MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable John Shively
Commissioner
Department of Natural Resources

DATE: October 27, 1997

FILE NO.: 661-98-0156

TELEPHONE NO.: 269-5232

SUBJECT: Authority to Regulate Fiber Optics

FROM: John T. Baker
Assistant Attorney General
Natural Resources - Anchorage

You have requested advice on the extent of the authority of the Department of Natural Resources ("DNR") to regulate the use of fiber optic cables or systems within Alaska. Specifically, you have asked for a review of relevant federal, state, and municipal laws and regulations. Your request also states the objective of determining if current compensation methods are adequate. I have attempted below to address the most relevant authority. Because of the compressed time period in which this memorandum was prepared, it may be advisable to supplement this information in the future. The authority of the Alaska Public Utilities Commission ("APUC") to regulate rates charged by telecommunications systems is beyond the scope of this memorandum.[1]

I. Applicable Federal Law

Federal Telecommunications Act

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act"), provides a general framework for the competition of interstate and intrastate telecommunications services and the delegation of authority at the federal, state, and local levels. Implementation of the Act has been delegated to the Federal Communications Commission ("FCC") and state Public Utility Commissions ("PUCs"). The Act preempts states and cities from enacting any laws or

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[1] It can be anticipated that situations will arise in which APUC and DNR jurisdiction will overlap. For example, if one utility sought joint use of the fiber optic capacity of another utility already operating within a DNR right-of-way, APUC might be required to adjudicate that request under AS 42.05.321. DNR, for its part, would have jurisdiction to determine the applicability of its right-of-way permitting and fee provisions to the new entrant utility.

taking any actions which will unreasonably restrain entries into interstate or intrastate telecommunications markets.[2] The Act states 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 services.

47 U.S.C. § 253(a).

The Act does not restrict State and local governments' ability to manage their public rights-of-way and to be compensated for their use, so long as they manage and charge compensation in a nondiscriminatory fashion. *Id.*, § 253(c). With regard to delegation of authority, state PUCs are empowered under the Act to establish baseline rates for certain services under their jurisdiction, while state and local agencies retain jurisdiction over access to their rights-of-way. *Id.*, § 252(d).

II. Applicable State Law

A. Statutory Authority

AS 38.05.850(a) authorizes the director of the Division of Land, without the prior approval of the commissioner, to issue permits, rights-of-way, or easements on state land for various uses, including telephone or electric transmission and distribution lines. The commissioner, upon recommendation of the director, must establish a reasonable rate or fee schedule to be charged for these uses, subject to an exception for nonprofit cooperative associations qualifying under AS 38.05.850(b) if the commissioner finds that waiving the fee is in the best interests of the state.

Under AS 38.05.810(e), the lease, sale, or other disposal of state land at fair market value may be negotiated with a licensed public utility or a licensed common carrier by the director with approval of the commissioner if the utility or carrier reasonably requires the land for the conduct of its business under its license. Under this subsection, the commissioner must retain a reversionary interest in the disposal, subject to a waiver if the waiver is in the public interest. AS 38.05.810(f) authorizes the leasing of state land for telephone or electric transmission and distribution lines for less than the appraised fair market value of the land if the lessee is a

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[2] The Act is an expression of Congressional will under the Commerce Clause of the United States Constitution, which gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. 1, Sec. 8, Clause 3.

nonprofit cooperative association organized under AS 10.25, the Alaska Electric and Telephone Cooperative Act. In determining the annual rental, the commissioner shall consider the nature of the public service rendered by the nonprofit cooperative association or licensed public utility and the terms of the grant under which the land was acquired by the state.

AS 38.05.035(e) also appears to provide authority to regulate fiber optic cables or systems. The statute authorizes the director, upon making a best interests determination and with the consent of the commissioner, to approve contracts for the "sale, lease, or other disposal of available land, resources, property, or interests in them." The statute provides further that "in addition to the conditions and limitations imposed by law," the director may impose additional conditions or limitations in disposal contracts as the director determines, with the consent of the commissioner, will best serve the interests of the state. This is a broad grant of authority which allows DNR to implement contract terms not expressly authorized by a discrete statutory provision, so long as the terms are consistent with constitutional mandates and are not preempted under federal commerce clause principles. For example, it appears that DNR could issue a lease for a fiber optic right-of-way and require as a term of the contract that a certain number of fibers be made available for state use. Under such a scenario, it would likely be necessary to determine the fair market value of this service to the state, to ensure that the compensation charged to the utility is adjusted accordingly. Such an approach would appear to be consistent with the "maximum benefit" clause of the Alaska Constitution.[3]

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[3] Article VIII, section 2 of the Alaska Constitution charges the legislature to provide for the "utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of its people." The Alaska Supreme Court has construed the "maximum benefit" clause, along with article VIII, section 1 of the state constitution, as "expressly acknowledg[ing] as state policy the general value of all lands." *Swindel v. Kelly*, 499 P.2d 291 (Alaska 1972).

B. Regulatory Authority

11 AAC 05.010 sets out fees for DNR services. 11 AAC 05.010(e)(6) establishes fees for an early entry authorization onto a prospective surface leasehold, which has obvious application to fiber optic rights-of-way. Section 05.010(e)(6)(A), covering site development, allows for an annual fee equal to the director's estimate of the prospective rental, while Section 05.010(e)(6)(B) sets an annual fee of $100 for each acre for site analysis that involves alteration to the land (including brushing, clearing, or excavating for percolation tests).

11 AAC 05.010(e)(11) provides fees for a private right-of-way or easement under AS 38.05.850. Section 05.010(e)(11)(A) sets an annual fee of $100 per acre, but no less than $200, for a non-exclusive use. Section 05.010(e)(11)(B) sets an annual fee equal to the director's estimate of the yearly fair market rental value for an exclusive use. 11 AAC 05.010(e)(13) allows a one-time fee of 10 cents per lineal foot for a public right-of-way or easement under AS 38.05.850 for a utility.

11 AAC 05.010(f) provides that, notwithstanding subsection (e), the director has the discretion to require a higher fee than set out in subsection (e) if the director determines that the location or nature of the use makes a higher fee appropriate to ensure a reasonable return to the state. In such a case the fee will be based on the director's estimate of the fair market value of the use or, at the applicant's option and expense, based on an appraisal of the fair market value of the use.[4] This provision could be particularly useful in allowing DNR to take advantage of changes in market conditions in order to guarantee a fair return to the state.

It should be noted that multiple provisions of 11 AAC 05.010 might apply to a given right-of-way.

III. Municipal Authority

Due to the relatively compressed timeline for this memorandum, no attempt was made to analyze individual municipal ordinances that might relate to the regulation of fiber optic rights-of-way. Rather, the general authority of municipalities is addressed.

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[4] The regulations define "director" for purposes of subsections (e) and (f) as meaning the director of the division that issues or grants the particular authorization. As an example, then, those subsections would appear to provide authority for a right-of-way across state park land under AS 41.21.020, to the extent that it would not conflict with a specific provision of AS 41.21 or a regulation adopted thereunder, and would not fall within designated incompatible uses or conflict with a comprehensive plan for a particular park unit.

A. Home Rule Municipalities

The power of a home rule city or borough is measured by its charter. Alaska Const., Art. X, Sec. 11; *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963). The test for whether the state has preempted regulation by local home rule governments is whether the legislature has prohibited the local regulation. *Jefferson v. State*, 527 P.2d 37, 47 (Alaska 1974); *Acevedo v. City of North Pole*, 672 P.2d 130, 132 (Alaska 1983). Specifically, the Alaska Supreme Court has stated that "prohibition must be either by express terms or by implication such as where the statute and the ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law." *Jefferson*, 527 P.2d at 43.

There is no general statutory prohibition against the regulation of telecommunications systems by home rule municipalities. Under AS 29.10.200, home rule municipalities are made subject to AS 29.35.070, mandating the adoption of platting requirements that may include the dedication of "streets, rights-of-way, public utility easements and areas considered necessary by the platting authority for other public uses." There is no prohibition on the establishment of fees for the use of utility easements or rights-of-way. Home rule municipalities are also subject to AS 29.35.020, under which they have the power to provide and regulate facilities and services, including utility services, outside their boundaries "to the extent that the jurisdiction in which they are located does not regulate them."

B. First and Second Class Municipalities

The power of first and second class, or general law, municipalities is derived entirely from Title 29. Only those powers enumerated by statute are authorized. Under AS 29.35.010, all first and second class cities have the power "to acquire, manage, control, use and dispose of real and personal property[,]" and "to regulate the operation and use of a municipal right-of-way, facility, or service . . . ." As with home rule municipalities, first and second class municipalities are subject to restrictions on their extraterritorial jurisdiction under AS 29.35.020.

AS 29.35.060 authorizes both home rule and general law municipal assemblies to grant franchises, including exclusive franchise privileges, to a utility not certificated by the APUC and to permit the use of streets and other public places by the franchise holder under regulations prescribed by ordinance. Under AS 29.35.070, both home rule and general law municipal assemblies may, subject to certain exemptions found in AS 42.05, "regulate, fix, establish, and change the rates and charges imposed for a utility service provided to the municipality or its inhabitants" by a utility not regulated by the APUC.

In accordance with a comprehensive plan adopted under AS 29.40.030, each first and second class borough assembly is mandated to adopt ordinances "governing the use and occupancy of land that may include, *but are not limited to*," zoning, land use permit requirements designed to encourage or discourage specific structures, and "measures to further the goals and objectives of the comprehensive plan." AS 29.40.040 (emphasis added). It is within the discretion of each borough to determine what elements to include within a comprehensive plan. *Lazy Mt. Land Club v. Matanuska-Susitna Borough Bd. of Adjustments & Appeals*, 904 P.2d 373 (Alaska 1995). For example, the Kenai Peninsula Borough has, consistent with its comprehensive plan, adopted ordinances requiring permits and establishing fees for construction and operation activities by utilities within borough rights-of-ways. *See* KPB 14.08.

All home rule and general law municipalities are of course political subdivisions of the State. As such, they are bound by the requirements of the Alaska Constitution and are subject to the federal preemption principles discussed above.

If you have further questions, please do not hesitate to contact this office.

cc: Jane Angvik, Director
Division of Land