letter detailing its objectives for adopting the regulations in R-18-001, stating that the structure of those regulations imbed an active investigation period that would be frustrated by endorsing legislation that either enlarged or reduced the Commission's jurisdiction, and noting that many of the objectives ATA may have for advancing their own statutory proposal can be largely achieved under current statute through a formal rulemaking proceeding. Any of Staff's proposals on modernization can be taken up, if at all, as part of the comprehensive review of the AUSF. The Commission should consider whether to advance a CATV deregulation proposal in line with this memorandum.

Finally, should the Legislature adopt changes to the Commission's jurisdiction in line with the ATA deregulation proposal, Staff recommends immediately opening a rulemaking to add back any of the removed statutory protections, including the obligation to set just and reasonable rates, as conditions for ongoing receipt of AUSF support.