HB
487

Alaska State Legislature

JUNEAU, ALASKA

INTERIM ADDRESS
WEST 4TH AVENUE
ANCHORAGE, ALASKA

CHAIRMAN JUDICIARY COMMITTEE
VICE CHAIRMAN HEALTH EDUCATION & SOCIAL SERVICES COMMITTEE
MEMBER RESOURCES COMMITTEE

FINANCE SUBCOMMITTEES
DEPT. OF COMMERCE & ECONOMIC DEVELOPMENT
ALASKA COURT SYSTEM

Representative Joe Green
District 10

Sponsor Statement

HB 487 - Member approval of political and expansion activities

HB 487 establishes that an electric cooperative may only include the costs of political or expansion activities in its rates if it; 1) advises members that rate monies will be used for such activities, 2) tells them how much of the rate money would be used for such activities, 3) informs the member that the cooperative would not refuse service if the members declines to consent, and finally, 4) receives the consent of the member.

HB 487 empowers consumers by providing them the opportunity to approve rate charges for political and expansion activities. AS 42.05.381 (a) currently restricts rate monies collected by a utility from being used for political contributions or public relations, with some exceptions. However, political and expansion activities *are* being undertaken, which suggests the statute needs clarification.

While cooperative members have the right to vote for board members who may publicly support or oppose political or expansion activities, participation in these elections is notoriously low. However, each member does receive a billing statement, which could easily include a statement of intent for the rate monies collected, and a questionnaire asking if the member approved of their rate money being dedicated to political or expansion activities.

HB 487 takes no position on electric utility industry restructuring. It only says that if a utility wants to expand into another service area, it can only do so with monies approved by its members for that purpose.

Sec. 42.05.381. Rates to be just and reasonable. (a) All rates demanded or received by a public utility, or by any two or more public utilities jointly, for a service furnished or to be furnished shall be just and reasonable; however, a rate may not include an allowance for costs of political contributions, or public relations except for reasonable amounts spent for

(1) energy conservation efforts;

(2) public information designed to promote more efficient use of the utility's facilities or services or to protect the physical plant of the utility;

(3) informing shareholders and members of a cooperative of meetings of the utility and encouraging attendance; or

(4) emergency situations to the extent and under the circumstances authorized by the commission for good cause shown.

(b) In establishing the revenue requirements of a municipally owned and operated utility the municipality is entitled to include a reasonable rate of return.

(c) A utility, whether subject to regulation by the commission or exempt from regulation, may not charge a fee for connection to, disconnection from, or transfer of services in an amount in excess of the actual cost to the utility of performing the service plus a profit at a reasonable percentage of that cost not to exceed the percentage established by the commission by regulation.

(d) A utility shall provide for a reduced fee or surcharge for standby water for fire protection systems approved under AS 18.70.081 which use hydraulic sprinklers.

(e) The commission shall adopt regulations for electric cooperatives and for local exchange telephone utilities setting a range for adjustment of rates by a simplified rate filing procedure. A cooperative or telephone utility may apply for permission to adjust its rates over a period of time under the simplified rate filing procedure regulations. The commission shall grant the application if the cooperative or telephone utility satisfies the requirements of the regulations. The commission may review implementation of the simplified rate filing procedure at reasonable intervals and may revoke permission to use the procedure or require modification of the rates to correct an error. The commission shall adopt the regulations concerning adjustment of rates by local exchange telephone utilities on or before October 1, 1991.

(f) A local exchange telephone utility may adjust its rates in conformance with changes in jurisdictional cost allocation factors required by either the Federal Communications Commission or the Alaska Public Utilities Commission upon a showing to the Alaska Public Utilities Commission of

(1) the order requiring the change in allocation factors;

(2) the aggregate shift in revenue requirement, segregated by service classes or categories, caused by the change in allocation factors; and

(3) the rate adjustment required to conform to the required shift in local revenue requirement.

(g) The commission shall allow, as a necessary and reasonable expense, all payments made to the Department of Environmental Conservation under AS 46.14.240 — 46.14.250. The commission shall allow the public utility to recover these fees through a periodic fuel surcharge rate adjustment. (§ 6 ch 113 SLA 1970; am § 1 ch 86 SLA 1976; am § 5 ch 106 SLA 1977; am § 4 ch 45 SLA 1980; am § 3 ch 104 SLA 1986; am § 1 ch 87 SLA 1990; am §§ 1, 2 ch 81 SLA 1991; am § 11 ch 74 SLA 1993)

Effect of amendments. — The 19[illegible] amendment added subsection (e).

The 1990 amendment inserted "and for local exchange telephone utilities" in the first sentence and inserted "or telephone utility" after "cooperative" in the second and third sentences of subsection (e).

The 1991 amendment, effective June 27, 1991, added the last sentence in subsection (e) and added subsection (f).

The 1993 amendment, effective June 26, 1993, added subsection (g).

NOTES TO DECISIONS

Separation of intrastate and interstate properties, expenses and revenues is required for properly determining the adequacy of a utility's intrastate rates. United States v. RCA Alaska Communications, Inc., 597 P.2d 489 (Alaska 1979).

Lobbying expenses excluded from revenue requirement. — The commission acted reasonably and within its statutory authority in excluding lobbying expenses as part of a utility's revenue requirement. Homer Elec. Ass'n v. State, Pub. Utils. Comm'n, 756 P.2d 874 (Alaska 1988).

Applied in Alaska Pub. Util. Comm'n v. Greater Anchorage Area Borough, 534 P.2d 549 (Alaska 1975).

HOMER ELECTRIC ASSOCIATION, INC., Appellant,

v.

STATE of Alaska, ALASKA PUBLIC UTILITIES COMMISSION, Appellee.

No. S-1952.

Supreme Court of Alaska.

May 20, 1988.

In connection with nonprofit electric cooperative's rate increase request, Public Utilities Commission entered orders excluding lobbying expenses from cooperative's "revenue requirement" and allocating 100 percent of costs incurred in rate-making proceeding to cooperative, and cooperative appealed. The Superior Court, Third Judicial District, Kenai, Charles K. Cranston, J., affirmed Commission on all substantive issues, but remanded for determination of specific proportion of cooperative's dues actually used for lobbying purposes, and cooperative appealed. The Supreme Court, Burke, J., held that: (1) per se exclusion of lobbying expenses from cooperative's "revenue requirement" was not abuse of Commission's discretion; (2) fees Commission paid for services performed by Attorney General's office in connection with rate-making proceeding were not "costs" recoverable by Commission; and (3) remand was required for individualized findings as to propriety of allocating 100 percent of costs of proceeding to cooperative.

Affirmed in part, reversed in part, and remanded with instructions.

Matthews, C.J., filed opinion dissenting in part.

1. Electricity ⇐11.3(4)

Public Utilities Commission had discretion under general statutory authority to exclude electric cooperative's lobbying expenses from cooperative's "revenue requirement," upon determination that inclusion of such costs would be contrary to best interests of electric cooperative's ratepayers, even though lobbying expenses were not listed in mandatory exclusion provision. AS 42.05.141, 42.05.141(a)(3), 42.-05.381(a).

2. Electricity ⇐11.3(5)

Public Utilities Commission's determination that it would not be just, fair or reasonable for electric cooperative to charge ratepayers for lobbying activities carried out on cooperative's behalf was subject to reasonable basis test upon review. AS 42.05.141, 42.05.141(a)(3), 42.05.-381(a).

3. Electricity ⇐11.3(4)

Per se exclusion of lobbying expenses from electric cooperative's "revenue requirement" was not abuse of Public Utilities Commission's discretion in rate-making proceeding. AS 42.05.141, 42.05.141(a)(3), 42.05.381(a).

4. Electricity ⇐11.3(4)

"Costs" recoverable by Public Utilities Commission in rate-making proceeding did not include fees paid by Commission for services performed by Attorney General's office pursuant to explicit statutory mandate. AS 42.05.111, 42.05.111(b), 42.05.651, 42.05.651(a), 42.06.610, 42.06.610(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Electricity ⇐11.3(5, 7)

Determinations that electric cooperative could better pass along costs of rate-making proceeding to ratepayers and that cooperative had "caused" costs of proceeding by requesting rate increase did not justify Public Utilities Commission's allocation of 100 percent of costs of rate-making proceeding to electric cooperative; remand was required for individualized consideration of facts of particular case. AS 42.05.-651(a), 42.06.140 et seq.

C.R. Baldwin, Kenai, for appellant.

Virginia A. Rusch, Asst. Atty. Gen., Anchorage, and Grace Berg Schaible, Atty. Gen., Juneau, for appellee.

Roger R. Kemppel, Donald C. Ellis, Kemppel, Huffman and Ginder, P.C., An-

merits and Homer Electric, joined by Alaska Rural as amicus curiae on the lobbying expense issue, appealed the matter to the superior court. Homer Electric argued on appeal that (1) the APUC erred in excluding lobbying expenses from Homer Electric's revenue requirement, (2) the APUC erred in including as costs those attorney's fees attributable to services performed by the Attorney General's office and, (3) the APUC abused its discretion in allocating to Homer Electric 100% of the costs incurred by the APUC in the rate making proceeding. The superior court affirmed the APUC on all substantive issues, but remanded the case for a determination of the specific proportion of Alaska Rural dues actually used for lobbying purposes. Homer Electric appeals the superior court's ruling.

II. EXCLUSION OF LOBBYING EXPENSES

[1] The APUC's decision to exclude lobbying expenses in the case at bar was based upon its conclusion that, "as a matter of law and public policy," lobbying expenses should be excluded from public utilities' revenue requirements.[4] We must decide whether such a policy decision was within the APUC's legitimate statutory authority and, if so, whether there was a reasonable basis for its application in the case at bar.

The APUC's general powers and duties are defined in AS 42.05.141. That statute provides in part:

> (a) The Alaska Public Utilities Commission may
>
> ....
>
> (3) *make or require just, fair and reasonable rates*, classifications, regulations, practices, services and facilities for a public utility[.]

(Emphasis added). In addition AS 42.05.381(a) provides in part:

> All rates demanded or received by a public utility, or by any two or more public utilities jointly, for a service furnished or to be furnished *shall be just and reasonable:* however, a rate may not include an allowance for costs of political contributions, or public relations....

(Emphasis added).

The APUC asserts that it has been given ample authority under these provisions to exclude any operating costs, including lobbying expenses, from a utility's revenue requirement when it concludes that inclusion of such costs is contrary to the best interests of the utility's ratepayers. Alaska Rural, appearing as amicus on behalf of Homer Electric,[5] argues that both the wording and legislative history of AS 42.05.381(a) preclude the APUC from excluding lobbying expenses from a utility's revenue requirement.

Alaska Rural's argument is primarily one of legislative intent. As originally enacted, AS 42.05.381(a) provided only that public utility rates be "just and reasonable," as determined by the APUC under its general rate making authority. Ch. 113, § 6, SLA 1970. The statute was amended in 1976, however, to specify certain expenditures which the APUC was *required* to omit from a utility's allowable costs. Ch. 86, § 1, SLA 1976. As originally proposed, the 1976 amendment would have specifically excluded lobbying costs, as well as costs in connection with advertising, political and charitable contributions, and public relations.[6] The bill was amended on the floor, however, to delete the prohibitions on lob-

4. The APUC's decision in this case was based upon its earlier decision on the same question in *In re Chugach Electric Ass'n*, APUC Order No. U-81-53(21)/U-83-57(9)/U-84-13(1) (1984).

5. Homer Electric adopts Alaska Rural's argument on this issue *in toto.*

6. The amendment, as originally proposed, read:

> All rates demanded or received by a public utility, or by any two or more public utilities jointly, for a service furnished or to be furnished shall be just and reasonable; *however, no rate may include an allowance for costs of advertising, political or charitable contributions, lobbying expenses, or public relations....*

H.C.S.S.B. 50, 10th Leg., 1st Sess. (May 14, 1977) (emphasis added). These exclusions were made subject to certain exceptions not relevant here. *Id.*

bying expenses, advertising and charitable contributions.[7]

Alaska Rural argues that the legislature's deletion of the term "lobbying expenses" from the list amounts to a legislative determination, not only that lobbying expenses need not be excluded, but also that they may not be excluded from a utility's revenue requirement. In support of its argument, Alaska Rural points to the statements of Representative Freeman, a sponsor of the amendment to remove "lobbying expenses" from the list, who argued during debate on the measure:

> Mr. Speaker ... I am basing my objection on personal experience.... [A]dvertising, ... lobbying expenses, [and] charitable contributions ... these are the sort of things that—especially the lobbying and advertising—are just part of doing business. For instance, if a utility sends a man down here to—in connection with a bill such as this, that's lobbying, and I just see no reason why you should ... a public utility especially has to come up with money to do business somewhere and this is just part of doing business. And I see nothing to be gained by putting these kinds of restrictions on a utility.

Record of the House Floor Debate on H.C. S.S.B. 50 (May 20, 1977). Alaska Rural concludes, based upon the foregoing, that the history of AS 42.05.381(a) evidences a clear legislative intent to *allow* lobbying expenditures as part of a utility's revenue requirement. We do not agree.

The mandatory exclusion provisions of AS 45.05.381(a) simply specify certain items which the APUC *must* exclude from a utility's revenue requirement. They say nothing whatsoever about what the APUC *may* exclude under its general authority to establish "just, fair and reasonable rates." AS 42.05.141(a)(3). The legislative history upon which Alaska Rural relies suggests at most that the legislature did not intend to eliminate the APUC's discretion to allow lobbying expenses if it saw fit to do so. Even Representative Freeman's comments, however, do not suggest an intent to prohibit the exclusion of such expenses where the APUC, in its discretion, determines that exclusion is appropriate.

[2] Having found no express or implied statutory prohibition on the APUC's ruling, we should reverse only if we find that the APUC had no reasonable basis for concluding that it was not "just, fair and reasonable" for public utilities to charge ratepayers for lobbying activities carried out on the utilities' behalf. *See Alaska Public Utilities Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 559 (Alaska 1975) (APUC rate making decisions generally subject to "reasonable basis" test); *Kelly v. Zamarello*, 486 P.2d 906, 917 (Alaska 1971) (reasonable basis test should be applied in cases "concerning administrative expertise as to either complex subject matter or fundamental policy formulations").

[3] In reaching its decision on the lobbying expense issue in this case, the APUC relied upon several of its earlier decisions excluding lobbying expenses. *See In re Chugach Electric Ass'n*, APUC Order No. U-81-53 (21)/U-83-57(9)/U-84-13(1) (1984); *In re Enstar Natural Gas*, APUC Order No. U-81-101 (1982); *In re RCA Alaska Communications*, APUC Order No. U-78-4(33) (1981). In those cases, the APUC noted that utility companies, in charging their customers for lobbying activities, are "presuming to determine without the prior knowledge or consent of [their] ratepayers what pending legislation is or is not beneficial to them." *In re Enstar Natural Gas*, U-81-101 at 3. It also noted that the practice of forcing ratepayers, by virtue of the utility's monopoly status, to subsidize political activities with which they may not agree, has been rejected by numerous other jurisdictions. *See In re RCA Alaska Communications*, U-78-4(33) at 95-96; *see also In re Public Service Co. of Colorado*, 13 P.U.R.4th 40, 58 (Colo.Pub.Util.Comm'n 1975); *In re Washington Water Power Co.*, 24 P.U.R.4th 39, 50 (Idaho Pub.Util.Comm'n 1978); *Washington Utilities and Transportation*

7. *See* H.C.S.S.B. 50, am H, 10th Leg., 1st Sess. (May 18, 1977).

Comm'n v. Pacific Northwest Bell Telephone, 26 P.U.R.4th 495, 514 (Wash.Util. & Trans.Comm'n 1978). *See generally In re Southwestern Bell Telephone*, 19 P.U. R.4th 1, 27–28 (Kansas State Corp. Comm'n 1977) (citing additional authorities). In accordance with these considerations, the APUC concluded that lobbying expenses were more appropriately borne by investors than by ratepayers, and that such activities should be financed out of profits rather than out of general operating costs.

We believe that the APUC's decision represents a logical solution to a difficult policy problem, and one which is consistent with the general regulatory trend in this arena.[8] We cannot say that it was without any reasonable basis. Nor can we say that it was unreasonable for the APUC to opt for a *per se* rule concerning the exclusion of lobbying expenses, rather than a case by case approach based upon the individual merits of each lobbying effort. The latter approach was explicitly abandoned by the APUC as unworkable because it required the Commission to make such "subjective and judgmental" decisions as:

> Is the Legislature (or Congress) acting wisely in changing existing laws? What types of proposed legislation should be defeated? Should a utility be reimbursed for meritorious but unsuccessful lobbying efforts? How should legislation beneficial to one utility's ratepayers but detrimental to others be treated?

In re Enstar Natural Gas, APUC Order No. U-81-101 at 3–4 (1982). We agree with the APUC that it would be untenable to force that body into a position of having to choose between "good" lobbying and "bad" lobbying for purposes of establishing a utility's proper revenue requirements. Thus, we hold that the APUC acted reasonably and within its statutory authority in excluding such expenses altogether.[9]

III. ATTORNEY GENERAL'S SERVICES AS AN ELEMENT OF COSTS

[4] Alaska Statute 42.05.651(a) grants the APUC the authority to allocate among the parties, including the Commission itself, the costs incurred by the APUC in connection with certain rate making proceedings. In this case, the APUC concluded that the fees which it was required to pay to the Attorney General's office for the use of an assistant attorney general were allocable costs within the meaning of AS 42.05.651(a).[10] Accordingly, it assessed $482.06 in attorney's fees against Homer Electric, as part of its cost allocation order. Homer Electric contests the allocation, arguing that the term "costs," as used in AS 42.05.651(a), does not include attorney's fees, and that, even if it did, it would not include fees paid to assistant attorneys general who are statutorily designated as legal counsel to the Commission. *See* AS 42.05.111.

The APUC concluded, and the superior court agreed, that our holding in *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Comm'n*, 711 P.2d 1170 (Alaska 1986), controls this issue. In *Amerada Hess*, we

8. In fact, at least one court has held that it may be unconstitutional to force ratepayers to subsidize political or religious activities with which they do not agree. *Cahill v. Public Service Comm'n*, 69 N.Y.2d 265, 513 N.Y.S.2d 656, 657, 506 N.E.2d 187, 188–89 (N.Y. 1986), *cert. denied*, — U.S. —, 108 S.Ct. 100, 98 L.Ed.2d 61 (1987) (plaintiff stated cause of action for violation of First Amendment rights based on Public Service Commission practice of including charitable contributions as part of a utility's authorized expenditures).

9. Neither the APUC nor Homer Electric has contested that portion of the superior court's decision which required remand for a determination of the specific percentage of Alaska Rural dues attributable to lobbying expenses. We agree with the trial court's conclusion that the arbitrary 50% figure was unsupported by the evidence, and we affirm the lower court's decision as to this limited remand.

10. The State Attorney General is designated by statute as staff counsel for the Commission. AS 42.05.111. However, the two assistant attorneys general assigned to the APUC are in fact paid for through "reimbursable services agreements," under which the Commission pays the Attorney General's office some $120,000 per year in exchange for its services. Of this figure, the Commission estimates that 46% (or $55,000) of the services provided by these assistant attorneys general is attributable to hearings and investigations for which the Commission may recover costs under AS 42.05.651.

held that the term "costs," as used in AS 42.06.610, includes fees paid to temporary private counsel retained on a contract basis by the APUC in connection with proceedings under the Pipeline Act. We stated:

> We ... reject the owners' contention that AS 42.06.610 does not authorize the allocation of attorney's fees. Pursuant to AS 42.06.610, the Commission is authorized to allocate the "costs" of the proceeding. The statute provides that "costs" include consultants' fees, but it nowhere excludes attorney's fees. When the legislature uses the term costs, it often intends to include attorney's fees. *See, e.g.*, AS 09.60.010. The inclusion of attorney's fees in the "costs" allocable in AS 42.06.610 is consistent both with the apparent intent of the legislature to allow the APUC to recoup its costs of regulation, and with AS 42.05.141(1) which provides that the powers of the APUC shall be liberally construed to accomplish its stated purposes. Thus, we hold that AS 42.06.610 authorizes the APUC to allocate the costs incurred in hiring temporary legal counsel for a particular proceeding.

Id. at 1182 (footnote omitted). The APUC points to the similarity in wording between AS 42.06.610 [11] and AS 42.05.651(a),[12] and argues that there is no reasoned basis upon which *Amerada Hess* can be distinguished from the case at bar. It concludes, therefore, that attorney's fees, including those attributable to the services of the Attorney General, are clearly allocable under the statute.

We agree with the APUC that the *Amerada Hess* rationale is applicable in the context of cost allocations under AS 42.05.651(a). Contrary to the APUC's assertion, however, that decision does not justify the cost allocation order entered here. *Amerada Hess* was expressly limited to cost allocations with regard to privately contracted "temporary legal counsel." 711 P.2d at 1181–82. That decision does not suggest that the APUC is entitled to be reimbursed for the cost of services rendered by the Attorney General's office pursuant to its statutory duty under AS 42.05.111,[13] nor do we think that such general overhead expenditures can be reasonably justified as an element of "costs" under AS 42.05.651(a).

Alaska Statute 42.05.651(a) provides that the APUC is entitled to allocate "costs ... includ[ing] the costs of any time devoted to investigation or hearing by *hired consultants* ... [and] any *out-of-pocket expenses* incurred by the commission in the particular proceeding." (emphasis added). Under traditional principles of *ejusdem generis*, we must limit the application of the general term "costs" to those expenses which are similar in nature to the more specific terms, "hired consultants" and "out-of-pocket expenses." *See* 2A N. Singer, Sutherland Statutory Construction § 47.17 (Sands 4th ed. 1984). Accordingly, while it may be appropriate to allow recovery of the state's expenses with regard to privately contracted outside counsel,[14] we do not

11. AS 42.06.610(a) provides:

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.

12. *See supra* note 3.

13. AS 42.05.111 provides:

(a) The attorney general is legal counsel for the commission. The attorney general shall advise the commission in legal matters arising in the discharge of its duties and represent the commission in actions to which it is a party. If, in the opinion of the commission, the public interest is not adequately represented by counsel in a proceeding, the attorney general, upon request of the commission, shall represent the public interest.

(b) The commission may employ temporary legal counsel from time to time in proceedings before the commission in which the attorney general is representing the public interest or a party before the commission.

14. We note that the use of temporary legal counsel is expressly limited by the terms of AS 42.05.111(b) to those situations in which the Attorney General is representing the public interest or a party before the commission.

think it proper, under this statutory scheme, to permit recovery for routine services rendered by officers of the state pursuant to an explicit statutory mandate.

Under the broad reading suggested by the APUC, we can conceive of no state expense incurred in connection with APUC rate making proceedings which would fall outside the scope of the term "costs" under AS 42.05.651(a). In our view, the term "costs" was never intended to be so broadly construed. Thus, we hold that the APUC erred in allocating as part of its costs those fees attributable to services performed by the Attorney General's office in connection with this proceeding.

IV. 100% COST ALLOCATION TO HOMER ELECTRIC

[5] Alaska Statute 42.05.651(a) allows the APUC to allocate the costs of rate making proceedings "among the parties, including the commission, as is just under the circumstances." In determining whether an allocation is "just under the circumstances," the Commission may consider "the results, ability to pay, evidence of good faith, other relevant factors and mitigating circumstances." AS 42.05.651(a).

In the case at bar, Homer Electric and the APUC were the only parties. The APUC allocated 100% of the costs of the proceeding to Homer Electric. The primary justifications offered by the Commission in support of this result were (1) that Homer Electric had a greater ability to pay because Homer Electric could pass the costs on to its ratepayers, while the APUC "must function under budgetary limitations," and (2) that, in fairness, "the cost-causer should be the cost-payer," and Homer Electric created these costs by filing its tariff revisions. We agree with Homer Electric that such considerations, by themselves,[15] are insufficient to justify the allocation in this case.

In *Amerada Hess*, 711 P.2d at 1180, we upheld the cost allocation scheme established under the Pipeline Act against a constitutional challenge claiming that the statute violated due process by allowing the Commission to be a "judge in its own cause" as to liability for costs. We stated:

> We conclude that the dual role of the APUC as both administrator of its own budget and adjudicator of costs does not violate state due process if sufficient safeguards exist against APUC's discretion. In this case, the APUC's issuance of a reasoned decision explaining its cost allocation was sufficient safeguard against the APUC's abuse of discretion. *We can adequately check the APUC's exercise of discretion by reviewing a decision setting forth the agency's factual premises and substantive considerations.*

Id. (emphasis added). We believe that this is an appropriate case in which to act as a check on the APUC's discretion.

We do not question the APUC's general authority to determine the appropriate proportion of the costs to be borne by each party in a rate making proceeding. However, we are disturbed by the reasoning of the APUC in this case. The factors upon which the APUC order is based, *i.e.*, that Homer Electric can better pass along its costs and that Homer Electric "caused" the costs in this proceeding by requesting the rate increase, would appear to be present in virtually every case. Indeed, the APUC's arguments suggest that it may be the Commission's regular policy that utility companies bear all costs in rate making proceedings. Such a policy is contrary to the clear wording of AS 42.05.651(a), which allows the Commission to allocate costs among the parties "*including the commission.*" To allow the APUC to base its findings as to its own liability upon such superficial and recurring grounds would be tantamount to interpreting the statute to

15. The Commission also noted that "Homer Electric was spared the expense of a full evidentiary hearing." However, this consideration is essentially neutral in character, the Commission was equally "spared" such costs. Moreover, AS 42.05.651(a) provides that costs should be allocated among the parties as is "just," whether they are incurred in hearings or investigations. Thus, the fact that this matter did not go to a "full evidentiary hearing" is not controlling.

read that "the commission may allocate costs among the parties *excluding the commission*." We think this is inconsistent with the legislature's intent. Consequently, we reverse the APUC's cost allocation and remand for further findings as to the propriety of a 100% cost allocation in the case at bar.[16]

V. CONCLUSION

The APUC rate-setting order, insofar as it relates to the exclusion of lobbying expenses from Homer Electric's revenue requirement, is AFFIRMED. In accordance with the trial court's earlier order, however, we REMAND to the superior court with instructions to REMAND the matter to the APUC for a determination of the specific portion of Alaska Rural dues actually used for lobbying activities.

The APUC cost allocation order is REVERSED and the matter is REMANDED to the superior court with instructions to REMAND to the APUC with instructions that the APUC (1) exclude from its cost allocation any fees attributable to services performed by the Attorney General's office in connection with this proceeding, and (2) make further findings as to the propriety of a 100% cost allocation order in this case.

MATTHEWS, Chief Justice, dissenting in part.

I agree with the opinion, except as to part IV concerning the 100% cost allocation to Homer Electric.

APUC gave three reasons in support of this allocation:

1. ability to pay, finding that Homer Electric had the superior ability since it could pass the costs on to the consumer;

2. "that insofar as possible the cost causer should be the cost payer; i.e. HEA was the party whose tariff revision generated the audit and associated costs in this proceeding and should be required to bear the burden of paying those costs."; and

3. that "HEA was spared the expense of a full evidentiary hearing in this proceeding."

The expression of the third reason suggests that if the Commission had subjected the utility to a full evidentiary hearing and was thus responsible for needless additional work, the Commission would not have made the 100% allocation.

It seems to me that all of these reasons are appropriate for consideration and that the Commission has expressed grounds which suffice to satisfy the "just under the circumstances" statutory standard. I would therefore affirm the cost allocation.

Dan (Ike) PARKER and Parker Paving, Inc., Appellants/Cross-Appellees,

v.

NORTHERN MIXING COMPANY, C.J. Guthrie, Douglas Guthrie, and Guthrie Machinery Co., Appellees/Cross-Appellants.

Nos. S-1667, S-1737.

Supreme Court of Alaska.

May 27, 1988.

Members of de facto partnership owning asphalt plant sued each other over proper distribution of assets and losses. The Superior Court, Third Judicial District, Charles K. Cranston, J., made various findings, rendered an accounting, and issued judgment from which all parties appealed. The Supreme Court, Rabinowitz, C.J., held that: (1) trial court properly found that individual who advanced monies to de facto partnership was not member of partnership, but was creditor; (2) one partner was entitled to partnership contribution for val-

16. We do not mean to suggest that the 100% cost allocation is necessarily unjustified. Our holding is simply that it is an abuse of discretion for the APUC to enter such an order without a more individualized consideration of the facts of the particular case.

Re Certification of Garbage and Refuse Utilities

Alaska Public Utilities Commission
September 21, 1973

ORDER extending for another 60 days the temporary (60-day) certificates granted to 19 refuse collection carriers formerly under the jurisdiction of the Alaska Transportation Commission but now deemed public utilities. Also, another refuse collection carrier is added to the list receiving the temporary authority.

[ABSTRACT OF DECISION. THE FULL CASE TEXT IS OMITTED.]

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1. CERTIFICATES, § 134 — Amendment — Temporary certificates — Extensions of time — Factors.

[ALASKA] Due to confusion over formal investigation and certificate requirements, the commission extended for another 60 days the temporary certificates granted to 19 refuse collection carriers formerly under the jurisdiction of the Alaska Transportation Commission but now deemed public utilities; another carrier also was added to the group receiving the temporary certificates.

Re City of Anchorage dba Municipal Light and Power Department

Additional respondent: Chugach Electric Association, Inc.

U-71-16
Order No. 19

Alaska Public Utilities Commission
September 27, 1973

ORDER resolving service area boundary conflicts between a municipal electric utility and a nearby electric cooperative. At least temporarily, the municipal utility is awarded most areas within corporate limits as well as a noncontiguous area around the airport. The cooperative is granted the area beyond city limits, as well as limited areas within city limits for which it is the existing primary supplier. For those areas within city limits granted the cooperative, the commission notes that as the cooperative's facilities for serving that area are depreciated, the municipal utility will have the right to construct and operate replacement facilities.

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1. CONSOLIDATION, MERGER, AND SALE, § 28 — Exchange of properties and customers — Objections to approval — Financial encumbrances.

[ALASKA] Where a municipal electric utility and an electric cooperative had several overlapping service areas and duplicative facilities, the commission realized that a straight exchange of properties and customers would not solve the problem, since such an exchange could interfere with existing loan encumbrances or other financial obligations associated with certain facilities.
p. 34.

2. SERVICE, § 221 — Abandonment —

Duplicative facilities — Objections to approval — Costs.

[ALASKA] Where a municipal electric utility and an electric cooperative had several overlapping service areas and duplicative facilities, the commission realized that simply requiring one or the other to remove and prematurely retire certain plant would not solve the problem, and could in fact be extremely costly.
p. 34.

3. MONOPOLY AND COMPETITION, § 28 — Service areas — Division of territory — Municipal utility.

[ALASKA] Where a municipal electric utility and an electric cooperative had several overlapping service areas and duplicative facilities, the commission attempted to resolve the problem (at least temporarily) by awarding the municipal utility most areas within city limits as well as a noncontiguous area in which was located the city airport; the territory represented the areas in which the municipality was the primary supplier and included Anchorage, Elmendorf Air Force Base, Knik Arm, and Point Woronzof.
p. 34.

4. MONOPOLY AND COMPETITION, § 28 — Service areas — Division of territory — Cooperative.

[ALASKA] Where a municipal electric utility and an electric cooperative had several overlapping service areas and duplicative facilities, the commission attempted to resolve the problem (at least temporarily) by awarding the cooperative most areas outside city limits as well as certain areas within city limits in which the cooperative was the primary supplier, including Turnagain, Spenard, and much of Fort Richardson.
p. 35.

5. CERTIFICATES, § 96 — Rival applications — Factors — Priority in occupying field.

[ALASKA] Where an electric cooperative was granted temporary authority to serve the Point Campbell Military Reserve pending final adjudication of a territorial dispute with a municipal electric utility, it was told that it would receive preferential consideration in a subsequent permanent certification proceeding for the Point Campbell area.
p. 35.

6. SERVICE, § 251 — Abandonment — Duplicative facilities — Substitution of facilities.

[ALASKA] Although an electric cooperative was allowed (temporarily) to continue providing service in those limited areas of a municipally served city in which the cooperative already had facilities in place, the municipal utility was told that it would be allowed to construct and operate replacement facilities as the cooperative's facilities were depreciated and retired, or it could allow the cooperative to renew its facilities.
p. 36.

7. CONSOLIDATION, MERGER, AND SALE, § 18 — Exchange of properties and customers — Commission plan — Voluntary transfers.

[ALASKA] Although stating that it believed its plan to solve a territorial dispute was a reasonable means by which to eliminate duplicative plant and facilitate an orderly transfer of properties and customers, the commission noted that its plan did not preclude any voluntary transfer or exchange plans developed by the affected parties.
p. 37.

BY THE COMMISSION:

ORDER DELINEATING SERVICE AREAS AND PROVIDING FOR ELIMINATION OF UNDESIRABLE DUPLICATION OF FACILITIES

On December 21, 1970, the CITY OF ANCHORAGE d/b/a MUNICIPAL LIGHT AND POWER DEPARTMENT (ML&P) filed an application in Docket U-70-63 for a certificate of public convenience and necessity requesting authority to furnish electric public utility service throughout a service area situated within and immediately adjacent to the City of

Anchorage. At the time of filing of its application, ML&P was operating an extensive network of electric generation, transmission, and distribution facilities for which Commission authority was not required prior to January 1, 1971.

Coincident with this provision of electric service by ML&P, CHUGACH ELECTRIC ASSOCIATION, INC. (CEA) under authority granted by Certificate of Public Convenience and Necessity No. 8, was furnishing similar service in much of the service area requested by ML&P. In the Commission's opinion, the identical services being offered in many instances by the two utilities represented undesirable duplication.

AS 42.05.221(d) provides that in an area where the Commission determines that two or more public utilities are competing to furnish identical utility service, and that this competition is not in the public interest, the Commission shall take appropriate action to eliminate the competition and any undesirable duplication of facilities. Accordingly, on March 11, 1971, the Commission issued its Order No. 1 in this proceeding seeking the advice and assistance of ML&P and CEA in:

(1) delineating the service area boundaries of each utility in those areas of competition;

(2) eliminating existing duplication and paralleling to the fullest reasonable extent;

(3) precluding future duplication and paralleling;

(4) providing for the exchange of customers and facilities;

(5) providing for such other mutually equitable arrangements as would be in the public interest.

Additionally, the order called for CEA and ML&P to file with the Commission, and serve on each other, briefs outlining their respective views as to how the Commission should proceed to take appropriate action to eliminate existing, and preclude future, undesirable duplication of facilities and competition pursuant to AS 42.05.221(d). Each brief was to include a proposed order designed to specifically implement the recommendations and suggestions contained in the brief.

In response to Order No. 1 herein, both ML&P and CEA submitted proposed orders which would establish a negotiating committee and allow the utilities a period of six months to reach agreement on a voluntary basis. Also, CEA proposed a second order which would establish interim service areas based principally upon which utility was the predominant supplier. The concept of the second proposed CEA order was accepted by the Commission and promulgated by its Order No. 3 in this proceeding, issued June 11, 1971.

On June 29, 1971, ML&P filed a petition to vacate and declare void Order No. 3 on the basis that the order had been entered ex parte without benefit of notice or public hearing as provided by Order No. 1. In response to the petition of ML&P, the Commission ordered that oral argument relating to Order No. 3 and its attached exhibit (map) would be heard on July 8, 1971.

Subsequent to the July 8, 1971, hearing, a series of conferences were held involving representatives of ML&P, CEA, and the Commission Staff, wherein a map was developed and accepted by all conferees concerned, together with a recommendation to the Commission that that map be substituted for the one defining interim service areas issued as a part of Order No. 3. Throughout Order No. 3 and in the related map, the terms "predominantly ML&P service" and "predominantly CEA service" were utilized in conjunction with areas in which one utility was authorized to proceed with the construction or installation of electric facilities without the prior concurrence of the other utility or of the Commission. A consensus evolved during the course of the conferences that these terms were somewhat difficult to accurately define and that the interim service areas should refer simply to:

(1) Areas requiring waiver of objection from the other utility or approval of the Commission prior to construction of electric facilities;

(2) Areas in which one utility (as indicated by the map) could proceed with construction or installation of electric facilities without a prior waiver of objection from the other utility or approval of the Commission.

The Commission subsequently accepted

the findings and recommendation arising from the conferences and implemented the suggested changes and modifications to Order No. 3 by issuance of its Order No. 6 herein. By its Orders No. 8 and 10 the Commission established the forms and procedures by which "Waiver of Objection" and "Commission Approvals" would be processed and obtained. These forms and procedures remain currently in effect.

Both ML&P and CEA in response to Order No. 1 filed proposals for the establishment of a Negotiating Committee for the purpose of consummating a voluntary agreement for the elimination of existing and future duplication of electric facilities. Each utility had requested a minimum period of six months to formulate a final plan for resolution of the problem. Accordingly the Commission by its Order No. 9 on August 31, 1971, established the requested Negotiating Committee. In addition to members from each of the utilities (as proposed by the utilities) one Commission Staff member was added by the Commission to serve as Coordinating Chairman.

During the months of September, October, November, and December, 1971, a number of meetings and work sessions were held by the Committee and its various designated subcommittees. At the conclusion of this four month period of preparatory work, all parties supposedly were in agreement that adequate guidelines had been established and that sufficient legal, engineering, and other related data had been compiled to conduct meaningful, initial negotiations early in January of 1972. Accordingly, the period of January 4 through January 8, 1972, was set by all parties for that purpose.

The full Committee met at 9:00 A.M. on January 4, 1972, with all parties presumably prepared to proceed with earnest negotiations directed toward the ultimate and timely resolution of the long standing service area problem existing between ML&P and CEA. Unfortunately, shortly after negotiations opened it became obvious that there was a wide divergence of opinion between certain representatives of the parties as to which exact issues were to be discussed, and (if discussed) how they were to be approached. Considerable discussion regarding a possible immediate resolution of these differences ensued, and the final conclusion of the Committee was that negotiations should be recessed until 9:00 A.M., January 6, 1972, at which time both CEA and ML&P should be prepared to present firm opening proposals without further delay.

On January 6, 1972, (prior to the reconvening of negotiations) CEA verbally requested a further recess until approximately January 10, 1972, in order to file a motion regarding modification of the procedures established by Order No. 9 in this proceeding. The Negotiating Committee Chairman, with the verbal concurrence of the ML&P counsel, granted the extension. Subsequently, on January 10, 1972, CEA filed a motion requesting, in essence, that in lieu of further informal negotiations at that time, each utility should be required to submit its proposal directly to the Commission for formal consideration.

Following a series of oral arguments and prehearing conferences, it was the Commission's decision to accept the motion of CEA for curtailment of Negotiating Committee action with proposals by each party to be submitted directly to the Commission. By its Order No. 13 issued April 4, 1972, the Commission directed that CEA and ML&P file written proposals simultaneously not later than 4:30 P.M. on April 10, 1972, including but not limited to, specific recommendations for a solution to the service area dispute in question. Order No. 13 also set the matter for hearing on May 10, 1972, a date which was ultimately continued until September 19, 1972.

In its proposal CEA recommended that ML&P be awarded the following described service area:

"Commencing at the mouth (east bank) of Fish Creek (Knik Arm of Cook Inlet), thence southerly along its east bank to its intersection with the center line of the Alaska Railroad right-of-way; thence south along the center line of the Alaska Railroad right-of-way to the center line of West Northern Lights Boulevard; thence east along the center line of West Northern Lights Boulevard to the center line of the Minnesota By-Pass; thence north along the center line of the

Minnesota By-Pass to a point at which a projection of the northern boundary of Block Nine (9) of the Romig Park Subdivision would intersect the center line of the Minnesota By-Pass; thence easterly along the northern boundary of Block Nine (9) of the Romig Park Subdivision to the center line of Spenard Road; thence northeasterly along the center line of Spenard Road to its intersection with the south bank of Chester Creek; thence generally east along the south bank of Chester Creek to the center line of Lake Otis Parkway; thence south along the center line of Lake Otis Parkway to the center line of East Northern Lights Boulevard; thence east along the section line common to Sections Twenty-one (21) (all such sections being in Township 13 North, Range 3 West, Seward Meridian) to the Center line of Boniface Parkway to the center line of the Glenn Highway; thence west along the center line of the Glenn Highway to the center line of Pine Street; thence generally west and north along the boundary of the Military Reservation (Elmendorf Air Force Base) to Knik Arm."

CEA proposed to receive all area in the vicinity of Anchorage falling outside the above described boundaries.

Additionally, CEA contemplated that the parties would be exchanging areas of service with each other to achieve compactness and eliminate "patch work" areas and that such exchanges would be pursuant to an equalization of economic burden.

In its filing ML&P proposed that it should be awarded as its service area all area within the corporate limits of Anchorage, including all future annexations. ML&P also proposed to exchange all properties at depreciated book value in accordance with the arrangement generally known as the "Tennessee Plan."

In comparing the recommendation of CEA and ML&P it was obvious to the Commission that neither plan offered an equitable solution to the problem. Also it was equally obvious that the same general impasse continued to exist between the utilities.

Public hearings commenced on September 19, 1972, to afford both CEA and ML&P the opportunity to augment their written filings and to cross examine the other party on its proposal. Messieurs Robert E. Sharp, Herbert C. Purcell, Gregory L. Jones, Donald R. Aubuchon, Robert L. Marshall, Charles D. Wood, and Robert Morrison appeared on behalf of ML&P, while L. J. Schultz, James D. Bumgardner, Gunnar Flygenring, and George Hedla presented testimony supporting CEA's position.

Mr. Sharp, Anchorage City Manager, introduced the City's Annual Statement and discussed growth and planning activities relating to ML&P. Mr. Purcell, ML&P Assistant Chief Engineer, discussed the desirability of establishing the demarcation between service areas along natural boundaries wherever possible. He also emphasized the need for the utilities to have their individual service areas defined with the least practicable delay in order that they might proceed with orderly development planning. Mr. Jones, Assistant Planner for the Greater Anchorage Area Borough, introduced evidence relating to the anticipated growth and zoning patterns applicable to the immediate Anchorage area. Mr. Aubuchon, Economist for the City, discussed the economic impact that implementation of the ML&P proposal would have on that organization. He also expressed a concern that any service area delineation made by the Commission afford ML&P an opportunity for continuing horizontal growth. Mr. Marshall, a Consultant for R. W. Beck & Associates, appeared and expressed his opinion as to the feasibility of the City's proposal. Mr. Wood, City Controller, presented data relating to transmission and distribution costs. Mr. Morrison, Budget Officer for the City, concluded testimony in support of ML&P with an explanation of the method by which overall City administrative costs were allocated between ML&P and the various other City departments.

Mr. Schultz, General Manager of CEA, gave a detailed description of that utility's electric system and presented a series of exhibits relating to future subscribers trends and power requirements. Mr. Bumgardner, CEA Operations Manager, revealed CEA's long range transmission and distribution plan and discussed the details of the proposal for

delineating service areas. Mr. Flygenring, CEA Executive Assistant for Finance, gave testimony which described the various methods by which CEA obtained funds for capital expansions. Mr. Hedla, a certified public accountant, concluded testimony for CEA with presentation of its financial statements.

[1, 2] Initially, the Commission envisioned that the resolution of the service area problem would result in the beginning of an extensive and orderly transfer of properties and customers between the utilities. After a thorough investigation of the matter, however, the Commission now concludes that such action would be neither feasible nor reasonable. First, the distribution facilities of CEA and ML&P are subject to loan encumbrances or bond covenants which presumably will require advance approval of the loan or bond holders in order to permit retirement or disposal of any substantial item of property prior to its normal life expectancy. Furthermore, in those areas where direct duplication presently exists, the removal of one or the other of the paralleling facilities and the accompanying transfer of subscribers would be extremely costly and would provide no immediate benefit other than aesthetic. Rather than to force a premature plant retirement on either utility in those instances where both CEA and ML&P are furnishing identical service in a given area, it would appear to be more appropriate to restrict or limit one of the utilities' construction activities but permit it to serve its existing customers until present plant is fully depreciated or is sold voluntarily to the other utility.

The Commission at this time will assign firm fixed service areas to each of the utilities.

[3] Essentially ML&P will be granted an overall service area comprised of two individual non-contiguous sub-areas. One of these sub-areas will encompass the Anchorage International Airport and all of Point Woronzof west of that area in which CEA is the sole supplier and south to the township line between T12N and T13N, S.M. More specifically, this sub-area is an area bounded by a line beginning at point of intersection of the NW corner of the Point Campbell Military Reserve and the high water line of Knik Arm; thence east to the SE corner of Section 35, T13N, R4W, S.M. (All further references to Sections in this sub-area description refer to T13N, R4W, S.M.); thence north to NE corner of SE 1/4 of Section 35; thence west to the NW of corner of the SE 1/4 of Section 35; thence north to the NE corner of SW 1/4 of Section 26; thence west to the NW corner of the SW 1/4 of Section 26; thence north to the NE corner of SE 1/4 of the NE 1/4 of Section 27; thence west to the SE corner of the NE 1/4 of the NW 1/4 of Section 27; thence north to the point of intersection with the high water mark of Knik Arm; thence generally southwesterly along the high water line of Knik Arm to the point of beginning. Except for infrequent minor border area penetrations by CEA, ML&P is the sole present supplier in this sub-area.

The second sub-area to be awarded to ML&P is an area bounded generally by a line beginning at approximately the NW corner of Section 24, T13N, R4W, S.M. (Until otherwise indicated all further references to sections in this sub-area description refer to T13N, R4W, S.M.); thence generally south along the center line of the Alaska Railroad right-of-way to a point of intersection with the section line common to Section 23 and Section 26; thence east to the NW corner of Section 30, T13N, R3W, S.M. (All further references to sections in this sub-area description refer to T13N, R3W, S.M.); thence south to the SW corner of the NW 1/4 of Section 31; thence east to the SE corner of the NW 1/4 of Section 32; thence north to SW corner of the NE 1/4 of Section 29; thence east to SE corner of the NE 1/4 of Section 29; thence south to the SW corner of the NW 1/4 of the SW 1/4 of Section 28; thence east to SE corner of the NE 1/4 of the SE 1/4 of Section 28; thence south to the SW corner of Section 27; thence east to the SE corner of Section 27; thence north to the SW corner of the NW 1/4 of the NW 1/4 of Section 26; thence east to SE corner of the NE 1/4 of the NW 1/4 of Section 26; thence south to the SW corner of the NE 1/4 of Section 26; thence east to SE corner of the SW 1/4 of the NE 1/4 of Section 26; thence south to the SW corner of the NW 1/4 of the SE 1/4 of the SE 1/4 of Section 26; thence east to the SE corner of the NE 1/4 of the SE 1/4 of the SE 1/4 of Section 26; thence north to the NE

corner of the SE 1/4 of the SE 1/4 of Section 23; thence west to the NW corner of the SW 1/4 of the SE 1/4 of Section 23; thence north to the NE corner of the SW 1/4 of Section 23; thence west to the NW corner of the NE 1/4 of the SW 1/4 of Section 23; thence south to the NE corner of the SW 1/4 of SW 1/4 of Section 23; thence west to a point approximately 400 feet east of the NW corner of the SW 1/4 of the SW 1/4 of Section 23; thence due south to a point approximately 400 feet north of the section line common to Section 23 and Section 26; thence due west to a point on the quarter section line common to the SE 1/4 and SW 1/4 of Section 22; thence north to the SW corner of the NE 1/4 of Section 22; thence east to the SE corner of NE 1/4 of Section 22; thence north to a point of intersection with the south boundary line of the Elmendorf Air Force Base Military Reservation; thence generally westerly along the boundary of the Elmendorf Air Force Military Reservation to the point of intersection with the high water line on Knik Arm; thence southwesterly along the high water line of Knik Arm to the point of beginning. This second sub-area to be awarded to ML&P basically contains those geographic areas inside and outside the corporate limits of Anchorage in which ML&P is essentially the sole supplier; all areas within the corporate limits not being served by either CEA or ML&P; and all areas within the corporate limits in which CEA and ML&P presently operate paralleling or duplicating facilities.

[4] CEA, in part, will be awarded those portions of the Turnagain and Spenard areas (both inside and outside the corporate limits of Anchorage) in which it is essentially the sole supplier, consisting of the following areas in T13N R4W, S.M.: SE 1/4 of Section 22; all of Section 23 west of the center line of the Alaska Railroad right-of-way; all of Section 25; NW 1/4 and the E 1/2 of Section 26; N 1/2 of the NE 1/4 of Section 27; NE 1/4 of Section 35; and all of Section 36. Additionally, CEA will be awarded the following blocks in the general Boniface/Tudor/Northern Lights/Baxter Road area in T13N, R3W, S.M. in which it is the principal supplier (These areas are contiguous to the remainder of CEA's service area, but are abutted on two or more sides by areas to be awarded to ML&P.): S 1/2 of the NW 1/4, SW 1/4, W 1/2 of the SE 1/4, and the S 1/2 of the SE 1/4 of the SE 1/4, all in Section 26; SE 1/4 of Section 22 less approximately the south 400 feet; and the NW 1/4 of the SW 1/4, the N 1/2 of the SE 1/4 and the SW 1/4 of the SW 1/4, less approximately the east 920 feet and the south 400 feet, all in Section 23. Also, CEA will retain all of its existing certificated service area generally south and east of the following line except for certain portions encompassing military reservations: Beginning at the point of intersection of the north boundary of the Point Campbell Military Reserve and the high water line of Knik Arm; thence east to the SW corner of Section 31, T13N, R3W, S.M. (All further references to sections in this description refer to T13N, R3W, S.M.): thence north to the NW corner of the SW 1/4 of Section 31; thence east to the NE corner of the SW 1/4 of Section 32; thence north to the NW corner of the SE 1/4 of Section 29; thence east to the NE corner of the SE 1/4 of Section 29; thence south to the NW corner of the SW 1/4 of the SW 1/4 of Section 28; thence east to the NE corner of the SE 1/4 of the SE 1/4 of Section 28; thence south to the NW corner of Section 34; thence east to the SE corner of Section 26; thence north to the NE corner of the SE 1/4 of Section 23; thence west to the SW corner of the NW 1/4 of Section 23; thence north to a point of intersection with the boundary of the Elmendorf Air Force Base Military Reservation.

[5] CEA presently furnishes service within the boundaries of the Point Campbell Military Reserve and maintains lines paralleling or penetrating the north boundary of that portion of the Fort Richardson Military Reservation, generally referred to as the Campbell Airstrip Area. Also, the Commission is aware that the City of Anchorage desires to acquire certain lands within the Campbell Airstrip Area for future airport usage. Finally, the Commission anticipates that either part or all of the two reservation areas subsequently may be returned to public use. Accordingly, it is the Commission's opinion that the rights to serve these areas at such date(s) as they may be released to the public, should be determined at this time.

CEA will be granted temporary operating authority and preferential consideration for

future permanent certification to furnish electric utility service within all of the Point Campbell Military Reserve and the following sections within the Fort Richardson Military Reservation: NE 1/4 of Section 34; N 1/2 of Section 35; N 1/2 of Section 36 all located in T13N, R3W, S.M.; and the S 1/2 of Section 12, T12N, R3W, S.M. Entry, construction, or operation within any portion of these areas prior to dedication to public use, is subject to the advance approval of the United States of America. ML&P will be granted temporary operating authority and preferential consideration for future permanent certification to furnish electric utility service within the following sections of the Fort Richardson Military Reservation, subject to the same terms and conditions set forth above for CEA: NE 1/4 and S 1/2 of Section 34; S 1/2 of Section 35; and the S 1/2 of Section 36, all located in T13N, R3W, S.M.; and Section 1, Section 2, Section 3, N 1/2 of Section 12; N 1/2 of Section 11, N 1/2 of Section 10, all located in T12N, R3W, S.M.

[6] In establishing the above service area boundaries between CEA and ML&P, extensive consideration was given to the requirements that ML&P be afforded the necessary opportunity for horizontal growth and that the existing revenue base of CEA be preserved. To assure ML&P a reasonable future growth the Commission granted it (wherever feasible) all areas within the corporate limits of Anchorage not being served presently by either utility. Additionally, ML&P was granted (where possible) all areas within the present city limits of Anchorage in which CEA and ML&P have essentially paralleling or duplicating facilities. To preserve CEA's immediate financial integrity, CEA will be afforded the opportunity to retain and operate its existing electric distribution lines within these ML&P service areas for the normal life of the plant. AS CEA plant is retired, ML&P will be permitted to construct and operate the replacement facilities.

The Commission recognized in assigning ML&P almost all areas within the city in which duplication exists, that without compensating factors the gradual phase out of facilities and customers by CEA would progressively reduce that utility's revenues. Such effect, however, should be offset adequately by CEA's exclusive authorization to serve the rapidly expanding business and residential communities immediately outside ML&P's service boundaries.

In setting the geographic limits of ML&P's electric distribution operations, the Commission would have preferred that ML&P be granted a single composite service area. Unfortunately, because of CEA's exclusive ownership of electric distribution plant in the Turnagain and Spenard areas, coupled with the apparent difficulties associated with any attempted force sale or exchange of properties, the assignment of one composite service area was impossible.

ML&P in its filings, proposed that any final order in this proceeding provide for the future ML&P acquisition of CEA distribution facilities and customers in areas subsequently annexed by the City of Anchorage. Such action would negate one of the principal objectives of this proceeding and would preclude CEA from recovering offsetting loss of revenue in those areas within the city in which duplication of facilities now exists. Both CEA and ML&P have stated that the lack of firmly established territorial boundaries between the two utilities presents a serious obstacle to the logical long-range development of transmission and distribution system plans for the general Anchorage area. To impose continually "floating" boundaries upon CEA would perpetuate a major existing problem for that utility.

In deriving the general boundary lines described by this order, the Commission relied solely upon the facilities information and the distribution plant data entered into the record in this proceeding. In doing so the Commission realized, because of the complex intermingling of CEA and ML&P plant along certain segments of the dividing lines, that an actual field survey of all the common boundaries may lead to minor adjustments. Accordingly, the Commission will allow the parties either individually or through the Negotiating Committee established by Order No. 9 in this proceeding to perform or arrange for the necessary field work and to prepare and submit to the Commission any reconsideration of the service area descriptions within sixty (60) days of the date of this Order. The parties may wish to recommend minor

changes in the boundaries indicated by this Order which are considered necessary to make proper the division between existing facilities that may be located on or along the same street, road, alley, or right-of-way.

The Commission in this determination also recognized that a distribution facility cannot be utilized for the full extent of its normal life without a reasonable level of routine and emergency maintenance. Accordingly, during the course of the period in which one utility is allowed to continue to operate its existing facility within the authorized service area of the other utility, necessary maintenance activities must be permitted, provided such maintenance does not constitute an attempt to extend the life of the facility beyond that for which it was or should have been dedicated.

In its establishment of firm service boundaries around areas containing electric distribution facilities of both CEA and ML&P, the Commission was fully aware that instances relating to new customers and line extensions would arise from time to time when it would be more *reasonable* and economical to allow the non-certificated utility to construct or install additional plant within the authorized service area of the other utility rather than to have service provided by the certificated utility. Accordingly, in such cases until the duplication of all distribution properties has been eliminated, the Commission will retain, in full force and effect, the "Waiver of Objection" procedures promulgated by Orders No. 8 and 10 herein, subject to the following additional condition. Prior to the construction or installation of new electric distribution facilities (as defined by Orders No. 8 and 10) by one utility in the authorized service area of the other utility, the utility proposing the installation or construction shall furnish to the certificated utility a written option to acquire those new facilities at depreciated cost at such time as the existing distribution plant to which the new facilities are to be connected are retired.

The Commission also visualizes that occasions will arise in geographic areas of dual service, when the utility certificated to serve that area will not be in an immediate position to provide the replacement facilities for plant being retired by the other utility. In that event the utility scheduled to retire its plant under the provision of this order, will be permitted to renew those facilities, subject to the granting of an option to the certificated utility to purchase the replacement plant at depreciated cost upon reasonable notice of intent to do so.

The Commission in reaching its decision in this proceeding has given due consideration to the prevention of additional undesirable duplication, the orderly elimination of existing parallel facilities, the prevention of complicating effects with regard to the bond and loan holders, the prevention of costly premature retirement of useful plant, and the preclusion of adverse financial impact on the utilities and their customers. It is the Commission's opinion that the service area delineation directed and the terms and conditions prescribed by this order represent an equitable and reasonable solution to the unresolved service area dispute which has existed between CEA and ML&P for over a decade.

[7] Nothing in this order is intended to preclude the voluntary transfer of facilities and customers by the utilities. In fact, the Commission encourages that such action be taken as speedily as loan, bond, and other requirements will permit. The Commission does not, however, condone the premature retirement of useful plant at increased rates to the customers simply for the purpose of eliminating existing duplicating services. Accordingly, the Commission will continue to monitor the property disposition and transfer activities of CEA and ML&P even after issuance of this final order or any reconsideration thereof actively intervening if (and only if) necessary to protect the public interest.

The Commission realizes that from time to time each utility will be required to construct new or additional transmission and sub-station intertie lines through the service area of the other utility. Nothing in this order is intended to limit such activities, provided, that no new customers are connected to these facilities within the authorized service area of the other utility.

THE COMMISSION FURTHER FINDS AND CONCLUDES:

1. The public convenience and necessity

dictate that the matter of the common service area boundaries between CEA and ML&P be resolved at this time.

2. It is neither feasible to attempt nor possible to achieve the immediate elimination of existing duplication previously created by CEA and ML&P because of the existence of long term loan encumbrances and bond covenants relating to the properties.

3. ML&P and CEA should be permitted to continue to own and operate existing facilities, as appropriate, within the authorized service areas of the other utility for the remainder of the useful service life of the associated pole, wire, and cable lines.

4. CEA and ML&P should be permitted to acquire new customers and build new electric distribution facilities within the authorized service area of the other utility when dictated by *reasonableness* and economic factors, if a waiver from the other utility or approval of the Commission is obtained first and the utility to which the area is certificated is provided the written option to purchase these new facilities at depreciated cost at such time as the electric distribution plant to which these new facilities are to be connected are retired.

5. Elimination of paralleling facilities through the premature retirement of duplicating plant could only result in either increased rates for the customers or decreased margins for the utilities in the absence of any significant improvement in service.

6. ML&P and CEA should be permitted to renew fully depreciated facilities located within the authorized service area of the other utility, if the other utility is not in an immediate position to furnish the replacement plant, provided however, that approval of the Commission is obtained and a written option is issued to the permanently certificated utility to purchase the replacement plant at depreciated cost upon reasonable notice to do so.

7. Although the long term growth patterns desired by CEA and ML&P may be altered by the service area delineations, terms, and conditions set forth in this order, there will be no significant adverse financial or operational impact upon the existing operations of either utility or its customers.

8. The service area delineations, terms, and conditions set forth herein will result in the prevention of further undesirable competition between the utilities, the curtailment of unnecessary new paralleling of facilities, and the ultimate elimination of existing duplication of electric distribution plant on an orderly basis, while at the same time providing for the continued growth of each utility within its assigned service area.

ORDER

THE COMMISSION ORDERS:

1. The authorized electric public utility service areas of the City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc. are hereby amended to the extent necessary to reflect those service area assignments described on Pages 10 through 15 of this Order.

2. The City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc. are authorized to continue to own and operate existing electric distribution facilities, as appropriate, within the authorized service area of the other utility for the remainder of the useful service life of the associated pole, wire, and/or cable lines.

3. The City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc. are hereby permitted to acquire new customers and extend existing electric distribution facilities (as described by Orders No. 8 and 10 herein) within the authorized service area of the other utility, provided all the following criteria are met:

a. It would be more reasonable, based on economic and other factors that service be furnished by the utility which is not certificated;

b. Concurrence of the utility to which the area is permanently certificated or approval of the Commission is obtained first under the terms and conditions set forth in Orders No. 8 and 10 in this proceeding relating to "Waivers of Objection;"

c. The utility proposing to furnish the service issues to the utility holding permanent certification a written option to purchase the new facilities at depreciated cost at such time as

the electric distribution plant to which these facilities are to be connected are retired.

4. The City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc., subject to approval of the Commission and issuance of an option to the other utility to purchase replacement facilities at depreciated cost upon reasonable notice to do so, may renew fully depreciated distribution facilities located within the certificated area of the other utility if the other utility is not in an immediate position to furnish the necessary replacement plant.

5. Nothing in this order shall be construed to preclude the City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc. from constructing new or operating new and existing transmission and sub-station intertie lines within the authorized service area of the other utility, provided that service is not extended to new customers within that certificated area, except as may be authorized by additional authority granted under the terms and conditions set forth in Ordering Paragraph 3 above.

6. The City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc., either individually or through the official Negotiating Committee established by Order No. 9 in this proceeding, may submit for reconsideration within sixty (60) days of the date of this order recommendations for minor service area boundary adjustments which will improve the division between existing facilities along common streets, alleys, roads, or rights-of-way.

DATED AND EFFECTIVE at Anchorage, Alaska, this 27th day of September, 1973.

Re Telecommunications Services Along the New Anchorage-Fairbanks Highway

Respondents: Matanuska Telephone Association, Inc.; Glacier State Telephone Company; RCA Alaska Communications, Inc.

U-71-102
Order No. 6

Alaska Public Utilities Commission
October 2, 1973

ORDER terminating an investigation into the extent of telecommunications services along a new highway between Anchorage and Fairbanks, upon finding that a cooperative effort among various telephone carriers had produced adequate telecommunications facilities along that route.

[ABSTRACT OF DECISION. THE FULL CASE TEXT IS OMITTED.]

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1. TELEPHONES, § 2 — Construction and equipment — Highway facilities — Cooperative effort.

[ALASKA] The commission found that a cooperative effort between various telephone carriers for the construction of additional pay telephones and microwave facilities had produced a network of adequate telecommunications services along a new highway between Anchorage and Fairbanks.

SUBJECT OF ANNOTATION

Beginning on page 963

Advertising or promotional expenditures of public utility as part of operating expenses for ratemaking purposes

Application of HAWAIIAN ELECTRIC COMPANY, INC., for Approval of Rate Increases and Revised Rate Schedules

Supreme Court of Hawaii
May 7, 1975

535 P2d 1102, 83 ALR3d 951

SUMMARY OF DECISION

The Supreme Court of Hawaii, Menor, J., affirmed in part and reversed in part an order of the state public utilities commission granting to an electric company an increase in its rates to produce an 8.25 per cent rate of return on its rate base and allowing it $549,000 for promotional expenses. The court found that the commission did not abuse its discretion in denying intervention status and granting participation status to a user of the utility's services and to an organization that was a user of the utility's services as well as being a membership organization concerned with protecting the environment and that the utility subscriber and the organization had standing to obtain judicial review of the commission's decision and order granting the utility a rate increase. The court also held that there was substantial evidence to support the commission's decision and order, except for the allowance of promotional expenses. The court found that the commission's decision to permit the utility to include promotional expenditures by the electric company to attract new customers from a competing utility and expenses for programs designed to increase the use of electricity and purportedly to improve the company's load factor was an abuse of discretion.

HEADNOTES

Classified to ALR Digests

Public Utilities § 27(1) — public regulation and control — state public utilities commission

1. Intervention as a party in a proceeding before a state public utilities commission is not a matter of right but is a matter resting within the sound discretion of the commission subject to the essential qualification that the discretion is not to be arbitrarily and capriciously exercised.

Public Service Commissions § 20 — proceedings and remedies — parties

2. A state public utilities commission did not abuse its discretion in denying intervenor status but granting participation status in a rate hearing of a electric utility company to a user of the services of the utility company and to a membership organization concerned with protecting and preserving the environment.

Public Service Commissions § 20 — proceedings and remedies — parties

3. A user of the services of an electric utility company and members of an organization devoted to protecting the environment, who testified that they would be paying higher utility rates under a rate approved by the state public utilities commission, had been "aggrieved" by the action of the commission in approving the higher rate and thus had standing to obtain judicial review of the decision and order of the commission, where, in addition to being "aggrieved" by the commission's action, they had been involved as participants during the agency hearings on the proposed increase and where the commission's staff — the agency through which they had participated at the hearings — had failed to appeal the decision of the commission.

Public Utilities § 36 — rates and charges — fixing of rates by public utilities commission

4. Except for the allowance of promotional expenses, there was substantial evidence properly and thoroughly adduced to support the decision and order of a state public utilities commission granting an increase in the rates charged by an electric company to produce an 8.25 per cent rate of return on its rate base.

Public Utilities § 38 — rates and charges — fixing rates — promotional costs

5. The decision of the state public utilities commission to permit an electric utility company to include for rate making purposes expenditures in its budget designed to attract new customers and to take customers from a competing gas utility company, which decision was based on a previous grant of similar expenditures to the gas company, failed to take into consideration the interests of the rate payer and was thus an abuse of discretion.

[Annotated]

Public Utilities § 38 — rates and charges — fixing rates — promotional expenditures

6. An electric utility failed to carry its burden of showing the propriety of its request for promotional expenditures which were designed to increase the use of electricity and purportedly to improve the company's load factor and which consisted essentially of direct advertising and contributions to dealer and distributor advertising of certain electric appliances. The utility could not show the presumed profits attributable to the sales which these expenditures would partially stimulate by subsidizing the promotional activities of dealers whose commercial transactions formed no part of the utility's own business venture. The utility also failed to satisfactorily show how much of an improvement in its load factors these expenses could reasonably be said to have made.

[Annotated]

Public Service Commissions § 14 — jurisdiction and powers — rates and charges

7. In the face of dwindling oil supplies and spiraling costs, promotional practices by utility companies which are wasteful or

which only serve to fuel the energy crisis should be viewed by a regulatory agency with extreme caution.

Syllabus by the Court

1. Intervention as a party in proceedings before the Public Utility Commission is addressed to the sound discretion of the commission, subject only to the essential qualification that this discretion not be arbitrarily and capriciously exercised.

2. A ratepayer who is compelled to pay higher utility rates because of agency action is a "person aggrieved" under HRS § 91-14(a), Hawaii Administrative Procedure Act.

3. Appellants have standing to challenge the order of the PUC in this court, where they have been "aggrieved" by the order; were involved as "participants" during agency hearings; and the PUC staff (the agency through which they participated at the hearings) has failed to appeal.

4. By basing its decision to allow promotional expenditures for ratemaking purposes solely on its previous grant of similar expenditures to a competing utility, the PUC failed to give adequate consideration to the interests of the ratepayer and thus abused its discretion.

5. The burden is on the applicant to prove justification for a requested rate increase and the reasonableness of proposed expenditures.

BRIEFS OF COUNSEL

Edward C. Kemper, III, Honolulu (**Matoch, Kemper & Brown,** Honolulu, of counsel), for appellant:

The state commission had an affirmative duty to fully develop a sound record, and to effectuate a complete disclosure of the pertinent facts. Scenic Hudson Preservation Society v FPC, 354 F2d 608 (2nd Cir. 1965); National Broadcasting Co. v FCC, 132 F2d 545 (D.C. Cir. 1942); WAIT Radio v F.C.C., 418 F2d 1153 (D.C. Cir. 1969).

Public interest is most directly involved in proceedings with regard to a monopoly industry or service, where intervention by responsible public groups is more critically necessary. Office of Communication of the United Church of Christ v F.C.C., 359 F2d 994, 1004 (D.C. Cir. 1966).

Appellants' status before the state commission was ambiguous, informal, and unsustained by even the most rudimentary constituents of meaningful participation. National Broadcasting Company v F.C.C., 132 F2d 545 (D.C. Cir. 1942); Office of Communication of the United Church of Christ v F.C.C., 359 F2d 994, 1003 (D.C. Cir. 1966).

The state commission's decision to permit appellee electric company to include promotional expenditures in its budget for rate-making purposes was arbitrary, capricious, and beyond the weight of the probative evidence. Moreover the decision was unreasonable as contrary to the best interest of the general public, the utilities, and their customers.

Any promotional expenditure intended to stimulate additional energy consumption is an expenditure carried to excess. For a public agency to gamble with the possibility of ecological catastrophe is surely thoughtless, unreasonable conduct.

Appellants were both de facto parties and aggrieved persons at the state commission hearings and therefore have standing to appeal to the state supreme court. East Diamond Head Ass'n v Zoning Bd. of Appeals, 52 Haw. 518, 524, 479 P2d 796 (1971); Office of Communication of the United Church of Christ v FCC, 359 F2d 994, 1005 (D.C. Cir. 1966); Scenic Hudson Preservation Society v FPC, 354 F2d 608, 616 (2d Cir. 1965); Citizens Committee for the Hudson Valley v Volpe, 425 F2d 97, 103 (2d Cir. 1970).

A person aggrieved must be specially, personally, and adversely affected. East Diamond Head Ass'n v Zoning Bd. of Appeals, 52 Haw. 518, 522, 479 P2d 796 (1971).

Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular envi-

ronmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. Sierra Club v Morton, 405 US 727, 734 (1972); United States v Students Challenging Regulatory Agency Procedures (SCRAP), 37 L.Ed.2d 254.

Appellee electric company's assertion that a sound record was developed is based on the assumption that all that was excluded was not a part of a sound record.

The state commission's decision allowing the appellee electric company to include any promotional expenses in the rate base was irrational.

Marshall M. Goodsill and **Gary S. Ckabayashi**, Honolulu (**Goodsill, Anderson & Quinn**, Honolulu, of counsel), for appellee:

Notice of appeal shall specify the parties taking the appeal. Only a party and not any person may appeal a circuit court decision. East Diamond Head Ass'n v Zoning Bd. of Appeals, 52 Haw. 518, 479 P2d 796 (1971); City & County of Honolulu v Public Util. Comm'n, 53 Haw. 431, 495 P2d 1180, aff'd on rehearing, 53 Haw. 669, 500 P2d 745 (1972).

The Appellants have no standing to appeal because they are not aggrieved. The mere involvement of the appellants as participants in the administrative proceeding does not give them standing to appeal. Utility Users League v Federal Power Comm'n, 394 F2d 16 (7th Cir.), cert. denied, 393 US 953 (1968); Castleman v Civil Serv. Comm'n, 58 Ill. App. 2d 25, 206 NE2d 514 (1965); Southern Union Gas Co. v New Mexico Pub. Serv. Comm'n, 82 NM 405, 482 P2d 913 (1971); East Diamond Head Ass'n v Zoning Bd. of Appeals, 52 Haw. 518, 522, 479 P2d 796 (1971); City & County of Honolulu v Public Util. Comm'n, 53 Haw. 431, 495 P2d 1180, aff'd on rehearing, 53 Haw. 669, 500 P2d 745 (1972).

A ratepayer has no constitutional or vested right or property right in the rates of a public utility. Public Util. Comm'n v United States, 356 F2d 236 (9th Cir.), cert denied, 385 US 816 (1966); Lenihan v Tri-State Tel. & Tel. Co., 208 Minn. 172, 293 NW 601, cert. denied, 311 US 711 (1940); Ten Ten Lincoln Place v Consolidated Edison Co., 190 Misc. 174, 73 NYS2d 2 (1947); United Gas Pipe Line Co. v Louisiana Pub. Serv. Comm'n, 241 La. 687, 130 So. 2d 652 (1961).

Interest in the environment does not make appellant nonprofit corporation aggrieved. Sierra Club v Morton, 405 US 727 (1972); Ward v Ackroyd, 344 F Supp 1202, 1211 (Md. 1972).

The question of whether energy consumption should be moderated in order to conserve natural resources is a matter for the voters or the legislature to decide, not for the state commission. The electric company has an obligation to provide adequate electric power for all those who desire to use it, and the state commission has a duty to the public to see to it that this obligation is met.

Intervention usually rests in administrative discretion. City of San Antonio v Civil Aeronautics Bd., 374 F2d 326 (D.C. Cir. 1967); Scenic Hudson Preservation Conference v Federal Power Comm'n, 354 F2d 608, 617 (2d Cir. 1965), cert. denied, 384 US 941 (1966).

Participation as parties of persons only insubstantially as remotely interested or affected is not necessary for protection of either private right or public interest. Exclusion of such persons from participation as of right is necessary for efficient conduct of the state commission's functions and to keep the hearings within manageable bounds. National Broadcasting Co. v Federal Communications Comm'n, 132 F2d 545, 556 (D.C. Cir. 1942), aff'd, 319 US 239 (1943).

A decision of the state commission is the product of expert judgment which carries a presumption of validity. He who would upset a rate order of the state commission carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Re App'n of Hawaiian Elec. Co., 42 Haw. 233, 245 (1947); Federal Power Com'n v Hope Natural Gas Co., 320 US 591, 602 (1944); Permian Basin Area Rate Cases, 390 US 747, 800, 812 (1968).

Advertising and promotional activities

have long been recognized as proper activities of electric utilities. (West Ohio Gas Co. v Public Util Comm'n (No. 1), 294 US 63, 73 (1935); (New England Tel. & Tel Co. v Department of Pub. Util., Mass., 275 NE2d 493, 517 (1971).

Before **Richardson**, C. J., **Kobayashi**, **Ogata** and **Menor**, JJ., and **Kato**, Circuit Judge, in place of **Levinson**, recused.

OPINION OF THE COURT

Menor, Justice.

This is an appeal by Life of The Land, a nonprofit corporation whose objectives are the protection and preservation of the environment of the people of Hawaii, and Tony Hodges, an individual [hereinafter appellants] from Decision and Order No. 3008 of the Public Utilities Commission of the State of Hawaii [hereinafter PUC], dated August 17, 1972.

Hawaiian Electric Company, Inc. [hereinafter HECO], filed its initial application for a rate increase and revision of rate schedules on April 27, 1971. The rate increase requested was to produce a sales revenue increase of 9.7% or $7,898,000. HECO further requested a rate of return on its rate base of no less than 8.5%. The application was amended on June 25, 1971, to cure technical defects, and again on October 13, 1971, to request approval of an environmental control clause.

After due notice given by the PUC, public hearings on HECO's application were held in Honolulu, Kailua, and Waipahu, on November 9, 10, and 11, 1971, respectively. Extensive testimony on environmental matters was given by representatives of appellant Life of The Land at each of the hearings. Appellant Hodges gave testimony at the Kailua hearing.

On August 10, 1971, the appellants filed a petition to intervene in the PUC economic hearings, alleging, inter alia, that appellant Hodges was a Hawaii resident and a subscriber of HECO services, and that appellant Life of The Land was a user of HECO services, as well as being a membership organization concerned with protecting and preserving the environment of the people of Hawaii. The appellants conceded that their intervention would broaden the immediate issue and cause a delay in the proceedings but urged the commission to grant their petition because it was "imperative that the environmental aspects of electricity generation and consumption be presented to the public."

After a hearing on January 24, 1972, the PUC denied the appellants' petition for intervention, but granted them participation status and directed them to present any relevant material they might have through

the PUC staff, which was being represented by Deputy Attorney General Harry Kim.

Hearings on the merits of HECO's application began on January 24, 1972, and continued throughout certain periods of the months of January, March, April, and May, 1972. HECO offered the testimony of eight witnesses; the PUC staff offered the testimony of seven. HECO supplied the staff with all materials that were requested, and submitted a total of 89 exhibits, the staff submitting an additional 20.

The appellants were represented at practically all of the hearings; met with PUC staff members to discuss the case; submitted proposed cross-examination questions for HECO's witnesses to Mr. Kim, who used those he deemed pertinent to the inquiry at hand; and presented limited testimony on the environmental control clause. Further, the appellants were permitted to submit proposed findings of fact and conclusions of law.

The PUC rendered its decision on August 17, 1972. It granted HECO an increase in its rates to produce an 8.25% rate of return on its rate base. It also allowed HECO $549,000 for promotional expenses, contrary to the recommendations of both the appellants and the PUC staff. After the appellants' petition for a rehearing was denied by the PUC on December 7, 1972, they filed this present appeal. The PUC staff has not filed an appeal in this case.

I

The appellants sought party intervenor status pursuant to PUC Rule 12.02. Their petition was denied, and they were instead allowed a participatory role under PUC Rule 12.03, which permits involvement to the degree directed by the presiding officer.

[1, 2] Intervention as a party in a proceeding before the PUC is not a matter of right but is a matter resting within the sound discretion of the commission. HRS Section 269-13; cf. H.R.C.P. Rule 24. This is generally true in proceedings before administrative agencies. 1 F. Cooper, State Administrative Law, 325 (1965). See also City of San Antonio v. C.A.B., 126 U.S.App.D.C. 112, 374 F.2d 326 (1967); P.U.C. v. United States, 356 F.2d 236, 241 (9th Cir. 1966), cert. denied, 385 U.S. 816, 87 S.Ct. 35, 17 L.Ed.2d 54; Pittsburgh v. Pennsylvania P.U.C., 153 Pa.Super. 83, 33 A.2d 641 (1943). This rule, however, is always subject to the essential qualification that this discretion is not to be arbitrarily and capriciously exercised. In this case, we are satisfied that the commission did not abuse its discretion in denying the appellants' motion for intervention.

It is clear that had the appellants been accorded intervenor status, they would have had the right to appeal all interlocutory and final orders affecting them. Fishgold v. Sullivan Drydock & Repair Corp.,

328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946); Securities & Exch. Comm'n v. United States Realty & Improvement Co., 310 U.S. 434, 60 S.Ct. 1044, 84 L.Ed. 1293 (1940). But having been denied party intervenor status, although allowed participation in this case, are the appellants now properly before this court? In other words, have the appellants the requisite standing to obtain judicial review of the decision and order of the PUC granting HECO a rate increase?

The question of standing is essentially one that resolves itself into the elementary proposition that one who is injured by the act of another may legally challenge the propriety of the action. But the answer to the threshold question of "who is injured" for purposes of judicial review is not always so obvious.

The Hawaii Administrative Procedure Act as codified in Chapter 91 of the Hawaii Revised Statutes entitles "[a]ny person aggrieved" by the action of an administrative agency to judicial review. In East Diamond Head Association v. Zoning Board, 52 Haw. 518, 479 P.2d 796 (1971), this court considered the question of what constituted an aggrieved person under the Act for purposes of appeal. There, an unincorporated landowners' association sought to challenge a variance that had been granted by the Zoning Board of Appeals of the City and County of Honolulu. The variance would have allowed a parcel of land adjacent to property held by members of the association to be used as a location for movie production. Association spokesmen testified at a public hearing that the movie operations would interfere with their property enjoyment. Such operations, their evidence indicated, would cause a significant increase in the level of noise, traffic, and congestion, as well as promote inconvenience generally, and impair the aesthetic character of the surrounding neighborhood. We reversed the trial court's holding that the association lacked the standing required to secure review since they had failed to intervene in the board's proceedings. Adopting the construction that a "person aggrieved" is one whose personal or property right has been injuriously or adversely affected by an agency's action, we held, inter alia, that the action of the board in granting the zoning variance "immediately and directly affect[ed] each homeowner," and thus, that the association had established its status as a person aggrieved. See also Dalton v. City and County, 51 Haw. 400, 403, 462 P.2d 199, 202 (1969) (standing found where plaintiffs resided "in very close proximity" to property alleged to have been improperly rezoned.)

In addition to the requirement that an aggrieved party be specially, personally and adversely affected for standing to lie, this court has added a further gloss to the standing issue as regards administrative proceedings. In City and County v. P.U.C., 53 Haw. 431, 495 P.2d 1180 (1972) we held that the person aggrieved must have been *involved* in the contested case. It is not enough that a person has been

"aggrieved" by agency action. He must also have contested the issue before the agency. However, this adversary participation need not be confined to formal proceedings before the agency. In East Diamond Head Association we held that a public hearing, conducted pursuant to published notice, was a "contested case" within the meaning of HRS § 91-1.

The appellants are users of electrical energy, and two members of appellant Life of The Land, in opposing the rate increase, testified that they would be paying the higher utility rates. A ratepayer who is compelled to pay higher utility rates by agency action is a person specially, personally and adversely affected. The fact that he shares this additional burden with all other users does not disentitle him from challenging the results. Cf. United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).[1] But he must pursue his remedies through established and legitimate channels.

In proceedings before the PUC, the Director of Regulatory Agencies is mandated by law to represent and protect the interests of consumers throughout the State. HRS § 26-9 (Supp.1974). He is an indispensable party to the proceedings, and in that capacity he acts through the technical staff and other personnel of the commission, aided by a specially designated deputy attorney general. In re Hawaiian Telephone Co., 54 Haw. 663, 513 P.2d 1376 (1973).

[3] The PUC staff, however, failed to appeal the decision of the PUC with regard to the rate increase. The practical effect of denying the appellants standing here would be to silence the voice of all those who would speak in the public interest, a duty that normally resides with the PUC staff. We hold, therefore, that where the appellants have been "aggrieved" by the action of the PUC, and where they were involved as "participants" during the agency hearings, and where the PUC staff (the agency through which they participated at the hearings) has failed to appeal the decision of the PUC, the appellants may challenge the order of the PUC in this court. We shall thus consider their appeal.

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1. We note that the trend in American jurisprudence as evidenced by recent decisions of this court and courts across the land, has been to broaden the class of persons that have standing to challenge agency action. The United States Supreme Court has clearly indicated that standing cannot be confined only to those who allege economic harm, nor can it be denied to others simply because many persons share the same purported injury:

"Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." United States v. SCRAP, 412 U.S. at 686, 93 S.Ct. at 2415 (quoting Sierra Club v. Morton, 405 U.S. at 734, 92 S.Ct. 1361, 31 L.Ed.2d 636).

II

We turn now to the question of whether the decision of the PUC should be affirmed, reversed, modified, or remanded for further proceedings consistent with our opinion.[2]

[4] We are satisfied from an exhaustive review of the record that, except for the allowance of promotional expenses, there is substantial evidence properly and thoroughly adduced to support the commission's decision and order.

The appellants contend that the PUC's decision to permit HECO to include promotional expenditures in its budget for ratemaking purposes was arbitrary and unreasonable, and contrary to the best interests of the general public. The PUC staff found itself in complete agreement with the appellants on this issue, and thus recommended the allowance of sales expenses in the sum of $713,100 but opposed HECO's request for promotional expenditures. The commission, however, approved the total sum of $1,262,100, including $549,000 for promotional activities. HECO's original request was broken down as follows:

Programs due to competitive fuels:		
Home Builder Program	$148,500	
Apartment Builder Program	105,000	
Cooperative Advertising	102,500	$356,000
Other programs to increase kilowatt-hours per kilowatt usage:		
Domestic Appliance Program	$123,000	
Commercial Cooking Program	17,400	
Commercial Water Heating	17,500	
Commercial Air Conditioning	9,500	
Medallion Program	700	
Signs Program	1,800	
100-Amp. Program	1,800	
Lighting and Wiring Program	4,000	
Special (Sales Program)	13,200	
AEBA Program	5,000	$193,900
Total		$549,900

2. HRS § 91-14(g) provides as follows:

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or charac-

The programs due to competitive fuels are designed to attract new customers and, where possible, capture customers and usage from the Honolulu Gas Company [hereinafter GASCO], while defending against similar efforts on the part of GASCO, the electric company's sole competitor in this area. They consist mainly of allowances or payments to owners and developers who build all-electric homes and apartments and advertise them for sale as such.

There is decidedly a serious question as to the legality of these rebates or allowances,[3] but we do not deem it advisable to decide that particular issue, inasmuch as it was not briefed and argued before this court. Moreover, we need not reach that issue, for we are satisfied that in the context of our times, these promotional expenditures on the part of regulated public service companies are wasteful and unreasonable,[4] and their allowance by the commission was an abuse of its discretion.

The disturbing aspect of the PUC decision to allow expenditures for these programs is the rationale behind it. GASCO had been granted an allowance for similar promotional expenditures earlier. See Decision and Order No. 2621 (PUC of Hawaii, Aug. 31, 1970). GASCO, in making its request, had argued that the expenses were necessary to attract customers away from Hawaiian Electric. HECO, in its present application for a rate increase, pointed to the GASCO allowance as justification for its own request. It seems apparent from the record that the PUC's decision was based on this particular argument of HECO.

The PUC has consistently failed to meet squarely the issue of the reasonableness of competitive advertising expenditures. In late 1963, the PUC ordered the opening of Docket No. 1581 for the avowed purpose of inquiring into the promotional practices of the utilities, pursuant to the authority vested in it by Section 104-15 of the Revised

terized by abuse of discretion or clearly unwarranted exercise of discretion.

3. In its Opinion No. 65-18, dated May 11, 1965, the Attorney General ruled these promotional practices to be proscribed rebates under Section 104-17 of the Revised Laws of Hawaii 1955, as amended (now HRS § 269-16 (Supp. 1974)). In a subsequent legal memorandum, dated November 5, 1969, the Attorney General advised the PUC that it, ultimately, must make its own determination of the reasonableness or unreasonableness of these promotional practices.

4. At the hearings before the PUC, HECO very candidly acknowledged that if these promotional activities were forbidden to both utilities, their respective shares of the market would remain the same. In his testimony before the PUC, Mr. Carl H. Williams stated:

"Q And if neither offered these programs, promotional allowances, each to stand on its own merit of gas or electricity, then where would you say would be your share of the market?

A My estimate is that it would be the same.

Q You would still gather that segment or that portion of the market which would normally want to use electricity and that portion of the market which wants gas would get gas without the promotional allowances?

A I think we would get similar proportion to what we're getting now, yes. . . ."

ANNOTATION

ADVERTISING OR PROMOTIONAL EXPENDITURES OF PUBLIC UTILITY AS PART OF OPERATING EXPENSES FOR RATEMAKING PURPOSES

by

Jane Massey Draper, B.C.L.

I. Preliminary Matters

§ 1. Introduction:
  [a] Scope
  [b] Related matters
§ 2. Background, summary, and comment:
  [a] Generally
  [b] Practice pointers

II. General Considerations

§ 3. General rule that corporate management should be permitted to control amount of advertising expenses
§ 4. Factors considered by court in application of rule:

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

64 Am Jur 2d, Public Utilities § 173

20 Am Jur Pl & Pr Forms (Rev Ed), Public Utilities §§ 31–104

15 Am Jur Legal Forms 2d, Public Utilities §§ 215.41 et seq.

15 USCS, Natural Gas §§ 717c, 717d; 16 USCS, Electric Utilities §§ 824d, 824e

US L Ed Digest, Carriers § 228; Public Service Commissions § 27; Public Utilities § 26

ALR Digests, Carriers, §§ 708–711; Public Service Commission §§ 14, 15, 17; Public Utilities § 38; Telephones §§ 16–19

L Ed Index to Annos, Public Utilities

ALR Quick Index, Electricity and Electric Companies; Public Utilities; Reasonableness; Telecommunications

Federal Quick Index, Federal Power Commission; Public Utilities; Rates and Charges

Consult POCKET PART in this volume for later cases

Rule that corporate management should be permitted to control amount of advertising expenses, § 3
Scope of annotation, § 1[a]
Summary, § 2
Telephone company, informational advertising expenses of, § 6
Test year, disallowance of expenditures during, § 8
Trade ally advertising, § 7

TABLE OF JURISDICTIONS REPRESENTED

Consult POCKET PART in this volume for later cases

US: §§ 2[b], 3, 4[b], 9[a, b]
Ark: §§ 2[a], 4[a], 8, 9[a]
Cal: §§ 2[b], 6
DC: §§ 3, 9[b]
Ga: §§ 2[b], 3, 6
Hawaii: §§ 2[b], 4[a], 9[a, b]
Ill: §§ 4[b], 9[a, b]
Kan: § 2[b]
La: § 8
Me: §§ 2[a], 4[b], 9[a]
Md: § 2[b]
Mass: §§ 2[b], 7, 9[b]
Mich: § 2[a, b]
Mo: §§ 2[b], 3, 4[a], 7
NH: §§ 3, 9[b]
NY: §§ 2[a, b], 7
NC: §§ 2[b], 4[b], 9[a]
Ohio: §§ 2[a, b], 4[b], 5
Okla: §§ 3, 4[a, b], 7, 9[a]
Or: §§ 2[a, b], 4[b], 6
Pa: § 2[b]
RI: § 2[a]
Tex: §§ 4[b], 9[b]
Utah: § 2[a]
Vt: §§ 3, 4[b], 5
Va: § 7
Wash: § 2[a, b]
FPC: § 2[b]

I. Preliminary matters

§ 1. Introduction

[a] Scope

Ordinarily, the determination of what business expenses are to be incurred by a public utility in its operations is a matter left within the discretion of the utility's management. Whether certain types of expenditures can then be classified as "operating expenses" and passed along to the utility's ratepayers is a question with which utility regulatory agencies are frequently confronted. In many instances, either the utility or the ratepaying public disputes the agency's response to the question, and one of the areas of contention is whether, for ratemaking purposes, expenses incurred by a public utility for promotion or advertising can be included under "operating costs." This annotation collects and analyzes the cases in which the courts, in reviewing agency determinations, have discussed or determined the propriety, for ratemaking purposes, of including the utility's advertising[1] or promotional[2] expenditures as operating expenses or cost of service.[3]

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1. For present purposes, the term "advertising" is used broadly and encompasses all forms of advertising by a public utility, including, for example, informational (see § 6, infra) and institutional (see § 7, infra) advertising, as well as advertising supporting rate increases (see § 8, infra).

2. For present purposes, the term "promotion" includes promotional advertising as well as other forms of promotion.

3. Although this annotation is con-

Relevant statutes are considered herein only insofar as they are reflected by reported cases within the scope of this annotation, and this annotation does not purport to reflect the current statutory law of any jurisdiction. The reader is cautioned to consult the most recent enactments of the particular jurisdiction in which he or she may be interested.

[b] Related matters

Validity of "fuel adjustment" or similar clauses authorizing electric utility to pass on increased cost of fuel to its customers. 83 ALR3d 933.

Charitable contributions by public utility as part of operating expense. 59 ALR3d 941.

What constitutes false, misleading, or deceptive advertising or promotional practices subject to action by Federal Trade Commission. 65 ALR2d 225.

Adequacy, as regards right to injunction, of other remedy for review of order fixing public utility rates. 8 ALR2d 839.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge. 1 ALR2d 160.

Validity, construction, and application of Johnson Act (28 USCS § 1342), prohibiting interference by Federal District Courts with state orders affecting rates chargeable by public utilities. 28 ALR Fed 422.

§ 2. Background, summary, and comment

[a] Generally

A public service or public utility commission is established to oversee business operations of the public utilities coming under its jurisdiction. One of the commission's primary jobs is to determine what rate a utility may fix for its services, to the end that the ratepayers will be charged only a fair and reasonable rate for the utility's product, and, on the other hand, that the utility's stockholders will receive a fair and reasonable return on their investment. One of the more troublesome areas confronting a commission is the determination of which utility operations really benefit the ratepayers and can thus be charged as legitimate business expenses[4] and figured in the rates to be charged for the utility's product or service, and which insure solely or in major part to the benefit of the stockholders. In the large catalog of operating expenses which are included in the computations for ratemaking purposes, advertising expenditures ordinarily come within the general rule that corporate management should be permitted to control the amount a utility spends,[5] provided always, of course, that the advertising engaged in is of benefit to the ratepayer,[6] and that the amount expended by the utility for advertising is within reason.[7]

Courts have dealt with advertising

cerned with whether advertising or promotional expenditures are allowable, for ratemaking purposes, as part of a public utility's operating expenses or cost of service, cases dealing with whether certain advertising or promotional practices are legal are not within the scope of this annotation. For cases involving the question of what constitutes false, misleading or deceptive advertising or promotional practices subject to action by the Federal Trade Commission, see the annotation at 65 ALR2d 225.

4. For a general discussion of a public utility's current and operating expenses, see 64 Am Jur 2d, Public Utilities § 173.

5. § 3, infra.

6. § 4[a], infra.

7. § 4[b], infra.

expenditures not only as a general category of operating expenses,[8] but also in terms of the type of advertising involved. Thus, expenditures for purely informational advertising—including methods of conservation—have been held properly allowable as utility operating expenses,[9] as have institutional advertising expenditures,[10] but expenses incurred by a public utility for advertisements in a campaign to increase the rates to be charged by the utility, or to explain why the rate increase is needed, have not been allowed as operating costs for ratemaking purposes.[11]

Expenditures for promotional purposes—both advertising and other forms of promotion—have presented entirely different questions, depending on the type of promotion undertaken and, more recently, upon the necessity for concern about conservation of resources. Thus, in some instances, expenditures for promotional advertisements and practices have been allowed as legitimate operating expenses,[12] but in other cases, such outlays of utility moneys have been disallowed, or reduced in amount, as not constituting the type of expense for which the utility's customers should be required to pay.[13]

The task set before public utility commissions is one of regulation, and not one of management. Many of the requests for judicial review of commission decisions have been based on contentions that the commission has usurped the prerogative of management in deciding how the utility's business should be run. For example, State v Oklahoma Gas & Electric Co. (1975, **Okla**) 536 P2d 887, §§ 7, 9[a], infra, was an appeal from a commission's order prohibiting promotional and institutional advertising by utilities,[14] wherein the court ruled that such an actual prohibition was an invalid invasion of the discretion reserved to corporate management of the utilities.

It would seem that management is ordinarily permitted to determine the amounts to be expended by a utility for informational or educational programs or advertising and subsequently included as operating expenses for ratemaking purposes. In Re Iroquois Gas Corp. (1971, NY) 91 PUR3d 511, the commission even spoke of its requiring the gas companies to maintain such programs. In what appears to be a singular action, the commission in Re D. C. Transit System, Inc. (1970, **Wash**) 85 PUR3d 1, mandated an intensified informational advertising program to maintain and promote the company's ridership, and set forth the procedures, including the amount to be put in escrow for such a program, to be followed by the company in implementing the commission's decision.

Within the area of informational advertising is a relatively new field of conservational advertising, in which the energy utilities are being encour-

8. § 5, infra.

9. § 6, infra.

10. § 7, infra.

11. § 8, infra.

12. § 9[a], infra.

13. § 9[b], infra.

14. A state statute prohibiting such orders, to the effect that no state agency, board, or commission might limit or restrict the right of any public utility to engage in or promote area development or to advertise, was upheld as constitutional, and not antithetical to the "common welfare clauses" of the United States and state constitutions, in Ohio Public Interest Action Group, Inc. v Public Utilities Com. (1975) 43 **Ohio** St 2d 175, 72 Ohio Ops 2d 98, 331 NE2d 730.

aged to participate. For example, in Washington Utilities & Transp. Com. v Pacific Power & Light Co. (1974, Wash) 7 PUR4th 470, the commission stated that it was appropriate to order that no allowance would attach to expenditures designed to encourage increased use of electricity for any purpose and that allowance would be made only for expenditures directly related to the conservation of electric energy, or directing use thereof to off-peak periods. And in Re Michigan Consolidated Gas Co. (1973, Mich) 1 PUR4th 229, the commission approved the initiation by a gas company of a conservation program aimed at convincing its customers to insulate their homes, and determined that its costs, including those incurred in the employment of advertising in the media, direct mailings to customers, use of the company's outdoor signs and message boards carried by its vehicles, and the preparation and distribution of an informational booklet, could be reflected in the rates prescribed for the company in future rate cases. But it is to be noted that even in this area of advertising, which is stressed as being of great importance in our present circumstances, at least one commission still gave "reasonableness" priority, stating, in Re Portland General Electric Co. (1974, Or) 8 PUR4th 393, that an individual utility should spend a reasonable amount for conservation advertising, but the amount thereof must be considered in view of the fact that much conservation advertising is now being done by governmental agencies, on a state and federal level, and that the news media have provided much in the way of conservation information to the general public.

The issue of the allowance, for ratemaking purposes, of institutional advertising expenses as operating costs, was fully discussed in Re Consolidated Edison Co. (1961) 41 PUR3d 305, where the commission allowed institutional advertising expenses over the contention that such advertising was a process of selling the organization and ownership of the company to its environment, and that therefore the stockholders, not the ratepayers should bear the burden of this conceivably necessary and proper expense. The commission, noting that what was of concern were advertisements which were obviously designed to project a favorable image of the company to its customers, its existing stockholders, and potential investors, went on to explain that to the extent that such advertising fostered sound consumer relations or encouraged people to invest in the company, it seemed clear that the consumers, as well as the stockholders, were ultimately benefited through the lessening of the expense of doing business. The argument had been made that institutional advertising had previously been largely considered as an improper charge to operating expenses for ratemaking purposes, but the commission pointed out that the trend in modern regulatory decisions was to allow such charges as proper for ratemaking purposes. For example, the commission stated, the Committee on Accounts and Statistics of the National Association of Railroad and Utility Commissioners issued its Accounting Interpretation E-110, wherein it stated that nonpromotional advertising of the kind referred to as institutional advertising—the purpose of which is to foster good will—should be charged to Operating Expense Account 787.2—Advertising. In another instance, the commission continued, the Federal Power Commission revised its Uniform System of Accounts, effective January 1, 1961,

to provide that institutional advertising or good will advertising charges should be included in Miscellaneous General Expenses, and above-the-line account, wherein there is recorded cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere. Although a witness had observed that the Federal Power Commission had issued accounting regulations only and, therefore, it did not necessarily follow that the same treatment would be adopted for ratemaking purposes, the commission reasoned that it did not seem unreasonable to conclude that the commission would go to the trouble of amending its system of accounts to expressly include institutional advertising as an operating expense if it had any reservation about the propriety of including such expense for ratemaking purposes, since it was obvious that if any doubt existed, the commission would have directed that such expense be charged below the line. The commission determined that in view of the fact that management should be permitted to control advertising expenditures so long as they are within the limits of reason, and so long as these expenses do not exceed what is reasonably necessary and proper in the particular case—and there had been no contention that the expenses herein were unreasonable or unnecessary—there was no ground to distinguish such costs from other necessary and proper expenses.

An almost unanimous front is presented in the disallowance as operating costs of advertising expenses incurred in connection with attempts to gain support for rate increases. The statement by the court in Ft. Smith v Southwestern Bell Tel. Co., (1952) 220 Ark 70, 247 SW2d 474, § 9[a], infra, to the effect that a quasi-judicial board had been created by the state to act for the public and for the utilities, and its determinations were not to be influenced by appeals directed to other sources, and that the utility must use all its receipts as though they were a public trust, and receipts must not be dissipated in an effort to get further increases from the public, seems an accurate summary of judicial and quasi-judicial attitudes on utilities' advertising campaigns in relation to ratemaking cases.

Commissions have almost uniformly disallowed promotional expenses as operating costs for ratemaking purposes where the utility practicing such promotional methods has as much demand on its capacity for service as it can handle. See, for example, Public Utilities Com. v New England Tel. & Tel. Co. (1949, Me) 80 PURNS 397, in which the commission disallowed a portion of the amount claimed as advertising expenses by the company, rejecting the necessity of the company's stimulating, by advertisements published at ratepayers' expense, an already overtaxing demand for telephone service which had in large part produced the financial difficulty of which the company was complaining. And see also Re Narragansett Electric Co. (1972, RI) 93 PUR3d 417, in which the commission determined that a promotional program was entirely unnecessary in view of the fact that the company had difficulty in handling the peak load under the present situation.

The allowance of advertising or promotional expenses of public utilities as part of operating expenses for ratemaking purposes is a question which will probably confront commissions, and courts, for years to come on a case-by-case basis. Although it would be perhaps a bit simplistic to

test each situation by the guidelines set forth in Re Utah Power & Light Co. (1952, **Utah**) 95 PURNS 390, such guidelines seem to state the case nicely: the advertising and promotion expenses of a company are completely within the control of management; the amount to be so expended can be large or small depending on the judgment and discretion of management; if the full amount of this type of expenditure is to be allowed as an operating expense in testing the company's need for additional net revenue, it is most incumbent upon the management that no expenditures be made in this category except those such as are reasonably necessary to fully serve the customers of the company and keep the company in contact with the consuming public as an alert, energetic, forward-looking business enterprise and public servant.

[b] Practice pointers

Counsel practicing before a utility regulating agency on behalf of a public utility seeking a rate increase needs to be aware that the burden of proof is upon the utility to establish that such an increase in revenue is essential.[15] And it is equally true that the one asserting the error of the rate set by the commission has the burden of proving that the order is invalid because it is unjust and unreasonable in its consequences.[16] Although a commission may examine a utility's expenses or cost of service very carefully, and although justification for large outlays is frequently required, an attorney for a utility may be able to prove his case by showing that the present utility rates set by the commission are confiscatory,[17] that utility income is insufficient both to meet overhead and also to give a fair and reasonable return to the utility's stockholders, and that management has handled the utility's affairs in a wise and efficient manner and still has found itself in a financial bind.

If counsel can show the reasonableness of the advertising expenditures by the utility—either by a comparison of such expenses to those of a sufficient number of utilities whose operations are similar in size and type, or by a showing that such expenses have remained a constant percentage of the total operating-expense budget over a significant period of time—and that such advertising expenditures will result in benefits to the ratepayer as well as to the stockholders, his defense of such items would seem to be sufficient. As the court pointed out in New England Tel. & Tel. Co. v Department of Public Utilities (1971) 360 **Mass** 443, 275 NE2d 493, 59 ALR3d 899,[18] in view of the fact that

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15. Application of Hawaiian Electric Co. (1975) 56 **Hawaii** 260, 535 P2d 1102, 83 ALR3d 951.

16. Fuels Research Council, Inc. v Federal Power Com. (1967, CA7) 374 F2d 842.

17. A bill in equity to enjoin enforcement of rates was held in Southern Bell Tel. & Tel. Co. v Georgia Public Service Com. (1948) 203 **Ga** 832, 49 SE2d 38, to be the proper remedy for a public utility whose rates set by the commission were clearly confiscatory and violative of due process. It was there explained that mandamus was an inadequate remedy, in that it was not available to require public officials (commissioners) to change their action taken in the exercise of a discretion vested in them by the law, and that it could merely require that these officials act again in the exercise of this discretion vested in them by law, which discretion was subject to errors in its conclusions.

For further discussion of this question, counsel's attention is drawn to the annotation at 8 ALR2d 839.

18. § 7, infra.

management should be permitted to control advertising expenditures as long as they are within the limits of reason, and so long as these expenses do not exceed what is reasonably necessary and proper in the particular case, there is no ground to distinguish such costs from other necessary and proper expenses. The court explained that to the extent that advertising fosters sound consumer relations or encourages people to invest in a company, it is clear that the consumers, as well as the stockholders, are ultimately benefited through the lessening of the expense of doing business.

If counsel can show the expenses in question to have been incurred for advertising of an informational nature, such as electric or gas utility advertisements directed to energy conservation and the proper use of energy,[19] or communications utility advertisements relating to the proper use of party telephone lines, and the issuance and distribution of telephone directories,[20] or advertisements giving information regarding benefits available to prospective utility employees,[21] the defense of such items of expense would seem to be complete, inasmuch as most informational advertising is considered beneficial to a utility's customers.

Counsel should be aware that promotional expenses are a more controversial item than are expenses incurred in advertising of an informational nature. However, expenses incurred in promotions which can be shown to have added new customers and/or to have sold additional services, and which are reasonable in amount, do not seem to encounter much opposition.[22] But such promotional expenditures have been disallowed by utility commissions in ratesetting cases where it was obvious that there would be no benefit to the ratepayer from such expenditures made by the utility,[23] and, as pointed out in Application of Hawaiian Electric Co. (1975) 56 **Hawaii** 260, 535 P2d 1102, 83 ALR3d 951, § 9[b], infra, expenses incurred for promotional practices which tend only toward wastefulness or an aggravation of the energy crisis have also recently become highly suspect.

In the area of attempting to justify expenses incurred in a utility's advertising campaign to "explain" its need for additional revenue, counsel will face a formidable array of judicial and quasi-judicial opinions running con-

19. See, for example, Re North Carolina Natural Gas Corp. (1973, **NC**) 99 PUR3d 237; Re Michigan Consolidated Gas Co. (1973, **Mich**) 1 PUR4th 229; Re Gas Service Co. (1974, **Mo**) 6 PUR4th 99; and Washington Utilities & Transp. Com. v Pacific Power & Light Co. (1974, **Wash**) 7 PUR4th 470.

20. Southern Bell Tel. & Tel. Co. v Georgia Public Service Com. (1948) 203 **Ga** 832, 49 SE2d 38.

21. Re New York Tel. Co. (1970, **NY**) 84 PUR3d 321; Pennsylvania Public Utilities Com. v Bell Tel. Co. (1971, **Pa**) 93 PUR3d 13.

Even such advertising results as obtaining sufficient numbers of new employees to avoid expensive overtime pay, and reducing the cost of handling public inquiries, were held in Re Pacific Tel & Tel. Co. (1954, **Cal**) 5 PUR3d 396, to be beneficial to the ratepayer and thus the cost of such advertising was allowed as an operating cost.

22. § 9[a], infra.

23. § 9[b], infra.

See, to similar effect, Re Pacific Tel. & Tel. Co. (1972, **Mo**) 95 PUR3d 1; Re Kansas Gas & Electric Co. (1972, **Kan**) 95 PUR3d 247; and Re Potomac Electric Power Co. (1975, **Md**) 10 PUR4th 13.

tra. Perhaps with some additions, the points brought out in the dissenting opinion in Re Southwestern Bell Tel. Co. (1949, Mo) 77 PUR NS 33, might be put forth. There it was stated, in respect to the disallowance of advertising expenses incurred in connection with the rate case, that this advertising, in the form of newspaper advertisements, pamphlets, and bill inserts, had been a proper means which the company employed to inform its subscribers of its need for additional money; that the company should have the right to present its problems to the public using its services; and that it was fair that the company should be allowed a reasonable sum for this purpose so that its customers would not be misled by information from less authoritative sources. Counsel might also note Cincinnati Gas & Electric Co. v Cincinnati (1948, Ohio) 75 PUR NS 97, in which it was held that advertising expenses incurred by a gas and electric utility in presenting its case in the newspapers, while the question of rates was still a matter of negotiation with the Council of the city, would be included in the costs of service.

The question of the allowance of advertising expenses incurred in connection with political issues, such as private versus government ownership and operation of public utilities, has been resolved by utility commissions against the inclusion of such expenses as operating costs for ratemaking purposes, and counsel should be aware that these decisions have been made both on the merits and in accounting procedure determinations. Determinations on the merits have, for the most part, been made in situations involving contributions by a local utility to a national advertising campaign.[24] The Federal Power Commission's decision in Re Alabama Power Co. (1959) 22 FPC 72, 29 PUR3d 209, set forth the situation with regard to such expenditures in the accounting context, and distinguished between those advertising expenses to be charged to an above-the-line advertising account and those to be charged to below-the-line accounts. The commission ruled that nonpromotional advertising of the type sometimes referred to as institutional advertising or as good will advertising, the purpose of which is to foster and maintain public good will rather than being intended for any immediate and direct promotion of sales of electricity or appliances, should be charged to account number 787.2, Advertising; however, Account 538, Miscellaneous Income Deductions, should be charged with the cost of any advertising done for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or ordinances, and approval or revocation of franchises, or for the purpose of influencing decisions of public officers, or of any advertising having any direct or indirect relationship to political matters. The commission explained that the 700 and 800 series of accounts involved operating expenses charged against electric revenues normally collected from the ratepayer (in the language of accountancy, such items are classified "above the line"), while account 538 involved income deductions which, being charged against general corporate income, more directly affected the shareholders. (Such items are referred to as

24. See, for example, Re Consumers Power Co. (1959, Mich) 29 PUR3d 133, and Re Pacific Power & Light Co. (1960, Or) 34 PUR3d 36.

"below the line.") The commission emphasized, however, that this proceeding dealt only with the classification of certain expenditures for accounting purposes, and that the directive requiring political advertising to be in account number 538 did not decide its final disposition for rate purposes.

II. General considerations

§ 3. General rule that corporate management should be permitted to control amount of advertising expenses

In the following cases involving the propriety of allowing advertising or promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts recognized the general rule that corporate management should be permitted to control the amount of advertising expenses incurred by the utility.

Good faith is to be presumed on the part of the managers of a business, and in the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay, the court, speaking to the issue of the allowability of promotion expenses for ratemaking purposes, observed in West Ohio Gas Co. v Public Utilities Com. (1935) 294 US 63, 79 L Ed 761, 55 S Ct 316.

See Trans World Airlines, Inc. v Civil Aeronautics Board (1967) 128 App DC 126, 385 F2d 648, cert den 390 US 944, 19 L Ed 2d 1133, 88 S Ct 1029, an appeal from a final subsidy mail rate determination, in which the court, referring to certain selling expenses, noted the principle that good faith is presumed on the part of the managers of a business regulated by the government, and that—in the absence of a showing of inefficiency or improvidence—their judgment on prudent outlay is not to be set aside by a commission regulating rates.

Public regulation must not supplant private management, the court noted in Southern Bell Tel. & Tel. Co. v Georgia Public Service Com. (1948) 203 Ga 832, 49 SE2d 38, reinstating the advertising expense item the commission had disallowed.

The propriety of spending money for advertising the wares of a utility is for the owners to determine. the court pointed out in Wichita Gas Co. v Public Service Com. (1930, DC Kan) 3 F Supp 722.

In view of the fact that the commission was of the opinion that management should be permitted to control advertising expenses as long as they are within the limits of reason, the expenses incurred therefor would be allowed, the court explained in State ex rel. Dyer v Public Service Com. (1960, Mo) 341 SW2d 795, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1351.

This is a field in which management must be allowed some discretion, within the bounds of good faith and prudent judgment, the court noted in Public Service Co. v State (1959) 102 NH 150, 153 A2d 801, in speaking of the amount claimed for promotion.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from a commission order prohibiting public utilities from making expenditures for promotional advertisements, in which the court pointed out that attempts to disallow promotional expenditures as operating expenses for ratemaking purposes had been held to constitute an invasion of the discretion reserved to corporate management if the expenditures were

designed to produce ultimate benefits to every customer and were not excessive or unwarranted.

The function of a public service commission is that of control and not of management, and regulation should not obtrude itself into the place of management, the court pointed out in considering the commission's action in regard to promotional expenses of the utility in Petition of New England Tel. & Tel. Co. (1949) 115 Vt 494, 66 A2d 135. The court declared that this rule is recognized in all of the cases. The court also noted that the matter of advertising expenses called for the exercise of judgment on the part of the management of the company and that good faith on its part was to be presumed.

§ 4. Factors considered by court in application of rule

[a] Is advertising beneficial to ratepayer?

In the following cases involving the propriety of allowing advertising or promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts recognized that one of the factors to be considered in determining whether the company's figures on such expenses should be allowed, reduced, or disallowed as part of the operating expenses was whether or not the advertising engaged in by the public utility benefited the ratepayer.

In El Dorado v Arkansas Public Service Com. (1962) 235 Ark 812, 362 SW2d 680, a minimum gas service charge case, the court stated, in effect, that advertising could be charged to utility expenses where increases in sales resulting therefrom would tend to lower the price paid by consumers.

Expenditures for advertising which did not benefit the ratepayer were disallowed as operating expenses in Application of Hawaiian Electric Co. (1975) 56 Hawaii 260, 535 P2d 1102, 83 ALR3d 951, where the court noted that one of the primary factors which the commission must take into consideration when it fixes rates is fairness to the ratepayer.

Advertising expenses incurred by the company and allowed as administrative costs by the commission would not be disallowed on appeal, where the commission had been unable to find that such advertising would not result in benefit to the ratepayers, the court noted in State ex rel. Dyer v Public Service Com. (1960, Mo) 341 SW2d 795, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1351.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from an order of the corporation commission prohibiting public utilities from making expenditures for institutional advertising, promotional advertising, and promotional practices, in which the court declared that the commission might disallow any institutional advertising expenditures from operating expenses for ratemaking purposes unless the utility established that such expenditures benefited all ratepayers.

[b] Is advertising expense reasonable?

In the following cases involving the propriety of allowing advertising or promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts recognized that one of the factors to be considered in determining whether the company's figures on such expenses should be allowed, reduced, or disallowed as part of the operating expenses was whether the amount expended by the

utility for advertising and promotions was reasonable.

The court noted in West Ohio Gas Co. v Public Utilities Com. (1935) 294 US 63, 79 L Ed 761, 55 S Ct 316, that within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others.

Advertising expenses were allowed where they had not been "excessive nor deemed improper," in Illinois Bell Tel. Co. v Illinois Commerce Com. (1973) 55 Ill 2d 461, 303 NE2d 364.

The court explained in Peoples Gas Light & Coke Co. v Slattery (1939) 373 Ill 31, 25 NE2d 482, app dismd 309 US 634, 84 L Ed 991, 60 S Ct 724, that ordinarily, in the absence of a showing of inefficiency or improvidence, the court will not substitute its judgment for the management's judgment as to the amount of outlay expended in procuring new business or in holding business already obtained.

Where the method used to increase business is appropriate, the amount expended for the advertising is reasonable, and the results justify the expenditure, such expenses are necessary operating expenses, the court explained in Wichita Gas Co. v Public Service Com. (1930, DC Kan) 3 F Supp 722.

The question is whether it clearly appears that the advertising expenses are excessive or unwarranted, the court pointed out in Central Maine Power Co. v Public Utilities Com. (1957) 153 Me 228, 136 A2d 726.

Promotional expenses should have been allowed as operational costs, the court declared in State ex rel. North Carolina Utilities Com. v Piedmont Natural Gas Co. (1961) 254 NC 536, 119 SE2d 469, where the commission had used an unreasonable standard of comparison in disallowing the expenditures, and had otherwise found the company's management to be reasonable and of high quality.

In Columbus v Public Utilities Com. (1950) 154 Ohio St 107, 42 Ohio Ops 186, 93 NE2d 693 (ovrld on other grounds Cleveland v Public Utilities Com., 164 Ohio St 442, 58 Ohio Ops 289, 132 NE2d 216), advertising expenses were allowed as an operational expense where the company's management had not been unreasonable in this respect.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from an order of the corporation commission prohibiting public utilities from making expenditures for promotional advertisements, in which the court explained that promotional expenditures may be excluded from operating expenses for ratemaking purposes if such expenditures are excessive, unwarranted, unreasonable, or incurred in bad faith.

The court in American Can Co. v Davis (1977) 28 Or App 107, 559 P2d 898, upheld the allowance of expenses of an advertising program directed at energy conservation, stating that there was substantial evidence enabling the commissioner to find that the utility's expenditures for such advertising were not unreasonable.

In State v Lone Star Gas Co. (1935, Tex Civ App) 86 SW2d 484, error ref, revd on other grounds 304 US 224, 82 L Ed 134, 58 S Ct 883, reh den 304 US 590, 82 L Ed 1549, 58 S Ct 1051, advertising or new business expenses were disapproved where the company was held not to have supported its expenditures by the quantum and character of evidence required.

See Petition of New England Tel. & Tel. Co. (1949) 115 Vt 494, 66 A2d

135, involving, inter alia, the court's response to questions presented by the briefs of both parties, which the court felt might arise for determination in a court-ordered hearing de novo before the commission, in which the court stated that the advertising expenses of the company should not be disallowed or reduced unless it clearly appeared that they were excessive or unwarranted or incurred in bad faith.

III. Particular types of advertising or promotional expenditures

§ 5. Advertising, generally

In the following cases involving the propriety of allowing advertising expenses incurred by a public utility to be included in operating expenses for rate-making purposes, the courts held that advertising expenses in general, as stated by the utility and allowed by the commission, were allowable.

Responding to the plaintiff cities' claim that advertising expenditures allowed by the commission as an operating expense for rate-making purposes had been excessive, the court in Columbus v Public Utilities Com. (1950) 154 Ohio St 107, 42 Ohio Ops 186, 93 NE2d 693 (ovrld on other grounds Cleveland v Public Utilities Com., 164 Ohio St 442, 58 Ohio Ops 289, 132 NE2d 216), upheld the allowance, explaining that the commission had stated that the determination of what a reasonable expenditure for this purpose should be was not subject to exact determination, and that the commission had been unable to say that the company's management had been unreasonable in this respect.

See Petition of New England Tel. & Tel. Co. (1949) 115 Vt 494, 66 A2d 135, a case in which the court responded to questions, presented by the briefs of both parties, which the court felt might arise for determination in a court-ordered hearing de novo before the commission, and in which the court considered the complaint of extravagant expenditures for advertising by the telephone company. Noting that the matter of advertising expense called for the exercise of judgment on the part of the management of the company and that good faith on its part was to be presumed, the court explained that although these expenses should be scrutinized with care by the commission, they should not be disallowed or reduced unless it clearly appeared that they were excessive or unwarranted or incurred in bad faith.[25]

§ 6. Informational advertising

In the following cases involving the propriety of allowing advertising expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts held that the utility's informational advertising expenditures, including those directed at energy conservation, were allowable.

In Los Angeles v Public Utilities

25. In Re New England Tel. & Tel. Co. (1950, Vt) 83 PURNS 414, a hearing de novo ordered by the court, the commission stated that it was proper to allow as a legitimate operating expense the cost of advertising designed to inform subscribers as to changes in service, its use, closing of directories, and party line relationships, since such advertising generally accrued to the benefit of the individual customer served by the company. The commission questioned the propriety, however, of advertising expense designed to promote the good will of the company and of the Bell System in general, as well as the propriety of advertising expense incurred by the company in explanation and justification of proposed rate increases pending before regulatory bodies.

Com. (1972) 7 Cal 3d 331, 102 Cal Rptr 313, 497 P2d 785, a review of the commission's approval of telephone rate increases, the court upheld the commission's inclusion of the major portion of advertising expenditures in operating expenses. The court, pointing out that advertising which is properly classified as informative, results in more than a mere fostering of good will, and should result in reductions in operating costs and more efficient service to the ratepayer, determined that the commission could properly conclude that expenditures for such purposes were reasonable operating expenses, and that in the absence of a showing that the amount allowed for informative advertising was primarily directed for other purposes, the allowance of the commission should be upheld.

A disallowance of the telephone company's advertising expenses, on the ground that the company already had more applications for telephones than it could fill and therefore should not advertise for more, was found to be in error in Southern Bell Tel. & Tel. Co. v Georgia Public Service Com. (1948) 203 Ga 832, 49 SE2d 38, a suit for an injunction against obstruction of the telephone company from placing in effect emergency rates exceeding those fixed by the commission's order. Explaining that the testimony of the company's witnesses was that the advertising consisted in part of notices in the papers to acquaint the public with the proper use of party lines, others relating to the issuance and distribution of new telephone directories, some to the conversion of services from the manual to the dial telephone—all testimony of the company showing that the money was actually spent for advertising purposes considered by the management to be in the public interest—the court concluded that the advertising expenditures were proper expenses and should have been considered in computing rates.

A rate set by the commission was affirmed in American Can Co. v Davis (1977) 28 Or App 107, 559 P2d 898, notwithstanding the contention that the cost of the utility's advertising program directed at energy conservation should not have been allowed as a ratepayer expense because it was not in the best interests of residential customers. The court stated that there was substantial evidence enabling the commissioner to find that energy conservation is in the public interest, and that the utility's expenditures for such advertising were not unreasonable. The court noted that other regulatory bodies which had considered this issue had allowed conservation advertising expenses.

§ 7. Institutional advertising

In the following cases involving the propriety of allowing advertising expenditures incurred by a public utility to be included in operating expenses for rate-making purposes, the courts held that institutional advertising expenditures made by the utility were allowable.

Holding to be error the action of the department of public utilities in disallowing, as a proper cost of service, nearly half of the claimed advertising expense of the utility, the court in New England Tel. & Tel. Co. v Department of Public Utilities (1971) 360 Mass 443, 275 NE2d 493, 59 ALR3d 899, rejected the department's determination that the institutional advertising relating to attempts to improve the climate of public opinion toward the company or to explain why service was not as good as it had been should be borne by the stockholders of the company. Citing with

approval a New York Public Service Commission decision[26] in which the commission had held that expenditures for institutional advertising were a proper expense for ratemaking purposes, the court noted that the decision stated that what was of concern there were advertisements which were obviously designed to project a favorable image of the company to its customers, its existing stockholders, and potential investors; that to the extent that such advertising fostered sound consumer relations or encouraged people to invest in the company, it was clear that the consumers, as well as the stockholders, were ultimately benefited through the lessening of the expense of doing business; that the trend in modern regulatory decisions was to allow such charges as proper for rate-making purposes. The commission had concluded that in view of the fact that management should be permitted to control advertising expenditures as long as they are within the limits of reason, and so long as these expenses do not exceed what is reasonably necessary and proper in the particular case, there was no ground to distinguish the advertising costs in question from other necessary and proper expenses. The court determined that the department's disallowance of some of the expenditures for advertising on the grounds stated by it was an unwarranted interference with the function and prerogative of the company's business managers and that it was therefore beyond the power and authority of the department. On remand the test year computations were to be made without deduction of such advertising costs, the court directed.

The court in State ex rel. Dyer v Public Service Com. (1960, Mo) 341 SW2d 795, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1351, declined to overturn a decision of the commission to allow, as an administrative expense, a contribution by an electric utility to a private utility power group for several advertisements. In this appeal from a judgment affirming orders of the public service commission made in a utility rate proceeding, the court explained (1) that the commission had found that it was a recognized fact that the principal purpose of advertising is to create good public relations and stimulate a demand for the service or product being advertised, and (2) that the commission was unable to find from the evidence offered that this particular form of advertising would do neither. The court went on to point out that the commission had further stated that in view of the fact that it was of the opinion that management should be permitted to control such advertising expenditures as long as they are within the limits of reason, and in view of the fact that the commission was unable to find that such advertising would not result in benefit to the rate payers, the expenses incurred therefor would be allowed.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from an order of the corporation commission prohibiting public utilities from making expenditures for institutional advertising,[27] in which the court declared that the prohibition on expenditures for institutional advertising was an unreasonable means of protecting rate payers from these expenditures. Noting that this

26. Re Consolidated Edison Co. (1961, NY) 41 PUR3d 305.

27. Institutional advertising was defined as advertising designed to promote the corporate image of the utility and to present it in a favorable light to the public and to potential investors.

did not mean that the commission must allow all institutional advertising expenses as operating expenses for rate-making purposes, the court concluded that the commission might disallow any institutional advertising expenditures from operating expenses for rate-making purposes unless the utility established that such expenditures benefited all rate payers.

Refusing to disturb the commission's allowance of the power company's expenses incurred for trade ally advertising, the court in Commonwealth v Virginia Electric & Power Co. (1971) 211 Va 758, 180 SE2d 675, an appeal from the corporation commission's authorization of electric rate increases, pointed out that although the commission had recently disapproved further use of such advertising in the form engaged in by the company, the commission had refused to eliminate those expenses, finding it reasonable to assume that the company would substitute some other form of promotional activity at an equal or greater cost.

§ 8. Advertising supporting rate increase

In the following cases involving the propriety of allowing advertising expenses incurred by a public utility to be included in operating expenses for rate-making purposes, the courts held that advertising expenses incurred in support of attempts to obtain rate increases should be disallowed.

In Ft. Smith v Southwestern Bell Tel. Co. (1952) 220 Ark 70, 247 SW2d 474, wherein the Arkansas Public Service Commission's condemnation of the company's practice of using the ratepayers' money to conduct an advertising campaign to increase the rates proposed to be charged the ratepayers by the company was approved,[28] the court explained that the commission's language indicated that in hearings for rate increases by any utility, the commission would carefully examine to see how much was being paid for overhead and staff work directed, in whole or in part, at trying to get rate increases from the public. Making no specific reduction in the amount of advertising expenditures claimed by the company as operating expenses, the court did declare that the utility must use all its receipts as though they were a public trust, and that receipts must not be dissipated in an effort to get further increases from the public.

Affirming the commission's disallowance of expenditures during the test year for advertising purposes, including costs of advertising by means of newspaper, radio, and television, ostensibly as a means of informing the public as to the company's situation in connection with the instant application for a rate increase, the court in Southern Bell Tel. & Tel. Co. v Louisiana Public Service Com. (1960) 239 La 175, 118 So 2d 372, noted that proper allowance should be made for ordinary advertising expenses. The court, referring to the commission's statement, explained that after re-

28. The commission, in Re Southwestern Bell Tel. Co. (1951, Ark) 87 PUR NS 97, from which the above appeal was taken, had noted that during the course of the hearing, the propriety of this practice was questioned and that the company had discontinued the practice after the issue had been raised in the hearing. The commission voiced the hope and assumption that the company would not engage in such practice in the future, but apparently took no further action on the matter, stating in its order that the operating revenues and expenses, as discussed in this opinion, were thereby approved.

viewing the rulings of the courts of other states which condemn the practice of utilities in using the rate payer's money to conduct an advertising campaign to increase the rates proposed to be charged to the rate payer, the commission disallowed this item, not on the grounds of impropriety, but because the record clearly showed that these expenditures were abnormal and nonrecurring in character and that their inclusion in the operating expense accounts would distort the test year earnings.

§ 9. Promotion

[a] Expenses allowed or allowable

Under the circumstances of the following cases involving the propriety of allowing promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts held that promotional expenditures made by the utility were allowable.

Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes, the court declared in West Ohio Gas Co. v Public Utilities Com. (1935) 294 US 63, 79 L Ed 761, 55 S Ct 316, reversing on appeal the decree of a state Supreme Court affirming a rate order of the state public utilities commission. The commission had more than halved the expenses claimed by the gas company for procuring new business or endeavoring to procure it, on the ground that anything more than what was allowed by the commission was unnecessary and wasteful. The court responded that the criticism had no basis in evidence, either direct or circumstantial. Noting that good faith was to be presumed on the part of the managers of a business, the court stated that in the absence of a showing of inefficiency or improvidence, a court would not substitute its judgment for theirs as to the measure of a prudent outlay.

In El Dorado v Arkansas Public Service Com. (1962) 235 Ark 812, 362 SW2d 680, a minimum gas service charge case, the court, responding to the contention that expenses incidental to merchandising, such as advertising, should not be allowed as a utility expense, declared that the commission had correctly allowed the expense of company advertising to be charged to utilities expense. The court pointed out that the record reflected that the company engaged in merchandising only such items as were related to its utility business and would tend to increase the sale of gas. The court held, therefore, that the commission had authority to permit the company to charge to utilities expense items of merchandise advertising, and that it did not act arbitrarily in doing so on the reasonable theory that increased gas sales would tend to lower the price paid by consumers.

On appeal from a rate base determination by the public utility commission, the court in Re Honolulu Gas Co. (1935) 33 **Hawaii** 487, determined that the commission's division of the gas company's expenses, incurred in carrying on a merchandise business devoted to the sale locally of gas stoves, gas heaters, gas refrigerators, and other gas appliances, between utility and nonutility activities, was unwarranted, and that such expenses, including advertising, should have been considered and included in the rate base. The court, pointing out that if the commission was correct in its conclusions that the merchandise activities of the company were nonutility, it followed that the same had no proper place in the rate base, and the

division of expenses on the above basis was justified, explained that the uncontroverted evidence showed that the merchandise business of the company constituted but a small percentage of the company's total operations, and that it returned slight, if any, profit to the company and was carried on solely for the purpose of promoting or increasing the demand for manufactured gas throughout the territory in which the company was supplying that product. Noting that there was ample authority to sustain the principle that a company will not be permitted to charge as an operating expense of its public utility activities separate merchandising or other nonutility enterprises, the court stated that it was well settled that where a gas manufacturing company engages in the sale of gas appliances not as an independent or profit-making vocation but to encourage and stimulate the sale of gas, the merchandising thus carried on is a business activity beneficial to the consuming public because the increased use of gas necessarily tends to lower the rate to the consumers, and the assets and capital thus devoted should be included within the property to be appraised in determining the rate base. Recognizing that here, as in other cases, it was the practice of the gas company to conduct such business partly to aid consumers in securing gas appliances manufactured under standard specifications that would thus render most efficient service to the consumers, and partly, by thus promoting the sale of appliances to be used for additional purposes, to increase the sale of gas, the court concluded that the reasonable expenses incurred in promoting new business or in the endeavor to procure it should be incorporated into the rate base.

Notwithstanding the contention that the commission had erred in allowing excessive amounts expended for advertising by the telephone company to be treated as operating expenses for rate-making purposes, the court in Illinois Bell Tel. Co. v Illinois Commerce Com. (1973) 55 Ill 2d 461, 303 NE2d 364, affirmed the commission's finding that the expenditures had not been excessive or improper. Noting that there was no quarrel with the company's expenditures for "informative" as distinguished from "promotional" advertising, the court stated that the telephone company's position was that a reduction in advertising would injure service and reduce its net earnings. The court referred to the commission's statement relative to the company's advertising and public relations programs, in which the commission had declared that the company's expense in relation thereto had not been excessive nor should it be deemed improper. The commission had gone on to add that in an economic climate involving inflationary spiraling of costs which the utilities cannot avoid and still provide adequate service to the public, it becomes apparent to the regulatory agencies that a company's operating expenses should be closely scrutinized and that those which do not specifically relate to business operations should be excluded for ratemaking purposes in the determination of the company's operating income. The commission had pointed out that this observation had also been made in a recent expression of policy on advertising by the New York Public Service Commission wherein it was stated that since management could control its advertising expenditures, it was not in the interest of anyone to have unnecessary institutional advertising

exacerbate customer resentments at a time when large rate increases were made necessary by increases in the various classes of costs beyond the control of utility management. The commission had concluded that sound business judgment indicated that the belt tightening process should begin in those areas not directly and totally related to the providing of the utility service to the public. The court explained that after the admonition that such expenditures would be carefully scrutinized in the future, the commission had then found that the telephone company's expenditures had not been excessive or improper, and the court stated that from its review of the record, it could not say that the commission's findings were without sufficient support in the evidence.

Denying the exceptions by the commission as to the gas company's advertising expenses to be included in operation costs for ratemaking purposes, the court in Wichita Gas Co. v Public Service Com. (1930, DC Kan) 3 F Supp 722, pointed out that the propriety of spending money for advertising the wares of a utility was for the owners to determine, and concluded that the method used by the gas company to increase its business was appropriate, the amount expended was reasonable, and the results justified the expenditure.

The court in Central Maine Power Co. v Public Utilities Com. (1957) 153 Me 228, 136 A2d 726, sustained the company's exception to the commission's exclusion, as operating expenses, of a large portion of the expenditures made by the company for sales promotions, with the court pointing out that the good faith of the management of the company was not challenged in the slightest degree and that the question resolved itself into whether it clearly appeared that the expenses were excessive or unwarranted, or, stated differently, whether expenses in excess of the allowance by the commission were within the limits of reason. The court, criticizing the commission for unreasonably substituting its judgment for that of the company's management, explained that the items had not been considered by the commission to be as a whole improper or unlawful charges against the ratepayers, and that placing a more than 50 percent reduction on the amounts shown to be required to meet the company's needs in the promotional field, basing such reduction on the ground that an expanding utility such as the electric company should severely reduce expense of this type, was clearly a substitution of the commission for the company in the management of the utility.

Promotion expenses, including those of advertising, for gas appliances and gas utilization, were allowed in Consolidated Gas Co. v Newton (1920, DC NY) 267 F 231, mod on other grounds, 258 US 165, 66 L Ed 538, 42 S Ct 264, a suit in equity brought to enjoin the defendant commission and state officials from imposing confiscatory rates on the plaintiff gas company. The propriety of the expenses was challenged largely because the sale of gas and of machines to burn gas had not increased much. The court pointed out that the truth appeared to be that the constantly increasing use of electricity for illumination had driven out gas more and more, until, to hold its sales, the plaintiff gas company had to promote the use of gas for heating and cooking. The court noted that the company had succeeded in achieving a slight increase in sales, and its officers attributed their ability

to do even this well to such promotions. Pointing out that their decision was not now open to question since they were under a duty to keep up their sales so far as they could, and to push the use of gas in any new ways in which the public would use it, the court determined that even under municipal management, advertising, when not pushed to the useless extreme which competition too often engenders, is a necessary function.

The commission's refusal to allow the gas company's promotional expenditures as operational costs had been found by the trial court to be in error of law, and the court in State ex rel. North Carolina Utilities Com. v Piedmont Natural Gas Co. (1961) 254 NC 536, 119 SE2d 469, an appeal from the commission's order canceling a proposed new rate, affirmed such finding. The commission had disallowed the amount in excess of the national average of promotional expenditures for companies retailing natural gas, but the court determined that the gas company's expenditures should have been compared to those of companies in the defendant company's class instead of to the national average. Pointing out that the gas company had, within recent years, changed over from manufactured to natural gas, that all its customers had to be "sold" on natural gas, that new customers had to be won, and that competition with electricity and oil had to be met, the court added that the company was faced with promotion in a new field at a time when promotional expenditures throughout the nation (on which the national average was figured) included those of many older companies which had been in the field for years with a well-known product and an established market. The court, noting that the commission had recognized the high quality of the company's management and that the company was rapidly expanding its facility by a heavy promotional program, remanded the proceeding to enable the commission, inter alia, to ascertain the company's true operating expenses.

See State v Oklahoma Gas & Electric Co. (1975, **Okla**) 536 P2d 887, an appeal from commission order prohibiting public utilities from making expenditures for promotional advertisements,[29] wherein the court declared that such prohibitions were invalid. The commission had argued that if such expenditures did not sell energy, they were wasteful, and rate payers should not be required to pay them, but the court responded that this argument did not justify prohibiting such expenditures, because the same result could be obtained by excluding such expenditures from operating expenses for rate-making purposes. To the opposite argument, that if such practices sold energy, they increased the use of fossil fuels and should be prohibited, the court replied that many promotional expenditures are designed to achieve conversion to competing utilities, and to instill preferences for one form of energy over another, rather than to increase overall consumption of energy, and that since the commission did not have jurisdiction over appliance manufacturers and distributors, and since the proposed prohibitions did not prohibit appliance manufacturers and distributors from advertising their products, the prohibited practices and expenditures had little, if any, effect upon overall consump-

29. Promotional advertising was defined as advertising designed to increase usage, obtain new customers, or encourage use of one form of energy over another.

tion of energy. As long as appliance manufacturers and distributors were allowed to advertise their products, it was arbitrary to deny utilities the right to counteract this advertising at the expense of the stockholders on the ground that promotional advertising and practices by utilities increased overall consumption of fossil fuels, the court explained. Turning then to testimony that if peak load demand for electricity exceeded peak capacity, a brownout would occur, the court declared that if a particular utility faced a foreseeable danger of being unable to meet peak demand, the commission might have authority to prohibit it from engaging in any promotional activities which would further increase its peak demand, but the court pointed out that this did not justify a rule prohibiting all utilities from engaging in such activities. Noting that attempts to disallow promotional expenditures as operating expenses for ratemaking purposes had been held to constitute an invasion of a discretion reserved to corporate management if the expenditures were designed to produce ultimate benefits to every customer and were not excessive or unwarranted, the court concluded that promotional practices which were reasonably calculated to improve the utility's load factor and benefit all consumers by reducing the average unit cost of energy were not unjustly discriminatory, and prohibitions against such practices constituted an invasion of the discretion reserved to corporate management.

[b] Expenses reduced or disallowed

Under the circumstances of the following cases involving the propriety of allowing promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts held that promotional expenditures made by the utility should be reduced or disallowed.

See Trans World Airlines, Inc. v Civil Aeronautics Board (1967) 128 App DC 126, 385 F2d 648, cert den 390 US 944, 19 L Ed 2d 1133, 88 S Ct 1029, a case involving a government subsidy mail rate determination rather than a determination of consumer rates, in which the court upheld the Civil Aeronautics Board's disallowance of a specified amount of selling expense as in excess of the amount appropriate under the honest, economical, and efficient management criterion, over the airline's contention that the disallowance was an unwarranted interference with the airline's managerial discretion. The court explained that once the principle of setting a ceiling on selling expenses was established, it was plain that the Board had acted reasonably and that its action had support in the record. In response to the airline's charges of interference with managerial discretion, the court pointed out that a company which sought and pocketed the boon of subsidy or protective contracts could not assail the restraint inherent in accountability to government officials as a tyrannical burden. The government officials were themselves accountable in court for compliance with the rule of law applicable to administrative agencies, the court explained, concluding that the petitioner had not established the agency's action in this case to be arbitrary or capricious.

In reversing that part of the public utility commission's ratemaking order which had allowed a sizable sum for promotional expenses, the court in Application of Hawaiian Electric Co. (1975) 56 Hawaii 260, 535 P2d 1102, 83 ALR3d 951, noted that the bur-

den was always on the applicant to prove justification for a requested rate increase, and that the electric company had the burden of showing the propriety of its request for these promotional expenditures. The court held that the electric company had not carried its burden. Part of the expenditures claimed were for allowances or payments to owners and developers who built all-electric homes and apartments and advertised them for sale as such, the court pointed out, declaring that in the context of present times, these promotional expenditures on the part of a regulated public service company were wasteful and unreasonable, and their allowance by the commission was an abuse of its discretion. The disturbing aspect of the public utility commission's decision to allow expenditures for these programs was the rationale behind it, the court observed, noting that the basis of the allowance seemed to be the circuitous reasoning by which an earlier allowance of promotional expenditures to the applicant's competitor, on the ground that the expenditures were necessary to attract away customers from the applicant, now necessitated a like allowance to the applicant. Disapproving the public utility commission's consistent failure to meet squarely the issue of the reasonableness of competitive advertising expenditures, the court explained that one of the primary factors which the public utility commission must take into consideration when it fixes rates is fairness to the ratepayer, and that it was obvious that the particular type of advertising competition involved here did not benefit the ratepayer. Turning then to the propriety of allowing a sizable sum for promotion programs designed to increase the use of electricity and purportedly to improve the company's load factor, the court indicated that these programs consisted essentially of direct advertising and contributions to dealer and distributor advertising of certain electric appliances. The electric company was, in effect, subsidizing the promotional activities of dealers and distributors whose commercial transactions formed no part of the electric company's own business venture, the court remarked, distinguishing such expenses from those of the gas company competitor, which sold gas appliances as an essential component of its commercial operations. The electric company failed to satisfactorily show how much of an improvement in its load factor these expenses could reasonably be said to make, the court observed, adding that since the appliances being promoted by the electric company were those generally in use during peak load periods, it was difficult to see how the electric company could argue that these expenses encouraged the increase of off-peak utility loads. In conclusion, the court spoke of the stark reality of energy problems and environmental concerns, and insisted that in the face of dwindling oil supplies and spiraling costs, promotional practices which were wasteful or which only served to aggravate the energy crisis should be viewed by a regulatory agency with extreme caution.

The commission, in setting new gas rates, had disallowed as operating expense one-third of the amount claimed by the appellant gas company as new business expense, and in Peoples Gas Light & Coke Co. v Slattery (1939) 373 Ill 31, 25 NE2d 482, app dismd 309 US 634, 84 L Ed 991, 60 S Ct 724, the court affirmed the commission's action in this regard, viewing the company's promotional prac-

tice of rental purchase plans for putting gas appliances on the premises of customers as creating an unduly large expenditure for business promotion to be charged as an operating account. The court explained that since gas appliances were sold by many other dealers, and since those sales made by the gas company, if conducted as a separate business, would not be subject to regulation, the advisability of such a method of promoting sales of gas and the propriety of the amount thus expended became matters entirely for the commission. Concluding that the action of the commission in disallowing part of the claimed promotional expenses was not unjustified, the court pointed out that in the very nature of things, a sale of outside articles to promote the sales of a commodity regulated by a utility must be controlled by the commission, since otherwise it would be possible to either raise the operating expenses to unreasonable heights or convert the utility into a mere medium for the sale of appliances and merchandise not regulated by the commission.

In Boston Consol. Gas Co. v Department of Public Utilities (1951) 327 Mass 103, 97 NE2d 521, a suit in equity to determine whether rates permitted by the department were confiscatory, it was determined that costs involved in the sale of gas appliances, including the cost of advertising appliances for sale, stood on a different footing than did expenses of sending repairmen to customers in response to complaints of leaks, faulty operation of appliances, etc., which were considered proper charges to the operating expenses of a gas business. The court noted that the gas company had treated the appliance business as a separate entity for most purposes, but had sought to treat the expenses of the appliance business, including the advertising expenditures, as a part of the company's business of supplying gas. The company had argued that gas could not be bought by the consumer like ordinary merchandise, but could be bought only by having it flow through appliances of one kind or another; that apart from these appliances it could not be advertised effectively; and that whatever promoted the flow of gas through appliances promoted the sale of gas. The court observed that the difficulty with the argument seemed to be that it either fell short of proving the point or it proved too much: if the appliance business was really a part of the gas business, the gas customers were entitled to have the profits from appliances included in the earnings of the gas business, but if it was really a separate business, its expenses ought not to be charged against the gas customers. The court cited an earlier case[30] in which it had been stated that the sale and servicing of gas appliances constituted a separate business from the supplying of gas, so that it would not be fair, on the one hand, to charge all customers with higher rates so that some might buy appliances and have them serviced at less than cost, or, on the other hand, to lower the cost of gas service because of a profit on those items. The court recommitted the case for purposes of having the company's earnings determined by correct legal standards.

While the public utility commission had determined that in the absence of evidence of bad faith or imprudence,

30. Lowell Gas Co. v Department of Public Utilities (1949) 324 Mass 80, 84 NE2d 811, cert den 338 US 825, 94 L Ed 501, 70 S Ct 71.

the advertising and promotional expenditures by an electric company were within the limits of the discretion of the management, the court in Public Service Co. v State (1973) 113 NH 497, 311 A2d 513, upheld the contention that all promotional advertising expense should be disallowed because the company and the industry was encountering increased unit costs and decremental profits. The court noted that it was not disputed that increased demand had caused the purchase of power from outside sources so that increased costs would result, and further observed that the parties making the contention disclaimed any concern with past advertising and promotion, seeking only to preclude further such expense. Pointing out that the merchandise and promotional advertising aggregated a comparatively insignificant figure, the court nevertheless held that under present conditions, promotional advertising might well be disallowed, and distinguished the holding of Public Service Co. v State (1959) 102 NH 150, 153 A2d 801,[31] which, the court explained, was decided under circumstances quite different from those of this case and could not stand in the way of disallowance of proposed expenses where appropriate under current conditions.

The commission's disallowance, for rate-making purposes, of certain claimed advertising or new business expenses, was upheld in State v Lone Star Gas Co. (1935, Tex Civ App) 86 SW2d 484, error ref, revd on other grounds 304 US 224, 82 L Ed 134, 58 S Ct 883, reh den 304 US 590, 82 L Ed 1549, 58 S Ct 1051, a suit by the state to restrain the defendant gas company from violating a rate setting order of the commission. The court explained that only a small amount of advertising was proved, nothing in proportion to the charges made for it, and concluded that the high annual expense claimed for advertising was not supported by the quantum and character of evidence required.

31. In the above-cited case, wherein the commission's action in making no reduction in the questioned accounts was upheld, the court voiced its unwillingness to question the judgment of the commission in its treatment of the amounts claimed by the company for sales and new business, of which promotional expenses were a part.

Consult POCKET PART in this volume for later cases

Special Edition -- A hard look at competition, unions and change

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Competition heats up

Chugach goes after a neighbor's customers

Chugach Electric Association has declared it intends to serve customers in a sister utility's service territory, firing the opening shot in what could become a competitive war for electric utility customers.

Chugach fired a shot across Anchorage Municipal Light & Power's bow in the form of a Sept. 19 letter saying it intended to begin serving one or more of ML&P's customers – beginning with a condominium office complex that houses Ray Kreig & Associates, among other firms. Kreig is a member of Chugach's board of directors.

Chugach has also approached several other ML&P customers, including the Anchorage Daily News and Columbia Alaska Regional Hospital, claiming it can provide them with electricity at a lower cost than ML&P charges.

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HYDRO PURCHASE -- At the October signing, ownership of the Eklutna Hydroelectric Plant transfers from the federal government to MEA, Chugach Electric Association and Anchorage Municipal Light & Power. From left are MEA General Manager Wayne Carmony, Chugach General Manager Gene Bjornstad and Municipality of Anchorage Operations Manager George Vakalis. MEA operates the plant. (See January 1998 Powerlines for a feature story.)

IBEW wages 'corporate campaign' at MEA

Surrounded by customer-hungry utilities, MEA management believes the co-op needs to become more competitive without sacrificing customer service.

"This is a difficult task, even in the best of circumstances," said co-op spokesman Bruce D. Scott, "but MEA has been gearing up for competition in the midst of an all-out effort to resist it by higher-ups from the International Brotherhood of Electrical Workers."

MEA and the IBEW, Local 1547, are presently negotiating separate contracts for the Information Services (computer) and Eklutna power plant employees represented by the union. But even as they sit at the bargaining table, the IBEW is waging a "corporate campaign" at the co-op, said Scott, MEA director of member and public relations.

In a corporate campaign, "the union uses all the leverage at its disposal to harass the company and make fighting the union so distracting and so expensive that management caves in on its bargaining demands," says an article in *Electric Light and Power Magazine.*

Author Ronald Meisburg writes that the tactics used in a corporate campaign may include conducting a public relations campaign against company management and obtaining unfavorable coverage in the media. He says other tactics include "inundating the company with information requests" and "filing unfair labor practice charges" against the company.

Whether or not IBEW leaders read Meisburg's article, Scott said they seem

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IBEW wages 'corporate campaign' at MEA

Continued from Page 1

to be following the blueprint for a corporate campaign, such as by making an attempt to bury MEA in information requests, Scott said.

Human Resources Director James Woodcock said that this year's correspondence from the IBEW requesting information from the co-op's management fills two fat binders.

Examples include a request from the IBEW for all daily time sheets for all linemen for a period of five years – literally thousands of pieces of paper, he said. In a separate request, a union representative asked for a list of all jobs performed by engineering supervisors from Aug. 1, 1996 to date, "along with all documents related to the jobs." The demand gave MEA less than 10 days to come up with the information.

While information requests are time-consuming and costly, Scott said, "two of the biggest weapons in the IBEW's arsenal are the grievance and the unfair labor practice complaints."

Between Jan. 1, 1996 and Oct. 20, the IBEW filed 84 grievances with the co-op and a dozen unfair labor practice complaints with the National Labor Relations Board (NLRB) against MEA. Scott said 40 of those grievances were filed through Oct. 20 of this year.

"The grievances cost the co-op thousands of dollars in attorneys' fees, in addition to consuming a great deal of staff time and associated in-house expenses," he said. "If the corporate campaign continues through the end of the year, MEA's legal expenses for labor relations are on a pace to average $240,000 per year since 1995," he said.

"But much more is at stake than attorney fees," he said. "Let's take one example, a disagreement that crops up with the IBEW on a regular basis – whether to enroll employees in the IBEW's $1 billion pension fund or the national plan MEA participates in."

"The national plan most of MEA's employees are enrolled in has performed so well that MEA has frequently enjoyed a moratorium on investing in the fund, saving the co-op about $2 million since 1994 and $5.5 million in the past decade," he said. "During this 10-year period, our members would have had to pay out millions of additional dollars if the union's pension plan had been in place."

Scott said that in the normal course of events, grievances are filed with the company and, if management and the union are unable to resolve them, the IBEW has the option to send them to arbitration (see box).

"Lately, however, the union, in its enthusiasm for the corporate campaign, has sent grievances straight to arbitration, before MEA management has even seen them," he said.

"The IBEW has even filed a complaint over our bylaws with the NLRB," he said. The union contends that a bylaw amendment proposed and approved by MEA's members last year is unlawful because it effectively excludes IBEW members and interdependent relatives from serving on the co-op's Board of Directors.

Subcontracting a concern

Many of the grievances filed this year stem from an amendment to MEA's bylaws approved by the co-op's members in 1994, Scott said. The amendment requires the co-op to engage in "free, open and competitive bidding" and says MEA cannot require contractors to sign labor agreements with the IBEW or any other union. Chugach Electric Association has a similar bylaw.

"This bylaw has the effect of placing IBEW members in competition with non-union workers, as well as members of other unions," Scott said.

MEA awarded several major construction contracts this year to a nonunion firm – a firm that won the bids in free, open and competitive bidding, he said. "Since then, the IBEW has stepped up its corporate campaign, turning in stacks of grievances and unfair labor practice complaints, sometimes on a daily basis, even though our labor agreements allow MEA to subcontract work."

Woodcock said that about a third of the complaints filed in 1997 appear to be tied to MEA's award of contracts to the non-union firm, Irby Construction, one of several contractors performing work for MEA this year.

'Preparation' expense

In 1996, the IBEW filed 40 grievances and four unfair labor practice (ULP) complaints. Later, it withdrew 14 of the grievances and three of the ULPs (the NLRB

Continued on Page 4

How the grievance process works

In short, the grievance process works like this: A grievance is filed by the union and submitted to the company. The company and the union discuss the issue to see if the two parties can resolve it. If it is not resolved to the union's satisfaction, the IBEW can ask that the grievance proceed to arbitration.

Arbitration is a process whereby the parties select an individual to act as an arbitrator. The arbitrator listens to the arguments on each side and then issues a decision. The arbitrator has the authority to determine whether the grievance has merit and whether or not the company should be ordered to take steps to remedy the complaint. The arbitrator also has the authority to deny the union's grievance.

In two of MEA's three bargaining union agreements – the Engineering, Operations and Accounting unit and the Information Services unit, respectively, the employee is supposed to discuss the issue of concern with his or her supervisor and the next level of supervision prior to filing a grievance.

Under the third agreement, which covers the "Outside" unit which includes linemen, meter readers and other employees, the process starts with a grievance. MEA is negotiating an agreement covering a fourth work unit consisting of employees at the Eklutna Hydroelectric Plant.

Approximately one-half of MEA's workforce is nonunion.

Competition heats up in the Anchorage Bowl

Continued from Page 1

hugach unilaterally declared it would pay ML&P a rental fee – called a "wheeling" charge – for using ML&P's lines to serve customers that presently "belong" to the municipal utility. MEA analysts said the rate chosen by Chugach "has no demonstrated basis in fact." It would take a fairly extensive study, and likely hearings before the Alaska Public Utilities Commission (APUC), to determine what the wheeling charge should be, and whether Chugach should even be allowed to pay one, the analysts said.

ML&P responded to Chugach's letter by filing a complaint with the APUC. Its complaint says ML&P is certified by the commission to provide service in an exclusive territory; Chugach, therefore, lacks the authority to provide service to customers within ML&P's territory.

Both utilities provide electrical service in Anchorage. ML&P serves an area sweeping north of Tudor Road, west of Boniface Parkway and east of Arctic Boulevard. Chugach serves most of the remaining Anchorage area. MEA provides service to Eagle River and Chugiak in the northern part of the Municipality of Anchorage.

Chugach representatives have stated that the APUC has the authority to determine when and where utilities can compete. But just in case that argument fails, Chugach is supporting a bill in the state legislature that would expressly give the APUC authority to regulate competition.

n the waning hours of the last legislative session, Chugach lobbyists introduced a different bill that would allow Chugach to compete with ML&P. The bill is now in the House of Representatives' Labor and Commerce Committee.

"MEA is opposing the bill because it would allow Chugach to set the rules for competition statewide, without grass roots involvement from the state's other utilities," said MEA General Manager Wayne D. Carmony. "There is a chance that the state could rush into defining how competition will be practiced before we assess the impact on ratepayers."

"There is a possibility, for example, that power providers would sell electricity at a discount to large commercial users. But because the fixed costs of a utility's investment do not go away, this could result in increased costs to residential customers," he said.

Carmony said that a competitive battle is also being waged by private energy firms trying to do just that – pick up the largest customers at a discount.

An Anchorage-based firm called Alaska Power Systems is marketing on-site diesel generators to Copper Valley Electric Association customers in Glennallen and Valdez. Another private firm, Aurora Power Resources (APR), is pooling its large commercial natural gas customers into one group "and going to all the power generators in the Railbelt and asking them to bid for the group,"according to an APR spokeswoman.

In Fairbanks, Golden Valley Electric Association (GVEA) recently signed a power supply contract with ML&P. GVEA previously had purchased as much as 300 million kilowatt-hours per year from Chugach, at less than half of what Chugach charges MEA. Chugach responded by suing GVEA for breach of contract.

MEA spokesman Bruce D. Scott said that increased competition has not been without its costs, particularly in the arena of legal expenses. MEA invested a considerable sum to fight off hostile takeover at-

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MEA's next Board of Directors meetings:

Monday, November 10 - 7 p.m.
Monday, December 8 - 7 p.m.

at MEA's main office in Palmer. Call 745-3231 for directions.

Web site: www.Matanuska.com

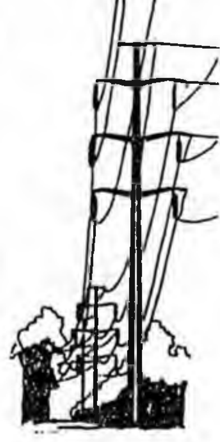
Board of Directors:

Barbara J. "Tamie" Miller *Acting President*	376-5636
William A. "Bill" Folsom *Secretary-Treasurer*	745-4339
Rodney R. Cottle	376-5711
James S. Hermon	745-3558
Frank G. Mielke	688-9754
Douglas R. Mills	745-3867
Wayne D. Carmony *General Manager*	745-9211

Who's who among Railbelt utilities

A member-owned cooperative, Chugach Electric Association, serves approximately 66,600 retail customers in Anchorage and provides wholesale electricity to MEA, Homer Electric Association, the city of Seward, Golden Valley Electric Association (GVEA) in Fairbanks and Chugach itself.

Owned by the Municipality of Anchorage, Anchorage Municipal Light & Power (ML&P) serves some 46,000 customers in Anchorage and recently signed a five-year contract to supply wholesale power to GVEA, in competition with Chugach.



Incorporated in 1941 as a member-owned cooperative, MEA serves 34,000 customers in the Chugiak-Eagle River area and throughout the Mat-Su Valley.

What's at stake for the IBEW

The International Brotherhood of Electrical Workers' corporate campaign at MEA is one of the ways the union is working to resist competition, said Bruce D. Scott, MEA director of co-op member and public relations.

"The IBEW is fighting to negotiate exclusive labor agreements and maintain the ones it has," Scott said. "The 5,000 or so IBEW members have had a fairly captive labor market in Alaska for decades. Now they're facing increased competition from nonunion workers, who make up the majority of Alaskans, as well as from workers in other unions."

Scott noted that the members of both MEA and Chugach Electric Association have changed their respective bylaws during the past few years to demand the utilities engage in "free, open and competitive bidding." Both sets of bylaws say that bidders may not be required to sign labor agreements with the IBEW or any other union.

"This throws open the doors to competition," he said, adding that the availability of such "open bid" work could even attract more skilled workers to Alaska.

General Manager Wayne D. Carmony said the electric industry as a whole is becoming much more competitive.

"This is forcing employers to operate more efficiently, to change the way we do business," he said. "We've always been extremely cost-conscious at MEA, but we're under pressure to become even more cost-efficient and concerned about the costs we pass on to our members than we have been in the past."

He noted that MEA has instituted three rate reductions – and no rate increases – during the past 18 months.

Scott said that IBEW, Local 1547, appears to be in a financially healthy position to wage its corporate campaign at MEA (See Page 1) and tackle competition in its labor market.

According to a federal report the IBEW filed, the local had revenues of more than $6.5 million in 1996 and assets with a fair market value of nearly $1.7 million. All but $200,000 of its revenues came from its dues-paying members. Scott said the dues represent only a fraction of the value of the contracts it negotiates for its members. The union paid out some $2.1 million in gross salaries to its union hall employees in 1996, as well as $122,000 in allowances and disbursements, says the report filed with the U.S. Department of Labor.

IBEW's 'corporate campaign'

Continued from Page 2

dismissed the fourth) – a third of the 44 complaints it filed. Scott said there is a possibility the union may drop some of the dozens of grievances it has filed in 1997. But even if the union eventually drops some of its complaints, they are extremely costly to MEA and its members, he said.

"The union may know in advance that it intends to drop a grievance at some point in the future. But the co-op has to treat every complaint as if the IBEW planned to take the issue to arbitration or file a complaint with the NLRB," he said.

"Filing grievances is one way for the IBEW to put pressure on MEA management to comply with the union's demands," he said. "Filing grievances and unfair labor practice complaints forces the co-op to hire attorneys to defend its members' interests. The IBEW's representatives then turn around and accuse management of having bad labor relations and 'wasting' funds on attorneys."

Since the IBEW began the corporate campaign, the charges against management have become part of the campaign rhetoric during the annual election for MEA directors, he said.

"Regardless of what happens Outside," Scott said, "MEA will do its best to represent the interests of our members, while preparing for the larger competitive battle with other electric utilities and private power providers."

Competition heats up

Continued from Page 3

tempts by Chugach in 1994 and 1995, as well as tens of thousands of dollars for APUC proceedings, he said.

He said the co-op also spent $179,000 in a successful effort to defeat a $5 million lawsuit filed by GVEA. The Fairbanks utility attempted to force MEA to upgrade some of its lines to allow other utilities to ship more cheap power to GVEA without providing sufficient compensation to MEA or giving adequate consideration of safety and related issues, he said.

"It is too soon to predict the shape of competition, or even if we will truly have it here in Alaska," he said. "In the Lower 48, there is more impetus for competition because major transmission lines flow from one state to another, enabling an electric utility in Georgia, for example, to purchase wholesale power from a power generation company in Florida. Alaska's power lines are all in-state."

Scott said a recent Federal Energy Regulatory Commission order directed electric utilities under its jurisdiction to allow others to use their transmission lines to provide electricity, charging them the same rates the utilities would charge themselves to provide power.

FERC also directed those utilities to "unbundle" services they provide to encourage competition, a process that ultimately could require a utility such as Chugach to break its generation, transmission, and distribution components into separate components or companies.

"Unbundling is a prerequisite if you're going to identify the costs of using a transmission or distribution line, such as Chugach is proposing to do with ML&P's lines," Scott said.

Carmony said that in its proposed 1998 budget, MEA is dividing itself on paper into a "wire company" and "service company" to better identify and control costs.

PowerLines is published monthly by Matanuska Electric Association Inc., a nonprofit electric cooperative owned and operated by the people it serves.

MEA's goal is to provide reliable power at the lowest possible cost.

Questions and suggestions regarding this publication should be addressed to Bruce D. Scott, CREC or Pamela Sadloske in Member and Public Relations, 745-3231.

To report a power outage, call 745-3231 or MEA's toll-free number, 800-478-5150.

CHUGACH ELECTRIC

CONSUMER CHOICE PHONE INFORMATION

4/3/98

Have you heard that you may soon be able to choose your electric company? Consumer choice of electric providers is happening nationwide. What that means is the electric industry is becoming deregulated, similar to telephone and the airlines.

Why Choice?
We think choice is good for consumers and many of our customers think so, too. In fact, in a recent survey in Anchorage, 92% of those surveyed said they were in favor of choosing their energy provider. Given a choice, we know many people will decide to stay where they are. Some will decide to switch. Of course, we hope you'll stay with us here at Chugach, but we do think you deserve to make that choice for yourself -- rather than having the electric company or the government require you to have service from a provider based on where you live. We think choice is good for Alaskans. Just like in other industries, competition should bring new services and make the industry more cost effective. These efficiencies will let families spend money currently used on electric service on other things. Also, it will allow Alaska providers to compete with Lower 48 electric companies. Otherwise, there could be a company from another state providing electricity to Alaskans.

Other States
California just gave consumers a choice starting April 1 and New York is close behind.

In Alaska
In Alaska, the Public Utilities Commission is currently considering the issue and there is a bill in the legislature.

DO YOU THINK CONSUMERS SHOULD HAVE A CHOICE?
If yes:
List

- We'd appreciate if we could add you to the list of consumers who do support choice. We already have a lot of other Alaskans on the list.

Bylaws
(Up until April 30)

- Also, please vote yes on the bylaws revisions on the ballot which you just received. It will give Chugach the flexibility to offer competitive energy services for you in the future.

Legislators

- Finally, we also encourage you to contact your state representatives and let them know you want choice. Most of the legislators in Juneau we have talked to support choice, but they have many important issues on the agenda a to consider. So we're asking those who want choice to please let their elected representatives know as soon as possible so the Legislature can consider the issue before they conclude in May. Since time is running short, it's important to tell them now. There's a very easy and quick way to send a message . Just call the Legislative Information Office at 258-8111 and ask to leave a Public Opinion Message that you're in favor of consumer choice for electric providers. Or you can also write or send an e-mail.

Need More Information?
Do you have access to Intemet? If so, click on the Chugach site at *www.chugachelectric. com* and you can get more information, plus a form to let us know you support choice as well as the information on how to contact your legislator. Or, we cam also fax or e-mail one to you.

Wrap Up/Information Collection
Let me get your name and address for the list of consumers who support choice.

Name
Address (including ZIP)
Are You a Chugach member? Yes No
May we use your name as a supporter of consumer choice?Yes No
(We will use names with permission for a list of those who support choice in Alaska.)

Intemal Information for List
Please include with each entry on the list:

Date/Time of Call Taken By

Thank you very much for your interest in consumer choice.

Additional Resources
Webpage
www.chugachelectric.com

Brochure
To send, fax or e mail (on I drive)

E-Mail Address at Chugach for Choice Comments
choice@chugachelectric.com

E Mail Addresses for Legislators
Senators
Senator_First Name_Last name@legis.state.ak.us
(_ = underscore)

Example: Senator_John_Smith@legis.state.ak.us

Representatives
Representative_First Name_Last Name@legis.state.ak.us

Other Resources for Consumer Service Reps or Consumers
(If transferring a customer call, please ensure someone is there to answer the phone before transferring and announce it is a *Choice* call. Thanks.)

Phil Steyer	4766
Patti Bogan	4736
Dianne Hillemeyer	4709
Gayle Knepper	4814
Debbie Debnam	4554
Priscilla Erickson	4505
Vivian Hamilton *	4344
Vivian Kinnaird *	4512

* out of the office frequently

You Choose . . .

- Your bank
- Your doctor
- Your phone company
- What about your *electric company?*

Shouldn't that be your choice too?

At Chugach . . . we think so.

Choose Your Electric Company?

We believe you have a right to choose, and most consumers feel the same. That's why we're talking about choice. And it's the reason you need to know more.

There's a lot of confusion about deregulation and competition. But deregulation is really the freedom to choose — for you and your family. Did you know that Americans from California to Maine already have the right to choose their electric provider? Don't you think Alaskans should have that right, too?

At Chugach, we think the choice should be yours and we're working hard to make that happen. You can help us by letting your elected representatives in Juneau know you want a choice. Are you a Chugach member? Then you can also vote "yes" on the upcoming bylaws revisions. We've included more details on the last page.

Chugach

Why Choose An Electric Company?

There are many benefits of choosing your electric company. Think about the benefits of deregulation in other industries: telecommunications and airlines, for example. Letting *you* make the choice has lowered prices and provided better, more competitive services. ***Alaskans already know they want a choice***: 92% of Anchorage residents surveyed in a recent study said they were in favor of choosing their electric company.

What About Other Electric Providers? What Do They Think?

In our opinion, most other electric companies in Alaska are taking an approach to protect themselves. They are trying to stop consumer choice by suggesting 'let's slow down and study it' or by talking about how choice could hurt Alaskans. But this just stands in the way of progress. Even if you like how the current system works now, we think it can be even better.

Given a choice, we know that many consumers will decide to stay with their current provider. Some will decide to switch. We believe that should be your option — not the electric company's nor the government's.

Why Now?

Sooner is better than later. Here are five reasons why:

1. There are many benefits that competition brings to consumers and businesses. Avoiding a decision or putting it off will only delay the time when you can take advantage of these benefits.

2. Many electric utilities in the Lower 48 are already offering choice to their consumers. That means that those utility companies have learned how to operate effectively in a competitive market — providing the services their consumers want. Those companies that excel at competition are now moving into other states to offer choice to the residents in those areas.

   Alaskan electric providers will also become more efficient as a result of competition. We think Alaska's utilities should learn how to compete with Lower 48 companies now. Otherwise, there may be a company from another state providing energy to Alaskans.

3. By offering choice and learning to compete, Alaska's utilities can continue to provide electric services. If the state's utilities are not competitive, these services will be provided by non-Alaskan companies that will move jobs outside.

4. Choice makes the entire industry more effective and able to offer more benefits to consumers. The efficiencies that result from competition will allow Alaskan businesses and families to spend money currently used for electric service on other things — supporting the local economy and increasing the standard of living.

5. Finally, as 92% of consumers already know, time and money is being wasted on *debating* about whether choice is good. Don't you agree that it's better just to get on with it — like other states — and focus on how to make choice work best for Alaskans?

What is Being Done So I Can Choose?

At Chugach, we've been working for over a year to make it possible for you to choose your electric company. Here are some of the things we've done.

Alaska Public Utilities Commission
Alaska statutes do not prohibit competition and choice in the electric industry, a fact many Alaskans don't know. That means you already have the right to choose. Before choice becomes a reality, however, the Commission must determine access charges so that electricity can be moved by one electric company across the lines owned by another company. Chugach has asked for this access and the Commission is considering the request.

Legislative Action
Many meetings with state legislators have been held to advocate consumer choice. Most lawmakers have expressed support. But they also have many other important issues to be discussed this year which could delay consideration of electric choice unless they know that their constituents want action before the session is over in May.

Bylaws Revisions
At Chugach, we know you will expect us to provide the best, most competitive energy services for you in the future. The bylaws amendments and corresponding revisions to the articles of incorporation in your upcoming ballot will give Chugach the flexibility to offer these services to meet your needs. The Board of Directors and the Bylaws Committee, both composed of Chugach members, strongly support these changes.

What Can I Do To Help?

There are several important steps you can take to help support consumer choice.

1. ***If you are a Chugach member, vote "yes" on the bylaws changes*** on the ballot, which you will receive soon by mail.

2. For all consumers: ***Let your elected representatives in Juneau know you want to choose your electric company.*** Because time is running short in this year's legislative session, it is important to tell them NOW.

You can contact your legislator in several different ways:

By phone or mail
Call the legislative information office in Anchorage at (907) 258-8111 or the office in your community and ask to leave a public opinion message. You can also call or write to the senator and representatives from your area. Their numbers are in the blue pages in the telephone directory or available at the legislative information office. Be sure to tell your legislators you want choice and you want them to consider it during this legislative session.

By e-mail
You can also e-mail your representatives.

Senators

Senator_first name_lastname@legis.state.ak.us

Example: Senator_John_Smith@legis.state.ak.us

Representatives

Representative_first name_lastname@legis.state.ak.us

Example: Representative_Mary_Smith@legis.state.ak.us

We'd also like to know what you think about choice. You can send us a copy of your legislative correspondence or other comments to

Chugach Electric
5601 Minnesota Drive
Anchorage, AK 99519-64300

You can also complete and return the short form below or send an e-mail to
choice@chugachelectric.com

Not Yet a Chugach Member?

If you're not a Chugach member, but would like to choose your electric company, you can help by contacting your legislators and letting them know you support choice.

Are you interested in receiving energy from Chugach for your home or business when it is available? Complete and return the information below, or you can call or send an e-mail. We'll keep you updated on progress, and let you know when you can receive power from Chugach.

Thank you for your support of this important choice for Alaskans.

Choice.
It's the
Chugach
difference

I'm Interested in Choice

_____ Yes. I'm interested in receiving energy from Chugach when it is available. Keep me updated on progress.

_____ I'm already a Chugach member. I support Alaskan's right to choose their electric provider.

Name ______________________________ *

Address ______________________________

Business Name (if applicable) ______________________________

City ______________________________ Zip ______________

Telephone: Day ______________________ Evening ______________________

Fax ______________ E-mail address ______________________________

* **May we use your name as a supporter of consumer choice? _____ Yes _____ No**

Return to: Chugach Electric, 5601 Minnesota Drive, Anchorage, AK 99519-64300 or fax to (907) 562-0027

ATTITUDES TOWARDS COMPETITION IN THE ELECTRIC INDUSTRY

February 1998

Chugach Electric

ATTITUDES TOWARDS COMPETITION IN THE ELECTRIC INDUSTRY

IVAN MOORE RESEARCH
TEL: 278-4600

Hello, my name is _________ and I'm calling for Ivan Moore Research, an Anchorage marketing research firm. We are conducting an Anchorage area public opinion survey concerning your household's utility services that should take no more than a few minutes. Your opinions are important to us, and we'd really appreciate your participation. (PAUSE)

S1. Is this a residential telephone?

IF "YES", CONTINUE...
IF "NO", TERMINATE...

S2. I need to speak with the person in your household who pays your utility bills, or who makes decisions about utility services. Would that be you?

IF "YES", CONTINUE...
IF "NO", ASK FOR PERSON...

S3. Do you pay your own electric bill or do you have a landlord that pays it for you?

IF "YES", THEN PROCEED...
IF "DON'T PAY ELECTRIC BILL/LANDLORD PAYS", THEN TERMINATE...

1. Which company provides your household with its electric service, Chugach Electric or ML+P?

	FREQUENCY	PERCENT
CHUGACH	1016	72.6%
ML+P	384	27.4%

OK, across the country, efforts are underway to allow individual customers to choose their electric provider. In Alaska, both the Legislature and Public Utilities Commission are now reviewing this issue. I'd like to ask you a few questions to see how you feel about this topic.

2. First, do you think that customers should have the right to choose which company they buy their electric power from?

	FREQUENCY	PERCENT
YES	1272	90.9%
NO	76	5.4%
DON'T KNOW	52	3.7%

3. Do you think competition in the electric industry would result in lower electric prices?

	FREQUENCY	PERCENT
YES	1032	73.7%
NO	233	16.7%
DON'T KNOW	135	9.6%

4. Do you think competition in the electric industry would result in better services?

	FREQUENCY	PERCENT
YES	1017	72.7%
NO	247	17.7%
DON'T KNOW	135	9.7%

5. If you could get better services or lower prices from a different power provider, would you want to be able to switch?

	FREQUENCY	PERCENT
YES	1276	91.1%
NO	80	5.7%
DON'T KNOW	44	3.2%

6. If a legislator were to vote in favor of allowing customers to choose their power supplier, would that make you feel more positive or more negative toward that legislator?

	FREQUENCY	PERCENT
MORE POSITIVE	904	64.6%
MORE NEGATIVE	71	5.1%
NO DIFFERENCE	425	30.3%

The following questions are for statistical purposes only.

7. In what year were you born?

	FREQUENCY	PERCENT
18-39	445	31.8%
40-47	332	23.7%
48-57	327	23.4%
58+	296	21.2%

(Mean = 47.7 years)
(Median = 45.8 years)

8. Of the people currently living in your household, how many are children or adolescents aged 18 or under?

	FREQUENCY	PERCENT
None	766	54.7%
One	222	15.9%
Two	273	19.5%
Three or more	139	9.9%

(Mean = 0.89 children)

9. Are you married or single?

	FREQUENCY	PERCENT
MARRIED	1079	77.1%
SINGLE	321	22.9%

10. GENDER...

	FREQUENCY	PERCENT
MALE	700	50.0%
FEMALE	700	50.0%

Thankyou very much for your help. Goodbye.

THE FOLLOWING VARIABLE WAS RECORDED FROM THE VOTER LIST:

	FREQUENCY	PERCENT
House District 10	100	7.1%
House District 11	100	7.1%
House District 12	100	7.1%
House District 13	100	7.1%
House District 14	100	7.1%
House District 15	100	7.1%
House District 16	100	7.1%
House District 17	100	7.1%
House District 18	100	7.1%
House District 19	100	7.1%
House District 20	100	7.1%
House District 21	100	7.1%
House District 22	100	7.1%
House District 23	100	7.1%

THE FOLLOWING VARIABLE WAS COMPUTED FROM THE PREVIOUS VARIABLE:

	FREQUENCY	PERCENT
Senate District E	100	7.1%
Senate District F	200	14.3%
Senate District G	200	14.3%
Senate District H	200	14.3%
Senate District I	200	14.3%
Senate District J	200	14.3%
Senate District K	200	14.3%
Senate District L	100	7.1%

THE FOLLOWING VARIABLE WAS CALCULATED FROM THE GENDER AND MARITAL STATUS VARIABLES:

	FREQUENCY	PERCENT
Married Males	552	39.4%
Married Females	528	37.7%
Single Males	148	10.6%
Single Females	172	12.3%

THE FOLLOWING VARIABLE WAS CALCULATED FROM THE AGE, MARITAL STATUS AND CHILDREN VARIABLES:

	FREQUENCY	PERCENT
Young Singles	73	5.2%
Adult Singles	167	11.9%
Single Parent	80	5.7%
Young Couple	71	5.1%
Mature Couples	454	32.4%
Young Family	261	18.7%
Mature Family	292	20.9%

	RIGHT TO CHOOSE?			Total
	Yes	No	Not sure	Col %
	Row %	Row %	Row %	
ELECTRIC PROVIDER:				
Chugach	91.3%	5.2%	3.5%	72.6%
ML+P	89.8%	6.1%	4.1%	27.4%
LOWER PRICES?				
Yes	96.3%	1.6%	2.1%	73.7%
No	68.7%	24.4%	6.9%	16.7%
Not sure	87.5%	2.2%	10.3%	9.6%
BETTER SERVICES?				
Yes	97.7%	1.2%	1.1%	72.7%
No	69.1%	22.8%	8.0%	17.7%
Not sure	79.2%	5.2%	15.5%	9.7%
WANT TO BE ABLE TO SWITCH?				
Yes	94.3%	3.3%	2.4%	91.1%
No	47.6%	36.5%	15.9%	5.7%
Not sure	70.0%	10.8%	19.2%	3.2%
EFFECT ON LEGISLATOR:				
More positive	98.9%	1.1%		64.6%
More negative	35.4%	52.7%	11.9%	5.1%
No difference	83.2%	6.7%	10.2%	30.3%
AGE OF RESPONDENT:				
18-39	96.9%	1.7%	1.4%	31.8%
40-47	91.4%	4.3%	4.4%	23.7%
48-57	87.5%	7.8%	4.7%	23.4%
58+	85.0%	9.7%	5.3%	21.2%
NUMBER OF CHILDREN:				
None	88.3%	6.6%	5.1%	54.7%
One	93.4%	3.8%	2.7%	15.9%
Two	92.2%	5.7%	2.1%	19.5%
Three or more	98.4%	.8%	.8%	9.9%
MARITAL STATUS:				
Married	90.6%	5.9%	3.5%	77.1%
Single	91.7%	4.0%	4.3%	22.9%
GENDER OF RESPONDENT:				
Male	91.2%	6.5%	2.3%	50.0%
Female	90.6%	4.3%	5.1%	50.0%
Total	90.9%	5.4%	3.7%	100.0%

	RIGHT TO CHOOSE?			Total
	Yes	No	Not sure	Col %
	Row %	Row %	Row %	
MARITAL STATUS BY GENDER:				
Married Males	91.0%	7.1%	1.9%	39.4%
Married Females	90.2%	4.6%	5.2%	37.7%
Single Males	91.8%	4.5%	3.8%	10.6%
Single Females	91.6%	3.6%	4.8%	12.3%
FAMILY STATUS:				
Young Single	95.8%	1.5%	2.8%	5.2%
Adult Single	88.5%	4.5%	7.0%	11.9%
Single Parent	94.7%	5.3%		5.7%
Young Couple	100.0%			5.1%
Mature Couple	85.2%	9.3%	5.5%	32.4%
Young Family	96.0%	2.5%	1.6%	18.7%
Mature Family	92.1%	4.9%	3.0%	20.9%
LEGISLATIVE HOUSE DISTRICT:				
House District 10	84.1%	8.9%	7.0%	7.1%
House District 11	96.3%	3.7%		7.1%
House District 12	93.9%	2.3%	3.8%	7.1%
House District 13	85.3%	9.7%	5.0%	7.1%
House District 14	95.7%	2.1%	2.1%	7.1%
House District 15	92.8%	3.0%	4.2%	7.1%
House District 16	92.2%	5.9%	1.9%	7.1%
House District 17	92.9%	4.4%	2.7%	7.1%
House District 18	88.0%	7.5%	4.5%	7.1%
House District 19	90.7%	2.9%	6.4%	7.1%
House District 20	86.5%	7.2%	6.4%	7.1%
House District 21	91.0%	5.2%	3.8%	7.1%
House District 22	91.2%	4.9%	3.8%	7.1%
House District 23	91.7%	8.3%		7.1%
LEGISLATIVE SENATE DISTRICT:				
Senate District E	84.1%	8.9%	7.0%	7.1%
Senate District F	95.1%	3.0%	1.9%	14.3%
Senate District G	90.5%	5.9%	3.6%	14.3%
Senate District H	92.5%	4.4%	3.1%	14.3%
Senate District I	90.5%	6.0%	3.6%	14.3%
Senate District J	88.6%	5.0%	6.4%	14.3%
Senate District K	91.1%	5.1%	3.8%	14.3%
Senate District L	91.7%	8.3%		7.1%
Total	90.9%	5.4%	3.7%	100.0%

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Local 1547

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KNUTE ANDERSON
PRESIDENT

IBEW 50 YEARS Growing with Alaska

Testimony of Gary Brooks
HB 487

Alaska Electrical Consumer's Bill of Rights

Good Afternoon, and thank you Mr. Chairman and Committee members for this opportunity to comment on this important legislation.

The IBEW, on behalf of the over one thousand members and their families who make their living in the utility industry in Alaska, and on behalf of our five thousands members who are consumers of electricity, views this proposed legislation as positive for consumers and our members who work in the industry.

Throughout this industry in the lower forty-eight states, we, the IBEW workforce have been hit hard by rapid, radical restructuring of the electric power provider industry, only to later see these impacts reversed. In California, years before any actual restructuring policy, thousands of employees were laid off, in the name of competition, downsizing and preparedness for the eventuality of restructuring. Then powerful storms hit, knocking out power systems statewide and the utility industry found itself completely unprepared to respond. In parts of the state, consumers went for more than a month with electricity. In Alaska, this is simply a risk we cannot afford to take. California has the luxury of a milder climate and an interconnected power grid.

Adding to the personal pain of the workers who were downsized out of jobs, who saw lifetime careers eliminated, and were forced to relocate to other parts of the country was the human toll on their families. College educations were postponed, families were disrupted -- only to be reversed by the state utilities commission who reacted to public complaints and ordered the utilities to re-man themselves. In the meantime, apprenticeship programs were shut down, workers moved away and even today, three years later, an open call for Power Lineman remains on our bulletin board, offering to pay moving expenses and signing bonuses for locating back in California.

We hope to learn from this lesson, and the lesson of the Northeast who went through much the same thing after the disastrous ice storms of last winter.

What we see this legislation doing, is calming the process in anticipation of deregulation, allowing all the stakeholders to plan and prepare for whatever change in the market is eventually adopted, without compromising reliability safety or the working lives of hundreds of Alaskans.

We are not opposed to restructuring of the electric utility market. What we ask is that any restructuring answer basic fundamental questions about universal access, job safety, cherry picking, rate ramping, societal impacts, stranded costs, cost to consumers, reliability, tax revenues, mega-mergers and market dominance and other issues. We are hopeful that the final policy will adequately address these issue, but in the meantime, we urge you to consider enacting this legislation so that good public policy can be enacted without the hysteria, hoopla and hyperbole that we may otherwise see and have already witnessed in other parts of the country.