**No. 20-1032 (consolidated with 20-1069)**

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**UNITED STATES COURT OF APPEALS**
**DISTRICT OF COLUMBIA CIRCUIT**

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**ALASKA COMMUNICATIONS SYSTEMS HOLDINGS, INC.,**
***Petitioner/Cross-Respondent*,**

**v.**

**NATIONAL LABOR RELATIONS BOARD,**
***Respondent/Cross-Petitioner*,**

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**PETITION FOR REVIEW**
**FROM THE NATIONAL LABOR RELATIONS BOARD**
**[Not Yet Scheduled for Oral Argument]**

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# BRIEF FOR PETITIONER/CROSS-RESPONDENT

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# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioner/Cross-Respondent Alaska Communications Systems Holdings, Inc. states:

## A. Parties and Amici

Petitioner/Cross-Respondent: Alaska Communications Systems Holdings, Inc.

Respondent/Cross-Petitioner: National Labor Relations Board

## B. Ruling Under Review

The ruling under review is the January 30, 2020 Decision and Order of the National Labor Relations Board in Case 19-CA-241609, granting the General Counsel's motion for summary judgment related to the underlying representation proceeding in which the Union was certified as bargaining representative. The Decision and Order is reported at 369 NLRB No. 17 and can be found in the Joint Appendix at 441-44.

## C. Related Case

Counsel states that – International Brotherhood of Electrical Workers, Local 1547, AFL-CIO v. Alaska Communications Systems Holdings, Inc., No. 20-35021, pending in the United States Court of Appeals for the Ninth Circuit, involving the Union as a party is a pending case that involves similar issues on the same factual background.

/s/ *Matthew J. Kelley*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 26.1 and 28(a)(1), Petitioner/Cross-Respondent Alaska Communications Systems Holdings, Inc. states:

(a) Petitioner discloses that Alaska Communications Systems Group, Inc. is the parent company of Alaska Communications Systems Holdings, Inc. and holds 100% of its stock.

(b) As relevant to this appeal, Alaska Communications Systems Holdings, Inc., provides a wide range of telecommunications services, across the state of Alaska, including local exchange carrier (i.e. landline telephone) services, commercial and residential broadband internet services, commercial private data networks and services, and maintaining of fiber optic data transport services in Alaska and Oregon.

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## GLOSSARY

Board .....National Labor Relations Board

DDE.....Decision and Direction of Election

INMC.....Integrated Network Management Center

NLRA or Act ..... National Labor Relations Act

NOC.....Network Operations Center

O & M.....Operations and Maintenance

## STATEMENT OF JURISDICTION

Under 29 U.S.C. § 160(f), this Court has jurisdiction over Petitioner's petition for review of the Board's "Decision and Order" dated January 30, 2020. The Board's Decision and Order is a final order within the meaning of Section 10(f) of the National Labor Relations Act, and Petitioner is a party aggrieved by the order. On February 13, 2020, Petitioner timely filed its petition for review with this Court.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Regional Director exceeded his powers in violation of the National Labor Relations Act and the Board's Rules and precedent when he added two individuals to the petitioned-for bargaining unit, without providing the Company due process, notice or the opportunity to present evidence, cross-examine witnesses, and make arguments regarding the inclusion of those individuals.

2. Whether the Board's decision to incorporate 12 individuals into an existing bargaining unit of approximately 320 of Petitioner's employees through a self-determination (i.e. *Armour-Globe*) election was arbitrary, capricious, an abuse of discretion, or lacked substantial evidence, where the "community of interest" factors overwhelmingly favor separate and distinct bargaining units.

## STATEMENT OF THE CASE

Petitioner Alaska Communications Systems Holdings, Inc. ("Alaska Communications" or the "Company"), headquartered in Anchorage Alaska, provides a wide range of telecommunications services, across the state of Alaska, including local exchange carrier (i.e. landline telephone) services, commercial and residential broadband internet services, commercial private data networks and services, and maintaining of fiber optic data transport in Alaska and Oregon.

Alaska Communications employs approximately 580 employees, approximately 320 of which are in a pre-existing bargaining unit (the "Alaska Unit"), represented by the International Brotherhood of Electrical Workers, Local 1547 ("IBEW" or "Union"). Alaska Communications and the Union have a long-standing collective bargaining relationship that encompasses at least five (5) collective-bargaining agreements or extensions since 1999. All of the represented employees in this unit work in Alaska and all of Local 1547's union halls are located in Alaska.

The Company's Alaska-based operations, both the Alaska Unit and the unrepresented positions, are spread across the state and the

employees are assigned to travel to locations. The collective bargaining agreement ("CBA" or "Agreement") expires on December 31, 2023, and covers wages, hours, and other working conditions. *See* JA 633, Art. 1. Most importantly, the Agreement applies "within the State of Alaska." *See Id.* at Art. 1.3. Alaska Communications has never had any unionized employees outside of Alaska.

In approximately October 2008, the Employer purchased WCI Cable Systems. JA 6-9, 86. WCI was a non-union company that operated submarine cables. JA 69. When Alaska Communications purchased WCI, it became the "Cable Systems Group." JA 80-1, 197.[1] Alaska Communications employees working in Oregon are part of the Cable Systems Group, headquartered in Hillsboro, Oregon.

Following Alaska Communications' purchase of WCI, Cable Systems continued to operate in the same way that it did prior to the purchase. JA 213. WCI, for example, serviced telecom carriers, and Cable

[1] The Hillsboro employees work under a different subsidiary Alaska Communications Systems Group (parent company), than the Alaska-based employees. The "Cable Systems Group" is organized under ACS Cable Systems, LLC, whereas the Alaska-based employees are organized under Alaska Communications Systems Holdings, Inc.

Systems continues to service such carriers. JA 301-03. In fact, the Cable Systems Group continues to service about 30 "legacy" WCI contracts that precede the Alaska Communications purchase. JA 91. The carrier customers, who provide approximately 80%-90% of Cable Systems' work, include Southern Cross, TATA, TPE, Hawaiki, and Quintillion. JA 36, 70, 133-34.

The Alaska Communications employees based in Hillsboro, Oregon maintain the WCI/Cable Systems Network. JA 31. The Hillsboro group is responsible for the submarine cables that run from Alaska to Oregon, as well as a couple of cables that we manage for our other customers – our larger customers." JA 206

Alaska Communications employees in Hillsboro work in one of two groups: (1) the Hillsboro Network Operations Center ("NOC"); or (2) Operations and Maintenance ("O&M"). Jeffrey Holmes ("Holmes") works as the NOC supervisor. Andrey Kondor, Scott Shier, Wes Wangen, Alan Daniels, Chris Jackson, and Mike LeCompte report to Holmes. JA 56-7, 81-2, 196-97, 204-05. Each of the NOC employees works in Hillsboro.

Chris Jackson ("Jackson") described the Hillsboro duties, stating: "the primary focus of the NOC is to do monitoring and dispatching." JA

24. He explained, "because we are a very thinly manned shop, we also do a lot more hands on work than our [bargaining unit] counterparts in Anchorage do." *Id.* For example, "we have customers that we provide services for that occasionally need us to do that inside plant type of work, replacing failed cards, running jumpers, helping to turn up new services, helping to decommission retired services." *Id.* Hillsboro NOC employees work extensively on the Quintillion network, a customer system serviced only by the Cable Systems Group. JA 199.

Like the NOC group, the O&M group consists primarily of employees in Oregon. Anatoliy Pavlenko ("Pavlenko") serves as the supervisor for the O&M group, working out of the Hillsboro office. JA 82, 215-16. Network technician Oliver LeJeune ("LeJeune") likewise works out of the Hillsboro office. JA 69. Unlike the NOC group, however, the O&M group includes employees located throughout Oregon, as well as two employees in Alaska. Station technician Shayne Burnem ("Burnem") works in Florence, Oregon (about 200 miles from Hillsboro) at a cable landing station. JA 75. At Florence, Burnem oversees the AKORN cable that comes from the Homer, Alaska cable station. JA 35.

Station technician Mark Anderson ("Anderson") works at Nedonna Beach, Oregon (about 90–100 miles away from Hillsboro) at another cable landing station. JA 72. At Nedonna Beach, Anderson oversees the Northstar Cable that lands from Whitter, Alaska. JA 9-11. Patrick "Linc" Craig ("Craig"), also a station technician, works at Pacific City, Oregon, at a cable landing station. JA 9-10. The Cable Systems Group, through Craig, monitors the Hawaiki cable. *Id.*

Jacob Kelley ("Kelley") and Steven Huff ("Huff") report to Pavlenko as well, but both of them work in Anchorage, Alaska at the Employer's Diamond D location. JA 82, 215-16. Despite working out of Diamond D, Kelley and Huff also oversee the Homer and Whittier cable landing stations. JA 32. In addition to these duties, the O&M group, with assistance from the NOC, maintains the terrestrial backhaul for the submarine cables. JA 83, 128-130. Terrestrial backhaul consists of fiber optic cables located above ground, which connect the submarine cables to one of three other locations: (1) Hillsboro office; (2) Pittock Building in Portland; and Westin Building in Seattle. JA 199. Together, the NOC, with all of its work described above, and the O&M group, with all of its duties, make up the Cable Systems Group. JA 127-28, 215.

On September 7, 2018, the IBEW filed a representation petition, under Section 9 of the National Labor Relations Act (the "Act" or "NLRA"), 29 U.S.C. § 159, requesting an *Armour-Globe* election for all "Network Operations Specialists, Senior Network Operations Specialists, Network Operations Technicians, Senior Network Technicians, Senior Team Leads, Senior Administrative Assistants, Submarine Cable Operations Technicians and Cable Systems Network Operations Supervisors **working for Alaska Communications in Oregon**. . . ." JA 385. (Emphasis added) The Petition described the Oregon employees performing functions for the Cable Systems Group. There were 12 individuals in the petitioned for classifications located in Oregon, with the two other members of the Cable Systems Group located in Alaska that were originally outside the petitioned for unit.[2]

A Hearing Officer conducted a Pre-Election Hearing on September 18–21 and October 2–4, 2018. The hearing focused on the supervisory

[2] The petitioned-for unit included two individuals in Hillsboro that the Regional Director ultimately found to be supervisory employees under the Act, but the Regional Director added the two Alaska employees to the unit on his own, maintaining the number in the current unit at 12, even though the composition is different from the petitioned for unit.

status of two Network Operations Center Supervisors and the Petitioner's attempt to combine the petitioned-for unit with the existing unit.

On December 18, 2018, the Regional Director issued a Decision and Direction of Election ("DDE"), finding there was a sufficient community of interest between the employees in the petitioned-for unit and the existing Alaska unit, disregarding substantial record evidence to the contrary. Further, the Regional Director improperly added two employees located in Alaska who were not in the petitioned-for unit, and whose inclusion was not litigated during the pre-election hearing. The Regional Director unilaterally modified the petitioned-for unit, a decision approved by the Board, thus violating Alaska Communications' due process rights. The Regional Director admits that without the two Alaska employees, the petitioned-for unit was inappropriate. JA 427

Despite specifically describing the petitioned-for unit as "inappropriate," and neither party seeking to change the petitioned-for unit through a Statement of Position, response to a Statement of Position, or at the outset of the hearing on the Petition, Regional Director Hooks directed an *Armour-Globe* election to add ten Hillsboro, Oregon

employees and two Anchorage, Alaska employees into a bargaining unit of over 300 employees in Anchorage, Alaska. JA 436.

After the Region conducted a mail-ballot election and a majority of the votes cast were in favor of the Union, the Employer made a Request for Review to the NLRB because: (1) a substantial question of law and policy was raised by the Regional Director's departure from officially reported Board precedent; (2) the Regional Director's decision on a number of substantial factual issues was clearly erroneous on the record, and these errors prejudicially affected the rights of the Company, and (3) the conduct of the hearing and rulings made in the proceeding resulted in prejudicial error.

The Board denied Alaska Communications' Request for Review. But, the Board specified "contrary to his [the Regional Director's] findings, there is no evidence of temporary interchange present in this case." The Regional Director relied on his erroneous interchange finding to conclude there was a community of interest between the Oregon employees and the existing bargaining unit.

The Regional Director's Decision, affirmed by the Board, ignored and misapplied controlling precedent. In addition, the Regional Director

made findings unsupported by the record evidence. The Regional Director had a duty to dismiss the petition because the petitioned-for unit was inappropriate.

To obtain judicial review, Alaska Communications refused to meet and bargain with the Union. Following Alaska Communications' technical refusal, Counsel for the General Counsel of the NLRB, moved to transfer the case to the Board, and requested a Decision and Order granting summary judgment against Alaska Communications. Alaska Communications opposed the General Counsel's summary judgment motion. On January 30, 2020, the Board issued its Decision and Order adopting the Regional Director's unit determination. JA 441-44. Alaska Communications now seeks the Court's review of the Board's Decision and Order.

## SUMMARY OF ARGUMENT

The Regional Director exceeded his authority when he arbitrarily, without due process, and contrary to Board rules, *sua sponte* added two employees from Alaska to the Union's petitioned for unit of 12 Oregon based employees. The Union did not include the two employees in its Petition, the Company did not seek to include them, and neither the

Regional Director nor the Hearing Officer identified their potential inclusion as part of the pre-election hearing. What is more, the issue was not litigated at the hearing. At the close of the hearing, the issue was first raised, and the Hearing Officer ruled the issue was not before him.

Having improperly added the two Alaska employees to make an admittedly inappropriate unit potentially an appropriate one, the Regional Director then ignored or improperly discarded substantial evidence weighing against a community of interest between the modified unit and the existing unit of Alaska-based employees.

The Regional Director's determinations were arbitrary and capricious, and substantial record evidence does not support the Regional Director's conclusion that the improperly modified unit he created shares a community of interest with the existing Alaska Unit. Hence, this Court should grant Alaska Communications' petition for review and deny enforcement of the Board's order.

## STANDING

Petitioner has standing to seek review of the Board's Decision and Order because it is a final order and Petitioner is a party aggrieved by said order under 29 U.S.C. § 160(f).

## ARGUMENT

### I. STANDARD FOR REVIEWING THE CONDUCT OF THE HEARING AND DECISIONS BY THE HEARING OFFICER AND BOARD.

Although this Court's review of election proceedings "is deferential, [this Court is] not merely 'the Board's enforcement arm. It is [the] responsibility [of this Court] to examine carefully both the Board's findings and its reasoning….'" *Randell Warehouse of Arizona, Inc. v. NLRB*, 252 F.3d 445, 448 (D.C. Cir. 2001) (quoting *General Elec. Co. v. NLRB*, 117 F.3d 627, 630 (D.C. Cir. 1997)); *see also Int'l Transp. Service, Inc. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006) (discretion given to the Board "has limits, and [this Court] will not rubber stamp NLRB decisions.") (citations and quotations omitted); *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 21 (D.C. Cir. 2012) (the court "bear[s] the 'responsibility to examine carefully both the Board's findings and its reasoning"; granting petition for review because the Board's order was not supported by substantial evidence)(citation omitted).

While the Board maintains discretion "in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," the Board "may [not] abuse that discretion." *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 994

(D.C. Cir. 2001) (citation omitted). Where there are "errors at [an election hearing] that deprive a litigant of the opportunity to present his version of the case," this Court has found the Board abused its discretion and declined to enforce a Board order certifying a union as collective bargaining representative. *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 586 (D.C. Cir. 2015) (quoting Roger J. Traynor, *The Riddle Of Harmless Error* (1970)); *see also Singer Sewing Mach. Co. v. NLRB*, 329 F.2d 200, 208 (4th Cir. 1964) ("Because the Board erroneously excluded evidence which it should have received and… prevented a witness from testifying who should have been made available for examination, it follows that enforcement of the order must be denied."); *Indiana Hosp., Inc. v. NLRB*, 10 F.3d 151, 155 (3d Cir. 1993) (Alito, J.) (overturning union certification where hearing officer improperly revoked employer's subpoena for testimony); *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727, 734 (D.C. Cir. 1983) (Scalia, J.) (overturning union certification where ALJ improperly revoked employer's subpoena for testimony because the Board's action "was taken without observance of procedure required by law").

Here, this Court should decline to enforce the Board's order certifying the Union as the collective bargaining representative of the petitioned-for unit and set aside the election. The Regional Director, affirmed with little analysis by the Board, abused his discretion when he failed to provide Alaska Communications notice of and an opportunity to present evidence on whether two employees in Alaska should be included within a unit of employees in Oregon. The Regional Director further abused his discretion to bootstrap the Oregon employees into the existing unit in Alaska under an *Armour-Globe* election.

## II. THE BOARD DEVIATED FROM ITS PRECEDENT AND THE CURRENT REPRESENTATION RULES.

The Regional Director improperly and without notice expanded the petitioned-for unit in violation of Board precedent and representation case rules. These actions unfairly prejudiced Alaska Communications and improperly skewed the community of interest analysis at the heart of this controversy.

### A. The Union Failed to Raise the Inclusion of Two Alaska-based Cable Systems Group Employees in the Unit.

On September 10, 2018, the IBEW filed its Petition for Election. It sought to incorporate 12 Alaska Communications employees in Oregon

into a pre-existing bargaining unit of Alaska-based employees represented by the IBEW. The Union did not include the two Alaska-based Cable Systems Group employees in its Petition for Election. Per the Board's rules regarding election petitions, on September 17, 2018, the Company filed its Position Statement ("Position Statement") with Region 19. *29 C.F.R. §102.63.* In its Position Statement, the Company identified multiple issues and argued "[t]he petitioned-for unit and the existing unit do not share a sufficient community of interest." At the pre-election hearing on September 18, 2018, the Union had an opportunity to respond to the Employer's Position Statement. The Record transcript captured this opportunity:

> Hearing Officer: Mr. Wielechowski, what is your position with respect to the issue raised by the Employer in its position – in its statement of position with respect to the community of interest issue with the proposed unit and the existing unit?
>
> Union Counsel: We believe there is a community of interest that is shared between the **Alaska unit and the Oregon unit that is being proposed**. So we disagreed with their position.

JA 2-3. (emphasis added).

The Board's rules precluded the Union from raising any argument regarding the inclusion of employees other than the Oregon-based Cable

Systems Network employees in the proposed unit. Section 102.66(d) states, "[a] party shall be **precluded** from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument **concerning any issue that the party failed to** [. . .] **place in dispute in response to another party's Statement of Position**. . . ." *29 C.F.R. § 102.66(d).*

Following this exchange, the parties and the Hearing Officer discussed a supervisory issue the Employer raised in its Position Statement. JA 3-4. Immediately after this exchange, the Regional Director listed the issues for hearing:

> Hearing Officer: Okay. The Regional Director has directed that the following issues will be litigated in this proceeding. **Number one, the issue regarding the community of interest with the petitioned-for unit and the existing unit**, and the second issue being litigated is whether or not the cable systems network operator supervisor position is a Section 2(11) supervisor position.

JA 4. (emphasis added).

The Regional Director reiterated the parties would litigate ***"the community of interest with the petitioned-for unit and the existing unit,"*** *i.e.* the unrepresented Cable Systems Group employees in Oregon and the represented employees in Alaska. *Id.*

At the conclusion of the hearing, once parties had proffered evidence on the issues designated issues by the Regional Director, the Union attempted to modify its position, and the Company objected. The Rules precluded the Union from raising any issue beyond the community of interest between the petitioned-for unit and the existing Alaska unit and the Regional Director, through his Hearing Officer, agreed with the Employer:

Hearing Officer: Okay. Also, in the Employer's position statement, the Employer took the position that an appropriate unit would be a standalone unit as compared to the petition for an Armour-Globe unit that would be included with the Alaska IBEW bargaining unit.

Mr. Wielechowski, does the Petitioner wish to proceed to an election in any alternative unit if the unit sought is found to be inappropriate by the Regional Director or the Board?

Union Counsel: Yes.

Hearing Officer: State for the record please.

Union Counsel: The Union will agree to an alternate unit that is proposed by the NLRB, whether that includes the two members of the Hillsboro cable systems unit or located in Alaska, or whether that is a standalone unit in the State of Oregon. And, of course, our preferred unit is the – an Armour-Globe unit that would bring them into the ACS Alaska collective-bargaining agreement.

Hearing Officer: Position still the same, Mr. Adlong?

Employer Counsel: They can't amend their petition now.

Hearing Officer: Right.

Employer Counsel: So those two Alaska guys are out. That's what they said. They filed a petition to waive their arguments. I want to make the clear.

Hearing Officer: And the two guys we're referring to are Jacob Kelley and Steven Huff?

Employer Counsel: Steven Huff.

Hearing Officer: Okay.

Employer Counsel: They were not in the petition for a unit.

JA 322-23.

Based on the Hearing Officer's response and the clear language of the Rules, these two employees were not at issue. In *Brunswick Bowling Products, LLC*, the Board said, "Section 102.66 governs the conduct of the hearing, and Section 102.66(d), the preclusion provision, specifically **precludes a defaulting 'party' from raising an issue it was required to but failed to timely raise**." 364 NLRB No. 96 (2016) (emphasis added). Here, the Union did not mention including unrepresented Alaska employees in the unit when questioned by the Hearing Officer at the outset when the Regional Director defined the scope of the hearing. According to the Rules and Board precedent, that failure precluded the Union from raising the issue.

### B. The Regional Director Exceeded the Scope of His Powers to Modify the Unit.

The Regional Director took the position that he could consider and receive evidence concerning any issue necessary. It is important to note the "receive evidence" portion of that statement. Here, the community of interest issue the Parties litigated considered only the "**community of interest with the petitioned-for unit and the existing unit."** It took more than two months for the Regional Director to issue his decision. At no point did the Regional Director seek to reopen the record on this issue. At no point did the Regional Director ask for supplemental briefs on this issue, even though he allowed post-hearing briefs in this case.

Regional Director Hooks never took evidence on the Alaska-based employees he added as it relates to community-of-interest factors with employees in the Alaska unit. Then, the Regional Director based a significant aspect of the community of interest determination on the very issue the Company never had the opportunity to address.

At no time during the existence of the Act has the Board expected a Regional Director to rescue an inappropriate, petitioned-for unit. *See e.g. Arbor Construction Personnel, Inc.*, 343 NLRB 257 (2004) (Regional Director's direction of election reversed where petitioned-for unit was

inappropriate). The petitioned-for unit never included the two Alaska-based employees that became the lynchpin of the Regional Director's decision. Without them, the petitioned-for unit was inappropriate. The Regional Director confirmed this point multiple times in the DDE, stating the Union's decision to exclude employees because they work in Anchorage "simply because they work outside Oregon, would unduly fragment the workforce and render the proposed Voting Group an irrational and indistinct one." JA. 427. The Regional Director made clear in his decision – that without the Alaska employees, the unit was inappropriate. *Id.*

The Regional Director cited *Fleming Foods, Inc.*, 313 NLRB 948, 950 (1994), but the Board has never relied on it for the proposition that a Regional Director can add employees into a proposed unit without due process. *Fleming* relates to residual units and in that case the Employer sought to expand the unit to include part-time clericals and maintenance employees. The Union sought a narrower unit than the one proposed by the Company. *Id.* The parties fully argued and briefed the issues and the Board expanded the unit. *Fleming* provides no support for the Regional Director's position. It supports the concept that the Board can determine

a unit larger than the one petitioned-for, when appropriate, and when both parties have fully briefed and articulated the merits of their positions.

Aside from whether the Regional Director lawfully expanded the unit, the impact on the community of interest standard cannot be understated. The Regional Director had to determine whether the petitioned-for unit should be included within an existing unit under *Armour-Globe* principles. The Regional Director used the two Alaska-based employees to overcome the biggest factor weighing against such inclusion – the thousands of miles between the two groups. He did so without due process and without notice to Alaska Communications that this issue was in play. Regional Directors must dismiss petitions for inappropriate units. *See e.g. Arbor Construction Personnel, Inc.*, 343 NLRB 257 (2004) (Regional Director's direction of election reversed where petitioned-for unit was inappropriate).

Without notice, discussion, argument, or the submission of evidence related to including the two employees, the Regional Director's decision was erroneous and prejudiced Alaska Communications. This Court must correct the Regional Director's error.

## III. THE BOARD DEPRIVED ALASKA COMMUNICATIONS OF DUE PROCESS WHEN IT INCLUDED TWO EMPLOYEES FROM ALASKA IN THE OREGON UNIT WITHOUT FIRST PROVIDING ALASKA COMMUNICATIONS NOTICE OR AN OPPORTUNITY TO ADDRESS THE MATTER.

The Board and Regional Director violated Alaska Communications' Fifth Amendment right to due process when it included two Alaskan employees within the unit of Oregon employees without providing notice or an opportunity to present evidence on the issue. More than 80 years ago, the Supreme Court held due process protections apply to administrative actions. *Morgan v. United States*, 298 U.S. 468 (1936). The Supreme Court explained, "'[t]he fundamental requisite of due process of law is the opportunity to be heard'" at "'a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In an analogous case, *NLRB v. Blake Construction Co.*, this Court held the Board violated the employer's due process rights. 663 F.2d 272, 280 (D.C. Cir. 1981). The Board found the employer violated Sections 8(a)(1) and (5) of the Act when it failed to extend a collective bargaining agreement to its non-union employees and refused to recognize the union

as those employees' bargaining representative. This Court declined to enforce those portions of the Board's order because "these violations were neither alleged in the complaint issued by the Board General Counsel nor fully and fairly litigated in the ensuing proceedings." *Id.* The Court explained:

> The applicable law is clearcut. Both the Administrative Procedure Act and the Board's own rules require that the complaint inform the Company of the violations asserted. The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing. *E.g. General Teamsters & Allied Workers Union No. 992 v. NLRB*, 427 F.2d 582, 588 (D.C.Cir.1970); *United Packinghouse, Food & Allied Workers Int'l Union v. NLRB*, 416 F.2d 1126, 1134 n.12 (D.C.Cir.1969), *cert. denied*, 396 U.S. 903, 90 S.Ct. 216, 24 L.Ed.2d 179. Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself. *E.g. United Packinghouse*, supra*; Montgomery Ward & Co.*, supra.

*Id.* at 279 (footnotes omitted). Although evidence bearing on the underlying issues was offered at the unfair labor practice hearing, this Court nevertheless refused to enforce the Board's order because "on the existing record we cannot see how the Company could be held to have actual knowledge that it was being charged directly with failure to apply

the contract to non-union employees or to deal with the Union as their representative." *Id.* at 282.

As in unfair labor practice cases, Section 9(c) of the Act and Section 102.60-67 of the Board's Rules are intended to ensure compliance with due process in representation cases. They do this through a regimented, step-by-step narrowing of the issues. When a union files a Petition under Section 102.60-61, all potential issues remain on the table, and the union must announce its position on those issues. Section 102.63(b) then requires an employer to file a Statement of Position, which narrows the issues to those the employer raises.

At this point, the Regional Director, based on the Petition and the Statement of Position, informs the parties of the issues they will litigate under Section 102.66(b). The rules state, unless the Regional Director directs otherwise, "[t]he Hearing officer shall not receive evidence concerning any issues as to which parties have not taken adverse positions. . . ." *Id.* Once the Regional Director specifies the issues, the Region conducts a hearing. The process of narrowing issues and allowing only limited litigation on the remaining issues in dispute provides essential due process. Regarding "notice," the Director's specification of

the issues under Section 102.66(b), preceded by the Petition and Statement of Position, informs the parties of the issues in dispute. Regarding "an opportunity to be heard," Section 102.64(a) explains:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the **party's contentions and are relevant to the existence of a question of representation.**

*29 C.F.R. § 102.64(a)* (emphasis added).

In other words, failure to inform the parties of the issue in dispute violates both due process and the Board's Rules. Otherwise, a party cannot know what contentions to consider or what represents relevant evidence.

Conversely, if an issue is not in dispute, the Rules permit neither consideration of nor evidence regarding that issue. Section 102.66(b) states "[t]he Hearing Officer **shall not receive evidence concerning any issue as to which parties have not taken adverse positions. . . ."** (emphasis added). The Rules also allow receipt of evidence to determine the Board's jurisdiction and other issues "**which the Regional Director determines that record evidence is necessary**." *29 C.F.R. § 102.66(b)* (emphasis added).

Here, the parties spent seven days at hearing, generating over 1,300 pages of transcript and submitting dozens of exhibits. The Regional Director also allowed the Parties to file post-hearing briefs. But, neither the Regional Director nor the Hearing Officer ever announced, as an issue requiring litigation, whether a unit including Anchorage employees Kelley and Huff with Oregon employees would be appropriate or would constitute an appropriate unit. What is more, the Petition, Position Statement, and pre-hearing specification of issues did not provide notice the Regional Director would consider such a unit. When mention of the unrepresented Alaska employees became a topic, the Employer's counsel immediately noted the Rules and the Union's inability to amend the petition; and, the Regional Director's representative conducting the hearing responded "**Right,**" confirming the issue would not be considered. JA 322-23. In addition, although he allowed the Parties to file briefs, the Regional Director said nothing regarding a new issue for consideration. JA 324-25. As a result, the Employer possessed no notice the Regional Director may rule on that issue, and it did not receive an opportunity to be heard.

Importantly, at the **outset** the Hearing Officer **did not** ask whether the Petitioner would proceed in a unit including the two Anchorage employees. Rather, the issues concerned only distinguishing between Alaska and Oregon employees. If the Regional Director had identified this issue prior to the Hearing, or at the outset of the proceeding, Alaska Communications could have presented evidence and contentions relevant to the issue. Moreover, when the potential for a unit including the two employees from Alaska with the employees from Oregon was addressed at the **conclusion** of the Hearing, the Hearing Officer **agreed** such a unit was **not** under consideration. Although it would have been too late and contrary to the Board's rules to have permitted the addition at that point, had the Hearing Officer said it was an issue he planned to consider, Alaska Communications could have requested to submit additional evidence on the issue, or at least addressed the issue in its post-hearing brief. Instead, **Alaska Communications never received notice or an opportunity to be heard on the issue the Regional Director ultimately found dispositive**.

Hence, as in *Blake*, this Court must decline to enforce the Board's decision on a novel issue not raised in the Petition or other Pre-Hearing Filings or directions "nor fully and fairly litigated in the ensuing proceedings." 663 F.2d at 272. *See also Morgan*, 298 U.S. at 481 (an agency violates due process when its decision-maker following a hearing "has not considered evidence or argument" on an issue).

## IV. ENFORCING THE BOARD'S ORDER WOULD EXCEED THE ADMINISTRATIVE DEFERENCE AFFORDED TO IT.

As explained by former Board Members Miscimarra and Johnson in their dissents to the 2015 amendments to the Rules, the Board's 2015 representation case rules under which this case was litigated were facially invalid. Specifically, they impermissibly infringed upon the Employer's speech by excessively curtailing the time in which all parties could voice their views on unionization. 79 Fed. Reg. 74308, at 74433, 74438-41 (Dec. 15, 2014). Similarly, the amendments undermined due process rights by foreclosing the right to an "appropriate hearing" under Section 9(c) of the Act. *Id*. at 74437-38. Access to legal representation also suffered from the amendments' "preoccupation with speed" because parties other than the petitioner possess less time to procure and obtain the advice of legal counsel. *Id*. at 74436. Additionally, employee privacy

rights suffered because employers were required to disclose all of their contact information to an external third party, with no meaningful safeguards on how the petitioner uses that information. *Id.* at 74452. The amended Rules under which this matter was administered therefore violate the Employer's and employees' rights as guaranteed under the Act. See *id.*, at 77430-77460.

Any interpretation of Section 102.60-67 of the Board's Rules (describing the Petition, Statement of Position, and Hearing processes) that permits Regional Directors to conjure up and impose previously unconsidered bargaining units would also render the Rules invalid as applied. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, governs the standard for review of agency rulemaking. 467 U.S. 837 (1984). In *Chevron*, the Supreme Court articulated a two-step analysis. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id. at* 842–43 (footnotes omitted). If Congress did not directly address the precise question, "the court does not simply impose its own construction on the statute, as

would be necessary in the absence of an administrative interpretation." *Id.* "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

The Rules as applied by the Regional Director here fail both steps of the *Chevron* test. The Supreme Court explained that it uses "traditional tools of statutory construction" to determine whether an agency rule fails step one of the *Chevron* test. *Id.* at 843 n.9. "For most judges, these tools include examination of the text of the statute, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history." *Id.* (citations omitted).

Here, the statutory intent is clear. Section 9(c) of the Act expresses Congress's mandate that representation case issues receive a full hearing. Imposing a bargaining unit unspecified in a petition or considered at hearing directly contradicts Congress's intent. Thus, to the extent the Board's Rules permit such an outcome, those Rules fail step one of the *Chevron* test, which makes them invalid.

Step two of the *Chevron* test accords with the Administrative Procedures Act's ("APA") requirement at 5 U.S.C. § 706(2)(A), which

requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Shays v. FEC*, 414 F.3d 76, 96-97 (D.C. Cir. 2005) (observing the overlap between the APA and *Chevron* step two).

Under this standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency[.]" *Id.* The Supreme Court has applied the *State Farm* articulation of the APA's "arbitrary and capricious" standard to judicial review of Board adjudicatory and rulemaking proceedings alike. *See Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (adjudicatory); *American Hosp. Assn. v. NLRB*, 499 U.S. 606, 618-20 (rulemaking).

The Regional Director here arbitrarily, capriciously, and *sua sponte* declared the unit including the two Alaska-based employees appropriate based upon a record that did not encompass the issue. While the Regional Director may have found some evidence those two employees existed, he abused his discretion by extrapolating that evidence to an entirely separate community of interest issue from the one the parties litigated and the Regional Director told the parties they would litigate. The Regional Director simply cannot have known what other evidence and arguments the parties would have presented if the parties knew the Region would analyze that issue. The community of interest amongst the concededly inappropriate petitioned-for unit was fully litigated, but no evidence was presented, or could have been presented as relevant, regarding the community of interest amongst all employees the Regional Director subsequently elected to include (both Oregon and Alaska-based employees) and the existing unit.

Furthermore, the due process concerns discussed above cause the Regional Director's approach to run afoul of 5 U.S.C. § 706(2)(A) of the APA, which requires invalidation of agency actions that are "contrary to constitutional right, power, privilege, or immunity[.]" If a Regional

Director can pull a purportedly appropriate bargaining unit out of thin air, simply by adding employees mentioned in passing during a hearing, then the Rules conflict with Section 9's requirement to hold a full hearing, while also approving arbitrary and capricious determinations. The Board cannot apply the Rules in this manner without running afoul of *Chevron*.

## V. THE EMPLOYER'S CABLE SYSTEMS EMPLOYEES DO NOT SHARE A COMMUNITY OF INTEREST WITH THE EXISTING UNIT, WITH OR WITHOUT THE TWO ANCHORAGE EMPLOYEES.

An *Armour-Globe* election, by which unrepresented employees may seek to join an existing collective bargaining unit, is appropriate where the unrepresented employees (1) "share a community of interest with unit employees," and (2) "constitute an identifiable, distinct segment." *Warner-Lambert Co.*, 298 N.L.R.B. 993, 995 (1990); see also *Armour & Co.*, 40 N.L.R.B. 1333, 1336 (1942); *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294, 299-300 (1937)

As the Regional Director found, the petitioned-for unit, which excluded two Anchorage employees, cannot be combined with the exiting unit to form an appropriate unit under Section 9 of the Act. JA 427. As he reasoned, such a combination would result in "an irrational and indistinct" unit. *Id.*

Even assuming *arguendo* the Regional Director could have added Kelley and Huff to the unit, which he could not, Cable Systems employees still cannot combine with the existing unit. The Cable Systems Group, even including those two employees, has a separate and distinct community of interest from the existing unit. The inclusion or exclusion of these two employees does not change the fact that the Employer acquired the Cable Systems Group as a separate entity, serving separate business purposes, for separate customers, and has continued to operate it separately since that acquisition. Consequently, the community of interest factors require that the existing unit and the Cable Systems Group would operate as separate bargaining units.

When an incumbent union seeks to add a group of previously unrepresented employees to its existing unit, and no other labor organization participates, it must demonstrate the petitioned-for employees share a community of interest with existing unit employees. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972). A variant of the community of interest test applies when employees in the unit sought work in

different geographic locations. *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at *2 (2016).

Under the community of interest standard, the Board examines "whether the sought-after employees' interests are sufficiently distinct from the petitioned-for group." *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at *5 (Dec. 15, 2017). In the geographic context, the Board focuses on whether the community of interest shared by one group is "separate and distinct" from that shared with the other group, and as compared to excluded locations. *Laboratory Corp.*, 341 NLRB 1079, 1082 (2004). The Petitioner conceded it bore the burden of proof on this issue. JA 4-5.

The multi-location variant of the community of interest test includes the following factors: geographic proximity; departmental organization, employee interchange; contact; common supervision; employees' skills and duties; functional integration of business operations; terms and conditions of employment; and bargaining history. *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 2 (2016). Here, the Cable Systems employees unquestionably have a separate and distinct community of interest from the community of interest shared amongst the existing bargaining unit employees.

Upon review of the Board's determination, this Court has previously "granted a petition for review if the NLRB's "bargaining unit determination ... is arbitrary or not supported by substantial evidence in the record." *NLRB. v. Tito Contractors, Inc.*, 847 F.3d 724, 728 (D.C. Cir. 2017) quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 420 (D.C. Cir. 2008) (internal quotation marks omitted). "[W]e may not find substantial evidence 'merely on the basis of evidence which in and of itself justified [the Board's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.' " *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 962 (D.C. Cir. 2003) (second alteration in original) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). "[T]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 961–62 (internal quotation marks omitted) (quoting *Universal Camera Corp.*, 340 U.S. at 488).

1. The Geographic Differences Between the Cable Systems Group and the Existing Unit Remain Significant

The Regional Director's concerns regarding the geographic distinctions between the petitioned-for unit and the existing unit are well-founded. According to the Union's own evidence, the overland

distance between Portland, Oregon and Anchorage, Alaska is **2,434 miles**. JA 153, 575. For perspective, that distance roughly approximates the distance between New York City and Boise, Idaho. Furthermore, even removing the indirect element of land travel (and, in this case, the crossing of two international borders), the Petitioner calculates an airborne distance of 1,538 miles. That distance exceeds, by approximately 100 miles, the space between Boston, Massachusetts and Omaha, Nebraska.

The Regional Director's impermissible *post hoc* addition of the two Anchorage employees does little to diminish these differences. Even considering their work in Alaska, the fact remains that 10 of the employees in the group to be added – or 87% of that group – work in Oregon. JA 407. Thus, the decision to include Kelley and Huff does not meaningfully alter the overall identity of the groups at issue. In fact, even after stating that they would be included, the DDE refers to the existing unit as the "Alaska unit" throughout. JA 405-39 *passim*. Thus, the Regional Director recognized that, even including Kelley and Huff, an important geographic divide exists between the "Alaska unit" and the Oregon-based Cable Systems employees.

Indeed, Kelley and Huff focus on supporting the Cable Systems work in Oregon. The Regional Director noted they report remotely to the facility in Hillsboro, Oregon, and "they respond to calls or assignments that serve the needs of the Hillsboro operations." JA 408. Thus, regardless of whether the unit includes Kelley and Huff, the *locus* of Cable Systems work remains in Oregon.

Furthermore, despite his reliance on geographic distinctions to find the petitioned-for unit inappropriate for inclusion with the existing unit, the Regional Director also attempted to minimize such distinctions by arguing both the existing unit and the Oregon-based Cable Systems Group already encompass large geographic areas. That these groups cover large areas means they *already* strain the bounds of unit appropriateness, not that they are amenable to *even further* expansion. The Regional Director should have exercised caution in expanding a unit to the point where it covers a significant portion of the globe's northern hemisphere.

The Regional Director's analysis also ignores those aspects of geographic distinctions that go beyond the vast distances between employees. Alaska possesses many unique geographic characteristics,

including widely dispersed small communities, islands, limited accessibility (including via ice roads and ferries), and other features associated with proximity to the Arctic Circle. JA 183-85, 296-97. Neither the area in which Oregon-based Cable Systems employees work, nor their corporate customers, contain or experience the unique geographic circumstances familiar to the Alaskan consumers for whom existing Alaska unit employees work.

Including Kelley and Huff in the Cable Systems Group does not diminish the geographic considerations that caused the Regional Director to find a combined unit excluding them inappropriate. JA 428e. Eighty-seven percent of the Cable Systems Group employees work in Oregon and they work throughout the state of Oregon. Adding 10 employees covering much of the state of Oregon to a bargaining unit covering all of Alaska is beyond the pale of the NLRA, and unprecedented in Board law. Distances of over 1,500 miles between those employees and the existing unit far exceed those the Board has found too great in other contexts. *See, e.g.*, *D&L Transportation*, 324 NLRB 160 (1997) (finding 29 miles to be too much distance); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063 (2001)

(25 miles); *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999) (6-12 miles).

Thus, even including Kelley and Huff, the geographic proximity here is so weak that the Board has rejected similarly strained units **even where every other community of interest factors favored combination.** *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964) (rejecting multi-location unit, despite significant functional integration and interchange, due to "relatively wide" geographic separation of 24 miles) (emphasis added). Furthermore, differences in geographic service areas play an especially important role in the utilities industry, and in such community of interest determinations. For example, in *Verizon Wireless*, 341 NLRB 483, 484 (2004), the Board closely examined both utilities industry considerations and geographic distinctions. Specifically, it considered both petitioned-for retail stores in Bakersfield, California on one hand, and excluded Northern California/Nevada and other "West Region" facilities on the other. The Board refused to presume the appropriateness of a system wide unit, and instead found that the Bakersfield locations alone constituted an appropriate unit.

This factor clearly weighs against a community of interest and any claim that the Oregon Cable Systems Group can belong to the Alaska bargaining unit. This factor alone required dismissal of the petition, yet the Regional Director, against the clear weight of the evidence – found it only "marginally" weighed against the inclusion of the Hillsboro group. JA 428.

2. The Cable Systems Business Unit is a Distinct Business Unit

Relying only upon conclusory statements and the overlapping duties of some corporate officers, the Regional Director found that "organization of the facilities" somehow weighs in favor of finding a community of interest between the existing unit and the Cable Systems Group. JA 429. In fact, since its acquisition in 2008, the Oregon-based Cable Systems Group has operated as an organizationally independent and distinct entity.

For example, Oregon Senior Administrative Assistant Kim Daschel testified she spoke on behalf of that group to corporate representatives. JA 99. She also handled the Cable Systems Group's budget and inventory. JA 92, 95-8. Operationally, Daschel tended to Hillsboro matters such as policy compliance and recording keeping. JA 100-01.

Even more directly, Daschel handled customer, supplier, and vendor contract renewals for Hillsboro, and utilized complex math for contractual Consumer Price Index calculations. JA 93-4. Similarly, Diana Ruhl, former long-tenured employee and current Union business representative assigned to the Employer, testified that the Cable Systems group is an independent organizational unit. JA 154.

In contrast to the Cable Systems Group's operation as an independent organizational unit serviced by Daschel, other employees perform those functions for bargaining unit operations in Anchorage. JA 103. Daschel is the only person who performed these duties for the Cable Systems Group, and she never visited Alaska. JA 102.

The Regional Director found the Cable Systems Group, "an identifiable, distinct segment of the Employer's operations." JA 426. The Cable Systems Group's history and status as a separate business unit provides the source of that distinctiveness. The continued historical divisions result in the groups servicing different customer contractual relationships. The Board has found separate customer contractual relationships warrant separate bargaining units. *Executive Resources Associates*, 301 NLRB 400, 401–02 (1991) (finding separate community

of interests for groups of employees of a single employer working under separate contracts). The differences represent more than formalities.

Customers

- The corporate network that Alaska unit employees work on serves the Employer's broader business purposes, including by meeting consumer needs going all the way into residential consumer homes, while the Cable Systems network almost exclusively handles contracts with large corporate telecommunications customers. JA 34-7, 40, 48, 54, 67-8, 70, 104, 120, 133-34, 143-45, 251-52, 254.

History/Integration

- This separation resulted from the historical division between the two entities, and the Employer has not achieved "integration" to the extent envisioned by some internal goals. JA 90, 142, 191, 247-48, 284-85, 311-12, 314. The evidence makes clear that separate networks exist. JA 118, 124-25. The evidence further shows that Bill Kositz, former Cable Systems Senior Manager, intentionally maintained the separation of the corporate network from the Cable Systems Group by removing hard drives and connections to the corporate network, as well as operational steps such as maintenance of different daily logs. JA 311.

Separate Equipment and Lack of Connection

- The corporate network managed by Alaska employees and the Cable Systems network are functionally separate networks, which use different "nodes" and equipment. JA 36-9, 55-6, 87, 118-19, 124-26, 130, 139, 149, 240-245, 311. In the words of Jeffrey Holmes, "WCIs former network and the ACS corporate are not connected. They never have been. They can't be." JA 253.

Access

- Although the two groups theoretically can access some functions on one another's networks as a functional matter, as a practical

> matter, the Employer prohibits them from doing so. JA 32-3, 41-2, 52-3, 64-6, 76, 84-5, 105-06, 108, 113, 131-36, 140-41, 147-49, 164-65, 182, 200, 217-219, 222-23, 245-46, 259-62, 278-80, 315-16. The Union itself has protested occasions when Oregon employees accessed the corporate network. JA 43-4, 59-61. The Employer's Netcool electronic system "filters out" all views of the other system. JA 50, 63, 137-38.

The work the Cable Systems Group performs on the submarine cables differs from the work the Alaska bargaining unit group performs. JA 221. To perform work on the submarine cables, an employee needs different skillsets and training. JA 237-41. The Anchorage Integrated Network Management Center ("INMC") watches 6,500 devices on the Netcool platform, while the Cable Systems Group only watches 50–65 devices. JA 49. The Anchorage INMC monitors devices all the way into customer's homes, while the Cable Systems Group does not perform that function. JA 304-08. The types of customers with whom employees work have practical effects on working conditions.

Consequently, the Regional Director's finding that this factor weighs in *favor* of a community of interest with the existing unit defies rational explanation, is not supported by the evidence, and constitutes a significant error.

3. Employee interchange occurs only rarely and contact between the groups accounts for a small portion of work duties

The Regional Director's fumbling of employee interchange evidence raises significant concerns about the validity of his analysis overall. In fact, the Board pointed out the Regional Director's error. JA 440, fn. 1.

This Court recently granted an employer's appeal where interchange was at issue. "The Board also fails to consider the lack of interchange among the different types of Tito employees." *NLRB. v. Tito Contractors, Inc.*, 847 F.3d 724, 733 (D.C. Cir. 2017). One of the key facts regarding employee interchange in that case was the distance between employees at different locations. "For example, on Tito's recycling side, the Cockeysville facility is approximately sixty miles from the Derwood facility, meaning that its employees could not easily move between the two if one facility was short-staffed. **This distance alone belies the existence of meaningful interchange between the recycling employees and Tito's labor-side employees.**" *Id.* (emphasis added). The Court found that the Board in *Tito's* ignored that employee interchange was lacking. "The Board did not explain how these isolated facts, even if true, supersede the lack of evidence that interchange exists

among Tito's two mechanics, one warehouseman and its many laborers (who themselves are separated)." *Id.*

Here, the Regional Director made no explicit finding on employee interchange. Instead, the Regional Director found the combined "Interchangeability and Contact among Employees" factor "neutral." JA 430. Regarding interchange itself, he stated, "the record reveals evidence of modest employee interchange." JA 429.

The Regional Director examined two types of interchange. First, he correctly observed that temporary visits by existing unit employees to Cable Systems employees, and *vice versa*, occur on a "rare" basis ("less than one stint per year"). *Id.* He categorized this as "interchange," while the Board correctly specified:

> while there are examples of Cable Systems Group employees traveling to other facilities to cross-train or shadow other employees and vice versa, interchange involves temporary or permanent transfer into a different classification, and neither the Regional Director nor the parties have identified any evidence of such temporary interchange in the instant dispute.

JA 440, fn. 1.

Second, the Regional Director characterized two permanent transfers over the course of nine years – one from the existing unit to

Cable Systems, and another from Cable Systems to the existing unit – as "multiple permanent transfers." JA 294-95, 429. Nowhere does the Regional Director explain how "rare" temporary visits and two permanent transfers over nine years could amount to evidence of "modest" interchange with an ultimately "neutral" impact on the community of interest analysis.

In fact, as the evidence acknowledged in the DDE shows, interchange between the existing unit and the Cable Systems Group is quite uncommon. That fact should weigh heavily on any examination of the relationship between the two groups. The Regional Director's mischaracterizations of the evidence, in an attempt to minimize the impact of evidence strongly supporting separate units, highlights the deficiencies in his approach to the record as a whole. This factor is not neutral, it weighs strongly against a community of interest between the two groups.

The other half of the "Interchangeability and Contact among Employees" factor the Regional Director found "neutral" also fails to support a combined unit. Indeed, the Regional Directly correctly observed, "it is clear that it is very rare for the employees to physically

work side by side with each other because all points in Alaska are separated from Hillsboro by several hundred miles (or more) and/or a multiple hour flight." JA 430.

The Regional Director nevertheless sought to minimize the importance of this critical fact, asserting:

> The unique nature of a telecommunications company engaged in providing and maintaining high-speed data transport systems (fiber optic cables transmit data at literally the speed of light), and which operates many of its facilities remotely (even in a physical sense), means that **remote interchange is more comparable to physical interchange than it would be for most employers:**

*Id*. (emphasis added).

Two major flaws in this analysis stand out. First, there is no authority, and the DDE cites none, showing the Board evaluates the community of interest factors differently based upon the nature of an employer's products or services. Second, the term "remote interchange" appears in ***no other Board case (or Regional Director's Decision) on record***. In fact, the phrase makes little sense. "Interchange" refers to instances in which employees in one group work in the other group, and in the geographic context, at one another's locations. *Hilander Foods*, 348 NLRB 1200, 1203–04 (2006). Even in this case, the Board's

identification of interchange focuses on the physical, rather than the ephemeral where the Board discussed "travelling to other facilities" to cross-train or shadow other employees. JA 440, fn. 1.

To the extent the Board or Regional Director is referring to work-related contact between the two groups, the record shows there is minimal contact. The primary purpose of calls between the two groups results from the inability of one group to access the other group's network. JA 45-7. Multiple Cable Systems employees testified their interactions with bargaining unit employees are quite limited. JA 17, 127-28, 115.

Meanwhile, Cable Systems Group employees interact much more frequently with one another, both in person and through other means, again demonstrating their own "separate and distinct" community of interest. JA 12-17, 18-19, 20, 24, 74-5, 107, 109-12, 186-90, 202-03. An Oregon-based witness even testified that, unlike existing unit employees, he interacts with Anchorage-based Cable Systems employees Kelley and Huff every day, and these Anchorage-based employees have also traveled to Oregon for training. JA 146, 166-67.

The Board regularly finds separate communities of interests where, as here, virtually no interchange occurs. *Hilander Foods*, 348 NLRB 1200, 1203–04 (2006) (relying upon only "minimal" temporary transfers and "only 8 or 9 permanent transfers involving the [location at issue] over a 3 ½ [year] period") (*citing Red Lobster*, 300 NLRB 908, 911 (1990) (finding insufficient interchange based on only 19 of 85 employees working temporary out-of-group assignments in a year)); *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000). The lack of in-person visits between the groups, and only two employee transfers over the course of nine years, plainly demonstrates a lack of interchange. The Board has held the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest. *Executive Resource Associates*, 301 NLRB at 401 (1991) (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981)). With virtually no interchange and limited contact, the Regional Director indisputably erred in finding this important factor "neutral." This factor, like the many others, weighs against a community of interest.

4. The Regional Director Found that Two Individuals Directly Supervise only Cable Systems Group Work, but

Nonetheless Weighed Common Supervision "Strongly" in Favor of a Community of Interest

The Regional Director devoted over two pages of analysis to determine the two Cable Network Operations Supervisors are statutory supervisors, but nevertheless concluded, "the common supervision factor weighs strongly in favor of finding a community of interest[.]" JA 424-26, 431. The Regional Director attempted to explain this contradiction by asserting, "the majority of § 2(11) supervisory duties are shared and superseded by Anchorage-based managers" higher in the chain of command. JA 431. The Regional Director's finding is not supported by the evidence.

Rather, the record establishes that, in addition to hiring authority, Cable Network Operations Supervisors Jeffrey Holmes and Anatoliy Pavlenko directly supervise nearly all day-to-day aspects of Cable Systems Group work. They approve travel, vacations, shift coverages, and timesheets for Cable Systems employees. JA 25, 58, 79, 121, 193-95, 207-10, 214, 224-225, 255-58, 265-70, 286-87, 309, 318-19, 557-62. In addition, they lead staff meetings, assign job duties, approve overtime, evaluate and coach employees, and decide work allocations. JA 26, 73, 207-09, 246, 271, 282-83, 285. They also discipline employees and

recommend promotions. JA 236-37, 272-74, 277-78. Multiple documents further show they approve work procedures for the Cable Systems Group. JA 226-35, 249-50, 448-490.

Holmes and Pavlenko report to Senior Network Operations Specialist Greg Tooke and Senior Manager of Network Services Management Thomas Brewer, who are based in Alaska. JA 201.[3] Consequently, Holmes and Pavlenko are **the only supervisors overseeing Cable Systems work in Oregon**.

Ignoring this real supervision by the Cable Network Operations Supervisors, the Regional Director relies instead upon much less routine facts, such as the role of senior Alaska-based management in annual evaluations, and their occasional visits to Cable Systems sites. JA 431. Similar to his analysis of other factors, the Regional Director fails to explain how such limited roles by senior managers can overcome the direct day-to-day supervisory duties of individuals devoted solely to the Cable Systems Group. Even more troublingly, he does not articulate how

[3] At the time of the hearing and decision, Brewer lived in Alaska. He has since moved to Oregon and now works out of the Hillsboro facility with the same title.

such facts could lead to a finding that, "the common supervision factor weighs strongly in favor of finding a community of interest[.]" *Id.*

Holmes and Pavlenko *separately* supervised the Cable Systems Group, and thus the supervision factor weighs *strongly against* combination of these two groups. Board community of interest standards require that *day-to-day* and *local* supervision must receive the greatest weight. *Red Lobster*, 300 NLRB 908, 911 (1990) (relying on significant authority vested in restaurant general managers); *Cargill, Inc.*, 336 NLRB 1114, 1114 (2001) (emphasizing "significant local autonomy"); *Purity Food Stores, Inc.*, 150 NLRB 1523, 1527 (1965). Here, the Regional Director identifies the Employer's Cable Network Operations Supervisors as the day-to-day and local supervision of the Cable Systems Group, and only the Cable Systems Group. The facts and the law thus show the Regional Director could do nothing other than find this factor weighs against a community of interest. His contrary determination is arbitrary, capricious, and not supported by substantial evidence.

5. Employees in the Two Groups Perform Different Duties, Using Different Skills, Due to the Differing Purposes of Their Business Units

The Regional Director acknowledged major differences in job duties between the two groups, but failed to analyze them rationally:

> The most notable difference is that the Oregon employees have the responsibility for monitoring and servicing undersea data cables, while the Alaska Unit employees primarily monitor terrestrial cables and nodes . . . None of the employees in the Alaska Unit are stationed out of a remote cable landing station. None of the employees in the Alaska Unit physically work on the undersea fiber optic cables. The Cable Systems Group also has proprietary software to monitor and remotely operate the physical plants and landing facilities, software of the kind that the Alaska Unit does not normally utilize.

JA 431-32.

In essence, the portion of Cable Systems Group work the Regional Director describes as different from existing unit work is *the entire scope of that work*. Meanwhile, existing unit work also possesses its own unique features. For example, the Record reflects that the one employee who transferred from the existing unit to the Cable Systems Group did so because he failed to meet the minimum bargaining unit qualifications. JA 291-92.

Even job titles and job descriptions differ. JA 23, 162; *compare* JA 601-32, 762 *with* JA 563-69, 571-80, 633-762. As a union representative

confirmed, it negotiated the bargaining unit's different job descriptions. JA 158-60, 601-32, 762. She admitted these negotiations serve to provide the unit with job security. JA 160-61. The Petitioner's bargaining goal ensures that only bargaining unit members perform those jobs. JA 160-61, 163-64.

Employees in the existing unit's primary facility watch 6,500 devices on their electronic ("Netcool") platform, while the Cable Systems Group only watches 50–65 devices. JA 49. The Anchorage facility monitors devices all the way into customer's homes, while the Cable Systems Group does not perform that function. JA 304-08.

What is more, the Cable Systems Group has over 60 policies that apply only to Cable Systems, and Alaska Communications Human Resources personnel did not know these policies existed prior to the hearing. JA 289, 448-90. In fact, those Human Resources staff members could not even access the Cable Systems Group policies without assistance from the Cable Systems Group supervisor Holmes. JA 289-90.

Further, while some Cable Systems employees may be capable of performing bargaining unit tasks, not a single bargaining unit member can perform all of the duties of the Cable Systems Group's employees. JA

259, 320-21. In contrast, the record makes clear that Oregon Cable Systems Group employees, including Kelley and Huff, all perform the same or similar job duties. JA 114, 317.

Despite these striking differences, the Regional Director relied upon similarities in some ***equipment*** utilized by the two groups to weigh this factor in favor of a combined unit. JA 432. This reliance was erroneous. As explained above, a normal work day in the existing unit differs significantly from a normal day in the Cable Systems Group for many reasons. These differences strongly support the need for separate units, regardless of any equipment overlap. As a result, the Regional Director should have found employee duties and skills to weigh in favor of separate units. *Potlatch Forests, Inc.*, 94 NLRB 1444, 1447 (1951) (employees working with separate supervision, using distinct skills and working different hours "enjoy a sufficient community of interest, apart from that of the remaining employees" so as to warrant a separate unit).

To the extent the Union or even the Board want to claim that the separate business units do perform similar duties, that argument still demonstrates no community of interest. The Board has specifically found no community of interest where the distinct groups are "virtually

interchangeable," but no interchange actually occurs. *Essex Wire Corp.*, 130 NLRB 450, 453 (1961) (finding no community of interest where jobs were "virtually interchangeable" but "there was in fact no interchange"); *See also Combustion Engineering*, 195 NLRB 909, 912 (1972). Simply put, this factor weighs against a community of interest.

6. Multiple Organizational and Practical Barriers Between the Two Groups Minimize Functional Integration

The parties devoted more time at hearing to the factor of functional integration than virtually any other. For his part, the Regional Director acknowledged:

> [I]t is clear that some tasks performed by the Cable Operations Group are discrete and not well integrated into the operations of the employees in Anchorage and the rest of ACS' operations. No Alaska Unit employees routinely service manned undersea fiber optic cable landing stations. No Alaska Unit employees perform remote power generation monitoring, hardware repair and replacement, or HVAC duties, either on the Oregon Coast or on the unmanned repeater lines that run from the Oregon Coast all the way to the Seattle co-location facility.

JA 433.

Notwithstanding these important facts, the Regional Director again focused on the nature of the Employer's services to find, "the unique nature of a remotely-monitored large-scale broadband data transport

network indicates that these geographically disparate employees are nonetheless more functionally integrated than not." *Id.*

This conclusion ignored several fundamental elements of Cable Systems Group operations. First, and most importantly, the record repeatedly reflects that since that group's acquisition by the Employer in 2008, there have been very few successful integration efforts. JA 90, 142, 191, 247-48, 284-85, 311-12, 314. Contrariwise, former Cable Systems Senior Manager Bill Kositz intentionally maintained separation of the existing unit's network from the Cable Systems Group by removing hard drives and connections, as well as operational steps such as maintenance of different daily logs. JA 311.

This lack of integration follows from the fact the two groups serve entirely different customer bases. The network that existing unit employees work on serves the Employer's broader business purposes, including meeting consumer needs by going all the way into residential consumer homes, while the Cable Systems Group almost exclusively handles contracts with large corporate telecommunications carrier customers. JA 34-7, 40, 48, 54, 67-8, 70, 104, 120, 133-34, 143-45, 251-52, 254. *Sears, Roebuck & Co. (Flint, Mich.)*, 151 NLRB 1356, 1358 (1965)

(where employees' primary activity "has a degree of functional difference and autonomy (including geographic and supervisory separateness)," a separate unit is warranted.).

Due to these historical and customer-driven differences, the network managed by existing unit employees and the Cable Systems Group are functionally separate networks, which use different "nodes" and equipment. JA 36-9, 55-6, 87, 118-19, 124-27, 130, 139, 149, 240-45, 311. As explained by supervisor Jeffrey Holmes, who has worked in the Cable Systems Group since its acquisition, **"[the predecessor's] former network and the ACS corporate are not connected. They never have been. They can't be."** JA 213, 253. (emphasis added).

Connections between the two networks are largely theoretical because the Employer prohibits employees from accessing the other group's networks without permission. JA 32-3, 41-2, 52-3, 64-66, 76, 84-5, 105-06, 108, 113, 131-36, 140-41, 147-49, 164-65, 182, 200, 217-19, 222-23, 245-46, 259-62, 278-80, 315-16. The Petitioner itself has protested occasions when Cable Systems Group employees accessed the existing unit's network. JA 43-4, 59-61. Furthermore, the Employer's Netcool electronic system "filters out" all views of the other system. JA 50, 63,

137-38. The Record reflects employees clearly know these boundaries. JA 43-4, 59-61.

In fact, the Company has so clearly defined those boundaries that special procedures exist for the possibility that cross-network access would be required during an emergency. The Employer's "KVM" disaster recovery cable could theoretically provide Oregon employees with access to the existing unit's network in the event of an emergency. JA 313, JCA 1-104. The Cable Systems Group has never used it nor has the Alaska bargaining unit. JA 51, 54, 62, 116-17, 310; JCA 1-104. Moreover, the cable itself remains physically unplugged, as confirmed by RX-3:

From: Holmes, Jeffrey R.
Sent: Wednesday, September 27, 2017, 1:14 PM
Subject: Hillsboro NOC: - KVM access for INMC
To: Brewer, Thomas G.
Cc: Hillsboro NOCC

FYI – Please see the thread below.

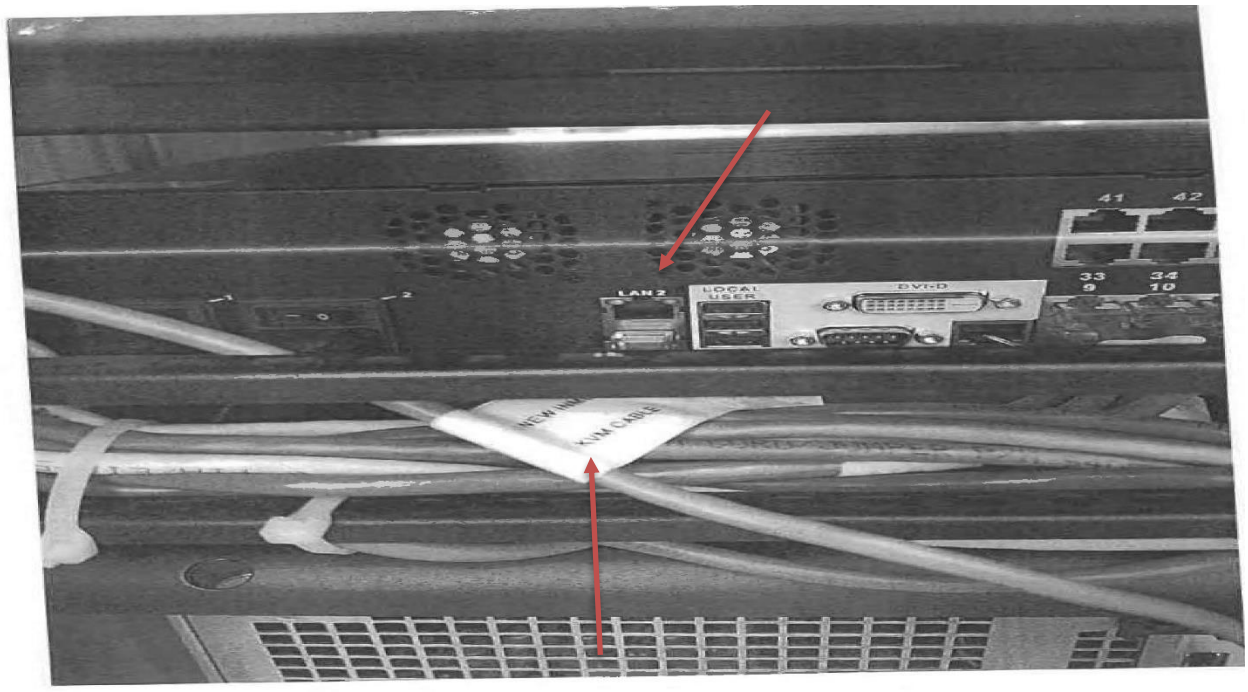
Jacob is creating a group along with username/password for the INMC (Raritan III) . If you are called to connect the cable then please plug into the LAN2 Port of the Raritan, but until further notice this will remain disconnected.

We used the connection from the tower In the NOCC Cabinet that was used for INMC Camera monitoring.

We will work together to complete a Hillsboro DR Handbook for the INMC.

Regards,

Jeffrey




JA 445-47; s*ee also* JA 220, 263-64, 281.

The Regional Director ignored these clear boundaries between the work of the two groups, and instead viewed the overall electronic system as "different phases of the same product." JA 433. That is nonsense. Alaska Communications does not operate an assembly line upon which Cable Systems employees perform one task and the bargaining unit performs the next. Rather, the Employer's employees possess technical expertise tailored to different systems, for different customers, based on continued historical divisions between each groups' work. Barriers of both policy and physical connections undermine attempts to construe the work as functionally integrated. The Regional Director thus should have

weighed the absence of functional integration in favor of separate units, but instead erred by arriving at the opposite conclusion. *Utica Mutual Insurance Company*, 165 NLRB 964 (1967) (noting the physical separateness of employees is one factor weighing against finding a community of interest).

7. The Regional Director Cited No Identical Terms and Conditions of Employment between the Two Groups, but Nonetheless Assigned the Factor a "Neutral" Impact

The Regional Director also erroneously concluded the terms and conditions of employment factor was "neutral." The Regional Director stated, "[t]he combination of similar hourly wages and some similar universal policies and benefits, but differences regarding pension benefits, health insurance, and other bargaining for benefits, lead me to conclude this factor is neutral[.]" JA 434. Thus, neither the wages, nor "some" policies the Regional Director relies upon, are identical between the two groups. These differences between ostensibly "similar" terms and conditions exist because the Parties have determined all terms and conditions of employment for the existing unit via collective bargaining, while the Employer has always possessed full discretion to set terms and conditions for the Cable Systems Group.

For example, while UX-13 represents an Employer policy on compensation that applies to the Cable Systems Group, whereas the CBA controls compensation for bargaining unit employees. JA 173-75. Last year, the Cable Systems Group experienced a 4.5% pay cut, while bargaining unit members obtained a 1.5% wage increase. JA 122, 292. *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962) ("[f]actors considered by the Board in determining community of interest among employees include . . . a difference in method of wages or compensation"); *Roman Catholic Archdiocese*, 216 NLRB 249 (1975) (separate compensation system weighs against finding of community of interest). Also last year, the Employer furloughed existing unit employees, but did not furlough any employees in the Cable Systems Group. JA 298. In addition, the Cable Systems Group receives a bonus as part of the employee compensation package, while existing unit members do not. JA 293. Well-established Board precedent holds that differences in the system of compensation, like those here, demonstrate separate interests. *Miller & Miller Motor Freight Lines*, 101 NLRB 581, 581–82 (1953) (relying on difference in pay scales to reject multi-location unit).

Other important differences also result from this distinction. The Cable Systems Group has a sick leave policy that applies only to them. JA 77-79, 592-600 Employees in the Cable Systems Group have unlimited flexible leave, but the CBA provides accrual of 4.62–10.77 hours per pay period for represented employees depending on length of service. JA 294; 633, Art. XII. Multiple other Employer policies apply to the Cable Systems Group, like the RIF/Severance Policy, Overtime Policy, and Recruiting and Hiring, but do not apply to bargaining unit members. JA 491-507, The Cable Systems Group does not use seniority, and those employees work ten hours per day, four days a week. JA 21-2, 71. As the DDE acknowledges, existing unit employees receive pension contributions, while Cable Systems employees do not. JA 434. *Trustees of Boston Univ.*, 235 NLRB 1233, 1236 (1978) (differences in benefits, among other factors, weighs against finding a community of interest).

Despite these many differences, the Regional Director focused on a categorization of wages as being "similar," and "some similar universal policies," to disregard this factor's impact in the ultimate community of interest analysis. The evidence shows differences in virtually every term and condition of employment, and properly weigh heavily in favor of

separate units. As this Court identified in *Tito's* "the Board overlooks the significant differences among Tito's employees' wages, hours and other working conditions. Tito's Cockeysville employees receive no fringe benefits and are paid less than the Dickerson and Derwood employees to whom both medical and dental insurance is available." *NLRB v. Tito Contractors, Inc.*, 847 F.3d 724, 733 (D.C. Cir. 2017). Here, as in *Tito's*, important differences "undermine the conclusion that [Alaska Communications'] employees share a community of interest. Because the Board failed to take this evidence into account, its conclusion is not supported by substantial evidence." *Id.*

8. The Existing Unit Possesses a Long History of Comprehensive Collective Bargaining, While Cable Systems Employees Have Experienced No Such History

The record leaves no doubt that no bargaining has occurred on a wider geographic basis. The current CBA states it applies only within the state of Alaska. JA 169, 633, Art 1.2. The CBA controls represented employees' terms and conditions of employment, including, for example, seniority. JA 169-73; 288. Employees under the CBA receive disciplinary forms, while non-bargaining unit members only receive emails regarding corrective actions. JA 274. The Petitioner agrees the CBA and past

practice control all Employer policies regarding the existing unit. JA 175-80. At least one Employer policy that applies to all employees, including the Cable Systems Group, specifies the CBA controls if a conflict exists. JA 177, 577-80. Additionally, the Employer furloughed bargaining unit members last year, but not Cable Systems Group employees. JA 298.

The Petitioner has contributed to the creation of these differences. For example, during the most recent round of bargaining, the Employer proposed to include bargaining unit members in the current non-unit health plan, but the Petitioner rejected that proposal. JA 181, 293. **In other words, the Petitioner bargained to prevent bargaining unit members from sharing similarities with the Cable Systems Group.** Further, the over 60 Cable Systems-specific policies discussed above, which even Human Resources personnel could not access, demonstrate divergent working conditions. JA 289-90, 448-90.

The Regional Director acknowledged these important differences between the two groups. But, like other factors weighing against their combination, he sought to minimize its impact rather than factoring it into the overall analysis. He essentially read bargaining history out of the analysis by concluding, without further elaboration. "The Board will

not adhere to bargaining history 'where the unit does not conform reasonably well to other standards of appropriateness.'"JA 435. (quoting *Crown Zellerbach Corp*., 246 NLRB 202, 203 (1979)). *Crown Zellerbach*, as the quotation suggests, relates to a *lack* of a community of interests. And, for the reasons discussed above, all other factors weigh against a community of interest, and thus a *fortiori* "conform reasonably well" to separate units. Nonetheless, the Regional Director refused to consider the significant differences resulting from the two groups widely divergent bargaining histories. As a result, the Regional Director's treatment of the difference between extensive bargaining history in the existing unit on one hand, and no such history on the other, highlights yet another glaring flaw in his analysis.

Bargaining history analysis plays an important role in community of interest determinations. *ADT Security Services Inc*., 355 NLRB 1388 (2010) (relying upon "service territory" covered by previous collective bargaining agreement in determining whether bargaining unit remained appropriate); *PCMC/Pacific Crane Maintenance Co*., 359 NLRB 1206, 1210 (2013) (relying, in successorship context, upon facts that certain aspects of employment relationship were amenable to bargaining with

one group's labor organization, but not the other), incorporated. by reference at 362 NLRB No. 120 (2015). The Board places particular emphasis on whether bargaining on a broader basis has ever occurred in its geographic community of interest determinations. *Colorado Interstate Gas Co.*, 202 NLRB 847, 848–49 (1973) (analyzing bargaining history of subsequently-decertified group within petitioned-for unit). Here, that has not occurred and the Union has specifically sought to thwart similarities between the two groups. This factor weighs against a community of interest.

## CONCLUSION

The Court should grant Alaska Communications' petition for review and deny enforcement of the Board's Order.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this principal brief contains 12,794 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with Century Schoolbook 14 point font.

/s/ *Matthew J. Kelley*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system to be served on the following registered participants: David Habenstreit, Usha Deenan, and Brady Francisco-FitzMaurice.

/s/ *Matthew J. Kelley*

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