

**S B**

**532**

A M E N D M E N T

OFFERED IN THE SENATE

TO: CSHB 300 (Judiciary) am

Page 2, line 21:

Delete "a"

Insert "or use a utility"

Page 2, line 22, after "product" through line 28:

Delete all material.

Insert "in the service area of a public utility, but that purchase the product or service from an entity other than the public utility certified for the service area, if the total annual compensation received by the entity from the sale of utility products and services exceeds \$50,000; and"

Original sponsor(s): Labor & Commerce Committee

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE  
2 CS FOR HOUSE BILL NO. 300 (Judiciary) am  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 SIXTEENTH LEGISLATURE - SECOND SESSION  
5 A BILL

6 For an Act entitled: "An Act relating to acquisition and ownership of  
7 capital stock of a public utility by a political  
8 subdivision; relating to certain property records  
9 maintained by public utilities; and including the  
10 customers of a public utility that has an annual  
11 compensation in excess of \$50,000 in the definition  
12 of 'public' for public utility regulation."

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

14 \* Section 1. AS 37.10.085(a) is amended to read:

15 (a) Except as provided in (c) of this section, neither [NEITHER]  
16 the state nor a political subdivision of the state may

17 (1) make a subscription to the capital stock of a corpora-  
18 tion;

19 (2) lend its credit for the use of a corporation; or

20 (3) borrow money for the use of a corporation.

21 \* Sec. 2. AS 37.10.085 is amended by adding a new subsection to read:

22 (c) To the extent that the political subdivision is authorized  
23 to acquire, own, or operate a public utility, it may exercise that  
24 power by acquiring and owning, in a manner consistent with law, all of  
25 the capital stock of a corporation that owns or operates a public  
26 utility. The political subdivision's authority with respect to lend-  
27 ing its credit and borrowing money for the use of the corporation is  
28 the same as if the political subdivision had acquired the assets of  
29 the corporation.

1 \* Sec. 3. AS 42.05.461 is amended to read:

2 Sec. 42.05.461. CONTINUING PROPERTY RECORDS. The commission may  
3 require a public utility to establish, provide, and maintain as a part  
4 of its system of accounts, continuing property records segregated by  
5 the year of placement in service, including a list or inventory of all  
6 the units of tangible property used or useful in the public service,  
7 identifying the property by location and project [SHOWING THE CURRENT  
8 LOCATION OF THE PROPERTY UNITS BY DEFINITE REFERENCE TO THE SPECIFIC  
9 LAND PARCELS UPON WHICH THE UNITS ARE LOCATED OR STORED]. The commis-  
10 sion may require a public utility to keep accounts and records in  
11 [SUCH] a manner that shows [AS TO SHOW, CURRENTLY,] the original cost  
12 of the property when first devoted to the public service, and the  
13 current related reserve for depreciation. A public utility with  
14 annual revenues exceeding \$100,000 shall keep continuing property  
15 records.

16 \* Sec. 4. AS 42.05.720(3) is amended to read:

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

18 (A) a [ANY] group of 10 or more customers that pur-  
19 chase the service or commodity furnished by a public utility; [AS  
20 DEFINED IN (4) OF THIS SECTION; AND] OR USE A UTILITY

21 (B) one or more customers that purchase a service or  
22 product which

23 (i) is equivalent to a service or product furnished by a public utility, BUT THAT PURCHASE THE PRODUCT OR SERVICE FROM  
24 AN ENTITY OTHER THAN THE PUBLIC UTILITY CERTIFICATED FOR  
25 THE SERVICE AREA, IF THE TOTAL ANNUAL COMPENSATION RECEIVED  
26 CERTIFICATED PUBLIC UTILITY, AND  
27 BY THE ENTITY FROM THE SALE OF UTILITY PRODUCTS AND SERVICES EXCEEDS  
28 ((ii) has a total value for which compensation is paid in excess of \$50,000; and) IN THE SERVICE AREA \$50,000.

29 (C) a [ANY] utility purchasing the product or service

1 or paying for the transmission of electric energy, natural or  
2 manufactured gas, or petroleum products that [WHICH] are re-sold  
3 to a person or group included in (A) or (B) of this paragraph or  
4 that [WHICH] are used to produce the service or commodity sold to  
5 the public by the utility;

## FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_ Agency Affected: Commerce & Economic Dev.  
 Title: Reacquisition and ownership of BRU: Alaska Public Utilities Commission  
capital stock of a public utility by a political subdivision  
 Sponsor: Senate Labor & Commerce Components: \_\_\_\_\_  
 Requestor: Senate Community & Regional Affairs

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0	0	0	0	0	0
<b>CAPITAL</b>	0	0	0	0	0	0
<b>REVENUE</b>	0	0	0	0	0	0

**FUNDING:** (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	0	0	0	0	0	0

**POSITIONS:**

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

**ANALYSIS :** (Attach a separate page if necessary)

No fiscal impact for FY 90

Prepared by: Ted Moninski, Executive Director Phone: 276-6222  
 Division: Alaska Public Utilities Commission Date: 3/27/90  
 Approved by Commissioner: Larry Merculieff *(Signature)* Date: 3/28/90  
 Agency: Department of Commerce & Economic Development

**Distribution (by preparer):**

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

ALASKA STATE LEGISLATURE · SENATE

SENATOR RICHARD I. ELIASON

LABOR & COMMERCE COMMITTEE, CHAIRMAN  
RESOURCES COMMITTEE  
RULES COMMITTEE  
SPECIAL COMMITTEE ON HIGH SEAS  
SALMON INTERCEPTION  
SELECT COMMITTEE ON  
LEGISLATIVE ETHICS



P.O. BOX 143  
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(907) 465-4916

FAX (907) 465-4928

M E M O R A N D U M

TO: Senator Mike Szymanski, Chair  
Senate Community and Regional Affairs Committee

FROM: Senator Dick Eliason

DATE: March 22, 1990

RE: SB 532 - Acquisition of capital stock of a public  
utility

I would appreciate a hearing on SB 532, "relating to the acquisition of capital stock of a public utility", at your earliest convenience.

This legislation will allow a municipality to purchase the stock of a public utility in order to acquire ownership of the utility. Back-up information supporting this approach is attached.

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 20, 1990

SUBJECT: Political subdivision ownership of  
capital stock in a public utility  
(Work Order No. 6-2371)

TO: Senator Dick Eliason, Chair  
Labor & Commerce Committee

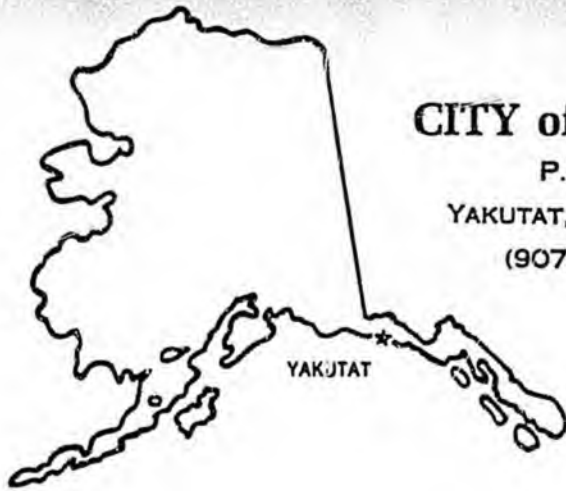
FROM: Teresa B. Cramer *TBC*  
Legislative Counsel

You have asked for a brief explanation of the effect of W.O. 6-2371.

Section 2 of the bill allows a city or other political subdivision to buy the stock of a public utility in order to acquire ownership of the utility if the political subdivision is authorized by other law to own or operate a utility. This is an alternative to buying the utility by buying the physical plant and other assets of the utility. The bill does not address what the city does with the corporate structure of the public utility after acquiring the stock.

If I may be of further assistance, please advise.

TBC:gc  
G14/002



## CITY of YAKUTAT

P.O. Box 6

YAKUTAT, ALASKA 99689

(907) 784-3323

March 13, 1990

The Honorable Richard Eliason  
Rm. 417, Capitol  
P.O. Box V  
Juneau, AK. 99811

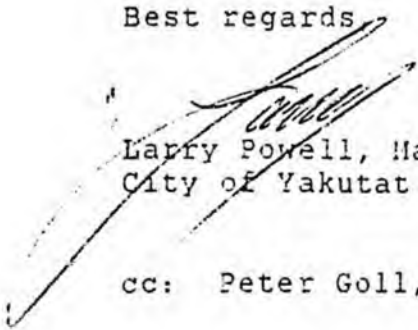
Dear Dick:

Please review the enclosed letter citing the necessity for introducing legislation to remedy a situation that is presently working adversely against the City of Yakutat in our efforts to purchase the Yakutat Power Co. It may also create problems for other public entities in similar situations.

Our request is that a very basic bill (suggested language is included in the attachment) be introduced at the earliest possible time for the Legislature's consideration.

Call at your earliest convenience should additional information or justification be required.

Best regards



Larry Powell, Mayor  
City of Yakutat

cc: Peter Goll, Representative

enclosure

LAW OFFICES

HEDLAND, FLEISCHER, FRIEDMAN, BRENNAN & COOKE

A PROFESSIONAL CORPORATION

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BETHEL, ALASKA 99559  
(907) 543-2744

March 8, 1990

BETHEL:

CHRISTOPHER R. COOKE

RECEIVED

MAR 12 1990

CITY OF YAKUTAT  
CITY CLERK

Mayor Larry Powell  
CITY OF YAKUTAT  
PO Box 6  
Yakutat, AK 99689

Re: Yakutat Power

Dear Larry:

Pursuant to our conversation of March 2, 1990, I am enclosing herewith a proposed amendment to AS 37.10.085 which, if enacted, would clear up any question about the ability of the City to continue operation of the utility company in the corporate form rather than dissolving the corporation.

According to John Parisena, dissolution of the corporation would result in a tax obligation of approximately \$137,000. Shelby Stastny has looked into the matter and concluded that the City could maintain the tax exempt status of the corporation under the Internal Revenue Code so long as the income accrues to the state or a political subdivision. Since all of the project revenues would be pledged to payment of the bonds or, to the extent of any excess, can be paid to the City, dissolution is not required to avoid taxation. Additionally, since the City, not the corporation, will be the issuer of the bonds, their tax exempt status is not in jeopardy according to the information from bond counsel for the bond bank.

I am also enclosing a memorandum which sets out the justification for the amendment, as well as an opinion that, whether the statute is amended or not, it is not violated by City ownership of the stock. However, bond

Mayor Larry Powell  
CITY OF YAKUTAT  
Page Two  
March 8, 1990

counsel may be nervous absent a concrete opinion from  
the court, and amendment of the statute would clear up  
any doubt.

Please let me know if you have further questions.

Sincerely,



John S. Hedland

JSH:jp

MEMORANDUM

TO: Larry Powell  
FROM: John S. Hedland  
DATE: March 8, 1990

1. Proposed statutory change.

AS 37.10.085 is amended by the addition of subsection (c) as follows:

(c) To the extent that the political subdivision is authorized to acquire, own, or operate a public utility, it may exercise that power by acquiring and owning, in a manner consistent with law, all of the capital stock of a corporation that owns or operates a public utility, and the political subdivision's authority with respect to lending its credit and borrowing money for the use of said corporation shall be the same as if the political subdivision had acquired the assets of said corporation.

2. Justification.

AS 37.10.085 as currently written stated as follows:

Sec. 37.10.085. Financial aid to corporations by state or political subdivision. (a) Neither the state nor a political subdivision of the state may

(1) make a subscription to the capital stock of a corporation;

(2) lend its credit for the use of a corporation; or

(3) borrow money for the use of a corporation.

(b) This section does not apply to debt issued by a municipality or a municipal joint insurance arrangement under AS 21.76.120.

The purpose of the amendment is to make it clear that a municipality may exercise its power to own and operate a public utility by acquiring the stock in a corporation that owns and

operates a public utility, and is not restricted to acquiring the assets of the company, and that it may finance acquisition or operation of the company in the same manner as if it owned the assets directly. If a municipality is required to acquire the assets, rather than the stock, of a public utility company, the assets must be sold by the corporation or the corporation must be dissolved. In either case, assuming that the fair market value of the assets (presumptively the purchase price) exceeds the corporation's depreciated basis in the assets, a substantial tax liability will arise that must ultimately be borne by the municipality, either through payment of the tax or an increase in the purchase price. There is no justification for imposing this unnecessary expense upon the municipality, since municipal ownership of the stock, rather than the assets, of a public utility company does not contravene any policy under Alaska law relating to either municipalities or utilities.

I do not believe that enactment of the proposed amendment would change the substantive law of Alaska. AS 37.10.085 as presently written does not, in my view, prohibit a municipality from acquiring all of the capital stock of a public utility company. However, under the strictures applicable to the sale of municipal bonds, bond counsel for either the municipality or the Alaska Municipal Bond Bank may raise questions about the authority of the municipality to acquire the stock in a public utility company, with the consequence that the bonds may not be marketable. The proposed amendment is designed to eliminate that problem.

It is clear that the evil at which AS 37.10.085 is directed--diverting public funds to private purposes--is not present when a municipality acquires, through a stock acquisition, a public utility that it may lawfully acquire through an asset acquisition. In Wright v. City of Palmer, 468 P.2d 325 (Alaska 1970), the court upheld the issuance of municipal bonds to be used to finance industrial sites to be leased to private companies. The court characterized the statute as one

which prohibits either the state or a political subdivision to lend its credit for the use of a private corporation, or to borrow money for the use of a private corporation. . . . We think that the question of whether the public credit is being pledged for a private purpose is also comprehended under the broader question of whether a public purpose is served by the bond issue and plan for its expenditure. . . . (Emphasis added). 468 P.2d at 328-29.

In State, ex rel. Johnson v. Consumers Public Power District, 10 N.W.2d 784 (Neb. 1943), the court was confronted with a Nebraska constitutional provision which provided that "no city, county, town, precinct, municipality, or other subdivision of the state, shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of, any railroad, or private corporation, or association." The case involved the legality of the public power district's acquisition of all of the common stock of an electric power company, for purposes of dissolving it and acquiring its assets. The court stated as follows:

Even if respondent is a political subdivision of the state . . . [the constitutional provision] has no application under the circumstances. This provision of our Constitution must be construed

with reference to the evils it was intended to correct or prevent. It was intended to prohibit any subdivision of the state from entering into private business by being associated as a stockholder, or being a partner, or a part owner, in a private business venture or enterprise. . . . [The constitutional provision] was never intended to prohibit a purchase by a subdivision of the state of all the capital stock of a corporation solely for the purpose of lawfully acquiring the physical property of such corporation for a public use, constitutionally defined and lawfully authorized by the legislature. 10 N.W.2d at 794.

It is clear that the Yakutat Power acquisition does not place the City in the position of investing in a private business venture or enterprise, and the same reasoning should apply here.

Acquisition of stock that has already been issued, from an existing shareholder, does not constitute making a "subscription" to the stock of the corporation. As the court noted in Sprague v. Straub, 451 P.2d 49, 52 (Ore. 1969):

The distinction between a subscription to stock and a purchase of stock is well established. The term subscription is ordinarily used to refer to an agreement to purchase stock in a prospective corporation to be organized in the future; it is to be contrasted with the purchase of the stock of an existing corporation.

The court cited Astoria & S.C.R. Co. v. Hill, 25 Pac. 379 (Ore. 1890); Commercial State Bank v. Eilers, 264 Pac. 452 (Ore. 1928). The Alaska statute must therefore be distinguished from statutes or constitutional provisions in other states which prohibit the state or municipality from 'becoming a stockholder in any . . . corporation'. (See, §9 Article XI, Oregon Constitution); being "directly or indirectly the owner of, any stock or bonds of any . . . corporation (New Jersey Constitution, Art. VIII, §III, ¶2), see,

Whelan v. N. J. Power & Light Co., 212 A.2d 136, 139-40 (N.J. 1965); "subscribe to, or be interested in the stock of any . . . corporation" (Oregon Constitution, Article XI, §6); "become a stockholder in any . . . corporation (original Ohio Constitution, see, Sprague v. Straub, supra, 451 P.2d at 54. Indeed, AS 37.13.120(g)(18) expressly authorizes the investment of permanent fund money in "preferred and common stock of corporations incorporated in the United States".

Since a corporation wholly owned by the municipality is not a "private corporation" within the court's interpretation of AS 37.10.085, municipal financing activities do not violate the prescription against lending credit or borrowing money in aid of a corporation. Even if such a corporation were treated as a private one, the issuance of revenue bonds to be repaid solely via a pledge of revenue earned through corporate operations would not amount to a pledge of public credit. Wright v. City of Palmer, supra, 468 P.2d at 329, n. 4; Miles v. City of Eugene, 451 P.2d 59, 62 (Oregon 1969); ("Likewise, the proposal in this case would not come within the constitutional prohibition against raising money or lending credit. Money coming from revenue bonds and not from tax money does not fall within the prohibition.")