Stuart Goering, Asst. Attorney General/HB 340

As requested, the following are concerns I have identified with HB 340. I have tried to keep my comments somewhat general, as the bill currently before the committee is ver. \U, but I am also aware that a work draft ver. \N is under discussion. I will address those two versions as a singular concept, except where necessary to address specific differences.

As I explained to the committee last Wednesday, these concerns are not advanced on behalf of the RCA. Instead, they represent my observations as an Assistant Attorney General in the exercise of the Department of Law's function, found in AS 44.23.020(b)(5), of advising the legislature on current and proposed law. However, my observations necessarily reflect the expertise and perspective I have developed advising and representing the RCA, and could fairly be assumed to be what I would advise commissioners if asked.

My concerns fall into three broad categories: timing, scope, and possible internal conflicts and conflicts with existing law. In essence, the bill would task the RCA to examine an idea and prepare a work product (characterized as a report in ver. \U or a plan in ver. \N) for delivery to the legislature. The nature of the examination is determined by the objectives to be considered, the "requirements" of the entity to be evaluated, and assumptions to be made in the evaluation process.

Timing

Both versions of the bill have fairly short timelines for completion. This appears reflect the sense that there is a crisis that must be addressed quickly.

While the RCA has significant expertise in the subject matter, and a highly qualified advisory staff, it is already using its resources to accomplish its existing statutory duties. Unique to the RCA are strict statutory timelines for completion of most of its core work, so existing matters cannot be put on hold while the work contemplated by this bill takes priority. As a consequence, it is likely that outside expertise will have to be identified and contracted for, which takes time and is governed by the state procurement process. In addition, as a commission (unlike a line department such as a DCCED) it must conduct its decision making in a matter of this type in public, and generally also includes public input in the form of written and oral comments.

Balanced against the difficulty of accelerating the assigned task is the probability that the crisis, while real, is not as pressing as it might initially appear. The RCA already has broad authority over efficiency and reliability of public utility operations (AS 42.05.291), joint use and interconnection of public utility facilities (AS 42.05.311 - .321), discrimination (AS 42.05.301 and .391) and management practices (AS 42.05.511). While there are completed and pending matters tangentially involving electric transmission, those have all arisen in the context of individual utility tariff filings. Overarching structural problems with the electric transmission system could be, but to date have not been, brought to the commission under the cited authorities. Such a proceeding would be an appropriate remedy even in the absence of this bill or additional legislation.

Scope

The scope of the evaluation portion is fairly narrow, and appears to dictate the adoption of a particular model. However, neither the bill itself, nor legislative history to date, clearly identifies the alternatives from which that particular model was selected nor the relative merits of the model. Indeed, there is as yet no legislative history to support the proposition that the selected model (apparently ERCOT) is even correctly described by the list of attributes in sub-section (b) of the bill.

The narrow scope of inquiry has two potentially negative effects. First, in the absence of a clearly articulated basis for the legislative decision in favor of the selected model, it negates the broad expertise of the agency in utility and pipeline matters which the RCA would otherwise bring to bear on their inquiry. This could have the probably-unintended effect of a work product that appears to reflect agency expertise, but which in fact only echoes a decision that was already made by the legislature. In other words, the RCA might be merely the conduit through which an idea is conveyed, not a meaningful contributor to the development of that idea.

Second, the narrow scope also creates ambiguity as to the RCA's task. On one hand, sub-section (a) directs the commission to "consider options," while at the same time sub-section (b) lists numerous details of the notional entity to be considered, and sub-section (c) mandates that the RCA make a number of foundational assumptions about the regulatory environment in which that entity will operate. A probable result of that ambiguity is a work product that does not address the range of existing solutions in electric and other regulated industries, except to the extent that a particular solution, no matter how effectively implemented in another jurisdiction or context, coincidentally matches the characteristics in sub-section (b) and the assumptions in sub-section (c).

I would suggest that the bill be modified to either: (1) identify the problem to be solved and grant the RCA latitude to apply its expertise to achieving a solution, or (2) define the concept to be implemented and pass authorizing legislation to allow the RCA to establish and regulate the appropriate entity. Essentially, existing sub-section (a), after deleting references to "the requirements of (b)," would suffice for the first option.

As an example of the latter approach, see AS 42.05.800 - .890, dealing with intrastate long distance telephone competition, and particularly the authority to create a state universal service fund (AS 42.05.840) and an exchange carriers association (AS 42.05.850). With that statutory authority, the RCA's predecessor adopted regulations and an access charge manual to govern the process of pooling of costs and access charge revenues for many of the state's local exchange carriers. One result is a single tariff developed from a pooled revenue requirement reflects the costs of operating facilities owned by multiple telecommunications carriers, and used by other telecommunications carriers, in a unitary telecommunications network.

Conflicts

One of the assumptions, funding of new facilities, contains language that appears to conflict with existing regulatory law. Specifically, the statement that "rate recovery is ensured through the planning, permitting and construction phase" suggests that cash flows from ratepayers to the new entity will begin at the planning stage. Normally, a public utility is expected to generate the cash necessary to plan, permit and construct a project, with rate recovery beginning when the facilities are placed into public utility service. The concept is that ratepayers should not have to pay for facilities until they are "used and useful," and, more importantly, that ratepayers do not pay for facilities that never enter service, or that otherwise do not benefit them. There is also an intergenerational inequity inherent in having

current ratepayers finance improvements that will benefit future ratepayers, because current and future sets of ratepayers usually have significantly different members.

Two of the assumptions appear to be internally inconsistent. Just and reasonable rates (assumption 3) are generally cost-based rates, but will not necessarily provide for "full cost recovery" (assumption 4) if costs were not prudently incurred, or were incurred for facilities that are not used and useful. The "full cost recovery" assumption therefore violates existing regulatory law, and the explicit assumption that rates will be "just and reasonable."

These apparent conflicts may be intentional. However, if the legislature intends to fundamentally modify regulatory jurisprudence, it is preferable to do so explicitly, not by implication.

One last item that does not necessarily merit a complete discussion is the amount of highly technical language in the bill (e.g., economic dispatch, ancillary services, universal tariff, single control area operator, parallel path flow and transmission congestion). Virtually none of the terms have definitions in existing Alaska law, and are susceptible of differing interpretations. For example, "open access" has a well-understood meaning in the context of transmission of electricity generated in a transparent, competitive market. It may not have a clear meaning in a different context.

Please call me if you have questions or would like to discuss this bill further.

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