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# MEMORANDUM

DATE:

May 5, 1981

TO: Representative Fred Brown  
Chairman, House Judiciary Committee

PHONE NO.:

FILE NO.:

FROM: Carolyn S. Guess Chairman *W*  
Alaska Public Utilities Commission

SUBJECT: House Bill 434

Enclosed is a copy of three items which should provide information regarding Commission implementation of AS 42.05.671 which was one of the subjects of the teleconference last Friday. Enclosed is a copy of 3 AAC 48.040 of our regulations and a letter, issued by the Commission to all utility managers, which details the procedure to be employed if proprietary or privileged status is requested, and a memorandum from Staff on the same subject. An Order from the Superior Court in Fairbanks which remands the decision in Docket U-76-52 to this Commission is also enclosed. You will note that the court said the decision in that proceeding was not supported by the evidence on the record. 611 P. 2d 493 (Alaska 1980) Therefore, the matter was remanded for the limited review of the financial fitness of Greatland Telephone Company now owned by Telephone Utilities of Alaska, Inc. A hearing on this matter has been scheduled for June 30, 1981.

Representative Clocksin posed questions and expressed concern regarding the use of administrative law judges (ALJs) and hearing officers as contemplated in Sections 5, 6 and 7 of HB 434. Section 5 only places ALJs and hearing officers in the partially exempt service to conform to legislative policy established last year for the Alaska Transportation Commission. Sec. 22, Ch. 115, SLA 1980. The APUC supports this policy decision. The addition of an ALJ to a merged commission is proposed because of the greater experience, hence status, that the title implies. The TAPS proceeding will be heard by Judge Kane, an FERC ALJ, and a designee of either the APC or the merged commission. Both the APC and the APUC believe the designation of an ALJ, in the event of merger, is preferable to the assignment of a hearing officer. The Commission believes it has the authority under its existing statute to designate a hearing officer in the event of a merged commission. AS 42.05 (2) (a) As I stated to the Judiciary Committee, the intent of a merged five-commissioner commission would be to designate an ALJ or a hearing officer to sit with Judge Kane for the second phase of TAPS proceeding. Enclosed is the appropriate section of the Administrative Procedures Act which speaks to the qualifications of hearing officers. Adapting those provisions to this proposal, the APC and APUC would support a 5 year practice of law qualification for an ALJ. An appropriate amendment to HB 434 is attached.

The Commission already has the authority under its statute and regulations to delegate the responsibility for conducting proceedings

to a hearing officer. The hearing officer may only prepare a recommended order. The final decision invariably and ultimately is the Commission's. This option has been important in the past to timely deal with situations the Commission has faced. As I indicated in the teleconference, Staff hearing officers have been used in the past by the APUC when Chugach Electric and ML&P both wanted to provide service to the same customer. There also may have been instances when the Consumer Protection Staff has served as a hearing officer in a complaint proceeding.

It is particularly important to a merged commission that this flexibility be continued. There could be instances, other than Phase II of TAPS that could require the use of an ALJ (or a hearing officer) which are not now contemplated by either commission, including possible remand decisions by FERC of any aspect of the TAPS I and II proceedings. Because the workload of a merged Commission is at least partially unknown and could require simultaneous proceedings, both as to pipeline and public utility matters the APUC supports the options that an ALJ or hearing officer provides to efficiently conduct the Commission's business.

(c) Postage stamps shall not be sent as a remittance unless the remitter is so directed.

(d) Every fee required by statute in connection with applications relating to certificates of public convenience and necessity or any other matter which by statute requires formal action by the commission shall be paid in full before the matter will be docketed for consideration. Every charge for copying, printing, reproducing and furnishing copies of reports, orders, pleadings, tariff sheets, regulations, etc., and all costs allocated pursuant to AS 42.05.651 shall be paid promptly upon receipt of the commission's invoice or order designating the amount owed. Failure to remit the amount due may, as appropriate and at the commission's discretion, result in

(1) discontinuance of the service for which payment is due;

(2) denial of standing to participate in a proceeding in which costs may be allocated until the amount due is paid;

(3) refusal of the commission to accept or act upon any application or tariff filing of the person who is in arrears until the amount due is paid;

(4) referral of the problem to the attorney general for appropriate action pursuant to AS 42.05.561 - 611.

(e) The commission may, by general order, prescribe appropriate charges to recover, in whole or in part, the costs it incurs in furnishing copies of notices, reports, orders or any printed or typed material in its possession, except privileged information or records. (Eff. 1/13/73, Reg. 44)

Authority: AS 42.05.151  
AS 42.05.201

3 AAC 48.040. PRIVILEGED RECORDS AND INFORMATION. (a) All facts, information, reports, orders, memoranda, books, accounts, and papers of every nature in the possession of the commission are available for examination by the public except

(1) communications relating to personnel matters received upon a confidential basis, and

medical and other personal information, which under governing personnel practices of the State of Alaska, are not public information;

(2) staff papers, unless entered as evidence in an adjudicatory proceeding;

(3) written communications between or among the commission, or between members of the commission and members of the staff while expressly assigned to aid the commission in the drafting of any order and findings, with or without opinion, in any matter or proceeding in which a hearing has been held;

(4) communications between a presiding officer, examiner or hearing officer and members of the commission or its staff in respect to any formal proceeding in which they are directly involved;

(5) staff notes and memoranda containing the gist of routine phone calls and conferences;

(6) information and data relating to the commission's budget and legislative proposals prior to the time they are acted upon by the Governor and the Legislature;

(7) bids for contracted services received in response to commission invitations prior to their acceptance;

(8) tape recordings, transcripts, notes, minutes and other information relating to conferences which, either by order of the commissioner or by mutual agreement of the parties, are privileged;

(9) any specifically designated information in an application, tariff filing, report or document which, for good cause shown, the commission may order withheld pursuant to written objection by the filing party;

(10) staff memoranda to the commission containing analyses and recommendations regarding the disposition of tariff filings;

(11) communications between legal counsel for the commission, or its staff, in regard to matters requiring confidential legal advice or assistance;

2 AAC  
3 AAC

(12) any information, record or document which, for good cause, the commission may, by order, specifically designate as privileged.

(b) If a commissioner or employee of the commission is served with a *subpoena duces tecum* to obtain material which is not part of the public files and records of the commission, it shall be made public only if authorized by the commission. Service of such a subpoena shall immediately be reported to the commission with a statement of all relevant facts. The commission will thereupon enter an appropriate order.

(c) Privileged information will not be made public or furnished to any person except pursuant to a *subpoena duces tecum* or application to the commission stating specifically the material or information that is desired and the reason it is desired. The commission may grant or deny such requests in whole or in part.

(d) If a person is authorized to obtain privileged information, the commission may attach to its authorization reasonable conditions.

(e) If the privileged information is in the possession of a consultant employed by the commission, the commission may require the person who desires it to reimburse directly the consultant for all or part of the costs incurred including but not limited to, reasonable compensation for professional and clerical services.

(f) All privileged material shall be filed separately from that which is public and no person (except the commission, its staff and its consultants, or other representatives) shall have access to it except pursuant to an order of the commission. (Eff. 1/13/73, Reg. 44)

Authority: AS 42.05.141  
AS 42.05.151  
AS 42.05.671

3 AAC 48.050. INSPECTION OF RECORDS AND FACILITIES. (a) The facilities and records of a public utility are not available to the public for inspection, copying or any purpose, other than to furnish a utility service or commodity, except

(1) as otherwise provided by statute or by applicable rule, regulation or general order of the commission;

(2) by specific order of the commission;

(3) with the prior voluntary consent of the utility;

(4) upon enforcement of a *subpoena duces tecum* or other legal process.

(b) Any member of the commission's staff and any agent, consultant or other authorized representative of the commission shall, upon presentation of his authentic credentials issued by the commission, have access to the premises of any utility during its regular business hours to investigate, inspect, examine, evaluate, or analyze its rates, services, facilities, accounts, books, records, contracts, and operating practices, and to make copies of any record, account, contract, or other document or paper of the utility or to implement, in any other way, any jurisdictional function of the commission. Every resulting note, working paper, memorandum, exhibit, schedule, or other record prepared or copied by the commission's staff, or by its agents, consultants or other authorized representatives shall be classified as "staff papers" but exhibits, evidence and testimony may be prepared from staff papers and be included in the record of any formal proceeding.

(c) If office and desk space is required to perform any function mentioned in (b) of this section, the utility shall provide it at a conveniently located place that is reasonably comfortable, adequately lighted and otherwise suitable. If the utility does not have satisfactory office and desk space in its own quarters, it shall have the responsibility of making other suitable arrangements, including the responsibility, if so ordered by the commission, of assuming, and directly paying, rental or lease charges for office and desk space selected by the commission.

(d) Public utilities shall, in every way possible, within reason, assist the commission's staff and its agents, consultants and representatives in the performance of any function designated in (b) of this section.

Amendment to House Bill 434

On page 2, line 14, delete "a new subsection", and insert:  
"new subsections"

On page 2, between lines 16 and 17, insert:

(d)(c) The commission may assign a qualified, unbiased, and impartial administrative law judge, with experience in the general practice of law, to conduct hearings under AS ~~42.05~~ and AS 42.06. The administrative law judge may perform other duties in connection with the administration of these chapters and other laws. An administrative law judge hired to conduct hearings under ~~AS 42.05~~ and AS 42.06 shall have been admitted to practice law for at least five years immediately before his appointment.

I agree with those cases which hold that an applicant need not perform an act which would be futile. But something more definite should occur than in the case at bar before the Commission's complaint procedures are brought to bear against an employer. As the event which triggers the Commission's procedures, the application should be as concrete and definite as possible. Conversely, before an employer is subjected to the substantial burden of defending against a discrimination charge, the application should be definite enough that the employer has notice of the applicant's demands. Otherwise, an indefinite, tentative, or vacuous inquiry can be a trap for the unwary.

A written application would furnish the clearest evidence in this regard. See, *Cedek v. Hamilton Federal Savings & Loan Ass'n*, 414 F.Supp. 495 (E.D.Mo.1976); *Hockett v. Administrator of Veterans Affairs*, 385 F.Supp. 1106, 1110-12 (N.D.Ohio 1974). I agree that an oral application can suffice in a number of circumstances, but where the facts of the transaction are susceptible to varying interpretations, doubtful points should be resolved against the applicant.

I would thus affirm the judgment of the superior court.



CITY OF FAIRBANKS, d/b/a Fairbanks  
Municipal Utilities System, Appellant,

v.

The ALASKA PUBLIC UTILITIES COM-  
MISSION and Wire Communications,  
Inc., d/b/a Great Land Telephone, Ap-  
pellees.

No. 3977.

Supreme Court of Alaska.

May 9, 1980.

City's municipal utility system appeal-  
ed from decision of the State of Alaska

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*een*, 411 U.S. 792, 802,  
, 36 L.Ed.2d 668, 678  
b did not attempt to  
vidence. Consequently,  
ommission's decision that  
AS 18.80.220(a)(1) by  
yer. We remand to the  
decide the appropriate  
back pay, and remedies.

#### ATTORNEY'S FEES

awarded attorney's fees  
o Civil Rule 82(a). Civ-  
its the award of attor-  
evailing party. Because  
this case, Yellow Cab is  
ling party; consequent-  
orney's fees is vacated.<sup>17</sup>  
art, VACATED in part,

e, with whom MAT-  
ins, dissenting.

esent on the question of  
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to the prevailing side, the  
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*Western Alaska v. Bob*  
, 592 P.2d 1200, 1204-05  
. the superior court erred  
d under Civil Rule 82(a).

Superior Court, Fourth Judicial District,  
James R. Blair, J., which affirmed order of  
the Public Utilities Commission granting  
certificate of public convenience and neces-  
sity to provide telephone service for a mili-  
tary reservation to a private company. The  
Supreme Court, Matthews, J., held that: (1)  
it was a denial of due process for Commis-  
sion not to allow city's representatives to  
view financial data of the private company  
on which the decision was based, and (2)  
fact that the private company was subject  
to the Commission's jurisdiction whereas  
the city's utility system was not subject to  
the Commission's jurisdiction was not a fac-  
tor in favor of private company.

Reversed and remanded.

#### 1. Administrative Law and Procedure ⇐791

Standard of review of agency findings  
of fact is that they will be set aside if they  
are not supported by substantial evidence  
on the whole record; inherent in that stan-  
dard is a requirement that facts found be  
based on evidence in the record.

#### 2. Administrative Law and Procedure ⇐490

Requirement that facts found by ad-  
ministrative agency be based on evidence in  
the record helps to ensure that the agency  
does not make decisions which have no ade-  
quate basis in fact, gives opposing parties  
the opportunity to challenge the agency's  
reasoning process and the correctness of the  
decision, and affords the reviewing courts  
the opportunity to evaluate the decision.

#### 3. Constitutional Law ⇐297

Failure of Public Utilities Commission  
to allow one of the parties to a proceeding  
involving a certificate of public convenience  
and necessity for telephone service to view  
financial information of the other party on  
which the Commission based its decision  
amounted to a failure of due process. U.S.  
C.A.Const. Amends. 5, 14.

Cite as, Alaska, 611 P.2d 493

I agree with those cases which hold that an applicant need not perform an act which would be futile. But something more definite should occur than in the case at bar before the Commission's complaint procedures are brought to bear against an employer. As the event which triggers the Commission's procedures, the application should be as concrete and definite as possible. Conversely, before an employer is subjected to the substantial burden of defending against a discrimination charge, the application should be definite enough that the employer has notice of the applicant's demands. Otherwise, an indefinite, tentative, or vacuous inquiry can be a trap for the unwary.

A written application would furnish the clearest evidence in this regard. See, *Cedeck v. Hamilton Federal Savings & Loan Ass'n*, 414 F.Supp. 495 (E.D.Mo.1976); *Hockett v. Administrator of Veterans Affairs*, 385 F.Supp. 1106, 1110-12 (N.D.Ohio 1974). I agree that an oral application can suffice in a number of circumstances, but where the facts of the transaction are susceptible to varying interpretations, doubtful points should be resolved against the applicant.

I would thus affirm the judgment of the superior court.



CITY OF FAIRBANKS, d/b/a Fairbanks  
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pellees.

No. 3977.

Supreme Court of Alaska.

May 9, 1980.

City's municipal utility system appeal-  
ed from decision of the State of Alaska

Superior Court, Fourth Judicial District, James R. Blair, J., which affirmed order of the Public Utilities Commission granting certificate of public convenience and necessity to provide telephone service for a military reservation to a private company. The Supreme Court, Matthews, J., held that: (1) it was a denial of due process for Commission not to allow city's representatives to view financial data of the private company on which the decision was based, and (2) fact that the private company was subject to the Commission's jurisdiction whereas the city's utility system was not subject to the Commission's jurisdiction was not a factor in favor of private company.

Reversed and remanded.

### 1. Administrative Law and Procedure ⇐791

Standard of review of agency findings of fact is that they will be set aside if they are not supported by substantial evidence on the whole record; inherent in that standard is a requirement that facts found be based on evidence in the record.

### 2. Administrative Law and Procedure ⇐490

Requirement that facts found by administrative agency be based on evidence in the record helps to ensure that the agency does not make decisions which have no adequate basis in fact, gives opposing parties the opportunity to challenge the agency's reasoning process and the correctness of the decision, and affords the reviewing courts the opportunity to evaluate the decision.

### 3. Constitutional Law ⇐297

Failure of Public Utilities Commission to allow one of the parties to a proceeding involving a certificate of public convenience and necessity for telephone service to view financial information of the other party on which the Commission based its decision amounted to a failure of due process. U.S. C.A.Const. Amends. 5, 14.

## 4. Records ⇐31

Privilege reflected by statute dealing with disclosure of information in the possession of the Public Utilities Commission should be construed narrowly so that it does not conflict with constitutional requirements of due process; provision of the statute that information not be withheld unless required in the interest of public will normally prevent a conflict with due process requirements but, if a conflict does occur, due process must control. AS 42.05.671. U.S.C.A.Const. Amends. 5, 14.

## 5. Telecommunications ⇐76

If one of the parties to proceeding involving application for certificate of convenience and necessity to provide telephone service did show that public disclosure of its income statements and balance sheets would harm it, the Public Utilities Commission could impose an order of confidentiality on representatives of the other parties, permitting cross-examination in camera and sealing that portion of the record containing the privileged information.

## 6. Telecommunications ⇐76

Fact that private applicant for certificate of public convenience and necessity to provide telephone service was subject to the Public Utilities Commission's jurisdiction whereas the municipal utility system of a city which was seeking the certificate was not subject to Commission's jurisdiction could not be regarded as a factor in favor of the private applicant.

Joseph W. Sheehan, Fairbanks, for appellant.

B. Richard Edwards, Anchorage, for appellees.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

1. At times the Commission treated Great Land Telephone as an entity separate from Wirecom. The evidence was clear, however, that Great Land is not a subsidiary or affiliate corporation of Wirecom, but simply an operating name.

## OPINION

MATTHEWS, Justice.

The City of Fairbanks appeals from a decision of the superior court affirming an order of the Alaska Public Utilities Commission which denied Fairbanks a certificate of public convenience and necessity to provide telephone service to the Fort Wainwright Military Reservation, and awarded the certificate to Wire Communications, Inc. (Wirecom) d/b/a Great Land Telephone.

Multiple claims of error are presented. With one exception, we agree with the well reasoned opinion of the superior court. The point on which we differ relates to the Commission's treatment of the question of the financial fitness of Wirecom.<sup>1</sup>

The Commission's order pertaining to financial fitness states:

In assessing the fitness, willingness and ability of competing applicants for a certificate of public convenience and necessity, among the most important factors to be considered is the financial strength of each applicant. FMUS witnesses have testified to the ability of FMUS to finance their proposed service from revenues, revenue bonding, other borrowing, or a combination of all three.

Witness Rompa for Great Land sponsored evidence of a one million dollar line of credit from the First National Bank of Anchorage. This witness and the staff financial witness Milne also attested to Great Land's ability to obtain the equity portion of its proposed 60/40 debt/equity ratio with cash to be provided by its parent Wirecom.

In our opinion both applicants possess the financial resources to implement their proposed service at Fort Wainwright.<sup>2</sup>

Wirecom proposed spending the sum of \$1,900,000 for capital expenditures for Fort Wainwright by 1978. It also proposed to

2. *In re Application of City of Fairbanks*, U-76-62 Order No. 2 at 9-10 (May 5, 1977).

maintain a 60/40 debt/equity ratio, the equity to be internally generated by assets of Wirecom. It submitted a letter of credit from the First National Bank indicating a loan commitment of \$1,000,000. However, the only balance sheet that was submitted was a balance sheet purporting to be that of Great Land, as a separate entity, listing total assets of \$1,500. No balance sheets or income statements for Wirecom were submitted.

At the hearing the commission staff requested two years' annual balance sheets and income statements from Wirecom. Wirecom agreed to supply them to the staff, but requested that they not be divulged to Fairbanks or become part of the record, claiming that they were proprietary and that revealing them could place Wirecom at a competitive disadvantage in its telecommunications contracting business. Fairbanks objected and suggested as an alternative that the income statements and balance sheets could be revealed to certain representatives of Fairbanks under an order of confidentiality.

The Commission ruled that the information was proprietary and should be kept confidential and did not allow any representative of Fairbanks to see it. A Commission staff member reviewed the income statements and balance sheets and based on that review testified that Wirecom could meet its financial commitments and was financially fit. The information upon which this determination was based was never placed in the record.

3. Wirecom's argument that this point is waived because it was neither included in Fairbanks' Statement of Points on Appeal, nor briefed is factually wrong (see Statement of Points on Appeal, No. 4 and Fairbanks' Brief, at 27-41) as is its assertion that Fairbanks did not object to non-disclosure of the underlying records (Tr. 1149, 1151, 1153-54, 1163-64, 1169).

4. *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963).

5. The requirement is in part statutory. AS 42.05.191 provides:

*Format of orders.* Every formal order of the commission shall be based upon the facts of record. Every order entered pursuant to a

Fairbanks claims that the Commission's handling of the information relating to Wirecom's financial fitness violated procedural due process.<sup>3</sup> We agree.

[1, 2] The standard of review of agency findings of fact is that they will be set aside if they are not supported by substantial evidence on the whole record.<sup>4</sup> Inherent in this standard is a requirement that the facts found be based on evidence in the record.<sup>5</sup> That requirement serves three purposes: First, it helps to ensure that the agency does not make decisions that have no adequate basis in fact; second, it gives opposing parties the opportunity to challenge the agency's reasoning process and the correctness of the decision; and third, it affords reviewing courts the opportunity to evaluate the decision.

[3] In this case, Fairbanks had no way of knowing what the financial information consisted of, no opportunity to subject it to the tests of cross-examination or other means of verification, no opportunity to rebut it, and no opportunity to argue that the staff's conclusion did not logically follow from the information on which it was based. Likewise, neither this court nor the superior court can evaluate the Commission's conclusion without the underlying information. These fundamental defects amount to a failure of due process.

*Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937) is particularly relevant. The Ohio Commission had relied on data not in evidence in evaluating

hearing shall state the commission's findings, the basis of its findings and conclusions, together with its decision. These orders shall be entered of record and a copy of them shall be served on all parties of record in the proceeding.

AS 44.62.570(b) states in part:

Inquiry in an appeal extends to the following questions:

(3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if . . . the findings are not supported by the evidence.

ON

2.  
Fairbanks appeals from a superior court affirming an order of the Public Utilities Commission granting Fairbanks a certificate of public convenience and necessity to acquire the Fort Wainwright telecommunication system, and awarded a license to the Great Land Tele-

communications system. The error is presented. The court agrees with the well established rule that the superior court. The court's order relates to the question of the fitness of Wirecom.<sup>1</sup>

Whether the fitness of Wirecom pertaining to its financial strength, willingness and ability of applicants for a certificate of public convenience and necessity are important factors to be considered in determining the financial strength of FMUS witnesses have testified that the fitness of FMUS to provide service from revenue, other borrowing, and other factors.

The Great Land sponsor of a \$10 million dollar line of service from the First National Bank of Fairbanks and the staff of the Commission also attested to the fact that they obtained the equity financing for the 60/40 debt/equity ratio provided by its

applicants possess the ability to implement their plan for Wainwright.<sup>2</sup>

Regarding the sum of expenditures for Fort Wainwright also proposed to

of Fairbanks, U-76-15, 5, 1977).

property owned by the telephone company for rate-making purposes. The telephone company was not given an opportunity to explain or rebut the data and claimed that because of this it had been deprived of a fair hearing in contravention of the requirements of the fourteenth amendment. The Court, in an opinion written by Mr. Justice Cardozo, agreed and made the following pertinent observations:

From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, "I looked at the statistics in the Library of Congress, and they teach me thus and so." This will never do if hearings and appeals are to be more than empty forms.

To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable? . . . What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. "A hearing is not judicial, at least in any

adequate sense, unless the evidence can be known."

Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints.

Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of "the rudiments of fair play" assured to every litigant by the fourteenth amendment as a minimal requirement. [Citations omitted].

301 U.S. at 302-05, 57 S.Ct. at 729-731 & 1 L.Ed. at 1100-02.

The Commission's ruling that the balance sheets and income statements of Wirecom need not be disclosed or made part of the record was based on AS 42.05.671 which provides:

*Public disclosure of information.* Facts and information in the possession of the commission are public, and reports, files, books, accounts and papers of every nature in its possession except records which by regulation are designated to be of a nonpublic or privileged nature are open to public inspection at reasonable times. However, a person may make written objections to the public disclosure of information contained in an application, report or document filed under the provisions of this chapter or of information obtained by the commission under the provisions of this chapter, stating the grounds for the objection. When an objection is made, the commission shall order the information withheld from public disclosure if the information would adversely affect the interest of that person

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and is not required in the interest of the public.<sup>6</sup>

[4] The privilege reflected by this statute should be construed narrowly so that it does not conflict with the constitutional requirements of due process. The requirement of the statute that information not be withheld if "required in the interests of the public" will normally prevent a conflict with due process requirements. If a conflict nevertheless occurs, due process must control.

[5] In this case no real showing was made by Wirecom that it would be competitively disadvantaged in its contracting business by disclosure of its income statements and balance sheets. It is not obvious how such harm might have come about, and no illustrations were offered. However, if a proper showing had been made, the Commission could have, consistent with the requirements of due process, imposed an order of confidentiality on Fairbanks' representatives, permitted cross-examination *in camera*, and sealed that portion of the record containing the privileged information.

[6] One other point bears mentioning. The Commission's order contains as a sub-conclusion the statement that "on-going regulatory supervision is in the public interest" and that Wirecom's proposal was preferable to that of Fairbanks because Wirecom was subject to the Commission's jurisdiction while Fairbanks was not. The superior

court found that it was improper for the Commission to make this value judgment, but that the error did not warrant reversal because it played a relatively insignificant role in the ultimate decision. We agree with the superior court that the fact that Wirecom was subject to the Commission's jurisdiction while Fairbanks was not may not be regarded as a factor in Wirecom's favor. The legislature has determined that it is in the public interest to allow municipalities to operate public utilities free from Commission supervision,<sup>7</sup> and the Commission cannot validly ignore that legislative judgment. In view of our disposition of this case it is unnecessary to determine whether the Commission's error in this respect would, standing alone, require a remand.

The decision of the superior court is reversed and this case is remanded to the superior court with instructions to vacate the order of the Commission and remand the case to the Commission for a redetermination of the question of certification following a supplemental hearing with regard to the financial fitness of Wirecom.



6. The statute is implemented by 3 AAC 48.040 which provides in pertinent part:

*Privileged Records and Information.* (a) All facts, information, reports, orders, memoranda, books, accounts, and papers of every nature in the possession of the commission are available for examination by the public except:

(b) any specifically designated information in an application, tariff filing, report or document which, for good cause shown, the commission may order withheld pursuant to written objection by the filing party;

(c) Privileged information will not be made public or furnished to any person except pursuant to a *subpoena duces tecum* or application to the commission stating specifically the material or information that is desired

and the reason it is desired. The commission may grant or deny requests in whole or in part.

7. AS 29.48.060 provides:

*Public utilities rates.* The assembly acting for the area outside cities and the council acting for the area within a city may regulate, fix, establish and change, as it considers proper, the rates and charges imposed for utilities services given to the municipality or its inhabitants by a public service association, corporation, or individual not regulated under AS 42.05 and may regulate and provide what is a reasonable deposit for meters and security for service to be given, provided that interest be paid on the deposit. All rates, charges and regulations shall be reasonable and shall permit a fair and reasonable return on invested capital.

Transp. Comm'n v. Gandia, Sup. Ct. Op. No. 1964 (File No. 3469), 602 P.2d 402 (1979).

Sup. Ct. Op. No. 813 (File No. 1066), 499 P.2d 304 (1972).

Cited in In re Application of Peterson,

Am. Jur. 2d reference. — 2 Am. Jur. 2d, Administrative Law, §§ 221-226.

**Sec. 44.62.350. Appointment of hearing officers.** (a) The governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter. The hearing officer may perform other duties in connection with the administration of this chapter and other laws.

(b) An agency with hearing officers may continue their employment as hearing officers on an unbiased and impartial basis within the particular agency and may hire additional officers and prescribe additional qualifications.

(c) A hearing officer hired after April 29, 1959, except to conduct hearings under the Alaska Employment Security Act (AS 23.20), shall have been admitted to practice law for at least two years immediately before his appointment. (§ 3 (ch 2) ch 143 SLA 1959; am § 7 ch 5 SLA 1966)

Stated in Alaska Alcoholic Beverage Control Bd. v. Malcolm, Inc., Sup. Ct. Op. No. 208 (File No. 363), 391 P.2d 441 (1964).

Dealers Ass'n v. State, ABC Bd., Sup. Ct. Op. No. 1963 (File No. 3697), 602 P.2d 434 (1979).

Cited in In re Application of Peterson, Sup. Ct. Op. No. 813 (File No. 1066), 499 P.2d 304 (1972). Ketchikan Retail Liquor

Am. Jur. 2d reference. — 2 Am. Jur. 2d, Administrative Law, §§ 407-409, 434-440.

**Sec. 44.62.360. Accusation.** A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned is initiated by filing an accusation. The accusation shall (1) be a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged, so that the respondent is able to prepare his defense; (2) specify the statute and rule which the respondent is alleged to have violated, but may not consist merely of charges phrased in the language of the statute and rule; and (3) be verified, unless made by a public officer acting in his official capacity or by an employee of the agency on whose behalf the proceeding is to be held; the verification may be on information and belief. (§ 4 (ch 2) ch 143 SLA 1959)

Section contemplates determinations of fact by agency. — This section regarding a formal accusation, contemplates the proceeding in which the agency must make determinations of fact. 1963 Op. Att'y Gen., No. 10.

provision is obviously inapplicable to a case in which a court of competent jurisdiction has entered a judgment regarding the acts or omissions for which a penalty may be inflicted. 1963 Op. Att'y Gen., No. 10.

And is inapplicable where court has entered judgment. — The accusation

**I. REQUEST**  
 Bill/Resolution No. House Bill 434 - An Act Relating to Pipeline and Merging the  
 Title the Alaska Pipeline Commission with the Alaska Public Utilities Commission  
 Requested by Governor Jay S. Hammond Date April 30, 1981

**II. FISCAL DETAIL**  
 Agency Affected Department of Commerce & Economic Development  
 Program Category Affected Public Protection  
 BRU, Program, or Subprogram(s) Affected Alaska Public Utilities Commission  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)  
**EXPENDITURES** (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES		389.3				
200 TRAVEL		28.3				
300 CONTRACTUAL		450.0				
400 COMMODITIES		3.2				
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS CLAIMS ETC						
<b>TOTAL</b>		870.8				

**FUNDING** (Thousands of Dollars)

GENERAL FUND		841.8				
FEDERAL FUNDS		29.0				
OTHER (Specify Fund Source)						

**POSITIONS**

FULL TIME		8.0				
PART TIME						
TEMPORARY						

**III. ANALYSIS** (See Fiscal Note Preparation Instructions, Section III)  
 The budget of the Alaska Pipeline is added to the budget of the Alaska Public Utilities Commission deleting the Alaska Pipeline Commission Executive Director position and salary.  
 The salary of one commissioner will be allocated for the Administrative Law Judge (ALJ) and the monies allocated for the two remaining positions will be used for staff for the ALJ. It is contemplated that a law clerk paralegal, clerical support and office space, supplies and equipment will be funded from these monies.

**IV. DATE** April 30, 1981 **PREPARED BY** John B. Fulghum  
**AGENCY** Alaska Public Utilities Commission  
**PHONE** (907) 276-6222  
**Original:** Legislative Finance  
**cc:** Budget and Management  
 Prime Sponsor (First Legislator Named)

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. House Bill 434 An Act Relating to Merging  
 Title the Alaska Pipeline Commission with the Alaska Public Utilities Com  
 Requested by Governor Jay S. Hammond Date April 30, 1981

II. FISCAL DETAIL

Agency Affected Department of Commerce & Economic Development

Program Category Affected Public Protection

BRU, Program, or Subprogram(s) Affected Alaska Pipeline Commission

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES		(458.9)				
200 TRAVEL		( 28.3)				
300 CONTRACTUAL		(450.0)				
400 COMMODITIES		( 3.2)				
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL		(940.4)				

FUNDING (Thousands of Dollars)

GENERAL FUND		(911.4)				
FEDERAL FUNDS		( 29.0)				
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME		( 9.0)				
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The budget of the Alaska Pipeline Commission is deleted with the intent of transferring all noted items to the budget of the Alaska Public Utilities Commission with the exception of one (1) full-time equivalent position which is included above. See APUC fiscal note.

IV. DATE April 30, 1981

PREPARED BY

*Karen St. Clair* Chairman  
 AGENCY ALASKA PIPELINE COMMISSION

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

PHONE

(907) 279-0583

May 3, 1978

Managers of all Public Utilities which  
we regulate

Enclosed is the procedure for the treatment of material  
or information for which proprietary or privileged status  
is requested.

If you have any questions regarding this procedure, you may  
contact me or Mr. Robert Stoller, staff attorney.

Sincerely,

ALASKA PUBLIC UTILITIES COMMISSION

Carolyn S. Guess  
Acting Executive Director

CSG:pm

PROCEDURE FOR THE TREATMENT OF MATERIAL OR  
INFORMATION FOR WHICH PROPRIETARY  
OR PRIVILEGED STATUS IS REQUESTED

1. This procedure supplements the Commission's present statute and regulation governing public disclosure of information, AS 42.05.671 and 3 AAC 48.040.
2. Written Petition for Proprietary or Privileged Status.
  - a. If no written request has been made to designate material or information as proprietary or otherwise privileged, all material and information that is filed with, served upon, or otherwise made available to the Commission shall be available for examination by the public. Any person wishing to protect material or information filed with, served upon or otherwise made available to the Commission shall file with the Commission a formal written petition identifying the material or information sought to be protected and setting forth the facts, reasons, or other grounds upon which the Commission should classify that material or information as proprietary or otherwise privileged.
  - b. Unless the public interest or considerations of justice require expedited action, the Commission shall decide whether to grant protected status in whole or in part or to deny protected status at the first tariff action meeting following submission of a formal written request.
  - c. Pending Commission action on a formal written request, the material or information specifically identified shall be temporarily treated as proprietary.
3. Adverse Commission Determination; Request for Reconsideration Withdrawal of Information.
  - a. If the Commission denies protected status under paragraph 2(b) above, the Staff will immediately notify the petitioner of the Commission's adverse determination. Notice shall be given by means of the most expeditious methods available. For example, where notice may be conveyed telephonically, then notice shall be given by telephone. For the Commission's internal record keeping purposes only, notice given orally shall be confirmed by letter.
  - b. Within three working days following receipt of notice of adverse determination, the petitioner may:
    - (1) Petition the Commission for reconsideration by supplementing the original petition; or
    - (2) Withdraw the material or information.If the petitioner neither seeks reconsideration nor withdraws the material or information within the three-working day grace period, the Commission will withdraw the temporary proprietary status and shall make the material or information public under its normal operating procedures.
4. Written Motion to Make Public Proprietary or Privileged Material or Information.
  - a. Any person may make written motion requesting access to material or information which the Commission has

information or material to which access is sought, and shall set forth the movant's reasons for seeking access thereto.

- b. Upon receipt of such a motion, the Staff shall notify the sponsor of the protected material or information by means of the most expeditious methods available. Within five working days following receipt of the notice of motion requesting access, the sponsor of the protected material or information shall submit its response, if any.
- c. As soon as reasonably possible after the expiration of the five working-day period specified in paragraph 4(b), the Commission will issue its determination to grant or deny the motion requesting access.

STATE  
of ALASKA

## MEMORANDUM

TO:  Judy White  
Research Analyst II

DATE: July 26, 1978

THRU: J. Lowell Jensen, P.E.  
Executive Director

FILE NO.

FROM: Robert E. Stoller  
Assistant Attorney General  
Staff Counsel

TELEPHONE NO.

SUBJECT: Procedures for Invoking APUC  
Proprietary Information  
Protective Designations

From time to time, utilities have submitted information to the Commission or Staff bearing a rubber-stamped statement to the effect that the filing utility considers the information to be privileged or confidential. Also, utilities have occasionally included unsupported or blanket statements in the cover letters accompanying their filings to the effect that the information filed is privileged or confidential or its release would cause the utility harm or injury.

You have asked for my legal opinions as to whether the rubber-stamped statement or the blanket statement in a cover letter qualifies as a written petition for proprietary or privileged status. In my opinion, they do not so qualify, and therefore the Staff is at liberty to disregard them and to release the assertedly proprietary information to any member of the public requesting access thereto.

The general rule of the statute is that any and all "reports, files, books, accounts and papers of every nature" in the Commission's possession are public. AS 42.05.671, first sentence. The statute provides that any person wishing to preserve the confidence of information filed with the Commission may "make written objections . . . stating the grounds for the objections." AS 42.05.671, second sentence. To merit protection, that written objection must clearly establish that public disclosure of the information "would adversely affect the interest of [the objecting] person and is not required in the interest of the public." AS 42.05.671, third sentence, emphasis added.

The regulation implementing AS 42.05.671, 3 AAC 48.040(a), provides in pertinent part:

"All facts, information, reports, orders, memoranda, books, accounts and paper of every nature in the possession of the Commission are available for examination by the public except . . .

(9) any specifically designated information in an application, tariff filing, report or document which, for good cause shown, the Commission may order withheld pursuant to written objection by the filing party." (Emphasis added).

Memo to  
Judy White

( 2 )

July 26, 1978

The core of the inquiry, then, is whether the written objection seeking proprietary status contains sufficient information to qualify as a showing of good cause. A rubber-stamped or an unsupported blanket statement does not qualify as a showing of good cause. At best, it amounts to a bald assertion of the utility that proprietary status is desirable.

The Alaska Supreme Court has specifically instructed this Commission that it may not defer to bald assertions by utility management, particularly when specific evidence can be committed to the record. Jager v. State, 537 p. 2d 1100, 1113 (Alaska 1975). In this same opinion, the Court interpreted the "good cause shown" requirement of section 3 AAC 48.130(f) of the Commission's regulations as requiring action when a complainant "brings evidence before [the Commission] amounting to probable cause" that action is required. Jager v. State, 537 p. 2d at 1108, emphasis added. But "the Commission is not compelled to act by the mere filing of a complaint . . . ." Jager v. State, 537 p. 2d at 1108.

There is no legal difference between the good cause shown requirement of 3 AAC 48.130(f) and the good cause shown requirement of 3 AAC 48.040(a)(9). Therefore, the mere filing of a rubber-stamped or blanket request does not compel the Commission or Staff to actively protect the information in question. And since the Commission may not defer to management's bald assertions, it may not withhold public access to information where there is only a bald assertion that the information should be held proprietary.

If you have any questions or comments, please feel free to contact me.

RES:lm

cc: Gordon J. Zerbetz, Chairman  
Marvin R. Weatherly, Commissioner  
Carolyn S. Guess, Commissioner  
Susan M. Knowles, Commissioner  
Stuart C. Hall, Commissioner

RECEIVED  
A.P.U.C.

Nov 23 1 02 PM '80

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
2 FOURTH JUDICIAL DISTRICT

3 CITY OF FAIRBANKS d/b/a )  
4 FAIRBANKS MUNICIPAL UTILITIES )  
5 SYSTEM, )

6 Plaintiff/Appellants )

7 vs. )

8 THE ALASKA PUBLIC UTILITIES )  
9 COMMISSION and WIRE COMMUNICA- )  
TELEPHONE, )

10 Defendants/Appellees. )  
11 )

FILED in the Trial Courts  
State of Alaska Fourth District

NOV 25 1980

WAYNE W. WOLFE, Clerk, Trial Courts  
Deputy

12 Superior Court #77-1268  
13 Supreme Court #3977

14 ORDER

15 The order issued by this court in this proceeding  
16 on June 27, 1980, in which the court remanded the decision of  
17 The Alaska Public Utilities Commission certifying Greatland  
18 Telephone Company to provide telephone service on Fort Wainwright  
19 Military Reservation U-76-62(3) is hereby clarified to permit  
20 the Commission to conduct further proceedings on the current,  
21 rather than prior, financial fitness of Greatland Telephone  
22 Company.

23  
24 James R. Blair  
25 Superior Court Judge

26 Nov. 25, 1980  
27  
28  
29  
30  
31  
32

2/6  
1-5-80

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

CITY OF FAIRBANKS d/b/a )  
 FAIRBANKS MUNICIPAL UTILITIES )  
 SYSTEM, )  
 )  
 Plaintiff/Appellants, )  
 )  
 vs. )  
 )  
 THE ALASKA PUBLIC UTILITIES )  
 COMMISSION and WIRE COM- )  
 MUNICATIONS, INC. d/b/a )  
 GREAT LAND TELEPHON, )  
 )  
 Defendants/Appellees. )

FILED In the Trial Courts  
State of Alaska, Fourth District

JUN 30 1980

WAYNE W. WOLFE, Clerk, Trial Courts  
by                      Deputy

Superior Court #77-1268  
Supreme Court #3977

RECEIVED  
A.P.U.C.  
JUN 7 3 58 PM '80

ORDER

In accordance with Supreme Court Opinion No. 2079 filed on the 9th day of May, 1980, and the Mandate spread the 19th day of May, 1980, this court

HEREBY ORDERS that the Order of the Alaska Public Utilities Commission is VACATED. The court

FURTHER ORDERS that this case is hereby REMANDED to the Commission for a redetermination of certification following a supplemental hearing with regard to the financial fitness of Wirecom.

DATED at Fairbanks, Alaska, this 27 day of June, 1980.

James R. Blair  
JAMES R. BLAIR  
Superior Court Judge

COPIES TO COUNSEL:  
                      
(Date)                      (Int)  
                      
Supreme Ct.

1 On page 1, after line 29, insert:

2 \* Sec. 4.5. AS 42.05.020(b) is amended to read:

3 (b) The governor shall designate one member of the com-  
4 mission as chairman of the commission. This member shall serve  
5 for a term of two [FOUR] years, but may be reappointed for suc-  
6 cessive terms.

7 On page 2, line 19, after delete "three", and insert:

8 one [THREE]

9 On page 2, between lines 28 and 29, insert:

10 \* Sec. 7.5. AS 42.05.651 is amended to read:

11 Sec. 42.05.651. EXPENSES OF PROCEEDINGS [INVESTIGATION OR  
12 HEARING]. During or after [AFTER] completion of a hearing, [OR]  
13 investigation or other proceeding held or conducted under this  
14 chapter, the commission shall allocate the costs of the hearing,  
15 [OR] investigation or other proceeding among the parties, includ-  
16 ing the commission, as is just under the circumstances. In allo-  
17 cating costs, the commission may consider the results, ability to  
18 pay, evidence of good faith, other relevant factors and mitigat-  
19 in circumstances. The costs allocated may include, but are not  
20 limited to, the costs of any time devoted to the investigation,  
21 [OR] hearing or other proceeding by hired consultants, whether  
22 or not the consultants appear as witnesses or participants. The  
23 costs allocated may also include any out-of-pocket expenses in-  
24 curred by the commission in the particular proceeding. The com-  
25 mission shall provide an opportunity for any person objecting to  
26 an allocation to be heard before the allocation becomes final.

27 \* Sec. 7.75. AS 42.05.711(i) is amended to read:

28 (i) After [ON] June 30, 1980, a utility which furnishes  
29 collection and disposal service or garbage, refuse, trash or  
30 other waste material and has annual gross revenues of \$200,000  
31 or less is exempt from the provisions of this chapter, other than  
32 the certification provisions of AS 42.05.221 - 42.05.281, unless

1 25 per cent of the subscribers or subscribers representing 25  
2 per cent of the annual gross revenue of the utility preition the  
3 commission for regulation.

4 On page 7, delete lines 6 - 8, inclusive, and insert:

5 \* Sec. 20. Except for secs. 4.5 and 17(c) of this Act, this Act  
6 takes effect July 1, 1981. Sec. 4.5 is retroactive to March  
7 16, 1981. Sec. 4.5 and sec. 17(c) of this Act take effect im-  
8 mediately in accordance with AS 01.10.070(c).

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ALASKA PUBLIC UTILITIES COMMISSION  
100 MACKAY BUILDING 338 DENALI STREET  
ANCHORAGE, ALASKA 99501  
PHONE 272-1487



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

March 31, 1981

The Honorable Jim Duncan  
Speaker of the House  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill transferring the authority for the administration of the Alaska Pipeline Commission (APC) Act (AS 42.06) to the Alaska Public Utilities Commission (APUC -- AS 42.05), effective July 1, 1981.

In response to "sunset" audits by the legislature, I directed the commissioners of the APC and the APUC to study the feasibility of merger. On the assumption that a seven-member commission would be recommended, I did not fill the currently vacant APC seat. The present APC commissioners recommended the elimination of their positions and the transfer of their statutory responsibilities to the APUC as presently constituted. The APUC concurred with their recommendation.

I believe that enactment of this bill will result in a more efficient method of regulating both public utilities and pipelines.

After merger, the APUC will thoroughly study any actual or potential conflicts between AS 42.05 and AS 42.06. The attached bill makes a number of amendments to make those two chapters compatible with each other. But time and experience will probably disclose other desirable changes.

The bill contains six major groups of provisions. First, sec. 13 of the bill effects a merger of the APC with the APUC by transferring to the APUC responsibility for the administration of the Pipeline Act, while sec. 15 of the bill establishes the new title for AS 42.06. Section 17 of the bill provides for the orderly transfer of the functions, powers and duties of the pending proceedings before, as well as the personnel, appropriations, and property of, the APC to the APUC.

In secs. 1, 2, and 3 of the bill, the APUC would be substituted for references to the APC in the statute governing common purchasers of oil (AS 31.15) and in the applicable provisions of the Right-of-Way Leasing Act (AS 38.35). Also, sec. 18 of the bill authorizes the substitution of the APUC for other references to the APC elsewhere in the Alaska Statutes. Additionally, secs. 8 -- 12 of the bill update references to relevant federal law. Since enactment of AS 42.06 in 1972, other federal legislation has been enacted that, arguably, affects the APC's jurisdiction. To avoid the necessity of making continual amendments to this state statute to reflect changes in federal law, substitution of general for specific references to applicable federal law is more appropriate and keeps the Alaska Statutes current. Section 14 clarifies the definition of "municipality" and conforms it to the more contemporary definition employed elsewhere in the Alaska Statutes.

Second, sec. 5 of the bill clarifies the authority of the APUC to employ an individual as executive director who possesses a professional background in engineering. This corrects an oversight in the 1978 legislation (sec. 2, ch. 103, SLA 1978). As a general rule, engineering is not considered a field "allied" to law or accounting. However, both the APC and the APUC employ engineers on their respective staffs, and a well-qualified engineer should not be precluded from applying for, or serving in the capacity of the commission's executive director.

Third, secs. 5 and 6 of the bill also authorize employment of administrative law judges to conduct proceedings subject to APUC jurisdiction. This is a position widely employed by comparable regulatory agencies in other states. Here it is designed primarily to permit an exceptionally well-qualified individual to serve as co-presiding officer in the joint hearings with the Federal Energy Regulatory Commission (FERC) which is considering the various phases of the Trans-Alaska Pipeline System tariff case that is subject to both federal and state jurisdiction. It is important that an individual selected to represent the State of Alaska be of equivalent stature to the FERC administrative law judge assigned to preside over this unique concurrent proceeding. To this end, secs. 4 and 5 classify the positions of hearing officer and administrative law judge in the partially exempt service -- a step employed by the Alaska Transportation Commission at the last legislative session. Sec. 22, ch. 115, SLA 1980.

Fourth, to facilitate commission consideration of the record where hearings are being conducted by a hearing officer or an administrative law judge, sec. 7 of the bill would permit commissioners serving on the decision-

making panel to read the hearing record rather than to require that they hear the evidence and argument in person. This amendment conforms to the existing practice and procedure both before the APUC, under 3 AAC 48.150(b), and the APC by stipulation, when less than a quorum of commissioners hears a case. The same rationale I advanced in my letter of transmittal with respect to sec. 1 of House Bill 81 (1981 H.J., p. 154 [Feb. 4, 1981]) is applicable here.

Fifth, sec. 16 of the bill makes clear that when the APC's regulatory authority over pipelines is transferred to the APUC, the exemption from the pipeline transportation property tax, specified in AS 43.56.210(6)(B)(iii), does not apply to such entities as the Trans-Alaska Pipeline System.

Finally, sec. 19 of the bill eliminates existing administrative provisions relating to the APC that no longer are necessary in a merged organization or that are covered by virtually identical provisions in AS 42.05. Two sections governing the filing and consideration of complaints (AS 42.06.490 -- 42.06.500) also are repealed. These are the two sections of AS 42.06 most seriously in conflict with existing APUC procedure. Compare AS 42.06.490 -- 42.06.500 with 3 AAC 48.130.

I am pleased to say that the members of both the APC and the APUC endorse this legislation.

Sincerely,

S/SSH

Jay S. Hammond  
Governor

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. House Bill No. 434 An act relating to pipelines and mergi  
Title the Alaska Pipeline Commission w/the Alaska Public Utilities Commis  
Requested by Governor Date \_\_\_\_\_

II. FISCAL DETAIL

Agency Affected Department of Commerce and Economic Development  
Program Category Affected Public Protection  
BRU, Program, or Subprogram(s) Affected Alaska Public Utilities Commission/Alaska Pipeline  
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES		2128.7				
200 TRAVEL		89.0				
300 CONTRACTUAL		742.6				
400 COMMODITIES		15.9				
500 EQUIPMENT		5.4				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
		2981.6				

TOTAL

FUNDING (Thousands of Dollars)

GENERAL FUND		2952.6				
FEDERAL FUNDS		29.0				
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME		48				
PART TIME		2				
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The budgets of the Alaska Public Utilities Commission and the Alaska Pipeline Commission are combined deleting the Alaska Pipeline Commission's Executive Director position and salary.

The salary of one commissioner will be allocated for the Administrative Law Judge (ALJ) and the monies allocated for the two remaining commissioner positions will be used for staff for the ALJ. It is contemplated that a law clerk or paralegal, clerical support and office space, supplies and equipment will be funded from these monies.

IV. DATE

3/31/81

PREPARED BY

Lawrence A. Buss

AGENCY

ADUC

PHONE

276-6222

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

HB81

January 16, 1981

Speaker of the House  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the Alaska Pipeline Commission.

Section 1 of the bill would amend AS 42.06.182 to allow one commissioner or a designated hearing officer to conduct hearings. Presently, AS 42.06.180 is too restrictive. It requires at least two commissioners to be physically present during the hearing. Further, all commissioners participating in a decision relating to a hearing must also be present at the hearing. Strict compliance with this section has not always been possible. For example, during the Trans Alaska Pipeline System (TAPS) proceeding, the Alaska Pipeline Commission (APC) agreed to hold concurrent hearings with the Federal Energy Regulatory Commission (FERC) at Washington, D.C. During 1978, the FERC/APC hearing schedule required the commissioners' attendance almost daily during a six-month period. To avoid such a situation, to reduce expenses, and to allow the APC to continue with other duties, parties involved in the TAPS case agreed to a stipulation requiring the physical presence of only one commissioner but allowing for participation in the decision by all commissioners who read all testimony and hearing transcripts. A similar TAPS stipulation was obtained in 1979, granting full participation rights to a newly appointed commissioner who did not attend any hearings or hear any argument, but who did read all the testimony and transcripts.

The proposed amendment to remove the restrictions would save money and enhance the APC's effectiveness. It would allow one commissioner or a hearing officer to conduct hearings, thereby assuring that the APC will be able to carry out its other obligations while a hearing is being conducted. It would also eliminate the need of the commissioners deciding the case to actually hear the

evidence, such a condition being unduly burdensome and not a requirement of constitutional due process. The amendments do not change the requirement that any decision of the APC be based entirely on the facts of record of the proceeding.

Section 2 of the bill would provide for a refund to shippers under certain circumstances following the conclusion of each phase of a multi-phase investigation or after judicial review.

Section 3 of the bill would allow the commission to allocate the cost of a proceeding before the proceeding has been completed. The statute now requires that the hearing or investigation be completed before costs can be allocated. In some instances, dockets have been open and are expected to remain open for several years, and the amounts involved can easily run into hundreds of thousands of dollars. To allocate one lump sum at the close of such a proceeding places a burden on all parties involved, including the commission. Adoption of this amendment will allow the steady return of recoverable costs to the general fund, and would make fiscal planning and budgeting easier and more consistent for all parties concerned.

Sincerely yours,

S/SSH

Jay S. Hammond  
Governor

THE LEGISLATURE OF THE STATE OF ALASKA  
Twelfth LEGISLATURE

FISCAL NOTE

APPENDIX XXII

I. REQUEST  
 Bill/Resolution No. HOUSE BILL 81  
 Title An Act Relating to the Alaska Pipeline Commission  
 Requested by Governor Date \_\_\_\_\_

II. FISCAL DETAIL  
 Agency Affected Alaska Pipeline Commission  
 Program Category Affected Consumer Protection  
 BRU, Program, or Subprogram(s) Affected Consumer Protection  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)  
 EXPENDITURES (Thousands of Dollars)

	FY 80	FY 81	FY 82	FY 83	FY 84	FY 85
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The Provisions of this bill will not have any increased fiscal impact on funding or expenditures of the Alaska Pipeline Commission. Section 3 of the bill relating to allocation of costs during or after a proceeding will allow for a steady return of monies to the general fund by dividing costs among all parties to the proceeding. The level of these returns cannot be estimated at present, however, the ultimate result may be lower overall costs to the State. There will be no decrease in budgeted costs to the Commission.

IV. DATE January 8, 1981 PREPARED BY Janis Williams, Commissioner  
 AGENCY Alaska Pipeline Commission  
 Original: Legislative Finance PHONE 279-0583  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)

A PERFORMANCE REVIEW  
OF THE  
ALASKA PUBLIC UTILITIES COMMISSION

August 1, 1979

Commissioner of the Department  
of Commerce and Economic Development  
Deputy Commissioner of the Department  
of Commerce and Economic Development

Charles Webber

Bertram L. Wagnon

Members of the  
Alaska Public Utilities Commission

Chairman  
Commissioner  
Commissioner  
Commissioner  
Commissioner

Gordon J. Zerbetz  
Marvin R. Weatherly  
Carolyn S. Guess  
Susan M. Knowles  
Stuart C. Hall

## ORGANIZATION AND FUNCTION

Prior to the creation of the Alaska Public Utilities Commission in 1970, utilities were regulated by the Alaska Public Service Commission (PSC). The PSC was established in 1959 as a part-time three-member commission responsible for all fixed utility regulation including generation, transmission or distribution of electric power, heat, water, natural or manufactured gas, oil or other petroleum products (except by pipeline); and the furnishing of telephone or telegraph communications, and community sewer services.

In 1960, the PSC gained responsibility for regulating transportation utilities with the passage of the Alaska Motor Freight Carriers Act and the Alaska Air Commerce Act. The transportation regulation duties were transferred to the Alaska Transportation Commission upon its creation in 1966. The 1960 legislation eliminated the PSC and created the APUC as a full-time three-member commission. That legislation also changed the definition of public utility to include those furnishing the following types of services for compensation: electrical; telecommunications; water, steam or sewer; transmission or distribution of natural or manufactured gas; and petroleum or petroleum products when no competition exists. A 1973 amendment added collection and disposal service of garbage, refuse, trash or other waste to the definition.

AS 42.05.040 requires one member to be a law school graduate, one to be a university graduate with a major in engineering, and one to be a university graduate with a major in finance, accounting or business administration. Two additional positions were added to the Commission in 1975 for which no special qualifications have been established. All members are appointed for six-year terms by the Governor and confirmed by the Legislature. The Commission may hire an executive director, who may be a member of the Commission.

Under AS 42.05, the Alaska Public Utilities Commission Act, the APUC is charged with the responsibility to assure the furnishing of adequate service to all public utility patrons, without discrimination, and at the lowest reasonable rates consistent with the interests both of the public and the utility. Statutory provisions direct the Commission, after determining an applicant is fit, willing and able to provide utility service, to issue that applicant a Certificate of Public Convenience and Necessity (CPCN). After issuance of a CPCN the Commission then regulates the rates, classifications, rules, regulations, practices, services and facilities of a public utility. The Commission has the authority to adopt regulations and to hold formal, quasi-judicial hearings to accomplish these purposes.

The staff of the APUC, in addition to the support staff of the Commissioners, is divided into five major functions: administration, engineering, communications carriers, consumer protection and information and financial/tariff analysis. A brief description of the services provided by those functions follows:

Administration. An Executive Director, hired by the Commission, is responsible for directing all staff functions and acts as liason between staff and Commissioners. He is assisted by a Deputy Director who has responsibility for records/document management. They are assisted in these duties by an administrative assistant, document processing personnel and other clerical support staff.

Engineering. The Engineering Section consists of a section chief, four utilities engineers, a draftsman and a clerical support person. This section is responsible for investigation of utility procedures and practices affecting quality of service; review of legal descriptions for service areas, plans for plant expansion, and plant-in-service and depreciation schedules. This section presents its evaluations in proceedings before the Commission.

Communications Carriers. This section was established by 1976 legislation to develop, recommend and administer policies and programs with respect to the regulation of rates, services, accounting and facilities of communications common carriers within the State involving the use of wire, cables, radio and space satellites. There is one position in this section and it is currently vacant.

Consumer Protection and Information. This function is carried out by a section chief and an information officer. The major responsibilities are investigation and resolution of consumer complaints, and public relations/information functions.

Financial/Tariff Analysis. Activities carried out by this section include: examination, analysis and evaluation of financial statements submitted with tariff filings; audits of financial records of utilities; examination of financial information comprising historical operating year and proforma adjustments; and presentation of these analyses at proceedings before the Commission. In addition to the section chief, there are five utility financial analysts and two research analysts authorized for this section.

## REPORT CONCLUSION

### Policy Issues

This review contains policy issues raised as a result of our evaluation of various Commission practices. The final policy decisions affecting these practices are not within the scope of this review but require legislative consideration. In debating these decisions, the legislative oversight committees should take into consideration the findings and alternatives presented in this report, so that the potential impact of the policy changes can be evaluated.

### Report Conclusion

In our opinion, the Alaska Public Utilities Commission should continue to regulate public utilities. We believe that the public interest is being served by requiring public utilities to be certificated by the APUC. This process stabilizes demand for the utility service by eliminating competition and thereby allowing economies of scale (declining unit costs with increased outputs) to operate. Economic regulation by the Commission, in place of that competition, ensures that the utilities provide adequate service at the lowest reasonable rates.

However, certain changes need to be implemented for the Commission to more effectively execute its mandated responsibilities. A number of factors have caused an increase in workload at the APUC which have diluted its ability to effectively regulate all utilities within its jurisdiction. Those factors include, but are not limited to, increases in the number of applications for certificates for which there are competing applicants, and more frequent rate increase requests due to spiraling costs, particularly for fuel.

We therefore evaluated the workload of the Commission for areas of regulation which could be eliminated or limited with the least public impact, and would allow the APUC to devote its limited time and resources on areas of greater import. This Division has now completed performance reviews under AS 44.66.050 of two of the three regulatory commissions in Alaska. We also evaluated them from an overview position, the entire utility regulatory scheme in Alaska.

In keeping with the intent of the Sunset Law which attributed public disenchantment with State government to a proliferation of that government, we recommend the Alaska Public Utilities Commission, the Alaska Transportation Commission and the Alaska Pipeline Commission be combined into a single regulatory commission. This recommendation stems from a comparison of

Alaska with the other forty-nine states in which we learned that Alaska is one of only three states utilizing three utility regulatory commissions and employs the second largest number of commissioners to staff those agencies (see Recommendation No. 1).

Areas of regulation which we recommend be eliminated from APUC's jurisdiction are cable television and garbage collection. Cable television service is an entertainment service, not a monopoly or a necessity, and deregulation of this service would not be detrimental to the public interest (see Recommendation No. 2). Services providing collection and disposal of garbage are not fixed, capital intensive utilities for which competition should be eliminated, as is necessary in the other utilities regulated by APUC. This industry should be regulated at the local level as a transportation utility (see Recommendation No. 3).

Areas of APUC regulation which we recommend be limited involve nonprofit telephone and electric cooperative corporations and utilities with gross annual revenues of less than \$100,000. AS 42.05 should be amended to allow the membership of the cooperatives, by vote of a majority of the members, to be given an opportunity on a utility by utility basis, to determine whether their cooperative should remain economically regulated by the APUC. This action would allow members of cooperatives who feel their board of directors is sufficiently responsive to the membership to withdraw from regulation, while those who feel their board is not responsive may appeal to the APUC (see Recommendation No. 4).

AS 42.05 should also be amended to exempt all certificated utilities with gross annual revenues of less than \$100,000 from economic regulation. This exemption would delete a minimum of 26 utilities or 20 percent of the current number of certificated economically regulated utilities under APUC. This action would not be contrary to the Commission's responsibility to protect the public interest because the cost of regulation as a percentage of operating costs for small utilities may outweigh the benefits of regulation, and because Commission time could be devoted to larger utilities serving a larger number of customers (see Recommendation No. 5).

The ability of the Commission to effectively regulate utilities has been hampered by omissions and inconsistencies in the Statutes and regulations. To allow for more effective case management and to avoid court appeals of Commission decisions, the APUC should promulgate regulations to accomplish the following: (1) to clarify the reporting and accounting requirements of utilities desiring to include rate case expense in their rate base; and (2) to prescribe industry performance standards to allow the Commission to effectively

monitor and enforce the quality of service being provided by utilities. A statutory amendment is needed to clarify whether transfer of certificates of public convenience and necessity from one utility to another through transfer of the controlling interest in the corporate stock is subject to APUC approval (see Recommendation No. 6).

The Commission's effectiveness has also been hampered by difficulties in recruiting and retaining employees for the Utility Financial Analysis Section and Utilities Engineering Section. Increasing compensation levels for those positions to a competitive level with employers in the Anchorage area and similar positions in the State government should allow recruitment and encourage retention of qualified experienced staff (see Recommendation No. 7).

Improvement in the efficiency of Commission operations would result from: (1) development of a topical cross-reference system for Commission orders (see Recommendation No. 9); (2) implementation of a time-management system to assist the Commission in prioritizing, planning and scheduling future workloads, and monitoring work in progress (see Recommendation No. 8); (3) establishment of separate collocation codes for budgeting and recording expenses of each function of the Commission (see Recommendation No. 11); and (4) restriction of Commissioner involvement in the administrative function of the Commission (see Recommendation No. 10).

A review of Commission appointment activity performed by the Office of the Governor showed that the chairmanship term of the present APUC chairman expired November 30, 1977 and, to date, a period of 20 months, no new appointment or reappointment to this position has been made. The Office of the Governor should make appointments in a timely manner.

#### Subsequent Event

The present Chairman of the APUC was reappointed to the chairmanship on July 31, 1979. That term will expire November 30, 1981.

FINDINGS AND RECOMMENDATIONS-

Recommendation No. 1

The Alaska Public Utilities Commission, the Alaska Transportation Commission and the Alaska Pipeline Commission should be combined into a single regulatory commission.

During our review process we compared the utility regulatory scheme utilized in Alaska with the schemes utilized in the other forty-nine states. This analysis revealed that Alaska is one of only three states utilizing three utility regulatory commissions and employs the second largest number of commissioners as shown below:

Regulatory Scheme	States Used By		Commissioners			Employees		
	No.	%	No. On Comm.	No. Of States	%	Hi	Lo	Avg.
One			1	1	2%			
Regulatory Commission	42	84%	3	29	69%	976	11	164
			5	10	24%			
			7	2	5%			
				42	100%			
Two								
Regulatory Commissions	5	10%	6	5	100%	726	87	242
Three			8	1	33%			
Regulatory Commissions	3	6%	11*	1*	33%	762	71*	419
			12	1	33%			
				3	100%			

\*Alaska

From: The 1977 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners.

A brief history of the development of Alaska's three regulatory commissions follows. The Alaska Public Service Commission (PSC) was established in 1959 as a part-time three-member commission responsible for all fixed utility regulation. In 1960 the PSC gained responsibility for regulating transportation utilities with the passage of the Alaska Motor Freight Carrier Act and the Alaska Air Commerce Act. The transportation regulation duties were transferred to the full-time three-member Alaska Transportation Commission (ATC) at its creation in 1966, and 1970 legislation eliminated the PSC and created the Alaska Public Utilities Commission (APUC) with jurisdiction over fixed utilities. That legislation established the APUC

A PERFORMANCE REVIEW  
OF THE  
ALASKA PIPELINE COMMISSION

July 11, 1980

Commissioner, Department of Commerce  
and Economic Development

Deputy Commissioner, Department of  
Commerce and Economic Development

Charles Webber

Peter Jeans

Members of the  
Alaska Pipeline Commission

Chairman  
Commissioner  
Commissioner

Cheri C. Jacobus  
Harry J. Donahue  
Karen W. Cory

## PURPOSE AND SCOPE OF THE REVIEW

### Purpose

In accordance with the provisions of Alaska Statutes 24.20.271(1) and 44.66.050 (sunset legislation), a review of the Alaska Pipeline Commission (hereinafter referred to as APC or the Commission) was conducted to determine whether there is a demonstrated need to continue pipeline regulation in its present form. Also, we reviewed Commission activities to see if the Commission has been operating in an efficient and effective manner.

AS 44.66.010(5) specifies that the Alaska Pipeline Commission will terminate on June 30, 1981, but will continue until June 30 of the following year for the purpose of concluding its affairs. This report shall be considered during the legislative oversight function in determining whether the Commission should be allowed to terminate, be reestablished in its present form, or be reestablished in a modified form.

### Scope

The functions reviewed included commissioner activity, administrative, financial/tariff analysis, engineering, consumer complaints, and records/docketing. Our review consisted of analyzing and evaluating the following:

1. Applicable statutes and regulations.
2. Interviews with the commissioners.
3. Interviews with staff members.
4. Interviews with APC regulated pipeline companies.
5. Interviews with attorneys who practice before the Commission.
6. Observation of a Commission hearing and court proceeding.
7. Interviews with Assistant Attorneys General assigned to APC.
8. Tests of APC records and documents.
9. Test of records and documents of the Office of the Governor on appointments to the APC.
10. A review of major Federal Energy Regulatory Commission decisions affecting the Commission.

## REPORT CONCLUSION

### Policy Issues

This review contains policy issues raised as a result of our evaluation of various Commission practices. The final policy decisions affecting these practices are not within the scope of this review but require legislative consideration. In debating these decisions, the legislative oversight committees should take into consideration the findings and recommendations presented in this report so that the potential impact of policy changes can be evaluated.

### Report Conclusions

In our opinion the intrastate transportation of oil and gas by pipeline carriers should continue to be regulated by the State of Alaska. However, we believe that a separate commission is not necessary to carry out this function. The economic regulation of pipelines provides benefits to the people of the State in the form of: (1) lower fuel costs, since processors of Alaskan oil and gas are able to obtain those resources over pipelines at fair and reasonable transportation rates, and (2) greater revenue to the State, since decreases in tariffs result in increases in wellhead value with corresponding increases in State royalty and tax collections.

In keeping with the intent of sunset legislation, which attributed public disenchantment with State government to a proliferation of that government, we recommend the Alaska Public Utilities Commission, the Alaska Transportation Commission, and the Alaska Pipeline Commission be combined into a single regulatory commission. Our analysis of APC operations and comparison of those operations to the APUC and ATC demonstrated to us that there is currently an insufficient workload to justify a separate commission for the regulation of pipeline transportation. Additionally, having evaluated all three regulatory commissions under AS 44.66.050, we believe economies of operation can be realized by the combination (see Recommendation No. 1).

As a result of the Commission's procedure of relying on pipeline companies to make themselves aware of the APC and voluntarily comply with Commission requirements, one pipeline was already under construction before application was made to the APC for certification to begin that construction. The Commission should develop and implement procedures to ensure compliance with the Commission's statutory certification requirements before pipeline construction is begun (see Recommendation No. 2).

Areas of vagueness and omissions in the statutes and regulations have already hampered, or have potential to hamper, the APC's ability to carry out mandated responsibilities. The regulations need clarification of what constitutes confidential versus public information, who is required to make application to the APC for connection permits, and what format that application should take. Amendment should be made to the statutes and regulations to allow a commissioner who has merely read the testimony in a proceeding to participate in the decision, and to allow the APC to allocate hearing and investigation costs, during, as well as at the completion of, those proceedings (see Recommendation No. 3).

A review of appointments made to the APC by the Office of the Governor since the Commission's initial staffing in 1974 showed that appointments have not been made in a timely manner. We also found several exceptions to AS 42.06.040 requiring six-year terms with appointments to fill vacancies to be made for the balance of the predecessor's term (see Recommendation No. 4).

## FINDINGS AND RECOMMENDATIONS

### Recommendation No. 1

The Alaska Public Utilities Commission, the Alaska Transportation Commission, and the Alaska Pipeline Commission should be combined into a single regulatory commission.

In keeping with the legislative intent of the sunset law which found "... that the substantial increase in the number of State agencies, boards and commissions, and the proliferation of rules and regulations which each has adopted have contributed to a public disenchantment with the operation of State government ..." (Ch. 149, SLA 1977), we have investigated the need for three separate regulatory commissions in the State of Alaska.

In a previous Legislative Audit report, we compared the utility regulatory scheme utilized in Alaska with the schemes utilized in the other forty-nine states. That analysis revealed that Alaska is one of only three states utilizing three separate utility regulatory commissions and employing the second largest number of commissioners. An update of that analysis shows that information to still be correct as demonstrated below:

<u>Regulatory Scheme</u>	<u>States Used By</u>		<u>Commissioners</u>			<u>Employees</u>		
	<u>No.</u>	<u>%</u>	<u>No. On Comm.</u>	<u>No. Of States</u>	<u>%</u>	<u>Range</u>		
						<u>Hi</u>	<u>Lo</u>	<u>Avg.</u>
One			1	1	2%			
Regulatory	42	84%	3	27	64%			
Commission			5	12	29%	900	17	172
			7	2	5%			
				42	100%			
Two			6	4	80%			
Regulatory			7	1	20%			
Commissions	5	10%		5	100%	803	19	235
Three			8	1	33%			
Regulatory	3	6%	11*	1	33%			
Commissions			12	1	33%	771	75*	430
*Alaska				3	100%			

From: "The 1978 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners."

Also included in our previous report were the results of a survey questionnaire to utility regulatory commissioners in other states which showed that:

- (a) Twenty-six of the responding thirty-two states (81%) felt the advantages of a single regulatory agency outweigh those of maintaining two or three separate agencies. Some of the advantages noted were: centralization of expertise; cost savings due to economies of scale and elimination of unnecessary duplication; in general a more efficient use of resources; and
- (b) Twenty-eight of the responding states (87%) felt commissioners can realistically develop the expertise to render decisions in fixed, transportation and/or pipeline utility cases.

The Division of Legislative Audit has now completed performance reviews of all three of Alaska's regulatory commissions. Based on the information gathered during the course of those audits, we recommend the following actions to produce a more efficient, cost-effective regulatory system in Alaska. The most efficient manner to effect the transition from three regulatory commissions to a single commission would be a two-phase process.

The first phase would be to combine the Alaska Pipeline Commission with the Alaska Public Utilities Commission. Our performance review of the APC demonstrated to us that there is currently an insufficient workload to justify a separate commission for the regulation of pipeline transportation. Table II shows workload statistics for the three commissions, APC, APUC, and ATC. These statistics have not been adjusted to reflect importance or complexity of docketed matters or individual agencies' operating efficiencies. However we do feel they offer a valid indication of the Commissions' workloads.

TABLE II:	No. of CPCN* Applications <sup>1</sup>	No. of Other Docketed Matters <sup>1</sup>	<u>Hearings</u> <sup>1</sup> No. Days	
APC	0	20	2	45 <sup>2</sup>
APUC	37	311	44	102
ATC	221	340	138	95

1. All information is for calendar year 1979.

2. Includes 42 days of hearings in TAPS proceedings.

\*Certificate of public Convenience and Necessity.

Even though pipelines have traditionally been regulated more as transportation utilities than fixed utilities, it would be more practicable to combine the Alaska Pipeline Commission with the Alaska Public Utilities Commission for the following reasons:

- (1) Pipelines in Alaska, unlike other areas of the country, are natural monopolies as are most fixed public utilities. The heavy fixed costs required for pipeline construction in Alaska, as well as the natural geographic barriers and climactic conditions, have either prohibited or made economically infeasible competition from traditional sources, i.e., other pipeline companies, trucking industry, the shipping industry or railroads.
- (2) The methodology adopted and utilized by the APC to determine fair and reasonable tariffs for pipelines is very similar to the methodology utilized by the APUC in determining rates for fixed utilities. Both commissions utilize a rate of return on rate base methodology, whereas the ATC utilizes an operating ratio methodology for establishing tariffs for transportation utilities. It should also be noted that the methodology used by these two commissions is the methodology used by the Federal Energy Regulatory Commission for regulation of interstate pipeline transportation.
- (3) The experience of the APUC in its Federal/State Communications Commission Joint Board work considering telephone separations methods for Alaska and Hawaii will be valuable in solving an APC problem which will have to be dealt with in the future. To date there has been no agreement between the Federal Energy Regulatory Commission and the APC on a method of allocating expenses between interstate and intrastate pipeline commerce. The problem of telephone toll separations between long-lines and local telephone companies and the problem of pipeline expense separation have obvious similarities that could be best dealt with by agency with experience in these types of negotiations.
- (4) During the last session of the Legislature, action was taken deregulating several areas of the APUC's jurisdiction. As stated in our previous report on the APUC, combining commissions without decreasing the present workload of those commissions would cause serious processing time delays. We believe there has now been sufficient deregulation of APUC's jurisdiction to allow a combining of commissions without harmfully impacting the agencies' operating efficiency.

There was some deregulation of transportation utilities (ferries and buses) during that session, but this action will not have a significant impact on ATC's workload.

Implementation of the first phase of the combining process would best be carried out after the APC has issued its decision on Phase One of the Trans-Alaska Pipeline System (TAPS) hearings, but before Phase Two hearings begin. The Commission estimates the Phase Two hearings will last approximately ten months and will be accompanied by lengthy, complex transcripts. Interruption of this process by a jurisdiction transfer and probable personnel change would, therefore, cause serious delays in completing the TAPS investigation and have possible legal ramifications.

The Second Phase of the process should be the combining of the Alaska Transportation Commission into the combined Public Utilities/Pipeline Commission. Prior to carrying out the Second Phase, a management study should be undertaken to determine the correct staffing levels and organization plan for a combined commission. The following recommendations should be given consideration in establishing a combined commission.

#### Number of Commissioners and Commissioner Qualifications.

The functions of the combined Public Utilities/Pipeline Commission could be carried out by a five-member commission. The present qualifications as stated at AS 42.05.040 should be retained with the two consumer positions changed to specify qualifications which would bring to the Commission the expertise needed for regulation of pipelines, e.g., petroleum engineering or transportation economics. The determination of how many commissioners should serve on the combined Public Utilities/Pipeline/Transportation commission should be made if and when intrastate transportation is substantially deregulated, and the number of commissioners needed would then reflect the extent of that deregulation.

#### Staffing

Until the APC's involvement in the TAPS proceedings is completed, additional financial and research or engineering staff should be retained. When the TAPS proceedings are complete an evaluation of the number of staff members needed should be made based on the estimated workload in pipeline cases at that time.

Consideration should also be given to creating a small, professional staff to work exclusively for the commissioners of the combined commission. When commissioners lack knowledge in areas that come before them in formal proceedings, a natural reaction would be to seek information from in-house staff experts, which creates a potential violation of the ex parte communication prohibition. Physical separation of commissioners and staff should also be considered.

## Budgeting

In addition to creation of a separate staff for commissioners, separate line item appropriations for staff operations and commissioner operations should be established to help ensure staff independence.

## Recommendation No. 2

The Alaska Pipeline Commission should develop and implement procedures to ensure compliance with the Commission's statutory certification requirements.

AS 42.06.240 states that "(a) After January 1, 1974 no pipeline carrier, or person which will be a pipeline carrier upon completion of any proposed construction or extension, shall engage in the transportation of oil or gas by pipeline subject to the jurisdiction of the commission, or undertake the construction or extension of any pipeline facilities for that purpose, or acquire or operate any pipeline facilities or extension, unless there is in force with respect to that pipeline carrier a certificate of public convenience and necessity issued by the commission authorizing those acts or operations." Since 1974, the Commission has received three applications for certificates of public convenience and necessity for new pipeline construction. Of the three, however, one pipeline was already under construction when the application was received.

Certificates of public convenience and necessity are required by statute to ensure companies seeking to provide pipeline transportation services are fit, willing and able to provide the services, to determine routes to be covered and, if the line will be competing with other pipelines, whether that competition is in the public's best interests. When construction is begun before the Commission has reviewed the application, the possibility exists that the Commission will find reason for not granting a certificate and the capital invested will be lost.

To date the Commission has relied on the pipeline companies to make themselves aware of the APC and to voluntarily comply with all Commission requirements. We recommend the Commission take more assertive action to ensure that pipeline companies are aware of the APC and comply with all requirements in a timely manner. Some examples of procedures which could be implemented which would assist the Commission in solving this problem would be to seek listing in the Department of Environmental Conservation's Directory of Permits, and to coordinate efforts with the appropriate State and Federal agencies to be notified when pipeline companies seek right-of-way permits.