

February 20, 1998

The Honorable John Shively, Commissioner
Department of Natural Resources
400 Willoughby Avenue
Juneau, AK 99801-1724

Sam Cotten, Chair
Alaska Public Utilities Commission
1016 W. 6th Avenue
Anchorage, AK 99501-1963

Phyllis Johnson, General Counsel
Alaska Railroad Corporation
P.O. Box 107500
Anchorage, AK 99510-7500

Re: Enforceability of AS 42.20.010
A.G. file no: 661-97-0586
1998 Op. Att'y Gen. No. 1

Dear Commissioners Shively and Cotten
and Counselor Johnson:

This office has received requests from the Alaska Public Utilities Commission, the Department of Natural Resources, and the Alaska Railroad Corporation for an opinion on the enforceability of AS 42.20.010.¹ This question has arisen because Alaska Fiber Star LLC has

¹ With all related headings, AS 42.20.010 reads:

AS 42.20. TELEGRAPH AND TELEPHONE SYSTEMS AND CABLE
LINES

Article 01. OWNERSHIP

Sec. 42.20.010. Establishment by foreigners prohibited.
Telegraph or cable lines owned or operated or controlled by persons not

constructed a fiber optic cable between Anchorage and Fairbanks along the corridor of the Alaska Railroad Corporation and applied to the Alaska Public Utilities Commission (“APUC”) for a certificate of public necessity and convenience. Alaska Fiber Star is an Alaska limited liability corporation which is 65 percent owned by World Net Communications, Inc. (“World Net”). World Net is owned and controlled by Australian investors.² Alaska Northstar Communications, LLC (“Alaska Northstar”), a Delaware corporation, has requested entry to state tidelands from the Department of Natural Resources for a fiber optic communications project from Pacific City, Oregon, to Whittier, Alaska. The sole owner and parent of Alaska Northstar is WCI Cable, Inc. (“WCI Cable”), a separate, but commonly owned sister company of World Net. WCI Cable is 100 percent owned by Australian interests.³ AS 42.20.010's prohibition on “cable lines owned or operated or controlled by persons not citizens of the United States, or by any foreign corporation . . .” is potentially a bar to these separate but related projects.⁴

citizens of the United States, or by any foreign corporation or government
may not be established in or permitted to enter Alaska.

² Alaska Fiber Star's Application for Temporary Operating Authority on an Expedited Basis and for a Certificate of Public Convenience and Necessity to Provide Intrastate Interexchange Telecommunications Service in the State of Alaska (January 6, 1998) at 4 filed at the Alaska Public Utilities Commission.

³ Memorandum, Aileen A. Pisciotta, counsel for Alaska Northstar, to Ron Zobel, Assistant Attorney General, February 18, 1998.

⁴ This opinion assumes that the term “cable lines” would include the modern cable in the Alaska Fiber Star or the Alaska Northstar project. It is likely that a court would hold that the statute, if valid, applied to the project. First of all, by 1900, Congress clearly did know of telephone communications. More important, the plain language of this proviso does not suggest that its intent was only to bar foreign owners from acquiring existing communications lines or the new military communications system that was to be built. The language clearly suggests a broader intent, to prohibit the construction of any potential, though as yet unidentified, communications facility that might be used by a foreign owner to send messages that could pose a threat to United States military

For the reasons explained below, this office has determined that AS 42.20.10 is unenforceable because it is preempted by Section 253 of the Telecommunications Act of 1996, 47 U.S.C. 253.⁵

I. The Legislative Background of AS 42.20.010.

AS 42.20.010 originated in an enactment of the United States Congress in 1900. Congress appropriated funds for a military communication system in Alaska, attaching a proviso that prohibited foreign ownership or control of telegraph or cable lines in the state. Act of May 26, 1900, Ch. 586, 31 Stat. 206.⁶

security. Military security was the purpose of the foreign ownership prohibition. Congress surely knew, even in 1900, that the methods of communications then available had been improving, and that the advancements could be expected to continue. Being concerned about military security, Congress could not have intended that foreign owners be prohibited from acquiring the communications technology of 1900, but not the improved technology that might be available a few years later. Even if a court did eventually decide the statute was not applicable to the project, in the meantime the mere threat of enforcement could cloud the project with potential litigation.

⁵ We do not think it is necessary to determine whether this statute also violates the World Trade Organization Basic Telecommunications Service Agreement, except to note that the FCC's Chief of the International Bureau has stated that the enforcement of the statute "would create a right on the part of the affected WTO member country to bring a dispute before the WTO against the government of the United States for violation of the WTO Agreement. Thus, enforcement of either section 17 [now repealed] and AS 42.20.010 would not be consistent with U.S. interests in the WTO." Peter Crowley, Chief, FCC International Bureau, to Aileen A. Pisciotta, dated June 17, 1997. (See attachment.) It is sufficient that Congress, the body with authority over international trade, has spoken in section 253 of the Telecommunication Act to remove such barriers to entry. The potential trade issue is just more reason to give full force to the congressional mandate in Section 253. See *Hauenstein v. Lynham*, 100 U.S. 483 (1880) (treaty providing inheritance rights for aliens prevails over state law disqualifying aliens from inheriting).

⁶ The sentence in which the foreign ownership prohibition appeared as a proviso read as follows:

For the purpose of connecting headquarters, Department of Alaska, at Saint Michael, by military telegraph and cable lines with other military stations in Alaska, four hundred and fifty thousand five hundred and fifty dollars:

As a federal law pertaining to Alaska, the foreign ownership prohibition was included in the 1949 codification of Alaska laws. Section 49-5-1 ACLA 1949. From the 1949 code, this section was carried over into Alaska Statutes under the Alaska Statehood Act, Section 8(d), which said "Upon admission into the Union, all of the territorial laws then in force in the Territory shall continue, except as modified." P.L. 58-508, 72 Stat. 339.

The identical federal statute, 47 U.S.C. § 17, which prohibited foreign ownership or control of cable lines in Alaska, has recently been repealed. A bill, with an amendment sponsored by Senator Stevens at the request of Governor Knowles repealing 47 U.S.C. § 17, was passed by the Congress and became a part of Public Law 105-119 on November 26, 1997. This action by the Congress demonstrates that the security reasons that caused it to originally pass section 17 are no longer applicable. The action by Congress was also consistent with the free market, pro-competitive policy of the Telecommunications Act of 1996.⁷ The original national security rationale giving rise to the federal and state legislation is now gone in view of the repeal of the underlying federal statute.

Provided, That commercial business may be done over these military lines under such conditions as may be deemed, by the Secretary of War, equitable and in the Public interests, all receipts from such commercial business shall be accounted for and paid into the Treasury of the United States, and that the sum hereby appropriated shall be immediately available: *Provided further*, That no telegraph or cable lines owned or operated or controlled by persons not citizens of the United States, or by any foreign corporation or government, shall be established in or permitted to enter Alaska.

⁷ Prior to the Congressional action, Alaska Fiber Star suggested that section 17 was inconsistent with the 1996 Act and that it was an oversight that it was not repealed in the Act. Congress' swift action in enacting its repeal is consistent with that view.

II. Is AS 42.20.010 a state barrier to entry preempted by Section 253 of the Telecommunications Act of 1996?

The Telecommunications Act of 1996⁸ is a comprehensive amendment of the Communications Act of 1934 where the Congress sought to establish what the Conference Report described as “a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all markets to competition.”⁹ The Federal Communications Commission (FCC) has said, “Congress thus rejected the historic paradigm of telecommunications services provided by government-sanctioned monopolies in favor of a new paradigm that encourages the entry of efficient competing service providers into all telecommunications markets.”¹⁰

Section 253 of the Act is one of its more important provisions opening up telecommunications markets, including intrastate markets, to competition. Section 253(a) provides that, “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹¹ Section 253(b) permits a state to impose “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers,” provided that such

⁸ The Act became law on February 8, 1996. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. § 151 *et seq.*

⁹ S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. at 1 (1996).

¹⁰ In re The Public Utilities Commission of Texas, CCBPol 96-13, Memorandum Opinion and Order, FCC 97-251 at ¶1 (rel: October 1, 1997) (hereinafter Texas PURA95 Decision).

¹¹ 47 U.S.C. § 253(a).

requirements are imposed “[o]n a competitively neutral basis and consistent with section 254.”¹² The Federal Communication Commission is given the power to preempt any state legal requirement that violates section 253(a) and is not saved by section 253(b).

In its recent and lengthy decision on a number of preemption issues raised by the Texas Public Utility Regulatory Act of 1995, the Federal Communications Commission stated, “In sum, section 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandates that ‘prohibit[s] or has the effect of prohibiting’ a firm from providing any interstate or intrastate telecommunications service. We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of any competitor to compete in a fair and balanced legal and regulatory environment.”¹³

Under the test developed by the FCC, the state legal requirement must first be examined to determine whether it effectively prohibits entry to “a class of telecommunications service providers.”¹⁴ If it is such a barrier to entry then the state legal requirement must be

¹² 47 U.S.C. § 253(b). Section 254 contains provisions on universal service which are not relevant here. 47 U.S.C. § 254.

¹³ Texas PURA95 Decision, ¶ 22, (Oct. 1997).

¹⁴ New England Public Communications Council, ¶ 18 (CCBPol 96-11), FCC 96-470 (December 6, 1996) (“This prohibition on competitive entry against a particular class of potential competitors is inconsistent with the pro-competitive policies of the 1996 Act and violates section 253(a).”) (New England Council Decision).

“competitively neutral” and “necessary” to accomplish the state interests, including public safety and welfare, listed in section 253(b).¹⁵

AS 42.20.010 on its face prohibits a company that is owned, operated, or controlled by persons who are not citizens of the United States from establishing a cable line, an important telecommunications facility used to provide service in Alaska. The FCC *Texas* decision states, “we find that section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service”¹⁶ This legal requirement effectively prohibits competitive entry to a class of potential competitors, companies controlled by foreigners, to any of the telecommunications markets in the state. This statute falls within the explicit preemption of section 253(a) and can only be saved by qualifying under section 253(b).

Under section 253(b) the state legal requirement must serve a legitimate state interest such as the public safety and welfare “on a competitively neutral basis.”¹⁷ AS 42.20.010 on its face singles out companies controlled by foreigners to pursue its interest in public safety and welfare.¹⁸

Companies that are controlled by foreigners are presumed to present a security threat, while companies controlled by citizens of the United States are not, without regard to any specific security

¹⁵ New England Council Decision, ¶ 19 (Dec. 1996).

¹⁶ Texas PURA95 Decision, ¶ 74 (Oct. 1997).

¹⁷ The alleged interests served by this statute are matters over which the state has little authority, such as military security, foreign affairs, and international trade. The “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively.” *United States v. Pink*, 315 U.S. 203, 233 (1942).

¹⁸ New England Council Decision, ¶ 20, (Dec. 1996) (“First, the [Connecticut Department of Public Utility] prohibition is not neutral on its face. . . .”); Classic Telephone, Inc. CCB Pol 96-10, Memorandum and Order FCC 96-397, Paragraph 27 (October 1, 1996) (hereinafter *Classic Telephone*) (Franchising requirement “prevents Classic from providing telecommunications services,

measures taken by either company. It singles out and completely eliminates the ability of foreign-owned companies to provide telecommunications services on their own facilities.¹⁹ This statute is an example of what is not “competitively neutral.” Standards for security that applied in an even-handed way to both companies would be “competitively neutral” and focus on the purpose of the legal requirement, rather than the foreign status of the owners.²⁰ A legal requirement that bars a foreign company from using its own facilities to provide telecommunications services, regardless of its compliance with laws relating to security, is not “competitively neutral.” Since it fails the test of competitive neutrality, there is no need to determine if this statute meets the FCC’s independent test of whether the statute is “necessary” to protect national security. As noted earlier, the Congress by passing the repeal of the parallel federal law apparently has decided that the security concerns are not substantial.

For the reasons stated above, we have concluded that AS 42.20.010 is preempted by section 253 of the Telecommunications Act of 1996 and is therefore unenforceable.

and therefore, on its face, appears to violate section 252(a).”).

¹⁹ New England Council Decision, ¶ 20, (Dec. 1996) (“[T]he prohibition significantly affects, if not completely eliminates, the ability of independent pay phone providers to compete for customers in the Connecticut pay phone market.”; Classic Telephone, ¶ 37, (Oct. 1996) (“[T]his mandate of competitive neutrality requires the [local government] to treat similarly situated entities in the same manner . . .”). Classic states that “foreclosing entry by one competitor while allowing another to enter” is an example of pursuing a state interest that is not competitively neutral. The definition of “telecommunications services” in the 1996 Act is “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used.*” (emphasis added). A legal requirement that does not allow a company to use its own facilities to provide telecommunications services is not a “competitively neutral” requirement.

²⁰ There is no evidence that this office is aware of that would indicate that Australia or these Australian investors are in any way a security threat to the State of Alaska or the United States.

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Sincerely,

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Attorney General

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Attachment