

**Before the
Federal Communications Commission
Washington, DC 20554**

| | | |
|-----------------------------|---|-------------------------|
| In the Matter of |) | File No.: EB-12-IH-0019 |
| |) | |
| Alaska Railroad Corporation |) | Acct. No.: 201332080013 |
| |) | |
| |) | FRN: 0001573419 |

ORDER

Adopted: February 14, 2013

Released: February 14, 2013

By the Chief, Enforcement Bureau:

1. In this Order, we adopt a Consent Decree entered into between the Enforcement Bureau (Bureau) and Alaska Railroad Corporation (Alaska RRC). The Consent Decree terminates an investigation by the Bureau against Alaska RRC for possible violations of the Commission's ex parte rules.¹

2. A copy of the Consent Decree negotiated by the Bureau and Alaska RRC is attached hereto and incorporated herein by reference.

3. After evaluating the facts before us and reviewing the terms of the Consent Decree, we find that the public interest would be served by adopting the Consent Decree and terminating the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether Alaska RRC possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) of the Communications Act of 1934, as amended,² and Sections 0.111 and 0.311 of the Commission's rules,³ the Consent Decree attached to this Order **IS ADOPTED**.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

¹ 47 C.F.R. §§ 1.1200–1.1216.

² 47 U.S.C. § 154(i).

³ 47 C.F.R. §§ 0.111, 0.311.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to William Hupprich, General Counsel, Alaska Railroad Corporation, P.O. Box 107500, Anchorage, AK, 99510-7500.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief
Enforcement Bureau

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CONSENT DECREE

1. The Enforcement Bureau of the Federal Communications Commission and Alaska Railroad Corporation, by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Enforcement Bureau's investigation into whether Alaska Railroad Corporation violated the Commission's ex parte rules.¹

I. DEFINITIONS

2. For the purposes of this Consent Decree, the following definitions shall apply:
- (a) "Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - (b) "Adopting Order" means an Order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Alaska RRC" or "Company" means Alaska Railroad Corporation and its predecessors-in-interest and successors-in-interest.
 - (d) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (e) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
 - (f) "Communications Laws" means collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which Alaska RRC is subject by virtue of its business activities, including but not limited to the Ex Parte Rules.
 - (g) "Compliance Plan" means the plan described in this Consent Decree at paragraph 11.
 - (h) "Covered Employees" means all employees and agents of Alaska RRC who perform, or supervise, oversee, or manage the performance of, duties that

¹ 47 C.F.R. §§ 1.1200–1.1216.

relate to Alaska RRC's responsibilities under the Communications Laws, including the Ex Parte Rules.

- (i) "Effective Date" means the date on which the Bureau releases the Adopting Order.
- (j) "Ex Parte Rules" means Sections 1.1200–1.1216 of the Commission's rules.
- (k) "Investigation" means the investigation initiated by the Office of General Counsel's January 17, 2012 letter² regarding possible violations of the Ex Parte Rules.
- (l) "Operating Procedures" means the standard, internal operating procedures and compliance policies established by Alaska RRC to implement the Compliance Plan.
- (m) "Parties" means Alaska RRC and the Bureau, and each is a "Party."
- (n) "Rules" means the Commission's regulations found in Title 47 of the Code of Federal Regulations.

II. BACKGROUND

3. On February 1, 2011, the Commission adopted the *Ex Parte Report and Order*,³ which amended and reformed the Rules on ex parte presentations made in the course of Commission proceedings.⁴ These rules took effect on June 1, 2011. They address, among other matters, written ex parte presentations directed to the merits or outcomes of permit-but-disclose proceedings.⁵ The Rules require that anyone who makes such a presentation to a Commission decision-maker must file a copy of that presentation, including any attachment, for inclusion in the record of the underlying proceeding.⁶

4. On November 29, 2011, an Alaska RRC employee sent an e-mail and attachments to Richard Arsenault, an official in the Commission's Wireless Telecommunications Bureau, regarding Alaska RRC potentially using spectrum in the 220 MHz band to deploy a positive train control system.⁷ Mr. Arsenault determined that the e-mail and attachments

² See Letter from Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, FCC Office of General Counsel, to Robert Turney, Alaska Railroad Corporation (Jan. 17, 2012) (OGC Letter).

³ See *Amendment of the Commission's Ex Parte Rules and Other Procedural Matters*, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 4517 (2011).

⁴ See *id.* at 4518.

⁵ 47 C.F.R. § 1.1206; see 47 C.F.R. § 1.1202 (defining presentation and ex parte presentation).

⁶ 47 C.F.R. § 1.1206(b); see 47 C.F.R. § 1.1202 (defining decision-making personnel).

⁷ See E-mail from Robert Turney, Telecom Engineer, Alaska Railroad Corporation, to Richard Arsenault, Chief Counsel, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Nov. 29, 2011, 2:27 p.m. EDT); OGC Letter; see also Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 104(i)(3), 122 Stat. 4848, 4858 (2008) (defining a positive train control system as "a system designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position").

addressed the merits of WT Docket 11-79,⁸ a permit-but-disclose proceeding in which Mr. Arsenault was a decision-maker.⁹ Mr. Arsenault informed the Alaska RRC employee that Alaska RRC must file his e-mail and attachments in WT Docket No. 11-79.¹⁰ Alaska RRC failed to file the required materials within the specified time period.¹¹ The subject materials were subsequently filed in WT Docket No. 11-79 by Mr. Arsenault.

5. On January 17, 2012, the FCC's Office of General Counsel sent a letter to Alaska RRC stating that there had been an apparent violation of the Ex Parte Rules and that the matter was being referred to the Bureau.¹² The Bureau and Alaska RRC thereafter entered into settlement discussions.

III. TERMS OF AGREEMENT

6. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order.

7. **Jurisdiction.** Alaska RRC agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and that the Bureau has the authority to enter into and adopt this Consent Decree.

8. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the Effective Date. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission Order.

9. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its Investigation. In consideration for the termination of said Investigation, Alaska RRC agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that, in the absence of new material evidence, the Bureau will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any new proceeding, formal or informal, or take any action on its own motion against Alaska RRC concerning the matter that was the subject of the Investigation. The Bureau also agrees that in the absence of new material evidence it will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against Alaska RRC with respect to Alaska RRC's basic qualifications,

⁸ See Wireless Telecommunications Bureau Seeks Comment on Spectrum Needs for the Implementation of the Positive Train Control Provisions of the Rail Safety Improvement Act of 2008, WT Docket 11-70, *Public Notice*, 26 FCC Rcd 6704 (2011).

⁹ See OGC Letter.

¹⁰ See E-mail from Richard Arsenault, Chief Counsel, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission to Robert Turney, Telecom Engineer, Alaska Railroad Corporation (Dec. 1, 2011, 4:38 p.m.); Email from Richard Arsenault, Chief Counsel, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission to Robert Turney, Telecom Engineer, Alaska Railroad Corporation (Dec. 5, 2011, 5:35 p.m.); OGC Letter.

¹¹ See OGC Letter.

¹² See *id.*

including its character qualifications, to be a Commission licensee or hold Commission authorizations.

10. **Compliance Officer.** Within thirty (30) calendar days after the Effective Date, Alaska RRC shall designate a senior corporate manager with the requisite corporate and organizational authority to serve as a Compliance Officer and to discharge the duties set forth below. The person designated as the Compliance Officer shall be responsible for developing, implementing, and administering the Compliance Plan and ensuring that Alaska RRC complies with the terms and conditions of the Compliance Plan and this Consent Decree. In addition to the general knowledge of the Communications Laws necessary to discharge his/her duties under this Consent Decree, the Compliance Officer shall have specific knowledge of the Ex Parte Rules prior to assuming his/her duties.

11. **Compliance Plan.** For purposes of settling the matters set forth herein, Alaska RRC agrees that it shall, within sixty (60) calendar days after the Effective Date, develop and implement a Compliance Plan designed to ensure future compliance with the Communications Laws, including the Ex Parte Rules, and with the terms and conditions of this Consent Decree. The Compliance Plan shall implement the following procedures:

- (a) **Operating Procedures.** Within sixty (60) calendar days after the Effective Date, Alaska RRC shall establish Operating Procedures that all Covered Employees shall follow to help ensure Alaska RRC's compliance with the Ex Parte Rules. Alaska RRC's Operating Procedures shall include internal procedures and policies specifically designed to ensure that Alaska RRC files a copy of any presentation, including any attachment, it makes to a Commission decision-maker directed to the merit or outcome of permit-but-disclose proceedings, for inclusion in the record of the underlying proceeding. Alaska RRC shall also develop a Compliance Checklist that describes the steps that a Covered Employee must follow to ensure compliance with the Ex Parte Rules.
- (b) **Compliance Manual.** Within sixty (60) calendar days after the Effective Date, the Compliance Officer shall develop and distribute a Compliance Manual to all Covered Employees. The Compliance Manual shall explain the Communications Laws that apply to Alaska RRC, including the Ex Parte Rules, and set forth the Operating Procedures that Covered Employees shall follow to help ensure Alaska RRC's compliance with the Ex Parte Rules. Alaska RRC shall periodically review and revise the Compliance Manual as necessary to ensure that the information set forth therein remains current and accurate. Alaska RRC shall distribute any revisions to the Compliance Manual promptly to Covered Employees. The Compliance Manual will require personnel, including Covered Employees, to contact Alaska RRC's Compliance Officer and, if appropriate, regulatory legal counsel with any questions or concerns that arise with respect to Alaska RRC's obligations under the Ex Parte Rules.
- (c) **Compliance Training Program.** Alaska RRC shall establish and implement a Compliance Training Program on compliance with the Communications Laws, including the Ex Parte Rules, and the Operating Procedures. As part of the Compliance Training Program, Covered Employees shall be advised of Alaska RRC's obligation to report any noncompliance with the Ex Parte Rules under paragraph 12 of this Consent

Decree and shall be instructed on how to disclose noncompliance to the Compliance Officer. All Covered Employees shall be trained pursuant to the Compliance Training Program within ninety (90) calendar days after the Effective Date. Any person who becomes a Covered Employee at any time thereafter shall be trained within thirty (30) calendar days after the date such person becomes a Covered Employee. Alaska RRC shall repeat the compliance training on an annual basis, and shall periodically review and revise the Compliance Training Program as necessary to ensure that it remains current and complete and to enhance its effectiveness.

- (d) **Termination Date.** Unless stated otherwise, the requirements of this Compliance Plan shall expire thirty-six (36) months after the Effective Date.

12. **Reporting Noncompliance.** Alaska RRC shall report any noncompliance with the Ex Parte Rules and with the terms and conditions of this Consent Decree within fifteen (15) calendar days after discovery of such noncompliance. Such reports shall include a detailed explanation of (i) each instance of noncompliance; (ii) the steps that Alaska RRC has taken or will take to remedy such noncompliance; (iii) the schedule on which such remedial actions will be taken; and (iv) the steps that Alaska RRC has taken or will take to prevent the recurrence of any such noncompliance. All reports of noncompliance shall be submitted to the Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 4-C330, 445 12th Street, SW Washington, DC 20554, with a copy submitted electronically to Theresa Z. Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela S. Kane at Pamela.Kane@fcc.gov, William Kehoe at William.Kehoe@fcc.gov, and Pam Slipakoff at Pam.Slipakoff@fcc.gov. The reporting obligations set forth in this paragraph shall expire thirty-six (36) months after the Effective Date.

13. **Compliance Reports.** Alaska RRC shall file Compliance Reports with the Commission ninety (90) calendar days after the Effective Date, twelve (12) months after the Effective Date, twenty-four (24) months after the Effective Date, and thirty-six (36) months after the Effective Date.

- (a) Each Compliance Report shall include a detailed description of Alaska RRC's efforts during the relevant period to comply with the terms and conditions of this Consent Decree and the Ex Parte Rules. In addition, each Compliance Report shall include a certification by the Compliance Officer, as an agent of and on behalf of Alaska RRC, stating that the Compliance Officer has personal knowledge that Alaska RRC (i) has established and implemented the Compliance Plan; (ii) has utilized the Operating Procedures since the implementation of the Compliance Plan; and (iii) is not aware of any instances of noncompliance with the terms and conditions of this Consent Decree, including the reporting obligations set forth in paragraph 12 of this Consent Decree.
- (b) The Compliance Officer's certification shall be accompanied by a statement explaining the basis for such certification and shall comply with Section 1.16 of the Rules¹³ and be subscribed to as true under penalty of perjury in substantially the form set forth in Section 1.16.

¹³ 47 C.F.R. § 1.16.

- (c) If the Compliance Officer cannot provide the requisite certification, the Compliance Officer, as an agent of and on behalf of Alaska RRC, shall provide the Commission with a detailed explanation of the reason(s) why and describe fully (i) each instance of noncompliance; (ii) the steps that Alaska RRC has taken or will take to remedy such noncompliance, including the schedule on which proposed remedial actions will be taken; and (iii) the steps that Alaska RRC has taken or will take to prevent the recurrence of any such noncompliance, including the schedule on which such preventive action will be taken.
- (d) All Compliance Reports shall be submitted to the Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 4-C330, 445 12th Street, SW Washington, DC 20554, with a copy submitted electronically to Theresa Z. Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela S. Kane at Pamela.Kane@fcc.gov, William Kehoe at William.Kehoe@fcc.gov, and Pam Slipakoff at Pam.Slipakoff@fcc.gov.

14. **Voluntary Contribution.** Alaska RRC agrees that it will make a voluntary contribution to the United States Treasury in the amount of ten thousand dollars (\$10,000) within thirty (30) calendar days after the Effective Date. Alaska RRC shall also send electronic notification of payment to Theresa Z. Cavanaugh at Terry.Cavanaugh@fcc.gov, Pamela S. Kane at Pamela.Kane@fcc.gov, William Kehoe at William.Kehoe@fcc.gov, and Pam Slipakoff at Pam.Slipakoff@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁴ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions regarding the form of payment :

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated. Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

Questions regarding payment procedures should be addressed to the Financial Operations Group

¹⁴ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

15. **Waivers.** Alaska RRC waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues the Adopting Order as defined in this Consent Decree. Alaska RRC shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Alaska RRC nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and Alaska RRC shall waive any statutory right to a trial *de novo*. Alaska RRC hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act,¹⁵ relating to the matters addressed in this Consent Decree.

16. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

17. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or order adopted by the Commission (except an order specifically intended to revise the terms of this Consent Decree to which Alaska RRC does not expressly consent) that provision will be superseded by such Commission rule or order.

18. **Successors and Assigns.** Alaska RRC agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

19. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Communications Laws.

20. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

21. **Paragraph Headings.** The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

22. **Authorized Representative.** The individual signing this Consent Decree on behalf of Alaska RRC represents and warrants that he is authorized by Alaska RRC to execute this Consent Decree and to bind Alaska RRC to the obligations set forth herein. The FCC signatory represents that she is signing this Consent Decree in her official capacity and that she is authorized to execute this Consent Decree.

¹⁵ See 5 U.S.C. § 504; 47 C.F.R. Part 1, Subpart K.

23. **Counterparts.** This Consent Decree may be signed in counterpart (including by facsimile). Each counterpart, when executed and delivered, shall be an original, and all of the counterparts together shall constitute one and the same fully executed instrument.

P. Michele Ellison
Chief
Enforcement Bureau

Date

William Hupprich
General Counsel
Alaska Railroad Corporation

Date