

SB

213

LAW OFFICES OF
KEMPPEL, HUFFMAN AND GINDER
A PROFESSIONAL CORPORATION

ROGER R. KEMPPEL
RICHARD R. HUFFMAN
PETER C. GINDER
DONALD C. ELLIS

ANDREW J. FIERRO
GEORGE S. HARRINGTON JR.
BOBBY DEAN SMITH
JAY D. DURYCH

ANCHORAGE OFFICE
255 E. FIREWEED LANE, SUITE 200
ANCHORAGE, ALASKA 99503-2094
19071 277-1604
TELECOPIER 19071 276-2493

CORDOVA OFFICE
520 2ND STREET
P.O. BOX 1829
CORDOVA, ALASKA 99574
19071 421-7410
TELECOPIER 19071 424-7454

July 23, 1993

David Hutchens
Executive Director
Alaska Rural Electric
Cooperative Association, Inc.
703 W. Tudor Road, Suite 200
Anchorage, AK 99503

Re: APUC Powers "Liberally Construed"

Dear Dave:

You have asked whether the "liberally construed" language found in AS 42.05.141(a)(1) has any operative effect; that is, whether the Alaska Supreme Court cites or relies upon this statutory language in reaching decisions involving the APUC.

The answer is that both the APUC and the Alaska Supreme Court find it necessary to cite this statutory section in order to create APUC jurisdiction in matters not expressly conferred by the legislature.

The two most recent supreme court cases citing this statutory section of which I am aware occurred just last year. In February 1992, the Alaska Supreme Court issued its opinion in the case of *Far North Sanitation v. APUC*, 825 P.2d 867 (February 7, 1992). In that decision, the court dealt with the question of the APUC's power to order interim refundable rates. The court quoted the APUC's argument that the legislature granted the APUC broad powers to accomplish its purposes and, further, provided that these powers should be liberally interpreted [citing AS 42.05.141(a)(1)] but went on to state that, on the question of whether the APUC has authority to declare a rate interim and refundable after hearing, there is conflicting case law. The court concluded, however, that the APUC had such implied authority, again citing AS 42.05.141(a)(1) and stating:

Alaska's statute mandates that the powers of the APUC be liberally construed.

Far North Sanitation v. APUC at p. 873.

Two months later, the court issued its opinion in *Colville Environmental Services, Inc. v. North Slope Borough*, 831 P.2d 341 (April 24, 1992), this time addressing the power of the APUC to attach conditions to a certificate of public convenience and necessity which conflicted with another state statute (AS 29.35.050). In concluding that the Commission had such power, the court again relied upon the liberally construed statutory language in reaching this result.

KEMPPEL LETTER

' LIBRALLY CONSTRUED'

David Hutchens
July 23, 1993
Page 2

In reaching its decision in *Colville*, the Alaska Supreme Court cited its earlier 1991 decision in *Homer Electric Association v. City of Kenai*, 816 P.2d 182, again discussing the effect of AS 42.05.141(a) and concluding in part that that section stands for the proposition that the Commission's "powers to adjudicate are plenary, as broad as the specific provisions of the act permit." *HEA v. City of Kenai* at p. 186.

I have not attempted to completely research all of the instances in which the APUC or the courts have relied upon AS 42.05.141 to expand the APUC's specific legislative powers, but I believe that the above cases illustrate that the courts have utilized this section on more than one occasion and have done so quite recently.

You should also note that the cases cited above have been decided both for and against the utility. That is to say that the existence of AS 42.05.141(a)(1) has not always worked to the detriment of the utility, but I do think it is fair to say that it has always worked to expand the APUC's jurisdiction and power beyond that otherwise explicitly granted to it by the legislature.

If you have any further questions or wish me to compile a more exhaustive list of court citations, please feel free to contact me.

Sincerely yours,

KEMPEL, HUFFMAN AND GINDER, P.C.



Roger R. Kempel
General Counsel for ARECA

RRK:lka



ARECA

Electric Service for 300,000 Alaskans

Alaska
Rural

Electric
Cooperative

Association, Inc.

703 W. Tudor Rd., #200
Anchorage, AK 99503
(907) 561-6103
FAX (907) 561-5547

August 2, 1993

Sen. Tim Kelly
716 W. 4th Ave., Suite 400
Anchorage, AK 99501-2133

Dear Sen. Kelly:

I am pleased to know that you plan to schedule consideration of APUC Sunset Review for early September. Our association has three priority issues we would like for your committee to consider in this review. One of these issues is also raised by the Audit Report.

APUC Powers Liberally Construed

For many years, the APUC has tended to expand the authority it exercises, and the courts have permitted this expansion to take place. The reason for this is the provision in AS 42.05.141(a)(1) that directs that "the powers of the commission shall be liberally construed . . ." This can work either to the advantage or disadvantage of the regulated utility, but in either case, we do not think it is appropriate. We have long believed that a more appropriate directive would be that "the powers of the commission shall be those specifically conferred by the legislature or necessarily implied from those specific grants of authority."

We have long believed that this power to define the role of the commission should rest with the legislature rather than the commission itself, but this issue now takes on much more critical importance. Now that the commission is funded primarily by a variable tax it imposes on the utilities called the "regulatory cost charge," the commission potentially has the resources to fund whatever level of regulation it wishes to develop. No agency of state government should have that kind of power.

Enclosed is a letter from Roger Kemppel, our attorney, which details a few recent examples in which the commission and the courts relied on the "liberally construed" language to expand their authority.

We ask that this section be amended so that the legislature reclaims its appropriate authority over the commission.

Negotiated Rulemaking

Negotiated rulemaking is authorized at the federal level, and it is being used there with increasing frequency. Without any special authorization, the Alaska Department of Environmental Conservation has also used this technique quite effectively. We think this approach to rulemaking has considerable merit at the APUC as well. The problem in implementing that approach at the commission without legislative directive is that it would violate existing rules of procedure at the commission which presume adversarial proceedings.

The federal energy legislation of 1992 contained a requirement that state regulatory bodies consider implementing "integrated resource planning." Negotiated rulemaking could be particularly useful in complying with that requirement.

Regulatory Cost Charge

This association objects to the whole idea of this special tax on utilities. We think that operations of the APUC should be paid for from unrestricted general revenue funds. However, if one assumes that the RCC will stay in place in some form, our concern is the same as that of the auditor: There has to be some way to make the allocations of cost under the RCC more equitable.

The audit report recommends that a timekeeping system be established which would be used to allocate responsibility for the RCC the next year. The commission objects to this recommendation because they think this timekeeping would increase their costs significantly. Because the industry is paying the commission's bills, we also have to be sensitive to their costs. So although we are in complete agreement with the audit report in how it defines the problem, we are ambivalent about the cure it recommends.

We recommend a more direct approach to solving the problem. Our proposal is to reconsider the amendment submitted by then Rep. Bert Sharp in the House Finance Committee when the RCC as it exists today was being drafted. The Sharp proposal was to adjust the gross electric revenues by deleting the cost of power before the RCC is calculated. The rationale for doing this is that the distribution function of an electric utility, without the cost of the electricity itself added in, is comparable to the service provided by a local telephone exchange. By deleting the cost of power from the calculation, a great deal more fairness between telephone and electric would be introduced into the system.

As the RCC calculation exists now, electric paid 39% of the total in FY 93, and that will increase to 43% of the total for FY 94. By contrast, the audit report estimates that telephone companies account for 45% of the workload while under the FY 94 plan they will be paying only 21% of the RCC. If the Sharp amendment were in place, the share of RCC for electric would drop to approximately 28% while the share for telephone would increase to approximately 27%.

I look forward to discussing these and other proposals which may be under consideration when your committee meets on APUC sunset review.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dave", written in dark ink.

David Hutchens

Operating Budget

Operating Budget

	FY92	FY93	Percent Change
APPROPRIATIONS			
71000 Personal Services	\$2,430,300	\$2,455,400	1.0%
72000 Travel	51,400	57,800	12.5%
73000 Contractual	1,114,800	1,163,500	4.4%
74000 Commodities	27,600	43,700	58.3%
75000 Equipment	2,900	20,400	603.4%
TOTALS	<u>\$3,627,000</u>	<u>\$3,740,800</u>	<u>3.1%</u>
EXPENDITURES			
71000 Personal Services	\$2,431,602	\$2,366,884	-2.7%
72000 Travel	40,383	47,777	18.3%
73000 Contractual	1,021,645	913,309	-10.6%
74000 Commodities	79,583	94,049	18.2%
75000 Equipment	52,556	71,327	35.7%
TOTALS	<u>\$3,625,769</u>	<u>\$3,493,348</u>	<u>-3.7%</u>
REVENUE RECEIPTS ¹			
General Fund:	\$207,943		
General Fund Program Receipts:		\$3,897,553 ²	
TOTAL RECOVERED	<u>\$207,943</u>	<u>\$3,897,553</u>	

¹ The Commission received revenues under various provisions of its statutes including application fees (AS 42.05.661/(AS 42.06.507), copying and postage charges (AS 42.05.201) and cost allocations in proceedings (AS 42.05.651/AS 42.06.610).

² The Commission funding was changed to General fund Program Receipts in FY93 (3 AAC 47) under the Regulatory Cost Charge program.

ALASKA PUBLIC UTILITIES COMMISSION
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

1016 WEST 6TH AVENUE
SUITE 400
ANCHORAGE, ALASKA 99501-1963
PHONE: (907) 276-6222
FAX: (907) 276-0160

March 1, 1993

Mr. Randy S. Welker, CPA
Legislative Auditor
Legislative Budget and Audit Committee
P.O. Box 113300
Juneau, Alaska 99811-3300

RECEIVED
MAR - 5 1993

LEGISLATIVE AUDIT

Ref: Audit Control No. 08-1404-93

Dear Mr. Welker:

On behalf of the Alaska Public Utilities Commission (Commission), I appreciate the opportunity to respond to your agency's audit of the Alaska Public Utilities Commission (08-1404-93). The Commission concurs with your finding in the "Report Conclusions" that the life of the Commission be extended until June 30, 2003. Therefore, this letter will focus on the Commission's response to your "Findings and Recommendations".

The audit states on page 1 "APUC was created to regulate public utilities so that citizens could enjoy adequate service at the lowest reasonable rates" (emphasis added). The actual ratemaking standard applied by the statute is "just and reasonable".

Recommendation No. 1 Alaska Statute 42.05.253 should be amended to require APUC to periodically adjust the regulatory cost charge (RCC) on an industry by industry basis. Further, the automatic repeal date of this statute should be deleted.¹

The Commission agrees that the program should be made permanent by deleting the automatic repeal date for the Regulatory Cost Charge Program (RCC). Last year the legislature switched the funding source for the Commission from general funds to this regulatory assessment. The Commission expended significant resources in developing regulations and procedures to make the program work and to make compliance by affected entities as straightforward as possible. The program is in place and running smoothly.

However, the Commission cannot support the recommendation to require itemization of the rates under the RCC program by utility/pipeline carrier type. Although in theory the recommendation has some merit, it is not at all clear to the Commission that it would be either practical or cost-effective to attempt to implement it at this time.

¹ To carry out this recommendation fully, the repeal date for AS 42.06.285 (pipeline carrier regulatory cost charge) should also be deleted.

Letter to Mr. Randy Welker, CPA
Page 2 of 3
March 1, 1993

Individual RCC rates would require full and direct allocation of the Commission's costs. The recommendation, if implemented as drafted, would substantially increase the cost of the RCC program. Full cost allocation would be expensive, especially during the year when it was implemented. A permanent increment to the Commission's budget would be required. The Commission would face a new administrative burden of setting individual RCC rates and handling protests to the rates.

One of the key principles guiding the development of the RCC was simplicity. The Commission has been able to absorb the ongoing costs of the RCC program from its existing budget, because the program has been kept simple and workable. Your recommendation for further refinement of the RCC would require the statutory cap of .61% of adjusted gross revenues (AS 42.05.253(a)) to be substantially increased. Based on your estimates by utility type for purposes of discussion, the current authorized budget for the Commission would require increasing the cap to .85% for certain utility groups, at a minimum.

From the perspective of most utility customers facing a regulatory cost charge bill of less than \$20 per year, different rates for different utility types would not have a measurable effect on their total bill.

Recommendation No. 2 Alaska Statute 42.05.711 should be amended to make it easier for utility consumers to opt in or out of regulation.

The Commission agrees in part. Since the legislature reached a policy conclusion that small utilities ought to be provided the statutory option to deregulate by majority vote, it seems appropriate to periodically adjust the gross revenue cutoff levels to maintain this as a realistic option. These gross revenue cutoff levels have not been adjusted since they were enacted in 1980.

Increasing the cut-off from \$325,000 to \$500,000, for example, would allow the members of nine additional economically regulated electric utilities to decide whether to vote for deregulation. They are Bettles, Far North, Gustavus, Manley, Middle Kuskokwim, Napakiak, Northway, PUI and Teller. Middle Kuskokwim is already eligible to vote for deregulation as a cooperative under AS 42.05.711(h). Attachment #1 lists electric and telephone utility gross revenues.

The cut-off for local exchange telephone companies would have to be increased from \$325,000 to approximately \$850,000 in order for any other utility to qualify for the option of voting to deregulate.

The Commission does support increases in the cutoff levels if there

Letter to Mr. Randy Welker, CPA
Page 3 of 3
March 1, 1993

is some compelling evidence that the benefits of regulation are not commensurate with the cost. Although the enactment of the RCC has quantified the cost side, the benefits, although tangible, are still difficult to quantify.

Recommendation No. 3 APUC should establish a timekeeping system.

The Commission agrees that this recommendation is worthwhile to pursue. If accomplished for internal management purposes, the system could be designed relatively economically. However, if the system is required to serve as the basis for billings, such as those recommended in Recommendation #1, it would be substantially more costly. In either case a fiscal note would be required to carry out this recommendation.

Recommendation No. 4 APUC should consider how to best ensure commission member access to adequate staff support and advice.

The Commission agrees.

Commission staff become a party to a proceeding only when designated to be so by Commission order. This decision is typically made by the Commissioners in adjudicatory session soon after a docket is established.

The Commission is familiar with the alternate models for deployment of the staff resources outlined in your report and will continue to entertain possibilities for improvement.

The Commission believes that a simplified method of obtaining counsel to support the Commission under contract is needed for cases where the attorney general represents staff as a party. Extended procurement procedures and the approval of the attorney general to selected the legal contractor both complicate this process.

Recommendation No. 5 The APUC member's terms of office should be staggered.

The Commission agrees. Legislation would be required to accomplish this change.

Thank you for the opportunity to respond.

Sincerely,
Don Schröer



Chairman

REPORT CONCLUSIONS

Policy Issues

This review contains policy issues raised as a result of our evaluation of various commission practices. The final policy decisions affecting those practices require legislative consideration. In debating these decisions the legislative oversight committees should take into consideration the findings and recommendations presented in this report to assist them in evaluating the potential impact of any policy changes.

Report Conclusions

In our opinion, the Alaska Public Utilities Commission is operating in an efficient and effective manner and should continue to regulate public utilities and pipelines. We believe that the public interest is being served by requiring public utilities and pipelines to be certificated by APUC. This process stabilizes demand for the utility service by eliminating competition and thereby allowing economies of scale to operate. Economic regulation by the commission, in place of that competition, ensures that the utilities provide adequate service at the lowest reasonable rates.

We recommend that AS 44.66.010(a)(4) be amended to extend the life of APUC to June 30, 2003. APUC has consistently demonstrated public need; we believe it is in the public's best interest to extend the life of this commission for ten years. However, we recognize that performance issues periodically arise. The Division of Legislative Audit can address these interim issues, if any, through a special audit at the request of the Legislative Budget and Audit Committee.

FINDINGS AND RECOMMENDATIONS

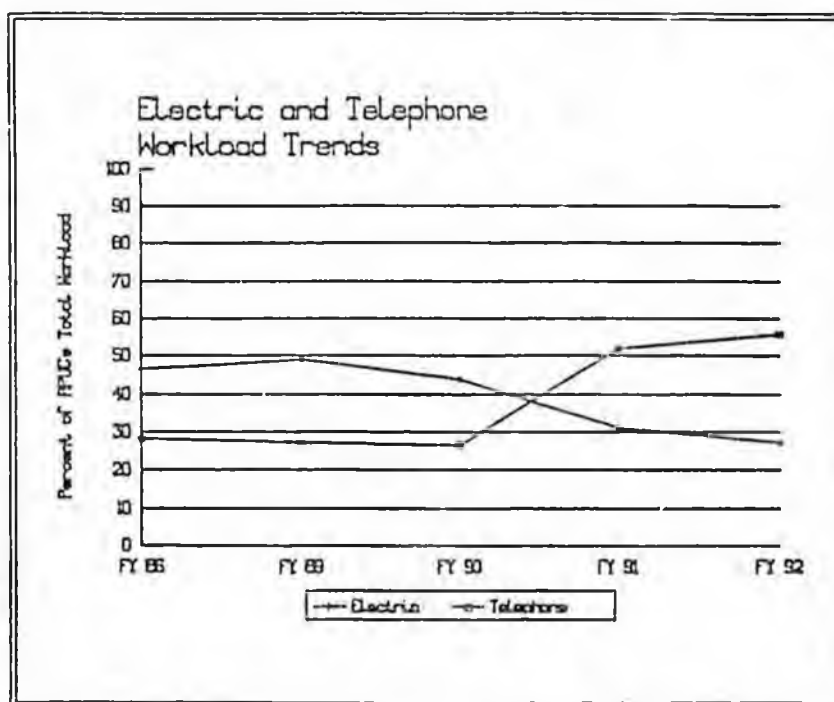
Recommendation No. 1

Alaska Statute 42.05.25j should be amended to require APUC to periodically adjust the regulatory cost charge (RCC) on an industry by industry basis. Further, the automatic repeal date of this statute should be deleted.

In our 1989 sunset audit report we recommended a program receipts budget for APUC, not because it was an alternative funding source but because of the potential benefits that this mechanism could provide. A user fee design can establish a basic fairness in that only those who benefit from the regulatory process bear its cost; it can also encourage consumers to recognize and eliminate unwarranted regulation through deregulation elections. However, these benefits will only be realized to the extent that the RCC program reasonably links the cost-causers with the cost-payers.

For FY 93, the legislature authorized a new RCC program which passes APUC's costs on to the consumers of regulated utilities. This program allocates costs based upon gross revenues. A single charge factor is used across-the-board for all utilities and all industries. Although we believe that a direct workload-based allocation program is preferable, as outlined in our 1989 report, we also continue to believe that a gross revenue based system could realize these benefits if the rates reflect the workload. However, the single RCC factor used in the current plan sacrifices some of program's potential benefit, in that the cost-payers are not necessarily the cost-causers.

We analyzed APUC's workload to evaluate the alignment of cost-causer to cost-payer. In the absence of verifiable data such as utility or industry codings on payroll time sheets, we were forced to approximate the workload by using rough estimates, which were provided on an unofficial basis by commission staff. They provided estimates of the average relative effort required to perform the ongoing APUC functions such as tariff filings, formal proceedings, certification proceedings, and formal and informal complaints. While we acknowledge that the weighting in these analyses is imperfect, we believe it provides an adequate indication of the



commission's workload. We found that the electric and telephone industries, on a combined basis, have represented approximately 79 percent of APUC's workload. The graph of these two industries illustrates the significance, variation, and trend that complicates setting of an RCC rate. The following table compares the commission's estimated FY 93 RCC receipts with the amount calculated based upon the workload over the past three years.

Industry	Flat Rate Allocation			Workload Allocation		Over (Under) Allocation
	Estimated Gross Revenues	RCC Percent	Estimated FY 93 RCC	Percent of Workload	Allocation	
Electric	\$260,673,485	.577%	\$1,504,086	34%	\$1,311,670	\$192,416
Telephone	153,306,332	.577%	884,577	45%	1,736,033	(851,456)
Pipeline	99,532,100	.577%	574,300	4%	154,314	419,986
Gas	99,152,056	.577%	572,107	3%	115,736	456,371
Water	22,955,320	.577%	132,452	4%	154,314	(21,862)
Sewer	17,129,576	.577%	98,838	2%	77,157	21,681
Refuse	15,856,758	.577%	91,493	4%	154,314	(62,821)
Cable	0	.577%	0	3%	115,736	(115,736)
Other	0	.577%	0	1%	38,579	(38,579)
Total	\$668,605,627		\$3,857,853	100%	\$3,857,853	\$ 0

This table demonstrates that, based upon the workload over the past three years, the flat across-the-board rate significantly undercharges telephone and overcharges electric, pipeline, and gas utilities. Of course, the over or under allocation amount by industry varies depending on how many years of workload are considered. The use of an across-the-board rate incorrectly assumes that an industry's gross revenues are closely correlated to the workload that it creates. Given the significance of the electric and telephone workload, variation, and trend, we do not believe that the allocation methodology should assume that all workload cycles reverse themselves and that all industries create the same amount of workload in the long run. Therefore, we recommend that the legislature amend AS 42.05.253 to require APUC to periodically adjust the RCC factors to reflect workload on an industry by industry basis.

Notwithstanding the above, we support the current RCC program; we believe that it provides a measure of equity and responsiveness to unwarranted regulation that was lacking prior to the program. Our recommendation is intended to further the equity and regulatory responsiveness objective of this program.

The RCC program was established as a trial program utilizing an automatic repeal of December 31, 1994. As we consider this program to be effective, we recommend that this repeal provision be deleted.

Recommendation No. 2

Alaska Statute 42.05.711 should be amended to make it easier for utility consumers to opt in or opt out of economic regulation.

In the 1989 sunset audit report, we recommended the deregulation of several industries as well as the smaller utilities in each industry. We continue to believe that not all industries need to be regulated and that the cost of regulation may exceed its benefits, particularly for the smaller utilities. With the recent adoption of a user fee approach under the RCC program, the impetus exists to make state government more responsive; what is lacking is a reasonable mechanism to allow consumers to select whether or not they want their utility to be regulated.

Alaska Statute 42.05.711 exempts electric and telephone utilities with revenues less than \$50,000 and refuse utilities with revenues under \$200,000. However, customers can obtain economic regulation by petitioning APUC. Alaska Statute 42.05.711 presently requires 25% of an exempted utility's subscribers to sign the petition. We believe that this is too great an obstacle to overcome and recommend that an election be called if APUC receives a petition demonstrating significant consumer interest. We recommend that the petition and election requirements be modeled after the deregulation election procedures in AS 42.05.712. These procedures call for an election if the petition is signed by 10% of the first 5,000 subscribers and 3% of the subscribers in excess of 5,000. These elections may only be held once every two years for a given utility.

Alaska Statute 42.05.711 also allows deregulation elections to be held for electric and telephone utilities with revenues of less than \$325,000 and other utilities with revenues under \$100,000. We believe that more consumers should be given the option to deregulate by substantially raising the cut-off amount.

In combination, these two changes would allow APUC and the user fee approach of the new RCC program to be more responsive to the regulatory needs of the utility consumer. The regulatory cost/benefit decision should be made by the consumer.

Recommendation No. 3

APUC should establish a timekeeping system.

We initially recommended, in 1979, that the commission implement the time system they had purchased. As part of a 1978 management audit of APUC, Arthur Young & Co. developed a time management system to assist the commission in prioritizing, planning, scheduling, and

monitoring the workflow. In response to our recommendation, the commission concurred that a time management system is a useful administrative tool. They indicated that the time system would be implemented.

In our 1989 sunset audit report we recommended that APUC establish a timekeeping system as an integral part of a direct-allocation RCC program. As the legislature selected an RCC program that was not time based, APUC was not required to implement this recommendation. However, as costs to establish and operate a time system are minimal and the benefits are substantial, we continue to recommend it.

The costs of a timekeeping system are minimal.

- The commission should determine what management reports are needed. While we acknowledge that the 1978 time management system is likely outdated, we recommend that the commission review it to assist them in developing this needs definition.
- Purchase and install "canned" software. There is very inexpensive software on the market that should meet the commission's needs. APUC already has a programmer on staff that could handle the installation.
- The ongoing cost to record time would be insignificant. An employee would need only a few minutes a day to electronically enter their time.
- The time system would also require a small amount of computer and personnel time to accumulate the data and generate periodic management reports.

The benefits of a timekeeping system are substantial.

- A time system would give APUC management a greater ability to prioritize, plan, schedule, and monitor their workload. We believe this information would be invaluable to the commission.
- The legislature is often involved in regulatory matters. Using these management reports, APUC would be better able to estimate the full effect of any regulatory changes.
- There is a potential for increased staff efficiency as a result of time sheet accountability.
- Time sheets would provide a defensible basis for the RCC allocation discussed in Recommendation No. 1. However, regardless of the action taken on Recommendation No. 1, the benefits of implementing a timekeeping system far outweigh the costs.

The nature of the commission's business is very different from most state agencies; they deal with a relatively small number of companies and work on discrete projects. APUC's workload is similar to that in the Attorney General's Office and the Department of Transportation and Public Facilities' maintenance and construction divisions, all of which maintain project time systems.

Recommendation No. 4

APUC should consider how to best ensure commission member access to adequate staff support and advice.

The commission members are inundated with technical information and complex issues. These issues must be thoroughly explored and the commission's decisions must be fully documented. The legislature recognized this difficult task and appropriately established full-time commission members with six-year terms. Nevertheless, there remains a substantial need for staff support and professional advice.

We are concerned that in the instances when commission staff are named as a party in an adjudicatory proceeding, the commission members do not have full access to support staff, professional staff, or legal counsel. The judicial model requires adversarial parties to present the case. APUC staff is frequently designated as a party to a case to provide this necessary balance. The assistant attorney generals advise APUC staff and effectively become a party to the case. Under this judicial model, ex parte communication rules prevent the commission members from directly obtaining assistance or advice from their staff or attorneys; this can only be accomplished if the utility is also present. This may often be impractical.

We believe that the commission would benefit from greater access to their staff and attorneys. The commission should consider how to best ensure full access. We offer the following alternatives:

- A group could be assigned, on a rotational basis, to each case. These individuals would be the party to the case; all others would be available to the commission members.
- Several staff could be assigned, on a rotational basis, directly to the commission. The criteria for selection may vary. The team could include all the professional disciplines, it could target the disciplines currently needed, or it could be a team of executive assistants. The remaining staff would be the party of record.

Although the above approaches have certain drawbacks, we believe that some separation would be achieved thus diminishing the ex parte communication problem. We believe this will enhance the commission's overall efficiency and effectiveness.

Recommendation No. 5

The APUC member's terms of office should be staggered.

The Alaska Public Utilities Commission has five members who are appointed by the governor and confirmed by the legislature in joint session to serve six-year terms. On October 31, 1993 two commission seats become available. Because the potential for

disruption of commission activity would be high with two new members coming in at the same time, we recommend the terms be staggered.

Currently, the terms are scheduled to end as follows:

Consumer seat (1)	October 31, 1993
Engineering seat	October 31, 1993
Legal seat	October 31, 1994
Consumer seat (2)	October 31, 1996
Finance seat	October 31, 1998

We propose this staggering be implemented by modifying the upcoming term of the engineering seat. We propose the following language be added to a temporary or special act:

The term of the Alaska Public Utilities Commission Engineering seat, which is scheduled to begin on November 1, 1993, shall end on October 31, 1995. This adjustment to the normal six-year term, as established under AS 42.05.030(a), is necessary to appropriately stagger commission membership.

Chairman Schröer's Remarks to the
Senate Labor & Commerce Committee Hearing
Juneau, Alaska, Tuesday, February 8, 1994 1:30 p.m.

Sunset Hearing Testimony

Introduction

I welcome the opportunity to speak to you as you mark up Sunset Legislation for our agency. The Commission supports SB 213 and has recommended several amendments to it.

I. General Commission Overview

The APUC is responsible for regulating Alaska's public utilities and pipeline carriers. Our mission statement says:

The Alaska Public Utilities Commission protects and promotes the public interest by certificating and economically regulating only qualified public utilities and pipeline carriers. It oversees the availability, affordability and quality of the utility services which are essential to Alaska's economic development.

It does this by making timely decisions that balance the competing interests of various parties.

The APUC issues certificates of public convenience & necessity to utility service providers and pipeline carriers who are fit, willing and able to provide service. We approve the rates, terms and conditions of service to the public. The Commission also does the rate-setting for the power cost equalization program, which helps out to cover a portion of the bill for high-cost electrical service to almost 69,000 customers.

The Commission consists of five members, each appointed by the Governor for a six-year term. We have a budget of \$3.6 million and a staff of 36. I am proud of the work of the Alaska Public

Page 2 of this testimony is unavailable

Utilities Commission.

II. Legislative Recommendations

A. Regulatory Cost Charge

The regulatory cost charge should be made permanent, rather than simply extending the repeal date by four years. I believe that this funding source is with us to stay. If problems occur in the future, the Commission sunset review is adequate to address them. If the Commission were zeroed out of the budget, the authority and the agency responsible to impose an RCC would both disappear.

Utilities have expressed concern about the possibility of overcollection of RCC beyond the amount of the Commission's. Currently the statute directs the Commission to change the rate as required to avoid overcollection. The problem is one of timing: by the time the fiscal year's results are known it is too late to adjust the rate. If the fourth quarter payment is split and only that amount required to balance the budget is applied to the fiscal year, the balance would apply to the subsequent fiscal year. The Commission would be required to reduce the RCC rate to take this balance into account.

The Commission has proposed language to ensure that overcollection of RCC and lapsing into the general fund does not happen. Section 52 of the Operating Budget will ensure that no RCC funds collected this fiscal year lapse into the general fund. I recommend similar permanent language in AS 42.05.253 and 42.06.285.

B. Power Cost Equalization

Traditionally the Commission has been responsible for setting the electric rates for PCE-eligible utilities. SB 106, the intertie bill, transferred the power cost equalization responsibilities formerly handled by the Alaska Energy Authority to the Dept. of Community & Regional Affairs. However, through a drafting error some references to the "Commission" were inadvertently changed to "department" (DCRA). The bill as passed transferred the PCE calculations to DCRA, but this was not the legislative intent. A revisor's bill has been prepared to correct this error. Meanwhile, the Commission will continue to carry out its assigned responsibilities under this program.

C. Cable Television Regulation

The Commission has received authority from the Federal Communications Commission to regulate the basic tier of cable utilities currently regulated by the Commission under state law. This would apply only the BC Cable Company in Juneau at this time. The City & Borough of Juneau has expressed interest in regulating cable companies, but state law does not allow this at this time. A change in statutes would be needed to allow local governments to regulate Cable TV.

D. Pipeline Legislative Recommendations

This is described in the annual report. In the interest of time I will not restate it.

E. Commission procurement of expert witnesses

The Commission recommends adding an exemption to the Procurement Act, 36.30.850 to allow it to hire its expert witnesses for cases in a timely manner.

The Commission has been unable to procure the professional services of expert witnesses in a timely fashion. The deadlines established in proceedings do not permit the procurement process to operate to produce a successful bidder in time for the contractor to properly prepare the case. Other parties to the proceedings utilizing private sector procurement procedures are able to hire their expert witnesses on a timely basis, the Commission is not. This either delays the processing of cases, or forces the Commission's witness to rush the preparation of a case, thus affecting the accuracy and credibility of the work, as well as costing the state more for overtime.

Next I would like to respond to each of the legislative changes suggested by the ARECA.

(1) **Liberaly Construed:** The phrase "liberaly construed" appears only once in AS 42.05. It is found in section 141, our powers & duties section:

SECTION 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;...

In HEA vs. City of Kenai the Supreme Court said:

In sum, we have construed AS 42.05.141(a)(1) to mean that the actual areas in which the APUC may exercise its adjudicatory authority are quite narrow. Within those narrow areas, however, the APUC's powers to adjudicate are plenary, as broad as the specific provisions of the act permit....

This provision presents two guiding principles for determining the extent of the APUC's jurisdiction under specific provisions of the Act. On the one hand, it includes a principle of limitation, restricting the APUC's power to the specific jurisdictional areas of its "stated purposes." On the other hand, it includes a principle of expansion, mandating that the APUC's power to act within its specific areas of jurisdiction "is to be liberally construed."

The Alaska Supreme Court has dealt with this provision eight times. In four of those cases the Court found the Commission lacked authority. (over Yellow page ads, borough regulation of rights-of-way, attorney cost allocation, and to refuse a rate increase required by bond covenant).

In another (Colville) Environmental Services vs North Slope Borough the Court concluded that the Commission's action "fell squarely within the adjudicatory authority granted the Commission by AS 42.05.271."

In these cases half the time utilities have used the "liberally

construed" as part of their own legal arguments and the courts have ruled in their favor about half the time.

The way I read it, this language does not confer upon the APUC any jurisdiction outside of its powers listed in the statute. If the APUC were a country, would do nothing to expand our borders. Instead, it operates only within the statutory powers granted. I do not support deletion of this provision.

The Commission has only discussed the issue of "liberally construed" nine times in all the orders we issued during our first 25 years on the job! In at least three of these cases the Commission acted to allow the intention of the utility or applicant for a certificate to be accomplished by waiving technical irregularities. In another the Commission found that it did not have statutory authority to recognize a doctrine of "retained rights" requested by a telephone utility requested under statute, despite "liberally construed".

(2) The second issue is Negotiated rulemaking. I think this is an interesting idea from the federal government that bears close examination. However, under the Constitution it cannot mean delegation of the rulemaking powers of the Commission to another body. The negotiating group must be treated as a state agency for purposes of the open meetings and public records acts. The process of developing regulations is terribly slow already, and I would not like to see it slowed further.

Also, it seems that this technique would work best with highly controversial issues. Many of the Commission's recent regulations have resulted from legislative mandates. This is true of simplified ratemaking, TRS (telephone service to the deaf Community), Intrastate phone service, and the regulatory cost charge. It is not clear to me how these regulatory proceedings would have benefitted from negotiated rulemaking. If this becomes an issue much more research will be necessary.

(3) Lower RCC rates for Electric Utilities:

The Commission responded to the Legislative Audit On March 1, 1993

Recommendation No. 1, in the Sunset Audit stated; Alaska Statute 42.05.253 should be amended to require APUC to periodically adjust the regulatory cost charge (RCC) on an industry by industry basis. Further, the automatic repeal date of this statute should be deleted.

The Commission agrees that the program should be made permanent by deleting the automatic repeal date for the Regulatory Cost Charge Program (RCC). Last year the legislature switched the funding source for the Commission from general funds to this regulatory assessment. The Commission expended significant resources in developing regulations and procedures to make the program work and to make compliance by affected

entities as straightforward as possible. The program is in place and running smoothly.

However, the Commission cannot support the recommendation to require itemization of the rates under the RCC program by utility/pipeline carrier type. Although in theory the recommendation has some merit, it is not at all clear to the Commission that it would be either practical or cost-effective to attempt to implement at this time.

Individual RCC rates would require full and direct allocation of the Commission's costs. The recommendation, if implemented as drafted, would substantially increase the cost of the RCC program. Full cost allocation would be expensive, especially during the year when it was implemented. A permanent increment to the Commission's budget would be required. The Commission would face a new administrative burden of setting individual RCC rates and handling protests to the rates.

One of the key principles guiding the development of the RCC was simplicity. This was true both for the utilities and carriers, their customers, as well for the efficient administration of the program. The Commission has been able to absorb the ongoing costs of the RCC program from its existing budget, because the program has been kept

simple and workable. The auditors' recommendation for further refinement of the RCC would require the statutory cap of .61% of adjusted gross revenues (AS 42.05.253(a)) to be substantially increased. Based on their estimates by utility type for purposes of discussion, the current authorized budget for the Commission would require increasing the cap to .85% for certain utility groups, at a minimum.

From the perspective of most utility customers facing a regulatory cost charge bill of less than \$20 per year, different rates for different utility types would not have a measurable effect on their total bill.

III. A.P.U.C.'s Response to the Recommendations of the Legislative Auditor

The Alaska Public Utilities Commission concurs with the legislative auditor's finding that the Commission is meeting its public purpose and supports extension of the sunset date at least four years.

A. Regulatory Cost Charge

The Commission opposes required readjustment of the RCC on an industry by industry basis. Keep it small. Keep it simple. And keep it uniform. The administrative expense of making this change would far exceed any value of individualization of rates.

As I stated in our response to the Legislative Audit recommendation:

From the perspective of most utility customers facing an RCC bill of less than \$20 per year, different rates for different utility types would not have a measurable effect on their total bill.

B .Easier Access for Utility Consumers to Opt In or Out of Regulations

I support increasing the cutoff from \$325,000 to either \$500,000 or \$1,000,000 for economically regulated electric utilities to be eligible to vote for deregulation. This 1 million dollar ceiling would mean that nine more electric utilities would be able to hold deregulation elections. Also one additional local telephone companies would qualify under this standard.

C. Timekeeping System

The Commission agrees that this recommendation is worthwhile to pursue. If accomplished for internal management purposes, the system could be designed relatively economically. However, if the system is required to serve as the basis for billings, such as those recommended in the auditors' first recommendation, it would be considerably more costly. In either case a fiscal note would be required to carry out this recommendation.

D. Commissioner's Access to Adequate Staff Support

I am proposing to beef up the staff support available to

Commissioners on regulatory policy issues. When Commission Staff is named as a party to a proceeding, the judicial ex parte rule prevent Commissioners from seeking their advice or research, except as formally presented in the case on the record. Specifically we are proposing to upgrade one position and create one new slot to serve as Commissioners' Policy Analysts. Details of this proposal will appear in the Commission's FY 95 budget request.

E. Stagger Commissioner's Terms

The Commission supported this one, but a statutory change would be needed to correct this time. Two Commissioners terms expired last year and the terms of the new appointees are scheduled to expire on the same day in 1999.

DIVISION OF LEGAL SERVICES

**LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

April 8, 1994

SUBJECT: Federal and state regulation of cable television (CSSB 213 (JUD))

TO: Senator Robin Taylor, Chair
Senate Judiciary Committee

FROM: Teresa B. Cramer *TBC*
Legislative Counsel

You have asked for an explanation of the interplay of state and federal rate regulation of cable television permitted under federal law.

Federal law concerning regulation of cable television is found at 47 U.S.C. §§521 - 559. Section 543, a copy of which is enclosed, addresses rate regulation. Definitions for the terms used are found at 47 U.S.C. §522, a copy of which is also enclosed.

Municipally owned cable systems. Under 47 U.S.C. §543(a)(1), if a cable system is owned or operated by a local government or franchising authority and is the only system within the jurisdiction, it is not subject to regulation at the federal or state level or by a franchising authority.¹

Systems subject to effective competition. Under 47 U.S.C. §543(a)(2), if a cable system is subject to effective competition, it is not subject to rate regulation at the federal, state, or local level. Subsection (1)(1) defines "effective competition" to mean that (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; or (B) the area is served by at least two distributors offering comparable video programming to at least half the households and the number of households subscribing to the distributors other than the largest distributor exceeds 15 percent of the households; or (C) a distributor operated by a franchising authority for that area offers video programming to at least half the households.

Systems not subject to effective competition. Under 47 U.S.C. §543(a)(2), if the Federal Communications Commission (FCC) finds that a cable system is not subject to effective competition, the rates for basic cable service² are subject to regulation

Senator Robin Taylor

April 8, 1994

Page 2

by a franchising authority and the rates for cable programming services³ are subject to regulation by the FCC. However, the FCC can regulate basic cable service in place of a franchising authority if the FCC finds, under paragraph (a)(6), that the franchising authority has not properly requested authority to regulate rates or has acted inconsistently with the requirements of rate regulation.

Qualification of franchising authority. Under 47 U.S.C. §543(a)(3), a franchising authority that intends to regulate cable system rates must file with the FCC a written certification that the franchising authority (A) will adopt and administer regulations consistent with the FCC regulations; and (B) has legal authority to adopt the regulations and the personnel to administer them; and (C) will provide an opportunity for consideration of the views of interested parties in the procedural laws and regulations that apply to rate regulation. The certification is effective 30 days after filing unless the FCC finds that one or more of the criteria to which the franchising authority certified is not met. If the FCC disapproves the certification, it must notify the franchising authority of revisions or modifications that are necessary to obtain the FCC's approval. 47 U.S.C. §(a)(4).

FCC revocation of jurisdiction. Under 47 U.S.C. §543(a)(5), a cable operator or other interested party may petition the FCC to review the regulation of cable system rates by a franchising authority. The FCC must revoke the ability of a franchising authority to regulate cable system rates if it finds that state and local laws and regulations do not conform to the regulations required by the FCC under subsection (b). The FCC may grant appropriate relief if it finds that the franchising authority has acted inconsistently with the requirements of subsection (a).

Establishment of basic service tier rate regulations and regulation of unreasonable rates. The FCC is directed, under 47 U.S.C. §543(b), to adopt regulations to ensure that rates for the basic service tier are reasonable. The subsection sets out particulars that the FCC regulations must address.

Under subsection (c), the FCC must establish criteria for identifying unreasonable rates for cable programming services and procedures for resolving complaints from subscribers, franchising authorities, and other state or local governmental entities alleging that a rate for cable programming services charged by a cable operator is unreasonable.

This is a brief overview of the interplay of federal and state regulation of cable system rates. Please let me know if you have additional questions on this subject.

TC:pl
94-294.plm

Enclosure

Senator Robin Taylor

April 8, 1994

Page 3

1. Under 47 U.S.C. §522(10), "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise. A franchise, defined in paragraph (9), is an authorization to construct or operate a cable system.
2. "Basic cable service" means any service tier which includes the retransmission of local television broadcast signals. 47 U.S.C. §522(3). Under paragraph (16), a "service tier" is a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator.
3. "Cable programming services" is defined at 47 U.S.C. §543(1)(2) to mean video programming provided over a cable system other than (A) video programming carried on the basic service tier and (B) video programming offered on a per channel or per program basis.

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of basic cable service by hearing impaired individuals.

(g) Any State law in existence on the effective date of this title which provides for any limitation or preemption of regulation by any franchising authority (or the State or any political subdivision or agency thereof) of rates for cable service shall remain in effect during the 2-year period beginning on such effective date, to the extent such law provides for such limitation or preemption. As used in this section, the term "State" has the meaning given it in section 3(v) [47 USCS § 153(v)].

(h) Not later than 6 years after the date of the enactment of this title [enacted Oct. 30, 1984], the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recommendations shall be based on a study of such regulation which the Commission shall conduct regarding the effect of competition in the marketplace.

(June 19, 1934, ch 652, Title VI, Part III, § 623, as added Oct. 30, 1984, P. L. 98-549, § 2 in part, 98 Stat. 2788.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The effective date of this title" and "such effective date", referred to in this section, is the effective date of § 2 of Act Oct. 30, 1984, P. L. 98-549, 98 Stat. 2780, which added 47 USCS §§ 521 et seq., and which became effective 60 days after enactment on Oct. 30, 1984, as provided by § 9(a) of such Act, which appears as 47 USCS § 521 note.

Prospective amendments:

April, 1993, prospective amendment of section. Act Oct. 5, 1992, P. L. 102-385, § 3(a), 106 Stat. 1464 (effective 180 days from enactment, except that the authority to prescribe regulations is effective on the date of enactment, as provided by § 3(b) of such Act, which appears as a note to this section), provides: "Section 623 of the Communications Act of 1934 (47 U.S.C. 543) is amended to read as follows:

" § 623. Regulation of rates

" (a) Competition preference; local and Federal regulation. (1) In general. No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612 [47 USCS § 532]. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.

" (2) Preference for competition. If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition—

" (a) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b); and

" (b) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c).

" (3) Qualification of franchising authority. A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Commission a written certification that—

" (a) the franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b);

" (b) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

" (c) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

" (4) Approval by Commission. A certification filed by a franchising authority under paragraph (3) shall be effective 30 days after the date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that—

" (A) the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Commission under subsection (b);

" (B) the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or

ipment which facilitates the
s.
h provides for any limitation
the State or any political
in effect during the 2-year
ovide for such limitation or
aning given it in section 3(v)
title [enacted Oct. 30, 1984],
t regarding rate regulation of
the Commission considers
a study of such regulation
petition in the marketplace.
O, 1984, P. L. 98-549, § 2 in

IVES

to in this section, is the
O, which added 47 USCS
nt on Oct. 30, 1984, as
ote.

. L. 102-385, § 3(a), 106
: authority to prescribe
3(b) of such Act, which
:munications Act of 1934

In general. No Federal
ole service except to the
§ 532]. Any franchising
: service, or any other
:scribers, but only to the
or franchising authority
owned or operated by a
tion that cable system is
isdiction.

a cable system is subject
ice by such system; shall
or franchising authority
s not subject to effective

be subject to regulation
: Commission exercises
ie regulations prescribed

ect to regulation by the

ity that seeks to exercise
:ll file with the Commis-

ulations with respect to
re consistent with the
b);

pt, and the personnel to

regulation proceedings by
eration of the views of

shising authority under
h it is filed unless the
ole opportunity for the

tering regulations with
that are not consistent
section (b);

hority to adopt, or the

"(C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

"If the Commission disapproves a franchising authority's certification, the Commission shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

"(5) Revocation of jurisdiction. Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b), the Commission shall revoke the jurisdiction of such authority.

"(6) Exercise of jurisdiction by Commission. If the Commission disapproves a franchising authority's certification under paragraph (4), or revokes such authority's jurisdiction under paragraph (5), the Commission shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3). Such new certification shall be effective upon approval by the Commission. The Commission shall act to approve or disapprove any such new certification within 90 days after the date it is filed.

"(b) Establishment of basic service tier rate regulations. (1) Commission obligation to subscribers. The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

"(2) Commission regulations. Within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 [enacted Oct. 5, 1992], the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission—

"(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

"(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

"(C) shall take into account the following factors:

"(i) the rates for cable systems, if any, that are subject to effective competition;

"(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;

"(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

"(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

"(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

"(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

"(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

"(3) Equipment. The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for—

"(A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and

"(B) installation and monthly use of connections for additional television receivers.

"(4) Costs of franchise requirements. The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.

"(5) Implementation and enforcement. The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include—

"(A) procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

"(B) procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;

"(C) standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and

"(D) standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

"(6) Notice. The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

"(7) Components of basic tier subject to rate regulation.

"(A) Minimum contents. Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

"(i) All signals carried in fulfillment of the requirements of sections 614 and 615 [47 USCS §§ 534, 535].

"(ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

"(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

"(B) Permitted additions to basic tier. A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

"(8) Buy-through of other tiers prohibited. (A) Prohibition. A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

"(B) Exception; limitation. The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after—

"(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

"(ii) 10 years after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 [enacted Oct. 5, 1992], subject to subparagraph (C).

"(C) Waiver. If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

"(c) Regulation of unreasonable rates. (1) Commission regulations. Within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 [enacted Oct. 5, 1992], the Commission shall, by regulation, establish the following:

"(A) criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;

"(B) fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any subscriber, franchising authority, or other relevant State or local government entity alleging that a rate for cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

Commission procedures which shall
ing authori-
subsection;
le operators
tions;
anges in the
this section,
ected shall
its when the
ted solely by
l; and
otice of the
o paragraph
franchising
ervice tier.
l provide its
is required
a minimum,
614 and 615
required by
by the cable
mitted by a
tional video
onal signals
bers at rates
this subsec-
tor may not
required by
per channel
bscribers to
ed for video
not apply to
es or other
ing on a per
ch (A). This
ed in a way
Consumer
subject to
perator, the
agraph (A)
may, to the
vaiver from
s reasonable
o days after
petition Act
establish the
ntifying, in
ble;
esolution of
ate or local
arged by a
hich proce-
omplaint to
question is

- "(C) the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of such complaint and that are determined to be unreasonable.
- "(2) Factors to be considered. In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors—
- "(A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;
- "(B) the rates for cable systems, if any, that are subject to effective competition;
- "(C) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;
- "(D) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;
- "(E) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and
- "(F) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.
- "(3) Limitation on complaints concerning existing rates. Except during the 180-day period following the effective date of the regulations prescribed by the Commission under paragraph (1), the procedures established under subparagraph (B) of such paragraph shall be available only with respect to complaints filed within a reasonable period of time following a change in rates that is initiated after that effective date, including a change in rates that results from a change in that system's service tiers.
- "(d) Uniform rate structure required. A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.
- "(e) Discrimination; services for the hearing impaired. Nothing in this title [47 USCS §§ 521 et seq.] shall be construed as prohibiting any Federal agency, State, or a franchising authority from—
- "(1) prohibiting discrimination among subscribers and potential subscribers to cable service, except that no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts; or
- "(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.
- "(f) Negative option billing prohibited. A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.
- "(g) Collection of information. The Commission shall, by regulation, require cable operators to file with the Commission or a franchising authority, as appropriate, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 [enacted Oct. 5, 1992] and annually thereafter, such financial information as may be needed for purposes of administering and enforcing this section.
- "(h) Prevention of evasions. Within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 [enacted Oct. 5, 1992], the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.
- "(i) Small system burdens. In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.
- "(j) Rate regulation agreements. During the term of an agreement made before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, nothing in this section (or the regulations thereunder) shall abridge the ability of such franchising authority to regulate rates in accordance with such an agreement.
- "(k) Reports on average prices. The Commission shall annually publish statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment, of—
- "(1) cable systems that the Commission has found are subject to effective competition under subsection (a)(2), compared with
- "(2) cable systems that the Commission has found are not subject to such effective competition.

"(l) Definitions. As used in this section—

"(1) The term 'effective competition' means that—

"(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

"(B) the franchise area is—

"(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

"(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or

"(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

"(2) The term 'cable programming service' means any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis."

Effective date of section:

Act Oct. 30, 1984, P. L. 98-549, § 9(a), 98 Stat. 2806, which appears as 47 USCS § 521 note, provides that this section shall be effective 60 days after enactment on Oct. 30, 1984.

Other provisions:

Application of this section and 47 USCS § 544. Act Oct. 30, 1984, P. L. 98-549, Title VII, § 9(b), 98 Stat. 2806, provides: "Nothing in section 623 or 624 of the Communications Act of 1934 [this section and 47 USCS §§ 544] as added by this Act, shall be construed to allow a franchising authority, or a State or any political subdivision of a State, to require a cable operator to restore, retier, or reprice any cable service which was lawfully eliminated, retiered, or repriced as of September 26, 1984."

Effective date of 1992 amendment. Act Oct. 5, 1992, P. L. 102-385, § 3(b), provides: "The amendment made by subsection (a) [amending this section] shall take effect 180 days after the date of enactment of this Act, except that the authority of the Federal Communications Commission to prescribe regulations is effective on such date of enactment."

RESEARCH GUIDE

Law Review Articles:

Wadlow and Wellstein, *The Changing Regulatory Terrain of Cable Television*. 35 Cath U L Rev 705, Spring, 1986.

Hammond IV, *To Be or Not To Be: FCC Regulation of Video Subscription Technologies*. 35 Cath U L Rev 737, Spring, 1986.

INTERPRETIVE NOTES AND DECISIONS

In establishing pass-through rule allowing cable systems to automatically pass through rate increases attributable to provision of basic service, Federal Communications Commission exceeded authority granted to it under § 623 of Cable Communications Policy Act of 1984 (47 USCS § 543). *American Civil Liberties Union v FCC* (1987, App DC) 823 F2d 1554.

47 USCS § 543(a) does not pre-empt substantive power of state department of public utilities control to prohibit cable operator from charging contributions in aid of construction to residents of sparse areas, since such contributions are not rate for provision of cable service within meaning of § 543(a). *Housatonic Cable Vision Co. v Department of Public Utility Control* (1985, DC Conn) 622 F Supp 798.

Cable Communications Act of 1984 (47 USCS §§ 521 et seq.) preempts threatened action by town, as franchising authority, to "freeze" cable company's rates following notice of intention to raise rates, because (1) Act was clearly intended by Congress to prevent piecemeal local regulation of cable industry, (2) "freeze" constitutes regulation within meaning of statute and regulations, and (3) company did not waive statutory right to raise rates. *Nashoba Communications Ltd. Partnership No. 7 v Danvers* (1988, DC Mass) 703 F Supp 161.

amd, reconsideration den (DC Mass) 1989 US Dist LEXIS 3150.

§ 544. Regulation of services, facilities, and equipment

(a) Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title [47 USCS §§ 521 et seq.].

(b) In the case of any franchise granted after the effective date of this title, the franchising authority, to the extent related to the establishment or operation of a cable system—

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 626 [47 USCS § 546]), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h), establish requirements for video programming or other information services; and

Purposes and thrust of Cable Communications Policy Act of 1984 (47 USCS §§ 521 et seq.) evinced congressional desire that franchise agreements be applied and modified so as to obtain realistic and flexible regulatory framework recognizing needs of both local governments and cable operators, but were primarily concerned with providing viable cable systems responsive to needs and interests of local communities they serve. *Tribune-United Cable of Montgomery County v Montgomery County* (1986, CA4 Md) 784 F2d 1227.

Cable Communications Policy Act (47 USCS §§ 521-559) was not intended to terminate Federal Communications Commission's policy of preempting local cable franchisors from enacting technical rules, except where Act explicitly or implicitly modifies provisions of policy. *New York v FCC* (1987, App DC) 814 F2d 720, 13 Media L R 2320.

State cable television programming decency act, which gives certain state officials authority to bring nuisance actions against anyone who continuously and knowingly distributes "indecent" material within state over any cable television system or pay-for-viewing television programming, has been preempted by Cable Communications Policy Act of 1984 (47 USCS §§ 521 et seq.), since state act is unconstitutionally overbroad and vague, and void on its face. *Community Television of Utah, Inc. v Wilkinson* (1985, DC Utah) 611 F Supp 1099, 11 Media L R 2217.

Action by town, as franchisor of cable television firm, seeking relief from cable television rate in-

crease did not arise under Cable Communications Policy Act of 1984 (47 USCS §§ 521 et seq.) and therefore did not come within original jurisdiction of Federal District Court; Act contains no language which either creates or expressly denies any cause of action to enforce cable television licensing agreement. *Norwood v Adams-Russell Co.* (1986, DC Mass) 627 F Supp 742.

Cable television operator does not have private right of action under Cable Communications Policy Act to seek to enjoin rival cable system which is unfranchised from constructing and operating cable TV service to apartment complex which is currently serviced by plaintiff. *Rollins Cablevue, Inc. v Sainni Enterprises* (1986, DC Del) 633 F Supp 1315.

Court is without jurisdiction over action seeking declaration that Communications Act of 1934 (47 USCS §§ 521 et seq.) preempts municipality's regulation of cable television rates, because preemption argument is only possible defense in earlier state action by municipality seeking to enforce ordinance and federal question must appear on face of well-pleaded complaint rather than by way of federal defense. *Cablevision of Boston Ltd. Partnership v Flynn* (1989, DC Mass) 710 F Supp 23.

General Accounting Office will not consider under its bid protest jurisdiction, allegations that agency has not complied with renewal provisions of Cable Communications Policy Act of 1984 (47 USCS §§ 521 et seq.) as Act expressly provides for judicial resolution of such disputes. (1986) 65 Op Compt Gen p 313.

§ 522. Definitions

For purposes of this title [47 USCS §§ 521 et seq.]—

- (1) the term "activated channels" means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;
- (2) the term "affiliate", when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;
- (3) the term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals;
- (4) the term "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);
- (5) the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;
- (6) the term "cable service" means—
 - (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
 - (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;
- (7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a

facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act [47 USCS §§ 201 et seq.], except that such facility shall be considered a cable system (other than for purposes of section 621(c)) [47 USCS § 541(c)] to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

(8) the term "Federal agency" means any agency of the United States, including the Commission;

(9) the term "franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 626 [47 USCS § 546]), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

(10) the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise;

(11) the term "grade B contour" means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

(12) the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;

(13) the term "other programming service" means information that a cable operator makes available to all subscribers generally;

(14) the term "person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

(15) the term "public, educational, or governmental access facilities" means—

(A) channel capacity designated for public, educational, or governmental use; and

(B) facilities and equipment for the use of such channel capacity;

(16) the term "service tier" means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

(17) the term "State" means any State, or political subdivision, or agency thereof;

(18) the term "usable activated channels" means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission; and

(19) the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

(June 19, 1934, ch 652, Title VI, Part I, § 602, as added Oct. 30, 1984, P. L. 98-549, § 2 in part, 98 Stat. 2780; Oct. 5, 1992, P. L. 102-385, § 2(c), 106 Stat. 1463.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

A prior § 602 of Act June 19, 1934, ch 652, Title VI, was redesignated as § 702 of such Act by Act Oct. 30, 1984, P. L. 98-549, § 6(a), 98 Stat. 2804, and appears as 47 USCS § 602.

Effective date of section:

Act Oct. 30, 1984, P. L. 98-549, § 9(a), 98 Stat. 2806, which appears as 47 USCS § 521 note, provides that this section shall be effective 60 days after enactment on Oct. 30, 1984.

Amendments:

1992. Act Oct. 5, 1992 (effective 60 days from the date of enactment, as provided by § 28 of such Act, which appears as 47 USCS § 325 note), redesignated paras. (1)–(10) as paras. (2)–(11), respectively, redesignated paras. (11)–(15) as paras. (13)–(17), respectively, and redesignated para. (16) as para. (19), in para. (17) as redesignated, deleted "and" following the concluding semicolon, and added new paras. (1), (12), and (18).

INTERPRETIVE NOTES AND DECISIONS

Rule issued by Federal Communications Com-

Franchised cable operator is entitled to prelimi-

cations
Delawa
Enterpr
Distr
televisic
to cross
to stat
USCS §
regulati
plans fo
not yet
rights-o
units wi

§ 531.

(a) A
designa
extent

(b) A f
may re
626 [4
govern
or gove
designa

(c) A
provid
to enfo
cable c
whethe

(d) In
(b), th

(1)
cap.
tive

(2)

(e) Sul
editori:
pursua

(f) For
networ
only to
(June
part, 9

§ 532.

(a) The

ARECA Resolution 94-3-2

APUC Extension

Whereas, the Alaska Public Utilities Commission provides a necessary and useful service;
and

Whereas, some problems have historically existed regarding the functioning of that
Commission;

Therefore Be It Resolved: ARECA supports CS SB 215 (L&C Work Draft) extending
the life of the APUC until 1998; however we request that it be amended (1) to provide
that all power costs be excluded from the formula for calculating the regulatory cost
charge, and (2) that the directive be removed from that statute that these laws be "liberally
construed."

RESOLUTION

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Bur. Version: SB 213
(S) Publish Date: 3-16-94

Revision Date: 2/4/93
Title: Extending the Alaska Public Utilities Commission and the regulatory cost charge
Sponsor: Senator Keily
Requestor: Senate Labor & Commerce

Department Affected: Commerce and Economic Development
BRU: Alaska Public Utilities Commission
Component: _____

COMPONENT SERIAL NO. _____

Expenditures/Revenues:

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL EXPENDITURES	0	0	0	0	0	0
----------------------	---	---	---	---	---	---

CHANGE IN REVENUES ()	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

FUND SOURCE

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 94) cost: \$ 0

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary.)

Changes in SSB 213 (L+C)
have no fiscal impact. This
fiscal note is appropriate.
3/15/94 LOK
date Comptroller (initial)

Prepared by: Bob Lohr, Executive Director
Division: Alaska Public Utilities Commission

Phone: 276-6222
Date: _____

Approved by Commissioner: Paul Fuhs
Agency: Commerce and Economic Development

Date: 2-7-94

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
For further distribution information call the Governor's Legislative Office

(e) If the commission employs professional consultants to assist it in administering this section, it may apportion the expenses relating to their employment among the competing utilities.

(f) [Repealed, § 12 ch 136 SLA 1980.] (§ 6 ch 113 SLA 1970; am § 1 ch 76 SLA 1973; am § 12 ch 136 SLA 1980; am §§ 15, 16 ch 168 SLA 1990)

Effect of amendments. — The 1990 amendment, effective June 22, 1990, deleted "after January 1, 1971" following "commodity or service" in the first sen-

tence in subsection (e).
... made a series of minor stylistic changes in subsection (e).

NOTES TO DECISIONS

Quoted in Homer Elec. Ass'n v. City of Kenai, 816 P.2d 182 (Alaska 1991).

42.05.253 - PUBLIC UTILITY RC
42.06.285 - PIPELINE CARRIER RC
42.06.400 - SUSPENSION OF TARIFF FILING

Sec. 42.05.251. Use of streets in municipalities.

NOTES TO DECISIONS

Jurisdiction over disputes over municipal restrictions on utilities. — The commission has jurisdiction pursuant to this section to adjudicate a dispute over the reasonableness of fees, terms and con-

ditions imposed by a municipality on the use of its rights-of-way by a utility. Homer Elec. Ass'n v. City of Kenai, 816 P.2d 182 (Alaska 1991).

Sec. 42.05.253. Public utility regulatory cost charge. (a) A regulated public utility operating in the state shall pay to the commission an annual regulatory cost charge in an amount not to exceed .61 percent of gross revenue derived from operations in the state, as modified under (c) of this section if appropriate. An exempt utility shall pay the actual cost of services provided to it by the commission.

(b) The commission shall by regulation establish a method to determine annually the amount of the regulatory cost charge for a public utility. If the amount the commission expects to collect under (a) of this section and under AS 42.06.285(a) exceeds the authorized budget of the commission, the commission shall, by order, reduce the percentages set out in (a) of this section so that the total amount of the fees collected approximately equals the authorized budget of the commission for the fiscal year.

(c) In determining the amount of the regulatory cost charge imposed under (a) of this section,

(1) a utility selling utility services at wholesale shall modify its gross revenue by deducting payments it receives for wholesale sales;

(2) a local exchange telephone utility shall modify its gross revenue by deducting payments received from other carriers for settlements or access charges.

(d) The commission shall calculate the total regulatory cost charges to be levied against all regulated electric utilities under this section. The commission shall allocate the total amount among the regulated electric utilities by using an equal charge per kilowatt hour sold at retail.

(e) The commission shall administer the charge imposed under this section. The Department of Revenue shall collect and enforce the charge imposed under this section.

(f) The commission shall allow a public utility to recover all payments made to the commission under this section. The commission may not require a public utility to file a rate case in order to be eligible to recover the regulatory cost charge.

(g) The commission may adopt regulations under AS 44.62 (Administrative Procedure Act) necessary to administer this section, including requirements and procedures for reporting information and making quarterly payments. The Department of Revenue may adopt regulations under AS 44.62 (Administrative Procedure Act) for investigating the accuracy of filed information, and for collecting required payments.

(h) In this section,

(1) "exempt utility" means a public utility that is certificated by the commission under AS 42.05.221 — 42.05.281 but, in accordance with AS 42.05.711, is exempt from other regulatory requirements of this chapter;

(2) "gross revenue" means the total operating revenue from intrastate services, as shown in a utility's annual report required by the commission by regulation;

(3) "regulated utility" means a public utility that is certificated by the commission under AS 42.05.221 — 42.05.281 and that is subject to the other regulatory requirements of this chapter;

(4) "wholesale sales" means sales to another utility for resale under circumstances that make revenue from the resale subject to the regulatory cost charge imposed under this section. (§ 20 ch 2 FSSLA 1992)

Delayed repeal of section. — Under § 36, ch. 2, FSSLA 1992, this section is repealed July 1, 1994.

Effective dates. — Section 40, ch. 2, FSSLA 1992 makes this section effective July 1, 1992.

Sec. 42.05.271. Modification, suspension or revocation of certificates.

NOTES TO DECISIONS

Deletion of condition from company's certificate authorized. — Order of the Alaska Public Utilities Commission which deleted a condition from company's certificate which barred company from of-

fering day-to-day collection services when such services were provided by a borough fell squarely within the adjudicatory authority granted the commission by this section. *Colville Envtl. Servs., Inc. v.*

Article 2. Certificate of Public Convenience and Necessity.

Section

285. Pipeline carrier regulatory cost charge

Sec. 42.06.245. Federally regulated carriers.

NOTES TO DECISIONS

Power to regulate intrastate rates. — Although the legislature recognized that federal regulators had jurisdiction over interstate commerce, the legislature intended to grant the Alaska Public Utili-

ties Commission full power to regulate intrastate rates. *Cook Inlet Pipe Line Co. v. Alaska Pub. Utils. Comm'n, Sup. Ct. Op. No. 3851 (File No. S-4144), P.2d (1992).*

Sec. 42.06.285. Pipeline carrier regulatory cost charge. (a) A pipeline carrier operating in the state shall pay to the commission an annual regulatory cost charge in an amount not to exceed .61 percent of gross revenue derived from operations in the state. A regulatory cost charge may not be assessed on pipeline carrier operations unless the operations are within the jurisdiction of the commission.

(b) The commission shall by regulation establish a method to determine annually the amount of the regulatory cost charge. If the amount the commission expects to collect under (a) of this section and under AS 42.05.253(a) exceeds the authorized budget of the commission, the commission shall, by order, reduce the percentage set out in (a) of this section so that the total amount of the fees collected approximately equals the authorized budget of the commission for the fiscal year.

(c) The commission shall administer the charge imposed under this section. The Department of Revenue shall collect and enforce the charge imposed under this section.

(d) The commission may adopt regulations under AS 44.62 (Administrative Procedure Act) necessary to administer this section, including requirements and procedures for reporting information and making quarterly payments. The Department of Revenue may adopt regulations under AS 44.62 (Administrative Procedure Act) for investigating the accuracy of filed information, and for collecting required payments.

(e) In this section, "gross revenue" means the total intrastate operating revenue as shown in a pipeline carrier's annual report required by the commission by regulation. (§ 24 ch 2 FSSLA 1992)

Delayed repeal of section. — Under § 36, ch. 2, FSSLA 1992, this section is repealed July 1, 1994.

Effective dates. — Section 40, ch. 2, FSSLA 1992 makes this section effective July 1, 1992.

(b) A pipeline carrier may not establish or place in effect any revised rates, charges, rules, regulations, conditions of service or practices except after 30 days' notice to the commission and to the public. Notice shall be given by filing with the commission and keeping open for public inspection the revised tariff provisions which shall plainly indicate the changes to be made in the schedules then in force and the time when the changes will go into effect. The commission may prescribe additional means of giving notice. The commission, for good cause shown, may allow changes to take effect on less than 30 days' notice under conditions the commission prescribes by order.

(c) Initial and revised tariffs shall be filed in the manner provided in AS 42.06.250. (§ 1 ch 139 SLA 1972; am § 1 ch 35 SLA 1977)

Collateral references. — Use of initial rate as basis for initial price determination on issuance of certificate of public convenience and necessity under § 7 of

Natural Gas Act (15 USC § 717), where area rate has been established, 43 ALR Fed. 803.

Sec. 42.06.400. Suspension of tariff filing. (a) When a tariff filing is made containing an initial or revised rate, classification, rule, regulation, practice, or condition of service the commission may, either upon written complaint or upon its own motion, after reasonable notice, conduct a hearing to determine the reasonableness and propriety of the filing. Pending a hearing the commission may, by order stating the reasons for its action, suspend the operation of the tariff filing for an initial period not longer than six months beyond the time when it would otherwise go into effect. If good cause is shown, the commission may suspend the operation of the tariff filing for an additional period not to exceed one year following the end of the initial suspension period. If information on which to base a just and reasonable tariff is lacking or incomplete at the close of the second suspension period, the commission may, during the suspension period and for good cause shown, with or without a hearing, order a further suspension and in such instance shall order the filed rate to be collected, subject to refund of the difference between the filed rate and the final rate, until a final rate can be set. The commission may order the difference between the temporary rate established under this section and the filed rate to be placed in escrow or secured by bond pending establishment of the final rate.

(b) An order suspending a tariff filing may be vacated if, after investigation, the commission finds that it is in all respects proper. Otherwise the commission shall hold a hearing on the suspended filing and issue its order, before the end of the suspension period, granting, denying or modifying the suspended tariff in whole or in part. If an initial tariff is suspended, the commission shall establish a reasonable temporary tariff. The commission may allow the collection of the filed initial tariff, or it may require collection of the temporary tariff.

If the commission allows collection of the filed initial tariff, it shall require the pipeline carrier to place the revenue representing the difference between the filed tariff and the temporary tariff in escrow in a financial institution approved by the commission, and keep accurate accounts of all amounts received, specifying by whom and in whose behalf the amounts are paid. At the end or vacation of the suspension period the amount, if any, owing to the pipeline carrier from the difference between the temporary tariff and the permanent tariff shall be paid to the pipeline carrier. The surplus, if any, shall be refunded to the persons in whose behalf the amounts were paid into escrow. Funds may not be released from escrow without the commission's prior written consent and instructions to the escrow agent. The commission may allow the pipeline carrier, at the carrier's expense, to substitute a bond or letter of credit in lieu of the escrow requirement. If the commission requires collection of the temporary tariff, it shall require the shipper to place the revenue representing the difference between the filed initial tariff and the temporary tariff in escrow in a financial institution approved by the commission, and require that accurate accounts similar to those specified above in this section be kept by the carrier and the shipper. The person owing shall pay the person owed to the satisfaction of the commission within 30 days after the commission order allowing or setting a permanent tariff. The amount, if any, by which the permanent tariff exceeds the temporary tariff shall be paid by the shipper to the carrier, or, if the temporary tariff exceeds the permanent tariff, the difference shall be paid by the shipper, and in either event such payment shall be made with interest calculated on the balance due at the end of each calendar month at the legal rate, as defined in AS 45.45.010(a). The commission may allow the shipper, at the shipper's expense, to substitute a bond or letter of credit in place of the escrow requirement.

(c) If a proposed increased rate is suspended, the commission shall establish a reasonable temporary tariff. The temporary tariff may be the same as the tariff the carrier is seeking to revise. The commission may allow the collection of the filed proposed increased rate, or it may require collection of the temporary rate. If the commission allows collection of the filed increased rate, it shall require the pipeline carrier to place the revenue representing the difference between the filed proposed increased rate and the temporary rate in escrow in a financial institution approved by the commission, and keep an accurate account of all amounts received, specifying by whom and on whose behalf the amounts are paid. At the end or vacation of the suspension period the amount, if any, owing to the pipeline carrier from the difference between the temporary rate and the permanent rate shall be paid to the pipeline carrier. The surplus, if any, shall be refunded to the persons on whose behalf the amounts were paid into escrow. Funds may not be released from escrow without the commission's

prior written consent and instructions to the escrow agent. The commission may allow the pipeline carrier, at the carrier's expense, to substitute a bond or letter of credit in place of the escrow requirement. If the commission requires collection of the temporary rate, it shall require the shipper to place the revenue representing the difference between the proposed increased rate and the temporary rate in escrow in a financial institution approved by the commission, and require that accurate accounts similar to those specified above in this subsection be kept by the carrier and the shipper. The person owing shall pay the person owed to the satisfaction of the commission within 30 days after the commission's order allowing or setting a permanent tariff. The commission may allow the shipper, at the shipper's expense, to substitute a bond or letter of credit instead of meeting the escrow requirement.

(d) One who initiates a change in existing tariffs bears the burden of proving the reasonableness of the change. (§ 1 ch 139 SLA 1972; am § 6 ch 35 SLA 1977; am §§ 1, 2 ch 22 SLA 1978; am § 1 ch 2 SLA 1979)

~~42.06.410. Power of commission to fix rates. (a) When the commission, after an investigation and hearing, finds that a rate demanded, reserved, charged or collected by a pipeline carrier for a service, subject to the jurisdiction of the commission, or that a classification, rule, regulation, practice, or contract affecting the rate, is unjust, unreasonable, unduly discriminatory or preferential, the commission shall determine a just and reasonable rate, classification, rule, regulation, practice, or contract to be observed or allowed and shall establish it by order.~~

~~(b) If an investigation is conducted in multiple phases, the commission may establish a rate at the end of a single phase. The rate established at the end of a single phase is to be considered a final rate under AS 42.06.400. If the rate established at the conclusion of the proceeding under (a) of this section or after judicial review is less than the rate established after a single phase of an investigation, a shipper is entitled to a refund of the difference between the amounts paid by the shipper and the amounts that would have been paid under the rate established at the conclusion of the proceeding or after judicial review. If the rate established at the conclusion of the proceeding under (a) of this section or after judicial review is more than the rate established after a single phase, a pipeline carrier is entitled to a payment of the difference between the amounts paid to the carrier and the amount that would have been paid under the rate established at the conclusion of the proceeding or after judicial review. (§ 1 ch 139 SLA 1972; am § 2 ch 27 SLA 1981)~~

jurisdiction - Error to hold jurisdiction real and lure to far N. (3796).

42.05.651(a)
Expenses of
INVESTIGATION
OR HEARINGS
OF PUBLIC
UTILITIES

Sec. 42.05.641. Regulation by municipality. The commission's jurisdiction and authority extend to public utilities operating within a municipality, 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. (§ 6 ch 113 SLA 1970; am § 18 ch 168 SLA 1990)

Effect of amendments. — The 1990 amendment, effective June 22, 1990, substituted "municipality" for "city or borough" in the first sentence and made a series of minor punctuation changes in the second sentence.

NOTES TO DECISIONS

commission as a stated full price, may that public utility (90)

42.06.610(a)
Expenses of
INVESTIGATION
OR HEARINGS OF
A PIPELINE
CARRIER

Applied in Colville Envtl. Servs., Inc. v. North Slope Borough, Sup. Ct. Op. No. 3832 (File No. S-4069), P.2d (1992).

Sec. 42.05.651. Expenses of investigation or hearing. (a) During a hearing or investigation held under this chapter, the commission may allocate the costs of the hearing or investigation among the parties, including the commission, as is just under the circumstances. In allocating costs, the commission shall consider the regulatory cost charge paid by a utility under AS 42.05.253 and may consider the results, ability to pay, evidence of good faith, other relevant factors, and mitigating circumstances. Notwithstanding an intervening party's ability to pay, if the commission determines that an intervening party has conducted its intervention in a frivolous manner, the commission shall allocate all costs associated with the intervention to that party. The costs allocated may include the costs of any time devoted to the investigation or hearing by hired consultants, whether or not the consultants appear as witnesses or participants. The costs allocated may also include any out-of-pocket expenses incurred by the commission in the particular proceeding. The commission shall provide an opportunity for any person objecting to an allocation to be heard before the allocation becomes final.

(b) [Repealed, § 28 ch 90 SLA 1991.] (§ 6 ch 113 SLA 1970; am § 63 ch 138 SLA 1986; am § 28 ch 90 SLA 1991; am § 21 ch 2 FSSLA 1992)

Delayed amendment of subsection (a). — Under § 22, ch. 2, FSSLA 1992, effective December 31, 1994, (a) of this section will read: "After completion of a hearing or investigation held under this chapter, the commission shall allocate the costs of the hearing or investigation among the parties, including the commission, as is just under the circumstances. In allocating costs, the commission may consider the results, ability to pay, evidence of good faith, other relevant factors and mitigating circumstances. Notwithstanding an intervening party's ability to pay, if the commission determines that an intervening party has conducted its intervention in a frivolous manner, the commission shall allocate all costs associated

with the intervention to that party. The costs allocated may include the costs of any time devoted to the investigation or hearing by hired consultants, whether or not the consultants appear as witnesses or participants. The costs allocated may also include any out-of-pocket expenses incurred by the commission in the particular proceeding. The commission shall provide an opportunity for any person objecting to an allocation to be heard before the allocation becomes final."

Effect of amendment. — The 1991 amendment, effective July 3, 1991, repealed subsection (b).

The 1992 amendment, effective July 1, 1992, in subsection (a), substituted "During a hearing" for "After completion of a hearing" and "may" for "shall" in the first sentence, inserted "shall consider the regulatory cost charge paid by a utility under AS 42.05.253 and" in the second sentence, and added the third sentence.

Sec. 42.05.661. Application fees. With each application relating to a certificate the applicant shall pay the commission a fee set by the commission by regulation that shall be deposited in the general fund of the state. (§ 6 ch 113 SLA 1970; am § 23 ch 2 FSSLA 1992)

Effect of amendments. — The 1992 amendment, effective July 1, 1992, substituted "a fee set by the commission by regulation that" for "a fee of \$50 which."

Sec. 42.05.711. Exemptions. (a) The provisions of this chapter do not apply to a person who furnishes water, gas or petroleum or petroleum products by tank, wagon, or similar conveyance, unless the person is thereby supplying water, gas, petroleum or petroleum products to a public utility in which the person has an "affiliated interest."

(b) Except as otherwise provided in this subsection, public utilities owned and operated by a political subdivision of the state, or electric operating entities established as the instrumentality of two or more public utilities owned and operated by political subdivisions of the state, are exempt from this chapter, other than AS 42.05.221 — 42.05.281 and 42.05.385. However,

(1) the governing body of a political subdivision may elect to be subject to this chapter; and

(2) a utility or electric operating entity that is owned and operated by a political subdivision and that directly competes with another utility or electric operating entity is subject to this chapter and any other utility or electric operating entity owned and operated by the political subdivision is also subject to this chapter.

(c) The ownership in whole or part, of the corporate stock of a public utility does not make the owner a public utility.

(d) The commission may exempt a utility, a class of utilities, or a utility service from all or a portion of this chapter if the commission finds that the exemption is in the public interest.

(e) Notwithstanding any other provisions of this chapter, any electric or telephone utility that does not gross \$50,000 annually is exempt from regulation under this chapter unless 25 percent of the subscribers petition the commission for regulation.

(

or t

be

—

(

gro

thi:

dur

(

fro:

42.

(

ba

rev

ch

42.

ser

cor

g

wt

we

pr

is

mu

ar

th

no

ca

th

ur

la

ur

m

pe

ex

19

ssity.

Article 4. Rates and Rate Schedules.

NOTES TO DECISIONS

Rate regulation scheme not unconstitutional taking. — The institution of a rate regulation scheme by the Alaska Public Utilities Commission which resulted in lower tariff revenues for an oil pipeline did not constitute an unconstitutional taking of the pipeline's property where there was no showing that the scheme threatened the pipeline's financial integrity and the argument that the commission took property when it reduced the utilities rate base was without merit, as the pipeline's rate base does not constitute property. *Cook Inlet Pipe Line Co. v. Alaska Pub. Utils. Comm'n. Sup. Ct. Op. No. 3851 (File No. S-4144), P.2d (1992).*

Disparity between intrastate and interstate rates not necessarily unjust discrimination. — In the regulation of public utilities a disparity between interstate rates and intrastate rates does not, by itself, equate to unjust discrimination against interstate commerce. Rather, a finding of unjust discrimination must rest on specific findings based on substantial

evidence that demonstrates that the intrastate rates are less than compensatory or insufficient to cover the full cost of service or that they were abnormally low and failed to contribute a fair share of overall revenue. *Cook Inlet Pipe Line Co. v. Alaska Pub. Utils. Comm'n. Sup. Ct. Op. No. 3851 (File No. S-4144), P.2d (1992).*

Intrastate rates not governed by Interstate Commerce Act. — Since § 2 of the Interstate Commerce Act, 49 U.S.C. § 2, which prohibits unlawful discrimination by common carriers in the setting of utility rates, does not apply to intrastate rates, § 2 does not require the Alaska public utilities commission to allow the owners of a pipeline to get intrastate rates which match interstate rates. There are other provisions under federal law, not relied upon by the utility, which prohibit intrastate rate discrimination. *Cook Inlet Pipe Line Co. v. Alaska Pub. Utils. Comm'n. Sup. Ct. Op. No. 3851 (File No. S-4144), P.2d (1992).*

Article 7. General Provisions.

Section
600. (Renumbered)
610. Expenses of investigation or hearing

Sec. 42.06.600. (Renumbered as AS 42.06.230(b).)

Sec. 42.06.610. Expenses of investigation or hearing.
(a) During a proceeding held under this chapter, the commission may allocate the cost of the proceeding among the parties, including the commission, as is just under the circumstances. In allocating costs, the commission shall consider the regulatory cost charge paid directly or indirectly under AS 42.06.285. The costs allocated may include the costs of any time devoted to investigations or hearings by hired consultants, whether or not the consultants appear as witnesses or participants. The commission shall provide an opportunity for any person objecting to an allocation to be heard before the allocation becomes final.

(b) After completion of a proceeding held under this chapter, the commission may reallocate the cost of the proceeding among the parties, including the commission, as is just under the circumstances. The

costs which are reallocated may include the costs of time devoted to investigations or hearings by hired consultants, whether or not the consultants appear as witnesses or participants. The commission shall provide an opportunity for any person objecting to a reallocation to be heard before the reallocation becomes final.

(c) [Repealed, § 28 ch 90 SLA 1991.] (§ 1 ch 139 SLA 1972; am § 3 ch 27 SLA 1981; am § 64 ch 138 SLA 1986; am § 28 ch 90 SLA 1991; am § 25 ch 2 FSSLA 1992)

Delayed amendment of subsection (a). — Under § 26, ch. 2, FSSLA 1992, effective December 31, 1994, (a) of this section will read: "During a proceeding held under this chapter, the commission shall allocate the cost of the proceeding among the parties, including the commission, as is just under the circumstances. The costs allocated may include the costs of any time devoted to investigations or hearings by hired consultants, whether or not the consultants appear as witnesses or

participants. The commission shall provide an opportunity for any person objecting to an allocation to be heard before the allocation becomes final."

Effect of amendments. — The 1991 amendment, effective July 3, 1991, repealed subsection (c).

The 1992 amendment, effective July 1, 1992, in subsection (a), substituted "may" for "shall" in the first sentence and added the second sentence.

Chapter 30. Miscellaneous Regulations Governing Public Utilities and Carriers.

Article

5. Responsibilities of Air Carriers (§ 42.30.225)

Article 5. Responsibilities of Air Carriers.

Section

225. Certification of compliance of air carriers

Sec. 42.30.225. Certification of compliance of air carriers.

(a) A person may not use an aircraft in air commerce before obtaining an annual certificate of compliance for that aircraft from the department. The department may issue a certificate of compliance for one aircraft or a fleet of two or more aircraft. The department shall issue or renew a certificate of compliance upon application and presentation of

(1) proof of financial responsibility required under AS 42.30.200;
 (2) proof of compliance with Federal Aviation Administration requirements, and, where applicable, federal certification for scheduled airline service.

(b) The annual fee for a certificate of compliance for one aircraft and for a fleet of two or more aircraft shall be set by the department by regulation. The certificate is valid for a calendar year. The certificate shall be visible to boarding passengers.

(c) [Repealed, § 11 ch 59 SLA 1987.]