SB

155

CITY OF KENAI

"Oil Capital of Alaska"

210 FIDALGO KENAI, ALASKA 99611
TELEPHONE 283-7535

April 20, 1987

The Honorable Arliss Sturgulewski
Senator, State of Alaska
P.O. Box V
(Interdepartmental Mail Stop: 3100)
Juneau, AK 99811

Dear Senator Sturgulewski:

The powerful and un-elected utilities lobby is still leveraging and pressuring legislators (the people's representatives) to add another indirect tax on the people of the State of Alaska at a time when all taxpayers in Alaska are going to be hit with large tax increases.

House Bill 155 and its Senate companion bill are designed to transfer the cost of relocating utilities to local taxpayers when a municipality is attempting to improve or upgrade the road system for its citizens.

These bills are totally unfair when one realizes the taxpayers had to pay for these right-of-ways or easements and the utilities use them free of charge. It makes little or no difference to the municipality if the utility is municipally owned. However, if the utility is privately owned (under this bill) the taxpayers are subsidizing private enterprize or adding to their profitability.

There are dozens of municipalities in Alaska that do not own electric, gas, telephone or cable TV companies and therefore should not be burdened with utility companies' costs of doing business which adds to their profitability with tax dollars.

To make a long story short, please find enclosed a clipping from the "Clarion," dated April 16, 1987, that describes the special interest legislation on behalf of utilities.

Knowing full well that you are a representative of the people, we are sure this special interest legislation will find its deserved fate -- the waste basket.

Sincerely,

CITY OF KENAI

Wm. J. Brighton
City Manager

WJB/clf
Enclosure
cc: Scott Burgess, AML
The Peninsula Clarion

City Council to carve up street fund

Clarion
4/16/87

By BERT GRUBB 4/16/87
Staff Writer

The Soldotna City Council tackled the knotty problem of unexpectedly high utility relocation costs in Wednesday night's public hearing on $390,000 worth of proposed street improvements.

At its regular meeting, the City Council was to decide how to carve up the money among eight projects within the city limits.

Seventy-five percent of the improvement costs will be paid by general obiligation bonds issued in 1985 and covered by sales tax revenue. Property owners are expected to pay the remaining 25 percent through special assessments.

City Manager Rich Underkofler told a room filled with about 30 people the bad news that Homer Electric Association wanted around $60,000 to move electrical utilities out of the middle of Stacy Drive to allow paving. Enstar gas company wants $23,000, the telephone company wants $16,000 and the cable TV company wants $4,000 for relocation costs.

Underkofler said budget estimates prepared for the expenditure of just $30,000 for right-of-way work on all eight streets

See SOLDOTNA, page 9

...Soldotna streets mulled

Continued from page 1

selected for improvements in 1987.

Stacy Drive resident Mike Tauriainen said as an engineer he has seen utility companies hold the city hostage for relocation work on a number of projects. He said the companies can drag their feet and if the city has to finish by a deadline it may wind up paying rather than negotiating.

Underkofler proposed that Stacy Drive be made an alternate project pending successful negotiations with utility companies and property owners for the payment of relocation expenses. He said it was unfair for the city to have to pay for the relocation and property owners feared the cost would be too high for them.

Tauriainen urged the City Council to press for a legal resolution of who is responsible for the cost rather than changing the status of Stacy Drive.

Road improvements complicated by cost of moving utilities

By POLLY CRAWFORD
Associate Editor

When Kenai City Attorney Tim Rogers catches a plane for Juneau to testify on House Bill and Senate Bill 155, not only is he taking on the entire utility lobby, he is fighting against legislation which could ultimately cost the city of Kenai and other municipalities millions of dollars through the years.

At first glance, the subject matter of the bill could either put a person to sleep or get his mind tangled in a web of explanations from legislative aides who themselves don't totally understand the bill so pass it off as "too complicated to explain."

A nutshell explanation simplifies the legislation: if utilities in a public easement need to be moved because of a municipality-sponsored improvement project, the municipality pays for the relocation of those utilities.

At face value, that may sound fair enough. Somebody is going to have to pay for those relocation costs — either the resident as a utility consumer or the resident as a municipal tax payer, so what's the difference? But a deeper dig reveals the ramifications of the legislation.

According to Kenai City Manager Bill Brighton, the whole crux of the issue is the fact that the utilities — not only publicly owned electrical cooperatives, but also for-profit utilities such as cable television — are allowed to use public easements for free. Not only are they allowed, according to Brighton, the municipalities are required to allow them.

In some cases, those public easements were purchased by the city from the landowners. Because the city is providing the real estate for the utilities to use for free, Brighton said that the cost of relocating those utilities when a road is being upgraded should be counted by the utilities as a cost of doing business.

A similar example would be a private landowner who put some kind of improvement, such as a fence or parking lot, in the public easement in front of his property. When an improvement project is being done on the road, the landowner is asked to remove his improvements at his own expense.

But the utilities, and the Alaska Public Utilities Commission, don't see it that way. The issue boiled down to a fight between the city of Kenai and the Homer Electric Association in which HEA claims the city owes it $500,000 for the cost of relocating its facilities because of city road improvement projects.

At first, Homer Electric went to the APUC to ask for a surcharge to be placed only on the residents of Kenai to pay for the relocation costs. The city fought the surcharge, stating it would be the same as a tax, and that as a cost of doing business, the cost should come from all the ratepayers.

Instead of ruling only on the surcharge, the APUC ruled on the entire issue of the cost of

See UTILITY, back page

Down Under

Sky Carver is back from a trip to Australia sponsored by the Rotary Club. See *People*, page 8.

Index today:

Long distance

A peninsula man will compete in today's Boston Marathon. See *Sports*, page 14.

...Utility tangle may increase cost of road improvements

Continued from page 1

relocating utilities, rejecting the city's use of a common-law principle to back its right to request the utilities to pay, and placing the entire cost of relocating on the city's back, as long as the utilities were properly placed to begin with. According to Ray Wipperman, spokesman for the APUC, the commission didn't feel it was fair that rate payers for an entire utility pay for improvements benefitting only the residents of one municipality.

The city has appealed that ruling to the Alaska Supreme Court, stating that the APUC had no jurisdiction to rule on the common-law principle. The city is currently awaiting a decision.

The common-law principle which states that utilities will bear the cost of relocation was not pulled from a hat. Currently, Alaska is one of the only states in which the initiator of an improvement project, whether it be state or municipality sponsored, (except for the city of Kenai) routinely pays the relocation costs.

According to Marte Lyons, utility engineer with the state Department of Transportation, before 1977, there was no question on the issue — the utilities picked up the costs. That's the way it's done throughout the Lower 48, based on the common-law rule.

The Alaska Legislature feared that cost could effectively bankrupt small Bush utilities, so passed a statute requiring that on state projects, many of which were 95 percent federally funded, the relocation costs would be considered part of the project cost. Lyons said the Federal Highway Administration opposed the law, stating it would be a waste of federal dollars.

With one victory under their belts, the utilities began the fight to make municipalities pay relocation costs. Kenai has been fighting the principle for five years, and, according to Rogers, one by one, the other municipalities have dropped out of the battle, sometimes finding it easier to pay the costs than fight the utilities.

According to Tabby Lyon, administrative aide to State Rep. Bette Cato, D-Valdez, sponsor of HB 155, utility lobbyists brought the matter to Cato as an issue which needed attention. Who actually wrote the bill — which unequivocally places the relocation costs on the municipalities — was not revealed. Tam Cook, an attorney with legislative legal services said she helped draft it, but said she couldn't divulge who worked on it with her. The sponsor in the Senate is State Sen. Joe Josephson, D-Anchorage.

Utility lines run down the middle of Stacy Drive in Soldotna.

Lyon said the bill is needed to make the way in which the costs are handled uniform throughout the state. She said if relocation were part of the project costs, city officials may vote against projects because their true costs would be too high. She also said that when utilities pay for relocations, they can add 8 percent to the costs and recover the entire amount from rate payers, while only the cost of relocation itself would be charged if the municipalities collected it from taxpayers.

While Rogers maintains total opposition to any bill, stating any conflicts should be resolved before the APUC on a case-by-case basis, he has written a substitute bill which would have the municipalities only paying for future relocation costs of utilities put in after the effective date of the legislation. Then, he said, the cities could keep a closer eye on just where the utilities are located instead of giving blanket permits.

A case in point is currently occurring in Soldotna, according to City Manager Richard Underkofler. The city, plus the neighborhood paying a 25 percent assessment, would like to pave Stacy Drive, four or five blocks long. The subdivision was originally platted and developed by Tom Blazy, who put in a 50-foot-wide street with 20-foot utility easements on either side of the road. But the easements would have had to have been cleared, so the utilities put their lines down the middle of the street. Even the cable TV line, installed three years ago, goes down the middle of the street.

Now, they have to be moved, but the utilities are refusing to pay the costs: $60,000 for Homer Electric lines, $23,350 for Enstar lines, $15,000 for telephone lines, and $4,000 for Sonic Cable.

"As far as we're concerned, the utilities are trespassing on our street," Underkofler said. "This problem is going to stop construction." He added that municipalities are at the mercy of the utilities concerning the cost of relocation, because only utility people can move the lines. It is charged against the municipality on a cost-plus basis, based on the time it takes, which ends up being twice as expensive as a private contractor, he said. "It's like giving them a blank check," he said. "The city has the right to audit, but how can the city say it should have cost four hours instead of 12."

HB 155 is currently in the House Finance Subcommittee, chaired by State Rep. C.E. Swackhammer, D-Soldotna. Another member of the subcommittee is State Rep. Mike Davis, D-Fairbanks, who is working to try to get the municipality side represented in the bill. According to his aide, Marilyn Heiman, the utility lobbyists have been working hard to get the bill passed.

Swackhammer said he currently holds no opinion on the bill, but has vowed to pass it out of the subcommittee to the full committee. He said he doesn't believe in the practice of holding bills hostage in committee.

He said he can see both viewpoints in the issue — the fact that the utilities are using public easements, but, on the other hand, "Why should a utility pay for the relocation of utilities only happening in the city of Kenai? If the cost of relocation is spread out to all users. why should a person in Homer pay for it?"

Swackhammer said that judging from testimony heard at a recent hearing, the municipalities and utilities are even further apart that they were before. He said that he wants to judge the bill by a standard of fairness, and try to get the two sides to compromise. If no compromise is forthcoming, though, he said his committee will vote the amendments up or down and hand the issue to the full committee.

34. Sporting Goods

35. Garden

36. Machinery

37. Wanted

38. Real Estate

BEAUTIFUL LAKESHORE
Property, fully timbered, gravel base. Lots have highway and lake frontage. ½ of Borough accessed value. $12,900 per acre with terms.
776-8662

ABSOLUTELY
3 bedroom, FmHA, Central Heights, wooded ravine, heated garage, refrig. More!
130t6/29009 283-4184

ATTENTION
Builders, home sellers, realtors: private party needs 3 to 4 bedroom home in Soldotna. Has 40 acres in Homer to trade toward your equity. Box 907, Soldotna. 262-5216 evenings.
S144t10/29189

Below borough appraisal. Cook inlet bluff lot. 6 3/4 acre cabin, Greycliffs.
S141t6/29110 283-5601

BELOW ASSESSED VALUE
$73,500 for 3 bedroom house. Possible lease purchase. Soldotna.
S142t6/29134 262-7351

DONNIS THOMPSON REALTY
118tf/16071 776-8721

FABULOUS VIEW HOMER
3 bedroom, 2,800 sq. ft. home on 3.7 acres, East Hill Road. Detached garage, large lawn, beautiful trees.
136t25/28933 235-6788

FOR SALE BY OWNER
$125,000. Deluxe custom home in Soldotna. For appointment.
S139t6/29029 262-7778

K-BEACH
Beautiful, 3-4 bedroom, 2 bath, double garage, custom home. Assumable.
141t24/29041 283-3933

K-BEACH
2,800 sq ft possible duplex and/ or business? $137,000.
S143t6/29167 262-9610

INVESTMENT HOME

38. Real Estate

INVEST FOR THE FUTURE
2.5 Beautfully wooded secluded acres in the Wik Lake area North Kenai. $200 down, $150 per month. 283-9423, 283-9433.
124tf/28536

KENAI
3 bedroom, 1 bath, oversized lot, fenced back yard, 8x12 wooden building. $75,000.
142t25/28910 283-3693

KENAI ASSUMABLE
Non qualifing loan in Woodland Subdivision 2400 s.f. custom tri-level home includes 4 bedroom, 3 bath, family room, 2 car heated garage. Set in wooded landscape with fenced yard. By owner. $115,000.
137t10/28942 283-3689

Kenai, immaculate 3 bedroom. home, .94 acre. Sell for what we owe.
143t6/29142 283-7269

KENAI RIVER FRONT
1 plus acre, in town, 4 bedroom, 3 bath, gorgeous.
S143t6/29166 262-9610

KENAI
3 plus bedrooms, 2 bath, double garage, 1.04 acres, excellent neighborhood plus much more. $155,000. 283-4502 after 7:00 283-4457.
144t10/29183

Mobile home rental, city lot. Same renter 3 years. Cash or terms.
140t12/29042 283-7659

RENT REDUCED AGAIN
~~$395~~ $350 On these townhouse style 2 bedroom units. With fireplace and a full basement for storage. Good Kenai location. Call Earnae at Totem Realty 262-4402

Nice building 2 acre, Soldotna South Sub. 6 miles south of town. $234 month payments on terms, $15,000 cash.
144t10/29169 283-4218

Nice 2,400 sq. ft. home on 2 1/2 acres in Kasilof. $5,000 down and assume loan.
S122t25/28489 262-1390

NINILCHIK
Unfinished chalet with gorgeous view of the inlet. Priced for quick sale. Just reduced $10,000 to $34,000. Cabin Realty.
S143t10/29159 567-3493

NINILCHIK
2 acre commercial lot next to

38. Real Estate

Greycliff acreage with cabin. Make cash offer.
S114tf/28186 262-1002

NON-QUALIFYING
Assumable. 1872 sq. ft. 4 bedroom 2 bath home. $111,000.
139t15/29000 283-7959

NORTH KEANI
3 bedroom, 2 bath, 1800 sq. ft., 1 acre, cathedral ceiling, country accents, covered deck, landsaped yard. $112,000 (Neg.). 776-5113, 776-5365.
139t10/29034

ON MACKEY LAKE
Custom ranch, 3 bedroom, 2 bath, oversized garage, jacuzzi. Must see. Negotiable.
S135t25/28895 262-6233

HOME FOR SALE BY OWNER
1,600 square feet, attached garage, gas heat, W/D, F/P, walk to Sterling school, on highway, one acre. $86,000 OBO
235-5631

OUT OF STATE OWNER
Must sell. 3 bedrooms, 2 bath, fireplace, sauna, double garage, fenced yard. Close to schools and shopping. Reduced from $125,000 to $113,000. 262-5214 or collect (405)255-1155.
S127t25/28677

OUTSTANDING BUY
Large windows, excellent location near schools. Gas heat and appliances, city water and sewage and lots more. Make this neat as a pin 3 bedroom, 1 3/4 bath home an excellent choice! 283-4649, 262-3204
139t10/29038

PRE-FORECLOSURE SALE
Take over payments. 3 bedroom, 1 bath, Soldotna cul-de-sac.
133t24/28814 283-7640

RIDGEWAY
Large 4 bedroom, 2 bath, rec room, sauna, jacuzzi, fireplace, double garage, landscaped. 262-4710 eves.
136t15/28903

SATHER CONSTRUCTION
New homes starting at $65,000. We take trades for down on FHA. VA zero down.

38. Real Estate

totem REALTY INC.
SPECIAL FINANCING
Fannie Mae acquired homes, several locations.
Totem Realty 262-4402 or Cliff 262-7218

SOMETHING NEW
On the Peninsula - Fuqusa modular and trailer homes. 1-4 bedrooms, two baths. Buy for approximately half the price it would cost to build. Come and see. Call McKenzie Homes.
144tf/4290 262-6149

SPECIAL 2 WEEKS ONLY
Large four bedroom, double garage. $18,000 Below appraisal. 2,800 sq ft living space on 2½ acres. Asking $97,000.
135t1/28884 776-5187

Three bedroom house, 1½ bath, fenced yard, heated garage, very clean.
140t6/29058 283-4238

TRI-PLEX
Zoned commercial. Downtown Soldotna.
S48tf/26756 262-1002

WOODLAND KENAI
4 bedroom, 2 bath, 2 fireplace, double garage, large lot.
136t25/28902 283-5322

$12,000 below appraisal. 5 bedroom house. Gas. 7½ acres. View. Robinson Loop.
S140t6/29076 262-5020

3 bedroom, 2 bath, woodstove on 1 acre with lake access. Assumable loan at $815 a month. 262-5205 after 6pm.
133t25/28838

4 BDRM HOME/ $79,900
Clam Gulch. Nice unfinished home on 5 acres. Owner financing. Low down. Alaskan Real Estate, Inc.
S140t5/29060 274-2634

4 bedroom, 2 bath, 1 1/8 acre, woodstove, gas heat, 8¼% assumable loan, off Murwood Dr. $98,000.
122t25/28465 283-9568

80 ACRE PARCEL
½ mile Tiermore Lake frontage, ½ mile highway frontage on Holt-Lamplight Road. Ready to subdivide. Road work complete. $2995 per acre.
776-8662

4-PLEX PARTNER
No down, new unit, you finance,

38. Real Estate

4 bedroom, 3 bath, den, 2,500 sq. ft. One acre. VIP Subdivision.
S131t25/28784 283-4322

4 BEDROOM BARGAIN
Clam Gulch. Beautiful family home on 6 acres. $105,000. Alaskan Real Estate, Inc.
S140t5/29061 274-2634

4 bedroom, 2 bath, 1 acre. Washer, dryer, refrigerator, microwave. $85,000. 262-5923 after 5:00.
S144t5/29194

2 PARCELS SUBDIVIDED
11 acres and 33 acres. ½ mile from new High School. Fully timbered with gravel base. Road work complete. $1995 per acre with terms.
After 6 pm 776-8375

$68,500
Cute cedar home, excellent location in Kenai, quiet cul-de-sac. 283-7437, 283-9663 evenings.
133t12/28808

9½% ASSUMABLE LOAN
On new home over looking Longmere Lake. $85,000.
131tf/28763 283-9113

39. Lots & Acreage

ACRE PLUS
Natural gas, wooded. K-Beach area. No covenants. $16,000 terms.
S140t6/29077 262-3261

COMMERCIAL LOT
144' frontage, Soldotna city limit, gas, electric, phone. $19,500.
S142t6/29135 262-5208

Investment opportunity! 10 acres off Island Lake Road. Call for more information.
141t12/29092 776-8195

KASILOF RIVERFRONT
1.3 acre wooded lot one mile off highway. 200 plus feet of frontage. Electricity to lot. $42,750.
140t5/29007 346-3275

39. Lots & Acreage

KENAI RIVER LOT
Reduced for fast sale. Call 283-9234 or 283-4950.
113t25/28737

LAKE FRONT LOTS
On Mackey Lake. Southern exposure, paved streets. Owner finance.
S135t6/28898 262-4185

LOT ON GASWELL
With well. $14,500 easy down possible trade. 262-4497, 262-5972.
S82tf/27439

MOORING ESTATES
Lot 13 block 2 $32,950 cash, $36,980 terms. 612-843-2087 evenings.
136t25/28907

Nicely wooded 1 acre lot, ceep Creek Park. Only $200 month payments.
144t5/29182 262-4218

NO DOWN
1.3 acre lots. Half of borough appraisal. Sterling area.
143t25/29158 262-4108

STERLING VIEW LOT
3.75 acre lot with road and electric to property. $23,000 financing available.
126t25/28594 776-8920

STERLING
10 acre parcels. Also house lots, $5,000 cash. Gas, electric. Owner.
S142t6/29049 262-7099

1 acre lot on K-Beach ;five miles from Kenai. Below borough assessment.
139t6/29004 283-9468

2 acres near Anchor Point. Large trees, nice lot. $9,950 cash or terms or trade. 612-843-2087 evenings.
136t25/28908

20 ACRES
Subdivided, 4 parcels. Reasonable, low down. Trees, creek. Partial sales.
S144t6/29196 262-2587

40. Commercial Property

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LAND AND WATER MANAGEMENT
SOUTHCENTRAL REGION
3601 "C" Street, P. O. Box 7005
Anchorage, Alaska 99510-7005

PUBLIC NOTICE UNDER AS 38.05.945

STATE OF ALASKA

THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners:	Carolyn S. Guess, Chairman Marvin R. Weatherly Susan M. Knowles Diana E. Snowden Louis E. Agi
In the Matter of the Filing of a Tariff Revision, Designated as TA35-32, by HOMER ELECTRIC ASSOCIATION, INC., for a Municipal Facilities Relocation Cost Adjustment	U-83-74 ORDER NO. 7
In the Matter of the Formal Complaint by MATANUSKA TELEPHONE ASSOCIATION, INC., Against THE CITY OF WASILLA Regarding Certain Utility Right-of-Way Powers	U-83-79 ORDER NO. 4

ORDER INVALIDATING MUNICIPAL PRACTICE OF DIRECTING UTILITY RELOCATIONS WITHOUT COMPENSATION

AGI, Commissioner:

I. Introduction and Background

Presently before the Commission is the issue of the validity under AS 42.05 of the common law rule authorizing municipalities to compel without reimbursement relocation of utility facilities located within municipal rights-of-way. This is the Commission's, and apparently also Alaska's, first direct consideration of the common law rule. It also appears to mark the first occasion in which the Commission has considered the scope of its regulatory powers under AS 42.05.251 over municipal activities affecting utilities. Because important matters of first impression are involved, it is appropriate that this Order comprehensively examine the relevant factors.

This Docket was initiated by the request of HOMER ELECTRIC ASSOCIATION, INC. (HEA), for approval of a Municipal Facilities Relocation Cost Adjustment (MFRCA) surcharge that would recover unreimbursed relocation expenses incurred in compliance

Alaska Public Utilities Commission
420 "L" Street, Suite 100
Anchorage, Alaska 99501

with a municipal directive only from ratepayers within the municipality. As the City of Kenai (Kenai) is apparently the only municipality actually occasioning such expenses, HEA requested that its MFRCA surcharge be applicable to Kenai subscribers. Kenai protested the proposed surcharge.

The Commission subsequently consolidated proceedings on HEA's proposed MFCRA with one aspect of a formal complaint by MATANUSKA TELEPHONE ASSOCIATION, INC. (MTA), against the City of Wasilla (Wasilla). Specifically, MTA requested a declaratory ruling that, if it were required by Wasilla, as a result of a municipal right-of-way ordinance challenged by MTA's complaint, to incur unreimbursed relocation expenses (as well as other recurring and one-time charges), then MTA would be authorized to impose a Municipal Facilities Cost Adjustment (MFCA) surcharge to recover those expenses from Wasilla ratepayers only. Wasilla opposed the request for an MFCA.

Both HEA and MEA in the first instance premised their request for authorized surcharges on AS 42.05.251, which provides:

> Use of streets in cities and boroughs. Public utilities have the right to a permit to use public streets, alleys and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires. A dispute as to whether fees, terms, conditions or exceptions are reasonable shall be decided by the commission. The commission may require a utility to add the amount of any permit fee paid as a pro rata surcharge to its bills for service rendered at locations within the boundaries of any city or borough which requires payment of a permit fee. (Emphasis supplied.)

As proposed by HEA, its MFRCA tariff would operate as a monthly per capita surcharge on HEA customers within a municipality that would clear any prior balance of unreimbursed relocation expenses directed by that municipality. The surcharge would not be imposed if the resulting charge would be less than $.10 per capita for the month; nor would it be imposed to the extent it exceeded $10 per capita for the month. Uncharged expenses would be carried forward

to subsequent months, subject to the same minimum/maximum constraints.

The contemplated MFCA tariff of MTA would require an initial estimate of the subject expenses to be incurred by MTA over the following 12 months, which estimate would then be averaged per month and spread on a per capita basis over the affected customers for their monthly surcharge. At the end of the 12-month period, any actual excess or deficiency in incurred expenses would be determined and credited or debited, as appropriate, to the estimate then being made for the ensuing twelve months.

The consolidated hearing was held on November 17, 1983, with counsel and principals for HEA, MTA, and Wasilla present. Kenai was invited to participate but declined to appear or accept full-party intervenor status in a letter from Kenai to the Commission dated September 14, 1983. In that letter, Kenai nonetheless stressed its opposition to HEA's MFRCA clause and incorporated earlier written comments dated August 17, 1983. The written comments of Kenai have been considered, together with the written and oral presentations of the parties.

II. Contentions of the Parties and Kenai

(a) Kenai

The arguments of Kenai against the proposed surcharge are premised on acceptance of the common law rule authorizing unreimbursed relocations, and Kenai cites McQuillin, Municipal Corporations, Secs. 34.72 and 34.74(a) for the statements of this rule. Those sections provide:

> Section 34.72. The grantee of a franchise to use the streets takes it subject to the right of the municipality to make public improvements whenever and wherever the public interest demands, and if the improvement causes injury to the company, as by requiring it to relay or change the location of its pipes, tracks, or poles, or otherwise, the grantee of the franchise cannot recover damages from a municipality therefor.
>
> Section 34.74(a). The fundamental common law right applicable to franchise in streets is that the utility

Alaska Public Utilities Commission
420 "L" Street, Suite 100
Anchorage, Alaska 99501

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> company must relocate its facilities in public streets when changes are required by public necessity. Accordingly, it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of the franchise, where public convenience or security require it, even at the grantee's own expense.
>
> This common law rule may be changed by contract between the utility and a municipality so that relocation expenses are borne by the municipality, or may be changed by statute so that relocation expenses in certain cases are borne by the state.

From this premise, Kenai advances several discrete arguments. First, Kenai maintains that assessing the utility's customers within the municipality for the expense of a directed relocation is no different in legal contemplation than requiring the municipality to pay that expense. Therefore, Kenai concludes that authorization of a surcharge provision would be tantamount to rejection of the common law principle.

Kenai appears also to advance a separate argument that relocation expenses should not be considered in the same category as permit or franchise fees under AS 42.05.251. In this argument, Kenai contends that absent express authorization from the Alaska Legislature, a municipality is without power to surrender its immunity from having to pay utility expenses for accommodating a municipal relocation request. This proposition seems premised on the contention that the municipality's common law right to direct unreimbursed relocations results from the police power of the municipality, which it may not contract away.[1]

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[1] In support of this contention, Kenai quotes 29 AM.JUR.2d Highways, Streets, and Bridges, Sec. 232, which states as follows:

> Rights in streets or highways granted to individuals or corporations are at all times held in subordination to the superior rights of the public. The grantee takes them subject to the paramount right of the public authorities to grade and improve the way and to make such requirements and regulations as are necessary and reasonable in order to make it suitable and convenient for the

Kenai next argues that HEA has approached the Alaska Legislature to extend AS 19.25.050 (which requires the State to pay utility relocation expenses incident to State highway work), to municipally directed relocation work and thereby abrogate the common law principle. The effort was unsuccessful, and Kenai argues that either the Legislature failed to terminate the city's police power or the Legislature has confirmed the common law rule

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([1]continued)

> use of the traveling public, and the grantee may be required to abandon the use granted, or to remove or change the location of structures erected under the grant, when demanded by the public necessity, convenience or welfare. This power of the public authority cannot be limited by contract. (Emphasis supplied.)

As a short answer, it may be observed that if a proper exercise of Commission discretion under AS 42.05.251 should result in authorizing this surcharge or invalidating unreimbursed relocations, this should constitute the requisite legislative action postulated as necessary by Kenai. More importantly, McQuillin in the previously quoted section acknowledged the general rule in this situation as being that a municipality may indeed assume by contract liability for relocation expenses. Seemingly involved here is recognition that two types of valid municipal activity can occasion request for utility relocation or removal; one, under the proprietary powers of the municipality, would be utility relocation incident to a municipal project requiring some sort of redesign or relocation of the roadway; the other, under the police powers of the municipality, would be utility relocations or even ouster incident to a need to maintain the roadway in a serviceable condition to the benefit of all users. The former, apparently constituting the typical situation in which the common law rule generates litigation, is subject to contractual surrender while the latter, when it occurs, would not be so subject. Indeed, it seems the argument encountered frequently is that legislative abridgment of the common law rule would constitute some sort of constitutionally prohibited impairment of vested or contractual obligations by a utility to a municipality to accept liability for relocation expenses. See, State Road Commission of Utah v. Utah Power & Light Company, 353 P.2d 171 (Utah 1960). Again, the short and sufficient answers are that the AM.JUR. treatise does not state the complete general rule, and that, in any event, proper action under AS 42.05.251 constitutes the allegedly requisite legislative action. Accordingly, the Commission will not address further this argument as a bar to the surcharge or other Commission action under AS 42.05.251, although the distinction between relocations directed pursuant to the police power rather than proprietary powers will be returned to in a somewhat different context later in the discussion.

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or the Commission as a matter of discretion should leave the issues to the Legislature.[2]

Kenai also observes that HEA has never paid an annual fee for use of municipal streets. By contrast, the gas utility serving the city, Kenai Utility Service Corporation (KUSCO), pays a 2 percent annual gross receipts tax. Kenai suggests that HEA, in the absence of such payment, should not have the security of possession associated with an easement nor otherwise enjoy a cognizable hardship claim.[3]

Following the Commission's dismissal of an earlier petition by HEA for a declaratory ruling that Kenai had breached a contract with HEA allegedly requiring the city to pay most of the unreimbursed relocation expenses currently accrued, HEA filed a complaint in the Superior Court seeking recovery of the relocation expenses. Kenai suggests that the Commission should stay proceedings on the tariff revision proposed herein until a decision is rendered in the court case. In this connection, Kenai also chides the Commission for probably having precipitated HEA's current

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[2]The Commission does not agree with the contention of Kenai that its documentation of a failure of the Legislature to enact a specific piece of legislation requiring municipal reimbursement of relocation expenses is tantamount to a legislative intent to place the common law principle beyond the purview of the Commission under AS 42.05.251. Indeed, given the uniquely broad responsibility conferred by the Legislature upon the Commission in AS 42.05.251 to regulate the interface between municipalities and public utilities, the generally ambiguous significance of legislative inaction is seemingly more consistent in this instance with a belief by the Legislature that utilities already had access to sufficient remedies before this Commission or the judiciary if the complex considerations attendant to the common law principle established its unsuitability for Alaska.

[3]However, KUSCO has submitted a proposed MFRCA surcharge of its own, as the Kenai ordinance exacting the two percent payment also specifically requires that the utility bear the costs of relocations directed by the municipality. Commission Docket U-84-2. In any event, HEA pays a gross receipts tax to the State which is then refunded to Kenai.

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tariff filing in that earlier dismissal by simultaneously suggesting the possible propriety of a municipal surcharge.[4]

Finally, the city contends that authorization of the surcharge would result in an unreasonable preference or undue discrimination against consumers located within municipalities and in favor of those located outside municipal boundaries, allegedly in violation of AS 42.05.391 which prohibits undue discrimination in a utility's rate structure.

(b) HEA

HEA in its initial filing for approval of the MFRCA surcharge notes that unreimbursed relocation expenses are proper items for a surcharge because of their relationship to permit fees which the Legislature authorized as proper items for such a surcharge in AS 42.05.251. HEA further contends that such treatment

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[4]After concluding that declaration of the rights of the parties under the agreement appeared more properly a matter for judicial determination, the Commission observed in the June 3, 1984, letter:

> However, it appears your client should consider filing a special tariff to authorize collection of the unreimbursed costs of any municipally-directed relocation as a surcharge on the bills of customers residing within the political boundaries of the City of Kenai. Assuming, arguendo, that the City is correct in its contention that there is no common law obligation to reimburse a utility for municipally-directed relocations, their cost would seem to be a proper expense of utility operations which are recoverable in rates. Because this is not a system-wide cost (and underlying benefit), it would seem unfair to pass the cost on to all subscribers. This conclusion seems particularly warranted as a municipality may negotiate away its immunity from having to pay relocation costs. Frequently, such immunity is surrendered, or liability for relocation costs assumed, in a franchise or permit agreement which would provide for payment of a fee by the utility. The requirement to pay either a fee or relocation expense at the discretion of the municipality would seem to make a fee and relocation expense interchangeable concepts, so that the authority of a utility in AS 42.05.251 to recover fees from the customers in the municipality receiving the fees would seem to necessarily sanction the recovery of relocation expenses in the same manner.

for unreimbursed relocation expenses is consistent with the general cost-causer/cost-payer philosophy of ratemaking, in that such expenses are incurred only in servicing those customers within the municipalities responsible for the unreimbursed expenses. Arguably, therefore, such tariff provisions are proper (even apart from AS 42.05.251) under AS 42.05.391 and its prohibition against utility rates that embody undue discrimination or preferences.

In response to specific points of Kenai, HEA argues, first, that the pending court case involving construction of a contract between Kenai and HEA is entirely separate from the issue of how or which ratepayers are billed for relocation expenses incurred by the utility. Consequently, according to HEA, there would be no justification for delaying the present Commission proceeding pending outcome of the court case.

HEA next responds that any contention of Kenai based on the common law rule of unreimbursed relocations is unavailing, since the common law principle presupposes the existence of a municipal franchise, citing McQuillin, supra, Sec. 34.74(a). HEA claims that AS 42.05 (and particularly the provision in AS 42.05.251 granting utilities under State law the right to use municipal rights-of-way) constitutes a legislative recision of municipal franchising authority in Alaska and associated common law rules purporting to control relationships between municipalities and utilities.

HEA then relies on AS 01.10.010 to conclude that the common law rule of unreimbursed relocations should not operate to preclude Commission approval of HEA's proposed MFRCA surcharge. AS 01.10.010 provides:

> Applicability of Common Law. So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the Legislature of the State of Alaska is the rule of decision in this State.

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The only remaining question, according to HEA, is whether or not the Commission is empowered to and should authorize the surcharge. Essentially repeating its earlier reliance on the cost-causer/cost-payer philosophy, HEA concludes that an MFRCA surcharge is entirely consistent with legislative and Commission declarations mandating fair and equitable rates and rate structures within Alaska.

(c) MTA

MTA believes a surcharge is appropriate under the cost-causer/cost-payer philosophy, as municipal residents are actually the principal users and beneficiaries from utility payments of fees and relocation expenses incurred in connection with municipal road improvements and maintenance. Thus, according to MTA, the municipal subscriber very justly should be the recipient of a special surcharge to recover such payment under general ratemaking practices.

MTA also argues that a surcharge is appropriate under a franchise theory applicable at least in its situation. In B-C Cable v. City and Borough of Juneau, 613 P.2d 616 (Alaska 1980), the Alaska Supreme Court held that AS 42.05.251 and AS 29.48.-050(1) did not abrogate existing franchise agreements between utilities and municipalities. The Court also noted that it is generally held that utility permits granting the right to use public streets are franchises. 613 P.2d at 619, n. 5.

According to MTA, agreements with Wasilla in 1976 and 1982 permitted the placement of utility facilities in public rights-of-way and expressly provided for Wasilla to pay the cost of any subsequent municipally directed relocations. The latter ordinance was in effect until August 22, 1983, when Wasilla enacted the ordinance which is the subject of the present complaint and does not provide for as wide an assumption of relocation responsibilities by Wasilla as did the earlier ordinances.

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It is MTA's contention that B-C Cable precludes Wasilla from directing relocation of pre-1983 facilities without also paying MTA for the costs of those relocations in accordance with the earlier contracts. Moreover, if the Commission will not modify the current ordinance or otherwise take action to enforce that liability upon Wasilla directly, it is entirely proper to have such unreimbursed relocation costs included in the requested special surcharge against Wasilla. Consequently, MTA argues that the surcharge is justified on the basis that municipal subscribers may serve as a proper surrogate for liabilties of the Wasilla municipal entity.

Finally, MTA advances an argument that suggests unreimbursed relocation expenses are in violation of the Alaska Constitution. Article I, Sec. 18, of the Alaska Constitution provides:

> Private property shall not be taken or damaged for public use without just compensation. (Emphasis supplied.)

Relying on State v. Hammer, 550 P.2d 820 (Alaska 1980), MTA argues essentially that (1) the emphasized portion of the Alaska Constitution creates a greater range of compensable interests than the Fifth Amendment to the United States Constitution, and (2) the common law rule allowing a municipality to mandate unreimbursed utility relocations violates the subject provision of the Alaska Constitution. Again, MTA completes its argument by suggesting that utility subscribers located within the municipal boundaries of Wasilla are fair surrogates for the Wasilla corporate entity. The argument concludes with the duly respectful suggestion that the Commission paraphrase and apply to itself the following language from State v. Hammer: "This court would poorly serve the law if it were to so blind itself to the realities of condemnation." 550 P.2d at 824.

(d) Wasilla

Wasilla responds to MTA's arguments by contending that customers outside municipal limits as well as those inside benefit from or are served by communications plant located within municipal boundaries. Moreover, certain relocation costs and damages will be incurred by MTA under the subject ordinance because of MTA's own faulty installations. Therefore, Wasilla suggests it is improper to consider only the subscriber located within the municipal boundaries as the cost-causer of a municipal assessment.

Second, Wasilla contends MTA consented to abrogation of the earlier agreement and thus cannot now rely on its provisions, which, in any event, addressed only relocation matters and not the full spectrum of costs which MTA may potentially incur under the new ordinance.

Finally, Wasilla disputes the characterization of relocation costs as "damages" under the Alaska Constitution, contending that such costs are visited by Wasilla on MTA in the city's capacity as administrators of public rights-of-way for the benefit of all users including other sub-surface users. According to this argument of Wasilla, relocation costs are "...a necessary and inevitable risk associated with the benefit MTA enjoys in making use of the city's property. There is nothing unconstitutional about paying for such costs."

III. Discussion

(a) Preliminary

This proceeding has addressed the validity of the common law rule authorizing unreimbursed relocations. The parties have discussed whether the rule is reasonable and whether it is consistent with the Constitution and statutory law of Alaska. The parties have requested from this Commission only a rejection or acceptance of the requested surcharges under AS 42.05.251, with

the municipalities arguing for rejection if the rule is valid and the utilities arguing for acceptance if the common law rule is invalid.[5]

However, as the Commission construes AS 42.05.251, the imposition of a surcharge requires a preliminary finding that the expense imposed by a municipality and to be recovered through the surcharge is the consequence of a reasonable fee, term, or condition. If the fee, term, or condition causing the expenses is not reasonable under AS 42.05.251, then the proper response is to prohibit or appropriately modify the subject municipal action.

AS 42.05.251 contemplates protection of the ratepayers within a municipality as well as those outside against the consequences of unreasonable municipal action. Where, as here, a practice is challenged as unreasonable, the Commission must first find the practice reasonable before considering whether a surcharge is appropriate for dealing with the financial consequences of the action to the utility. Moreover, this seemingly reasonable if not obligatory interrelationship under AS 42.05.251 between the reasonableness of municipally occasioned expenses and surcharge mechanisms is supported by factual and policy considerations concerning the undesirable and inequitable features of such mechanisms in general and for recovery of unreimbursed relocation expenses in particular.

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[5] To a certain extent, the Commission has contributed to the parties' restricted approach in its previously noted suggestion that HEA consider filing for a surcharge mechanism if it is obligated to accept unreimbursed relocation expenses. However, because the Letter Order premised its suggestion that a surcharge mechanism was worth further consideration on the express assumption for argument's sake that the common law rule was correct, it should reasonably have been understood from the letter that the Commission was not intending any judgment on the common law rule or precluding investigation of remedies other than a surcharge if the rule were challenged as it has been in this proceeding.

(b) Surcharge Mechanisms in General

The generally applicable rates and rate structure of a utility attempt to match revenues and costs both for the utility as a whole and for functional classes of service. Typically, the rates and rate structure are based on audited historical data and appropriate *pro forma* adjustments. Structured opportunities are also provided for affected consumers to participate in the process.

The beneficial results of this exacting process are several. Ratepayers are provided with reasonable rates for types and amounts of service used. This means, among other things, that current expenses of utility operations are appropriately allocated to and paid for by the various classes of current ratepayers, and common capital expenses are appropriately shared between proper classes of current ratepayers and future ratepayers who will also benefit from those expenditures.

Moreover, the rates that emerge from this process are relatively stable, which is an often overlooked but frequently important consideration for the vast majority of consumers who operate within fixed incomes and for whom the cumulative total of monthly utility payments constitutes a substantial budget expense. Also not to be minimized is that under the standard ratemaking approach utilities have a considerable incentive to minimize costs, either to maintain profits or offset other rising costs under existing rates and, thereby, to avoid the necessity of seeking rate relief in formal rate proceedings with their unlimited scope of review and uncertain results.

Surcharges, on the contrary, are erratic whenever they are intended to recover on a monthly basis variable current expenses.[6] Even HEA's suggested monthly lid of $10 per capita does

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[6] KUSCO, it should be noted, contends in support of its

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not remove the potential of sizable swings in uncontrollable and unbudgeted utility billings. Moreover, if there are substantial amounts that are held back monthly because of the $10 lid (and if it is proper to consider relocation expenses as current and not capital expenses), then to that extent there is a mismatch in periods for incurring and paying expenses.

The MTA proposal for annual estimates and prospective adjustments for incurred differentials does have the virtue of eliminating month-to-month swings. However, it does add the disadvantage of requiring the municipal ratepayer each month to pay an amount that is composed entirely of an estimated amount adjusted for a true-up in another year's estimate; in other words, a charge not reflecting current reality.

As suggested, there is also the issue of whether relocation expenses, even under a surcharge, should be recovered on any sort of current basis. Admittedly, it is to the utility's advantage to recover its expenses on as current a basis as possible. However, relocation expenses represent labor and materials associated with plant that will thereafter enjoy a full service life. Even under a surcharge mechanism, the current municipal ratepayer should be entitled to a temporal allocation of such cost. With respect to a properly allocated amount to the current municipal ratepayer, there should also be a further allocation within classes of municipal users as is done with other common current expenses.

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[6](continued)

proposed MFRCA in Docket U-84-2, that "...these [relocation] costs cannot be predicted with any degree of accuracy...." KUSCO TA Letter No. 15. HEA alleges that as of its filing, presumably not including the past construction season, it has $200,000 in unreimbursed relocation expenses that it proposes to recover from Kenai subscribers under its requested surcharge.

Additionally, neither HEA nor MTA appears to propose a viable method for noticing and allowing the public and Commission to investigate the accuracy and prudence of a relocation expenditure. Moreover, as a surcharge item, the situation would be lacking the typical dynamic for the utility to minimize costs of a relocation. Indeed, there could be a disincentive to the utility's exploring larger reconfigurations in the event of a mandated reimbursement in order to avoid complications in determining proper allocations to the surcharge account. This is not to suggest that the utility's normal prudence or the Commission's own review efforts would be ineffective checks, or that some sort of notice provision could not be interwoven into an MFRCA surcharge. However, the added value of a utility's traditional incentive to minimize cost is not a factor that should be lightly removed.

In this connection, it should be observed that the Commission is not considering surcharges that permit flow-throughs of changes in wholesale power costs or fuel costs, which are concededly current expenses, easily verifiable, comparatively unavoidable or unmodifiable, and rateable by usage rather than customer. None of these considerations are present in the proposed surcharges for unreimbursed relocations, so that allowance of pass-through mechanisms is not nearly as justifiable. Moreover, it should not be forgotten that surcharges even in fuel and wholesale power situations are not well received of late (if ever), principally because their presence reduces incentives to minimize or offset cost increases.

Beyond these negative aspects of surcharges in general and recovery of unreimbursed relocation expenses in particular, there are further considerations underlying the equity of recovering such expenses from the municipal ratepayer alone under any

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methodolgy. In other words, it is not entirely clear that assessment of the municipal ratepayer for such expenses is justified even under cost-causer/cost-payer or similar principles.

Assuming the propriety of municipal mandating of unreimbursed relocations, all that has occurred is that the utility has been subjected to an expense of utilization of another's right-of-way. Such an expense can reasonably be viewed as the quid pro quo for lack of an initial or ongoing fee paid by the utility to place its facilities in the right-of-way or even, until shown to the contrary, the "balance" of compensation due for a less than sufficient initial or ongoing fee that would assure security of facility placement.

Viewed in such a light, the expense of unreimbursed relocations within a municipality does not appear as a practical and perhaps also conceptual matter any different from the expenses of easement acquisition or compliance, or even unusual construction or maintenance circumstances, that the utility will incur normally in providing service anywhere in its service area, even outside municipal boundaries. Typically, however, the utility does not segregate those expenses where incurred outside the service area (unless part of an applicable line extension policy) and thereby insulate the municipal subscriber from responsibility for them. Therefore, a good argument exists that any cost burdens associated with utilization of municipal rights-of-way should not be paid for by municipal residents only.

Admittedly, a utility can protect itself in dealing with private individuals against excessive easement or unusual construction expenses through invocation of eminent domain powers or appropriate line extension policies, while unreimbursed relocations seemingly cannot be so limited. However, this is not a

satisfactory rejoinder as the fair value of easements not included in a line extension charge or the prudent expenses of easement compliance and unusual construction or maintenance circumstances are nonetheless shared by the municipal ratepayer. By the same token, if liability for unreimbursed relocations is considered as merely the reasonable value of the right to lay facilities in municipal rights-of-way, it should be shared by all consumers. Moreover, it would not be beyond possibility for the Commission's aid to be invoked under AS 42.05.251 to resolve disputes as to whether relocation expenses exceed a reasonable value for use of municipal rights-of-way that year. Anticipating later discussion herein, such a determination would be on a basis comparable to an eminent domain valuation because the issue in that instance would be in the nature of a determination of the fair market rental value of municipal properties.

None of the foregoing is to suggest that a utility could not or should not in an appropriate case file for separate rates for subscribers within and outside of municipal boundaries. However, functional service classes rarely follow municipal boundaries, and this Commission generally exhibits a preference for "postage stamp" or common rates within a single service area. However, in the absence of a full cost-of-service study based on municipal/nonmunicipal divisions, it is difficult to see the equity in singling out the item of unreimbursed relocation expenses for selective recovery on a theory that not to do so would result in an undue discrimination against or subsidy by the nonmunicipal ratepayer in favor of the municipal ratepayer. Stated alternatively, it is difficult to conclude that the municipal ratepayer is such a cost-causer in this situation as to fairly

warrant imposition of sole responsibility for payment of relocation expenses.[7]

This lack of decided equity in favor of restricted surcharge versus general rate recovery for unreimbursed relocation expenses is also demonstrated in a rebuttal from other jurisdictions to a Commission premise in inviting the surcharge filings in its letter. In that invitation, one issue that was thought to require future attention was the interchangeability between relocation expenses and permit fees, which are expressly mentioned as a possible surcharge item in the statute. Assuming the identity were adequately established, it seemed doubtful at first glance that any meaningful obstacle would appear to surcharging such expenses. However, the statutory language even as to such fees is permissive, and the limited experience of other jurisdictions in handling such franchise and permit fees is not consistent.

In Washington, for instance, the court reversed an order of the Washington Department of Public Service requiring a telephone utility to impose municipal surcharges to recover franchise fees exacted by local municipalities. The court there stated:

> A franchise is "a special privilege conferred by the government on an individual or individuals and which does not belong to the citizens of the country general ly, of common right." 37 C.J.S., Franchise Par. 1, p. 142. Such a franchise as those with which we are here concerned is a contract between a municipal corporation

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[7]There is also a contention not explicitly denominated that the municipal subscriber, if not fully a cost-causer of unreimbursed relocation expenses, is at least a 'cost controller' and beneficiary with respect to such items. However, and without lengthy analysis, it is difficult to find that the degree of control over municipal actions with respect to imposition of unreimbursed relocation expenses obviously warrants surcharging municipal subscribers. Moreover, even allowing full weight to the control and benefit notions, this only raises a larger issue. If a ratepayer owns property beyond his service premises, is it reasonable that he be required to gratuitously surrender the value of an easement therein as a condition to enjoying the right to utility service? The Commission cannot dispel the sense that notions such as control and benefit in this context mask an effort at sanitizing the proposition that "two wrongs make a right."

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> and a person who has applied for leave to engage in certain business operations of a public nature within the limits of the municipality. Franchises granted to respondent include the right to place poles, wires and conduits within the public streets. Any person desiring such a franchise must apply therefor to the municipal corporation. If his application be favorably considered, a franchise is offered upon certain conditions. This offer the applicant may accept or refuse. If accepted, the franchise provisions become binding on all persons concerned, save as heretofore noted as to provisions fixing rates....
>
> It might well be that respondent would find it convenient to procure an easement over private property outside the municipal limits, for the purpose of placing its poles and wires. Money paid for such an easement would certainly be properly classed as an operating expense. It seems reasonable to consider that payment of a certain proportion of respondent's gross income collected from rate payers within the city limits be considered as compensation for use of streets, if no other provision has been made for the payment for the privilege. Such franchise payments, if considered as compensation for the use of the streets, would be properly classed as a general operating expense.

State ex rel. Pacific Telephone & Telegraph Co. v. Department of Public Service, 142 P.2d 498, 535-536 (Wash. 1943). In sum, the Washington court thought it not unreasonable to conclude that a very broad view of the matter can equate a franchise fee and easement fee as both being an exercise between a utility and property owner in reaching an appraisal of property value which, in turn, should receive consistent treatment in ratemaking. The court did, however, allow municipal taxes to be recovered only from subscribers within the municipality.

In Utah, on the other hand, the court registered bewilderment at the Washington approach and in a pair of cases confirmed the propriety of confining recovery of franchise fees to subscribers within the assessing municipality. Ogden City v. Public Service Commission, 260 P.2d 751 (Case I), 754 (Case II) (Utah 1953). The court there stated:

> The question remains: Can the Commission permit a utility to charge and bill subscribers of an area, for payment of imposts on the company levied by local governmental authority of that area?

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> In a distinguishable case, Ogden finds support for a negative answer, and another case agrees where franchises only are involved, but deserts her and supports the Commission, where other levies are imposed,--a distinction we logically cannot perceive, albeit there may be one. But competent and well-reasoned authority agrees with the Commission, and conforms more nearly to the views of this court, particularly where, as here, ever-changing and probably ever-increasing local imposts appear on the horizon which neither the legislature nor the company to date has controlled, and where, should we conclude otherwise, discrimination would fluctuate in direct proportion to the actions of a myriad of local governing bodies. (Case I.) (Footnotes omitted.)

260 P.2d at 753.

> The Company's president asserted that in the past, because of lower unit operational costs, densely populated areas (where local imposition generally prevailed) had benefited outlying areas having no impositions, since rates for like service were the same, statewide, irrespective of residence in or out of a local imposition area, which, in reverse, represented a discrimination against users in the areas where such impositions existed. The argument is suggested that the local imposts tend to lessen or neutralize the discimination against subscribers in non-imposition communities. But neutralizing one discrimination by increasing another is no answer. Public policy seeks the elimination of as many discriminations as possible in a field where total elimination thereof is difficult or impossible of achievement. If the discrimination adverted to exists in fact, it is for the Commission to help write its obituary, rather than to cancel its effectiveness by permitting the creation or persistence in being of another. (Case II.)

260 P.2d at 755.

Thus, even if the interchangeability of annual municipal charges and unreimbursed relocation expenses is accepted, there is not clear guidance from that proposition alone as to how such expenses should be recovered.

The foregoing review of the disadvantages to be experienced by ratepayers under surcharges in general and for recovery of unreimbursed relocation expenses in particular, coupled with the question of fairness in any event of singling out such expenses for recovery from municipal subscribers alone, is intended to establish only that the proposed surcharges are not the eminently equitable vehicles they appeared to be initially. Nonetheless, the Commission is not intending at this point to rule on

the circumstances under which a surcharge might be appropriate. There are inequities in visiting unreimbursed relocation expenses on the general ratepayer as well as the substantial policy consideration of not adopting an approach that encourages all municipalities to pass expenses to utilities that will increase utility rates to all. Nor are the full range of obstacles postulated here applicable to surcharges for items other than relocation expenses. Indeed, the Commission could be overstating at least some concerns in the foregoing analysis. However, this analysis does illustrate the concerns on behalf of the municipal subscriber with the proposed surcharges that moved the Commission to reexamine AS 42.05.-251 and ultimately conclude that an expense to be surcharged to municipal ratepayers must first be reasonable under the statute.

(c) Reasonableness of Unreimbursed Relocations

(i) Benefit/Burden Standard

The Commission must first consider the criteria for appraising reasonableness under AS 42.05.251. The primary guide that permeates all Commission decisionmaking under AS 42.05 is protection of the legitimate interests of utility ratepayers, and there is no reason for not employing the same guide in approaching an issue of reasonableness with respect to municipal actions.

For present purposes, these legitimate interests can be abstracted from AS 42.05 as, simply, ensuring that the ratepayer pays no more than reasonable operating expenses and the fair value of used and useful plant employed in the provision of safe and adequate utility service. In short, the ultimate concern in any event is that the ratepayer in utility rates pays no more than fair value for a benefit received or burden generated by the utility in the ordinary course of delivering reasonably adequate service.[8]

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[8]It should be noted that this benefit/burden test is only one

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Applying this test of reasonableness in the context of a municipal practice of directing unreimbursed relocations irrespective of any utility fault, the expenses of which must then be recouped from customers, the question is whether there is a rational or substantial connection between payment of such expenses by ratepayers and cognizable benefit received or burden occasioned by the utility in the ordinary course of providing utility service to the ratepayer. If so, then the practice is reasonable with perhaps only a secondary question of insuring that the expenses are calculated to be commensurate to the reasonably related benefit or harm. If not so related, then, as to those utilities' ratepayers which the Commission is charged to protect under AS 42.05, the Commission must declare municipal efforts to direct unreimbursed relocation expenses as unreasonable within the contemplation of AS 42.05.251.

In determining whether or not the common law rule satisfies the benefit/burden test, it is relevant to examine the historical justification for unreimbursed relocation charges. There appears to have been an evolution in judicial opinion on the subject. The court in Baltimore Gas and Electric Co. v. State Roads Commission, 134 A.2d 312 (Md. 1957), had before it a request by the utility for relocation expenses incident to the commission's construction of a tunnel. In ordering compensation under the theory that the statutory scheme creating and empowering the commission had abrogated the common law rule that a public utility must relocate facilities in public ways at its own expense if made

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([8]continued)

test of reasonableness under the statute. AS 42.05.251 also contemplates that a challenged municipal practice not discriminate among or against utilities, and this aspect will also be examined in the next section.

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necessary by improvements or extensions of the road system, the Court stated:

> The Commission and the Company agree that the controlling part of the statute is the paragraph of Sec. 120 reading: 'All private property damaged or destroyed in carrying out the powers granted by this sub-title shall be restored or repaired and placed in its original condition as nearly as practicable or adequate compensation made therefor * * *.'
>
> * * * *
>
> The Commission concedes that if private property, other than that of a utility, located in, on or under State owned land, is damaged but not taken in the course of the building of a bridge, motorway or tunnel, Sec. 120 requires the payment of compensation for the damages that otherwise would be incidental or consequential and so, damnum absque injuria. Its earnest argument is that there is a fundamental difference between statutes, on the one hand, that merely extend to owners of property damaged consequentially, and not directly, the right to compensation enjoyed by owners of property taken, and statutes, on the other 'which deny to the State the police power with respect to public utility facilities located on the public domain * * *.'
>
> * * * *
>
> There is no esoteric or sacred difference--if there is any significant difference--between the police power of the State to injure the rights of property of a utility without paying for the injury and the State's power to so injure the rights of property of every other owner. Cases that have imposed the common law burden on the utility sometimes have relied on an implied limitation or condition that the company will move its facilities at its own expense if the public interest requires moving but, as we see it, the bedrock basis for the police power to require the moving of utility facilities without paying compensation, is that the State does not take property within the meaning of the Constitution and, therefore, is not required to pay. Because it has not taken the property, the damage to the owner is consequential or incidental, just as is the damage to one abutting the newly built or improved road or bridge whose property is not taken but merely damaged. In both cases the common law rule has been that the loss to the owner was damnum absque injuria.

Id. at 314-315, 316, 318.

The court went on to cite both its own earlier decision and that of the New York Court in In re Gillen Place, 106 N.E.2d 897, 900 (N.Y. 1952), for the proposition that a utility laying

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facilities pursuant to franchise has an "incorporeal hereditament" or property interest in the nature of an easement which is a sufficient property interest for compensation under the statute in the event of damage.[9]

As also stated by the Maryland court, the common law rule has alternatively been justified as an "implied limitation or condition" on utilization of municipal streets. This appears to be a reference to the earlier observed view of McQuillin (see pp.

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[9]The Maryland Court had also discussed the New York approach, in which the common law rule is stated as denying reimbursement for relocations directed pursuant to the governmental powers of a municipality but allowing reimbursement if the relocations are required to accommodate either a proprietary activity of the municipality or another utility's use of the streets. The most significant aspect of the New York approach appears to be the judicial reluctance, absent the clearest legislative statement possible, to construe statutory language as sufficiently broad to abrogate the common law rule and protect a utility's interests in facilities laid in public rights-of-way. Maryland disagreed with such a restrictive interpretation and further suggested that New York might have abandoned this approach In re Gillen Place, in which compensation was allowed for utility relocaction incident to construction of a municipal bus garage and shop, on the theories that the activity was proprietary and, in any event, the utility's interests were compensable as eligible subsurface structures under the condemnation statute involved. The Maryland Court observed that Judge Fuld, who had authored a previous significant opinion in New York supporting a restrictive construction approach, had dissented vigorously. Contrary to the Maryland Court's prediction, New York did not continue its arguably tentative step toward liberalization of its approach in the subsequent decision of Consolidated Edison Company of New York v. Lindsay, 248 N.E.2d 150 (N.Y. 1969), in which Judge Fuld, writing for the majority, denied compensation, holding that In re Gillen Place must be strictly confined to its facts. The common law rule allows exceptions, essentially, only when the municipality 'goes into business for itself,' and legislative abrogation of the rule to the benefit of utilities must be very clear. Under the statutes involved in that case, a utility's subsurface rights were not intended to be compensable. The policy basis for the attitude seems to be that so long as the utility did not pay the city any money for street use, it should not be compensated for a relocation unless the relocation is required by another utility or the city incident to the generation of revenues. Consolidated Edison Company, 248 N.E.2d at 153.

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3-4 of this Order) which considers the common law rule as an implied condition of franchises unless expressly disclaimed. In this connection, it should also be observed that a franchise is defined as follows:

> In American law, a franchise is defined as a special privilege conferred by the government on individuals or corporations and which does not belong to the citizens of a country generally by common right, and it is immaterial whether the grant is made direct by the legislature or by a municipality to whom the power is delegated.

Id., Sec. 34.03 at 9. McQuillin is in essence stating that a municipality's right to mandate unreimbursed relocations is an aspect of its right to prohibit entry.

While the significance under Alaska law of both the franchise and condemnation approaches to unreimbursed relocations will be explored further at a later point, the above views of the source of the common law rule appear to reflect one immediately relevant point: Nowhere is the rule justified on a theory that its invocation is intended to compensate for a burden imposed by normal utility operations or a benefit received by the utility in its normal operations. Rather, the unreimbursed relocation expenses are incurred primarily, if not exclusively, because of a road or other civic project of a municipality whose occurrence, timing, extent, and nature are totally at the discretion of the municipality and irrespective of any particular utility activity within the affected right-of-way. Consequently, under the benefit/burden test of reasonableness, the expenses for unreimbursed relocations cannot be passed on to the utility's customers as a reasonable exchange for a benefit received or burden caused by a utility to the municipality in the ordinary course of the utility's normal operations.

Implicit in the foregoing is a further conclusion that unreimbursed relocations cannot be justified as a species or

alternative manifestation of a franchise, permit, or license fee exacted in exchange for the right to engage in a utility enterprise within municipal boundaries, or at least to use municipal rights-of-way in the conduct of that enterprise within municipal bcundaries. Whether denominated the franchise, permit, or license authority (and the terms frequently appear interchangeable), the municipal right to special monetary exactions from a utility seems to be premised on either the "regulatory" power of the municipality to reasonably regulate the entry and conduct of enterprises affecting the public interest and to be compensated for the activity, or the "ownership" power of a municipality to deny use of its rights-of-way to public utilities except on terms negotiated between the municipality and utility, including possible one-time and/or recurring payments.

The regulatory aspect of franchising would not seem adequate to serve as a justification for unreimbursed relocations. Such authority to the extent recognized should only justify fees commensurate with regulatory or other quantifiable cost burdens imposed by the utility on the municipality; but, as observed, unreimbursed relocations are not based on such utility-occasioned costs. However, fees associated with the ownership aspect of the franchise authority would seem to be limited only by the value to the utility in being allowed to operate within the municipality, so that the utility deals with the municipality much as it would with a private property owner in negotiating an easement. As neither ownership franchise fees nor unreimbursed relocations are based on utility-occasioned costs, ownership franchising could arguably constitute a wedge for the allowance of unreimbursed relocations or other conditions with financial impact that are not limited by regulatory or other quantifiable cost burdens imposed by the utility on the municipality.

However, it seems clear that judicial precedent and statute in Alaska preclude any compensation being paid by a utility for the value of engaging in a utility enterprise within municipal boundaries or even within its rights-of-way. In Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska 1970), the Alaska Supreme Court had before it a municipal ordinance that purported to require a utility issued a certificate of public convenience and necessity by this Commission under AS 42.05 to also acquire a permit to serve customers within municipal boundaries, which permit in turn required a showing of inadequacy of existing services. The court ruled the ordinance could not stand, stating:

> This does not mean that the City of Anchorage is without jurisdiction to charge Chugach with the responsibility of meeting reasonable standards of construction, limiting its joint use of public ways so as not to unduly restrict their utility, obtaining and filing plans, and providing the city with other information to allow for the proper administration of municipal police powers. It is only that part of the municipal ordinance which is applied inconsistently with our state laws that must yield.... (citation omitted). It means, simply, that the city may not deny Chugach the right to provide the electrical service requested by Park Lanes.

Id. at 123.

The opinion clearly preempted any right of a municipality to deny operating authority within municipal boundaries on public interest grounds where the utility has received operating authority pursuant to AS 42.05.[10] Thus, to the extent even the regulatory aspect of the franchise authority might otherwise justify a fee being exacted as a condition of entry, there would

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[10] By reasonable extrapolation, this decision would seemingly also apply to other areas of potential public interest regulation by a municipality that the legislature entrusted to the Commission in AS 42.05., such as rate regulation. It should also be observed that the decision reflected a preemption of municipal authority in the subject area, not a two-tiered approach with the municipality functioning as a first forum and the Commission as a second or appeals-type forum.

seem to be no such authority in Alaska. Regulatory entry is controlled by state statute.

The opinion did acknowledge the survival under its rationale of certain municipal powers over right-of-way activities, which would allow regulatory control in matters not typically regulated by an agency such as the Commission. Moreover, after the Chugach case was submitted for decision, the Legislature enacted AS 42.05.251 which, as previously quoted but useful to restate here, provides in its first sentence as follows:

> Utilities have the right to a permit to use public streets, alleys, and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires.

The Legislature thus directly conferred on regulated utilities the right to use municipal rights-of-way. The municipality, by logical implication, was denied authority to grant or withhold such rights and, with it, the authority to negotiate on a value basis with the utility. The only authority municipalities possess over utility activities, whether under the terms franchise, permit, or license, is the authority to police right-of-way usage essentially as illustrated in Chugach and to impose fees commensurate with that activity, with even the reasonableness of both the activity and fee subject to review before this Commission under the remaining provisions of AS 42.05.251.[11]

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[11]The status of municipal authority over utilities as a result of the statutory scheme in Alaska seems to be that reflected in the following passages from McQuillin, supra.

> In the absence of constitutional limitations, the creation of a state public service commission may have the effect of abrogating all conflicting regulatory powers theretofore vested in municipalities, or even of taking from municipalities all control over public utilities, except the power to enforce municipal police and sanitary regulations and other regulations authorized under the police power, and the power to grant franchises upon the terms and in the manner prescribed by law. (Citations omitted). Id., Sec. 34.09.

For these reasons, the Commission concludes that the

([11]contined)

> All franchises or privileges known by that term proceed from the state in the exercise of its sovereign powers. The power to grant franchises resides in the state; and the city, in granting a franchise, acts as agent for the state. Sometimes the right to use the streets is conferred by a general statute or the charter of the company, or by a constitutional provision, and in such case the consent of the municipality is not required. (Citations omitted.) Id., Sec. 34.10.

> A municipality cannot absolutely refuse to allow the use of its streets by a public service company where the right to use the streets has been unconditionally granted by the legislature. So where the right to the use of the streets has been expressly granted to a public service company by the legislature, no municipal power to prohibit such use of the streets can be inferred from the clause in the grant that the use shall be subject to such regulations and restrictions as may be imposed, since the restrictions thereby intended must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use, or impose new conditions to the power to exercise the franchise.

> On the other hand, where it is provided that the consent of the municipality must be obtained before the streets can be used, a municipality has power to refuse to allow a public service company to use its streets, and its authority is not limited to a reasonable regulation of the method of using the streets. (Citations omitted.) Id., Sec. 34.19.

> If the consent of the municipality is necessary to the use of streets by a public service company, the municipality, on granting the right to use the streets, may impose conditions on the company which will be binding on it if it accepts the right to use the streets, or conditions precedent to be performed before the rights under the franchise can be claimed, provided, however, that such conditions are not forbidden by the constitution or statutes or inconsistent with conditions prescribed by the legislature; conditions that conflict with the public service act are of no force or effect....

> If a company is granted the right to use streets by the state, a municipality cannot impose conditions as to rates or the like, since such conditions are not proper police regulations and in such a case no other conditions can be imposed. And if a corporation is authorized by the legislature, by charter or otherwise, to use the streets of a municipality, it has been held that the muncipality cannot compel the company to sign a contract imposing stipulations as to the manner of using streets, although the municipality undoubtedly retains its power to regulate the use of the streets by the company, in the exercise of the police power. Likewise, conditions

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benefit/burden test of reasonableness under AS 42.05.251 does not include as an element of cognizable benefit to the ratepayer any payment to the municipality for the values of the right to engage in a utility enterprise within municipal boundaries or within municipal rights-of-way. Consequently, the practice of mandating unreimbursed relocations cannot be sustained on the premise it is a type of payment to the municipality for the value of utilizing municipal rights-of-way.

Moreover, the Commission must register here a further finding. Even if a value approach to permit or franchise fees is applicable in Alaska, the command in AS 42.05.251 that such fees be reasonable implies that the fee in question should be accompanied by an intent to approximate value or be amenable to a correlation to such value if challenged. Unreimbursed relocations, however, have no intended correlation to value. Nor are they amenable to any efforts at such correlation as, by nature, they are totally dependent on the general scope of municipal construction activity in a particular year or period of years. There is no way the utility or the ratepayer can rationally budget for the expense which could well be severe in any period.

([11] continued)

> in the grant of a franchise, on acceptance, cannot become a valid contract which will divest the municipality of its police power....
>
> If conditions may be imposed, the municipality may retain the right to revoke the license or privilege at pleasure, or for breach of condition or to purchase the grantee's property on the streets upon the termination of the franchise. And, the municipality may impose conditions of service; fix rates; limit the duration of the grant; require restoration of streets....
>
> ...And it has been held that the conditions must be performed by the company at its own expense, it being estopped from saying that the conditions are not reasonable. (Citations omitted.) Id., Sec. 34.36, at 95-96.

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The Commission does not believe the Legislature intended the allowance of reasonable terms or conditions of usage of municipal rights-of-way in AS 42.05.251 to include practices with such unpredictable consequences. Accordingly, and despite the fact that in a given year the Commission could conceivably scale down unreimbursed relocation expenses to no more than the reasonable rental value of the municipal rights-of-way for the year, the Commission must hold that the practice of mandating unreimbursed relocations is unreasonable even if municipalities may be compensated for the value of right-of-way usage.

The reasonable practice in the event value compensation is authorized is for the municipality to impose an annual fee expressly for that purpose and have available appropriate supporting methodology and data if the fee is subsequently challenged. This constitutes the only rational and responsible approach to value compensation.

(ii) Discrimination

The benefit/burden test set forth herein for measuring reasonableness under AS 42.05.251 should not be the exclusive measure employed by the Commission. By its nature, a reasonableness standard reflects a legislative intent that the body vested with such discretion should retain a residual capacity to recognize relevant equitable considerations that in a particular instance would be ignored or inadequately treated under an inflexible formula. For instance, a benefit/burden test would not be helpful in the face of a discriminatory policy by a municipality that subjected one utility to "reasonable" fees or conditions yet insulated others from the same impositions. Yet, it is difficult to avoid concluding that such discrimination should be a significant aspect of reasonableness under AS 42.05.251. Nor should a discrimination policy be subject to consideration only to the extent other utilities may be involved. If any interests are

similarly situated to a utility's with respect to a municipal endeavor, then the utility's interests should be entitled to similar consideration.[12]

Typically, the activity occasioning the relocation mandate is a civic project that, while proper and lawful for the municipality to undertake, carries with it an obligation to make compensation for property interests adversely affected by the undertaking. In other words, the activity occasioning the relocation is ordinarily undertaken pursuant to the proprietary and not the police powers of the municipality (which latter power arguably is not subject to the constraint of compensation to affected interest). Nonetheless, public utilities are denied the protection of such compensation.

The Commission is of the opinion that a utility laying facilities in municipal rights-of-way has by virtue of certification of this Commission and the rights granted in AS 42.05.251 sufficient interest to be treated similarly to other persons whose interests would be protected in the course of the municipal undertaking. Accordingly, the Commission concludes that a municipal practice of mandating unreimbursed utility relocations incident to a proprietary activity of the municipality is unreasonable as placing an inequitable or unduly discriminatory burden on a utility's ratepayers to finance public improvements. This finding is independent of the earlier finding that the common law rule is unreasonable under the burden/benefit test. And, despite being based on considerations that might support a judicical finding

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[12]It should be noted that the Commission is not considering the benefit/burden test as necessary but not sufficient to justify the reasonableness of a questioned municipal action. It is entirely plausible to suppose that a municipality can in circumstances unknowable at this time establish the reasonableness of a municipal action, notwithstanding that such action would fail the benefit/burden test.

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that the common law rule is inconsistent with the Alaska Constitution (to be discussed in the next section), this finding is not based on such possible unconstitutionality but on the application of the discretion conferred on the Commission in AS 42.05.251 to independently appraise the reasonableness of municipal actions affecting regulated utilities.

(iii) Additional Considerations: Status of Historical Justifications for Rule under Alaska Law

A. Franchise Theory (B-C Cable Co. v. City and Borough of Juneau)

The preceding section indicated that the common law rule was premised on the larger municipal power to deny entry under the ownership aspect of the franchise authority. But, as the Commission construed the Chugach decision and AS 42.05.251, that franchise power was denied to municipalities in Alaska and, with it, any dependent powers. It is possible that the Alaska Supreme Court has already confirmed this voiding of the franchise power.

In B-C Cable Company v. City and Borough of Juneau, supra, the Alaska Supreme Court considered a contention that the passage in 1970 of AS 42.05.251, AS 42.05.641, and AS 29.48.050(a) effected a legislative withdrawal or denial of the municipal franchise authority in Alaska as to regulated utilities.[13] The case involved the continued legality of a 3 percent franchise for permit fees specified in ordinances antedating the above statutory provisions.

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[13] Section 42.05.641 provides: Regulation by municipality. The commission's jurisdiction and authority extend to public utilities operating within a city or borough, whether home rule or otherwise. In the event of a conflict between a certificate, order, decision or regulation of the commission and a charter, permit, franchise, ordinance, rule or regulation of such a local governmental entity, the certificate, order, decision or regulation of the commission shall prevail.

Section 29.48.050(a) provides: Franchises and permits. (a) The assembly, acting for areas outside cities and the

The court held that pre-existing franchise agreements were valid unless superseded by specific order of the Commission pursuant to AS 42.05.251 and AS 42.05.641. This seems to have been based on the court equating franchises and permits, considering franchise ordinances as contracts, noting that AS 42.-05.641 contained a reference to valid "franchises," and holding that the Legislature should not be presumed to have intended the statutory provisions to operate retrospectively.

The utility had also advanced a further contention that even if the franchise or permit fees in that case were not invalidated, the 3 percent fee should be voided until the city established a reasonable permit fee for the use of its streets pursuant to AS 42.05.251. The court noted that this contention had as its premise that the 3 percent fee, "...was originally designed to compensate the city for use of municipal streets and for the costs of municipal supervision and regulation. Since the latter services have now been assumed by the APUC, appellant argues that the reasonableness of the fee is subject to doubt." Id. at note 4. It is not clear from the statement of the premise whether it was derived from the facts of the case, represented a generic contention of the utility, or reflected a conclusion of the court as to the legal purpose and scope of franchise or permit fees in Alaska. The court rejected the contention that it should void the 3 percent fee on the basis that the reasonableness of the fee is within the original jurisdiction of this Commission and the utility should first try its case on that point before this body.

([13]continued)

> council acting for the area within a city may grant franchises, including exclusive franchise privileges, for the construction, operation or maintenance of bus transportation systems and public utilities not regulated under AS 42.05 and may permit them the use of streets and other public places under regulations prescribed by ordinance.

The court's focus in the opinion on not giving retrospective effect absent clear legislative direction to the subject statutory provisions implies that they have prospective effect. As the issue in contention was whether or not the Legislature had repealed municipal franchising, the implication was that the court concluded a voiding of the franchise power had occurred. Similarly, the wording of the premise on which a contention of unreasonableness of the franchise fee might be sustained, coupled with the absence of any qualification on that premise which could have issued as a matter of guidance to the Commission without necessarily disturbing its original jurisdiction, supports the conclusion that permit fees after the enactment of AS 42.05.251 should be limited to offsetting regulatory burdens and costs to the municipality associated with right-of-way usage by a utility, and not include any compensation to the municipality for the value of the right-of-way.

This distinction between prospective and retrospective operation of the 1970 statutory provisions could be significant as HEA did not assume responsibility for Kenai until 1971 pursuant to an ordinance/sales agreement for the theretofore municipally owned electric utility system. Similarly, all the relevant events in the MTA situation occurred after 1970. Consequently, HEA's and MTA's rights and obligations presumably would be tested under the prospective application of the subject statutory provisions.

The difficulty with the B-C Cable decision, of course, is that it did not expressly affirm that a prospective voiding of the franchise power had occurred by virtue of the subject statutory provisions and, if so, to what extent or in which aspects. Nor did the opinion expressly confirm the regulatory burden test of reasonableness for permit fees and, presumably, other attempted limitations. The absence of such express declarations would seem to reflect an uncertainty by the court as to either the actual

intent of the legislature or the consequences of premature statement. Indeed, having observed that AS 42.05.641 expressly refers to franchises and also noting in its opinion that permits and franchises can be interchangeable concepts and terms, the court could have entertained concern as to whether the term "permit" in AS 42.05.251 reflected a legislative intent that certain aspects of "franchise" authority did persist in the new legislative scheme. If so, premature prophylactic abrogation of franchising authority could have unintended consequences.

Nonetheless, it appears to the Commission that it was the court's intent to void the ownership aspects of municipal franchising or permitting in Alaska with respect to regulated utilities, leaving intact only those regulatory aspects of permitting and franchising not preempted under the holding in Chugach Electric Association v. City of Anchorage, supra. If this is correct, then to the extent the practice of unreimbursed relocations is premised on or is viewed as an incident of the ownership and not regulatory aspect of franchising, the Alaska judiciary would appear by necessary implication to have already rejected the common law rule as inconsistent with the statutory law of Alaska.

Admittedly, however, the Commission is here speculating or perhaps predicting a holding of the judiciary. At the least, though, the decision in B-C Cable did sanction a Commission inquiry under AS 42.05.251 into the reasonableness of particular fees or terms for utilization of municipal rights-of-way, and did confirm that under AS 42.05.641 a determination of unreasonableness would invalidate the fee or practice. Such a particular inquiry was undertaken in the preceding sections and resulted in a Commission determination that the common law rule of unreimbursed relocations is unreasonable because (1) its necessary (but not sufficient) predicate to constitute a cognizable utility benefit

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is the existence of value compensation, but the Legislature abrogated that premise; and (2) based on the Commission's construction of AS 42.05.251, even if value compensation is still permissible, the practice has sufficient undesirable consequences to preclude its acceptance as a reasonable condition of right-of-way usage.

B. Insufficient Interest for Compensation (State v. Hammer)

It will also be recalled from Baltimore Gas and Electric Co. v. State Roads Commission, supra, that even if viewed as an incident of the franchising authority, this is not sufficient justification for the common law rule. The underlying reason utility interests in facilities laid pursuant to franchise are historically denied compensation in the typical instance of relocations incident to a municipal proprietary activity[14] is that such interests seem to have been classified as "incorporeal hereditaments" and, as such, considered damnum absque injuria or too insubstantial a property interest to merit protection under the traditional wording and construction of the United States' and most states' constitutional provisions requiring compensation for governmental takings. Thus, the court in Baltimore Gas and Electric Co. was required to find in the enabling legislation creating the condemning authority particular language that was construed as intending to enlarge the otherwise too narrow state constitutional provision on compensatory taking so as to render the utility's interest compensable and not subject to the common law rule.

The significance here of Baltimore Gas and Electric Co. is that the statutory language found in that case to be sufficient for compensation is similar to the language contained in Art. I, Sec. 18, of the Constitution of the State of Alaska, which provides:

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[14]It should be noted that Baltimore Gas and Electric Co. v. State Roads Commission, supra, at 317-318, contained a fairly lengthy rebuttal to the notion that there is an inherent division

> Private property shall not be taken or damaged for public use without just compensation.

Moreover, as correctly observed by MTA, the Alaska judiciary has construed this language as creating an Alaska compensation standard broader than traditionally allowed. In State v. Hammer, supra, the court had before it a contention that lost profits incurred by a lessee of condemned property until a new business site could be procured should be compensable. Acknowledging that the traditional view would deny such damages, the court stated:

> The traditional view had been that such damages, as part of the category of incidental damages, are not recognized in eminent domain proceedings, being damnum absque injuria, a loss which does not give rise to an action for damages. Compensation has been denied under three theories: that damage to personal property need not be compensated for; that the state has taken the land only, and not the business; and that the damages are too speculative to be awarded. The first theory is inapplicable in Alaska, since by statute and case law, personal property is included in the categories of property for which the condemnor must compensate the owner. We do not find either of the other theories sufficiently persuasive to cause us to deny compensation for the damages suffered here.

Id. at 823 (footnotes omitted). After observing that the U.S. Supreme Court in Mitchell v. United States, 267 U.S. 341 (1925), had embraced the second view that destruction of a business is merely an uncompensable incident to the taking of property, the court stated:

> Secondly, Mitchell v. United States, supra, was decided under the fifth amendment to the United States Constitution, which unlike the Alaska Constitution, does not expressly require compensation for damage to property. Finally, the reasoning of Mitchell is unacceptable

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([14]continued)

between police and proprietary activities of a municipality with respect to the obligation to make compensation. The court's view was that all municipal activities proceed from the police power, and it is only the wording of the relevant constitutional or statutory provision that dictates whether compensation shall be paid. It is not necessary in this discussion to depart from the conventional proprietary/police power division as the Commission is considering only instances in which the subject municipal project would carry an obligation to pay compensation in the event nonutility private property was taken during the course of the project.

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> because it fails to provide a realistic measure of what has been taken. The court simply ignored, for the purpose of compensation, the destruction of Mitchell's business, characterizing it as 'an unintended incident of the taking.' This court would poorly serve the law if it were to so blind itself to the realities of condemnation.

Id. at 824 (footnotes omitted). The court continued on to state it is illogical to consider loss of profits too speculative in a condemnation proceeding but sufficiently certain for use in other civil contexts, and observed:

> Our dissatisfaction with the reasoning used to deny compensation for damages such as loss of profits due to business interruption is shared by commentators, and by courts, which while feeling compelled by precedent to deny compensation, have commented on the harshness of the result. Other courts, faced with intolerably inequitable results, have simply rejected the traditional views. In Luber v. Milwaukee County, 47 Wis. 2d 271, 177 N.W.2d 380 (1970), the Wisconsin Supreme Court ...pointed out that over time the use of the fair market value measure of compensation alone had become inadequate:
>
> 'The importance of allowing recovery for incidental losses has increased significantly since condemnation powers were initially exercised in this country. During the early use of such power, land was usually undeveloped and takings seldom created incidental losses. Thus the former interpretation of the "just compensation" provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship. In modern society, however, condemnation proceedings are necessitated by numerous needs of society and are initiated by numerous authorized bodies. Due to the fact people are often congregated in given areas and that we have reached a state wherein re-development is necessary, commercial and industrial property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some of the cases exceed the fair market value of the actual physical property taken.'
>
> The court concluded that "the rule making consequential damages damnum absque injuria is, under modern constitutional interpretation, discarded."

Id. at 825-826 (footnotes omitted). The court concluded:

> Having reviewed the cases from other jurisdictions both denying and requiring compensation for incidental damages, we turn to an examination of the relevant Alaska law. Article I, Sec. 18 of the Alaska Constitution provides that "private property shall not be taken or damaged for public use without just compensation". Given this mandate, we are unable to deny temporary loss

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of profits damages to Kito. His business is 'property', and it has been directly damaged by the state in taking of his leasehold. His damages have been fixed by stipulation. To deny compensation for such damages would contravene the policy behind the constitutional provision, that the condemnee should not pay a higher price for a public improvement than do other members of the public. The constitution does not require Kito to make a special sacrifice for the Petersburg Highway.

We have indicated in other eminent domain cases that the just compensation provision of the Alaska Constitution requires full indemnification of the owner for property taken or damaged....As we stated in Steward & Grindle Inc. v. State, 524 P.2d 1242 (Alaska 1974):

'Without such a rule, the State forces a property owner to pay a greater portion of the costs of a public project than any other taxpayer must pay by afflicting him with the unavoidable expenses of condemnation. Placing such a burden on the property owner is no more...just than assessing a levy against him but no others.'

Id. at 826-827 (footnotes omitted).

The acknowledgment in Hammer that a restricted view of constitutionally compensable interests is not suitable in modern times with its heavy pace of governmental activity and condemnation is very much reminiscent of the policy considerations invoked by the court in Baltimore Gas and Electric Co. to read the statutory phrase "damages" as intended to require compensation for unreimbursed relocations. And, every bit as much as in the instance of an uncompensated owner of a destroyed business, to deny a utility compensation is to require a utility ratepayer, whether within or outside of a municipality, to make a "special sacrifice" or pay "a levy against him but no others." Accordingly, even if some aspects of ownership franchising have survived in the present statutory scheme, the common law rule allowing a municipality to mandate unreimbursed utility relocations nonetheless appears be inconsistent with the Constitution of the State of Alaska.

(iv) Clarification of Holding

The determination that the common law rule authorizing the municipal practice of mandating unreimbursed utility relocations is unreasonable as to regulated utilities is not meant to

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reject totally the rule. AS 42.05.251 and Chugach Electric Association v. Municipality of Anchorage, supra, do preserve, subject to Commission review, the police power of the municipality to regulate right-of-way usage. Thus, permitting (or even franchising) to insure compliance with reasonable safety and construction standards is authorized, and a utility may properly be required to relocate its facilities without compensation in the event of non-compliance. Indeed, even in the absence of an expressed procedure or specification of placement or construction standards, a utility is obligated to construct and maintain facilities in municipal rights-of-way utilizing a reasonable degree of prudence to insure not only the safety of the facilities but the maximum opportunity for others to use the right-of-way without conflict, and such obligations may also be enforced by the municipality without reimbursement. Also, a municipality does not warrant to a utility that rights-of-way would be preserved in any particular condition. Thus, if the municipality should require a utility to remove and replace its facilities incident to repairs necessary either to restore after emergency, or to otherwise reasonably maintain, serviceability of the right-of-way in the condition existing when the utility first laid its facilities, such removal and replacement may be directed without compensation. These are illustrative circumstances only, and other situations could well arise in which the municipality may require an unreimbursed relocation as an incident of right of way activity pursuant to its police powers. Southwestern Bell Telephone Company v. the City of Fayetteville, 609 S.W.2d 914, 918, (Ark. 1981).

However, the decision herein is intended to abrogate the common law rule where a municipality requests relocation incident to a proprietary activity and recognizable management direction is present. Proprietary activities are at this time defined for the purpose of AS 42.05.251 to be primarily all activities reflected

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in a municipal capital budget. It is also intended to apply to situations in which a municipality allows itself or a third party (whether or not a utility) to lay facilities or work in its rights-of-way when such work will necessitate relocation or other disturbance of a present utility's facilities. It is, of course, a reasonable condition of entry into a right-of-way for the municipality to require the entering entity to absorb such relocation expenses of other utilities, so the municipality can adequately protect itself in these circumstances. The foregoing should constitute the vast majority of instances in which the common law rule would be invoked, and utilities and municipalities should have little difficulty in agreeing on the nature of a particular project.

In the event of dispute, the Commission remains available pursuant to AS 42.05.251 to resolve whatever problems may arise. To avoid abuse of the exceptions allowed, it will be the burden of the municipality to establish in the event of dispute that the requested unreimbursed relocation is a reasonable exercise of its supervisory powers over right-of-way usage. It is expected that utilities, for their part, have or will make a normal practice of recording the circumstances of any relocation for which they do pay expenses so as to permit validation of the propriety of such payment and their proper disposition in rate-making proceedings. Considering that such situations where ratepayers will assume the burden will be comparatively few and basically reflect true construction or regulatory necessities, such payments typically will be capitalized and recovered in generally applicable rates. In other words, there is no justification for utilities to have municipal surcharge tariffs to authorize recapture of unreimbursed relocation expenses. In those rare occasions that, for reasons unforeseeable at this time, a

municipal surcharge might be appropriate, the Commission will consider such surcharges on a case-by-case basis.

This decision also reflects the Commission's opinion that nonregulatory or ownership permit and franchise fees are unreasonable. This determination is applicable to any current or future franchise or permit fees. Franchise or permit fees that are based on a utility's revenues would seem presumptively unrelated to the actual costs of supervising the utility's right-of-way activities or other burdens caused by normal utility operation. Accordingly, the Commission will disallow such payments in reviewing future requests for rate relief, unless such a fee has been sustained in the individual utility's instance prior to conclusion of the rate case. For those occasions in which the Commission might allow nonregulatory or ownership franchise and permit fees, the Commission will also consider on a case-by-case basis whether such fees should be recovered in generally applicable rates or in a special municipal surcharge. As should also be clear, the Commission's predisposition is to require regulatory permit or franchise fees to be recovered in general rates, as they do not at present generate apprehensions concerning escalation to the point of significant impact and they are otherwise based on operational considerations.

Another aspect of this decision should also be mentioned. While B-C Cable Company v. City and Borough of Juneau, supra, sustained the validity of at least those franchises antedating the 1970 statutory scheme on behalf of the municipality, it did allow for Commission review of the reasonableness of terms even in those franchises. There is no reason why, in connection with franchises or permits either antedating or postdating the statutory scheme, a municipality could not seek relief before this Commission from any terms and conditions in such agreements as may appear or in the course of time become injurious to the

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municipality's interest in regulating right-of-way activity.[15] Indeed, such relief might well be obligatory to pursue in certain situations in light of the foregoing comments concerning discriminatory practices, although it also appears some allowance for discriminatory practices might be appropriate if commensurate with a past benefit received from the utility.

VI. Application of Determination To Present Filings

As the Commission is acting pursuant to a partial vesting of the legislative discretion in rejecting of the common law rule, this determination would appear to be applicable to any dispute brought before the Commission by a utility opposing an unreimbursed relocation. In State Road Commission of Utah v. Utah Power & Light Co., 353 P.2d 171 (Utah 1960), the court sustained a legislative declaration to compensate utility relocations incident to federal highway projects over a contention that it would unconstitutionally abrogate implied terms of the utilities' franchises incorporating the common law rule. The court there stated:

> In this case it is admitted that the franchises were granted and accepted with knowledge that they were subject to the exercise of the police power of the state. Among the unwritten provisions, then as now, was that overarching one to comply with the law at all times. What that law would be from time to time, no one knew. What specific acts or other considerations would be required of the utilities was just as unpredictable. 'We know in part, and we prophesy in part.' When a change in use of the street necessitated adjustment with respect to use by the utilities and a demand for action on the part of the utilities was made, then and only then would an obligation arise and the requirements imposed by the obligation become known. If the law had changed or street uses now unknown were contemplated, the requirements would be affected accordingly. The utilities assumed that risk to their advantage or disadvantage. The theory that the common law rule as it existed when the franchises were granted became an integral part of the franchises as if expressly written therein, and could not be modified by subsequent legislation, is not supported by the authorities. All contracts and property rights are held subject to the fair exercise of the police power of the state.

Id. at 177 (footnotes omitted). The same opinion also quoted

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[15] See also McQuillin, supra, Sec. 34.36 (quoted at note 12.)

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the follcwing language in Justice Cardozo's opinion in Oswego & Syracuse Co. v. State, 124 N.E. 8 (N.Y. 1919):

> This case is governed, therefore, by our decision in that of the Lehigh Valley Railroad so far as the facts of the two cases are the same. The state finds a distinction between them in the terms of the claimant's permit. In the earlier case there was an implied reservation by the state of the right to destroy the bridge in the improvement of navigation **** In this case the reservation was expressed. We think the difference is unsubstantial. The power of the state is not changed by the form of reservation. Even though no permit had been granted, the duty of the railroad would be the same. The equity of its position is not destroyed by its promise to obey the law. In such matters we must go beneath the form of the transaction to its substance **** In form only the duty is contractual. Back of the form of contract there lies the substance of submission to coercive power of the state. We are not dealing with a fee bargain, which has been found afterwards to be a hard one. What the legislature's power of relief or dispensation may be in such circumstances, we need not now determine. We are dealing with a bargain dictated by the law. Between such a case and that of the Lehigh Valley Railroad we find no difference in principle. The state was about to execute a great public work. It was that in the doing of that work there would be destruction of private property. Much of the damage would be damnum absque injuria. Nonetheless it would be damage. The result would be inequality in the distribution of public burdens. Some would pay more dearly than others in proportion to benefits received. The question was for the legislature whether the equity of compensation was strong enough to merit recognition. We cannot hold it to be illusory.

353 P.2d at 174.

In South Central Bell v. City of Chattanooga, 578 S.W. 2d 950 (Tennessee 1958), the court held that, notwithstanding internal designation, a particular city project was not a normal city activity (or "merely a street job," Id. at 925) but a redevelopment project within the contemplation of the state statute requiring reimbursement for utility relocation incident to redevelopment projects. In the course of the opinion, the court summarily rejected a contention that the utilities were barred from seeking reimbursement because their franchise agreement expressly assumed the responsibility for relocation expenses:

> It is claimed that the plaintiffs by their franchise from the city agreed to pay all relocation expenses. The city argues that under the emphasized portion of the

> statute these franchises are binding contracts whereby the benefits of furnishing their respective services to the citizens of the city inured to the benefit of the utilities. This argument is foreclosed by the recent decision of the Middle section of this Court in Metropolitan Dev., Etc. v. South Cent. Bell. (Tenn. Ct. App. 1978) 562 S.W.2d 438.

Id. at 953.

From these opinions, it seems to be the better and more modern rule that as against at least a legislative rejection of the common law, a municipality may not claim a vested right in continuation of the rule. Nor may such a vested right be claimed on the basis of an express recital in the franchise or permit ordinance that the utility assumes the burden of relocation expenses. Accordingly, the Commission's determination should be effective in any future disputes brought before it.

With respect to MTA's request for a declaratory ruling that a municipal surcharge is available to recover unreimbursed relocation expenses, there is no difficulty with a "present" application of this opinion as the determination of liability for relocations directed or to be directed under the disputed ordinance is before the Commission in the parallel complaint docket. Actually, Wasilla accepts responsibility for the expense of relocations of facilities placed pursuant to the permit system and location standards contemplated under its new ordinance, so that it does not truly generate a dispute over the common law rule. The dispute is over facilities laid pursuant to the old agreements under which Wasilla also assumed responsibility but which had no permit system or location standards.

The issue is whether MTA, despite the earlier agreements assuming municipal responsibility for the expenses of relocation, but without any permit system or relocation standards, is nonetheless liable for the expenses of relocation of earlier laid facilities if they were positioned in Wasilla's rights-of-way in violation of the new standards. This issue would seem necessarily to

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require resolution in favor of MTA. However, as discussed earlier (see page 41 of this opinion), MTA nonetheless had an obligation to prudently lay its facilities even in the absence of express municipal standards. Included in this obligation is the requirement that MTA maintain accurate "as-builts" of its plant in municipal rights-of-way. Whether or not MTA has any relocation or other liability under the foregoing principles will be considered further in the complaint docket, together with the possible further issue of whether there should be a general ratepayer recovery. Accordingly, a surcharge will not be appropriate for such items.

The reasonableness of permit fees and other possible expenses under the new Wasilla ordinance will also be discussed in the decision on the complaint. However, it may be observed here, that Wasilla seeks only to recover what it contends are the reasonable costs for damage and regulatory supervision occasioned by MTA's presence in Wasilla's right-of-way; there are purportedly no value components to the charges sought to be levied. Accordingly, no surcharge will be allowed for such permit fees and expenses under the new ordinance as the Commission may allow.

With respect to the HEA situation, the Commission's determination to reject the common law rule does not solve all problems. Clearly, this ruling will apply to any future relocations directed by the city, so there is no need for a municipal surcharge for such future relocations. However, HEA claims to have held back from its revenue requirement for generally applicable rates some $200,000 in past unreimbursed relocations which it now seeks to recover as the opening balance in the requested surcharge. It is not as clear to the Commission if its ruling rejecting the common law rule could properly be applied to sanction recovery of those expenses from the city and, if not, whether and how those charges may now be recovered.

The question here is whether the specified instances generating the present $200,000 in unreimbursed relocation expenses are consummated transactions beyond the reach of this Commission to undo and, if so, whether the utility may by any method pass these expenses on to ratepayers without violating the rule against retroactive ratemaking. Such a decision that these are consummated transactions would be harsh as the utility has obviously been attempting in good faith to seek an appropriate treatment of the problem, first thought its complaint and then through the present filing. Indeed, it seems clear in hindsight that a good deal of the present difficulty could have been avoided if the initial complaint, notwithstanding its premise on an alleged contractual breach, had not been dismissed but instead expanded to embrace a direct inquiry into whether the common law rule was reasonable and lawful as either an implied or express condition of right-of-way usage.

However, the dismissed complaint before the Commission has in fact been filed in court and, according to the copy thereof attached to the city's pleading, contains a final prayer for such other and further relief as the court may deem appropriate. It appears that the matter of liability for such relocation expenditures as between HEA and the city is still at issue. Therefore, the most efficient procedure for resolving present uncertainties is for HEA to request leave to amend its judicial complaint to include an additional prayer for relief based on this Order.

It also seems reasonable to request the Attorney General's office to seek intervention on, initially, the request to amend the complaint and, if allowed, to respond thereafter on the merits of the case as may be appropriate. If the request to amend should be denied, that would presumptively resolve the question of the applicability of this Order to the subject relocations, as well as the retroactive ratemaking issue, leaving only

the question of whether the contractual claim will be granted.

With respect to such contractual claim if it becomes the remaining issue, HEA may settle or litigate the matter in any prudent manner. If a prudent resolution should result in HEA's having to absorb some or all of the expenses of the unreimbursed relocations, then the undepreciated balance of such expenditures should be transferred to the appropriate plant accounts and thereafter utilized in establishing the utility's total revenue requirement and generally applicable rates.

The Commission is rejecting the use of a surcharge for recovery of such potential exposure for the subject relocations. The exposure would constitute a nonrecurring expenditure, so that even the arguably strongest surcharge premise of discouraging similar future activity by Kenai and other municipalities would be largely inapplicable. Coupled with the other considerations previously advanced concerning the inequity of a surcharge mechanism, this persuades the Commission that the best mode of recovery for such potential exposure is through generally applicable rates. Of course, if the Commission's Order herein is reviewed and reversed as to sanction the common law rule in Alaska, the Commission would then have to determine whether or not a surcharge is the proper response for recapturing the expense.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The request of Matanuska Telephone Association, Inc., for a declaratory ruling approving a Municipal Facilities Cost Adjustment surcharge against ratepayers within the City of Wasilla is denied.

2. The request of Homer Electric Association, Inc., in TA35-32 for a Municipal Facilities Relocation Cost Adjustment

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surcharge to recover only from ratepayers within the municipalities directing unreimbursed relocations the costs of those relocations is denied.

3. The practice of municipalities directing unreimbursed relocations of utility facilities laid in municipal rights-of-way is declared unreasonable within the contemplation of AS 42.05.251, except for those situations discussed in the body of this Order.

DATED AND EFFECTIVE at Anchorage, Alaska, this 11th day of January, 1985.

BY DIRECTION OF THE COMMISSION
(Commissioner Diana E. Snowden, dissenting with separate statement, nunc pro tunc;
Commissioners Carolyn S. Guess, Chairman, and Marvin R. Weatherly, not participating)

(S E A L)

Alaska Public Utilities Commission
420 "L" Street, Suite 100
Anchorage, Alaska 99501

STATE OF ALASKA

THE ALASKA PUPLIC UTILITIES COMMISSION

Before Commissioners:	Carolyn S. Guess, Chairman Marvin R. Weatherly Susan M. Knowles Diana E. Snowden Louis E. Agi
In the Matter of the Filing of a Tariff Revision, Designated as TA35-32, by HOMER ELECTRIC ASSOCIATION, INC., for a Municipal Facilities Relocation Cost Adjustment	U-83-74
In the Matter of the Formal Complaint by MATANUSKA TELEPHONE ASSOCIATION, INC., Against THE CITY OF WASILLA Regarding Certain Utility Right-of-Way Powers	U-83-79

DISSENTING STATEMENT OF COMMISSIONER DIANA E. SNOWDEN
TO ORDER NOS. 7 AND 4

Commissioner Snowden, while sympathetic to the merits of repudiating the common law rule, dissents from the majority decision on the basis that such repudiation is properly the prerogative of the court and legislature and not within the discretion vested in the Commission under AS 42.05.251. It is Commissioner Snowden's further opinion that unreimbursed relocation expenses incurred by a utility through municipal application of the common law are most equitably recovered from only municipal ratepayers through an appropriate surcharge mechanism.

DATED at Anchorage, Alaska, this 11th day of January, 1985.

Diana E Snowden
by cg

Alaska Public Utilities Commission
420 "L" Street, Suite 100
Anchorage, Alaska 99501

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CITY OF SKAGWAY

GATEWAY TO THE GOLD RUSH OF "98"

P. O. BOX 415 SKAGWAY, ALASKA 99840

907-983-2297

April 3, 1987

Senator Richard Eliason
State of Alaska
P. O. Box V
Juneau, Alaska 99811

Dear Senator Eliason;

It has come to our attention that in SB155 and HB155 the Legislature is considering payment of utility relocation costs by municipalities. The City of Skagway is opposed to this legislation.

In June, 1983, after long and heated argument with our local utility, the Alaska Power and Telephone Company, over, among other things, quality of service, possible condemnation and utility relocation costs, the City of Skagway and Alaska Power and Telephone Company reached an agreement whereby a twenty-year franchise permit was signed. A major point of contention in reaching this agreement was the cost of utility relocation as a consequence of public construction.

If these proposed bills pass the legislature, the City of Skagway would be left with an agreement that would no longer contain the major provision gained by the City. It does not seem fair to permit a private company the use of public rights of way to provide utility services for private gain and then to require the municipality to pay for the relocation of these facilities if public construction must occur in a public right of way.

At the least, passage of these bills should provide for existing permit agreements to remain in force, but such a provision would still not address the fundamental unfairness of this legislation and the burden it transfers from the private sector to the public sector.

Sincerely,

Thomas Healy
City Manager

OFFICE OF ADMINISTRATION
April 3, 1987

Alaska Municipal League
Legislative Bulletin
105 Municipal Way, Suite 301
Juneau, Alaska 99801

re: Legislative Bulletin # 1?-6
House Bill 155 and Senate Bill 155

The City of Valdez feels that a municipality should pay for utility relocation only if the utilities to be moved in the right-of-way are there by reason of a permit. If the utilities are not permitted or do not comply with current codes and industry standards, then the utilities should be relocated at the expense of the utility companies.

Thank you for the opportunity to comment on this.

Sincerely,

CITY OF VALDEZ, ALASKA

John Thorp, P.E.
Acting City Manager

JT/jt/lma

P.O. BOX 307 • VALDEZ, ALASKA 99686
TELEPHONE (907) 835-4313 • TELEX 25-381 • TELECOPIER (907) 835-2992

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 3/26/87 5-DAY NOTICE
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER: TRANSPORTATION

**FISCAL NOTE(S) ATTACHED X **
IN ACCORDANCE WITH AS 24.08.035
(see below)

3/3/87

DATE TURNED INTO OFFICE 4/10/87

Mr. President:

C&RA Committee considered SB 155

change, relocation, or removal of utility facilities incident to the construction of road or other projects by a municipality.

and recommended:

[X] replace with CS for SB 155 [X] same title
[ ] new title

[ ] attached amendment(s) and

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to

[ ] letter of intent adopted and attached

** Committee [ ] attached or [X] adopted fiscal note(s)
[X] zero [ ] fiscal impact

MEMBERS SIGNING DO PASS

Tim Kelly

OTHER RECOMMENDATIONS

Mike Dimond
Fred Brandt
Rick Halford

Cliff Stumpfenhi Do Pass
Chairman signature and recommendation

[ ] Committee Backup Attached

(1)

THE SUPREME COURT OF THE STATE OF ALASKA BALDWIN

CITY OF KENAI,

Appellant,

v.

STATE OF ALASKA, PUBLIC UTILITIES COMMISSION,

Appellee.

File No. S-1337

OPINION

[No. 3176 - May 8, 1987]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai
Peter A. Michalski, Judge.

Appearances: Timothy J. Rogers, City Attorney, Kenai, for Appellant. Mark L. Figura, Assistant Attorney General, Anchorage, Harold M. Brown, Attorney General, Juneau, for Appellee. Andrew E. Hoge, Hoge and Lekisch, Anchorage, for Intervenor Matanuska Telephone Association, Inc. Carol A. Baldwin, Kenai, for Intervenor Homer Electric Association, Inc.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

MATTHEWS, Justice.

This is an appeal by the City of Kenai from a decision of the superior court dismissing Kenai's appeal to that court from a decision of the Alaska Public Utilities Commission. The superior court found that Kenai was not a party to the

Commission's proceedings, and therefore had no right to appeal. Homer Electric Association and Matanuska Telephone Association were parties to the Commission's proceedings, and both have been granted intervenor status in this appeal. Because Kenai has a legally recognized interest which was adversely affected by the Commission's action, and because Kenai sufficiently participated in the Commission's proceedings, we hold that Kenai has standing to obtain judicial review of the agency's action by means of an appeal. We therefore vacate the dismissal and remand the case to the superior court.

I. FACTS AND PROCEEDINGS

In 1971, Homer Electric Association, by contract with the City of Kenai, assumed control of certain municipal utility facilities located within the City. Subsequent street construction required Homer Electric to relocate those utility facilities, but the City refused to reimburse it for the relocation expense. Homer Electric sought declaratory relief before the Commission to resolve the dispute according to the contract terms. The Commission declined to hear the contract dispute on jurisdictional grounds, but encouraged Homer Electric to file for a special tariff before the Commission to recover the expense either through a surcharge or through general rates.

Homer Electric filed for a tariff revision which provided for a surcharge to recover all costs associated with the

relocation of electric facilities at a municipality's request when those costs are not paid by the municipality. The Commission issued a notice of utility tariff filing, and three individuals and the City responded as interested parties with letters opposing the tariff. In "adamantly oppos[ing]" the tariff filing, the City argued that under common law, a utility has the duty to relocate its facilities at its own expense when public convenience or necessity so requires.

The Commission suspended the operation of the proposed tariff and scheduled a public hearing in view of the City's strong opposition to the filing. The Commission also "concluded that the City met the standards for intervention set forth in 3 AAC 48.110," and determined "that full-party intervenor status should be granted to the City." In its order suspending the tariff filing, scheduling a public hearing, and granting intervenor status to the City, the Commission stated that "[the utility] and the City should be prepared to answer [five] questions" relating to Homer Electric's proposed tariff revision.[1] The Commission also stated that if the City did not

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1. The Commission directed the City to be prepared to answer the following questions:

> (1) What is the nature of the facilities relocation costs which are the subject of [this order]?

(Footnote Continued)

wish to be granted full-party intervenor status, it should notify the Commission.

In a letter to the Commission, the City formally declined the Commission's offer of full-party intervenor status. The letter stated:

> While the City of Kenai declines the Commission's grant of full party intervenor status in this proceeding, it does not wish to convey an impression of disinterest or lack of importance in this matter by the City of Kenai.
>
> The City's initial response . . . consisting of six pages plus attachments set forth at length not only the City's policy position in this matter, but provided citation of statute and case law authorities in support of its position.

(Footnote Continued)

> (2) If facilities are relocated at the request of municipalities and the municipalities do not directly pay the costs of the relocations, how should the utility allocate those costs to its ratepayers?
>
> (3) Does the answer to the preceding question vary according to circumstances associated with individual relocations? If so, how should these variations be reflected in a tariff format?
>
> (4) How should the proposed [Municipal Facilities Relocation Cost Adjustment] affect previously uncollected municipal facilities relocation costs?
>
> (5) Are municipalities the only entities to which the proposed surcharge should apply?

The City further observed that the Commission had already apparently decided that a municipality had the discretion to require a utility to pay for relocation expense. The City quoted from the Commission's letter to Homer Electric, in which the Commission declined to decide the contract dispute:

> The requirement to pay either a fee or relocation expense at the discretion of the municipality would seem to make a fee and relocation expense interchangeable concepts, so that the authority of a utility in AS 42.05.251 to recover fees from the customers in the municipality receiving the fees would seem to necessarily sanction the recovery of relocation expenses in the same manner.

Thus, in light of the earlier statement by the Commission to the utility, the City asserted that "[i]t would seem that the City's participation as a party in this matter may well be an unnecessary step for the Commission to formally order what has previously been decided."

On November 17, 1983, the Commission conducted a public hearing but the City did not appear or otherwise participate. The Commission issued its decision on January 11, 1985. The decision specifically considered the City's earlier arguments contained in the City's letter opposing the tariff revision.

Although the Commission recognized that the parties sought only an order from the Commission accepting or rejecting the proposed surcharge, the Commission found it necessary to preliminarily determine "the validity under AS 42.05 of the common law rule authorizing municipalities to compel without

reimbursement relocation of utility facilities located within municipal rights-of-way." The Commission held that the practice of municipalities directing unreimbursed relocations of utility facilities was unreasonable, thereby making the City liable for the relocation costs incurred by Homer Electric. The Commission also denied Homer Electric's request for a surcharge.

The City appealed the Commission's decision to the superior court explicitly relying on AS 42.05.551,[2] AS 44.62.560,[3] and Alaska Rule of Appellate Procedure 602.[4] The Commission moved to dismiss the City's appeal on the grounds that the City was not a party to the administrative proceedings and therefore had no right to appeal. Homer Electric joined in the motion to dismiss, and Matanuska Telephone submitted a statement of position supporting the Commission and Homer Electric.

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2. AS 42.05.551, Review and enforcement, provides in part:

> (a) All final orders of the commission [APUC] are subject to judicial review in accordance with AS 44.62.560 - 44.62.570 of the Administrative Procedure Act.

3. AS 44.62.560, Judicial review, provides in part:

> (a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters.

(Footnote Continued)

The City opposed the motion to dismiss, and requested in the alternative declaratory relief pursuant to the Declaratory Judgment Act, AS 22.10.020(g),[5] and Ketchikan Retail Liquor Dealers Association v. State, Alcoholic Beverage Control Board, 602 P.2d 434, 440 n.21 (Alaska 1979).

The superior court entered an order dismissing the case on the grounds that the City had no right of appeal because it was not a party. The City's motion for reconsideration was also denied. This appeal followed.

II. KENAI'S STANDING TO APPEAL

Whether a party has standing to seek judicial review of an agency's decision following an evidentiary hearing, either by appeal or in a declaratory judgment action, is a question of law, reviewable de novo.

(Footnote Continued)

4. Alaska Rule of Appellate Procedure 602 provides for time and notice of appeals, and for bonds on appeal.

5. The parties refer to Alaska's Declaratory Judgment Act as AS 22.10.020(b). In 1984, subsection .020(b) was redesignated as subsection .020(g). See AS 22.10.020 (Supp. 1986). AS 22.10.020(g) provides in part:

> In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought.

The judicial review provisions of the Administrative Procedure Act, AS 44.62.560(a),[6] are made applicable to APUC proceedings by AS 42.05.551.[7] AS 44.62.560(a) does not specify who is qualified to obtain judicial review of administrative adjudications. Since the statute is silent on this point, the answer must be supplied by reference to other sources of law. This has already been accomplished in part in Ketchikan Retail Liquor Dealers Association v. State, Alcoholic Beverage Control Board, 602 P.2d 434 (Alaska 1979). In Ketchikan, we held that parties to an administrative hearing could appeal under AS 44.62.560(a), while expressly leaving open the question as to "whether a non-party may also have a right to appeal . . . ." 602 P.2d at 439 n.19. We referred to the statutory definition of party as "the agency, the respondent, and a person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear in the proceeding." AS 44.62.640(b)(4) (emphasis in text of quoted opinion, 602 P.2d at 440). It is evident that we construed the word "appear" to have the same general meaning as "participate" because we went on to quote with approval the following language from Application of Bank of Rhame, 231 N.W.2d 801, 808 (N.D. 1975):

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6. AS 44.62.560(a) is set out in note 3, supra.

7. AS 42.05.551 is set out in note 2, supra.

(9)

> [A]ny person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a "party" to any proceedings for the purposes of taking an appeal from the decision.

602 P.2d at 440.

The City of Kenai meets the test set out in Bank of Rhame, namely it (1) was directly interested in the proceedings, (2) was factually aggrieved by the decision, and (3) participated in the proceedings.

The City's participation is established by its opposition to the tariff filing of Homer Electric. This opposition fills more than fifty pages of the administrative record and contains citations to legal authorities and extensive arguments. Because of the City's opposition, the tariff was suspended and a public hearing was scheduled. Although the City declined formal party intervenor status and did not present witnesses or additional arguments at the hearing, it was understood, as stated by the Commission's presiding officer, to have "nonetheless stressed its opposition . . . and incorporated earlier written comments," which were in fact considered by the Commission. The issues presented by Kenai in its opposition constituted the focus of the public hearing and of the Commission's order that followed. This is sufficient participation to achieve "party"

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status for the purpose of standing to appeal from an administrative adjudication.[8]

We hold that the City of Kenai has standing to appeal the Commission's decision. We therefore vacate the superior court's dismissal of the City's appeal and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

ORDER
Pursuant to Appellate Rules 508(e) and (f) (l), attorney fees of $ 750.00 are awarded to Appellant
the Appellant shall serve and file with this court an itemized and verified cost bill by 5-18-87. Entered by direction of Justice Matthews.
Dated: 5-6-87 Deputy: C Arnold

8. See also Mahuiki v. Planning Comm'n, 654 P.2d 874, 880 (Ha. 1982) (standing upheld where a person whose legitimate interest is injured by agency action participates as an adversary - appellants had submitted letters against proposed agency action which were received as part of record); Alfred I. duPont School Dist. v. Delaware Alcoholic Beverage Control Commission, 343 A.2d 600, 604 (Del. 1975) (under Delaware statute, when one becomes a party to the record, either by protest received into evidence or formal appearance in person or by representative, that person becomes formal "party to hearing"); compare Model State Administrative Procedure Act § 5-106, 14 U.L.A. (Supp. 1986) (a person to whom agency action is specifically directed, a person who was a party to agency proceeding, or a person otherwise aggrieved or adversely affected has standing to obtain judicial review of agency action).

Introduced: 3/3/87
Referred: Community & Regional
Affairs & Transportation

IN THE SENATE BY JOSEPHSON

SENATE BILL NO. 155

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the change, relocation, or removal of utility facilities incident to the construction of road or other projects by a municipality."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 29.10.200 is amended by adding a new paragraph to read:

(49) AS 29.35.075 (relocation of utility facilities).

* Sec. 2. AS 29.35 is amended by adding a new section to read:

Sec. 29.35.075. RELOCATION OF UTILITY FACILITIES. (a) If, incident to the construction of a road or other project, a municipality determines and orders that a facility of a utility subject to regulation under AS 42.05 that is located across, along, over, under, or within a right-of-way under its jurisdiction must be changed, relocated, or removed, the utility owning or maintaining the facility shall change, relocate, or remove it in accordance with the order. ~~The utility shall pay a share of the cost of the work required.~~ The order shall provide a reasonable time period for compliance. If the utility facility is not changed, relocated, or removed under the order, the facility becomes an unauthorized encroachment and may be disposed of by the municipality.

(b) The cost of change, relocation, or removal of a facility of a utility subject to regulation under AS 42.05 necessitated by municipal road or other project construction shall be allocated as provided in the permit, franchise, or other agreement with the municipality. If no specific allocation has been agreed to, the cost shall be borne by the municipality only if the facility has been placed in the

municipal right-of-way

(1) under a valid easement or permit that specifies the location of the facility and the facility is within two horizontal feet and one vertical foot of that location; or

(2) ~~before~~ the municipality ~~had~~ a system for granting easements or permits for utility facilities.

(c) In (b) of this section, "cost of change, relocation, or removal" means the entire cost incurred by a utility properly attributed to the change, relocation, or removal of a facility, less costs for improvements or upgrading not required by the change, relocation, or removal; if a facility is to be relocated and replaced with new equipment, there shall also be subtracted from the entire cost any salvage value derived from the old facility.

(d) This section applies to home rule and general law municipalities.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
3KN-85-00169 CI

CITY OF KENAI
v.
STATE OF ALASKA,
ALASKA PUBLIC UTILITIES COMMISSION

APPEAL OF ADMINISTRATIVE ORDER
OF THE ALASKA PUBLIC UTILITIES COMMISSION

AMENDED BRIEF OF APPELLANT

Timothy J. Rogers
City Attorney
City of Kenai
210 Fidalgo Street
Kenai, Alaska 99611

★ Fairbanks North Star Borough

809 Pioneer Road · P.O. Box 1267 · Fairbanks, Alaska 99707 · 907/452-4761

March 30, 1987

APR 3 1987

McKie Campbell
c/o Senator Arliss Sturgulewski
Pouch V
Juneau, AK 99811

Dear Mr. Campbell:

SUBJECT: SUGGESTED MODIFICATIONS TO LANGUAGE OF SB 155

Along the lines of our brief conversations in Juneau on Friday, March 27, I recommend the following language be considered as a substitute bill for SB 155, "An act relating to the change, relocation or removal of utility facilities incident to the construction of road or other projects by a municipality."

1. Add to page 1, line 20, after the word "compliance.":

   "The utility shall prepare an estimate of the work required by the order for review and approval by the municipality before beginning work."

2. Add to page 1, line 27, after the word "municipality.":

   "The cost shall not exceed the approved estimate unless agreed to by the municipality."

3. Remove the word "municipal" from page 2, line 1.

4. Add to page 2, line 3, after the word "horizontal":

   "feet and one vertical"

5. Add to page 2, line 6, after the word "permits":

   "in that right-of-way"

6. Add to page 2, line 6, after the word "facilities.":

   "and the facility is located such that it met all applicable codes, regulations, and statutes at the time of its installation."

I will immediately follow up these suggested wording changes in SB155 with a letter describing some of my concerns and the impetus for making these changes. Thank you for your attention to our suggestions in this matter.

Sincerely,

Clark R. Milne

Clark R. Milne
Manager
Division of Civil Engineering

cc: Pat Walsh, Special Assistant to the Mayor, FNSB

cm8-141

★ Fairbanks North Star Borough

809 Pioneer Road · P.O. Box 1267 · Fairbanks, Alaska 99707 · 907/452-4761

M E M O R A N D U M

TO: Dick Jackson, Administrator Director

THROUGH: Neil Kersten, Public Works Director

FROM: Clark Milne, Manager, Civil Engineering Division Clark Milne

DATE: March 30, 1987

SUBJECT: NEED FOR MODIFICATIONS TO SB155, "RELOCATION OF UTILITIES IN RIGHT-OF-WAYS"

To validate my letter which suggested changes to SB155 concerning municipalities (such as the FNSB) being responsible for paying utilities to remove or relocate existing utility facilities within right-of-ways, I would like to submit to you the comments below.

My first and foremost concern is that our FNSB utility permit system is quite young, having only been instituted on July 1, 1985. Thus, the majority of all utilities installed in road rights-of-way in the FNSB have been put in before our utility permit system was in effect, and the language of Section 29.35.075.(b)2 will probably be in effect the majority of the time. Thus, we will consistently be responsible for the costs of moving utility facilities in our rights-of-way. I believe this is inappropriate and not in the public's best interests, at least so far as the unrestricted wording of (b)2 imposes these costs on us.

Our experience in the Civil Engineering Division has been that the majority of the time when we require the removal or relocation of a utility facility from our right-of-way, it is due to a past failure of the utility to install the service line or facility properly in the first place. This includes both aerial crossings that are too low, buried lines that are too shallow, and utility poles that intrude too closely to the existing road shoulders so that necessary road widening (within the right-of-way) requires the relocation of an existing pole. To require us to pay for these oversights, under-designs, and inappropriate installations by the utility firms seems unconscionable. Thus, my suggested revision in the SB155 language (as noted in my letters to Linda Anderson and McKie Campbell, see attached), item no. 4, which would require that the utility firm have installed the affected facility properly, i.e. to the standards of the applicable code or regulation, in the first place.

The most common and expensive instances of this type of facility that must be moved are aerial crossings above the roadway which are currently at less than the minimum 18 foot required by national electrical code. It is our practice, and is supported by the common law, that the utility firm is wholly responsible for the costs of raising these substandard lines crossing our right-of-way to an appropriate, code/standard elevation above the road surface.

Similarly, we have had significant problems and expenses due to the relocation of telephone or power lines below the road surface. We have found that all too often a utility placed a line too shallowly in the right-of-way and a new road project thus uncovers and interferes with it. Again, national electric code requires that any power or telephone line must be buried at least 30" under the ground surface. If only this were the common condition of buried utility lines in the FNSB our troubles would be nearly over! Unfortunately, there are many instances in our road projects where buried utility lines are very often found to be at anywhere from 4" to 24" below the ground surface--thus, the road interference with minor improvements to the roadway.

In both of the cases noted above, SB155 would automatically give the utility firm a "reprieve" from having to pay for their illegal and substandard utility placement. Without actually calculating the exact expenses generated by utility relocation for FNSB projects in the last few years, I believe that as a rough estimate approximately 10% of our capital improvement monies for road improvement projects would go to utility relocation were SB155 to be passed in the form submitted by Senator Josephson.

Other concerns I have tried to deal with in my revised language for SB155 are evidenced in the other items noted in my letters of March 30. The first item deals with my concern that utility firms should work with the municipalities before beginning work on utility removal or relocation to assure that their field activities are cost-effective and solely done in an effort to replace or relocate the facility which is interfering with the legitimate uses of the road right-of-way. I fear circumstances where the utility could indiscriminately overcharge the municipality for unnecessary expenses, as well as situations where the replacement facility is a superior and improved product to that which is being replaced. Neither of these two concerns is addressed in SB155 as originally submitted.

Item no. 2 would tend to assure that the costs as discussed and approved by the utility and municipality before beginning work are indeed those reached during construction. I foresee reasonable incidences where the initial cost estimate is exceeded, but believe that the municipalities can negotiate with the utilities in a timely manner to increase those agreed upon estimates for valid, discernable reasons.

Item no. 3 was requested because I do not know what a "municipal right-of-way" is. In the Borough we only have public rights-of-way, some of which are included within service areas and thus subject to municipal maintenance efforts.

Item no. 4 addresses my concern that an often crucial dimension in the location of utility facilities is the exact depth or elevation of the line or pipe. I understand that many utility firms have extremely poor as-built records of the location of their facilities, but I believe this should be the utility's concern, problem and expense, not ours.

Item no. 5 deals with my concern that the existing FNSB utility permit system applies only to those rights-of-way within recognized road service areas. The revised language would read "before the municipality had a system for granting easements or permits in that right-of-way for utility facilities," which would eliminate the problem of us having to pay for facility relocations in rights-of-way not covered by a utility permit system such as ours because the permit system was restricted to rights-of-way within service areas. Thus, if a service area annexed new roads after the utility firm installed a facility (after July 1, 1985), and we later interfered with that facility with our transportation use of that road right-of-way, we would not be held responsible for the lack of our utility permit system, but rather the utility firm would be responsible for having to follow good practice and the" applicable codes, regulations and statutes" affecting that utility facility.

Finishing up with item no. 6 from my letter, I understand that it may be troublesome to do the research necessary to confirm what "codes, regulations and statutes "apply to the various situations we find in needing utility relocations in our rights-of-way, but it seemed to me to be the most just and fair dividing line when faced with paying for a utility relocation or not. I agree with the concept that if a utility firm acted within the applicable codes and standards of their industry and all applicable regulations and statutes within the State of Alaska, our dramatic modification of the use of a road right-of-way should include and require our payment for the relocation or removal of the affected utility facilities. It is interesting to note that I believe that I understand the utility's point of view of some of these costs and concerns. But I do not believe that they should be able to "end run" the existing common law and the common sense of justice inherent in having to pay for their own mistakes of the past.

For additional specifics or other questions, please feel free to contact me at ext. 351.

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TABLE OF CASES AND AUTHORITIES

CONSTITUTIONAL AND STATUTORY REFERENCES

Alaska Constitution, Article I, Section 18. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

AS 01.10.010. **Applicability of common law.** So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.

AS 09.55.290. **Jurisdiction.** Eminent domain proceedings may be commenced in the superior court.

AS 19.25.020. **Relocation of utilities incident to highway projects.** (a) If, incident to the construction of a highway project, the department determines and orders that a utility facility located across, along, over, under, or within a state right-of-way must be changed, relocated or removed, the utility owning or maintaining the facility shall change, relocate or remove it in accordance with the order. The order shall provide a reasonable time period for compliance.

(b) If the utility facility is not changed, relocated or removed in accordance with the order, the facility becomes an unauthorized encroachment and may be disposed of in accordance with AS 19.25.240 - AS 19.25.250. In addition, the owner of the facility shall indemnify the state for any amount for which the state may be liable to a contractor by reason of the encroachment.

(c) The cost of change, relocation, or removal necessitated by highway construction is a cost of highway construction to be paid by the state in accordance with AS 19.45.001(4), notwithstanding the terms or provisions of any existing permit, agreement, regulation or statute to the contrary.

(d) If requested by a municipality, the department shall implement this chapter by requiring to the maximum extent possible location underground of electric power transmission lines within the municipality.

AS 22.10.020. **Jurisdiction of the superior court.** (a) The superior court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters, including probate and guardianship of minors and incompetents.

(b) The jurisdiction of the superior court extends over the whole of the state.

(c) The superior court and its judges may issue injunctions, writs of review, mandamus, prohibition, habeas corpus and all other writs necessary or proper to the complete exercise of its jurisdiction. A writ of habeas corpus may be made returnable before any judge of the superior court.

(d) The superior court has jurisdiction in all matters appealed to it from a subordinate court, or administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

(e) An appeal to the superior court is a matter of right, but an appeal from a subordinate court may not be taken by the defendant in a criminal case after a plea of guilty, except on the ground that the sentence was excessive. The state has no right to appeal in criminal cases, except to test the sufficiency of an indictment or information or to appeal a sentence on the ground it is too lenient.

(f) An appeal to the superior court may be taken on the ground that a sentence of imprisonment of 90 days or more was excessive and the superior court in the exercise of this jurisdiction has the power to reduce the sentence. When a sentence is appealed by the state on the ground it is too lenient, the court may not increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

(g) In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

(h) The superior court, in an action for divorce, separation, or child support, affecting inalienable stock in a corporation organized under 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act), may order the stock transferred to the spouse, a child, or a guardian or custodian for a child, but may not order it sold on the open market or transferred to other persons.

(i) The superior court is the court of original jurisdiction over all causes of action arising under the provisions of AS 18.80. A person who is injured or aggrieved by an act, practice or policy which is prohibited under AS 18.80 may apply to the superior court for relief. The person aggrieved or

injured may maintain an action on behalf of that person or on behalf of a class consisting of all persons who are aggrieved or injured by the act, practice or policy giving rise to the action. In an action brought under this subsection, the court may grant relief as to any act, practice or policy of the defendant which is prohibited by AS 18.80, regardless of whether each act, practice or policy, with respect to which relief is granted, directly affects the plaintiff, so long as a class or members of a class of which the plaintiff is a member are or may be aggrieved or injured by the act, practice or policy. The court may enjoin any act, practice or policy which is illegal under AS 18.80 and may order any other relief, including the payment of money, that is appropriate.

AS 29.48.030 Municipal facilities and services. (a) A municipality may exercise the powers necessary to provide the following public facilities and services:

(1) streets and sidewalks;
(2) sewers and sewage treatment facilities;
(3) harbors, wharves, and other marine facilities;
(4) watercourse and flood control facilities;
(5) health services and hospital facilities;
(6) cemeteries;
(7) police protection and jail facilities;
(8) cold storage plants;
(9) telephone systems;
(10) light, power and heat;
(11) water;
(12) transportation systems;
(13) community centers;
(14) libraries, visual or performing arts centers, or museums;
(15) recreation facilities;
(16) airport and aviation facilities;
(17) garbage and solid-waste collection and disposal service and facilities subject to AS 29.48.033;
(18) fire protection service and facilities, not in conflict with AS 18.70.075, but not limited to AS 18.70.075;
(19) parking and parking facilities;
(20) housing and urban renewal, rehabilitation and development;
(21) preservation, maintenance and protection of historic sites, buildings and monuments;
(22) consumer protection;
(23) emergency medical services and facilities.

(b) First and second class boroughs may exercise the powers conferred by (a) of this section or AS 29.48.033(a) only after they have been assumed in the manner required under AS 29.33.250 - 29.33.290 for areawide exercise or in the manner required under AS 29.38 for exercise in the borough area outside cities, or are

conferred by AS 29.48.020 for exercise in the borough area outside cities. However, as to powers conferred under (a)(12) of this section, exercise of the powers areawide or in the borough area outside cities is at the option of the borough and is not subject to those restrictions on acquisition of additional borough powers. With respect only to boroughs which on September 10, 1972 are not exercising powers conferred under (a)(12) of this section on an areawide basis, objection which a city may raise to areawide exercise of the powers by a borough shall be reviewed by the Alaska Transportation Commission. The commission shall decide whether exercise of the powers exclusively by the borough areawide is to be approved as in the public interest under the particular facts and circumstances at issue.

AS 29.48.035. Regulatory powers. (a) A municipality may regulate the operation and use of its public rights-of-way, public facilities and services. It may also regulate the following:

(1) vehicle, pedestrian, and other traffic, and licensing and operation of motor vehicles, including snow vehicles and off-highway vehicles, and operators not inconsistent with AS 28.01.010;

(2) licensing of drivers of taxicabs, for-hire automobiles, motor buses, or other vehicles for the transportation of passengers or baggage not inconsistent with AS 28.01.010;

(3) vehicle parking not inconsistent with AS 28.01.010;

(4) transportation fares;

(5) licensing, impounding and disposition of animals;

(6) selling of food;

(8) abandoned property;

(9) dangerous and disorderly conduct;

(10) alcoholic beverages as provided by AS 04.21.010;

(11) recreational devices as provided by AS 05.20.100;

(12) control of insects and rodents;

(13) offering for sale, exposure for sale, sale, use, or explosion of fireworks;

(14) building, housing and related codes, which may be provided by cities within cities or, in the manner required in (b) or (c) of this section, by first or second class boroughs in the borough area outside cities or areawide, subject to the following:

(A) exceptions to requirements of the codes may be made in the codes among other reasons, in order to provide for the preservation, maintenance and protection of historic sites, buildings and monuments;

(b) codes may not be used to prohibit or restrict the development or use of solar or wind energy unless the assembly or council finds that the development or use of solar or wind energy would endanger the health or safety of the public;

(15) condemnation and abatement of public nuisances and hazards;

(16) garbage and solid-waste collection and disposal;

(17) water pollution control;

(18) air pollution control as provided in AS 46.03.140 -46.03.230;

(19) other powers and functions affecting the general health, safety, well-being and welfare of its inhabitants;

(20) licensing of day care facilities.

(b) First and second class boroughs may exercise the powers conferred by (a) of this section only after they have been assumed in the manner required under AS 29.33.250 - 29.33.290 for areawide exercise or in the manner required under AS 29.38 for exercise in the borough area outside cities or are conferred by AS 29.48.020 for exercise in the borough area outside cities. However, as to powers conferred under (a)(5), (17), (18) and (20) of this section, exercise of the powers areawide or, as to (a)(5), (17) and (20), in the borough area outside cities is at the option of the borough and is not subject to those restrictions on acquisition of additional borough powers. Upon adoption of a borough ordinance to provide for areawide exercise of the powers specified, no home rule or general law city within the borough may exercise the powers, unless the borough ordinance provides otherwise or the borough by subsequent ordinance ceases to exercise the power.

(c) The provisions of (b) of this section notwithstanding, boroughs which on September 10, 1972 are exercising building, housing or related code powers, except as those code powers relate to flood control, on an areawide basis or in the borough area outside cities shall, subject to acquisition of the powers on an areawide basis by transfer or election as provided in (b) of this section, exercise the powers in the borough area outside cities and, upon agreement of the city and borough, within any city, home rule or otherwise, in which the powers are being exercised on September 10, 1972; if the city does not agree to continue borough exercise of the powers within the city, the city shall exercise the powers within the city.

AS 42.05.141. General powers and duties of the commission. (a) The Alaska Public Utilities Commission may

(1) regulate every public utility engaged or proposing to engage in such a business inside the state, except to the extent exempted by AS 42.05.711, and the powers of the commission shall be liberally construed to accomplish its stated purposes;

(2) investigate, upon complaint or upon its own motion, the rates, classifications, rules, regulations, practices, services and facilities of a public utility and hold hearings on them;

(3) make or require just, fair and reasonable rates, classifications, regulations, practices, services and facilities for a public utility;

(4) prescribe the system of accounts and regulate the service and safety of operations of a public utility;

(5) require a public utility to file reports and other information and data;

(6) appear personally or by counsel and represent the interests and welfare of the state in all matters and proceedings involving a public utility pending before an officer, department, board, commission or court of the state or of another state or the United States and to intervene in, protest, resist, or advocate the granting, denial or modification of any petition, application, complaint or other proceeding;

(7) examine witnesses and offer evidence in any proceeding affecting the state and initiate or participate in judicial proceedings to the extent necessary to protect and promote the interests of the state.

(b) The commission shall perform the duties assigned to it under AS 44.83.162.

(c) In the establishment of electric service rates under this chapter the commission shall promote the conservation of resources used in the generation of electric energy.

AS 42.05.251. **Use of streets in cities and boroughs.** Public utilities have the right to a permit to use public streets, alleys and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires. A dispute as to whether fees, terms, conditions or exceptions are reasonable shall be decided by the commission. The commission may require a utility to add the amount of any permit fee paid as a pro rata surcharge to its bills for service rendered at locations within the boundaries of any city or borough which requires payment of a permit fee.

AS 42.05.551. **Review and enforcement.** (a) All final orders of the commission are subject to judicial review in accordance with AS 44.62.560 - 44.62.570 of the Administrative Procedure Act.

(b) If an appeal is not taken from a final order of the commission, the commission may apply to the superior court for enforcement of this chapter, the regulations adopted under it and the orders of the commission. The court shall enforce the order by injunction or other process.

AS 42.05.641. **Regulation by municipality.** The commission's jurisdiction and authority extend to public utilities operating within a city or borough, whether home rule or otherwise. In the event of a conflict between a certificate, order, decision or regulation of the commission and a charter, permit, franchise, ordinance, rule or regulation of such a local governmental entity, the certificate, order, decision or regulation of the commission shall prevail.

AS 44.62.560. Judicial review. (a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. Except as otherwise provided in this section, the notice of appeal shall be filed within 30 days after the last day on which reconsideration can be ordered, and served on each party to the proceeding. The right to appeal is not affected by the failure to seek reconsideration before the agency.

(b) The complete record of the proceedings, or the parts of it which the appellant designates, shall be prepared by the agency. A copy shall be delivered to all parties participating in the appeal. The original shall be filed in the superior court within 30 days after the appellant pays the estimated cost of preparing the complete or designated record or files a corporate surety bond equal to the estimated cost.

(c) The complete record includes (1) the pleadings, (2) all notices and orders issued by the agency, (3) the proposed decision by a hearing officer, (4) the final decision, (5) a transcript of all testimony and proceedings, (6) the exhibits admitted or rejected, (7) the written evidence, and (8) all other documents in the case.

(d) Upon order of the superior court, appeals may be taken on the original record or parts of it. The record may be typewritten or duplicated by any standard process. Analogous rules of court governing appeals in civil matters shall be followed where this chapter is silent, and when not in conflict with this chapter.

(e) The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action.

JURISDICTIONAL STATEMENT

The administrative order being appealed, Order No. 7, U-83-74, was entered on the eleventh day of January, 1985 by the Alaska Public Utilities Commission. The Superior Court has jurisdiction to review such decisions pursuant to AS 44.62.560, which is made applicable to APUC Orders by AS 42.05.551. The City of Kenai received Order No. 7 January 23, 1985 and filed a Notice of Appeal February 14, 1985.[1]

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[1] Parties to the Case

City of Kenai
210 Fidalgo Street
Kenai, Alaska 99611

Alaska Public Utilities Commission
c/o M[illegible]igura, Assistant Attorney General
O[illegible]e Attorney General
1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501

Matanuska Telephone Association, Inc.
c/o Andrew E. Hoge, Esq.
Hoge & Lekisch
437 "E" Street, Suite 500
Anchorage, Alaska 99501

Homer Electric Association, Inc.
c/o Charles R. Baldwin, Esq.
P.O. Box 4210
Kenai, Alaska 99611

STATEMENT OF ISSUES

In an excrutiatingly verbose Order, somewhat reminiscent of the Tower of Babel[2], the Alaska Public Utilities Commission (APUC) has invalidated "[t]he practice of municipalities directing unreimbursed relocations of utility facilities laid in municipal rights-of-way." Record page 319. Utilities are directed to relocate their facilities when public construction necessitates it. The common law requires utilities to bear this expense, but the APUC has declared, in addition to other things not before it, that a refusal by municipalities to pay the utility relocation expenses is unreasonable within the contemplation of AS 42.05.251. The APUC Order effectively abrogates the common law rule on liability for relocation expenses.

The validity of the APUC action, and all points of appeal, are dependent upon the resolution of three central issues: The jurisdiction of the APUC; the validity of the common law rule in Alaska; and the scope of the APUC's authority under AS 42.05.251. In accord with the Statement of Points on Appeal filed by Appellant, this Brief will therefore address the following issues: 1.) APUC jurisdiction; 2.) Validity of the common law rule under Alaska case law and statute; 3.) APUC duties under

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2 "Come, let us go down, and there confound their language, that they may not understand one another's speech." Genesis 11:7.

AS 42.05.251 and conflict with the common law; 4.) APUC authority under AS 42.05.251; 5.) Whether and how Art. I, Sec. 18 of the Alaskan Constitution is applicable; 6.) Municipal proprietary interest in public rights-of-way; and 7.) The correct characterization of relocation expenses.

STATEMENT OF THE CASE

Homer Electric Association (HEA), by contract with the City of Kenai (City), assumed control of certain municipal utility facilities within the City. Subsequent street construction required relocation of utility facilities and the City refused to reimburse HEA for that expense. HEA sought declaratory relief before the APUC to resolve this dispute according to the contract terms. The APUC declined to hear the contract dispute on jurisdictional grounds, but encouraged HEA to file for a special tariff before the APUC to recover the expense either through a surcharge pursuant to AS 42.05.251 or through general rates. Record Supplement.

HEA then filed a tariff revision (TA 35-32) which provided for a surcharge to recover all costs associated with the relocation of electric facilities at a municipality's request when those costs are not paid by the municipality. Record page 1. The City responded as an interested party expressing opposition to a surcharge of City residents only, citing the common law rule that those costs be borne by utilities. Record

page 31. The APUC suspended the tariff revision and called a public hearing on the proposal, U-83-74 Order No. 1, requesting the City to intervene. Record page 87. The Order identified five questions to be considered which related to the method of allocating relocation expenses to consumers.

The City declined to accept intervenor status, but reiterated its position. Record page 94. On November 17, 1983, a public hearing was held on U-83-74 (consolidated with U-83-79). Record page 139. A decision, Order No. 7, U-83-74, issued on January 11, 1985. Record page 270. It is this Order that Appellant addresses. The Order went beyond a determination of how or if the relocation expenses should be recovered by the utility to adopt a rule that has several effects: It abolishes the common law rule as to relocation expenses in Alaska; it denies municipalities any interest in their rights-of-way that would support use fees charged to utilities; it invalidates existing and future franchise agreements between municipalities and utilities that provide for use fees; it requires all municipalities to compensate utilities for relocation expenses any time a municipality is engaged in a "proprietary activity," defined by the APUC to include most public improvements within rights-of-way owned by the public; and it makes no distinction between economically regulated utilities and the cable television industry which is economically unregulated.

I

The APUC Lacks Jurisdiction To Adjudicate Disputes Over Relocation Expenses Between A Utility And A Municipality Incident To Construction Activity Within A Right-Of-Way Owned By The Municipality

As stated in Order No. 4 this is the first occasion that the Commission "...has considered the scope of its regulatory powers under AS 42.05.251 over municipal activities affecting utilities."[3] Record page 270. This occasion was presented through a request by a utility to surcharge Kenai ratepayers to cover relocation expenses which the City of Kenai refused to pay pursuant to the common law rule.[4] The APUC went far beyond determining which method of recovering this utility expense from

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3 AS 42.05.251. Use of streets in cities and boroughs. Public utilities have the right to a permit to use public streets, alleys and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires. A dispute as to whether fees, terms, or conditions or exceptions are reasonable shall be decided by the commission. The commission may require a utility to add the amount of any permit fee paid as a pro rata surcharge to its bills for service rendered at locations within the boundaries of any city or borough which requires payment of a permit fee.

4 "Under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities." Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. of Virginia, U.S. , 78 L.Ed. 2d 29, 34, 104 S.Ct. , (1983).

ratepayers would be the appropriate method, or whether the utility's claim for the amount requested was justified. The APUC has determined, erroneously, that its jurisdiction includes the authority to decide whether a common law rule governing the legal relationship between a utility and a municipality and their respective interests in the use of a public right-of-way owned by the municipality has been impliedly abrogated by Alaska statutory and case law, or should be expressly abrogated by the APUC's own regulations.

Appellant's jurisdictional argument is divided into three basis: First, case law has limited APUC jurisdiction to exclude the power to adjudicate property rights and common law responsibilities in municipal rights-of-way applicable to a municipality and a utility; second, the statute in question only requires the APUC to determine reasonableness of fees, terms or conditions a municipality places on the utility's permit to use a municipal right-of-way, not to rule on the effect or validity of the common law rule or whether a taking of property has occurred; and third, AS 42.05.251 does not give the APUC broad equitable powers to independently appraise the reasonableness of all municipal actions affecting regulated utilities.

A. Alaska Case Law Has Limited APUC Jurisdiction To Exclude The Power Exercised.

The issue of whether the APUC has authority to adjudicate disputes over construction activity due to improvements within a municipal right-of-way has already been addressed by the Alaska

Supreme Court. This decision, which held that the APUC has no such authority, is Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972), overruled on other grounds, 595 P.2d 629. In that case the City-owned utility needed to use a right-of-way owned by the Borough to service a subdivision within the City. The Borough refused to grant the City a permit to use the right-of-way, but the City installed its facilities despite the refusal. The Borough sought an injunction in Superior Court. The parties later agreed to an installation plan, thereby settling the immediate problem; but since the dispute over control of construction within the rights-of-way was a continuing one, they submitted the following question to the Superior Court: Whether the Borough had the authority to regulate the use of its rights-of-way, including construction in those rights-of-way. 504 P.2d at 1029.

The Superior Court referred the matter to the APUC, citing primary jurisdiction in the APUC as its reason, and the Borough appealed, claiming that the APUC lacked jurisdiction to adjudicate that issue. The Supreme Court noted that the "...resolution of this issue ... depends upon the nature and scope of the PUC's jurisdiction." 504 P.2d at 1032. The Court identified AS 42.05.141 as the enabling act defining the general powers and duties of the APUC. In holding that the APUC lacked jurisdiction to determine the matter, the Court stated:

> The essence of the administrative power conferred upon the PUC is regulatory; the Commission is empowered to set rates, promulgate regulations, collect information, process complaints against utilities and the like. The statutory framework, however, does not grant unlimited adjudicatory

> authority to the PUC. The agency is not empowered to decide disputes between municipalities over the control of construction activities within rights-of-way belonging to one of the litigants....By stipulation, the dispute concerns the Borough's authority to control work and other activities which take place within the Borough's rights-of-way. In short, the Alaska Public Utilities Commission Act simply does not contemplate the establishment of an administrative body with the authority to adjudicate such disputes. 504 P.2d at 1033, 1034.

There are only two differences between the present case and Greater Anchorage: Here the utility is not owned by a city, and here the dispute over construction concerns liability for relocation costs rather than municipal authority to prohibit the construction.

The similarities between Greater Anchorage and the present dispute, however, easily place the present dispute within the holding of that case: the dispute concerns construction activity within a public right-of-way. (504 P.2d at 1034); the municipal owner of the right-of-way is refusing to accede to certain construction demands of the utility; the dispute centers on the municipality's police power to regulate construction within and the use of its own right-of-way; and the APUC is adjudicating a dispute over construction regulation and liability under the common law rather than administratively regulating utility operations and rates. The Supreme Court expressly held that the APUC lacked such adjudicatory jurisdiction in Greater Anchorage, and that holding controls here. 504 P.2d at 1035.

While Greater Anchorage does not specifically address APUC jurisdiction over relocation expense disputes, that issue is addressed in a case very similar to the decision on appeal,

General Telephone Company of the Northwest Inc. v. City of Bothell, 693 P.2d 215 (Wash. App. 1985). As in Alaska, utilities are guaranteed a right to use municipal rights-of-way by state law in Washington. The City of Bothell directed the utility to relocate its facilities at its own expense for public safety reasons. This was in accord with the franchise agreement between Bothell and the utility. The utility relocated its facilities, but sought a tariff to recover this expense from City residents. The Washington Utilities and Transportation Commission granted the tariff, pre-empting municipal authority to regulate its rights-of-way through a franchise agreement.

The trial court upheld the tariff, but the appellate court reversed. The reasoning of the decision, that the utility commission is a regulatory agency lacking such adjudicatory jurisdiction, sounds very much like Greater Anchorage:

> [I]n our view the Washington Utilities and Transportation Commission (WUTC) has no authority to allow General to enact a tariff which changes the conditions of General's franchise and forces the city to pay the cost of undergrounding the company's facilities.
>
> The legislature conferred upon the WUTC the power to regulate the rates, services, facilities, and practices of telephone companies. ...The legislature also gave cities the power to grant franchises to telephone companies. ...Bothell's franchise to General is a form of contract between the city and the telephone company. ...It may only be abrogated by the WUTC if it affects rates or services to the general public; if the franchise concerns proprietary rights of the City granting the franchise, the WUTC has no power. 693 P.2d 218.

The City of Bothell was relying upon a franchise agreement when it directed the utility to relocate at its own expense. In the present case, the City of Kenai relied upon the common law. In both cases, the utility commission in question exceeded its regulatory jurisdiction to adjudicate relocation disputes.

A similar result has been reached by Pennsylvania courts. The Pennsylvania Public Utilities Commission has general regulatory authority "...to determine the reasonableness of utility rates and rate structures; and the adequacy, efficiency, and safety of utility service." Equitable Gas Company v. Pennsylvania Public Utility Commission, et al, 442 A.2d 419, 422 (Pa. 1982).

The general authority of the Pennsylvania Public Utilities Commission is therefore the same as that of the APUC as outlined by Greater Anchorage. But this regulatory jurisdiction does not extend to adjudication of relocation disputes between a utility and a municipality. "This argument has been rejected in the context of cases governed by the common law rule; that is, cases where a utility is merely required to move its facilities from one to another portion of a public highway right-of-way." Equitable Gas, 442 A.2d at 422; Borough of Highspire et al v. Pennsylvania Power and Light et al, CCH, Utilities Law Reports, §23,733 (Pa. 1982).

The APUC is a regulatory agency with limited authority over rates and general operations of utilities in relation to consumers. It is not an adjudicative body empowered to rule on relocation cost disputes arising under the law or through contract.

B. Jurisdiction To Adjudicate The Present Issue Is Unnecessary For The APUC To Perform Its Duties Imposed By AS 42.05.251.

Greater Anchorage does not address AS 42.05.251, though the statute was in effect at the time of that decision. Order No. 7 relies on AS 42.05.251 as authority for the APUC's action. The reasoning is that the common law rule is a fee, term or condition regulating the use of a municipal right-of-way and the APUC has jurisdiction to determine the reasonableness of any such fee, term or condition affecting the utility's right to use the public right-of-way granted by the statute. Record page 281.

There can be no doubt that municipalities retain some regulatory authority, as yet undefined, over the use of its rights-of-way by utilities that is beyond APUC authority to review for reasonableness under AS 42.05.251. B-C Cable v. City and Borough of Juneau, 613 P.2d 616 (Alaska 1980). Appellant contends that construction expense liability under the common law rule is within the municipal regulatory authority that is beyond APUC review under the statute.

The issue addressed in B-C Cable concerned the validity of a franchise agreement entered into between a utility and a municipality prior to the adoption of the Alaska Public Utilities

Act (APUCA). The agreement in part required the utility to pay a three percent franchise tax to the municipality.[5] After adoption of the Act, the utility refused to comply with the agreement, contending that the APUCA pre-empted municipal regulation and voided existing franchise agreements. Summary judgment was granted to the municipality and the utility appealed. On appeal, the utility maintained "...that the APUC Act is complete and comprehensive in its regulation of public utilities and leaves nothing for a city to regulate except its public streets," citing AS 42.05.251 and AS 42.05.641 as the pre-emptive legislation. 613 P.2d at 618.

The Supreme Court disagreed: "While the AP[illegible]ct pre-empts a large portion of the regulatory authority of municipalities over utility companies, it does not pre-empt all such authority." Id. The court identified the authority of the APUC as including review for the reasonableness of the franchise fee, but not for the right of a municipality to assess a fee in the first place. 613 P.2d at 619. Thus there is some regulatory authority that a municipality has over its own rights-of-way even under AS 42.05.251. Though B-C Cable does not define the scope of authority reserved to municipalities, at a minimum that authority is the authority to govern construction activity within its own rights-of-way consistent with Greater Anchorage.

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5 The court construed all franchise agreements, whether arising from an ordinance or a franchise permit, as being in the nature of a contract. This position is in accord with the weight of authority. B-C Cable, 613 P.2d at 619 and cases cited.

The effect of AS 42.05.251 is quite simply to give utilities a right to a permit to use the municipal rights-of-way upon payment of a fee, subject to reasonable terms and conditions on that use imposed by the city. The limited authority given to the APUC is to determine the reasonableness of the fee, term, or condition and to allow a surcharge to recover the fee. It is unnecessary for the APUC to adjudicate the validity of the common law rule on relocation expenses to perform its duties under AS 42.05.251.

As an administrative commission, the APUC has no inherent authority. Rutter v. State, 668 P.2d 1343, 1349 (Alaska 1983). The only authority the APUC has is that which is expressly allowed or which is impliedly necessary to perform its duties. State, Dept. of Labor, etc. v. U. of Alaska, 664 P.2d 575 (Alaska 1983). AS 42.05.251 simply refers to how much a municipality may assess as a fee, and to the reasonableness of permit terms and conditions relating to such things as supervision, construction standards, or placement of the utility facilities within the right-of-way. Since it is unnecessary for the APUC to adjudicate disputes over construction liabilities in municipal rights-of-way under the common law to perform its duties under AS 42.05.251, the APUC has exceeded its statutory jurisdiction in doing so. Id; Borough of Highspire, CCH Utilities Law Reports, §23,733.02 (1982).

It is likewise unnecessary for the APUC to adjudicate taking issues under Art. I, Sec. 18, of the Alaska Constitution to perform its duties under AS 42.05.251. Order No. 7 analyzes the application of the common law as resulting in a taking under the Alaska Constitution. Record page 306. Any utility claim that its property was damaged or taken would clearly have to be heard in Superior Court, not before the APUC. The Superior Court alone has such jurisdiction. AS 22.10.020; AS 09.55.290.

C. The APUC Has Exceeded Its Jurisdiction Under AS 42.05.251 To Act In Equity.

Aside from reviewing the case law, statutory requirements or constitutionality of the common law rule, the APUC relied on an alternative basis for its adjudicatory authority to rule on the reasonableness of the common law rule. That alternative basis is a purported equitable authority granted under AS 42.05.251 to review any municipal action affecting utilities for reasonableness. Record pages 300-302. The APUC determined that the common law "...is unreasonable as placing an inequitable or unduly discriminatory burden on a utility's ratepayers to finance public improvements." Order No. 7, p.32. This finding was not a constitutional decision, but rather was based "... on the application of the discretion conferred on the Commission in AS 42.05.251 to independently appraise the reasonableness of municipal actions affecting regulated utilities." Record page 302.

Appellant contends that AS 42.05.251 confers no equitable authority whatsoever on the APUC to review the reasonableness of any municipal action affecting regulated utilities beyond the discretion to review the reasonableness of the amount of permit fees charged by a municipality, or the reasonableness of terms, conditions or exceptions that a municipality imposes on a utility in the actual physical placement of its facilities within the public right-of-way through a permit. "Administrative agencies are creatures of statute, deriving from the legislature the authority for the exercise of any power they claim." Rutter v. State, 668 P.2 at 1343, 1349 (Alaska 1983). The power conferred on the APUC is expressly defined under AS 42.05.251 and needs no expansion by implication. State, Dept. of Labor, Etc., v. U. of Alaska, 664 P.2d 575, 579 (Alaska 1983). The APUC lacks the sweeping discretionary jurisdiction it claims under AS 42.05.251.

II

Validity Of The Common Law Rule As To Relocation Expenses In Alaska

As pointed out in the Order, the issue of the validity of the common law rule is one of first impression in Alaska, though there is ample case law from other jurisdictions. The case law is uniform in opinion. The issue of the validity of the common law is a question of law. The appropriate standard of review is

therefore the substitution of judgment standard. Earth Resources Co. v. State Department of Revenue, 665 P.2d 960, 965 (Alaska 1983).

The rule is stated in Michigan Bell Telephone Co. v. City of Detroit, 308 N.W. 2d 608, (Mich. App. 1981):

> At common law, and in most recent cases to consider this issue, the right of the public utility to use public streets is subject to the right of the local government to require the utility to relocate its lines and facilities at its own expense when made necessary by considerations of public health and welfare (citations omitted).

See also McQuillin's §§34.74, 34.74a. The basis of this rule is generally recognized as being the police power. El Paso Natural Gas Co. v. State of Arizona, 662 P.2d 157, 158 (Ariz. 1983);New York Telephone Co. v. City of New York, 466 N.Y.S. 2d 56, 58 (N.Y. 1983); McQuillin's §§30.39, 34.74. The interest that a utility acquires in the right to use a municipal right-of-way remains subordinate to the municipality's exercise of the police power for the public health and safety. Urban Renewal Agency of the City of Beaverton v. Pacific Northwest Bell Telephone Co., 542 P.2d 908, 911-912 (Or. App. 1975); McQuillin's §34.74. The fact that a utility operates under a franchise granted by either the municipality or the state does not relieve the utility from application of this rule. Michigan Bell Telephone Co., 308 N.W. 2d at 610; Gen. Tel. Co. of Northwest, 693 P.2d at 217.

The common law rule can be modified in two ways: express legislative action, or contract agreement pursuant to appropriate municipal authority to do so. Pennsylvania Gas & Water Co. v. Nenna & Frain Inc., 467 A.2d 330, 334 (Pa. 1983); McQuillin's

§34.74a. Only the legislative action method is involved here. The City of Kenai has consistently taken the position that the utilities, with the help and guidance of the APUC, are attempting to do through an administrative order that which they could not accomplish through the state legislature: abolish the common law. Record Supplement. The acrobatic semantics that the reader is dragged through when reading the Order attempts to circumvent the fact that the legislature has refused to abolish the common law rule.

The APUC Order reasons that the legislature and judiciary in Alaska may have impliedly rejected the common law rule. Record pages 302-305.[6] There is, however, no case law authority found by Appellant that recognizes an implied modification of the common law rule. Rather, any legislative action that precludes the municipality from exercising its police power pursuant to the common law rule must be express:

> The reasonable construction ... is to assume that the people are not to be burdened with any heavier expense than necessity requires, and that to relieve the public service corporations having franchises in the streets of their common-law liabilities and to pass them over to the taxpayer can only be accomplished by the express direction of the Legislature. Southern California Gas Co. v. City of Los Angeles, 329 P.2d 289, 293 (Ca. 1958) cert. den. 359 U.S. 907, 79 S. Ct. 583, 3 L.Ed. 2d 572 (1959), quoting Transit Commission v. Long Island R. Co., 171 N.E. 565, 568 (N.Y.), and citing New York City Tunnel Authority v. Consolidated Edison Co., 68 N.E. 2d 445, 448-449 (N.Y. 1946).

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6 After musing over the B-C Cable decision and the implied rejection of franchise authority, the APUC determined that "...premature prophylactic abrogation of franchising authority could have unintended consequences." Record page 305. Appellant agrees with the APUC that premature prophylactic abrogation is a problem.

See also McQuillin's, §§ 34.74, 34.74a; East Bay Municipal Utility District v. Richmond Redevelopment Agency et al, 142 Cal. Rptr. 584, 589 (1974); Connecticut Railway and Lighting Co. et.al. v. New Britain Redevelopment Commission, 287 A.2d 362, 366 (Conn. 1971): "There can be no doubt that in the absence of express statutory authority a utility is not entitled to reimbursement for its expense in relocating its facilities located in public highways."

Cases which have recognized a legislative modification of the common law rule have limited the modification strictly to those situations expressly provided for in the statute. These cases typically involve urban renewal or federal highway construction statutes that expressly require a municipality or state to pay all or some portion of a utility's relocation expenses. See, for example AS 19.25.020; City of Columbus v. Indiana Bell Telephone Co., 281 N.E. 2d 510, 513 (Ind. 1970):

> Nothing in this opinion should be construed as an attempt to alter the common law right of the city to subordinate the utility's interest to an exercise of the police power in any other setting than urban renewal. It is because of the expressed legislative intention and the nature of urban renewal that this exception has been established. Quoting City of Center Line v. Michigan Bell Telephone, 182 N.W. 2d at 772 (Mich. 1970).[7]

Where the statutes and contracts are silent as to the relocation expenses state judicial decisions have refused to find any implied responsibility on the part of the municipality to pay

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7 Other case examples of this principle are Opinion of the Justices, 132 A.2d 613 (N.H. 1957); Missouri Pacific Railroad Co. v. City of Topeka, 518 P.2d 72 (Kan. 1974); South Central Bell Telephone Co. v. City of Chattanooga, 578 S.W.2d 950 (Tenn. 1978).

these expenses incurred by the utility. So. Cal. Gas. Co. v. City of L.A.; Transit Com. v. Long Island R. Co.; Conn. Railway and Lighting Co. et.al. v. New Britain Redevelopment Comm., supra. Any doubtful provision as to the relocation expenses should be construed in favor of the public. Urban Renewal Ag. of the City of Eugene v. Pacific Northwest Bell Telephone Co., 542 P.2d 908, 912 (Or. App. 1975).

The United States Supreme Court, in an 8-0 decision, has recently applied this rule of construction to federal statutes that identify "businesses" and "displaced persons" entitled to certain relocation expenses. The Court refused to allow utility relocation expenses to be impliedly included within those relocation expenses reimbursed under the statute. Rather, the court held that the common law rule was not abrogated because the legislative intent to do so was not expressed. Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Telephone Co. of Virginia, U.S. , 78 L.Ed. 2d 29, 34, 104 S.Ct. (1983).

The common law rule of the exercise of a municipality's police power in this situation is thus well established and quite clear. The city may direct a utility to relocate its facilities within municipal rights-of-way at the utility's own expense when relocation is necessary for the construction of improvements for the public health and safety. Any action of the APUC invalidating this rule of law must be based upon express statutory directive. The statute relied on by the APUC to invalidate the common law

rule is AS 42.05.251. This statute contains no express language modifying or invalidating the common law rule. Appellant's claim of error, then, is that the common law has not been expressly invalidated by the legislature through statute, which is the sole manner in which this police power may be restricted (no implied modification), and the APUC erred in finding any such modification has occurred.

III

APUC Responsibilities Under As 42.05.251 Do Not Conflict With the Common Law Rule

AS 42.05.251 grants utilities the right to a permit and grants municipalities the right to a fee.[3,8] It authorizes the APUC to determine the reasonableness of any fee, term, condition or exception a municipality includes in the permit. The fee, term, condition or exception language in the statute is not inclusive of all rules or laws that pertain to the legal relationship between a municipality and a utility in the use of a right-of-way. B-C Cable v. City and Borough of Juneau, 613 P.2d 616 (Alaska 1980). That language refers only to the permit terms

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8 No fee was charged HEA by the City for the use of the right-of-way, and no permit was issued. The City and HEA have a contract for the takeover of certain utility facilities which is currently in litigation as to relocation expense liability. At the APUC's urging, HEA has moved to amend its complaint in that case to state a cause of action for recovery on the basis of the APUC Order. Record page 317.

that a municipality imposes on the utility. Proper construction of this statute demonstrates that there is no conflict between the common law rule and AS 42.05.251 at all.

Review of the construction given to a statute by an administrative commission requires application of the independent judgment standard by which the court makes its own determination of the meaning of the statute. Wentland v. Employment Sec. Div., 671 P.2d 1285 (Alaska 1983); National Bank of Alaska v. State Department of Revenue, 642 P.2d 811 (Alaska 1982). The construction given this statute by the APUC is that it authorizes the commission to review any municipal action affecting a regulated utility for reasonableness. Record page 302. Here a reliance on the common law is deemed a "municipal action" or "practice" affecting a utility. Aside from the fact that reliance on the law is not an unreasonable action or practice of a municipality, there is no conflict between the common law rule and AS 42.05.251. The common law rule, therefore, cannot be unreasonable under the statute.

The common law rule on relocation expenses does not curtail or restrict a utility's right to the use of a municipal right-of-way which is granted by the statute. It simply subordinates the utility's right of use to the police power of the municipality. Vermont Gas Systems Inc. v. City of Burlington, 286 A.2d 275, 277 (Vt. 1971); So. Cal. Gas Co. v. City of L.A., 329 P.2d 289, 291 (Ca. 1958). A rule of common law regulating activity between a utility and a municipality not

in conflict with statute remains in force. AS 01.10.010. This construction has been applied in Alaska in regard to franchise provisions and APUC regulatory activity, and the same construction should be given in this situation:

> While the APUC Act pre-empts a large portion of the regulatory activity of municipalities over utility companies, it does not pre-empt all such authority. ...As we read AS 42.05.251 and AS 42.05.641, provisions of a municipal franchise not in actual conflict with APUC regulatory activity remain in force. B-C Cable Co. Inc. v. City and Borough of Juneau, 613 P.2d 616, 618 (Alaska 1980).

The rule enunciated in B-C Cable as to conflict between APUC regulatory authority under AS 42.05.251 and franchise provisions applies as well to APUC authority and municipal police power under the common law. There is no conflict here between the APUC's regulatory duties under AS 42.05.251 and the common law rule. The common law rule therefore remains in effect.

IV

The APUC Has No Statutory Authority To Invalidate The Common Law Rule As To Relocation Expenses

The APUC, as an alternative to finding a legislative or judicial modification of the common law, relies upon the authority delegated under AS 42.05.251 to expressly invalidate the common law rule on its own. See footnote No. 1 at pages 273, 274 of the Record. Appellant contends that no such delegation has occurred.

The APUC is a creature of statute and its power is limited to that conferred. Rutter v. State, 668 P.2d 1343 (Alaska 1983). The APUC has no inherent authority. It may enact regulations only where such regulations are necessary to performing its assigned duties. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). The APUC has relied upon the scope of authority granted under AS 42.05.251 as including within its rulemaking power the authority to adopt a rule that modifies the common law rule as to relocation expenses. The APUC has determined that the common law rule is under most, but not all, circumstances an unreasonable fee, term or condition under AS 42.05.251. Record pages 309-311, 319.

The authority conferred on the APUC under AS 42.05.251 is to review the reasonableness of fees, terms or conditions included by a municipality in a permit to use its right-of-way.[3] The issue of the scope of APUC authority under this statute, then, is whether the common law rule is a fee, term or condition of a permit subject to APUC review, even where there is no permit issued by the City to the utility. This is a question of statutory construction and the appropriate standard of review is the independent judgment standard. Wentland v. Employment Sec. Div., 671 P.2d 1285, 1286 (Alaska 1983); Nat. Bank of Alaska v. State Dept. of Rev., 642 P.2d 811, 815 (Alaska 1982).

A. AS 42.05.251 Only Allows APUC Review Of Permits.

Appellant initially contends that proper construction of AS 42.05.251 only allows the APUC to review actual permits granted by municipalities. The statute prevents a municipality from denying a utility the use of a right-of-way. It does this by entitling all utilities to a use permit. But in many instances no permit is granted when a utility places its facilities in public rights-of-way. The municipality simply does not object to the use of them. In those cases, there would be nothing whatsoever for the APUC to review; yet the common law would still apply. No permit was required by the City of Kenai in the present case, and consequently, there is nothing to review under AS 42.05.251.

The APUC gets around this problem through illogical gymnastics. The "permit fees" identified in the statute are reasoned to be "interchangeable concepts" with other items, such as relocation expenses. See Record Supplement, Record, Footnote 4, page 276, 285. The result is that the APUC can review for reasonableness anything that it considers to be an interchangeable concept with permit fees, terms, or conditions.

Words sometimes, however, have plain meanings to which even lawyers must succumb. "Permit" is one of them. There is no permit here to review. Proper construction of the statute precludes APUC review of "interchangeable concepts." If the

legislature chooses to empower the APUC to review "interchangeable concepts" it may do so through another statute that is, hopefully, as clear and succinct as AS 42.05.251.[9]

B. The Common Law Rule Is Not A Fee Under AS 42.050.251

The Order contains a lengthy analysis at pages 280-311 that Appellant understands to go as follows: HEA applied for a surcharge. A surcharge must be due to a reasonable permit fee. If the fee is unreasonable, the APUC will modify or prohibit it. Relocation costs are interchangeable with permit or franchise fees. There is a split of authority as to whether such fees should be recovered as an operating expense or through a surcharge. The APUC concludes that under some circumstances, the common law rule is reasonable, such as when relocation is needed for repairing storm damage. These relocation costs "...typically will be capitalized and recovered in generally appliable rates." Record page 311.

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9 Appellant notes that the interchangeable concept argument advanced by HEA was that permit fees and relocation expenses are interchangeable concepts because one can be negotiated out or down for the other. Record pages 149-150. Or, as the Order phrases it, payment of relocation expenses is the "quid pro quo" for right-of-way use. Record page 285. But HEA pays no permit fee to any city. Record page 163. If relocation expenses can be negotiated for payment of a permit fee, the logical extension of this argument would be that utilities pay all relocation expenses if the city will refrain from charging any permit fees. Since HEA pays no permit fees, it should be content to pay relocation expenses under its own theory.

In most other cases, however, the relocation cost is an unreasonable fee and may not be forced on the utility. Thus this cost would never be recaptured through surcharge, because the municipality has to pay it. Relocation costs would, therefore, never be recaptured pursuant to AS 42.05.251 under any circumstances since "...there is no justification for utilities to have municipal surcharge tariffs to authorize recapture of unreimbursed relocation expenses." Record page 311.

All of the above APUC reasoning misses, or avoids, the point that no fee is being paid to a municipality when relocation is necessary. Franchise fees and relocation expenses are not interchangeable concepts. Relocation expenses are not paid to municipalities at all. These expenses are never an obligation of the municipality until the legislature expressly makes them so. Utility payment of them does not satisfy some obligation of the municipality. They are not use fees.[10] They are not easement acquisition payments. They are not fair market value condemnation compensation paid to a property owner. Regardless of the appropriate mechanism through which a utility should recover its relocation expenses from its ratepayers, the relocation expenses are, quite simply, a business expense, not a "fee" imposed on a

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10 The Order prohibits municipalities from collecting a rental-type use fee from a utility, which could conceivably off-set the relocation expenses being imposed on municipalities, because municipalities no longer have proprietary interests in their rights-of-way. This point is addressed later in the Brief.

utility by a municipality under AS 42.05.251 for the use of its right-of-way. Connecticut Ry. & L. Co. v. New Britain Redev. Com'n., 287 A.2d 362 (Conn. 1971).

C. The Common Law Rule Is Not A Term Or Condition Under AS 42.05.251.

The "terms" or "conditions" under AS 42.05.251 refer to restrictions or regulations of the right-of-way use that a city or borough imposes on a utility. They refer to how a utility can use the right of way. See B-C Cable. The Order construes AS 42.05.251 as allowing a surcharge for expenses incurred by a utility due to any term or condition of use of the right-of-way imposed by a city. If adherence to the common law rule is a term or condition required by a municipality, then the utility could recover the relocation expense through a surcharge. Record page 281.

Appellant's initial argument on this point is that the common law is not imposed on utilities by municipalites. It is imposed on all parties to this appeal, including the APUC, by state statute, AS 01.10.010.[11] The common law is, to the extent not specifically abrogated by the legislature, the law of the

[11] AS 01.10.010. Applicability of common law. So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.

state. Simply because a municipality relies on state law does not transform the state law into a local rule or regulation, or into a "municipal practice" as the APUC phrased it.

The terms and conditions of AS 42.05.251 must refer to local regulation. If the APUC is correct and adherence to state law is properly classified as a term or condition, then any state law that a municipality relies on in its relationship with a utility becomes subject to APUC review for reasonableness. The absurd result is that the APUC has displaced the state legislature in authority. State law becomes subject to APUC review for reasonableness.

Adherence to the law is not considered an unreasonable term or condition by the APUC in all instances, however. According to the APUC reasoning, if the municipality chooses to improve a street, or drainage, or install sewers or water lines and fire hydrants, or to engage in any other "proprietary activity," then the common law rule becomes an unreasonable term or condition. The APUC defines "proprietary activity" to be primarily all activities reflected in a municipal capital budget. Record pages 310-311.

Under the Order, then, the municipality's police power is subordinated to the utility's interest in municipal right-of-way use any time the municipality engages in a capital budget improvement. Either the taxpayers, or the property owners being

assessed for the improvement, would first have to cover the cost of relocating the utility facilities before improvements could be made by a municipality in its "proprietary capacity."

The proprietary/governmental function analysis used by the APUC is a confusing and contradictory area of the law. Cases can typically be found on either side of the fence characterizing the same municipal function as being either proprietary or governmental.

The use of this analysis should be avoided whenever possible. The United States Supreme Court has recently retreated from the use of this analysis in commerce cases by overruling its prior decision in National League of Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976). That case was overruled by Garcia v. San Antonio Metropolitan Transit Authority, Nos. 82-1913, 82-1951, Feb. 15, 1985.

Garcia characterized the proprietary/governmental analysis as being completely unworkable in an extensive criticism of the history and use of this legal theory. The APUC Order is a classic example of the morass that can result from application of this analysis. The APUC has somehow concluded through application of this analysis that municipalities no longer have a proprietary interest in their own rights-of-way.[12]

After this conclusion the APUC reasons that, since municipalities no longer have any proprietary interest, they cannot charge utilities a user fee. Since user fees and

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[12] The issue of whether municipalities still have a proprietary interest in rights-of-way is addressed later in this Brief.

relocation expenses are interchangeable concepts, municipalities cannot force utilities to relocate without reimbursing the expense. An attempt to require a utility to follow the common law would therefore be an imposition of an unreasonable term or condition under AS 42.05.251. Record pages 297, 300. All existing and future franchise agreements calling for a user fee are also declared void. Record page 312.

The obvious objectives of the APUC in using the proprietary/governmental analysis are to eliminate any ability of a municipality to charge franchise fees and to force municipalities to pay relocation expenses. It was a calculated step taken by the APUC to deprive municipalities of franchising authority without going through the Legislature. This Court should overrule the use of the proprietary/governmental analysis in determining whether the common law is a term or condition under AS 42.05.251. At the least, the court should not utilize the APUC proprietary/governmental characterization.

Appellant notes that the use of the proprietary/governmental analysis is unnecessary to determine the issue at hand. After a criticism of this legal tool, the California Court of Appeal avoided its use in a relocation expense dispute. The Court quoted New York Telephone Co. v. City of Binghamton, 219 N.E.2d 184, 186 (N.Y. 1966) when it stated:

> The distinction between "governmental function" and "proprietary function" is a sort of abstraction difficult to make meaningful in a day when municipalities continually find new ways to exercise police power in their efforts to cope with the pressing needs of their citizens. (cite omitted) A utility's right to compensation should depend, not on whether municipal activity is "governmental" or

"proprietary," but on whether compensation has been required by the Legislature, or whether there has been a constitutionally compensable taking or damaging of a valuable property right." Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Glendale, et al, 142 Cal.Rptr. 584, 591 (Ca App 1977) hearing denied (1978).

This legal theory has, however, been used in other jurisdictions to determine when municipal construction nessitating utility relocation is outside the public health and safety interests that come within the common law rule. If the government requires relocation for a purpose other than public health and safety it must pay the relocation costs. See City of Pontiac v. Consumers Power Company, 300 N.W.2d 594, 496 (Mich. Apn. 1980) appeal denied (1981); Rochester Telephone Corp. v. Village of Fairport et.al., 446 N.Y.S.2d 823 (N.Y. 1982). (But see dissenting opinion.) In any event, the activities identified by the APUC as being proprietary are actually recognized as being governmental in nature. "Among the powers generally held to be governmental rather than private are the construction and maintenance of streets; conservation of public health; extinguishment of fires and making arrangements therefor; and power to legislate as to public utilities." McQuillin's, §10.05. See also City of Anaheim v. Metropolitan Water District of Southern California, CCH Utilities Law Reports, §23, 719.03 (Cal. App. 1982); Pacific Telephone and Telegraph Co. v. Redevelopment Agency of the City of Glendale, 142 Cal. Rptr. 584, 592. Even if the proprietary/governmental function analysis is used, then, the

APUC has erred in application of it to determine all capital improvement items are proprietary functions not subject to the common law rule.

The municipality has no inherent authority over public roads. McQuillin's §§30.39, 30.39a; AS 29.48.030(a), AS 29.48.035(a); New York Telephone Co. v. City of New York, 466 N.Y.S.2d 56, 58 (N.Y. 1983). The municipality acts in its governmental capacity when it improves roadways for the public health and safety. It has no inherent authority to either impose on a utility, or to release a utility from the common law requirements. City of Wichita v. Kansas Gas and Electric Co., 464 P.2d 196, 204 (Kan. 1970).

Thus, the common law rule is not a term or condition imposed by the municipality, such as a restriction on construction material, or location, which is selected to regulate how a right-of-way may be used. The APUC has erred in construing AS 42.05.251 as including the common law rule within "terms and conditions" subject to review under that statute.

V

The APUC Has Erred In Determining That A Utility's Interest In The Use Of Municipal Rights-Of-Way Is Protected By Art. I, Sec. 18 Of The Alaska Constitution, Or That A Taking Has Occurred

The APUC has interpreted Art. I, Section 18 of the Alaska Constitution[13] as including the interest that a utility has in the use of municipal rights-of-way pursuant to AS 42.05.251 within the category of property interests protected by the takings clause. Additionally, the APUC has determined that a taking occurs when a utility, in accordance with the common law, is required to relocate its facilities within municipal rights-of-way due to public improvement construction. Record pages 306-309. Both of these determinations are erroneous. Both are questions of law that require the substitution of judgment standard of review. Earth Resources Co. v. State, Dept. of Rev., 665 P.2d 960, 965 (Alaska 1983).

The reasoning of the APUC is that AS 42.05.251 has given the utility an interest that is sufficient to be protected by the Alaska takings clause, which is broader than traditionally allowed,[14] and thus "...the common law rule allowing a

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13 Art. I, Section 18. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

14 Under the federal constitution, relocation expenses are damnum absque injuria and are not a taking or damages that require compensation. Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Telephone Co. of Virignia, U.S. , 78 L.Ed.2d 29, 34, 104 S.Ct. (1983); New Orleans Gas Co. v. Drainage Comm., 197 U.S. 453, 462, 49 L.Ed. 831, 25 S.Ct. 471 (1905); 4A Nichols, Eminent Domain §15.22.

municipality to mandate unreimbursed utility relocations ... appears to be inconsistent with the Constitution of the State of Alaska." Record page 309. This line of reasoning in the Order relies heavily on the traditional case law distinction between the proprietary and governmental activity of municipal governments. The APUC characterizes the activity of a municipality in construction and improvements of its rights-of-way as a proprietary interest. This interest, however, is governmental, not proprietary and, as stated before, is inherent in the state and delegated to municipalities. See McQuillin's §§30.39, 30.39a.

Aside from the nature of the governmental activity involved, the APUC relies on State v. Hammer, 550 P.2d 820 (Alaska 1980) as authority for its determination that the relocation expenses are not merely damnum absque injuria but compensable interests. Hammer involved an exercise by the state of its eminent domain power in condemning land for a highway. The land had a business operating on it that was forced to shut down all operations and relocate. The relocation took many months during which time the business owner made no profits. The issue on appeal was whether these lost profits were compensable under the Alaska Constitution. The court held that they were.

Hammer is inapplicable here. In that case the business itself was a property interest that was directly damaged by the condemnation of real property. Here the utility has no property

that is being taken by the municipality. The municipality owns the property already. The relocation "damages" occur due to the subordinate position of the utility's interest in the use of the municipality's property to the police power of the municipality rather than from the municipality's taking something from the utility. The utility's interest has consistently been denied taking protection in this situation in other jurisdictions where the utility is required to relocate as opposed to being denied further use of the right-of-way altogether. Vermont Gas Systems Inc. v. City of Burlington, 286 A.2d 275 (Vt. 1971); Urban Renewal Agency of the City of Eugene v. Pacific Northwest Bell Telephone Co., 542 P.2d 908 (Or. App. 1975); Michigan Bell Telephone Co. v. City of Detroit, 308 N.W.2d 608 (Mich. 1981).[15]

Thus, while the utility will incur expenses due to the relocation, and could therefore be said to suffer some damage to its property (facilities) due to the construction of public improvements, the "damage" suffered is actually an operating cost that a utility must anticipate when utilizing the right-of-way of another entity rather than purchasing its own easement. The interest of the utility granted pursuant to AS 42.05.251 is in the nature of a license that a municipality cannot refuse, rather

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15 Appellant has located one jurisdiction where the relocation expenses were compensable under the state constitution taking clause: Arkansas State Highway Com. v. Arkansas Power & Light Co., 330 S.W.2d 77 (Ark. 1960). But see the dissent, 330 at 81, which recognized that cases to the contrary "are numerous and unanimous Arkansas may be alone against the weight of authority. See 4A Nichols, Eminent Domain, §15.22. Unlike the situation in Alaska, the Arkansas utilities paid substantial user fees, a factor considered by the Arkansas Court.

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than a vested property right. Rochester Telephone Corp. v. Village of Fairport et.al., 446 N.Y.S.2d 823, (N.Y. 1982); Borough of Highspire et.al. v. Pennsylvania Power and Light, CCH Utilities Law Reporter §23, 733 (Pa. 1982). It can be withdrawn by the state at any time. As such, the utility's use remains subordinate to the needs of the public.[16] The Appellant's claim of error, then, is that the APUC has incorrectly determined that the interest that a utility has under AS 42.05.251 in using a municipal right-of-way is "property" under Art. I Section 18 of the Alaska Constitution.

In the event that the court should find such an interest to be property for taking purposes, Appellant contends that no taking has occurred. The general rule in Alaska is:

> ...a taking does not occur until: 1.) legal title vests in the State, 2.) the State enters into actual possession, or 3.) the State takes constructive possession either by causing damage to property or by depriving the owner of full beneficial use of his land. Stewart & Grindle, Inc. v. State, 524 P.2d 1242, 1246 (Alaska 1974).

In the present situation, the utility's property interest, if there is one, is a permit, or license, to use municipal rights-of-way. The fact that a utility may be required to relocate facilities due to the superior interest of the municipality acting for the public health, safety or welfare does

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> "Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or public ways are at utility expense, a common law liability unless abrogated by the clear import of the language used in a particular statute." 4A Nichols, Eminent Domain, §15.22.

not deprive a utility of its "property." The utility still has exactly what it had before the governmental action: a permit to use the right-of-way. City of Wichita v. Kansas Gas & Electric Co., 464 P.2d 196,205 (Kan. 1970). The utility has not been "deprived of the economic advantages of legal ownership." Grant v. State, 560 P.2d 36, 39 (Alaska 1977). Rather, the utility has simply incurred a foreseeable expense associated with the ownership of this type of "property" that is normally incurred in the course of its operations.

The only conceivable manner in which this interest could be damaged is if the permit to use the right-of-way was somehow denied altogether by the municipality, but this possibility is precluded by the statute. Appellant's claim of error, then, is that even if the utility's interest in using the municipal rights-of-way is "property" under Art. I Section 18 of the Alaska Constitution, it has not been taken or damaged due to the application of the common law rule on relocation expenses.

VI

The APUC Has Erred In Determining That Municipalities Have No Proprietary Interest In Municipal Rights-Of-Way

The APUC has interpreted Alaska statute and case law as voiding any proprietary interest that municipalities have in their rights-of-way. Record pages 294-300. Alternatively, the

APUC has determined that any permit fee for the use of the right-of-way must be based on, and directly correlated to, any actual relocation expenses incurred by utilities, with the burden of proof on the municipality before the APUC, prior to recovery of any fee. Record pages 290-294. Any existing contract agreements between municipalities and utilities that may be inconsistent with the APUC order by allowing for such a fee are declared void. Record pages 312-313. All three of these points are based on the existence of the municipality's proprietary interest in the right-of-way. All three determinations are erroneous.

A. Alaska Statute And Case Law Have Not Voided The Municipal Proprietary Interest In Rights-Of-Way.

Order No. 7 cites Chugach Electrical Association v. City of Anchorage, 475 P.2d 115 (Alaska 1970) and AS 42.05.251 as authority for its conclusion that "... it seems clear that judicial precedent and statute in Alaska preclude any compensation being paid by a utility for the value of engaging in a utility enterprise within municipal boundaries or even within its rights-of-way." Record page 296. Chugach, according to the APUC, prohibits a municipality from charging a fee, exacted from a utility as a condition of entry to its right-of-way. The interpretation of the Chugach decision in relation to statute is a question of law requiring application of the substitution of judgment standard of review. ERCA v. Dept. of Rev., 665 P.2d 960 (Alaska 1983).

Prior to the Chugach decision, the Legislature enacted AS 42.05.251 which expressly entitles utilities to a permit for the use of municipal rights-of-way. According to the APUC reasoning, with the passage of AS 42.05.251, "the municipality, by logical implication, was denied authority to grant or withhold such [use] rights and, with it, the authority to negotiate on a value basis with the utility." Record page 297. The APUC then concludes, through implication, that the sole purpose of the "fee" under AS 42.05.251 is to compensate the municipality for any costs incurred in policing right-of-way usage under the regulatory authority reserved to municipalities by the Chugach decision. Id.

Neither the Chugach decision nor AS 42.05.251 prohibit a municipality from charging utilities a reasonable fee for the use of its rights-of-way. Chugach involved a utility authorized by the Public Service Commission (PSC) to operate within the city limits of Anchorage. The utility was requested to provide service to a consumer within the city, but the city took steps to prohibit the utility from doing so without first receiving a permit from the city. The city then refused to issue the permit since the utility did not demonstrate a need for the increased service as required under the city ordinance criteria, and sought an injunction against the utility's operation.

The trial court granted the injunction, finding the utility's facilities to be an encroachment absent a permit from the city. On appeal, the utility reiterated its argument that the legislature had pre-empted the field of utility regulation

and the city lacked authority to prohibit its use of the right-of-way. 475 P.2d at 118. The Supreme Court declined to address this issue, however, since the legislature had in the interim enacted AS 42.05.251, which expressly granted utilities the right to a permit to use the municipal right-of-way. Id.

The issue that was determined in Chugach was whether a municipal ordinance requiring a permit to provide service or the statutory authority of the PSC (now APUC) to grant permission to service an area would control in a direct conflict between the two. It was a decision on home rule. Any further authority of that case was subsequently restricted by the Supreme Court: "... this court's opinion in Chugach must be confined to the specific facts and particular legal issues in that case, and any broader implications must be disavowed." Greater Anchorage Area Bor. v. City of Anchorage, 504 P.2d 1027, 1035 (Alaska 1972) overruled on other grounds 595 P.2d 629.

The Chugach decision, therefore, does not address the issue of whether a municipality has proprietary interests enabling it to charge a fee for utility use of its public rights-of-way. In fact, read in conjunction with Greater Anchorage Area Borough and B-C Cable, Chugach actually retains municipal authority over and proprietary rights in public rights-of-way that have not been expressly proscribed by the legislature and are not in conflict with APUC enabling acts.

A further question is raised by the Order. If municipalities have no proprietary interest that justifies a user fee, does that mean that municipalities in Alaska will be precluded by the APUC from collecting franchise fees they are entitled to under federal law from economically unregulated utilities? As an example, federal legislation permits a five percent franchise fee assessed on cable television companies by municipalities. If the APUC is correct and municipalities no longer have any proprietary interest in public rights-of-way, municipalities have no franchise authority justifying a franchise fee on cable television even though federal law prescribes one. This result is inconsistent with Alaska case law and statute. The APUC has erred in finding void or in voiding municipal proprietary interests in rights-of-way.

B. A Permit Fee Is Not Required To Be Based On Or Correlated To Actual Relocation Expenses Incurred.

As a policy the APUC attempts to allocate utility costs and expenses on a cost causer/cost payer basis. A test that is applied by the APUC to determine allocation of expenses is the benefit/burden test. The Order analyzes the reasonableness of any fee under AS 42.05.251 by applying this test and by analyzing the municipal action in equity for discrimination. Record page 290. (Discrimination is addressed later in the brief.) Since HEA sought a surcharge, the APUC assumed as a premise that the relocation expense is a fee recoverable through a surcharge.

As Appellant understands the APUC reasoning, the surcharge under this test is only allowable if the expense has "... a rational or substantial connection between payment of such expenses by ratepayers and cognizable benefit received or burden occasioned by the utility in the ordinary course of providing utility service to the ratepayer." Record page 291. Since the relocation expense is "caused" by the municipal construction, so the APUC reasoning goes, there is no benefit to the ratepayer or burden that the utility bears in its ordinary activity of providing utility service to the ratepayer. Since the ratepayer does not benefit, he should not have to pay for the relocation. Since relocation expenses are not a burden of ordinary operations, the utility should not have to pay for it either.The surcharge is therefore, unreasonable under the benefit/burden test, and the municipality pays the expense.

Later on in the Order the APUC explains that, since municipalities have no proprietary interest and can no longer charge "rent," any fee collected from the utility by the municipality would have to bear a direct correlation to relocation expenses actually incurred by the utility; but since (if Appellant follows the Order's reasoning) any such "compensation" to the municipality would have to be based on fair market rental value of the right-of-way, the fee for any given year could never exceed the fair market rental value for that year even if relocation expenses incurred that year far exceeded such value. Record pages 299-300.

Through all of the benefit/burden fee analysis the APUC is misapplying its own standards. The benefit/burden test is being used to determine whether a city or a utility has liability under the law to pay certain expenses rather than to determine how acknowledged expenses of a utility are to be recovered by the utility. The two issues are distinct. One is a legal issue and the other a policy issue. A policy test for the latter cannot be used to determine the former.

The Order characterizes the relocation expense as something that has come about through no fault of the utility. Record page 291. The expense is caused "... primarily, if not exclusively..." by municipal discretion irrespective of utility activity. Record page 294. This line of reasoning in the Order only confounds, or avoids, the nature of the relationship between the utility and the municipality. Appellant's argument on this issue echoes earlier arguments.

First, relocation expense liability pursuant to the common law rule is not a fee, term, or condition under AS 42.05.251 that is subject to a benefit/burden analysis. Second, the utility's use of the right-of-way is subordinate to the municipality's right to make improvements for the public health and safety. Third, a utility that utilizes rights-of-way of a municipality rather than purchasing its own easement must anticipate, as a normal operating cost, relocating its facilities within the right-of-way when the owner requires it.

Thus the relocation expenses are not "caused" by the municipality. A utility must expect them to occur under the circumstances. This is particularly true when the utility has placed facilities in the middle of an unimproved right-of-way without regard for future development. See Record pages 210-213. If they are "caused" by anything, relocation expenses are "caused" by the utility's failure to acquire its own private easement, or by short-sighted location decisions.

The error made here, in requiring a correlation between any fee and actual relocation expenses, is that the APUC has confused the issue of appropriate fee recovery mechanisms, a ratemaking policy matter, with the issue of liability for the relocation expenses, a question of law. The result, requiring permit fees to be correlated to actual relocation costs rather than a reasonable rental rate, is therefore erroneous as well.

C. Existing Franchise Agreements That Provide For A Utility To Pay A Nonregulatory Or Ownership Permit And Franchise Fee Cannot Be Declared Void By The APUC.

The APUC Order applies the decision to all existing franchise agreements and permits between utilities and municipalities that require the utility to pay the municipality for the use of the right-of-way. Record page 312. (As opposed to a regulatory fee, which is still allowable.) These existing agreements are declared void, and future agreements to that effect are prohibited. The APUC relies on B-C Cable Co. v. City & Borough of

Juneau, 613 P.2d 616 (Alaska 1980) as authority that existing franchise agreements are subject to APUC regulation. The reliance on B-C Cable, however, is misplaced.

In B-C Cable a utility had a franchise agreement with the municipality that required the utility to pay a three percent franchise tax. After the franchise agreement was entered into, the APUC Act was adopted by the legislature. The utility discontinued payment of the tax, claiming all franchise agreements were rendered invalid by the legislature.[17] The municipality sued to collect its three percent fees and prevailed at trial.

On appeal, the Alaska Supreme Court reviewed the scope of the APUC Act, and particularly AS 42.05.251 and AS 42.05.641. The utility contended that these statutes removed all regulatory authority over utilities from municipalities and placed that authority with the APUC, thereby voiding all existing municipal franchise agreements. 613 at 618. (emphasis added) The court disagreed. The court identified the franchise fee in question as having two purposes: "That fee was originally designed to compensate the city for the use of municipal streets and for the cost of municipal supervision and regulation." Footnote 4, 613 at 618. The court's ruling was that the APUC Act did not "...either expressly or by clear implication nullify the rights and liabilities of the parties under the franchise

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17 Order No. 7 is having the same affect. The City of Kenai has received notice from a gas utility that it may not honor our franchise tax due to the possible effect of Order No. 7.

agreements...," and therefore the state's general saving clause, AS 01.10.010, kept the franchise agreements in force. 613 at 619.

The authority of the APUC identified and defined in B-C Cable was authority to review the reasonableness of the amount of the use fee, not to abolish it or declare such fees void and unreasonable under AS 42.05.251 as contended in the Order No. 7. The B-C Cable decision is in keeping with the Greater Anchorage Area Borough decision that explains the limited adjudicatory authority of the APUC. Municipalities are expressly allowed to charge a fee under AS 42.05.251, and that fee may be for the use of rights-of-way. The APUC has exceeded its authority outlined in these cases by declaring void all existing or future franchise agreements which provide for a user fee paid by a utility to a municipality for the use of a right-of-way.

VII

Relocation Expenses Are Business Expenses, Not Public Improvement Construction Costs

The Order asserts that unreimbursed relocation expenses are a cost of constructing public improvements. The APUC Order concludes that burdening the utility with relocation expenses is unreasonable and discriminatory because it saddles ratepayers with a disproportionate share of the cost of the public improvements. Record pages 300-302.

The construction of public improvements results in costs to private interests that are directly related to the public improvement construction, but are nonetheless within the class of damnum absque injuria and are not considered a cost of the public construction for the purpose of compensation. See 2A Nichols, Eminent Domain §6.31; McQuillin's §32.38. The expense of relocating facilities is an expense the utility must anticipate when public construction occurs.

Even where a utility has a vested right to use municipal rights-of-way, the local government, absent state legislation to the contrary, is not divested of the power to improve the right-of-way for the general welfare of the community and require the utility to relocate its facilities at its own expense. Michigan Bell Telephone Co. v. City of Detroit, 308 N.W.2d 608 (Mich. App. 1981). The interest of the utility under a right of use such as is granted under AS 42.05.251 is ancillary to the primary interest of the public in its right-of-way, and is subordinate to the interest of the public. Vermont Gas Systems, Inc. v. City of Burlington, 286 A.2d 275 (Vt. 1971). The relocation costs borne by the utility are in the nature of a business loss. Connecticut Ry & C. Co. v. New Britain Redev. Com'n., 287 A.2d 362 (Conn. 1971). As such, these costs are properly recovered by a utility from all ratepayers through general rates. AS 42.05.251 does not provide for a surcharge to cover a business loss; only for a permit fee. Since the

relocation costs are anticipated business expenses, they are not costs of public construction discriminatorily imposed on the utilities or their ratepayers.

CONCLUSION

The APUC Order should be invalidated as to part 3, Record page 319, because the APUC lacks jurisdiction to adjudicate the issues surrounding the validity of the common law rule. If the Court concludes that the APUC has such jurisdiction, the Order should be invalidated because the common law rule can only be modified by the express directive of the Legislature or Courts and no such modification has taken place. If the Court concludes that the common law rule can be modified through implication, the Order should be invalidated because the common law rule has not been impliedly modified in Alaska.

If the Court concludes that the common law rule has not been modified by judicial decision or the legislature, the Order should be invalidated because the APUC lacks authority to expressly modify the common law rule on its own. The APUC has exceeded its authority under AS 42.05.251, and in addition to invalidating the Order, Appellant requests that this Court give

proper construction to that statute and to the issues of law raised by Appellant.

DATED: This _____ day of _____, 1985.

CITY OF KENAI

By: _____
Tim Rogers
City Attorney

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

DATE: February 12, 1987

TO: Chip Dennerlein, Director of Intergovernmental Affiars

FROM: J. David Norton, Municipal Engineer, DPW

SUBJECT: UTILITY RELOCATION COSTS AMENDING SECTION 7 AS.29.35.010

Following are the comments of Public Works Engineering Division on the proposed amendments to Section 7 AS.29.35.010 Utility Relocations Costs.

1. The conditions of paragraph (a) indicate that, since Anchorage Municipal Ordinances currently provide for permitting procedures and responsibility for utility relocation costs, the proposed statue would have minimal effect on the manner in which such responsibility is now assigned.

2. "The cost of relocating or removing the utility shall be borne by the improvement project if the utility was placed within a two-foot horizontal location specified by permit issued by the Municipality." If this provision is to be interpreted as allowing a total of four feet of horizontal leeway, then it should be changed to read, "...one foot horizontal tolerance either side of the assigned utility installation centerline...."

3. Consideration should be given to the concept of Expired Service Life, a system used by Alaska DOT/PF which provides that the utility participates in a portion of the cost of relocating facilities one mile or greater in length when relocation will give the utility the effect of extended life.

4. It is our feeling that when a project is in a grandfathered area and involves relocating a utility having a reasonable amount of expected remaining life, that the project budget should cover the relocation costs with credits applied for design and betterment of the facility.

5. In regards to new placement of utilities, we feel that Section 29.35.061 (a) of this proposed amendment allows us the latitude we have needed in the past to require the utilities to bear the cost of any necessary construction.

JDN/PH/clg
1/jdn/350

cc: R. R. Mann
Susan Metcalf
John Olnes
Gene Green

Alaska Telephone Association
201 E. 56th Avenue / Suite 230
Anchorage, Alaska 99518
(907) 563-4000

Bernadette B. Murray
President

Ted Lehne
Executive Director

March 27, 1987

COMMENTS ON SB 155/HB 155

The Alaska Telephone Association Board of Directors on March 11, 1987, voted unanimously to support this legislation. It did so because we believe the bill sets a fair requirement on municipalities and also gives them an incentive to consider the full cost of a construction project before deciding to go ahead with it.

Fairness

The provisions of this legislation come into effect when a municipality decides to take an action that requires the relocation of the facilities of a utility within a municipal right of way. Typically, this means the locality decides to widen a road, relocate a road, or abandon a right of way to construct a municipal building, or for some other municipal purpose. Usually the utility had no plans to move its facilities. In the case of our members, these facilities are usually a pole line, buried line, or cable vault. When the municipality decides that the utility line must be moved, it creates a cost for the utility that the utility would not incur at that time otherwise. Fairness requires that the cost causer pay the cost it creates. This legislation requires that.

This legislation is also sensitive to concerns that a utility may have its facilities upgraded at municipal expense, by providing for certain offsets. It also exempts payment for utility facilities that are not located within a reasonable distance of where plans say they should be. And it allows a municipality to order a facility moved, and to take action to dispose of it if the utility ordered to move it fails to do so in a reasonable time.

Our members are not enthusiastic about these provisions, but accept them as

limitations to add a "comfort zone" for municipalities.

One other point on fairness. The State Department of Transportation and Public Facilities currently pays utilities, including municipalities, for relocation of their facilities required by state construction projects.

Full Cost

Our second reason to support this legislation is that it provides an incentive for a municipality to consider the full costs of its actions. By requiring a municipality to pay for the utility relocation costs of its actions, it forces the municipality to consider that cost. In some cases, that cost is a very important cost component of the project.

If Legislation Not Adopted

What happens if this legislation is not adopted? Unless a municipality volunteers to pay, a utility must pay to relocate its facilities when a municipality has a construction project in the works that will require it. That cost is passed on to the rate payer as an allowable expense. If the utility's rate payers were also all residents of the municipality, then it could be argued that the money is simply coming out of a different pocket of the same person. But the utility's rate payers and the municipality's residents are almost never the same group. And the financial considerations are almost never the same. The municipality will probably pay for the project with bonding or a grant. To the extent the project is paid for by taxes, either fully at the time or over time through bonding, the resident does not pay the full cost since the resident's taxes are deductible on the federal tax return. In short, if the utility relocation costs are paid for by the municipality, the resident is very unlikely to pay the full cost. On the other hand, if the utility must pay, the full cost is added to the expenses of the utility and the customers must pay not only the relocation costs, but a rate of return

on the investment if appropriate, and any interest costs of borrowing. In short, the cost to residents of the state if the municipality pays for utility relocation costs is, in almost every case, likely to be less, and in most cases much less, than if the utility pays.

Finally, a word about the telephone industry in Alaska. This bill is not a case of Alaskans subsidizing the utility relocation costs of large national firms. Of the 20 local exchange companies in Alaska that are members of ATA, three are municipally owned, seven are Alaskan cooperatives, six are private Alaskan small businesses, one is a small business located in the State of Washington, two are subsidiaries of PTI, a large concern located in the State of Washington, and only one is a subsidiary of a large national holding company.

Summary

In summary, the Alaska Telephone Association supports the adoption of SB 155/HB 155 this legislation session, because it believes it is in the best interest of Alaskans, and because fairness requires it.

Alaska MUNICIPAL League

TELEPHONE
(907) 586-1325

105 MUNICIPAL WAY, SUITE 301
JUNEAU, ALASKA 99801

April 2, 1987

APR 2 1987

MEMORANDUM

TO: Senator Arliss Sturgulewski, Chair
Members of the Senate Community and Regional Affairs Committee

FROM: Scott A. Burgess, Executive Director

SUBJECT: SB 155 - Relocation of Utility Facilities

The Alaska Municipal League is opposed to SB 155 and shifting the cost of relocating utility facilities in connection with municipal construction in rights-of-way from the utility company to the municipality. The AML has opposed this effort every year similar legislation has been introduced into the Legislature; most recently, SB 67 in the 13th Legislature. The legislation, if passed, would deviate from common and case law.

The AML's 1987 Policy Statement was most recently revised and adopted by the membership, representing 124 municipalities, at their annual meeting in Juneau last November. On page 17 of the Policy Statement, it states the following:

> Utility Relocation Costs: The League opposes any effort to shift to municipalities the cost of all non-municipal, utility relocation within existing rights-of-way associated with municipal street work.

As 12 McQuillan, Municipal Corporations, Section 34.74 on page 183 states:

> The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity. Accordingly, it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of a franchise, where public convenience or security require it, even at the grantee's own expense, and even in the face of a protest by a consumer. It makes no difference whether the surface or subsurface of streets is involved.

The common law rule referenced above can be modified by legislative action or contract agreement between the municipality and the utility company. The League urges the Legislature not to change common law and practice, and, instead, leave the matters addressed in this bill to local officials to work out with local utilities in the best interest of the local public.

Municipal rights-of-way are first and foremost for transportation and roads. As a secondary use, utility companies have a right to use the rights-of-way as utility corridors. Such use is in lieu of the utility having to purchase their own rights-of-way, and is usually free or with a minimum permit fee in the larger municipalities. However, the use of the right-of-way for little or no cost is with the understanding that the utility will relocate their facilities, if necessary, to accommodate road improvements, unless provided for differently in individual ordinances or franchise agreements between municipal and utility companies.

The proposed legislation does not distinguish between private, for-profit, investor-owned utilities and non-profit and REA utilities, nor between the regulated, essential utilities such as gas and electrical on one hand and the unregulated, unessential utilities such as cable television on the other. The potential cost of relocating utilities for the utility companies is just the cost of doing business, counter- balanced by the savings of not having to buy the rights-of-way from a land owner. Utility companies have always known upfront that they could potentially incur relocation costs in the event that road improvements are necessary. Any change in this by the Legislature is an intrusion into the local authority of the municipalities and their road powers.

Shifting the cost of utility relocation, as proposed in this bill, would shift the cost from the rate payer to the taxpayer. The additional cost may mean that necessary road improvements, necessary for public safety, may be delayed or simply not done given limited road construction dollars. This is especially true for local improvement districts and for boroughs with limited road powers and road service areas with limited dollars available.

The situation is also different than it is with state road construction. The State owns its rights-of-way in fee simple. They have complete control over their roads and can prohibit their use by utility companies. Municipalities cannot. The State Department of Transportation also operates with a large professional staff which is capable of supervising the permitting, planning, and installation of utilities in their roadways, including requiring "as-builts" of the facilities installed. Many municipalities do not require permits or fees or have tight controls over the utility companies and where and how they placed their utilities in the rights-of-way. And why should they build such expensive bureaucracies when it is common understanding that the utility will be responsible for relocating their facilities if necessary? Finally, the State of Alaska gets much of its highway improvement funds from the federal government. Therefore, it can build the cost of relocating utilities into the cost of the project and shift the costs to largely, third party, non-resident taxpayers.

In addition to the general argument that the legislation would inappropriately shift the cost of relocating utility facilities to the municipalities, the change from common law and past practice is made even more onerous in that such a change and the impact would be retroactive. Under Section 2 of the bill with the proposed added language of AS 29.35.075 (b)(2), the municipalities would be penalized for following the laws in place; i.e., many municipalities have allowed utilities to place

their facilities in the rights-of-way without charge or without permits because the understanding and law required the utility company to bear the responsibility and cost to move them if necessary. Under the language of this section, if there is no permit system, the municipality would pay the cost of relocation.

One final point is relevant, again, only if you accept the basic concept of the bill, and we do not. While the cost to the municipality for relocating the utility facilities is discounted for upgrades and salvage value in subsection (d) of the bill, "useful remain life" is not. If the municipality is required to pay for the cost of relocating the facility, it should have have to pay for brand new equipment if it has limited remaining life left; e.g., the telephone pole is old and rotting and would have had to be replaced in a year even if the municipality were not making road improvements which require their removal.

Again, the AML is opposed to SB 155 and shifting the cost of utility relocation from the utility company to the municipality and the general taxpayers.

SAB:phl

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
TIM KELLY, Vice Chairman
RICK HALFORD
MIKE SZYMANSKI
FRED ZHAROFF

P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4989

Senate
Community and Regional Affairs Committee

TO: Senate C&RA Members April 2, 1987

FROM: Senate C&RA Staff

RE: SB 155 - Relating to change, relocation, or removal of utility facilities incident to the construction of road or other projects by a municipality

Various versions of this bill have been in the legislature for at least five years. In general utilities support the bill and municipalities oppose it. There will be representatives from both groups to testify at the hearing today.

It is not anticipated that SB 155 will pass out of committee today, but rather, after all testimony, staff will work with interested committee members and other parties and bring a committee substitute back to committee in the near future.

Included in this packet is a zero fiscal note from the Department of Community and Regional Affairs; a statement form the Alaska Municipal League; material, including suggested amendments, from the Fairbanks North Star Borough; and two letters from the Alaska Rural Electric Cooperative Association.

★ Fairbanks North Star Borough

809 Pioneer Road · P.O. Box 1267 · Fairbanks, Alaska 99707 · 907/452-4761

March 30, 1987

Linda Anderson
FNSB Liaison
130 Seward St., Rm 304
Juneau, AK 99801

Dear Ms. Anderson:

SUBJECT: SUGGESTED MODIFICATIONS TO LANGUAGE OF SB 155

Along the lines of our brief conversations in Juneau on Friday, March 27, I recommend the following language be considered as a substitute bill for SB 155, "An act relating to the change, relocation or removal of utility facilities incident to the construction of road or other projects by a municipality."

1. Add to page 1, line 20, after the word "compliance.":

   "The utility shall prepare an estimate of the work required by the order for review and approval by the municipality before beginning work."

2. Add to page 1, line 27, after the word "municipality.":

   "The cost shall not exceed the approved estimate unless agreed to by the municipality."

3. Remove the word "municipal" from page 2, line 1.

4. Add to page 2, line 3, after the word "horizontal":

   "feet and one vertical"

5. Add to page 2, line 6, after the word "permits":

   "in that right-of-way"

6. Add to page 2, line 6, after the word "facilities.":

   "and the facility ~~is~~ was located ~~such that it met~~ in compliance with all applicable codes, regulations, and statutes at the time of its installation."

I will immediately follow up these suggested wording changes in SB155 with a letter describing some of my concerns and the impetus for making these changes. Thank you for your attention to our suggestions in this matter.

Sincerely,

Clark Milne

Clark R. Milne
Manager
Division of Civil Engineering

cc: Pat Walsh, Special Assistant to the Mayor, FNSB

cm8-141

★ Fairbanks North Star Borough

309 Pioneer Road · P.O. Box 1267 · Fairbanks, Alaska 99707 · 907/452-4761

M E M O R A N D U M

TO: Dick Jackson, Administrator Director

THROUGH: Neil Kersten, Public Works Director

FROM: Clark Milne, Manager, Civil Engineering Division Clark Milne

DATE: March 30, 1987

SUBJECT: NEED FOR MODIFICATIONS TO SB155, "RELOCATION OF UTILITIES IN RIGHT-OF-WAYS"

To validate my letter which suggested changes to SB155 concerning municipalities (such as the FNSB) being responsible for paying utilities to remove or relocate existing utility facilities within right-of-ways, I would like to submit to you the comments below.

My first and foremost concern is that our FNSB utility permit system is quite young, having only been instituted on July 1, 1985. Thus, the majority of all utilities installed in road rights-of-way in the FNSB have been put in before our utility permit system was in effect, and the language of Section 29.35.075.(b)2 will probably be in effect the majority of the time. Thus, we will consistently be responsible for the costs of moving utility facilities in our rights-of-way. I believe this is inappropriate and not in the public's best interests, at least so far as the unrestricted wording of (b)2 imposes these costs on us.

Our experience in the Civil Engineering Division has been that the majority of the time when we require the removal or relocation of a utility facility from our right-of-way, it is due to a past failure of the utility to install the service line or facility properly in the first place. This includes both aerial crossings that are too low, buried lines that are too shallow, and utility poles that intrude too closely to the existing road shoulders so that necessary road widening (within the right-of-way) requires the relocation of an existing pole. To require us to pay for these oversights, under-designs, and inappropriate installations by the utility firms seems unconscionable. Thus, my suggested revision in the SB155 language (as noted in my letters to Linda Anderson and McKie Campbell, see attached), item no. 4, which would require that the utility firm have installed the affected facility properly, i.e. to the standards of the applicable code or regulation, in the first place.

The most common and expensive instances of this type of facility that must be moved are aerial crossings above the roadway which are currently at less than the minimum 18 foot required by national electrical code. It is our practice, and is supported by the common law, that the utility firm is wholly responsible for the costs of raising these substandard lines crossing our right-of-way to an appropriate, code/standard elevation above the road surface.

Similarly, we have had significant problems and expenses due to the relocation of telephone or power lines below the road surface. We have found that all too often a utility placed a line too shallowly in the right-of-way and a new road project thus uncovers and interferes with it. Again, national electric code requires that any power or telephone line must be buried at least 30" under the ground surface. If only this were the common condition of buried utility lines in the FNSB our troubles would be nearly over! Unfortunately, there are many instances in our road projects where buried utility lines are very often found to be at anywhere from 4" to 24" below the ground surface--thus, the road interference with minor improvements to the roadway.

In both of the cases noted above, SB155 would automatically give the utility firm a "reprieve" from having to pay for their illegal and substandard utility placement. Without actually calculating the exact expenses generated by utility relocation for FNSB projects in the last few years, I believe that as a rough estimate approximately 10% of our capital improvement monies for road improvement projects would go to utility relocation were SB155 to be passed in the form submitted by Senator Josephson.

Other concerns I have tried to deal with in my revised language for SB155 are evidenced in the other items noted in my letters of March 30. The first item deals with my concern that utility firms should work with the municipalities before beginning work on utility removal or relocation to assure that their field activities are cost-effective and solely done in an effort to replace or relocate the facility which is interfering with the legitimate uses of the road right-of-way. I fear circumstances where the utility could indiscriminately overcharge the municipality for unnecessary expenses, as well as situations where the replacement facility is a superior and improved product to that which is being replaced. Neither of these two concerns is addressed in SB155 as originally submitted.

Item no. 2 would tend to assure that the costs as discussed and approved by the utility and municipality before beginning work are indeed those reached during construction. I foresee reasonable incidences where the initial cost estimate is exceeded, but believe that the municipalities can negotiate with the utilities in a timely manner to increase those agreed upon estimates for valid, discernable reasons.

Item no. 3 was requested because I do not know what a "municipal right-of-way" is. In the Borough we only have public rights-of-way, some of which are included within service areas and thus subject to municipal maintenance efforts.

Item no. 4 addresses my concern that an often crucial dimension in the location of utility facilities is the exact depth or elevation of the line or pipe. I understand that many utility firms have extremely poor as-built records of the location of their facilities, but I believe this should be the utility's concern, problem and expense, not ours.

Item no. 5 deals with my concern that the existing FNSB utility permit system applies only to those rights-of-way within recognized road service areas. The revised language would read "before the municipality had a system for granting easements or permits in that right-of-way for utility facilities," which would eliminate the problem of us having to pay for facility relocations in rights-of-way not covered by a utility permit system such as ours because the permit system was restricted to rights-of-way within service areas. Thus, if a service area annexed new roads after the utility firm installed a facility (after July 1, 1985), and we later interfered with that facility with our transportation use of that road right-of-way, we would not be held responsible for the lack of our utility permit system, but rather the utility firm would be responsible for having to follow good practice and the" applicable codes, regulations and statutes" affecting that utility facility.

Finishing up with item no. 6 from my letter, I understand that it may be troublesome to do the research necessary to confirm what "codes, regulations and statutes "apply to the various situations we find in needing utility relocations in our rights-of-way, but it seemed to me to be the most just and fair dividing line when faced with paying for a utility relocation or not. I agree with the concept that if a utility firm acted within the applicable codes and standards of their industry and all applicable regulations and statutes within the State of Alaska, our dramatic modification of the use of a road right-of-way should include and require our payment for the relocation or removal of the affected utility facilities. It is interesting to note that I believe that I understand the utility's point of view of some of these costs and concerns. But I do not believe that they should be able to "end run" the existing common law and the common sense of justice inherent in having to pay for their own mistakes of the past.

For additional specifics or other questions, please feel free to contact me at ext. 351.

cm8-143

Clark Milne

U.S. Department
of Transportation
Federal Highway
Administration

Real Estate Acquisition Guide for Local Public Agencies

A Resource Manual for Use by:
Local Public Agency and State
Personnel Involved in the Acquisition
of Real Property for Federally-Assisted
Public Improvement Projects

Prepared by:
Real Estate Division
Office of Right-of-Way

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3/3/87

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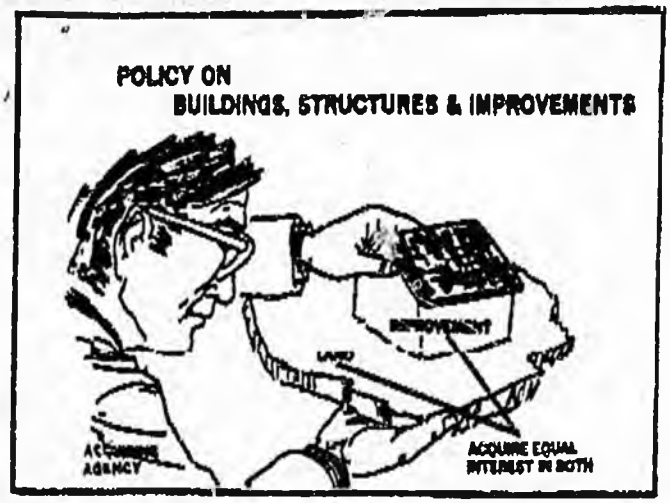

other improvements. The Uniform Act requires that such tenant receive just compensation for any such buildings, structures, or improvements. The tenant is due this compensation even if the lease requires the tenant to remove any buildings, structures, or improvements at the end of the lease term.

Any building, structure, or other improvement which would be considered to be real property if owned by the owner of the real property on which it is located shall be considered to be real property for acquisition purposes. Acquisition from the tenant-owner shall follow the same procedures as for a fee owner.

Just compensation for a tenant-owned improvement is the amount which the improvement contributes to the fair market value of the whole property or its removal value, whichever is greater. Removal value is considered to be salvage value.

a. The term "salvage value" means the probable sale price of an item, if offered for sale on the condition that it will be removed from the property at the buyer's expense, allowing a reasonable period of time to find a person buying with knowledge of the uses and purposes for which it is adaptable and capable of being used, including separate use of serviceable components and scrap when there is no reasonable prospect of sale except on that basis.

b. The contributory value consists of:

1. The value in place of a building, structure, or other improvement, the present use of which is the highest and best use of the land to be acquired, for its remaining economic life; or

2. The interim use value of a building, structure, or other improvement, the present use of which is not the projected highest and best use of the land to be acquired, for a specified interim time period longer than the remaining term of the lease (interim use value includes the present worth of the salvage value of the buildings, structures, or other improvements at the end of the interim time period); or

3. The value in place of a building, structure, or other improvement, the present use of which is not the highest and best use of the land to be acquired, for the remaining term of the lease plus the worth of its salvage value at the end of the lease term.

No payment shall be made to a tenant-owner for any improvements unless:

a. The tenant-owner, in consideration for the payment, assigns, transfers, and releases to the acquiring agency all of the tenant-owner's right, title, and interest in the improvement;

b. The owner of the real property on which the improvement is located disclaims all interest in the improvement; and

c. The payment does not result in the duplication of any compensation otherwise authorized by law.

This provision shall not be construed to deprive the tenant-owner of any rights to reject payment under this provision and to obtain payment for such property interests in accordance with other applicable law.

14.5 Utility Relocation and Accommodation

contact State for explanation

Historically, it has been in the public interest for public utility facilities to use and occupy the right-of-way of public roads and streets. This is especially the case on

local roads and streets that primarily provide a land service function to abutting residents, as well as on conventional highways that serve a combination of local, State, and regional traffic needs. This practice has generally been followed nationwide since the early formation of utility and highway transportation networks. Over many years, it has proven to offer the most feasible, economic, and reliable solution for transporting people, goods, and public service commodities (water, electricity, communications, gas, oil, etc.), all of which are vital to the general welfare, safety, health, and well being of our citizens. To have done otherwise would have required a tremendous increase in the acquisition of additional right-of-way for utility purposes alone. This could have also resulted in significant added costs to be borne by the utility consumers through increased rates for utility services so provided.

Under the practice of jointly using a common right-of-way, there are two broad areas of concern to highway and utility officials alike. First is the cost of relocating, replacing, or adjusting utility facilities that fall in the path of proposed highway improvement projects, commonly referred to as Utility Relocations and Adjustments. Second, is the installation of utility facilities along or across highway right-of-way and the manner in which they occupy and jointly use such right-of-way, commonly referred to as the Accommodation of Utilities.

Federal-aid funds may participate in relocating utilities displaced by a proposed highway project when certain conditions have been met.

First of all, you should check with the State highway department to be sure you are in compliance with the appropriate State procedures.

If the facilities are only serving the owner of the land and are not serving some aspect of the "public" then they would be treated under normal acquisition procedures for private property.

When it is determined that the utility is in fact serving the "public," the next step is to determine which of the utility adjustments are potentially eligible for federal-aid funding. In general, Federal-aid funds may participate in the costs of adjusting utilities where:

* the utility has a legal compensable interest in its present location by reason of holding a fee or easement to the real property; or

* the State is authorized by statute to pay for the utility adjustment; or

* the utility is owned by a governmental unit, is within public right-of-way, and the governmental unit is not required by law or agreement to relocate its facilities.

If, after the above is satisfied, it is determined that the new rights-of-way are required for the utility, there are two options available for obtaining the right-of-way. First, the utility may obtain the replacement right-of-way and be reimbursed for its costs. The second is for the highway agency to be the responsible party for obtaining the right-of-way. This needs to be covered as part of the utility relocation agreement between the highway agency and the public utility approved by the FHWA Division Office. Where the highway agency is obtaining the replacement rights-of-way, the provisions of the Uniform Act will apply. If the agreement calls for the utility to provide the rights-of-way, the Uniform Act does not apply.

14.6 Joint Development/Multiple Use

Highway joint development/multiple use projects have been carried out for many purposes, but the basic objectives have been to achieve better compatibility between the highway and its environment and to obtain maximum benefits from the use of increasingly scarce right-of-way.

Joint development/multiple use projects can have a major influence on highway location and design. Non-highway activities such as housing, business activities, parking, and recreation can be located in the airspace above or below the highway or on land adjacent to the highway. The designs for both the highway and the non-highway elements must be developed in close coordination and with a view toward achieving esthetic harmony, safety, overall economy, and compatibility with the adjoining neighborhood.

Joint development/multiple use applies not only to cooperative planning by the highway and the non-highway agencies, but also involves concern for land use beyond the immediate highway right-of-way. The intent is to

ALASKA RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC.

237 E. FIREWEED LANE • SUITE 301
ANCHORAGE, ALASKA 99503 • (907) 276-3235

March 30, 1984

TO: All House Members

FROM: David Hutchens Dave

SUBJECT: CS for CS for SB 67 (Rules) - Very similar to SB155 MC

Eventually the House will get to its Daily Calendar for 3-29. When that time comes, please support SB67.

This bill provides for reimbursement by municipalities of the net cost of relocating utility facilities when municipal road projects force their relocation. Most municipalities have in fact paid these costs in the past just as the State Department of Transportation has done since 1973. Some municipalities are now refusing to participate in these relocation expenses, and we see a growing trend in that direction.

These relocation expenses should properly be paid for by the municipalities as a part of the road project. In some cases, the cost of utility relocations can be more than the cost of the road itself. This situation leads to distortions in decision making. The municipality considers all the benefits of the road project, but only part of its costs.

The problem to the utilities' consumers is very real. A distribution line will typically be financed for 35 years. If the utility is forced to replace that line without reimbursement after 5 years, the consumers then have to pay 65 years' worth of debt on that facility in 35 years.

In many cases, the utility lines were there first. Chugach Electric, for example, has between 100 and 200 miles of line which were installed before there were adjacent roads, before there was any formal permit or easement process, and in some cases before those areas were within municipal boundaries. It would be extremely unfair for them now to be required to move those facilities at their own expense to accommodate a new road project.

In total economic terms it would not really make much difference whether relocation costs are paid by utility ratepayers or municipal tax payers, but in many cases they are not the same

people. For example, the City of Kenai is one of those municipalities which refuses to pay. They are one of several communities within the service area of Homer Electric Association. When the city of Kenai refuses to pay, the result is to transfer part of the cost of City of Kenai road projects to residents of the other communities throughout the HEA service area.

In the interest of simple fairness, please vote for SB 67. The cost causer should be the cost payer.

people. For example, the City of Kenai is one of those municipalities which refuses to pay. They are one of several communities within the service area of Homer Electric Association. When the city of Kenai refuses to pay, the result is to transfer part of the cost of City of Kenai road projects to residents of the other communities throughout the HEA service area.

In the interest of simple fairness, please vote for SB 67. The cost causer should be the cost payer.

(10) HB 155

ALASKA RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC.

237 E. FIREWEED LANE • SUITE 301
ANCHORAGE, ALASKA 99503 • (907) 276-3235

March 3, 1987

Representative Bette Cato
Pouch V
Juneau, AK 99811

Dear Representative Cato:

Thank you for introducing HB 155.- Same as SB 155- M&C

In regard to the relocation of utility facilities incident to a municipal construction project, this legislation would clarify the law as to when the utility pays and when the municipality pays. If there is a written agreement on these matters between the parties, that agreement would govern. If there is not a written agreement on allocation of costs, the municipality would pay if the utility facility is properly located under a permit or if the utility facility was installed before the municipality permit system applied to the construction of the facility in question in question.

The effect of all this is to resolve a long-standing dispute by protecting the utility investment in existing facilities. It will require municipalities in some cases to include utility relocation costs in the cost of municipal construction projects which would otherwise be in dispute between the parties.

By making these utility relocation costs a part of the cost of the highway project, the local utility rate payer is relieved of this burden. In most cases a State or federal grant is the funding source for the road project. In those cases, these relocation costs would be transferred to the state or federal government.

In some cases the expense will be assumed by the municiaplity. When this expense is transferred from the local utility rate payer to the local municipal taxpayer, there is no net change for residents who are in both roles. However, a utility's consumers and the municipality's taxpayers are not always the same people. Fairness requires that if a municipal project causes the cost of relocating

CITY OF PALMER

231 W. EVERGREEN AVE.
PALMER, ALASKA 99645

Phone (907) 745-3271

A HOME RULE CITY

March 24, 1987

RECEIVED After Packet was compiled. MC

The Honorable Mike Szymanski
Senator
State of Alaska
Box V
Juneau, Alaska 99811

RE: HB 155 Utility Relocation

Dear Senator Szymanski,

Like so many things, if you don't succeed at first, try, try again, and HB 155 Utility Relocation is a good example of this.

For the past two Legislative Sessions, the question of utility relocation responsibility has been presented to the legislators for consideration which if enacted would place an undue burden on the local political entities.

The problems which confront the City of Palmer are not unique to our city alone but other cities and boroughs within the State where the utilities are not municipally-owned.

Even though the City of Palmer has had a permitting system in effect since 1981, we find during reconstruction of streets and underground utilities, the permit allocation of right-of-way use has not been followed as specified. Naturally, the utility has to bear the relocation cost as a part of the agreement signed. However, our biggest problems are the utilities installed prior to our permitting system. Those utilities meander all over the right-of-way at varying depths. By grand-fathering ALL previously installed utilities gives the utilities a free ride for their errors at taxpayers expense. The utilities are not accountable for their mistakes which is wrong. Even worse is to allow a two (2) foot horizontal error in the utility placement. This is impossible to live with. Our utility permit requires the utility to be placed within a 0-5 foot area from the property line, no more, no less. If a utility cannot be placed in a five (5) foot area, then something is wrong.

Using our adopted design for a collector street, the width is 44 feet back-of-curb to back-of-curb without sidewalks. Using a 60 foot right-of-way, this utility corridor becomes very important if each utility uses their share properly and is considerate of their fellow utilities.

In my 26 years in the municipal field, ranging from a Sewer and Water Plant Operator to Director of Public Works to City Manager, I have found that the utilities are reluctant to spend the money or have on staff a qualified surveyor to lay out the exact location of the right-of-way. The employees assigned to the task are instructed to install the utility according to the work order which in many cases is vague or impossible to relate to actual field conditions. For example, if undergrowth has occurred in the right-of-way, rather than clear through this obstacle, the construction crews would install the utility further out in the right-of-way to avoid the undergrowth, further compounding the inevitable problem.

I have no problem with my sharing the burden of relocation if in fact the City of Palmer errored when the permit was issued or was issued in good faith with the population change requiring an entirely different or wider right-of-way to accommodate a higher volume street which was not forecasted in the Comprehensive Plan. An interesting point, not one mention is made of the Comprehensive Plan in this bill as a basis for relocation cost allocation.

We have a tendency to absolve the past errors here in Alaska which continues to haunt us no matter how good our intentions are, and this is another example. The City of Palmer urges you to vote against House Bill 155.

Should you have any questions, please contact me.

Yours truly,

David L. Soulak
City Manager
City of Palmer

DLS/cac

cc: Scott Burgess
Mayor Carte'
House Transportation & Finance Committee Members

Alaska State Legislature

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JUNEAU, ALASKA 99811
(907) 465-4989

Senate
Community and Regional Affairs Committee

TO: Senate C&RA Members April 2, 1987

FROM: Senate C&RA Staff

RE: SB 155 - Relating to change, relocation, or removal of utility facilities incident to the construction of road or other projects by a municipality

Various versions of this bill have been in the legislature for at least five years. In general utilities support the bill and municipalities oppose it. There will be representatives from both groups to testify at the hearing today.

It is not anticipated that SB 155 will pass out of committee today, but rather, after all testimony, staff will work with interested committee members and other parties and bring a committee substitute back to committee in the near future.

Included in this packet is a zero fiscal note from the Department of Community and Regional Affairs; a statement form the Alaska Municipal League; material, including suggested amendments, from the Fairbanks North Star Borough; and two letters from the Alaska Rural Electric Cooperative Association.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : SB 155
Publish Date :

REQUEST:

Revision Date:
Agency Affected : Community & Regional Affairs
Title : "An Act change, relocation, or removal of utility facilities..construction
BRU : Local Government Assistance
Sponsor : Josephson
Component : Training & Development
Requestor : Senate C&RA

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Doug Griffin, Deputy Director
Phone : 465-4750
Division : Municipal & Regional Assistance
Date : 4/1/87

Approved by Commissioner : Brent C. Allen
Date : 4-1-87
Agency : Community & Regional Affairs

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

page ____ of ____

Alaska MUNICIPAL League

TELEPHONE
(907) 586-1325

105 MUNICIPAL WAY, SUITE 301
JUNEAU, ALASKA 99801

April 2, 1987

APR 2 1987

MEMORANDUM

TO: Senator Arliss Sturgulewski, Chair
Members of the Senate Community and Regional Affairs Committee

FROM: Scott A. Burgess, Executive Director

SUBJECT: SB 155 - Relocation of Utility Facilities

The Alaska Municipal League is opposed to SB 155 and shifting the cost of relocating utility facilities in connection with municipal construction in rights-of-way from the utility company to the municipality. The AML has opposed this effort every year similar legislation has been introduced into the Legislature; most recently, SB 67 in the 13th Legislature. The legislation, if passed, would deviate from common and case law.

The AML's 1987 Policy Statement was most recently revised and adopted by the membership, representing 124 municipalities, at their annual meeting in Juneau last November. On page 17 of the Policy Statement, it states the following:

> Utility Relocation Costs: The League opposes any effort to shift to municipalities the cost of all non-municipal, utility relocation within existing rights-of-way associated with municipal street work.

As 12 McQuillan, Municipal Corporations, Section 34.74 on page 183 states:

> The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity. Accordingly, it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of a franchise, where public convenience or security require it, even at the grantee's own expense, and even in the face of a protest by a consumer. It makes no difference whether the surface or subsurface of streets is involved.

The common law rule referenced above can be modified by legislative action or contract agreement between the municipality and the utility company. The League urges the Legislature not to change common law and practice, and, instead, leave the matters addressed in this bill to local officials to work out with local utilities in the best interest of the local public.

Municipal rights-of-way are first and foremost for transportation and roads. As a secondary use, utility companies have a right to use the rights-of-way as utility corridors. Such use is in lieu of the utility having to purchase their own rights-of-way, and is usually free or with a minimum permit fee in the larger municipalities. However, the use of the right-of-way for little or no cost is with the understanding that the utility will relocate their facilities, if necessary, to accommodate road improvements, unless provided for differently in individual ordinances or franchise agreements between municipal and utility companies.

The proposed legislation does not distinguish between private, for-profit, investor-owned utilities and non-profit and REA utilities, nor between the regulated, essential utilities such as gas and electrical on one hand and the unregulated, unessential utilities such as cable television on the other. The potential cost of relocating utilities for the utility companies is just the cost of doing business, counter- balanced by the savings of not having to buy the rights-of-way from a land owner. Utility companies have always known upfront that they could potentially incur relocation costs in the event that road improvements are necessary. Any change in this by the Legislature is an intrusion into the local authority of the municipalities and their road powers.

Shifting the cost of utility relocation, as proposed in this bill, would shift the cost from the rate payer to the taxpayer. The additional cost may mean that necessary road improvements, necessary for public safety, may be delayed or simply not done given limited road construction dollars. This is especially true for local improvement districts and for boroughs with limited road powers and road service areas with limited dollars available.

The situation is also different than it is with state road construction. The State owns its rights-of-way in fee simple. They have complete control over their roads and can prohibit their use by utility companies. Municipalities cannot. The State Department of Transportation also operates with a large professional staff which is capable of supervising the permitting, planning, and installation of utilities in their roadways, including requiring "as-builts" of the facilities installed. Many municipalities do not require permits or fees or have tight controls over the utility companies and where and how they placed their utilities in the rights-of-way. And why should they build such expensive bureaucracies when it is common understanding that the utility will be responsible for relocating their facilities if necessary? Finally, the State of Alaska gets much of its highway improvement funds from the federal government. Therefore, it can build the cost of relocating utilities into the cost of the project and shift the costs to largely, third party, non-resident taxpayers.

In addition to the general argument that the legislation would inappropriately shift the cost of relocating utility facilities to the municipalities, the change from common law and past practice is made even more onerous in that such a change and the impact would be retroactive. Under Section 2 of the bill with the proposed added language of AS 29.35.075 (b)(2), the municipalities would be penalized for following the laws in place; i.e., many municipalities have allowed utilities to place

their facilities in the rights-of-way without charge or without permits because the understanding and law required the utility company to bear the responsibility and cost to move them if necessary. Under the language of this section, if there is no permit system, the municipality would pay the cost of relocation.

One final point is relevant, again, only if you accept the basic concept of the bill, and we do not. While the cost to the municipality for relocating the utility facilities is discounted for upgrades and salvage value in subsection (d) of the bill, "useful remain life" is not. If the municipality is required to pay for the cost of relocating the facility, it should have have to pay for brand new equipment if it has limited remaining life left; e.g., the telephone pole is old and rotting and would have had to be replaced in a year even if the municipality were not making road improvements which require their removal.

Again, the AML is opposed to SB 155 and shifting the cost of utility relocation from the utility company to the municipality and the general taxpayers.

SAB:phl

★ Fairbanks North Star Borough

809 Pioneer Road · P.O. Box 1267 · Fairbanks, Alaska 99707 · 907/452-4761

March 30, 1987

Linda Anderson
FNSB Liaison
130 Seward St., Rm 304
Juneau, AK 99801

Dear Ms. Anderson:

SUBJECT: SUGGESTED MODIFICATIONS TO LANGUAGE OF SB 155

Along the lines of our brief conversations in Juneau on Friday, March 27, I recommend the following language be considered as a substitute bill for SB 155, "An act relating to the change, relocation or removal of utility facilities incident to the construction of road or other projects by a municipality."

1. Add to page 1, line 20, after the word "compliance.":

   "The utility shall prepare an estimate of the work required by the order for review and approval by the municipality before beginning work."

2. Add to page 1, line 27, after the word "municipality.":

   "The cost shall not exceed the approved estimate unless agreed to by the municipality."

3. Remove the word "municipal" from page 2, line 1.

4. Add to page 2, line 3, after the word "horizontal":

   "feet and one vertical"

5. Add to page 2, line 6, after the word "permits":

   "in that right-of-way"

6. Add to page 2, line 6, after the word "facilities.":

   "and the facility ~~is~~ was located ~~such that it met~~ in compliance with all applicable codes, regulations, and statutes at the time of its installation."

I will immediately follow up these suggested wording changes in SB155 with a letter describing some of my concerns and the impetus for making these changes. Thank you for your attention to our suggestions in this matter.

Sincerely,

Clark Milne

Clark R. Milne
Manager
Division of Civil Engineering

cc: Pat Walsh, Special Assistant to the Mayor, FNSB

cm8-141

★ Fairbanks North Star Borough

809 Pioneer Road · P.O. Box 1267 · Fairbanks, Alaska 99707 · 907/452-4761

M E M O R A N D U M

TO: Dick Jackson, Administrator Director

THROUGH: Neil Kersten, Public Works Director

FROM: Clark Milne, Manager, Civil Engineering Division Clark Milne

DATE: March 30, 1987

SUBJECT: NEED FOR MODIFICATIONS TO SB155, "RELOCATION OF UTILITIES IN RIGHT-OF-WAYS"

To validate my latter which suggested changes to SB155 concerning municipalities (such as the FNSB) being responsible for paying utilities to remove or relocate existing utility facilities within right-of-ways, I would like to submit to you the comments below.

My first and foremost concern is that our FNSB utility permit system is quite young, having only been instituted on July 1, 1985. Thus, the majority of all utilities installed in road rights-of-way in the FNSB have been put in before our utility permit system was in effect, and the language of Section 29.35.075.(b)2 will probably be in effect the majority of the time. Thus, we will consistently be responsible for the costs of moving utility facilities in our rights-of-way. I believe this is inappropriate and not in the public's best interests, at least so far as the unrestricted wording of (b)2 imposes these costs on us.

Our experience in the Civil Engineering Division has been that the majority of the time when we require the removal or relocation of a utility facility from our right-of-way, it is due to a past failure of the utility to install the service line or facility properly in the first place. This includes both aerial crossings that are too low, buried lines that are too shallow, and utility poles that intrude too closely to the existing road shoulders so that necessary road widening (within the right-of-way) requires the relocation of an existing pole. To require us to pay for these oversights, under-designs, and inappropriate installations by the utility firms seems unconscionable. Thus, my suggested revision in the SB155 language (as noted in my letters to Linda Anderson and McKie Campbell, see attached), item no. 4, which would require that the utility firm have installed the affected facility properly, i.e. to the standards of the applicable code or regulation, in the first place.

The most common and expensive instances of this type of facility that must be moved are aerial crossings above the roadway which are currently at less than the minimum 18 foot required by national electrical code. It is our practice, and is supported by the common law, that the utility firm is wholly responsible for the costs of raising these substandard lines crossing our right-of-way to an appropriate, code/standard elevation above the road surface.

Similarly, we have had significant problems and expenses due to the relocation of telephone or power lines below the road surface. We have found that all too often a utility placed a line too shallowly in the right-of-way and a new road project thus uncovers and interferes with it. Again, national electric code requires that any power or telephone line must be buried at least 30" under the ground surface. If only this were the common condition of buried utility lines in the FNSB our troubles would be nearly over! Unfortunately, there are many instances in our road projects where buried utility lines are very often found to be at anywhere from 4" to 24" below the ground surface--thus, the road interference with minor improvements to the roadway.

In both of the cases noted above, SB155 would automatically give the utility firm a "reprieve" from having to pay for their illegal and substandard utility placement. Without actually calculating the exact expenses generated by utility relocation for FNSB projects in the last few years, I believe that as a rough estimate approximately 10% of our capital improvement monies for road improvement projects would go to utility relocation were SB155 to be passed in the form submitted by Senator Josephson.

Other concerns I have tried to deal with in my revised language for SB155 are evidenced in the other items noted in my letters of March 30. The first item deals with my concern that utility firms should work with the municipalities before beginning work on utility removal or relocation to assure that their field activities are cost-effective and solely done in an effort to replace or relocate the facility which is interfering with the legitimate uses of the road right-of-way. I fear circumstances where the utility could indiscriminately overcharge the municipality for unnecessary expenses, as well as situations where the replacement facility is a superior and improved product to that which is being replaced. Neither of these two concerns is addressed in SB155 as originally submitted.

Item no. 2 would tend to assure that the costs as discussed and approved by the utility and municipality before beginning work are indeed those reached during construction. I foresee reasonable incidences where the initial cost estimate is exceeded, but believe that the municipalities can negotiate with the utilities in a timely manner to increase those agreed upon estimates for valid, discernable reasons.

Item no. 3 was requested because I do not know what a "municipal right-of-way" is. In the Borough we only have public rights-of-way, some of which are included within service areas and thus subject to municipal maintenance efforts.

Item no. 4 addresses my concern that an often crucial dimension in the location of utility facilities is the exact depth or elevation of the line or pipe. I understand that many utility firms have extremely poor as-built records of the location of their facilities, but I believe this should be the utility's concern, problem and expense, not ours.

Item no. 5 deals with my concern that the existing FNSB utility permit system applies only to those rights-of-way within recognized road service areas. The revised language would read "before the municipality had a system for granting easements or permits in that right-of-way for utility facilities," which would eliminate the problem of us having to pay for facility relocations in rights-of-way not covered by a utility permit system such as ours because the permit system was restricted to rights-of-way within service areas. Thus, if a service area annexed new roads after the utility firm installed a facility (after July 1, 1985), and we later interfered with that facility with our transportation use of that road right-of-way, we would not be held responsible for the lack of our utility permit system, but rather the utility firm would be responsible for having to follow good practice and the" applicable codes, regulations and statutes" affecting that utility facility.

Finishing up with item no. 6 from my letter, I understand that it may be troublesome to do the research necessary to confirm what "codes, regulations and statutes "apply to the various situations we find in needing utility relocations in our rights-of-way, but it seemed to me to be the most just and fair dividing line when faced with paying for a utility relocation or not. I agree with the concept that if a utility firm acted within the applicable codes and standards of their industry and all applicable regulations and statutes within the State of Alaska, our dramatic modification of the use of a road right-of-way should include and require our payment for the relocation or removal of the affected utility facilities. It is interesting to note that I believe that I understand the utility's point of view of some of these costs and concerns. But I do not believe that they should be able to "end run" the existing common law and the common sense of justice inherent in having to pay for their own mistakes of the past.

For additional specifics or other questions, please feel free to contact me at ext. 351.

cm8-143

Clark Milne

U.S. Department of Transportation
Federal Highway Administration

Real Estate Acquisition Guide for Local Public Agencies

A Resource Manual for Use by:
Local Public Agency and State Personnel Involved in the Acquisition of Real Property for Federally-Assisted Public Improvement Projects

Prepared by:
Real Estate Division
Office of Right-of-Way

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3/3/87

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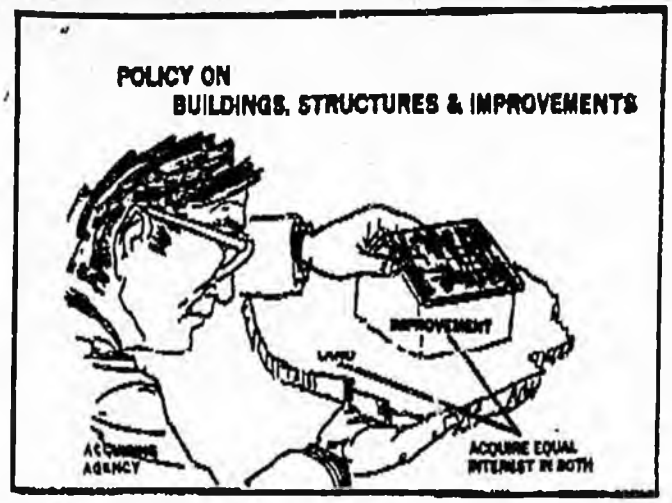

other improvements. The Uniform Act requires that such tenant receive just compensation for any such buildings, structures, or improvements. The tenant is due this compensation even if the lease requires the tenant to remove any buildings, structures, or improvements at the end of the lease term.

Any building, structure, or other improvement which would be considered to be real property if owned by the owner of the real property on which it is located shall be considered to be real property for acquisition purposes. Acquisition from the tenant-owner shall follow the same procedures as for a fee owner.

Just compensation for a tenant-owned improvement is the amount which the improvement contributes to the fair market value of the whole property or its removal value, whichever is greater. Removal value is considered to be salvage value.

a. The term "salvage value" means the probable sale price of an item, if offered for sale on the condition that it will be removed from the property at the buyer's expense, allowing a reasonable period of time to find a person buying with knowledge of the uses and purposes for which it is adaptable and capable of being used, including separate use of serviceable components and scrap when there is no reasonable prospect of sale except on that basis.

b. The contributory value consists of:

1. The value in place of a building, structure, or other improvement, the present use of which is the highest and best use of the land to be acquired, for its remaining economic life; or

2. The interim use value of a building, structure, or other improvement, the present use of which is not the projected highest and best use of the land to be acquired, for a specified interim time period longer than the remaining term of the lease (interim use value includes the present worth of the salvage value of the buildings, structures, or other improvements at the end of the interim time period); or

3. The value in place of a building, structure, or other improvement, the present use of which is not the highest and best use of the land to be acquired, for the remaining term of the lease plus the worth of its salvage value at the end of the lease term.

No payment shall be made to a tenant-owner for any improvements unless:

a. The tenant-owner, in consideration for the payment, assigns, transfers and releases to the acquiring agency all of the tenant-owner's right, title, and interest in the improvement;

b. The owner of the real property on which the improvement is located disclaims all interest in the improvement; and

c. The payment does not result in the duplication of any compensation otherwise authorized by law.

This provision shall not be construed to deprive the tenant-owner of any rights to reject payment under this provision and to obtain payment for such property interests in accordance with other applicable law.

14.5 Utility Relocation and Accommodation

contact State for explanation

Historically, it has been in the public interest for public utility facilities to use and occupy the right-of-way of public roads and streets. This is especially the case on

local roads and streets that primarily provide a land service function to abutting residents, as well as on conventional highways that serve a combination of local, State, and regional traffic needs. This practice has generally been followed nationwide since the early formation of utility and highway transportation networks. Over many years, it has proven to offer the most feasible, economic, and reliable solution for transporting people, goods, and public service commodities (water, electricity, communications, gas, oil, etc.), all of which are vital to the general welfare, safety, health, and well being of our citizens. To have done otherwise would have required a tremendous increase in the acquisition of additional right-of-way for utility purposes alone. This could have also resulted in significant added costs to be borne by the utility consumers through increased rates for utility services so provided.

Under the practice of jointly using a common right-of-way, there are two broad areas of concern to highway and utility officials alike. First is the cost of relocating, replacing, or adjusting utility facilities that fall in the path of proposed highway improvement projects, commonly referred to as Utility Relocations and Adjustments. Second, is the installation of utility facilities along or across highway right-of-way and the manner in which they occupy and jointly use such right-of-way, commonly referred to as the Accommodation of Utilities.

Federal-aid funds may participate in relocating utilities displaced by a proposed highway project when certain conditions have been met.

First of all, you should check with the State highway department to be sure you are in compliance with the appropriate State procedures.

If the facilities are only serving the owner of the land and are not serving some aspect of the "public" then they would be treated under normal acquisition procedures for private property.

When it is determined that the utility is in fact serving the "public," the next step is to determine which of the utility adjustments are potentially eligible for Federal-aid funding. In general, Federal-aid funds may participate in the costs of adjusting utilities where:

* the utility has a legal compensable interest in its present location by reason of holding a fee or easement to the real property; or
* the State is authorized by statute to pay for the utility adjustment; or
* the utility is owned by a governmental unit, is within public right-of-way, and the governmental unit is not required by law or agreement to relocate its facilities.

If, after the above is satisfied, it is determined that the new rights-of-way are required for the utility, there are two options available for obtaining the right-of-way. First, the utility may obtain the replacement right-of-way and be reimbursed for its costs. The second is for the highway agency to be the responsible party for obtaining the right-of-way. This needs to be covered as part of the utility relocation agreement between the highway agency and the public utility approved by the FHWA Division Office. Where the highway agency is obtaining the replacement rights-of-way, the provisions of the Uniform Act will apply. If the agreement calls for the utility to provide the rights-of-way, the Uniform Act does not apply.

14.6 Joint Development/Multiple Use

Highway joint development/multiple use projects have been carried out for many purposes, but the basic objectives have been to achieve better compatibility between the highway and its environment and to obtain maximum benefits from the use of increasingly scarce right-of-way.

Joint development/multiple use projects can have a major influence on highway location and design. Non-highway activities such as housing, business activities, parking, and recreation can be located in the airspace above or below the highway or on land adjacent to the highway. The designs for both the highway and the non-highway elements must be developed in close coordination and with a view toward achieving esthetic harmony, safety, overall economy, and compatibility with the adjoining neighborhood.

Joint development/multiple use applies not only to cooperative planning by the highway and the non-highway agencies, but also involves concern for land use beyond the immediate highway right-of-way. The intent is to

ALASKA RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC.

237 E. FIREWEED LANE • SUITE 301
ANCHORAGE, ALASKA 99503 • (907) 276-3235

March 30, 1984

TO: All House Members

FROM: David Hutchens Dave

SUBJECT: CS for CS for SB 67 (Rules) - Very similar to SB155 MS/L

Eventually the House will get to its Daily Calendar for 3-29. When that time comes, please support SB67.

This bill provides for reimbursement by municipalities of the net cost of relocating utility facilities when municipal road projects force their relocation. Most municipalities have in fact paid these costs in the past just as the State Department of Transportation has done since 1973. Some municipalities are now refusing to participate in these relocation expenses, and we see a growing trend in that direction.

These relocation expenses should properly be paid for by the municipalities as a part of the road project. In some cases, the cost of utility relocations can be more than the cost of the road itself. This situation leads to distortions in decision making. The municipality considers all the benefits of the road project, but only part of its costs.

The problem to the utilities' consumers is very real. A distribution line will typically be financed for 35 years. If the utility is forced to replace that line without reimbursement after 5 years, the consumers then have to pay 65 years' worth of debt on that facility in 35 years.

In many cases, the utility lines were there first. Chugach Electric, for example, has between 100 and 200 miles of [illegible] which were installed before there were adjacent roads, before [illegible]e was any formal permit or easement process, and in some c[illegible]es before those areas were within municipal boundaries. It would be extremely unfair for them now to be required to move those facilities at their own expense to accommodate a new road project.

In total economic terms it would not really make much difference whether relocation costs are paid by utility ratepayers or municipal tax payers, but in many cases they are not the same

people. For example, the City of Kenai is one of those municipalities which refuses to pay. They are one of several communities within the service area of Homer Electric Association. When the city of Kenai refuses to pay, the result is to transfer part of the cost of City of Kenai road projects to residents of the other communities throughout the HEA service area.

In the interest of simple fairness, please vote for SB 67. The cost causer should be the cost payer.

(10) HB 155

ALASKA RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC.

237 E. FIREWEED LANE • SUITE 301
ANCHORAGE, ALASKA 99503 • (907) 276-3235

March 3, 1987

Representative Bette Cato
Pouch V
Juneau, AK 99811

Dear Representative Cato:

Thank you for introducing HB 155.- Same as SB 155- MSU

In regard to the relocation of utility facilities incident to a municipal construction project, this legislation would clarify the law as to when the utility pays and when the municipality pays. If there is a written agreement on these matters between the parties, that agreement would govern. If there is not a written agreement on allocation of costs, the municipality would pay if the utility facility is properly located under a permit or if the utility facility was installed before the municipality permit system applied to the construction of the facility in quest.on in question.

The effect of all this is to resolve a long-standing dispute by protecting the utility investment in existing facilities. It will require municipalities in some cases to include utility relocation costs in the cost of municipal construction projects which would otherwise be in dispute between the parties.

By making these utility relocation costs a part of the cost of the highway project, the local utility rate payer is relieved of this burden. In most cases a State or federal grant is the funding source for the road project. In those cases, these relocation costs would be transferred to the state or federal government.

In some cases the expense will be assumed by the municiaplity. When this expense is transferred from the local utility rate payer to the local municipal taxpayer, there is no net change for residents who are in both roles. However, a utility's consumers and the municipality's taxpayers are not always the same people. Fairness requires that if a municipal project causes the cost of relocating

utility facilities, then the municipality should be responsible for that cost. It is also important that all of the costs as well as all of the benefits of a proposed project be considered at the time a municipality decides to relocate or widen a highway. Without HB 153 the municipality considers all of the benefits of a proposed project but it only considers a part of the cost.

Sincerely,

David Hutchens
Executive Director

CITY OF PALMER

231 W. EVERGREEN AVE.
PALMER, ALASKA 99645

Phone (907) 745-3271

A HOME RULE CITY

March 24, 1987

RECEIVED After Packet was compiled. MC/

The Honorable Mike Szymanski
Senator
State of Alaska
Box V
Juneau, Alaska 99811

RE: HB 155 Utility Relocation

Dear Senator Szymanski,

Like so many things, if you don't succeed at first, try, try again, and HB 155 Utility Relocation is a good example of this.

For the past two Legislative Sessions, the question of utility relocation responsibility has been presented to the legislators for consideration which if enacted would place an undue burden on the local political entities.

The problems which confront the City of Palmer are not unique to our city alone but other cities and boroughs within the State where the utilities are not municipally-owned.

Even though the City of Palmer has had a permitting system in effect since 1981, we find during reconstruction of streets and underground utilities, the permit allocation of right-of-way use has not been followed as specified. Naturally, the utility has to bear the relocation cost as a part of the agreement signed. However, our biggest problems are the utilities installed prior to our permitting system. Those utilities meander all over the right-of-way at varying depths. By grand-fathering ALL previously installed utilities gives the utilities a free ride for their errors at taxpayers expense. The utilities are not accountable for their mistakes which is wrong. Even worse is to allow a two (2) foot horizontal error in the utility placement. This is impossible to live with. Our utility permit requires the utility to be placed within a 0-5 foot area from the property line, no more, no less. If a utility cannot be placed in a five (5) foot area, then something is wrong.

Using our adopted design for a collector street, the width is 44 feet back-of-curb to back-of-curb without sidewalks. Using a 60 foot right-of-way, this utility corridor becomes very important if each utility uses their share properly and is considerate of their fellow utilities.

In my 26 years in the municipal field, ranging from a Sewer and Water Plant Operator to Director of Public Works to City Manager, I have found that the utilities are reluctant to spend the money or have on staff a qualified surveyor to lay out the exact location of the right-of-way. The employees assigned to the task are instructed to install the utility according to the work order which in many cases is vague or impossible to relate to actual field conditions. For example, if undergrowth has occurred in the right-of-way, rather than clear through this obstacle, the construction crews would install the utility further out in the right-of-way to avoid the undergrowth, further compounding the inevitable problem.

I have no problem with my sharing the burden of relocation if in fact the City of Palmer errored when the permit was issued or was issued in good faith with the population change requiring an entirely different or wider right-of-way to accommodate a higher volume street which was not forecasted in the Comprehensive Plan. An interesting point, not one mention is made of the Comprehensive Plan in this bill as a basis for relocation cost allocation.

We have a tendency to absolve the past errors here in Alaska which continues to haunt us no matter how good our intentions are, and this is another example. The City of Palmer urges you to vote against House Bill 155.

Should you have any questions, please contact me.

Yours truly,

David L. Soulak
City Manager
City of Palmer

DLS/cac

cc: Scott Burgess
Mayor Carte'
House Transportation & Finance Committee Members

Dept. of Transportation & Public Facilities

Position Paper

BILL NO: HB 155

TITLE: Utility Relocation on Municipal Projects

APPROVED: Mark Hickey MH
Commissioner

DATE: 3/9/87

The Department of Transportation and Public Facilities supports HB 155.

The legislation would require municipalities to treat utility relocation, incident to municipal road and other project construction, in a manner similar to that currently required for utility relocation on State highway, airport and public facility construction. As the bill is written, it would apply only to utilities regulated under AS 42.05.

For further information call Susan Fleischhauer at 465-3900.

(4) HB 155

STATE OF ALASKA

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

- *P.O. BOX B*
  JUNEAU, ALASKA 99811-2100
  PHONE: (907) 465-4700
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March 6, 1987

POSITION PAPER

RE: HB 155 -- "An Act relating to the change, relocation, or removal of utility facilities incident to the construction of road or other projects by a municipality."

SPONSOR: Representative Cato

Effects of Bill:

Section 1 of the bill simply adds another home rule limitation appropriate for this bill.

Section 2 of the bill designates to municipalities the power to order a utility within a municipal grants right-of-way to be changed, relocated, or removed and provides for the cost of the order to borne by the municipality if the facility is within the municipalities' jurisdiction.

Comments:

The majority of utility facilities are owned and operated by municipalities in rural areas. This bill will place the burden of all costs relating to movement of utilities on the entity requesting the movement.

Because of the costs associated with utility relocation, the Department believes that the proposed legislation would provide the means for municipalities to thoroughly review proposed changes before requiring the movement of utilities. The Department recognizes that this bill may place additional costs on governments, but since the cost is created by the local government, this is not unreasonable. The Department does not oppose this bill.

David G. Hoffman By Doug Griffin

David G. Hoffman, Commissioner

21-P1LH

ALASKA RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC.

237 E. FIREWEED LANE • SUITE 301
ANCHORAGE, ALASKA 99503 • (907) 276-3235

March 4, 1987

Representative Heinrich Springer, Chairman
House Community and Regional Affairs Committee
Pouch V
Juneau, AK 99811

Dear Representative Springer:

It will be impossible for me to be present on Monday, March 9 when your committee consi[illegible] HB 155. This letter is to express the strong support our a[illegible]ciation has for this legislation. We hope this bill will resolve the long-standing problems between a number of utilities and municipalities regarding the cost of utility relocation incident to a municipal construction project.

This particular legislation resulted from negotiations between an Anchorage area utility and the Municipality of Anchorage. When I met with both parties in January they expressed support for the approach taken by this bill. Our associaition, looking at it from a statewide perspective, believes it is an important step forward.

However, we do suggest that the phrase "subject to regulation" which appears on lines 15-16 and 25 should be amended to read "certificated." This would have the effect of applying the policy of this legislation uniformly across the state in relations between municipalities and utilities whether or not the utilities are economically regulated by the Alaska Public Utilities Commission (APUC). Other disputes between municipalities and utilities are subject to APUC jurisdiction whether or not the utility is regulated, and it is important that precedent be followed here.

Sincerely,

David Hutchens

David Hutchens
Executive Director

cc Representative Bette Cato

Introduced: 3/3/87
Referred: Community & Regional Affairs & Transportation

5-0704A

9.586-13 25

IN THE SENATE BY JOSEPHSON

SENATE BILL NO. 155

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the change, relocation, or removal of utility facilities incident to the construction of road or other projects by a municipality."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 29.10.200 is amended by adding a new paragraph to read:

(49) AS 29.35.075 (relocation of utility facilities).

* Sec. 2. AS 29.35 is amended by adding a new section to read:

Sec. 29.35.075. RELOCATION OF UTILITY FACILITIES. (a) If, incident to the construction of a road or other project, a municipality determines and orders that a facility of a utility subject to regulation under AS 42.05 that is located across, along, over, under, or within a right-of-way under its jurisdiction must be changed, relocated, or removed, the utility owning or maintaining the facility shall change, relocate, or remove it in accordance with the order. The order shall provide a reasonable time period for compliance. If the utility facility is not changed, relocated, or removed under the order, the facility becomes an unauthorized encroachment and may be disposed of by the municipality.

(b) The cost of change, relocation, or removal of a facility of a utility subject to regulation under AS 42.05 necessitated by municipal road or other project construction shall be allocated as provided in the permit, franchise, or other agreement with the municipality. If no specific allocation has been agreed to, the cost shall be borne by the municipality only if the facility has been placed in the

municipal right-of-way

(1) under a valid easement or permit that specifies the location of the facility and the facility is within two horizontal feet of that location; or

(2) before the municipality had a system for granting easements or permits for utility facilities.

(c) In (b) of this section, "cost of change, relocation, or removal" means the entire cost incurred by a utility properly attributed to the change, relocation, or removal of a facility, less costs for improvements or upgrading not required by the change, relocation, or removal; if a facility is to be relocated and replaced with new equipment, there shall also be subtracted from the entire cost any salvage value derived from the old facility.

(d) This section applies to home rule and general law municipalities.

5-0704B
Cook
4/9/87

Original sponsor: Josephson

BY THE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

IN THE SENATE

CS FOR SENATE BILL NO. 155 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

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(b) The cost of change, relocation, or removal of a facility of a utility ~~subject to regulation~~ certificated under AS 42.05 necessitated by municipal road or other project construction shall be allocated as provided in the permit, franchise, or other agreement with the municipality. If no specific allocation has been agreed to, the cost shall be borne by the municipality only if the facility has been placed in the

municipal right-of-way

(1) in accordance with a valid easement or permit that specifies the location of the facility; or

(2) after June 30, 1987, in an area for which the municipality does not have a system for granting easements or permits for utility facilities and if the facility has been located in compliance with codes, regulations, and statutes applicable at the time of its installation.

(c) In (b) of this section, "cost of change, relocation, or removal" means the entire cost incurred by a utility properly attributed to the change, relocation, or removal of a facility, less costs for improvements or upgrading not required by the change, relocation, or removal, if a facility is to be relocated and replaced with new equipment, there shall also be subtracted from the entire cost any salvage value derived from the old facility.

(d) This section applies to home rule and general law municipalities.

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
TIM KELLY, Vice Chairman
RICK HALFORD
MIKE SZYMANSKI
FRED ZHAROFF

P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4929

Senate
Community and Regional Affairs Committee

TO: Senate C&RA Members April 2, 1987

FROM: Senate C&RA Staff

RE: SB 155 - Relating to change, relocation, or removal of utility facilities incident to the construction of road or other projects by a municipality

Various versions of this bill have been in the legislature for at least five years. In general utilities support the bill and municipalities oppose it. There will be representatives from both groups to testify at the hearing today.

It is not anticipated that SB 155 will pass out of committee today, but rather, after all testimony, staff will work with interested committee members and other parties and bring a committee substitute back to committee in the near future.

Included in this packet is a zero fiscal note from the Department of Community and Regional Affairs; a statement form the Alaska Municipal League; material, including suggested amendments, from the Fairbanks North Star Borough; and two letters from the Alaska Rural Electric Cooperative Association.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : SB 155
Publish Date :

REQUEST:

Revision Date:
Title : "An Act change, relocation, or removal of utility facilities..construction
Sponsor : Josephson
Requestor : Senate C&RA

Agency Affected : Community & Regional Affairs
BRU : Local Government Assistance
Components : Training & Development

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Doug Griffin, Deputy Director
Phone : 465-4750
Division : Municipal & Regional Assistance
Date : 4/1/87

Approved by Commissioner : Brent C. Allen
Date : 4-1-87
Agency : Community & Regional Affairs

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

Alaska MUNICIPAL League

TELEPHONE
(907) 586-1325

105 MUNICIPAL WAY, SUITE 301
JUNEAU, ALASKA 99801

April 2, 1987

APR 2 1987

MEMORANDUM

TO: Senator Arliss Sturgulewski, Chair
Members of the Senate Community and Regional Affairs Committee

FROM: Scott A. Burgess, Executive Director

SUBJECT: SB 155 - Relocation of Utility Facilities

The Alaska Municipal League is opposed to SB 155 and shifting the cost of relocating utility facilities in connection with municipal construction in rights-of-way from the utility company to the municipality. The AML has opposed this effort every year similar legislation has been introduced into the Legislature; most recently, SB 67 in the 13th Legislature. The legislation, if passed, would deviate from common and case law.

The AML's 1987 Policy Statement was most recently revised and adopted by the membership, representing 124 municipalities, at their annual meeting in Juneau last November. On page 17 of the Policy Statement, it states the following:

> Utility Relocation Costs: The League opposes any effort to shift to municipalities the cost of all non-municipal, utility relocation within existing rights-of-way associated with municipal street work.

As 12 McQuillan, Municipal Corporations, Section 34.74 on page 183 states:

> The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity. Accordingly, it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of a franchise, where public convenience or security require it, even at the grantee's own expense, and even in the face of a protest by a consumer. It makes no difference whether the surface or subsurface of streets is involved.

The common law rule referenced above can be modified by legislative action or contract agreement between the municipality and the utility company. The League urges the Legislature not to change common law and practice, and, instead, leave the matters addressed in this bill to local officials to work out with local utilities in the best interest of the local public.

Municipal rights-of-way are first and foremost for transportation and roads. As a secondary use, utility companies have a right to use the rights-of-way as utility corridors. Such use is in lieu of the utility having to purchase their own rights-of-way, and is usually free or with a minimum permit fee in the larger municipalities. However, the use of the right-of-way for little or no cost is with the understanding that the utility will relocate their facilities, if necessary, to accommodate road improvements, unless provided for differently in individual ordinances or franchise agreements between municipal and utility companies.

The proposed legislation does not distinguish between private, for-profit, investor-owned utilities and non-profit and REA utilities, nor between the regulated, essential utilities such as gas and electrical on one hand and the unregulated, unessential utilities such as cable television on the other. The potential cost of relocating utilities for the utility companies is just the cost of doing business, counter- balanced by the savings of not having to buy the rights-of-way from a land owner. Utility companies have always known upfront that they could potentially incur relocation costs in the event that road improvements are necessary. Any change in this by the Legislature is an intrusion into the local authority of the municipalities and their road powers.

Shifting the cost of utility relocation, as proposed in this bill, would shift the cost from the rate payer to the taxpayer. The additional cost may mean that necessary road improvements, necessary for public safety, may be delayed or simply not done given limited road construction dollars. This is especially true for local improvement districts and for boroughs with limited road powers and road service areas with limited dollars available.

The situation is also different than it is with state road construction. The State owns its rights-of-way in fee simple. They have complete control over their roads and can prohibit their use by utility companies. Municipalities cannot. The State Department of Transportation also operates with a large professional staff which is capable of supervising the permitting, planning, and installation of utilities in their roadways, including requiring "as-builts" of the facilities installed. Many municipalities do not require permits or fees or have tight controls over the utility companies and where and how they placed their utilities in the rights-of-way. And why should they build such expensive bureaucracies when it is common understanding that the utility will be responsible for relocating their facilities if necessary? Finally, the State of Alaska gets much of its highway improvement funds from the federal government. Therefore, it can build the cost of relocating utilities into the cost of the project and shift the costs to largely, third party, non-resident taxpayers.

In addition to the general argument that the legislation would inappropriately shift the cost of relocating utility facilities to the municipalities, the change from common law and past practice is made even more onerous in that such a change and the impact would be retroactive. Under Section 2 of the bill with the proposed added language of AS 29.35.075 (b)(2), the municipalities would be penalized for following the laws in place; i.e., many municipalities have allowed utilities to place

their facilities in the rights-of-way without charge or without permits because the understanding and law required the utility company to bear the responsibility and cost to move them if necessary. Under the language of this section, if there is no permit system, the municipality would pay the cost of relocation.

One final point is relevant, again, only if you accept the basic concept of the bill, and we do not. While the cost to the municipality for relocating the utility facilities is discounted for upgrades and salvage value in subsection (d) of the bill, "useful remain life" is not. If the municipality is required to pay for the cost of relocating the facility, it should have have to pay for brand new equipment if it has limited remaining life left; e.g., the telephone pole is old and rotting and would have had to be replaced in a year even if the municipality were not making road improvements which require their removal.

Again, the AML is opposed to SB 155 and shifting the cost of utility relocation from the utility company to the municipality and the general taxpayers.

SAB:phl

★ Fairbanks North Star Borough

809 Pioneer Road · P.O. Box 1267 · Fairbanks, Alaska 99707 · 907/452-4761

March 30, 1987

Linda Anderson
FNSB Liaison
130 Seward St., Rm 304
Juneau, AK 99801

Dear Ms. Anderson:

SUBJECT: SUGGESTED MODIFICATIONS TO LANGUAGE OF SB 155

Along the lines of our brief conversations in Juneau on Friday, March 27, I recommend the following language be considered as a substitute bill for SB 155, "An act relating to the change, relocation or removal of utility facilities incident to the construction of road or other projects by a municipality."

1. Add to page 1, line 20, after the word "compliance.":

   "The utility shall prepare an estimate of the work required by the order for review and approval by the municipality before beginning work."

2. Add to page 1, line 27, after the word "municipality.":

   "The cost shall not exceed the approved estimate unless agreed to by the municipality."

3. Remove the word "municipal" from page 2, line 1.

4. Add to page 2, line 3, after the word "horizontal":

   "feet and one vertical"

5. Add to page 2, line 6, after the word "permits":

   "in that right-of-way"

6. Add to page 2, line 6, after the word "facilities.":

   "and the facility ~~is~~ was located ~~such that it met~~ in compliance with all applicable codes, regulations, and statutes at the time of its installation."

I will immediately follow up these suggested wording changes in SB155 with a letter describing some of my concerns and the impetus for making these changes. Thank you for your attention to our suggestions in this matter.

Sincerely,

Clark Milne

Clark R. Milne
Manager
Division of Civil Engineering

cc: Pat Walsh, Special Assistant to the Mayor, FNSB

cm8-141

★ Fairbanks North Star Borough

809 Pioneer Road · P.O. Box 1267 · Fairbanks, Alaska 99707 · 907/452-4761

M E M O R A N D U M

TO: Dick Jackson, Administrator Director

THROUGH: Neil Kersten, Public Works Director

FROM: Clark Milne, Manager, Civil Engineering Division Clark Milne

DATE: March 30, 1987

SUBJECT: NEED FOR MODIFICATIONS TO SB155, "RELOCATION OF UTILITIES IN RIGHT-OF-WAYS"

To validate my letter which suggested changes to SB155 concerning municipalities (such as the FNSB) being responsible for paying utilities to remove or relocate existing utility facilities within right-of-ways, I would like to submit to you the comments below.

My first and foremost concern is that our FNSB utility permit system is quite young, having only been instituted on July 1, 1985. Thus, the majority of all utilities installed in road rights-of-way in the FNSB have been put in before our utility permit system was in effect, and the language of Section 29.35.075.(b)2 will probably be in effect the majority of the time. Thus, we will consistently be responsible for the costs of moving utility facilities in our rights-of-way. I believe this is inappropriate and not in the public's best interests, at least so far as the unrestricted wording of (b)2 imposes these costs on us.

Our experience in the Civil Engineering Division has been that the majority of the time when we require the removal or relocation of a utility facility from our right-of-way, it is due to a past failure of the utility to install the service line or facility properly in the first place. This includes both aerial crossings that are too low, buried lines that are too shallow, and utility poles that intrude too closely to the existing road shoulders so that necessary road widening (within the right-of-way) requires the relocation of an existing pole. To require us to pay for these oversights, under-designs, and inappropriate installations by the utility firms seems unconscionable. Thus, my suggested revision in the SB155 language (as noted in my letters to Linda Anderson and McKie Campbell, see attached), item no. 4, which would require that the utility firm have installed the affected facility properly, i.e. to the standards of the applicable code or regulation, in the first place.

The most common and expensive instances of this type of facility that must be moved are aerial crossings above the roadway which are currently at less than the minimum 18 foot required by national electrical code. It is our practice, and is supported by the common law, that the utility firm is wholly responsible for the costs of raising these substandard lines crossing our right-of-way to an appropriate, code/standard elevation above the road surface.

Similarly, we have had significant problems and expenses due to the relocation of telephone or power lines below the road surface. We have found that all too often a utility placed a line too shallowly in the right-of-way and a new road project thus uncovers and interferes with it. Again, national electric code requires that any power or telephone line must be buried at least 30" under the ground surface. If only this were the common condition of buried utility lines in the FNSB our troubles would be nearly over! Unfortunately, there are many instances in our road projects where buried utility lines are very often found to be at anywhere from 4" to 24" below the ground surface--thus, the road interference with minor improvements to the roadway.

In both of the cases noted above, SB155 would automatically give the utility firm a "reprieve" from having to pay for their illegal and substandard utility placement. Without actually calculating the exact expenses generated by utility relocation for FNSB projects in the last few years, I believe that as a rough estimate approximately 10% of our capital improvement monies for road improvement projects would go to utility relocation were SB155 to be passed in the form submitted by Senator Josephson.

Other concerns I have tried to deal with in my revised language for SB155 are evidenced in the other items noted in my letters of March 30. The first item deals with my concern that utility firms should work with the municipalities before beginning work on utility removal or relocation to assure that their field activities are cost-effective and solely done in an effort to replace or relocate the facility which is interfering with the legitimate uses of the road right-of-way. I fear circumstances where the utility could indiscriminately overcharge the municipality for unnecessary expenses, as well as situations where the replacement facility is a superior and improved product to that which is being replaced. Neither of these two concerns is addressed in SB155 as originally submitted.

Item no. 2 would tend to assure that the costs as discussed and approved by the utility and municipality before beginning work are indeed those reached during construction. I foresee reasonable incidences where the initial cost estimate is exceeded, but believe that the municipalities can negotiate with the utilities in a timely manner to increase those agreed upon estimates for valid, discernable reasons.

Item no. 3 was requested because I do not know what a "municipal right-of-way" is. In the Borough we only have public rights-of-way, some of which are included within service areas and thus subject to municipal maintenance efforts.

Item no. 4 addresses my concern that an often crucial dimension in the location of utility facilities is the exact depth or elevation of the line or pipe. I understand that many utility firms have extremely poor as-built records of the location of their facilities, but I believe this should be the utility's concern, problem and expense, not ours.

Item no. 5 deals with my concern that the existing FNSB utility permit system applies only to those rights-of-way within recognized road service areas. The revised language would read "before the municipality had a system for granting easements or permits in that right-of-way for utility facilities," which would eliminate the problem of us having to pay for facility relocations in rights-of-way not covered by a utility permit system such as ours because the permit system was restricted to rights-of-way within service areas. Thus, if a service area annexed new roads after the utility firm installed a facility (after July 1, 1985), and we later interfered with that facility with our transportation use of that road right-of-way, we would not be held responsible for the lack of our utility permit system, but rather the utility firm would be responsible for having to follow good practice and the" applicable codes, regulations and statutes" affecting that utility facility.

Finishing up with item no. 6 from my letter, I understand that it may be troublesome to do the research necessary to confirm what "codes, regulations and statutes "apply to the various situations we find in needing utility relocations in our rights-of-way, but it seemed to me to be the most just and fair dividing line when faced with paying for a utility relocation or not. I agree with the concept that if a utility firm acted within the applicable codes and standards of their industry and all applicable regulations and statutes within the State of Alaska, our dramatic modification of the use of a road right-of-way should include and require our payment for the relocation or removal of the affected utility facilities. It is interesting to note that I believe that I understand the utility's point of view of some of these costs and concerns. But I do not believe that they should be able to "end run" the existing common law and the common sense of justice inherent in having to pay for their own mistakes of the past.

For additional specifics or other questions, please feel free to contact me at ext. 351.

cm8-143

Clark Milne

U.S. Department of Transportation
Federal Highway Administration

Real Estate Acquisition Guide for Local Public Agencies

A Resource Manual for Use by:
Local Public Agency and State Personnel Involved in the Acquisition of Real Property for Federally-Assisted Public Improvement Projects

Prepared by:
Real Estate Division
Office of Right-of-Way

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3/3/87

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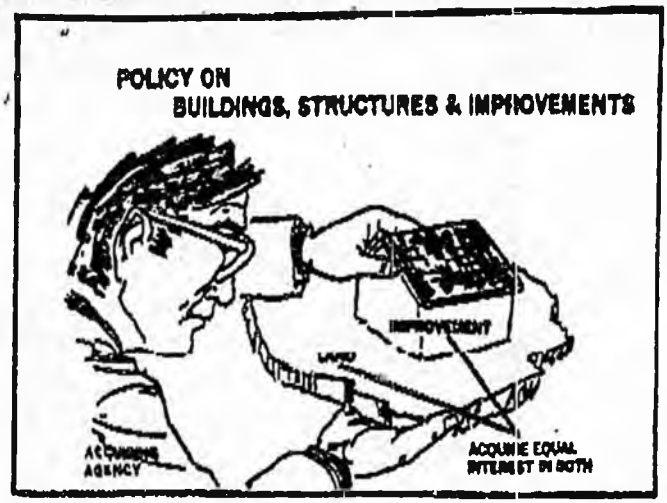

other improvements. The Uniform Act requires that such tenant receive just compensation for any such buildings, structures, or improvements. The tenant is due this compensation even if the lease requires the tenant to remove any buildings, structures, or improvements at the end of the lease term.

Any building, structure, or other improvement which would be considered to be real property if owned by the owner of the real property on which it is located shall be considered to be real property for acquisition purposes. Acquisition from the tenant-owner shall follow the same procedures as for a fee owner.

Just compensation for a tenant-owned improvement is the amount which the improvement contributes to the fair market value of the whole property or its removal value, whichever is greater. Removal value is considered to be salvage value.

a. The term "salvage value" means the probable sale price of an item, if offered for sale on the condition that it will be removed from the property at the buyer's expense, allowing a reasonable period of time to find a person buying with knowledge of the uses and purposes for which it is adaptable and capable of being used, including separate use of serviceable components and scrap when there is no reasonable prospect of sale except on that basis.

b. The contributory value consists of:

1. The value in place of a building, structure, or other improvement, the present use of which is the highest and best use of the land to be acquired, for its remaining economic life; or

2. The interim use value of a building, structure, or other improvement, the present use of which is not the projected highest and best use of the land to be acquired, for a specified interim time period longer than the remaining term of the lease (interim use value includes the present worth of the salvage value of the buildings, structures, or other improvements at the end of the interim time period); or

3. The value in place of a building, structure, or other improvement, the present use of which is not the highest and best use of the land to be acquired, for the remaining term of the lease plus the worth of its salvage value at the end of the lease term.

No payment shall be made to a tenant-owner for any improvements unless:

a. The tenant-owner, in consideration for the payment, assigns, transfers, and releases to the acquiring agency all of the tenant-owner's right, title, and interest in the improvement;

b. The owner of the real property on which the improvement is located disclaims all interest in the improvement; and

c. The payment does not result in the duplication of any compensation otherwise authorized by law.

This provision shall not be construed to deprive the tenant-owner of any rights to reject payment under this provision and to obtain payment for such property interests in accordance with other applicable law.

14.5 Utility Relocation and Accommodation

contact State for explanation

Historically, it has been in the public interest for public utility facilities to use and occupy the right-of-way of public roads and streets. This is especially the case on

local roads and streets that primarily provide a land service function to abutting residents, as well as on conventional highways that serve a combination of local, State, and regional traffic needs. This practice has generally been followed nationwide since the early formation of utility and highway transportation networks. Over many years, it has proven to offer the most feasible, economic, and reliable solution for transporting people, goods, and public service commodities (water, electricity, communications, gas, oil, etc.), all of which are vital to the general welfare, safety, health, and well being of our citizens. To have done otherwise would have required a tremendous increase in the acquisition of additional right-of-way for utility purposes alone. This could have also resulted in significant added costs to be borne by the utility consumers through increased rates for utility services so provided.

Under the practice of jointly using a common right-of-way, there are two broad areas of concern to highway and utility officials alike. First is the cost of relocating, replacing, or adjusting utility facilities that fall in the path of proposed highway improvement projects, commonly referred to as Utility Relocations and Adjustments. Second, is the installation of utility facilities along or across highway right-of-way and the manner in which they occupy and jointly use such right-of-way, commonly referred to as the Accommodation of Utilities.

Federal-aid funds may participate in relocating utilities displaced by a proposed highway project when certain conditions have been met.

First of all, you should check with the State highway department to be sure you are in compliance with the appropriate State procedures.

If the facilities are only serving the owner of the land and are not serving some aspect of the "public" then they would be treated under normal acquisition procedures for private property.

When it is determined that the utility is in fact serving the "public," the next step is to determine which of the utility adjustments are potentially eligible for Federal-aid funding. In general, Federal-aid funds may participate in the costs of adjusting utilities where:

* the utility has a legal compensable interest in present location by reason of holding a fee or easement to the real property; or
* the State is authorized by statute to pay for the utility adjustment; or
* the utility is owned by a governmental unit, is within public right-of-way, and the governmental unit is not required by law or agreement to relocate its facilities.

If, after the above is satisfied, it is determined that the new rights-of-way are required for the utility, there are two options available for obtaining the right-of-way. First, the utility may obtain the replacement right-of-way and be reimbursed for its costs. The second is for the highway agency to be the responsible party for obtaining the right-of-way. This needs to be covered as part of the utility relocation agreement between the highway agency and the public utility approved by the FHWA Division Office. Where the highway agency is obtaining the replacement rights-of-way, the provisions of the Uniform Act will apply. If the agreement calls for the utility to provide the rights-of-way, the Uniform Act does not apply.

14.6 Joint Development/Multiple Use

Highway joint development/multiple use projects have been carried out for many purposes, but the basic objectives have been to achieve better compatibility between the highway and its environment and to obtain maximum benefits from the use of increasingly scarce right-of-way.

Joint development/multiple use projects can have a major influence on highway location and design. Non-highway activities such as housing, business activities, parking, and recreation can be located in the airspace above or below the highway or on land adjacent to the highway. The designs for both the highway and the non-highway elements must be developed in close coordination and with a view toward achieving esthetic harmony, safety, overall economy, and compatibility with the adjoining neighborhood.

Joint development/multiple use applies not only to cooperative planning by the highway and the non-highway agencies, but also involves concern for land use beyond the immediate highway right-of-way. The intent is to

ALASKA RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC.

237 E. FIREWEED LANE • SUITE 301
ANCHORAGE, ALASKA 99503 • (907) 276-3235

March 30, 1984

TO: All House Members

FROM: David Hutchens Dave

SUBJECT: CS for CS for SB 67 (Rules) - Very similar to SB155 MS/L

Eventually the House will get to its Daily Calendar for 3-29. When that time comes, please support SB67.

This bill provides for reimbursement by municipalities of the net cost of relocating utility facilities when municipal road projects force their relocation. Most municipalities have in fact paid these costs in the past just as the State Department of Transportation has done since 1973. Some municipalities are now refusing to participate in these relocation expenses, and we see a growing trend in that direction.

These relocation expenses should properly be paid for by the municipalities as a part of the road project. In some cases, the cost of utility relocations can be more than the cost of the road itself. This situation leads to distortions in decision making. The municipality considers all the benefits of the road project, but only part of its costs.

The problem to the utilities' consumers is very real. A distribution line will typically be financed for 35 years. If the utility is forced to replace that line without reimbursement after 5 years, the consumers then have to pay 65 years' worth of debt on that facility in 35 years.

In many cases, the utility lines were there first. Chugach Electric, for example, has between 100 and 200 miles of line which were installed before there were adjacent roads, before there was any formal permit or easement process, and in some cases before those areas were within municipal boundaries. It would be extremely unfair for them now to be required to move those facilities at their own expense to accommodate a new road project.

In total economic terms it would not really make much difference whether relocation costs are paid by utility ratepayers or municipal tax payers, but in many cases they are not the same

people. For example, the City of Kenai is one of those municipalities which refuses to pay. They are one of several communities within the service area of Homer Electric Association. When the city of Kenai refuses to pay, the result is to transfer part of the cost of City of Kenai road projects to residents of the other communities throughout the HEA service area.

In the interest of simple fairness, please vote for SB 67. The cost causer should be the cost payer.

(10) HB 155

ALASKA RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC.

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March 3, 1987

Representative Bette Cato
Pouch V
Juneau, AK 99811

Dear Representative Cato:

Thank you for introducing HB 155.- Same as SB 155- MSG

In regard to the relocation of utility facilities incident to a municipal construction project, this legislation would clarify the law as to when the utility pays and when the municipality pays. If there is a written agreement on these matters between the parties, that agreement would govern. If there is not a written agreement on allocation of costs, the municipality would pay if the utility facility is properly located under a permit or if the utility facility was installed before the municipality permit system applied to the construction of the facility in question in question.

The effect of all this is to resolve a long-standing dispute by protecting the utility investment in existing facilities. It will require municipalities in some cases to include utility relocation costs in the cost of municipal construction projects which would otherwise be in dispute between the parties.

By making these utility relocation costs a part of the cost of the highway project, the local utility rate payer is relieved of this burden. In most cases a State or federal grant is the funding source for the road project. In those cases, these relocation costs would be transferred to the state or federal government.

In some cases the expense will be assumed by the municiaplity. When this expense is transferred from the local utility rate payer to the local municipal taxpayer, there is no net change for residents who are in both roles. However, a utility's consumers and the municipality's taxpayers are not always the same people. Fairness requires that if a municipal project causes the cost of relocating

utility facilities, then the municipality should be responsible for that cost. It is also important that all of the costs as well as all of the benefits of a proposed project be considered at the time a municipality decides to relocate or widen a highway. Without HB 155 the municipality considers all of the benefits of a proposed project but it only considers a part of the cost.

Sincerely,

David Hutchens
Executive Director