

LEGAL SERVICES

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MEMORANDUM

February 12, 2010

SUBJECT: Definition of "public" in AS 42.05
(Work Order No. 26-LS1353\E)

TO: Senator Lesil McGuire
Attn: Mike Pawlowski

FROM: Brian J. Kane *BJK*
Legislative Counsel

You have asked the following: For the definition of "public" or "general public"¹ found at AS 42.05.990(3), does that definition include all three subparagraphs, (A), (B), and (C), so that all three must be satisfied to mean "public"? Or, are (A), (B), and (C) three different options for the meaning of "public," as in (A) or (B) or (C)?

Generally speaking, "and" should be used as a conjunctive and "or" as a disjunctive. Under ordinary circumstances, the literal meaning of the words "and" and "or" should be applied unless the literal meaning makes the statute inoperable or it becomes questionable. *Sutherland Statutory Construction*, sec. 21:14 (7th ed.). In the case at hand, though, it seems that using the word "and" as a conjunctive brings the subparagraphs in the definition into conflict. Assuming that all three things are required for the definition of "public," then you have a scenario where there is (1) a group of 10 or more customers, (2) one or more customers, and (3) a utility purchasing the product. If all three of these are a part of "public," then it is quite difficult to think of a situation where this definition would actually apply. On the one hand you are dealing with customers purchasing from a utility, and on the other hand you have a utility purchasing

¹ In full, AS 42.05.990(3) reads: (3) "public" or "general public" means

- (A) a group of 10 or more customers that purchase the service or commodity furnished by a public utility;
- (B) one or more customers that purchase electrical service for use within an area that is certificated to and presently or formerly served by an electric utility if the total annual compensation that the electrical utility receives for sales of electricity exceeds \$50,000; and
- (C) a utility purchasing the product or service or paying for the transmission of electric energy, natural or manufactured gas, or petroleum products that are re-sold to a person or group included in (A) or (B) of this paragraph or that are used to produce the service or commodity sold to the public by the utility.

electricity to sell to a customer. These cannot both occur at once in order to fulfill the definition. Using the term "and" as a conjunctive appears to make this definition inoperable, as best I can surmise. Therefore, it appears that the second option for the definition that is offered is the correct interpretation for the definition of "public." Hence, the term "public" means (A), or it means (B), or it means (C).

In relation to the definition for "public utility" -- which has the line "furnishing, by generation, transmission, or distribution, electrical service *to the public* for compensation" -- you can, assuming that "and" is disjunctive, read "public" to mean any one of the three options available in (A), (B), or (C), which offers a more expansive inclusion into this section than a reading requiring all three paragraphs to be met.

The definition in question was amended in 1990.² Prior to 1990, the definition read as follows

(3) "public" or "general public" means

(A) any group of 10 or more customers that purchase the service or commodity furnished by a public utility as defined in (4) of this section; and

(B) any utility purchasing the product or service or paying for the transmission of electric energy, natural or manufactured gas, or petroleum products which are re-sold to a group included in (A) of this paragraph or which are used to produce the service or commodity sold to the public by the utility.

With only two parts to the definition, it seems clearer that "public" either means what is described in (A) or it means what is described in (B). To fall under the definition of public, there does not have to be a scenario where there is a group of 10 or more customers *and* any utility purchasing the product. If that was the proper reading, then finding an entity that met that criteria would be very difficult. The change in the definition that occurred in 1990 added one more subparagraph to the definition (now (B)). Adding this third subparagraph did not change the definition to mean that the term "public" had to include all three paragraphs to be considered "public."

In conclusion, it appears that the term "public" can have the meaning listed in AS 42.05.990(3)(A) or (3)(B) or (3)(C) -- it does not have to meet all three at once. However, amending the definition to change the "and" to an "or" would relieve the definition of controversy.

If I may be of further assistance, please advise.

BJK:ljw
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² The amending language can be found at sec. 4, ch. 140, SLA 1990.