

HB

178

Alaska State Legislature

House of Representatives



Official Business

State Capitol
Juneau, AK. 99801-1182

COMMITTEE ON COMMUNITY AND REGIONAL AFFAIRS

REPRESENTATIVE ANDREW HALCRO, REPRESENTATIVE JOHN HARRIS, CO-CHAIRMEN

STATE CAPITOL, ROOM 418

JUNEAU, ALASKA 99801-1182

(907) 465-3882

AGENDA

APRIL 15, 1999

1. Call Meeting To Order
2. Call Roll
 - a. Morgan
 - b. Murkowski
 - c. Joule
 - d. Kookesh
 - e. Dyson
 - f. Harris
 - g. Halcro
3. HB 178 - Deregulation of Garbage Utilities
 - a. Representative Pete Kott - Sponsor
(Staff - Pat Harman)
 - b. Public Testimony
4. Any announcements from other members of the Committee
5. Motion to Adjourn

Sec. 1.

(b)

(4) the property interests of private carriers that already provide solid waste collection and disposal service under a certificate of public convenience and necessity issued by the Alaska Public Utilities Commission should be protected by requiring municipalities to either grant [~~exclusiv~~] franchises to these carriers for a period of time or purchase the certificate, equipment, and facilities at fair market value.

Sec. 2.

(e)

(1) grant an exclusive franchise to the certificated utility to continue to provide the service for a term of at least five years from the later of the date that the franchise was granted or January 1, 2000; the franchise must contain an agreement that will allow the carrier to charge customers at the rates contained in the utility's tariff in effect on June 1, 1999, adjusted for inflation and any extraordinary increases in operating expenses; the term of the agreement and the rates charged are subject to amendment by agreement of the municipality and the franchisee; or

(2) Grant competing franchises. If the municipality grants more than one competing franchise, competitors' rates are price deregulated. One of the competing franchises holders must be the certificated utility that provides residential or commercial solid waste collection and disposal service under a certificate issued by the Alaska Public Utilities Commission in the service area in the municipality; or

~~(2)~~ (3) purchase, at fair market value, the utility's certificate, equipment, and facilities that are related to providing service in the municipality.

(g) If more than one public utility provides residential or commercial solid waste collection and disposal service under certificates issued by the Alaska Public Utilities Commission in a service area in a municipality, the municipality may establish an appropriate system of solid waste collection and disposal service as provided in (e) of this section. However, if a municipality deprives a public utility holding a certificate to provide service in the municipality of the right to provide any of its existing services [within] in any part of its existing service areas within the municipal boundaries between the effective date of this subsection and January 1, 2005, the municipality shall purchase at fair market value the portion of the utility's certificate, equipment, and facilities that are related to the services that the municipality will not allow the public utility to provide [providing service in the municipality].

Delete Section 2 (j) (2) Renumber the remaining. (Deletes definition of fair market vale)

New Text Underlined [DELETED TEXT BRACKETED]

Sec. 1.

pg 2, line 24

(b)

(4) the property interests of private carriers that already provide solid waste collection and disposal service under a certificate of public convenience and necessity issued by the Alaska Public Utilities Commission should be protected by requiring municipalities to either grant [exclusive] franchises to these carriers for a period of time or purchase the certificate, equipment, and facilities at fair market value.

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pg 3, line 18

(2) grant competing franchises. If the municipality grants more than one competing franchise, competitors' rates are price deregulated. One of the competing franchises holders must be the certificated utility that provides residential or commercial solid waste collection and disposal service under a certificate issued by the Alaska Public Utilities Commission in the service area in the municipality; or

[(2)] (3) purchase, at fair market value, the utility's certificate, equipment, and facilities that are related to providing service in the municipality.

*pg 3, line 30
pg 4, lines 1 & 2*

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New Text Underlined [DELETED TEXT BRACKETED]

Alaska Telephone Association

201 E. 56th, Suite 114
Anchorage, AK 99518
(907) 563-4000
FAX (907) 562-3776

David Fauske
President

James Rowe
Executive Director

April 14, 1999

Honorable Andrew Halcro, Co-Chair
Honorable John Harris, Co-Chair
House Community and Regional Affairs Committee
Alaska State Legislature
Juneau, Alaska 99801

RE: HB 178 - Removing waste management from regulation by the APUC

Dear Representatives Halcro and Harris:

The Alaska Telephone Association has reviewed HB 178, an act relating to removing solid waste collection from regulation by the APUC. Although having no particular interest in waste management, the association is enthusiastic with the thought that the workload of the APUC might be reduced by the removal of waste management from its agenda.

Since passage of The Telecommunications Act of 1996 the commission has seen its telecommunications workload increase tremendously. What was touted as deregulatory federal legislation has initiated a flurry of activity at the state level with access reform, state universal service funding, rate rebalancing, tariffs for new services, mergers, entry requests for local exchange competition and intrastate competition, new entries into the private payphone market, and service to rural health care providers. Certainly there are other issues and none of the pre-1996 telecommunications issues have gone away.

The APUC has nine new positions approved and desperately needed, but unfilled due to the state hiring freeze. Remember that the APUC is funded by a regulatory cost charge, not through the general fund. Though it might seem, on the surface, to be self-serving, the ATA would be happy to see the commission have more time to devote to telecommunications matters. The public would benefit by a speedier response time. The transfer of waste management regulation from state to the local level would allow the commission to focus more of its energy on telecommunications dockets.

I'd be happy to discuss this issue with you further.

Sincerely,



Jim Rowe

**VALLEY REFUSE, INC.
PO BOX 879109
WASILLA, ALASKA 99687
(907) 892-6606**

April 15, 1999

Representative Andrew Halcro, Co-Chair
Representative John Harris, Co-Chair
House Community & Regional Affairs Committee
State Capital, Juneau, Alaska 99811

RE: House Bill 178, 4/15/99 Hearing

Representatives Halcro and Harris, Fellow Committee Members;

I appreciated the opportunity, presented to me this morning, to express my views and opinions on HB 178. I would like to clarify some points made by the final participant, Heather Graham, outside council for Waste Management.

Ms. Graham alluded to the support for deregulation contained in APUC's Legislative Audit. I would like to point out that the most recent audit stating that position was in 1989. The 1993 and 1999 APUC Legislative Audit made no reference to refuse regulation.

I have enclosed four pages excerpted from the 1989 audit and the 1985 audit, the dates clearly marked at the top of the first page of each excerpt. As was brought out in today's hearing, the market in 1999 in no way resembles the 1989 or 1985 market.

Please note the marked line under Recommendation Number 1 of the 1985 audit. This line states "economic theory in transportation regulation promotes restricting competition to encourage capital investment in a growing industry, not eliminating competition as is the theory in capital intensive, fixed utility regulation." By virtue of its issuance of multiple certificates and overlapping service areas, while retaining its power of rate review, the APUC has followed this concept. As I stated earlier today, **COMPETITION ALREADY EXISTS.**

Ms. Graham also claimed that Waste Management's bill (her own words) does not seek to remove the company from the jurisdiction of the state attorney general in restriction of trade issues. I have no legal training, but it would seem to me that if jurisdiction is not clearly and expressly given by state statute, that jurisdiction does not exist. I have sent a letter to the state attorney general asking for his opinion on this.

In regards to the assumption that rates approved by the APUC are just and reasonable, that is a true statement. The APUC is entrusted with the responsibility of ensuring that rates, classifications, regulations, services and facilities of a public utility are indeed just and reasonable. However, at the time the APUC approved the currently tariffed rates, the makeup of the individual utilities was greatly different.

The Reader's Digest version of basic utility rate making theory states that when expenses are higher, higher rates can be justified. When the currently tariffed rates were approved, each utility had its own general manager, bookkeeping and office staff, costs of maintaining individual offices, and administrative costs such as billing. With Waste Management's ability to consolidate all of these offices and associated functions, thereby drastically reducing the associated expenses, their profit margin goes up tremendously. Given the lower expenses enjoyed by consolidated operations, are the original tariffed rates still justified?

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I also have some concerns with the authority this bill would grant to municipalities and local governments. Without oversight by another agency, the balance of power could swing greatly in favor of city or local government.

If a municipality decides to provide service themselves, this bill would allow for revenue enhancements through cross subsidization of refuse rates. In other words, a revenue shortfall in one area of government could be made up by increasing refuse rates. Is this fair to citizens, and what recourse would citizens have? To whom could they complain?

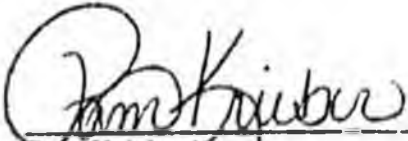
Currently, municipalities must hold an APUC certificate for EACH utility they operate, and be subject to APUC scrutiny in their rates. Due to rate review by a neutral agency, the APUC, cross subsidization is not possible. Allowing one governmental entity to administer franchises, self-regulate, and set rates (through agreement with a franchisee, or after five years, at their own discretion) is clearly a case of the coon dog guarding the chicken coop.

Another problem with this bill is it could put municipalities and local governments in competition with private enterprise. Should municipalities choose to provide their own refuse service, they can obtain financing for a lesser rate than a private individual or company by virtue of their access to bond money. This gives them an unfair advantage over small operators who must seek financing to expand their operations.

I was asked this morning if I knew what the Mat-Su Borough thought of this bill. I responded that I could not, and would not, speak for the Borough. I discovered this afternoon that a statement from the Mat-Su Borough Manager, Mike Scott, was sent to an incorrect FAX number and did not reach me as intended. I have received that FAX and forward it on to you. As you can see, the position of Mr. Scott is that the borough does not support an additional regulatory burden and sees no reason for the legislation (HB 178) at this time.

I want to thank the committee members for reviewing this bill with open minds and looking beyond the smoke and mirrors supplied by the true sponsors of this bill. Representatives, if I thought this bill was in the best interest of all Alaskans I would support it. I know in my heart that is not the case.

Sincerely,


Pam Krieger

facsimile transmittal

MSB	MATANUSKA-SUSITNA BOROUGH
	Borough Manager's Office 350 E. Dahlia Avenue, Palmer, Alaska 99645

To: Pam Krieber	Fax: 892-6606 745-6070
From: Kathy Wolf, Administrative Secretary	Date: 03/31/99 <i>faxed 2:04 PM</i>
Phone: (907)745-9689	Fax: (907)745-9669
Re: Your fax dated 3/22/99	Pages: coversheet only

This is written in response to your fax of 3/22/99 addressed to the borough attorney, Michael Gatti. The borough manager, Michael Scott, has requested I advise you that we do not support additional regulatory burden on the borough and don't see any reason for the legislation at this time.

Thank you.

Excerpt from 1989 Legislative
Audit of APUC, 08-1354-89-R

Further, overriding all the above considerations, the public interest being addressed must represent a substantial portion of the State's population; unique situations should be addressed at the local level.

While we acknowledge that not everyone will subscribe to this theory of regulation, we believe it to be fundamentally sound. Utilizing these principles, we analyzed APUC's jurisdiction and determined that governmental control in the following areas was unwarranted.

- A. Alaska Statute 42.05 should be amended to cease certification and regulation of companies furnishing collection and disposal service of garbage, refuse, trash, or other waste material.

Whether an individual considers refuse collection to be an essential service for modern living depends primarily on where they reside in the State. However, even essential services should generally not be regulated unless they are natural monopolies. For example, we do not believe that essentials such as food and clothing should be regulated.

Refuse collection, as with most enterprises, has certain economies of scale that affect its operations. However, these economies of scale are not such that one company can obviously provide the area-wide services for a significantly lower total cost than could several competitors. Relative to traditionally-regulated industries, refuse collection requires less capital, and thus they have a higher percentage of variable costs and less significant economies of scale. Further, the competition within service areas in several locations defeats the natural monopoly premise in the larger markets. We believe that a natural monopoly could occur in this industry in only the very small markets and that these do not warrant regulation due to the cost to benefit relationship.

Therefore, refuse collection should not be regulated unless there are overwhelming negative side effects present under competition in this industry. We acknowledge the possible negative effects of increased truck traffic, refuse pickup scheduled throughout the week in individual neighborhoods, and consistency problems as companies adjust to the economic realities of competition. However, these problems did not overwhelm the residents of the Mat-Su Borough as a result of the residential competition which began in 1985. Further, the Alaska Municipal League has adopted a resolution asking that refuse collection be de-regulated.

In response to our previous sunset audit recommendations to deregulate this industry, APUC expressed concern over the health and sanitation problems that could occur if these companies were removed from their jurisdiction. These health and sanitation issues are presently under the jurisdiction of local communities and also the Department of Environmental Conservation.

→ There are presently forty-three certificated refuse companies; nine of these are economically regulated under AS 42.05.711, as they have annual gross revenues of greater than \$200,000. Although APUC has no time sheet data upon which to estimate the cost to regulate these forty-three companies, the commission states in their FY 88 Annual Report that the time dedicated to refuse is excessive relative to agency resources and the resultant public benefit, and they recommend that this industry be deregulated.

B. Alaska Statute 42.05 should be amended to cease certification and regulation of radio common carriers.

There are currently ten certificated radio common carriers in Alaska. Radio Common Carrier (RCC) services include radio paging, mobile radiotelephone, and improved mobile telephone public utility services.

The commission opened an investigative docket on the subject of deregulation of RCCs in 1981 which resulted in a 1982 decision to cease economic regulation of this industry. The commission cited as justification, among other things, that RCC service was not an essential service. As RCC service is not essential to the average Alaskan, we concur with the commission that it should not be economically regulated. We further contend that services that are not essential should not be certificated.

In that 1982 decision, APUC stated that the certification process should be continued to monitor the interconnection to the telecommunications network and to prevent cross-subsidization of non-monopoly RCC services by monopoly local exchange telephone services. However, both these concerns can be monitored through the continuing processes of certification and economic regulation of local exchange services.

Cellular phones are relatively new to Alaska, and APUC has not yet decided if or how they should be regulated. We understand these phones provide a higher sound quality at a higher cost than conventional radio phones and over a shorter range; as such, they may be even less of an essential service to the average Alaskan.

We recommend that in densely populated regions where a potential public health hazard would occur from the interruption or cessation of refuse service, that local governments provide the necessary regulation to mitigate those problems. That authority is already provided at AS 29.48.033, but is currently superseded by the APUC.

Recommendation No. 2

Alaska Statute 42.05 should be amended to cease certification and regulation of radio common carriers.

There are currently seven certificated radio common carriers in Alaska. Radio common carriers (RCCs) are defined at 3 AAC 48.820(39) as a radio paging, mobile radiotelephone, or improved mobile telephone public utility services.

Regulation of radio common carriers has evolved substantially since the certification of the first RCC service in Alaska in 1965. The first evolutionary step came in 1976 when the Commission allowed competition between two radio common carriers in Fairbanks. During that hearing the following testimony was given by the area sales manager, Radio Common Carrier Market, Motorola Communications.

It has been my experience that competition per se in the area of radio communications has been beneficial, both to the public and to the common carriers themselves. Specifically, competition tends to expand the services offered to the public, and increases the public awareness of the radio common carrier paging services. In many cases, reduction of costs to the public in the form of lower service rates is as a result of competitive influences.

The Commission opened an investigative docket on the subject of deregulation of radio common carriers in 1981 which resulted in a 1982 decision to cease economic regulation in the industry. Cited by the Commission as major justification was:

- (1) RCC service is not an essential or necessary service.
- (2) Customer needs may be satisfied by competing firms since there is no physical connection between company and consumer.
- (3) A sufficient number of firms offer various types of RCC service and, because of the availability of close substitutes, elasticity of demand is high, thereby preventing unreasonable rates.

Except, 1985 Legislative Audit
of APUC 08-4230-86-5

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

Alaska Statute 42.05 should be amended to cease certification and regulation of those utilities furnishing collection and disposal service of garbage, refuse, trash, and other waste material.

Responsibility for certificating and regulating utilities furnishing collection and disposal service of garbage, refuse, trash, and other waste material was added to the Alaska Public Utilities Commission Act by a 1973 amendment. Prior to that time those utilities were under the jurisdiction of the Alaska Transportation Commission. There are currently 34 certificated refuse utilities, of which nine are economically regulated.

The recommendation to deregulate refuse utilities was made in a prior APUC sunset audit report dated August 1, 1979 with the following economic justification. The refuse industry is not capital intensive as are the fixed utility industries regulated by the APUC. Net plant investment per customer is significantly lower than for traditional fixed utilities. The majority of capital is mobile and there is no permanent physical connection of customer to utility. Refuse collection and disposal, therefore, more closely resembles a transportation service than a fixed utility. Economic theory in transportation regulation promotes restricting competition to encourage capital investment in a growing industry, not eliminating competition as is the theory in capital intensive, fixed utility regulation.

That economic justification is still valid. Additionally, several events have occurred since 1979 which further strengthen the argument for State deregulation at this time. The first event is the initiation of an investigation in 1983 by the APUC to determine whether public utility refuse collection services in the Matanuska-Susitna Borough should be deregulated. Commission staff supported the concept, but the Commission has been unable to reach a consensus of opinion on the question. This has resulted in no action being taken on a number of applications for certificates to provide service within the Matanuska-Susitna Borough during this time.

The second event, of much greater significance, was the termination of the Alaska Transportation Commission by public ballot in 1984. This resulted in de facto deregulation of all other transportation services in the State of Alaska.

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April 9, 1999

House Community and Regional Affairs Committee
Representative Andrew Halcro, Co-Chair
Alaska State Legislature, State Capital
Juneau, Alaska 99801-1182

RE: House Bill 178

Dear Representative Halcro:

I am strongly opposed to House Bill 178, an act which seeks to remove solid waste collection and disposal service from regulation by the Alaska Public Utilities Commission.

Conceptually, deregulation is generally good for the government and public on both a nationwide and statewide level. However, in the specific case of garbage hauling in the state of Alaska, 95% of the hauling companies in the state are owned by ONE COMPANY, USA Waste of Alaska, a wholly owned subsidiary of Waste Management, Inc.

Waste Management is the largest waste hauling conglomerate in the world. They have become a strong presence in Alaska in the last two years, beginning their takeover by purchasing Anchorage Refuse and Eagle River Refuse. They have purchased Peninsula Sanitation on the Kenai Peninsula, Wasilla Refuse in the Mat-Su Borough, Star Sanitation and Drake Sanitation in Fairbanks, Arrow Refuse in Juneau, Jason Enterprises in Seward, and operations in Kodiak, Dutch Harbor, and Ketchikan. Given that they own operations all over the state, and in some areas are the ONLY company in the area, it would definitely be in their best interest to remove state-wide oversight.

Waste Management has successfully achieved vertical integration in many areas of the country by purchasing landfills in addition to hauling companies. When they own everything from the ground up in the State of Alaska, competition will be effectively stifled. This legislation will make it easier for them to start their own landfill, requiring the approval of only one person.

If this happens, the Mat-Su Borough and Anchorage Municipal Landfills will each see a drastic reduction in revenue. Waste Management is the largest volume producer in the South Central Alaska region. As they divert their product to their own landfill, the revenue stream at the Anchorage and Mat-Su landfills will be reduced. Expenses are relatively fixed and will not be reduced at the same rate. Tipping fees for the other landfill users, both private and commercial, will increase to make up the deficit.

Waste Management may allow other haulers, if any are left in existence, to use their landfills at a premium price. Either way, others will be forced to charge higher rates to their customers in order to pay the higher landfill tipping fees. Please see enclosed news clipping from Refuse News dated March 1999 relating to recent landfill tipping fee increases in the Lower 48.

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HB 178 proposes that municipalities and boroughs bear the burden of local control by either providing the collection and disposal service directly or by granting franchises to private carriers. There are several repercussions to this action which should be considered.

1. If a municipality or borough assumes the role of refuse hauler, this puts the government in direct competition with private enterprise. Higher taxes will be assessed to cover the costs.
2. A greater financial burden is placed on the municipality or borough by requiring the local government provide additional services, or APUC-like regulation, and most certainly an added level of administration to accommodate these additional responsibilities.
3. HB 178 proposes a "franchise fee" of not more than 2.5% of the gross revenue to cover these additional costs. However, there are absolutely no guarantees that 2.5% will adequately fund this program. The fee would be passed on to the customers, who would end up paying more money for exactly the same service. You may call it a "user fee" or a "franchise fee", but this fee is nothing more than a thinly-veiled tax.
4. Should the borough or municipality choose to franchise to only one entity, Waste Management would definitely have the advantage in negotiating contracts due to their greater financial assets. They would certainly benefit by having a large residential and commercial customer base locked into their revenue stream.

Local governments are currently strapped for funds to pay for necessary functions such as schools, roads and infrastructure improvements. The burden of providing additional governmental services, or APUC-like regulation, or an added level of administration could be cost prohibitive even with the revenue sources included in this legislation. It would definitely be in Waste Management's best interest if local governments should choose to not regulate refuse service at all. With no state or local regulation, Waste Management would have free rein to lower rates to a level which would squeeze out the few remaining competitors, then charge fees that would provide the greatest profit margin. They certainly have the resources to absorb any interim losses.

Their representatives will state that the industry will "self-correct". Unfair or exorbitantly high pricing will allow competitors to come into the market. However, garbage companies are not easy to start from scratch. They require a large investment in equipment, working capital and time to develop a viable customer list large enough to pay the bills. This is the reason major companies prefer to buy smaller ones.

As it stands now, Waste Management has NO major competitors in the State of Alaska. Other nationwide competitors are not inclined to invest capital resources to come into a limited, remote market where one huge company has already locked up the entire state. At this point in time, given the presence of only one major operator in Alaska, state-wide oversight of this industry is critical!

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Continued state-wide regulation through the Alaska Public Utilities Commission will assure that the best interests of all people of the State of Alaska are served. The Commission has historically supported competition in refuse service. Where geographically appropriate, the Commission has taken steps to open areas of the state to competition. They have done so by issuing overlapping certificates, while retaining rate-setting oversight to ensure fairness among competitors.

We own Valley Refuse, Inc., one of the last privately owned refuse hauling companies in the state. Valley Refuse, Inc. is a small operation, but is the largest residential hauler in the Mat-Su Borough. We provide a necessary service to over 1,500 residences. Our rates are fair and competitive. By providing competition in the residential refuse market in the Mat-Su Borough, we have made refuse service affordable for all households.

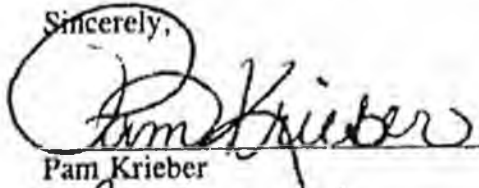
Wasilla Refuse (Waste Management), our competitor in the Mat-Su Valley, does not have even 250 residential customers. The profit in residential refuse collection is not as high, so they prefer to concentrate on areas of higher margins. They have offered to sell us their residential collections IF we sold them our container collections. We are not interested in any such deals.

We are active members of our local community. Our activities include serving on the board of United Way, membership in the local Rotary club, participation in the Chamber of Commerce, charter membership in the local community recycling movement and participation in local church programs. We have collected used clothing donations from our customers and have distributed them to local assistance agencies and to the Russian relief movement. We have assisted in spring community clean-ups for years. We support our local economy by purchasing our fuel, supplies, containers, and equipment from local vendors. We donate blood when the need arises.

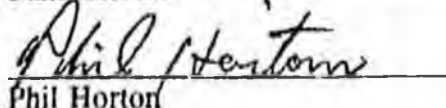
We believe in putting something back into our community. In general, large Outside corporations are not active at the local level; their donation decisions are made at the corporate level and benefit the community in which their corporate headquarters exist.

Please support competition in the refuse hauling industry by defeating this bill. Competition is in the best interests of the people of the State of Alaska. If competition ceases and Waste Management becomes the only company operating in the state, prices for service will climb, service options will be limited, all profits made will go directly Outside and very little will be put back into our communities, except for garbage deposited into the landfills owned by Waste Management.

Sincerely,



Pam Krieber



Phil Horton

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B U S I

EYEING THE COMPETITION

Corporate espionage is so pernicious that the U.S. passed a law to curb it. But in today's global economy, dirty tricks are all in a day's work

By DANIEL EISENBERG

THE TITLE OF THE HAND-SCRIBBLED memo outlined Waste Management's goal in no uncertain terms: "Cadiz Kill." In 1995 Cadiz Inc., an agricultural firm based in Santa Monica, Calif., was leading opposition to Waste Management's proposal to build a mega-garbage dump near its property. So, like any other tactically thinking business, the country's largest trash hauler brought in a consultant to get things moving.

Joseph Lauricella, though, wasn't your typical McKinsey man. He set up a sham pro-dump grassroots organization. His duties, according to San Bernardino County grand jury indictments and his testimony, included swiping confidential data, sabotaging potential deals and spreading rumors that linked Cadiz to illegal dumping and drug trafficking—all in an attempt to drive down its stock price and cripple its lobbying efforts. Last fall Lauricella was sentenced to six years in prison for his consulting efforts. Waste Management and four of its executives, who claim that Lauricella was a renegade acting on his own, have pleaded not guilty to various charges, including stock fraud and wiretapping.

Waste Management may specialize in garbage, but it isn't the only outfit accused of playing dirty. Far from it. Just last week, Motorola sued Intel for allegedly hiring away key employees to obtain its microchip trade secrets. Minneapolis-based agribusiness giant Cargill recently acknowledged that a rogue employee may have lifted proprietary genetic material

from a competitor, an admission that effectively killed a \$650 million deal to sell its North American seed division to a German biotech venture.

Next week a Taiwanese father-and-daughter business team is scheduled to be tried for paying a U.S. research engineer to pilfer manufacturing secrets from label maker Avery Dennison. Another Taiwanese-based executive goes on trial in early April, charged with attempting to buy the secret formula for Bristol-Myers Squibb's cancer drug Taxol for \$400,000—just one of many alleged plots to fleece R. and D.-rich pharmaceutical firms. Last spring a Gillette consultant went to prison for trying to market secret designs of the company's Mach3 razor to competitors such as Bic. And a small Maryland soft-drink distributor claims that Coca-Cola Enterprises, the bottler partly owned by Coke, used wiretapping and other shady tactics to destroy his business. CCE denies all the charges.

Cheating in business, of course, is older than the wheel. But corporate spooks and saboteurs are especially busy in today's global, high-tech economy, where the most prized assets can be stored on a disk and surveillance equipment can fit on a shirt button. To help slow them down, Congress passed the Economic Espionage Act of 1996, which carries a long prison term for intellectual-property theft. The good guys haven't had much luck yet, though not for lack of effort. The FBI has nearly tripled its investigations into corporate espionage in the past year. But in 1997 at least \$25 billion in intellectual property was stolen from U.S. corporations, by a conservative estimate. And these aren't just cases of for-



N E S S



LEWIS & CLARK PHOTOGRAPHY COURTESY

eign spies left over from the cold war working for new capitalist bosses. Increasingly, U.S. firms are turning to Dumpster divers or computer hackers to stay ahead of the competition, and disgruntled workers are walking off with classified material. One worrisome ploy, the FBI says, is to send in spies posing as tech consultants on the Y2K computer bug.

The first federal economic-espionage case to go to trial, however, is decidedly low-tech—in essence, it's all about glue. In Youngstown, Ohio, next week, Justice Department attorneys will argue that Pin Yen Yang, president of Taiwan-based Four Pillars Enterprise, and his daughter paid Avery Dennison engineer Ten Hong "Victor" Lee \$67,500 over a four-year period to steal the \$3 billion-a-year company's formulas for making adhesive labels and tape. Officials say China—already defending against charges of nuclear espionage in the Los Alamos case—and Taiwan are among the most notorious purloiners of business secrets, allegedly sending graduate students to infiltrate companies and bring data home.

But, as in any case of cloak-and-dagger, it's sometimes hard to tell exactly who's snookering whom. Four Pillars recently turned the tables and filed suit in China and Taiwan, charging that in the late '80s and early '90s, Avery lured the much smaller Four Pillars (annual sales: \$140 million) into discussion about a joint venture in China in order to steal manufacturing information so it could set up its own competing factory. Intriguingly, Four Pillars will argue that by luring the government into the case and helping the FBI set up a sting operation, Avery used the Economic Espionage Act as a competitive weapon. Avery Dennison, which denies those charges, says Four Pillars' suit is simply an attempt to "distract attention from its own criminal conduct."

In this era of downsizing and diminished corporate loyalty, close to two-thirds of all U.S. intellectual-property losses can be traced to insiders, according to Richard J. Heffernan, a Branford, Conn., security consultant and co-author of a biannual espionage survey by the American Society for Industrial Security. "People are always looking for somebody who looks different when a great deal of the theft is committed by insiders who walk and talk just like you and me," notes Heffernan.

Last fall Cargill was accused by Pioneer Hi-Bred International, a leading seed developer, of stealing its closely guarded genetic material. Initially, Cargill vehemently denied any wrongdoing, but during settlement talks it acknowledged uncovering "problem areas." Though it won't elaborate much, Cargill says an employee who previously worked for Pioneer and is the target of a lawsuit may have mixed some of Pioneer's breeding material into Cargill's seed corn products without the company's knowledge.

To protect themselves against employees who walk out for the next best offer, corporations have taken a harder line against talent raids, essentially equating them to espionage. That seems to be the case with Wal-Mart's trade-secret suit

IT'S A DIRTY JOB, BUT ...



WASTE MANAGEMENT allegedly hired Joseph Lauricella to sabotage CADIZ, which opposed its plans to build a meg-a-garbage dump



CARGILL recently admitted that a rogue worker may have lifted genetic seed material from PIONEER HI-BRED



amazon.com

WAL-MART claims online bookstore



AMAZON.COM hired away its top techies to copy its database, which has been a key competitive weapon

against Amazon.com. The nation's largest retailer contends that the Web's leading e-tailer lured 15 of its top techies out to Seattle from Wal-Mart's hometown of Bentonville, Ark., for the express purpose of duplicating its prized information database—a vast system that tracks customer shopping patterns and product flow. "There's a lot of computer talent out in the Valley," notes Wal-Mart spokeswoman Betsy Reithmeier. "If you're coming to Bentonville, you're looking for something specific." Amazon has filed a countersuit denying the accusations. The company says it was just looking for talented people.

Robert N. Friedman, CEO of discount retailer Loehmann's, has no such defense, at least according to a lawsuit filed by Forty Three Apparel, a New York City-based women's-fashion maker. In mid-1997, the suit contends, Friedman pressured Forty

BUSINESS

Three Apparel president Mark Singer, who depended on Loehmann's for 80% of his business, into giving Friedman's wife Debbie a high-level job. Within a year, she left the firm, allegedly with clothing patterns and manufacturing processes, and started her own competing outfit. (Loehmann's says the suit has no merit.) It didn't take long, Singer argues, for Forty Three Apparel to lose its Loehmann's business to Debbie Friedman and sink into bankruptcy.

You don't necessarily need James Bond to pilfer corporate secrets. Amateur actors will do fine. Over the past few years, textile manufacturer Milliken & Co. allegedly stole information from a host of rivals without so much as a bug or a mole. Instead, according to a lawsuit filed last October by Johnston Industries, based in Columbus, Ga., one Milliken employee posed as a business-school student researching a paper, and another played a Swiss banker seeking investment opportunities. One alleged target, NRB Industries, has reportedly settled its case against Milliken. The \$2 billion-a-year titan has denied the charges, but Johnston, a \$330 million-a-year textile firm, claims it lost \$30 million to the alleged skullduggery. "It defies logic," says president D. Clark Ogle, "that a company 10 times our size would feel threatened [enough] to do that."

Since passage of the Economic Espionage Act, only 13 criminal cases have gone to indictment. In December two men were sentenced for scheming to sell Intel prototype microchips to rival Cyrix, and most recently a California man, David Kern, was charged with stealing engineering secrets from his former employer, Varian Associates, a leading Silicon Valley maker of radiotherapy systems used to treat cancer. For more than a year, a federal grand jury has reportedly been looking into whether a subsidiary of financial-information giant Reuters was involved in an attempt to steal data from rival Bloomberg (Reuters says it is cooperating and denies any wrongdoing).

Prosecuting such crimes is no easy matter. Many companies shy away from reporting incidents for fear of bad publicity or having to divulge their treasured secrets in court. That may be a small price to pay, though. For now, the underhanded tactics "are classics for one reason," says Alan Brill, of investigative firm Kroll Associates. "They still work." —With reporting by Elaine Shennen/Washington, Jackson Baker/Memphis, Marsha L. Gilbert/Greenville, Lonca Moteney/San Francisco, Dian Misonbeam/San Bernardino and other bureaus

CRACKING THE CODE

THE DRESS CODE IS BUSINESS CASUAL—NO JEANS ALLOWED, NOT TO MENTION pierced noses. It's the first day of class—hacking class—and the instructors, smartly attired in matching corporate polo shirts, point at screens full of code and step-by-step directions on how to hack a host computer. "Get this: No username, no password, and we're connected," says one. "I'm starting to get tingles. They're going to be toast pretty quick." Geekspeak, at least, is still de rigueur.

In the world of corporate espionage, a company's host computer is the mother lode, which means that protecting it is vital. That's the goal of Extreme Hacking, one of a growing number of counterhacking courses that teach perfectly respectable people the how-tos of cracking their own networks so they can better protect them. "We're kind of wearing the white and black hats at the same time," says Eric Schultze, the Ernst & Young instructor who gets tingles from an exposed password file.

How easy is it to hack? If those guys can teach a novice like me how to break



BREAK-INS: Corporate counterhackers learn just how vulnerable their company's servers are

through a firewall, I figure, then all our networks are in trouble. Guess what? All our networks—at least, the ones without encryption keys or extremely alert administrators—are in trouble. Why? Because this is the information age, and the average computer gives up far too much information about itself. Because a network is only as strong as its weakest user. And because the most common log-on password in the world, even in non-English speaking countries, is "password." With users like this, who needs enemies?

How big a problem is this in the real world? "Rarely is there a moment when a hacker isn't trying to get into our networks," says a senior Microsoft executive. "People go looking for that weak link." Recently hackers found a backdoor through a user in Europe—an administrator, no less—with a blank password. This allowed the hacker root access—the ability to change everyone else's password, jump onto other systems and mess up the payroll file.

In our first class, we have no problem rooting around in the Web servers of a top Internet company. We find three open ports on the firewall and a vulnerable mail server. "This network is a f---ing mess," says a classmate. "We need to have a word with these people."

Over the next few days, any faith I had in the security of the world around me crumbles. Think your password is safe because it isn't "password"? If it's in the dictionary, there is software that will solve it within minutes. If it's a complex combination of letters and numbers, that may take an hour or so. There is software that will hijack your desktop and cursor—and you won't even know about it. Hacking doesn't require much hardware; even a Palm Pilot can do it. What protection do you have? "Minimize enticements," say the teachers. If you don't want to be a victim of information rape, in other words, don't let your network give out so many details to strangers.

Old-school hackers scoff at the notion that businesses can stop them. "Corporations can't teach hacking," says Emmanuel Goldstein, editor of the hacker quarterly 2600. "It has to be in you." Perhaps. But if a few more firms learn to avoid becoming toast, that's no bad thing.

—By Chris Taylor

WMI raises fees at select sites

HOUSTON-Waste Management Inc. announced an average tipping fee increase of two to three percent at selected landfill sites across the country in late February. Other major players in the landfill industry are expected to follow suit this month.

The WMI increases will be larger for customers that do not have contracts with the company, said Cherie Rice, vice president of investor relations.

Specific rate hikes at specific landfills and other disposal facilities owned by WMI would not be released by the company.

The rate increases were not greeted with applause, Rice noted, but reflect increased costs of operating modern, state-of-the-art landfills.

Indeed, in New York some independent haulers have complained to the city's Waste Trade Commission, which said it would investigate after tipping fees nearly doubled at WMI's Hunts Point recycling station.

Haulers complained the hike violates antitrust regulations or fair trade practices.

The largest increase so far came at WMI's American landfill in Ohio, which raised rates 138 percent.

Municipality of Anchorage



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Rick Mystrom, Mayor

OFFICE OF THE MAYOR

March 24, 1999

Representative Bill Hudson, Chair
Utility Restructuring Committee
Alaska State Legislature
State Capital
Juneau, AK 99801-1182

Fax: (907) 465-2273

Re: Waste Collection and Disposal Bill

Dear Chairman Hudson:

The Municipality of Anchorage has reviewed the current draft of the above legislation and believes the regulatory scheme contained therein raises difficult, if not potentially harmful, issues concerning local government functions, local government finances, and consumer protection.

Mixing regulation and local politics may prove to be bad public policy. As you know, under state statute local governments do not have or exercise general regulatory powers over industry. The exercise of such power would require expertise which local governmental personnel generally do not possess, meaning we would have to expend time and effort to acquire and maintain such expertise as part of the broader additional expense which this bill would impose. Even with the aid of such expertise, popularly elected local governmental bodies may not prove best suited to conduct the often complex quasi-judicial functions which rate-making and certification require.

Even if such bodies could perform regulatory functions effectively, the law they would be required to execute, as proposed in the bill, is both complex and uncertain. As an example, it is unclear to us exactly what options the Municipality would have or be required to exercise under the transitional provisions of sections 1(b) and 2, given the multi-company, multi-service area structure created and currently overseen by the Alaska Public Utilities Commission. Absence of clarity can lead to litigation and unanticipated burdens. Further, and although I believe that when government requirements necessitate

Representative Bill Hudson, Chair
March 24, 1999
Page 2

the taking of private property full compensation should be paid therefore, the bill's proposed buyout provisions appear unduly complex, rigid, and may be triggered under circumstances (such as litigation) creating unexpected and unwanted fiscal responsibility.

Most importantly, in the context of current and emerging ownership patterns within Alaska's waste industry, the elimination of comprehensive statewide regulatory oversight could permit the consolidation and exercise of market power within that industry. The evasion of statewide regulation could mean higher prices for all consumers. The inability of each local government to look beyond its own jurisdiction would permit such practices to flourish, resulting in discriminatory rate levels as between different locales. Only at a consolidated (rather than local) level of examination and review could predatory pricing and cross-subsidization practices be discerned and corrected.

To our knowledge, there is no groundswell among local governments to assume a regulatory role. As a matter of fact, we have taken the liberty of contacting the Alaska Municipal League which has confirmed our view.

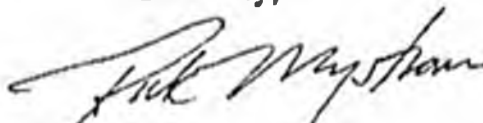
The Municipality's 1999 Legislative Program, approved unanimously by the Municipal Assembly, specifically addresses the issue of waste disposal services:

...a forfeiture of certificated areas of service and deregulation of the industry in its entirety is only possible if ratepayers, and taxpayers, are protected from monopolistic price fixing, cross-subsidization, and a loss of value of the taxpayers' investment.

Highest Priority Legislative Issues, 2-2. The draft bill contains no language upon which the Municipality of Anchorage can rely that the scheme of regulation proposed would provide the ratepayers and the taxpayers better service at a lower cost.

I am aware of your commitment both to Alaskan consumers and to open governmental processes, and appreciate this opportunity to comment on the proposed legislation prior to its introduction. For the reasons noted herein, this draft bill runs contrary to the best interests of the residents of Anchorage and the Municipality could not support it.

Sincerely,



Rick Mystrom
Mayor

cc: Members of the Anchorage Municipal Assembly



WASTE MANAGEMENT

6301 Rosewood St.
Anchorage, AK 99518
(907) 563-3717
(907) 279-2744 Fax

BY FACSIMILE

March 26, 1999

RESPONSE TO MAYOR
MUSTON'S LETTER

Representative Bill Hudson, Chair
Public Utility Restructuring Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Re: Refuse Collection and Disposal Legislation

Dear Chairman Hudson:

I would like to take this opportunity to thank you and your staff for reviewing the proposed refuse collection and disposal legislation. I very much appreciate your committee taking the time to consider the bill as this legislation approaches refuse collection and disposal from a new and fresh perspective.

This legislation is intended to eliminate unnecessary regulation, increase competition, and provide for local control of refuse collection and disposal services. It provides that local governments shall administer solid waste services using either local government officials and employees or by granting one or more franchises to private carriers. This is not an unfunded mandate. Rather, if the local government chooses to issue one or more franchises to private carriers, the legislation requires the franchisee(s) to pay franchise fees to the local government that will more than cover the costs of administering the services. And, allowing these services to be provided by franchise helps keep rates down. This is good for consumers. It is also good for competition because more carriers are likely to enter the market and seek to compete under a franchise system than under the system administered by the Alaska Public Utilities Commission (APUC), which is often inefficient and expensive.

I am aware that several members of the Anchorage Municipal Assembly have expressed support for this legislation, and that the Mayor of Anchorage has identified a number of concerns about it. I would like to take this opportunity to address the issues raised by the Mayor's letter. I believe that this legislation does not present the problems his letter suggests and I further believe that the legislation promotes the Municipality's 1999 Legislative Program.

His first concern is that local governments do not have the regulatory power, expertise or budget to administer refuse collection and disposal services. He is particularly

concerned that a local government is not best suited to conduct ratemaking and certification functions.

However, this legislation's purpose is not to duplicate at the local level the ratemaking and certification functions now handled by the APUC. The goal of this legislation is to make ratemaking proceedings, which are time-consuming and expensive, wholly unnecessary. This legislation calls for local governments to either provide the service themselves or to award one or more franchises for the provision of refuse collection and disposal service. No ratemaking decisions would be required. No certification battles would be waged.

In addition, I believe that local governmental personnel do have both the authority and expertise to administer such programs. Alaska law currently grants local governments with the authority to administer refuse collection and disposal services, which is why the Municipality of Anchorage can operate a refuse collection utility. I also believe that local governments have ample expertise to provide the service themselves: the City of Anchorage itself has an entire division (Solid Waste Services) that administers solid waste collection and disposal services. Local governments also have the ability to issue bids for selecting one or more franchisees. Local governments routinely issue requests for proposals for city services. Hardly a day goes by when the classifieds in the Anchorage Daily News do not include some competitive bid proceeding by the Municipality of Anchorage or other local government.

Although the Mayor's letter expresses concern about the additional expense that this bill would impose, the letter does not acknowledge the additional revenue the legislation provides to cover these expenses. Under the legislation, local governments that grant franchises to private carriers will be able to collect a franchise fee to cover the costs of establishing and administering the franchise system. Those revenues should be more than adequate to fund the local franchise system. Local governments such as the Municipality of Anchorage that use their own officials and employees to collect and dispose of solid waste will be able to pay for their systems through the rates they charge to customers.

The Mayor additionally expresses concern over the Municipality's options under the legislation because of the existing multi-company, multi-service area structure created and overseen by the Alaska Public Utilities Commission. I agree with the Mayor that the greater Anchorage area is currently subject to a confusing checkerboard of rules, regulations and authorities governing refuse collection and disposal services. One set of rules exist for the geographic area within the old City of Anchorage boundaries, and another set of rules exist for the geographic area outside of the old City boundaries but still within the City of Anchorage. Within the old City boundaries, the City of Anchorage controls the provision of residential and commercial refuse service. The City itself is the sole provider of residential and commercial service except for one category of commercial service that the Municipality does not provide and therefore allows several commercial carriers to provide. The APUC controls the provision of residential and commercial refuse service in the greater Anchorage area outside the old City of Anchorage boundaries. In these areas, commercial refuse is provided competitively and residential service is provided by a single commercial carrier.

The proposed legislation eliminates this checkerboard of differing governmental authorities and regulations because the City of Anchorage would have exclusive control over the entire area. This is good for competition, as competitors would have a single set of rules to follow under a single governmental authority. It is also good for the Municipality of Anchorage because it clarifies and confirms its authority over the entire area. Uncertainty exists now, but that uncertainty would be eliminated under this legislation.

The Mayor's letter then states that elimination of a comprehensive statewide regulatory authority could permit the consolidation and exercise of market power within the industry that could result in (1) price discrimination between different locales and (2) higher prices for consumers. The legislation actually has the opposite effect. In the near term, rates would be frozen at the current levels (other than increases reflecting inflation and extraordinary operating expenses). Therefore, rates would be maintained for the entire term of the initial franchise period (five years in most cases).

After five years, consumers would continue to be well served. Local governments would have the opportunity to request proposals or bids for refuse service and could grant one or more franchises to the lowest cost provider of high-quality service. The potential service providers would have an incentive to minimize costs in order to be the successful bidder.

And, I do not share the Mayor's concern about price discrimination between different locales. The rates for refuse collection and disposal service currently vary by community. I do not see how that would change under this legislation because the proposed legislation caps the rates of private carriers at their current levels for a period of at least five years subject only to adjustments for inflation and extraordinary operating expenses. Thereafter, in areas where services are provided by private carriers, rates would be set based on the award of one or more franchises. Therefore, I believe that any concern about price discrimination is unfounded.

While the Mayor of Anchorage's letter states that there is no strong support by local governments for this legislation, we believe that this is not the case. Many local governments already administer refuse collection and disposal services through contracts with private carriers, including the Kodiak Island Borough, the Fairbanks North Star Borough, the Mat-Su Borough, the Kenai Peninsula Borough and the City of Seward. These local governments administer refuse collection and disposal programs without the resources of the City of Anchorage, and I believe that these entities will support this legislation.

The Municipality of Anchorage's 1999 Legislative Program would be promoted by this legislation's enactment. This legislation completely protects the Municipality of Anchorage from the forfeiture of certificated areas of service and loss of value of taxpayers' investments. This legislation grants the Municipality of Anchorage complete authority over how refuse collection and disposal is carried out within the greater City of Anchorage boundaries, a right that the Municipality does not have at this time. In fact, the Municipality of Anchorage's

right to provide exclusive commercial refuse service within the old City of Anchorage boundaries was challenged recently in a proceeding before the APUC, and this legislation would protect the Municipality's investments by resolving that ambiguity completely in the Municipality's favor.

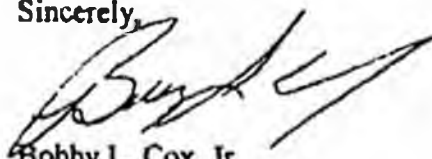
This legislation promotes the Municipality's Legislative Program in other ways. For example, this legislation protects ratepayers from monopolistic price fixing. Under current law, refuse providers are exempt from state antitrust laws. Under the proposed legislation, refuse providers that are in competition with other refuse providers would be subject to state antitrust laws.

The Mayor's letter ignores the fact that 47 out of the 50 states regulate refuse at the local level rather than at the state level. Over the past twenty years, the trend has been to go to local regulation, and it is plain that local regulation and control works better than state control as almost all jurisdictions have gone that way. Local control is better for Alaska because each community in Alaska is unique and has different requirements for solid waste collection and disposal service.

In short, this legislation simplifies government and enhances competition. Ratepayers' interests are well protected under this legislation. The Municipality of Anchorage's powers are clarified and enhanced. Local governments that choose to provide refuse collection and disposal services through one or more private carriers will have a revenue source to at least cover the costs of administering the program. Local governments can respond to the unique requirements of their communities.

Again, I appreciate your willingness and that of your staff to review this proposed legislation. Please do not hesitate to call me should you have any questions regarding the legislation or this letter.

Sincerely,



Bobby L. Cox, Jr.
Division Vice President
Alaska Division
Waste Management

cc: Mayor Rick Mystrom
Members of the Anchorage Municipal Assembly



April 13, 1999

Representative Andrew Halcro
Alaska State Legislature
Co-Chair, Community & Regional Affairs
State Capitol
Juneau, AK 99801-1182

Re: HB 178: An Act relating to removing solid waste collection and disposal service from regulation by the Alaska Public Utilities Commission; ...

Dear Representative Andrew Halcro,

I am the owner and President of Commercial Refuse, Inc. (CRI), an Alaskan owned and operated, regulated and certificated refuse utility in Anchorage. I am opposed to HB 178, a bill that will deregulate refuse. I have spoken with the other "remaining Alaskan owned independent refuse utilities" in this area and believe that their views, concerns and comments are the same as those in this letter.

CRI and the other independent refuse companies in this area are opposed to any such legislation that will specifically remove statewide oversight and regulatory powers from the Alaska Public Utilities Commission (APUC), and transfer the same to local municipalities and boroughs. If this legislation is allowed to become law, it would constitute a serious mistake.

This committee should be acutely aware that the refuse business in Alaska has been recently transformed by Waste Management, Inc. (WMI) into one large monopoly. WMI now controls over 95% of all refuse business in this state. If there was ever a time to recognize the need for continued statewide regulation, now is that time. In fact, this is the most improper moment to consider deregulation of refuse or transfer those regulatory burdens to local municipalities and boroughs.

The goal of WMI has been to control the market, from collection to disposal (landfills). Regulation is not in their best interest, for they require an unregulated market to achieve their goals. For the public, the lack of regulation in a market where one company (WMI) has such a dominant monopoly, such as Alaska, this can hardly be considered to be in the public's best interest. Unlike other states, Alaska does not possess comparably sized competitive refuse companies to assist in controlling market pricing and service. In fact, many communities here have only one company to receive service from. Localized control would be ineffective in regulating such a large statewide monopoly.

Commercial Refuse

INCORPORATED

750 E. International Airport Rd.
Anchorage, AK 99518

PHONE (907) 362-3700
FAX (907) 362-3750

Representative Andrew Halcro
Alaska State Legislature
Co-Chair, Community & Regional Affairs
April 13, 1999

The Alaska Public Utilities Commission (APUC) has regulated refuse utilities for many years in Alaska. While there has been some discussion about deregulation, at this time such action would be ill advised. WMI's latest attempt to have legislation introduced that will deregulate the refuse industry here in Alaska is purely self-serving and will benefit only WMI. If we ever needed regulation, now is the time. The APUC is well equipped to handle this function and serves the industry well. However, the most important aspect is the protection of the public from monopolistic practices from an entity such as WMI.

Another aspect that should be considered is the fact that the regulated utility companies "pay their way" through the RCC (Regulatory Cost Charge). This is not necessarily a budgetary concern for the state since the services of the APUC are paid for. Since Alaska lacks a consumer protection agency at this time, what viable mechanism would exist for consumer problems if deregulation were to occur? At the present, most communities and municipalities are ill equipped to handle functions such as the APUC provides. In fact, many may not be able to.

I find it difficult to comprehend any valid reason at this time or the near future, for deregulation. The present status with the APUC maintaining statewide regulatory control is highly appropriate and recommended. The APUC does have all the needed functions to protect the public and provide a forum for consumer problem resolutions. For all the reasons mentioned, I am opposed to any attempt to deregulate refuse at this time.

Sincerely,


Jim A. Arnesen
President

cc: Rep. John Harris, Vice Chair
Rep. Fred Dyson
Rep. Carl Morgan
Rep. Lisa Murkowski
Rep. Reggie Joule
Rep. Albert Kookesh

Municipality of Anchorage



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~~Pat Abney, Vice Chair~~
ANCHORAGE ASSEMBLY

April 13, 1999

Representative Bill Hudson
Chair, Utility Restructuring Committee
State Capitol Room 108
Juneau, Alaska 99801-1182

SENT VIA FAX
ORIGINAL BY MAIL

Dear Representative Hudson:

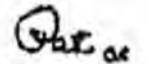
I'm writing in support of House Bill 178. This legislation would transfer the control of solid waste collection and disposal service from the Alaska Public Utilities Commission to cities, municipalities and boroughs.

I believe local control of these services is a better system for Alaska. It would allow each community to determine all aspects of solid waste collection and disposal, including issues such as the frequency of such services, charges and fees and the nature, location and extent of providing solid waste handling services.

As an Anchorage Assemblymember, I have worked hard to increase the amount of material we recycle in this community. We currently have a recycling task force that has been meeting for the past year, which will soon bring recommendations forth on how we can do better. This local control could be very beneficial to our recycling efforts because I believe we would be better able to respond to this interest through structuring rates in a way that encourages recycling. At the very least, we could test it with a pilot project.

Another benefit of local control is that it offers better opportunities for competition. It specifically allows for local governments to either provide the service themselves or to provide service through one or more franchisees with private carriers. My understanding is that nearly every state (except for Alaska) provides for local, rather than statewide control of solid waste collection and disposal. I encourage you to support House Bill 178. If you have any questions, please feel free to call.

Sincerely,


Pat Abney

**Municipality
of
Anchorage**



JOE MURDY

Anchorage Assembly
P.O. Box 196650
Anchorage, Alaska 99519-6650

March 19, 1999

*Representative Bill Hudson
Chair, Utility Restructuring Committee
State Capitol Room 108
Juneau, Alaska 99801-1182*

**SENT BY FAX
ORIGINAL BY MAIL**

Dear Bill Hudson:

The reason for this letter is to ask your support of the proposed house bill which would mandate local control over refuse collection and disposal services. Local control allows local governments to respond to local needs in a way that state government often cannot. Refuse collection and disposal is a service that should be administered at the local, rather than at the state level because some local governments want to provide the service themselves, while others prefer private carriers to provide the service.

I am aware that there is some degree of uncertainty from time to time regarding the extent of a Municipality's power to control refuse collection and disposal service, and that the Alaska Public Utilities Commission (APUC) has had to sort out these issues. I am also aware that the APUC has had to determine whether refuse collection and disposal service in communities throughout Alaska should be provided on a competitive basis and what the terms and parameters of that competition should be.

It would only make good sense that the State of Alaska follows the lead of the majority of states and place control of their refuse collection and disposal services at the local level. Local governments can then respond to the unique interests of their communities.

For these reasons, I urge your support. Thanks for your consideration and if you have any questions, please don't hesitate to call.

Sincerely,

Joe Murdy (alc)

*Joe Murdy
Anchorage Assemblymember*

Municipality of Anchorage



P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
TELEPHONE: (907) 343-4311

March 19, 1999

ANCHORAGE ASSEMBLY
Assemblyman Kevin Meyer
344-9374

Representative Bill Hudson
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Rep. Hudson:

I write this letter in support of the proposed legislation that would transfer the control of solid waste collection and disposal service from the Alaska Public Utilities Commission to cities, municipalities, and boroughs.

I believe local control of these services is a better system for Alaska. Local control of these services would allow each community to determine all aspects of solid waste collection and disposal, including issues such as the frequency of such services, charges and fees, and the nature, location and extent of providing solid waste handling services. This could be very beneficial to recycling efforts. As you know, parts of Anchorage are extremely interested in collection of recyclable materials. If there was local control of solid waste collection and disposal throughout the greater Anchorage area, we would be better able to respond to this interest through structuring rates in a way that encourages recycling, at least on a pilot project basis.

Another benefit of local control of these services is that it offers better opportunities for competition. Competition is restricted in Alaska because a new carrier must obtain a certificate from the Alaska Public Utilities Commission, which can be a time consuming process and, in some cases, an expensive one as well. In contrast, local control of solid waste collection and disposal could increase competition because, as but one example, local governments could issue one or more franchises to private carriers through a competitive bid process. In exchange for a franchise fee, carriers would compete for the ability to provide services and could be required to maintain rates at a specified level. Larger areas of Alaska and particularly Anchorage would be able to attract proposals from many carriers and, in so doing, promote competition. This legislation specifically allows for local governments to either provide the service themselves or to provide service through one or more franchises with private carriers.

My understanding is that nearly every state (except for Alaska) provides for local rather than statewide control of solid waste collection and disposal, probably for the reasons I support local control of these services.

Thank you.

Sincerely,

Kevin Meyer
Anchorage Assemblymember

Dear George,

I have not introduced this legislation. I am reviewing the proposal by Waste Management and soliciting input from affected parties.

Thank you for your input.

Bill

george & brenda wuerch wrote:

Subject: Solid Waste

Date: Tue, 23 Mar 1999 11:21:27 -0900

From: george & brenda wuerch <wuerch@alaska.net>

To: Representative_Bill_Hudson@ligis.state.ak.us

Dear Bill,

Just a short note to thank you for sponsoring the bill to remove solid waste collection and disposal services from regulation by the Alaska Public Utilities Commission.

The more we can move regulatory decisions to the local governmental level the more likely local needs will be met in ways that users support. Your bill will help Anchorage citizens and enable the Municipality to adjust to competition more effectively.

Further, it seems a small benefit, but reducing the work load of the APUC should help in the state budget battle too.

Good luck and thanks again,

George Wuerch
Anchorage Assemblyman

Municipality of Anchorage



P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-4311
Voice Mail: (907) 343-4114

ANCHORAGE ASSEMBLY
Ted Carlson

March 19, 1999

*Representative Bill Hudson
Chair, Utility Restructuring Committee
State Capitol Room 108
Juneau, Alaska 99801-1182*

SENT VIA FAX
ORIGINAL BY MAIL

Dear Representative Hudson:

I am writing and asking your support in the passage of the proposed legislation that provides local control of refuse collection and disposal services. As I understand it, the Alaska Public Utilities Commission ("APUC") currently regulates the provision of refuse collection and disposal services.

Refuse collection and disposal is unlike telecommunications or electric power, where the cost of building an infrastructure and providing service is high, and where specialized expertise at a state commission is necessary. The refuse industry is much easier for a new provider to enter, as a new provider needs, most importantly, a large truck with sufficient safety features to carry refuse. And, the state simply does not need to regulate refuse collection and disposal because high specialized expertise is not required.

The results of the current regulatory scheme is a complicated checkerboard of regulatory authority that impedes the efficient administration of refuse collection and disposal. For example, the Municipality of Anchorage has a certificate from the APUC that allows it to be the exclusive provider of residential and commercial service within the boundaries of the old City of Anchorage. However, outside the old City of Anchorage boundaries, but still within the City of Anchorage, private carriers provide competitive commercial service, and one private carrier provides residential service, all under the direction and jurisdiction of the APUC.

It would make far more sense to allow the City of Anchorage to administer all refuse collection and disposal programs within the greater City of Anchorage boundaries instead of having the APUC administer refuse collection in part of the City, and having the City administer refuse collection in the rest. Moreover, if the City controlled refuse collection and disposal outside the old City boundaries, the Municipality of Anchorage could consider issuing franchises to private carriers for the collection and disposal of refuse outside the old City of Anchorage boundaries in exchange for a franchise fee. I understand the Kodiak Borough administers refuse collection and disposal through a franchise, and is pleased with the results. Furthermore, I think this proposed legislation is good public policy.

Thanks in advance for your consideration.

Sincerely,

Ted Carlson

*Ted Carlson
Anchorage Assemblymember*

Alaska Telephone Association

201 E. 56th, Suite 114
Anchorage, AK 99518
(907) 563-4000
FAX (907) 562-3776

David Fauske
President

James Rowe
Executive Director

April 14, 1999

Honorable Andrew Halcro, Co-Chair
Honorable John Harris, Co-Chair
House Community and Regional Affairs Committee
Alaska State Legislature
Juneau, Alaska 99801

RE: HB 178 -- Removing waste management from regulation by the APUC

Dear Representatives Halcro and Harris:

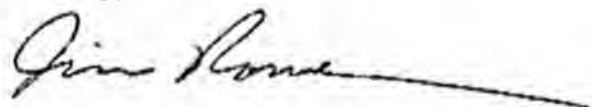
The Alaska Telephone Association has reviewed HB 178, an act relating to removing solid waste collection from regulation by the APUC. Although having no particular interest in waste management, the association is enthusiastic with the thought that the workload of the APUC might be reduced by the removal of waste management from its agenda.

Since passage of The Telecommunications Act of 1996 the commission has seen its telecommunications workload increase tremendously. What was touted as deregulatory federal legislation has initiated a flurry of activity at the state level with access reform, state universal service funding, rate rebalancing, tariffs for new services, mergers, entry requests for local exchange competition and intrastate competition, new entries into the private payphone market, and service to rural health care providers. Certainly there are other issues and none of the pre-1996 telecommunications issues have gone away.

The APUC has nine new positions approved and desperately needed, but unfilled due to the state hiring freeze. Remember that the APUC is funded by a regulatory cost charge, not through the general fund. Though it might seem, on the surface, to be self-serving, the ATA would be happy to see the commission have more time to devote to telecommunications matters. The public would benefit by a speedier response time. The transfer of waste management regulation from state to the local level would allow the commission to focus more of its energy on telecommunications dockets.

I'd be happy to discuss this issue with you further.

Sincerely,



Jim Rowe

All of 1998			
Route & Area		% of Income	% of Customer
Core Area Garbage Haul			
Copper Center			
M100-M105.5 O'Rich		18.31%	26%
Glennallen & North Tazlina			
M173-M190 Glenn / M110-M123 Rich		26.76%	25%
Edgerton & South Tazlina			
M79-M110 Rich / M0-M19 Edgerton		8.36%	23%
Gakona			
M123-M129 Rich / M0-M5 Tok		25.28%	11%
Extended Area Garbage Haul			
North Richardson			
M130-M198 Richardson Hwy		3.17%	3%
Slana			
M6-M90 Tok Hwy		8.14%	8%
Nelchina			
M141-M173 Glenn Hwy		1.83%	1%
Chitina			
M19-M35 Edgerton Hwy		4.57%	2%
South Richardson			
M79-M110 Richardson Hwy		6.69%	1%

Landfill located @ Mile 122 Richardson Hwy.
 15% of REVENUE = 60% of mileage TRAVELED
 we maintain landfill - no state or federal aid.

Post-it® Fax Note	7671	Date	4/15	# of pages	1
To	DEE HARRIS	From	SU NEELEY		
Co./Dept	(H) CRA	Co.			
Phone #		Phone #			
Fax #		Fax #			

Sponsor Statement

HB 178

The issue of deregulating refuse has been around longer than I have been in the Legislature. The APUC historically has advocated deregulation, and legislation has been introduced recently in the Senate to deregulate refuse collection and disposal services.

I support efforts to relax the regulatory control over the refuse industry, but I want to make sure that we have a framework that promotes competition and is in the best interest of consumers. Refuse collection and disposal service must continue to be managed to some degree, and there is a better way than state regulation. The answer is local regulation.

Refuse collection and disposal in most states is regulated locally. I believe local control of these services is a better system for Alaska. Each community is unique and has different requirements for refuse services. Some communities want to provide the service themselves, and others want private carriers to provide the service. Some communities may want incentives for recycling built into rates. This legislation empowers local governments to handle these and other issues as their customers and leaders desire.

This is not an unfunded mandate. Should a local government wish to provide the refuse services itself, the costs would be paid for through rates. Should a local government want one or more private carriers to provide the services, this legislation allows local governments to establish franchises and to collect franchise fees, which would more than cover the costs of administering the franchises.

The legislation is also consumer oriented. It provides that in areas where a single private carrier provide exclusive service, rates would be frozen for five years at their current level adjusted for costs due to inflation and extraordinary expenses. In areas where there is competition, rates are deregulated and competitors can freely compete based on rates.

The legislation also promotes the benefits of competition. Competition is restricted in Alaska because a new carrier must obtain a certificate from the Alaska Public Utilities Commission, a process which I understand can be expensive and, given the overwhelming workload at the APUC, can also be extremely time-consuming. Local control should therefore reduce that barrier to entry.

Competition will also be encouraged by this legislation because it will simplify the regulatory environment. Geographic areas like Anchorage are a regulatory checkerboard because parts of Anchorage are subject to the jurisdiction of the APUC, and other parts are subject to the jurisdiction of the Municipality of Anchorage. We should simplify the regulatory environment and remove the guesswork. This bill does that by providing complete local control for refuse services.

This legislation will also promote the benefits of competition by expressly granting local governments the right to issue one or more franchises to private carriers for refuse collection and disposal service. If companies have to compete for a franchise, local governments are likely to have multiple bidders and consumers will benefit from that competition through lower prices and competitive service offerings.

It makes good sense for the State of Alaska to follow the lead of nearly every other state and place control of refuse collection and disposal services at the local level. This legislation is good public policy, is good for Alaska and is good for local governments.

I urge your support of HB 178.

FISCAL NOTE

STATE OF ALASKA
1999 LEGISLATIVE SESSION

BILL NO. HB 178

Revision Date/Time (Note if correction) _____ Dept. Affected _____
 Title Alaska Public Utilities Commission BRU AK Public Utilities Commi
Deregulation of Garbage Utilities Component APUC Operations
 Sponsor Rep. Kott
 Requester H. C&RA Component Serial No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2005
Personal Services	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0			
Grants & Claims	0.0	0.0			
Miscellaneous	0.0	0.0			
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES					
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts					
1003 GF Match					
1004 GF					
1005 GF/Program Receipts					
1037 GF/Mental Health					
Other (Specify Type)	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) cost: _____

POSITIONS

Full-time	0	0	0	0	0
Part-time	0	0	0	0	0
Temporary	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This bill removes refuse collection and disposal utilities from the definition of "public utility" under the Alaska Public Utilities Commission and assigns or authorizes responsibility for regulation of refuse utilities to local government. The resources freed up by this legislation would be used by the Commission to respond to the backlog of dockets from other regulated utilities.

Prepared by Robert A. Lohr Phone _____
 Division APUC Date/Time _____
 Approved by Commissioner Deborah O. Sedwick Date 4.14.99
 Agency _____

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Sectional Analysis

HB 178

- Section 1 (a), (1), (2), (3) Provides an introduction for having municipalities regulate solid waste instead of the state.
- Section 1 (b), (1) Introduces local control of solid waste.
(2) In municipalities that have no solid waste services on the effective date, allows for the future creation of a solid waste service. But does not require it.
(3) Introduces a franchise fee option for municipalities to recover costs of implementing the act.
(4) Protects existing holders of APUC solid waste certificates for a period of time by granting an exclusive franchise or by purchasing the certificate, equipment, and facilities at fair market value.
- Section 2 Adds six new sections to AS 29.35.050. Each new section is explained below.
- (e) Completely protects municipalities' ability to operate refuse collection and disposal services. Upon the bill's passage, where there is one or more private carriers operating with a certificate in the municipality, a municipality has three options. First, a municipality could continue to have the existing certificate holder continue to provide exclusive service for the 5 year transition period. During that 5-year transition period, the exclusive provider would be required to provide service at its existing tariffed rate, subject only to increases for inflation and extraordinary increases in operating expenses. Second, whether or not an area has competition, a municipality would have the right to issue multiple competing franchises. If an area already has competition, competitors would have a right to continue to provide service for the 5-year transition, and new competitors could be allowed at the municipality's election. If the municipality allows for competing franchises, rates would not be regulated and competitors could increase or decrease their prices. Third, a municipality could purchase some or all of an existing certificated utility's equipment, facilities and certificate.
- (f) Allows, but does not require, a municipality that currently has no solid waste collection service to either provide it, or to franchise it.
- (g) Requires a municipality to purchase at fair market value the proportional part of a utility's certificate and facilities if a municipality deprives a certificated utility from providing any of

its services in any part of its certificated service area during the 5-year transition period.

- (h) Allows municipalities to charge a franchise fee. The fee must be in the range of .5% to 2.5% of the franchisee's gross revenue.
- (i) Allows a municipality to require all persons, property owners, or occupants to use solid waste collection and disposal system. This is similar to AS 29.35.050 (2). Environmental and public health concerns require that solid waste be handled in an approved manner.
- (j) Provides for definitions of the following terms: commercial and residential service, defines a municipality, and defines fair market value.

- Section 3 Amends AS 29.35.070 to conform to this act. This is a house keeping section.
- Section 4 Amends AS 29.35.210 (a) (4) by removing garbage and solid waste powers from second class boroughs in this section. The authority to regulate solid waste is covered in the definition of municipality in section 2 (j) (3) of this bill. Second class boroughs will continue to be able to regulate solid waste.
- Section 5 Amends AS 38.05.810 (f) to conform to this act. This is a house keeping section.
- Section 6 Amends AS 42.05.711 (l) to conform to this act. This is a house keeping section.
- Section 7 Amends AS 42.05.712 (h) to conform to this act. This is a house keeping section.
- Section 8 Amends AS 45.50.572 (d) to conform to this act. It confirms that Alaska's antitrust laws apply to private refuse carriers, except where a municipality grants a private carrier an exclusive franchise to operate in an area. This is a house keeping section.
- Section 9 Repeals several statues required to conform to this act. This is a house keeping section.
- Section 10 Provides for an immediate effective date for sections 1,2,4,8, and 9(a) of this act.
- Section 11 Provides for an effective date for the remainder of the act as of January 1, 2000.

1
Subject: HB 178

Date: Tue, 13 Apr 1999 17:01:48 -0800

From: "Jim Arnesen" <jarnesen@mail.alaskalife.net>

To: <Representative_Andrew_Halcro@legis.state.ak.us>

CC: <Representative_Fred_Dyson@legis.state.ak.us>,
<Representative_Lisa_Murkowski@legis.state.ak.us>

April 13, 1999

Representative Andrew Halcro

Alaska State Legislature

Co-Chair, Community & Regional Affairs

State Capitol

Juneau, AK 99801-1182

Re: HB 178: An Act relating to removing solid waste collection and disposal service from regulation by the Alaska Public Utilities Commission; …

Dear Representative Andrew Halcro,

I am the owner and President of Commercial Refuse, Inc.(CRI), an Alaskan owned and operated, regulated and certificated refuse utility in Anchorage. I am opposed to HB 178, a bill that will deregulate refuse. I have spoken with the other "remaining Alaskan owned independent refuse utilities" in this area and believe that their views, concerns and comments are the same as those in this letter.

CRI and the other independent refuse companies in this area are opposed to any such legislation that will specifically remove statewide oversight and regulatory powers from the Alaska Public Utilities Commission (APUC), and transfer the same to local municipalities and boroughs. If this legislation is allowed to become law, it would constitute a serious mistake.

This committee should be acutely aware that the refuse business in Alaska has been recently transformed by Waste Management, Inc. (WMI) into one large monopoly. WMI now controls over 95% of all refuse business in this state. If there was ever a time to recognize the need for continued statewide regulation, now is that time. In fact, this is the most improper moment to consider deregulation of refuse or transfer those regulatory burdens to local municipalities and boroughs.

The goal of WMI has been to control the market, from collection to disposal (landfills). Regulation is not in their best interest, for they require an unregulated market to achieve their goals. For the public, the lack

of regulation in a market where one company (WMI) has such a dominant monopoly, such as Alaska, this can hardly be considered to be in the public's best interest. Unlike other states, Alaska does not possess comparably sized competitive refuse companies to assist in controlling market pricing and service. In fact, many communities here have only one company to receive service from. Localized control would be ineffective in regulating such a large statewide monopoly.

Representative Andrew Halcro

Alaska State Legislature

Co-Chair, Community & Regional Affairs

April 13, 1999

The Alaska Public Utilities Commission (APUC) has regulated refuse utilities for many years in Alaska. While there has been some discussion about deregulation, at this time such action would be ill advised. WMI's latest attempt to have legislation introduced that will deregulate the refuse industry here in Alaska is purely self-serving and will benefit only WMI. If we ever needed regulation, now is the time. The APUC is well equipped to handle this function and serves the industry well. However, the most important aspect is the protection of the public from monopolistic practices from an entity such as WMI.

Another aspect that should be considered is the fact that the regulated utility companies "pay their way" through the RCC (Regulatory Cost Charge). This is not necessarily a budgetary concern for the state since the services of the APUC are paid for. Since Alaska lacks a consumer protection agency at this time, what viable mechanism would exist for consumer problems if deregulation were to occur? At the present, most communities and municipalities are ill equipped to handle functions such as the APUC provides. In fact, many may not be able to.

I find it difficult to comprehend any valid reason at this time or the near future, for deregulation. The present status with the APUC maintaining statewide regulatory control is highly appropriate and recommended. The APUC does have all the needed functions to protect the public and provide a forum for consumer problem resolutions. For all the reasons mentioned, I am opposed to any attempt to deregulate refuse at this time.

Sincerely,

1

Jim A. Arnesen

President

cc: Rep. John Harris, Vice Chair

Rep. Fred Dyson

Rep. Carl Morgan

Rep. Lisa Murkowski

Rep. Reggie Joule

Rep. Albert Kookesh

the commission shall release the record for the purpose of preparing for or making a presentation to the commission in the proceeding if the record or information derived from the record will be used by the commission in the proceeding.

(c) A person may make written objection to the public disclosure of information contained in a record under the provisions of this chapter or of information obtained by the commission under the provisions of this chapter, stating the grounds for the objection. When an objection is made, the commission may not order the information withheld from public disclosure unless the information adversely affects the interest of the person making written objection and disclosure is not required in the interest of the public.

(d) In this section, "record" means a report, file, book, account, paper, or application, and the facts and information contained in it. (§ 6 ch 113 SLA 1970; am § 8 ch 110 SLA 1981)

NOTES TO DECISIONS

Narrow construction. — The privilege reflected by this section should be construed narrowly so that it does not conflict with the constitutional requirements of due process. *City of Fairbanks v. Alaska Pub. Utils. Comm'n*, 611 P.2d 493 (Alaska 1980).

Due process controls over section. — The re-

quirement of this section that information not be withheld if "required in the interests of the public" will normally prevent a conflict with due process requirements. If a conflict nevertheless occurs, due process must control. *City of Fairbanks v. Alaska Pub. Utils. Comm'n*, 611 P.2d 493 (Alaska 1980).

Sec. 42.05.681. Validity of certain certificates. A certificate issued before July 29, 1968, to a public utility for the generation, transmission, or distribution of electric energy and power, or for the furnishing of telecommunications may not be considered as terminated or voided for the sole reason that the utility did not or would not produce an annual gross income in excess of \$25,000. (§ 6 ch 113 SLA 1970)

Sec. 42.05.691. Utility classes. The commission may by regulation provide for the classification of public utilities based upon differences in annual revenue, assets, nature of ownership, and other appropriate distinctions and as between these classifications, by regulation, provide for different reporting, accounting, and other regulatory requirements. (§ 6 ch 113 SLA 1970)

Sec. 42.05.701. [Renumbered as AS 42.05.720.]

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

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

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

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

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

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

42.05.711 (i) $\frac{1}{3}$ (r)
are repealed

(e) Notwithstanding any other provisions of this chapter, any electric or telephone utility that does not gross \$50,000 annually is exempt from regulation under this chapter unless the subscribers petition the commission for regulation under AS 42.05.712(h).

(f) Notwithstanding any other provisions of this chapter, an electric or telephone utility that does not gross \$500,000 annually may elect to be exempt from the provisions of this chapter other than AS 42.05.221 — 42.05.281 under the procedure described in AS 42.05.712.

(g) A utility, other than a telephone or electric utility, that does not gross \$150,000 annually may elect to be exempt from the provisions of this chapter other than AS 42.05.221 — 42.05.281 under the procedure described in AS 42.05.712.

(h) A cooperative organized under AS 10.25 may elect to be exempt from the provisions of this chapter, other than AS 42.05.221 — 42.05.281, under the procedure described in AS 42.05.712.

(i) A utility that furnishes collection and disposal service of garbage, refuse, trash, or other waste material and has annual gross revenues of \$300,000 or less is exempt from the provisions of this chapter, other than the certification provisions of AS 42.05.221 — 42.05.281, unless the subscribers petition the commission for regulation under AS 42.05.712(h). Notwithstanding AS 42.05.712(b) and (g), if subscribers representing 25 percent of the gross revenue of the utility petition the commission for regulation, the utility is subject to the provisions of this chapter.

(j) The provisions of this chapter do not apply to sales, exchanges, or gifts of energy to an electric utility certificated under this chapter when the energy which is the subject of the sale, exchange, or gift is waste heat, electricity, or other energy which is surplus or the by-product of an industrial process. In an area in which no electric utility is certificated for service, energy provided by sale, exchange, or gift may be provided to any utility which is certificated for service to that area. A contract for the sale, exchange, or gift of energy exempt under this subsection does not make the supplier a public utility and does not transfer the responsibility to provide utility services from a certificated utility to any other person.

(k) A utility that furnishes cable television service is exempt from the provisions of this chapter other than AS 42.05.221 — 42.05.281 unless the subscribers petition the commission for regulation under the procedure described in AS 42.05.712.

(l) A person, utility, or cooperative that is exempt from regulation under (a) or (d) — (k) of this section is not subject to regulation by a municipality under AS 29.35.060 and 29.35.070.

(m) The collection and disposal, under AS 29.35.050(c), by a municipality of waste material deposited at an intermediate transfer site is exempt from this chapter. (§ 6 ch 113 SLA 1970; am § 3 ch 76 SLA 1973; am § 8 ch 83 SLA 1980; am §§ 7 — 9 ch 136 SLA 1980; am § 89 ch 59 SLA 1982; am § 1 ch 30 SLA 1983; am § 68 ch 74 SLA 1985; am § 1 ch 80 SLA 1985; am § 2 ch 107 SLA 1986; § 5 ch 93 SLA 1990; am § 3 ch 176 SLA 1990; am §§ 4 — 8 ch 1 SLA 1995)

Cross references. — For limitations on these exemptions, see AS 42.05.254, AS 42.05.321(b), and AS 42.05.381(c).

Effect of amendments. — The 1995 amendment, effective June 26, 1995, in subsections (e) and (k), deleted "25 percent of" following "unless"; in subsection (e), added "under AS 42.05.712(h)" at the end; in subsection (f), substituted "\$500,000" for "\$325,000"; in subsection (g), substituted "\$150,000" for "\$100,000"; rewrote subsection (i); and, in subsection (k), added "under the procedure described in AS 42.05.712" at the end and made minor stylistic changes.

Editor's notes. — Section 4, ch. 176, SLA 1990 provides that subsection (m) does not apply to a

municipality with a population of less than 50,000 until July 1, 1991.

Opinions of attorney general. — An electrical utility owned and operated by a regional electrical authority would continue to qualify for the broad exemption from this chapter, available to political subdivisions under subsection (b) of this section once the regional electrical authority had completed its proposed organization as a nonprofit corporation under AS 10.20, June 7, 1976, Op. Att'y Gen.

When a deregulated utility exceeds the gross annual limit of \$325,000 (increased in 1995 to \$500,000) specified in subsection (f), and thus fails to be eligible for deregulation, the deregulation exemption ends

(c) Except as provided in (b) of this section, the commission may prohibit installation of facilities for origination or termination of long distance service in a given location only if it determines that installation of the facilities in that location is not in the public interest. (§ 2 ch 93 SLA 1990)

Sec. 42.05.820. No municipal regulation. A long distance telephone company that is exempted in whole or in part from complying with all or a portion of this chapter may not be regulated by a municipality under AS 29.35.060 and 29.35.070. (§ 2 ch 93 SLA 1990)

Sec. 42.05.830. Exchange access charges. In providing for competition under AS 42.05.800 — 42.05.890, the commission shall establish a system of access charges to be paid by long distance carriers to compensate local exchange carriers for the cost of originating and terminating long distance services. (§ 2 ch 93 SLA 1990)

Sec. 42.05.840. Universal service fund. The commission may establish a universal service fund or other mechanism to be used to ensure the provision of long distance telephone service at reasonable rates throughout the state and to otherwise preserve universal service. (§ 2 ch 93 SLA 1990)

Sec. 42.05.850. Exchange carrier association. The commission may require the local exchange carriers to form an association to assist in administering the system of access charges and may require the association to file tariffs and to engage in pooling of exchange access costs and revenue if necessary to achieve the purposes of AS 42.05.800 — 42.05.890. (§ 2 ch 93 SLA 1990)

Cross references. — For legislative intent in enacting this section, see § 1(b), ch. 93, SLA 1990 in the Temporary and Special Acts.

Sec. 42.05.860. Restrictions on resale of telecommunications services prohibited. A telephone company may not prohibit or restrict the resale of telecommunications service. If an interexchange telecommunications service is resold, the reseller shall receive credit in an appropriate amount for an applicable exchange access charge if the credit is necessary to prevent double payment of the access charges. (§ 2 ch 93 SLA 1990)

Sec. 42.05.890. Definitions. In AS 42.05.800 — 42.05.890,

- (1) "local exchange carrier" means any carrier certificated to provide local telephone services;
- (2) "long distance carrier" or "long distance telephone company" means any carrier certificated to provide long distance telephone services;
- (3) "long distance telephone service" or "long distance service" means intrastate, interexchange telephone service. (§ 2 ch 93 SLA 1990)

Revisor's notes. — Enacted as AS 42.05.995. Renumbered in 1990.

Article 11. General Provisions.

Section
990. Definitions
996. Short title

Sec. 42.05.990. Definitions. In this chapter

- (1) "affiliated interest" includes:
 - (A) a person owning or holding directly or indirectly five per cent or more of the voting

42.05.990 (+) (F)
is repealed

securities of a public utility engaged in intrastate business in this state;

(B) a person, other than those specified in (A) of this paragraph, in a chain of successive ownership of five per cent or more of voting securities, the chain beginning with the holder of the voting securities of such public utility;

(C) a corporation five per cent or more of whose voting securities are owned by a person owning five per cent or more of the voting securities of the public utility or by a person in such a chain of successive ownership of five per cent or more of the voting securities;

(D) a corporation five per cent or more of whose voting securities are owned or held by a public utility;

(E) a person with whom the public utility has a management or service contract;

(F) a person who is an officer or director of such a public utility or of a corporation in a chain of successive ownership of five per cent or more of voting securities;

(G) a corporation which has one or more officers or directors in common with a public utility;

(H) a person or corporation who or which the commission determines as a matter of fact, after investigation and hearing, actually is exercising such substantial influence over the policies and actions of a utility in conjunction with one or more other corporations or persons with whom they are related by ownership or blood, or by action in concert, that together they are affiliated with the utility within the meaning of this section even though none of them alone is so affiliated; or

(I) a person or corporation who or which the commission determines as a matter of fact after investigation and hearing actually is exercising substantial influence over the policies and actions of a utility even though such influence is not based upon stockholdings, stockholders, officers or directors to the extent specified in this section;

(2) "commission" means the Alaska Public Utilities Commission;

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

(A) a group of 10 or more customers that purchase the service or commodity furnished by a public utility;

(B) one or more customers that purchase electrical service for use within an area that is certificated to and presently or formerly served by an electric utility if the total annual compensation that the electrical utility receives for sales of electricity exceeds \$50,000; and

(C) a utility purchasing the product or service or paying for the transmission of electric energy, natural or manufactured gas, or petroleum products that are re-sold to a person or group included in (A) or (B) of this paragraph that are used to produce the service or commodity sold to the public by the utility;

(4) "public utility" or "utility" includes every corporation whether public, cooperative, or otherwise, company, individual, or association of individuals, their lessees, trustees, or receivers appointed by a court, that owns, operates, manages, or controls any plant, pipeline, or system for

(A) furnishing, by generation, transmission, or distribution, electrical service to the public for compensation;

(B) furnishing telecommunications service to the public for compensation;

(C) furnishing water, steam, or sewer service to the public for compensation;

(D) furnishing by transmission or distribution of natural or manufactured gas to the public for compensation;

(E) furnishing for distribution or by distribution petroleum or petroleum products to the public for compensation when the consumer has no alternative in the choice of supplier of a comparable product and service at an equal or lesser price;

(F) furnishing collection and disposal service of garbage, refuse, trash, or other waste material to the public for compensation;

(5) "rate" includes each rate, toll, fare, rental, charge, or other form of compensation demanded, observed, charged, or collected by a public utility for its services;

Anchorage, 579 P.2d 1071 (Alaska 1978).

For discussion of imperfections in the escrow procedure. — See Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough, 534 P.2d 549 (Alaska 1975).

Denial of interim rate increase held arbitrary. — Where the superior court found that the existing rate was confiscatory, where the borough was clearly operating the sewer utility at a great loss, where the period prior to a final hearing could be construed to be unreasonable and where the commission failed to provide any further justification for its decision, the denial of the interim rate increase was arbitrary, and the superior court's injunction voiding the commission's order did not constitute an abuse of its discretion. Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough, 534 P.2d 549 (Alaska 1975).

Commission determination that proposed rates were reasonable was not supported by substantial evidence on the record as a whole. Jager v. State, 537 P.2d 1100 (Alaska 1975).

Procedure consistent with statutory allocation of burden of proof. — Where the commission had first been satisfied by a public utility's evidence that the rates were reasonable and thereafter turned to complainant to show otherwise, this procedure, consistent with the statutory allocation of the burden of proof, is clearly reasonable. Jager v. State, 537 P.2d 1100 (Alaska 1975).

Refund methods. — See United States v. RCA Alaska Communications, Inc., 597 P.2d 489 (Alaska

1979), overruled on other grounds, Owsichuk v. Guide Licensing & Control Bd., 627 P.2d 616 (Alaska 1981).

Commission did not err in suspending company's tariff revision filings five times, constituting a 22-month suspension, given the complexities involved, including consideration of separated company versus total company's revenue requirements, and the availability of interim relief if warranted. The fact that interest rates dropped from the time the company filed the tariff to the time the commission made its final decision did not entitle the company to an analysis based on the higher rates. Glacier State Tel. Co. v. Alaska Pub. Utils. Comm'n, 724 P.2d 1187 (Alaska 1986).

Powers of commission. — The legislature intended to grant the commission broad powers to establish "fair and just" rates. Implied within that broad grant of powers is the authority for the commission to declare a rate interim and refundable, so long as the commission provides protection for the interests of both the utility and the public. Far N. San., Inc. v. Alaska Pub. Utils. Comm'n, 825 P.2d 867 (Alaska 1992).

Failure to hold hearing nonjurisdictional and subject to waiver. — Error involving the commission's failure to hold a hearing before ordering an interim refundable rate was nonjurisdictional and subject to waiver by a party's failure to raise it before the commission. Far N. San., Inc. v. Alaska Pub. Utils. Comm'n, 825 P.2d 867 (Alaska 1992).

42.05.431
(F) §(9)
are repealed

Sec. 42.05.430. [Repealed, § 5 ch 113 SLA 1970.]

Sec. 42.05.431. Power of commission to fix rates. (a) When the commission, after an investigation and hearing, finds that a rate demanded, observed, charged, or collected by a public utility for a service subject to the jurisdiction of the commission, or that a classification, rule, regulation, practice, or contract affecting the rate, is unjust, unreasonable, unduly discriminatory or preferential, the commission shall determine a just and reasonable rate, classification, rule, regulation, practice, or contract to be observed or allowed and shall establish it by order. A municipality may covenant with bond purchasers regarding rates of a municipally owned utility, and the covenant is valid and enforceable and is considered to be a contract with the holders from time to time of the bonds. The financial covenants contained in mortgages and other debt instruments of cooperative utilities organized under AS 10.25 are also valid and enforceable, and rates set by the commission must be adequate to meet those covenants. However, a cooperative utility that is negotiating to enter a mortgage or other debt instrument that provides for a times-interest-earned ratio (TIER) greater than the ratio the commission most recently approved for that cooperative shall submit the mortgage or debt instrument to the commission before the instrument takes effect. The commission may disapprove the instrument within 60 days after its submission. If the commission has not acted within 60 days, the instrument is considered to be approved.

(b) A wholesale power agreement between public utilities is subject to advance approval of the commission. After a wholesale power agreement is in effect, the commission may not invalidate any purchase or sale obligation under the agreement. However, if the commission finds that rates set in accordance with the agreement are not just and reasonable, the commission may order the parties to negotiate an amendment to the agreement and if the parties fail to agree, to use the dispute resolution procedures contained in the contract.

(c) Notwithstanding (b) of this section,

(1) a wholesale agreement for the sale of power from a project licensed by the Federal Energy Regulatory Commission on or before January 1, 1987, and related contracts for

the wheeling, storage, regeneration, or wholesale repurchase of power purchased under the agreement, entered into between the Alaska Energy Authority and one or more other public utilities or among the utilities after October 31, 1987, and before January 1, 1988, and amendments to the wholesale agreement or related contract, are not subject to review or approval by the commission until all long-term debt incurred for the project is retired; and

(2) a wholesale agreement or related contract described in (1) of this subsection may contain a covenant for the public utility to establish, charge, and collect rates sufficient to meet its obligations under the contract; the rate covenant is valid and enforceable.

(d) Meetings between the Alaska Energy Authority and public utilities concerning a wholesale agreement for the sale of power or other matter exempted from review of the commission under (c) of this section must comply with AS 44.62.310.

(e) Validated costs incurred by a utility in connection with the related contracts described in (c)(1) of this section must be allowed in the rates charged by the utility. In this subsection, "validated costs" are the actual costs that a utility uses, under the formula set out in related contracts described in (c) of this section, to establish rates, charges for services and rights, and the payment of charges for services and rights. This subsection does not grant the commission jurisdiction to alter or amend the formula set out in those related contracts.

(f) In the establishment of rates of a utility furnishing solid waste material collection and disposal service, the commission shall permit recovery of reasonable, net capital and operating costs relating to solid waste recovery and recycling services after considering the utility's recovery of revenue associated with the service.

(g) In the establishment of rates under this chapter, the commission shall promote cost-effective solid waste recovery and recycling services.

(h) When setting or reviewing rates for a public utility that sends or receives power over the power transmission interties between Fairbanks and Healy or between Anchorage and the Kenai Peninsula, the commission shall consider those costs that have not been directly assigned to other individual generating utilities by the utility responsible for the construction of the intertie to have been incurred for the system existing on August 11, 1993. (§ 6 ch 113 SLA 1970; am §§ 4, 5 ch 104 SLA 1986; am §§ 1, 2 ch 11 SLA 1988; am § 1 ch 46 SLA 1991; am § 4 ch 18 SLA 1993)

Revisor's notes. — Subsection (e) was enacted as AS 42.05.511(d). Renumbered in 1988.

Cross references. — For provisions governing the Alaska Energy Authority, see AS 44.83.

Editor's notes. — Section 8, ch. 104, SLA 1986 provides that (b) of this section "applies only to wholesale power agreements entered into on or after June 7, 1986."

Section 5, ch. 11, SLA 1988 provides that subsections (c) and (e) of this section are retroactive to November 1, 1987.

Legislative history reports. — For legislative letters of intent on the amendments to this section by ch. 11, SLA 1988 (SCS CSIB 356(R1a)), see 1988 House Journal, pp. 2233 — 2234 and 1988 Senate Journal, pp. 2483 — 2484.

Opinions of attorney general. — The Alaska Public Utility Commission was not authorized to review the Long-Term Power Sales Agreement 4 Dam Pool — Initial Project of the Alaska Power Authority, a wholesale power agreement signed by the Alaska Power Authority (now Alaska Energy Authority), two electric cooperatives, and three cities in southeast Alaska, since the agreement was signed prior to June 7, 1986. February 12, 1988, Op. Att'y Gen.

A power purchase contract between the Alaska Power Authority (now Alaska Energy Authority) and Municipal Light & Power is subject to approval by the Alaska Public Utilities Commission under subsection (b). February 18, 1987, Op. Att'y Gen. (Opinion rendered prior to the 1988 amendment of this section.)

NOTES TO DECISIONS

History of section. — See Alaska Pub. Utils. Comm'n v. Municipality of Anchorage, 555 P.2d 262 (Alaska 1976).

The commission may establish rates only after an investigation and hearing. Far N. San., Inc. v. Alaska Pub. Utils. Comm'n, 825 P.2d 867 (Alaska 1992).

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), overruled on other grounds, Owsichek v. Guide Licensing & Control Bd., 627 P.2d 616 (Alaska 1981).

(b) This section applies to home rule and general law municipalities. (§ 10 ch 74 SLA 1985)

NOTES TO DECISIONS

Municipal assembly's designation of land as a potential school site gave the owner of the land no right to compel a sale of the land, because the local school district had management authority over its budget as well as district operations, and the assembly could not force the district to spend money to acquire a particular site. *Homeward Bound, Inc. v. Anchorage Sch. Dist.*, 791 P.2d 610 (Alaska 1990).

Municipal assembly's designation of property as a potential school site was not a taking for which the property owner could recover just compensation, where the assembly's mere designation was not a concrete indication that the municipality intended to condemn the property. *Homeward Bound, Inc. v. Anchorage Sch. Dist.*, 791 P.2d 610 (Alaska 1990).

Collateral references. — Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves. 35 ALR3d 1293.

Validity of "freezing" ordinances or statutes preventing prospective condemnee from improving, or otherwise changing, the condition of his property. 36 ALR3d 751.

Cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property. 40 ALR3d 143.

Consideration of fact that land owner's remaining land will be subject to special assessment in fixing severance damages. 59 ALR3d 534.

Sec. 29.35.040. Emergency disaster powers. (a) A municipality that is wholly or partially in an area that is declared by the President or governor to be a disaster area may participate in and provide for housing, urban renewal, and redevelopment in the same manner as a home rule city. The exercise of these powers by a borough shall be on a nonareawide basis, except a borough may exercise the powers transferred to it by a city as provided by AS 29.35.310.

(b) Powers granted by this section must be initiated within a period of not more than five years after the date of declaration of a natural disaster by the President or governor, but these powers may be extended for an additional period of not more than three years. (§ 10 ch 74 SLA 1985)

Sec. 29.35.050. Garbage and solid waste services. (a) Notwithstanding AS 29.35.200 — 29.35.220, a municipality may by ordinance

(1) provide for the establishment, maintenance, and operation of a system of garbage and solid waste collection and disposal for the entire municipality, or for districts or portions of it;

(2) require all persons in the municipality or district to use the system and to dispose of their garbage and solid waste as provided in the ordinance;

(3) award contracts for collection and disposal, or provide for the collection and disposal of garbage and solid waste by municipal officials and employees;

(4) pay for garbage and solid waste collection and disposal from available money;

(5) require property owners or occupants of premises to use the garbage and solid waste collection and disposal system provided by the municipality;

(6) fix charges against the property owners or occupants of premises for the collection and disposal; and

(7) provide penalties for violations of the ordinances.

(b) The governing body of a municipality may not prohibit a person holding a valid certificate from the Alaska Public Utilities Commission from continuing to collect and dispose of garbage, refuse, trash, or other waste material, or provide other related services in an area in the municipality if the certificate authorizes the collection and disposal of garbage, refuse, trash, or other waste material and providing of other services in the area, and the certificate was originally issued before the municipality provided similar services. Except as provided in (c) of this section, a municipality may not provide

29.35.050 (a) & (b)
are repealed

(c) & (d) are not

for a garbage, refuse, trash, or other waste material collection and disposal service in an area to the extent it lies in an area granted to a garbage, refuse, trash, or other waste material carrier by a certificate issued by the Alaska Public Utilities Commission to the carrier until it has purchased the certificate, equipment and facilities of the carrier, or that portion of the certificate that would be affected, at fair market value. A municipality may exercise the right of eminent domain to acquire the certificate, equipment, and facilities of the carrier, or that portion of the certificate that would be affected.

(c) A municipality may establish an intermediate transfer site for the collection and disposal of garbage, refuse, trash, or other waste material without purchasing the certificate, equipment, or facilities of a waste material carrier certificated by the Alaska Public Utilities Commission. The municipality may, without compensating a certificated waste carrier operating in the area, provide for or contract with a certificated or noncertificated entity to provide for the collection and disposal of waste material left at the intermediate transfer site.

(d) This section applies to home rule and general law municipalities. (§ 10 ch 74 SLA 1985; am §§ 1, 2 ch 176 SLA 1990; am § 38 ch 21 SLA 1991)

Revisor's notes. — Subsection (c) was enacted as subsection (d) and relettered in 1990, at which time former subsection (c) was relettered as subsection (d).

provides that the amendments made to this section by §§ 1 and 2, ch. 176, SLA 1990 do not apply to a municipality with a population of less than 50,000 until July 1, 1991.

Editor's notes. — Section 4, ch. 176, SLA 1990

NOTES TO DECISIONS

"Provided similar services." — The phrase "provided similar services" in subsection (b) refers only to lawfully performed services. *Colville Env'tl. Servs.,*

Inc. v. North Slope Borough, 331 P.2d 341 (Alaska 1992).

Collateral references. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 140 et seq.

maintenance of sewer disposal plant as nuisance. 40 ALR2d 1198.

62 C.J.S., Municipal Corporations, §§ 279, 657.

Municipal liability for maintenance of public dump as nuisance. 52 ALR2d 1134.

Liability of municipal corporation for damages for

Sec. 29.35.055. Local air quality control program. A municipality may establish a local air quality control program as provided in AS 46.14.400 only if the municipality has obtained the consent of its governing body through an ordinance authorizing the participation. This section applies to home rule and general law municipalities. (§ 6 ch 74 SLA 1993)

Sec. 29.35.060. Franchises and permits. (a) The assembly acting for the area outside all cities in the borough and the council acting for the area in a city may grant franchises, including exclusive franchise privileges, to a person, corporation, organization, or utility not certificated by the Alaska Public Utilities Commission and may permit the use of streets and other public places by the franchise holder under regulations prescribed by ordinance.

(b) Unless the grant is made on a competitive basis, the grant of an exclusive right to use a public street or right-of-way for more than five years to a utility or a transportation system not certificated by the Alaska Public Utilities Commission shall be valid only if approved by a majority of the voters at an election.

(c) This section applies to home rule and general law municipalities. (§ 10 ch 74 SLA 1985)

Collateral references. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 140 et seq.

64 C.J.S., Municipal Corporations, § 1726. Municipality's liability in damages for refusal to grant franchise. 37 ALR2d 694.

Alaska State Legislature

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COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

UNLESS OTHERWISE INDICATED, MEETING TIME 8:00 AM, ROOM 124, CAPITOL BUILDING

TUESDAY, APRIL 13, 1999

BILLS PREVIOUSLY HEARD

THURSDAY, APRIL 15, 1999

HB 178+* DEREGULATION OF GARBAGE UTILITIES

BILLS PREVIOUSLY HEARD

TUESDAY, APRIL 20, 1999

HB200+* MUNICIPAL PROPERTY TAX EXEMPTIONS
(PENDING INTRODUCTION AND REFERRAL)

HB 175+* LICENSING OF FOSTER GROUP HOMES
(PENDING REFERRAL)

HCR6+* LOCAL GOVERNMENT IMPACT TASK FORCE

THURSDAY, APRIL 22, 1999

HB 193* ADMIN COSTS OF VILLAGE PUBLIC SAFETY OFFICERS

BILLS PREVIOUSLY HEARD

* FIRST PUBLIC HEARING
+ TELECONFERENCE

CS FOR HOUSE BILL NO. 178()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVE KOTT

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to removing solid waste collection and disposal service from
 2 regulation by the Alaska Public Utilities Commission; requiring certain
 3 municipalities, and permitting other municipalities, to regulate solid waste collection
 4 and disposal service within the municipal boundaries; and providing for an
 5 effective date."

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

7 * Section 1. LEGISLATIVE FINDINGS AND INTENT. (a) The legislature finds that

8 (1) in most states, solid waste collection and disposal service is not regulated
 9 at the state level; rather, if it is regulated at all, solid waste collection and disposal service is
 10 regulated at the county or city level;

11 (2) each community in Alaska is unique, and therefore local governments are
 12 better able to determine the level of service and the appropriate market structure for solid
 13 waste collection and disposal service within the community's boundaries than is a state

1 commission;

2 (3) local control of solid waste collection and disposal service would allow a
3 municipality to establish a comprehensive solid waste management plan based on the size,
4 nature, and population density of the area to respond to the unique needs of the community
5 and to better serve customers within the municipal boundaries.

6 (b) It is the intent of the legislature to provide in this Act that

7 (1) when the Alaska Public Utilities Commission ceases to regulate solid waste
8 collection and disposal service, a municipality in the state that owns and operates a solid waste
9 collection and disposal service or that has within its boundaries a certificated public utility that
10 is providing solid waste collection and disposal service should replace the commission's
11 regulation with a system of local control either by continuing its ownership and operation of
12 a solid waste collection and disposal service or by granting one or more franchises to private
13 carriers to do so;

14 (2) a municipality that does not own or operate a solid waste collection and
15 disposal service and that, on the effective date of this section, does not have within its
16 boundaries a certificated public utility providing the service should be authorized but not
17 required to establish a system of solid waste collection and disposal;

18 (3) a municipality should recover the cost of implementing this Act either
19 through revenue earned from directly providing solid waste collection and disposal service or
20 by the collection of franchise fees;

21 (4) the property interests of private carriers that already provide solid waste
22 collection and disposal service under a certificate of public convenience and necessity issued
23 by the Alaska Public Utilities Commission should be protected by requiring municipalities to
24 either grant franchises to these carriers for a period of time or purchase the certificate,
25 equipment, and facilities at fair market value.

26 * Sec. 2. AS 29.35.050 is amended by adding new subsections to read:

27 (e) By January 1, 2000, a municipality that, on the effective date of this
28 subsection, holds a certificate from the Alaska Public Utilities Commission to provide
29 solid waste collection and disposal service or that has within its boundaries a public
30 utility certificated by the Alaska Public Utilities Commission to provide solid waste
31 collection and disposal service shall by ordinance provide for a system of residential

1 and commercial solid waste collection and disposal for the affected service areas. The
2 municipality may satisfy the requirement of this subsection either by operating the
3 service itself, with municipal officials and employees, or by granting one or more
4 franchises to a private carrier to provide the service. Notwithstanding
5 AS 29.35.250(b), a city that is inside a borough and that has established a system of
6 solid waste collection and disposal before the effective date of this subsection may
7 maintain that service. If, on the effective date of this subsection, a public utility
8 provides residential or commercial solid waste collection and disposal service under
9 a certificate issued by the Alaska Public Utilities Commission in a service area in a
10 municipality, the municipality shall

11 (1) grant an exclusive franchise to the certificated utility to continue
12 to provide the service for a term of at least five years from the later of the date that
13 the franchise was granted or January 1, 2000; the franchise must contain an agreement
14 that will allow the carrier to charge customers at the rates contained in the utility's
15 tariff in effect on June 1, 1999, adjusted for inflation and any extraordinary increases
16 in operating expenses; the term of the agreement and the rates charged are subject to
17 amendment by agreement of the municipality and the franchisee;

18 (2) grant competing franchises; if a municipality grants more than one
19 franchise in an area,

20 (A) the municipality may not regulate the rates for service
21 within the area of competition; and

22 (B) one of the franchise holders in the area of competition must
23 be the public utility that provided residential or commercial solid waste
24 collection and disposal service in that service area on the day before the
25 effective date of this section under a certificate issued by the Alaska Public
26 Utilities Commission; or

27 (3) purchase, at fair market value, the utility's certificate, equipment,
28 and facilities that are related to providing service in the municipality.

29 (4) A municipality that is not described in (e) of this section may by ordinance
30 provide for a system of residential and commercial solid waste collection and disposal.
31 The ordinance may provide either that the municipality will operate the service itself,

1 a home rule or first class city, a second class borough, or a unified home rule
2 municipality;

3 (3) "residential solid waste collection and disposal" means the
4 collection and disposal of solid waste, garbage, refuse, or trash from a container that
5 has a capacity of less than one cubic yard, whether or not the property from which the
6 material is collected is considered residential property.

7 * Sec. 3. AS 29.35.070(a) is amended to read:

8 (a) The assembly acting for the area outside all cities in the borough and the
9 council acting for the area in a city may regulate, fix, establish, and change the rates
10 and charges imposed for a utility service provided to the municipality or its inhabitants
11 by a utility that is not subject to regulation under AS 42.05 unless that utility is
12 exempted from regulation under AS 42.05.711(a), [OR] (d) - (h), (i), or (k) or is
13 exempted under regulations adopted under AS 42.05.810 from complying with all or
14 part of AS 42.05.010 - 42.05.721.

15 * Sec. 4. AS 29.35.210(a) is amended to read:

16 (a) A second class borough may by ordinance exercise the following powers
17 on a nonareawide basis:

- 18 (1) provide transportation systems;
- 19 (2) regulate the offering for sale, exposure for sale, sale, use, or
20 explosion of fireworks;
- 21 (3) license, impound, and dispose of animals;
- 22 (4) [SUBJECT TO AS 29.35.050,] provide [GARBAGE, SOLID
23 WASTE, AND] septic waste collection and disposal;
- 24 (5) provide air pollution control under AS 46.14.400;
- 25 (6) provide water pollution control;
- 26 (7) participate in federal or state loan programs for housing
27 rehabilitation and improvement for energy conservation;
- 28 (8) provide for economic development;
- 29 (9) provide for the acquisition and construction of local service roads
30 and trails under AS 19.30.111 - 19.30.251;
- 31 (10) establish an emergency services communication center under

1 AS 29.35.130;

2 (11) subject to AS 28.01.010, regulate the licensing and operation of
3 motor vehicles and operators;

4 (12) engage in activities authorized under AS 29.47.460;

5 (13) contain, clean up, or prevent a release or threatened release of oil
6 or a hazardous substance, and exercise a power granted to a municipality under
7 AS 46.04, AS 46.08, or AS 46.09; the borough shall exercise its authority under this
8 paragraph in a manner that is consistent with a regional master plan prepared by the
9 Department of Environmental Conservation under AS 46.04.210.

10 * Sec. 5. AS 38.05.810(f) is amended to read:

11 (f) The commissioner shall lease state land for telephone or electric
12 transmission and distribution lines for less than the appraised value of the land if the
13 lessee is a nonprofit cooperative association organized under AS 10.25. The
14 commissioner may lease state land that is not located within the boundary of a
15 municipality for the disposal of garbage, refuse, trash, or other waste material for less
16 than the appraised value of the land if the lessee is approved by the commissioner
17 and collects and disposes [A LICENSED PUBLIC UTILITY AUTHORIZED TO
18 COLLECT AND DISPOSE] of garbage, refuse, trash, or other waste material outside
19 the boundaries of a municipality. Before determining the annual rental, the
20 commissioner shall consider the nature of the public service rendered by the nonprofit
21 cooperative association or approved lessee [LICENSED PUBLIC UTILITY] and the
22 terms of the grant under which the land was acquired by the state. A nonprofit
23 cooperative association may not construct improvements other than transmission or
24 distribution lines and substations on land leased under this subsection. An approved
25 lessee [A LICENSED PUBLIC UTILITY] may not construct permanent improvements
26 on land leased under this subsection that are not related to the purpose of the lease.

27 * Sec. 6. AS 42.05.711(l) is amended to read:

28 (l) A person, utility, or cooperative that is exempt from regulation under (a),
29 [OR] (d) - (h), (i), or (k) of this section is not subject to regulation by a municipality
30 under AS 29.35.060 and 29.35.070.

31 * Sec. 7. AS 42.05.712(h) is amended to read:

1 (h) A utility or cooperative that is already exempt from regulation under this
2 section or that is exempt from regulation under AS 42.05.711(e) [, (i),] or (k) may
3 elect to terminate its exemption in the same manner.

4 * Sec. 8. AS 45.50.572(d) is amended to read:

5 (d) AS 45.50.562 - 45.50.596

6 (1) apply to long distance telecommunications services provided by
7 public utilities;

8 (2) [. AS 45.50.562 - 45.50.596] do not apply to

9 (A) other services provided by public utilities that have been
10 issued a certificate of public convenience and necessity under AS 42.05; or

11 (B) solid waste collection and disposal that is regulated by
12 a municipality under AS 29.35.050 where the municipality has granted the
13 private carrier an exclusive franchise to operate in an area.

14 * Sec. 9. REPEAL OF STATUTES. (a) AS 29.35.050(a) and 29.35.050(b) are repealed.

15 (b) AS 42.05.431(f), 42.05.431(g), 42.05.711(i), 42.05.711(m), and 42.05.990(4)(F)
16 are repealed.

17 * Sec. 10. Sections 1, 2, 4, 8, and 9(a) of this Act take effect immediately under
18 AS 01.10.070(c).

19 * Sec. 11. Except as provided in sec. 10 of this Act, this Act takes effect January 1, 2000.

Amendment

#1

G version of the bill: Section 2 (e) (1) Line 14 insert after customers no [at
more than "

This amendment caps the rates. Present language fixes the rates.

MEMORANDUM

TO: Jonathan Lack
FROM: Steven E. Mulder
DATE: April 29, 1999
RE: HB 178

Jonathan, thank you for the committee substitute work draft.

Section 2(e)(3) continues existing state law requiring a municipality to compensate a certificate holder when a "taking" occurs. Under state law, a utility holding a certificate has a property interest in its certificated operations. Currently, under AS 29.35.050(b), the governing body of a municipality may not prohibit a certificate holder from continuing its authorized collection and disposal services until it has purchased the "certificate, equipment and facilities of the carrier, or that portion of the certificate that would be affected, at fair market value."

In reviewing the draft committee substitute, it appears section 2(c)(2)(B) should be changed to be consistent with the (e)(1) five year term requirement. We suggest the following language be added to (e)(2)(B):

One of the franchise holders in the area of competition must be the public utility that provided residential or commercial solid waste collection and disposal service in that service area on the day before the effective date of this section under a certificate issued by the Alaska Public Utilities Commission; the franchise must be for a term of at least five years from the later of the date that the franchise was granted or January 1, 2000; or

Jonathan Lack
April 29, 1999
Page 2

Also, I attended the Anchorage Assembly work session on HB 178 on Tuesday morning of this week and the lunch meeting of the Solid Waste Advisory Commission on Wednesday. The following is a discussion of issues raised at those meetings and some suggested language changes that would address those concerns.

1. Some members of the advisory commission expressed the view that AS 29.35.050(a) should not be repealed but rather a new subsection (8) added to state:

(8) grant franchises under (c) of this statute.

2. There was concern that paragraph (e) of section 2 of HB 178 may not clearly allow the Municipality of Anchorage to maintain the current checkerboard of service areas. A suggestion was made to delete this sentence:

[THE MUNICIPALITY MAY SATISFY THE REQUIREMENT OF THIS SUBSECTION EITHER BY OPERATING THE SERVICE ITSELF, WITH MUNICIPAL OFFICIALS AND EMPLOYEES, OR BY GRANTING ONE OR MORE FRANCHISES TO A PRIVATE CARRIER TO PROVIDE THE SERVICE.]

And to substitute:

In implementing this requirement, the municipality may operate the service itself; it may also grant one or more franchises to provide the service. Where the municipality holds a certificate from the Alaska Public Utilities Commission to provide solid waste collection and disposal service, it may retain exclusive or non-exclusive authority to continue to provide such service in its service area.

Jonathan Lack
April 29, 1999
Page 3

3. There was a suggestion to add to the end of (e)(3):

, provided however, the obligation to purchase shall not exist after January 1, 2005.

4. Some would be comforted by additionally adding to (e)(3) the following:

no franchisee shall be entitled to compensation solely as a result of expiration of any franchise granted under (e).

Please note that the Solid Waste Advisory Commission did not vote to formally recommend the above possible changes; however, these are suggestions of language changes that could address concerns of some members of the commission.

cc: Pat Harmon

JOHN M. CONWAY
BRUCE E. GAGNON
ROBERT J. DICKSON
W. MICHAEL MOODY
PATRICK B. GILMORE
RICHARD E. VOLLERTSEN
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JEROME H. JUDAY
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LAW OFFICES OF
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APR 22

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OF COUNSEL
KENNETH R. ATKINSON

April 21, 1999

Mary K. Hughes, Esq.
Municipal Attorney
Municipality of Anchorage
P.O. Box 196650
Anchorage, Alaska 99519-6650

Re: House Bill 178

Dear Ms. Hughes:

You have requested our review and evaluation of House Bill 178, paying special attention to whether the proposed legislation is constitutional. This letter constitutes our analysis.

House Bill 178 appears to signify an attempt by a single foreign corporation, Waste Management, Inc., to exert its market power in the Alaska economy at the expense of local governments, and ultimately, the residents of the State. House Bill 178 is peculiar in one respect, however, because it places the State in a new "facilitating" role with respect to substantial market power consolidation affecting the State. Rather than resisting the trend in the private sector toward market consolidation within Alaska, House Bill 178 is unique because it proposes that the State actually take the proactive step of creating and sanctioning a monopoly in the State's refuse industry.

Proponents of House Bill 178 may view the bill as simply transferring regulatory oversight of the refuse industry from state to local government. But the bill does much more than that. It effectively diminishes the regulatory capacity of local government by extending new and exclusive rights to the private company currently certified to collect refuse in many of Alaska's communities. A comparison of the current regulatory scheme with the proposed regulatory regime will highlight a few of these shortcomings.

Mary K. Hughes, Esq.

April 21, 1999

Page 2

Under the existing regulatory scheme, a refuse company must acquire a Certificate of Public Convenience and Necessity from the Alaska Public Utilities Commission. AS 42.05.221(a). The Certificate of Public Convenience and Necessity is a property right which is entitled to protection. Homer Electric Ass'n v. City of Kenai, 423 P.2d 285, 289-90 (Alaska 1967). But the Certificate does not grant the Certificate holder a monopoly right to provide exclusive utility service. Chugach Electric Ass'n v. City of Anchorage, 426 P.2d 1001, 1003 (Alaska 1967); Homer Electric Ass'n v. City of Kenai, 423 P.2d 285, 289 (Alaska 1967). The utility is always subject to competition from other private companies or from the municipality itself. Chugach Electric Ass'n, supra; Homer Electric Ass'n, supra.

In contrast, under proposed Section 2(e) of House Bill 178, the rights of a refuse collector currently possessing a Certificate from the APUC would be greatly expanded at the expense of the municipalities and residents of the State. No longer would the refuse collector be subject to free and open competition. Instead the public utility would be insulated from competition and would be entitled to monopoly rights and monopoly profits. Under subsections one and two of Section 2(e), the refuse collector would have either the right to be granted an *exclusive* franchise by the municipality for at least five years, or, if the municipality determines that an unrestrained monopoly was not in its residents best interests, the right to have its assets purchased at fair market value by the municipality. Any refuse collection monopoly created and sanctioned under House Bill 178 would enjoy immunity from antitrust regulation under the State antitrust laws pursuant to Section 8 of House Bill 178.

Viewed from an antitrust perspective, House Bill 178 ends competition in the refuse industry in Alaska in favor of establishing monopolies. The purpose of the antitrust laws is to protect competition and to prevent monopoly. Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-49 (1951). By stamping out competition, establishing a monopoly, and then granting that monopoly immunity under the state antitrust laws, House Bill 178 turns the underlying policy for the state antitrust laws on its head.

Given House Bill 178's purpose of ending free competition in the refuse industry while simultaneously protecting the property rights of currently certified refuse collectors, the situation becomes even more problematic when multiple refuse collectors are certified by the APUC in any given service area. In this situation under the proposed act, the municipalities are required to bestow a monopoly on one refuse collector while simultaneously buying out any other certificated refuse collectors. Section 2(g), ll. 25-29.

Mary K. Hughes, Esq.
April 21, 1999
Page 3

The net result is to place a tremendous financial burden upon municipalities at a time of dwindling revenues for the sole purpose of allowing a private corporation to collect monopoly profits.

Moreover, in municipalities such as Anchorage where the municipality itself owns and operates a refuse collection service, House Bill 178 gives the municipality two options under subsections 2(e) & (g): either (1) grant an exclusive franchise to the private corporation and end municipal service without any form of compensation to the municipality, or (2) buy out the private refuse collector at fair market value. Assuming that the buy-out option is barred by prohibitive costs in an era of dwindling revenues, a valuable public right and asset will effectively be transferred to a private corporation without compensation when the exclusive franchise is granted to the private refuse company.

Perhaps the most troubling aspect of House Bill 178 is that the regulatory body will be held hostage by the interests and demands of the regulated refuse collector. After the exclusive franchise is granted and the monopoly created, Section 2(g) requires the municipality to buy out the refuse collector at fair market value if the municipality "deprives a public utility holding a certificate to provide service in the municipality of the right to provide service within municipal boundaries." § 2(g), p. 3, ll. 29-31 to p. 4 ll. 1-2. Neither "deprive" nor "right" is defined under House Bill 178. Because any form of public regulation necessarily infringes upon private rights to some degree, the refuse monopolist could assert that its buy-out rights have been triggered by any municipal regulation which it found unfavorable. The unfortunate result is to grant the sole remaining refuse collector extensive political power over local government as a complement to the extensive economic power it receives as a result of its monopoly status. This proposed legislation gives a private corporation political and economic power of unprecedented proportion.

In addition to the problems discussed above, House Bill 178 raises numerous constitutional issues as well. House Bill 178 is proposed by one party: Waste Management Inc. In light of the fact that Waste Management owns most private refuse companies in the State possessing Certificates of Public Convenience and Necessity, and therefore will effectively be receiving a monopoly on waste collection throughout the State, House Bill 178 is not drafted for the general welfare but instead for the private advantage of one private corporation.

House Bill 178 will be subject to challenge as a special act under Article II, Section 19 of the Alaska Constitution. Legislation which *incidentally* operates to private

advantage must bear a "fair and substantial relationship" to legitimate purposes. State v. Lewis, 559 P.2d 630, 643 (Alaska 1977). The very legitimacy of House Bill 178's purpose is questionable because its purpose and effect are to grant monopoly rights and monopoly profits to one private corporation at the expense of the municipalities and residents of the State. Moreover, even if a legitimate purpose for House Bill 178 could be articulated to some degree, that purpose is questionably furthered by the grant of monopoly rights to Waste Management at the expense of Alaskan municipalities and residents. House Bill 178 may be subjected to heightened judicial scrutiny, however, because it goes farther than *incidentally* affording a private advantage to Waste Management. House Bill 178 *intentionally* operates to Waste Management's private advantage because it was drafted for the very purpose of affording Waste Management monopoly or buy-out rights at the expense of Alaskan municipalities and tax paying citizens. Accordingly, House Bill 178 may be judicially reviewed to determine whether it is the least restrictive means to serve a compelling governmental interest. See, e.g., State, Dep't of Transp. & Labor v. Enserch Alaska Constr., Inc., 787 P.2d 624, 631-32 (Alaska 1989).

House Bill 178 is also subject to challenge under the equal protection clause by those refuse collectors who are statutorily denied the right compete against Waste Management, Inc. "'The right to engage in economic endeavor' is an important right that the government may impair only if its interest in taking the challenged action is important and the nexus between the action and the interest it serves is close." Laborers Local No. 942 v. Lampkin, 956 P.2d 422, 430 (Alaska 1998)(quoting State, Dep't of Transp. & Labor v. Enserch Alaska Constr., Inc., 787 P.2d 624, 633 (Alaska 1989)). As discussed above with reference to an Article II, Section 19 challenge, it may be difficult to articulate a legitimate governmental purpose for bestowing a monopoly on a private corporation at the expense of residents of the State, much less an "important" governmental interest. Moreover, if an important interest can in fact be articulated, the requisite "close" relationship between the private monopoly and the purported purpose is also questionable.

Finally, House Bill 178 may be subject to challenge by Anchorage tax paying residents who are being treated differently than Fairbanks tax paying residents under the proposed legislation. Under House Bill 178 Section 2(e), "a city that is inside a borough and that has established a system of solid waste collection and disposal before the effective date of this subsection may maintain that service." Thus, Fairbanks will be permitted to maintain the status quo, but a municipality such as Anchorage will be required to either grant an exclusive franchise to Waste Management, Inc. or buy out Waste Management, Inc. under Section 2(e). Anchorage taxpayers would have citizen-taxpayer standing to challenge

the plan, see Baxley v. State, 958 P.2d 422, 428-29 (Alaska 1998), as a violation of equal protection under the Alaska Constitution. The level of judicial scrutiny could vary from a "substantial-relationship-with-a-legitimate-state-purpose" test, to "the-least-restrictive-means-for-furthering-a-compelling-governmental interest" test. As discussed in connection with an Article II, Section 19 challenge, a legitimate much less compelling purpose for House Bill 178 is questionable, and the relationship between the proposed monopoly rights for Waste Management and any articulated purpose is also suspect.

In short, House Bill 178 is special interest legislation designed to benefit one private corporation, at great expense to the Municipality of Anchorage, and local government bodies throughout the State. The bill bestows unprecedented rights and powers on one private corporation, thereby producing numerous pitfalls and shortcomings. House Bill 178 therefore should not be enacted into law.

Very truly yours,

ATKINSON, CONWAY & GAGNON

By


Bruce E. Gagnon

By


Jeffrey J. Jarvi

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 26, 1999

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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VIA FACSIMILE & U.S. MAIL

The Honorable Andrew Halcro
Alaska State Legislature
House of Representatives
Alaska State Capitol, Room 418
Juneau, Alaska 99801

Re: House Bill 178

Dear Representative Halcro:

We are in receipt of your letter of April 22, 1999. One of your questions concerned the antitrust ramifications of exempting franchises under the state antitrust laws. I have responded to a similar question asked by Representative Kott. A copy of that letter is attached.

The other questions are much harder to answer in a concise way. Whether property has been taken or damaged in constitutional terms is often dependent on the particular facts. It is even more difficult to make generalizations without specific facts about the required valuation when there has been an admitted taking.

The question of whether a decertification of a utility's right to serve is a taking and what compensation may be due is now the subject of litigation before the Alaska Supreme Court in a case involving the modification of an electrical service area by the Alaska Public Utilities Commission on Prince of Wales Island. Tlingit-Haida Regional Electrical Authority v. State of Alaska, Alaska Public Utilities Commission (Nos. S-8833, S-8844, and S-8843). The THREA case, unlike HB 178, deals with decertification by a public utility commission for public interest reasons, rather than a municipality establishing its own solid waste collection business. The case has been briefed. The APUC removed the Klawock area from THREA and ordered that

Alaska Power Company serve the area. The superior court has held that removal of the service area was a taking. The APUC has appealed whether the modification of the certificate was a taking and has taken the position that compensation is not due for lost future profits for the utility. The brief is attached.

There is case law in other jurisdictions that support the position that a modification of a certificate for public interest reasons is not a taking. Cambridge Telephone Co. v. Pine Telephone, 712 P.2d 576, 581 (Idaho 1985) (holding that modification of a certificate of public convenience and necessity was not a taking of a property right); Knox County Rural Electric Membership Corporation v. PSI Energy, Inc., 663 N.E.2d 182, 192-93 (Ct. of App. Ind. 1996) (rejecting a takings claim and denying compensation to a utility whose service area was reduced in the public interest by the Indiana Utility Regulatory Commission).

However, the issue of whether a municipality could create an exclusive franchise for itself and therefore leave existing facilities and equipment with reduced value would present a more difficult question. Even if it is a taking, the facts may determine whether future profits of a going concern would be included in the compensation, rather than limited to facilities and equipment.

Attached is a general outline of takings principles that was prepared to aid in analyzing such a question. It should not be considered a legal opinion but you may find it helpful. It illustrates how the analysis can vary with the facts.

It should be noted that HB 178 in Section 2 adds a new subsection (AS 29.35.050(j)(2)) which defines "fair market value" as including "future projected revenue." There is no definition in the present statute and case law would determine the meaning of "fair market value" under it. This definition guarantees compensation that may go beyond what is required by the constitution.

Finally, we would have to know exactly what provision raises concerns under the local or special acts provision before we could express our view on that issue.

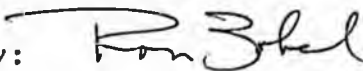
Representative Andrew Halcro
Alaska State Legislature

April 26, 1999
Page 3

We hope this answers some of your questions. We will be happy to provide more analysis once the question is more specific.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 
Ron Zobel
Assistant Attorney General

Enclosures:

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 23, 1999

VIA FACSIMILE & U.S. MAIL

The Honorable Pete Kott
Alaska State Legislature
House of Representatives
Alaska State Capitol
Juneau, Alaska 99801

Re: House Bill 178

Dear Representative Kott:

You have asked whether Section 8, of HB 178, makes private solid waste collection and disposal carriers subject to Alaska's antitrust laws.

Under present law refuse utilities are exempt from antitrust laws if the utility has a certificate from the APUC. AS 45.50.572 (d). However, because Section 9, of HB 178, acts to remove solid waste collection and disposal from the definition of a public utility and from the APUC's jurisdiction, this would subject refuse collection to Alaska's antitrust laws.

Section 8, of HB 178, however, acts to limit the application of Alaska's antitrust laws in one specific category. This section exempts from state antitrust laws a private solid waste and collection provider where a municipality has granted "an exclusive franchise to operate in an area."

The new exemption under Section 8 creates an exemption to antitrust laws for all conduct by an exclusive franchisee, without any assurance that the conduct will be reviewed or regulated by a municipality. The net effect of Section 8 is to eliminate the State's ability to review, for antitrust concerns, whether conduct by an entity with an exclusive franchise would result in any anticompetitive effects. Further, the elimination of the state's antitrust review authority occurs in the absence

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FAX (907) 465-6735

Representative Pete Kott
Alaska State Legislature

April 23, 1999
Page 2

of any guarantee that the municipality or any other regulatory body will conduct such a review.

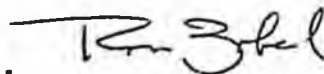
Exemptions to the state antitrust laws should be determined by whether the specific activity or conduct, and any "anticompetitive effects", have been considered and approved by a regulatory body. This is the approach taken by present state law in AS 45.50.572 (g) and the analogous "state action" doctrine under the federal antitrust law. The important distinction is between exempting a legal person that has an exclusive franchise and exempting only the conduct of that person that has been reviewed.

In summary, while Section 8 and 9, of HB 178, make private solid waste and collection carriers subject to antitrust law, the Sections also act to exempt from Alaska's antitrust laws conduct that may be anticompetative, without guaranteeing that a review will be commissioned by any other regulatory body.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:



Ron Zobel
Assistant Attorney General

has occurred.

See Anchorage v. Sandberg, 861 P.2d 554, 557 (Alaska 1993) citing Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2892-95 (1992); see also Cannone v. Noey, 867 P.2d 797, 800 (Alaska 1994).

B. STEP II: IF GOVERNMENTAL ACTION RESULTS IN A TAKING, JUST COMPENSATION IS DUE

WHAT PRINCIPLES APPLY IN DETERMINING WHAT IS JUST COMPENSATION?

1. The Alaska Supreme Court has repeatedly stated that the protection of private property under Art. I, Sec. 18 of the Alaska Constitution is to be liberally construed in favor of the property owner. Zerbetz v. Municipality of Anchorage, 856 P.2d 771, 782 (Alaska 1993). This means that "the requirement that the condemnor pay just compensation when property is damaged provides broader protection for private property rights than the fifth amendment to the United States Constitution." Id.

2. The Alaska Supreme Court has defined "just compensation" as:

The term just compensation implies full indemnification to the owner for the property taken. In other words the property owner should be placed in the same position as he was prior to the taking of his property.

Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 150 (Alaska 1971); see also Bakke v. State, 764 P.2d 655, 657 (Alaska 1987).

3. Fair market value of the property as of the date of the taking usually is the compensation that is required to satisfy the just compensation requirement. Gacksetter v. State, 618 P.2d 564, 567 (Alaska 1980).
4. Just Compensation includes compensation for loss of personal property. Stroh v. State, 459 P.2d 480, 483-87 (Alaska 1969) (appending superior court opinion, which allowed recovery of compensation for loss of personal

property taken); see also State v. Hammer, 550 P.2d 820, 827 (Alaska 1976).

- *5. The Alaska Supreme Court has held that just compensation in an eminent domain proceeding required the state to compensate Mr. Hammer for the temporary lost profits that accrued during the relocation of his business. State v. Hammer, 550 P.2d 820, 826-27 (Alaska 1976).



PRESTON GATES ELLIS &
ROUVELAS MEEDS LLP
ATTORNEYS

JAMES R. WEISS
DIRECT DIAL: (202) 662-8425

April 20, 1999

Honorable Andrew Halcro, Co-Chair
House Community and Regional Affairs Committee
Alaska State Legislature
Juneau, Alaska 99801

Re: *H.B. 178 Solid Waste Collection and Disposal Bill*

Dear Chairman Halcro:

Preston Gates is national antitrust counsel for Waste Management, Inc. In that capacity, we have been asked to review and comment on the antitrust aspects of House Bill 178.

Section 8 of the bill as drafted does not exempt or shield refuse service providers from state antitrust laws except in one narrow circumstance: where the local government grants an exclusive franchise. In this instance, the local government chooses to regulate the provision of solid waste services through a franchise agreement with a single provider.

This exception is necessary for two reasons. First, under current law, any municipality and solid waste company entering into an exclusive franchise agreement will be exposed to antitrust liability. Without an exemption, any disgruntled bidder is armed with an antitrust suit against the municipality and successful bidder for an agreement which will, by definition, exclude the unsuccessful bidder from the market. Such cases would almost always be without merit and, for that reason, House Bill 178 would not allow such a suit. Disallowing such suits would not, however, preclude all remedies. In the event the contract process is improperly manipulated, other state causes of action are available to enjoin or punish such activity.

Second, the exemption will make Alaska law consistent with the federal Local Government Antitrust Act, which precludes the collection of antitrust damages from municipalities and companies contracting with municipalities. This exemption is based on the rationale that public entities are presumed to act in the best interests of its citizens.

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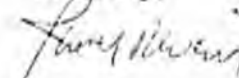
Honorable Andrew Halcro
April 20, 1999
Page 2

Currently, AS 45.50.572(d) exempts from state antitrust laws certain services, including solid waste collection, provided by public utilities that have been issued a certificate of public convenience and necessity. House Bill 178 allows (but does not mandate) a franchise system to replace the previous public utility certificate system. The bill takes into account this change of regulatory system by amending AS 45.50.572(d) to say that Alaska's antitrust laws do not apply when a municipality grants an exclusive franchise. Where a municipality grants multiple franchises, the exemption is not needed and does not apply.

Notably, House Bill 178 does *not* shield municipalities or bidders from any state antitrust claims arising beyond the franchise contract between the municipality and the successful franchise bidder. For example, the bill does not preclude antitrust suits against two or more companies that conspire to allocate the bids on the contract, or against the winning bidder who engages in predatory pricing or other monopolistic practices to drive a competitor from the market.

In summary, House Bill 178 will not diminish the protections available under state or federal laws to any competitor, whether large or small. To the contrary, the bill provides the potential for increased competition where local government so chooses.

Sincerely,



James R. Weiss

Counsel for Waste Management, Inc.



CLERK'S OFFICE
AMENDED AND APPROVED
Date: 4-27-99

Submitted by: Assembly Member Wuerch,
Prepared by: Assembly Office
For reading: April 27, 1999

ANCHORAGE, ALASKA
AR NO.99- 106

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING STATE LEGISLATION WHICH PROVIDES A MANNER AND METHOD OF ALASKA PUBLIC UTILITIES COMMISSION DEREGULATION WHICH PROVIDES THE ANCHORAGE RATEPAYERS PROTECTION FROM INCREASED COST OF SERVICES TOGETHER WITH SAFE AND RELIABLE SERVICE AND TAXPAYERS PROTECTION FROM A LOSS OF VALUE OF THE TAXPAYERS' INVESTMENT

WHEREAS, the Municipality of Anchorage provides refuse collection pursuant to ordinance as provided for in AS 29.35.050;

WHEREAS, the State Legislature has for many years discussed deregulation of refuse collection;

WHEREAS, the Municipality of Anchorage supports deregulation of refuse collection services provided that the Anchorage ratepayers are protected from increased costs of service and are provided safe and reliable services and the Anchorage taxpayers are protected from a loss of value of the taxpayers' investment in refuse collection services;

NOW, THEREFORE, the Anchorage Assembly resolves:

Section 1: That the Anchorage Assembly hereby supports legislation which would provide a method and manner of Alaska Public Utilities Commission deregulation of refuse collection services which provides the Anchorage ratepayers safe, reliable services at a reasonable cost and the Anchorage taxpayers no loss of value in their investment. Such legislation should not alter the provisions of AS 29.35.050(a). should provide an option to the Municipality of Anchorage to maintain its own refuse collection, and should allow the Anchorage Assembly to exercise regulatory powers similar to those contained in AS 42.05.

Section 2: That the Municipal Clerk shall forward copies of this resolution to the Governor and the Alaska State Legislature immediately upon passage and approval.

1 AR 99-106

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3 .PASSED AND APPROVED by the Anchorage Assembly this 27th day of April
4 1999.

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ATTEST:

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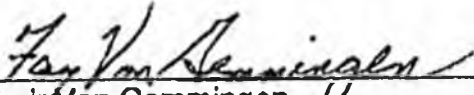
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19

Municipal Clerk.



Chair/Von Gemmingen

Bell	*		
Carlson	*		
Wuerch	.		
Taylor	*		
Wohlforth	*		
Von Gemmingen	*		
Clementson		*	
Meyer	*		
Abney	*		
Kendall		*	
Murdy		*	

Date 4/27 Yes No Abstain

Title #10 substituted C8

mean on APUC

*Long
xwuerch*

02-005 (Rev. 5/98) *

Municipality
of
Anchorage



P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-4311
Fax: (907) 343-4780
<http://www.ci.anchorage.ak.us/Assembly>

ANCHORAGE ASSEMBLY

April 19, 1999

*HB 178
file
: copy to CoRA
members*

Honorable Andrew Halcro
Honorable John Harris
Co-Chairs, House Community and Regional Affairs Committee
State Capitol, Room 418
Juneau, AK 99801

Dear Representatives Halcro and Harris:

I would like to take this opportunity to comment on House Bill 178. In my estimation, this legislation is good public policy because it transfers control of refuse collection from the state to local governments. Decisions at the local level best ensure that the community's needs will be met in an efficient and effective manner.

The current regulatory system is complicated, burdensome, and ineffective. Refuse collection does not need this type of regulatory oversight. In fact, only three states, including Alaska, remain under the control of a Public Utilities Commission.

I can support this legislation only if it does not require the local government to adopt any regulations currently enforced by the state. Each local government should be allowed to make its own decision as to how much, if any, regulation is required.

I also support this legislation because it is consumer oriented. This legislation freezes rates for refuse collection at their current levels for up to five years or until the local government determines if a competitive system should be put into place. Likewise, this legislation protects a valuable city asset in Anchorage and rests its ultimate destiny where it should be, with local elected officials.

Sincerely,

Bob Bell
Assemblyman

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3-30-99

Utility Restructuring Committee
Rep. Bill Hudson, Chairman
AK. State Legislature, State Capital
Juneau, AK. 99801-1182

re. Proposed Legislation To Deregulate Refuse Hauling

Dear Representative Hudson and Committee,

We have seen and read the proposed legislation to remove APUC's authority to regulate refuse hauling. At this time and stage in our business we would highly recommend that you NOT sponsor it.

We agree on all the points submitted to you from Pam & Phil of Valley Refuse of Wasilla. We also are a privately owned refuse business located in Denali Borough. Our area is quite spread and sparsely populated, and it takes the whole area combined to make a 1/3 of it. We do residential and commercial.

We would like to add that we have always been very pleased with our relationship with the APUC. they may take awhile, but have been very helpful to us and our business. The decisions they make are always made on the basis of what is in the best interest of the public.

Thank you for your time.

Sincerely,

Leroy & Vickie Lausen

Leroy and Vickie Lausen
Lausens Dependable Disposal





March 19, 1998

Rep. Norm Rokeberg
House of Representatives
Labor & Commerce Committee
State Capitol
Juneau, AK 99801-1182

Re: HB 161 Deregulation of Refuse Utilities

Dear Rep. Rokeberg and L&C Committee members,

I am the owner of Commercial Refuse, Inc. (CRI). I have some concerns and wish to make some comments in regards to the above proposed legislation.

In October of 1994, CRI applied for a certificate from the Alaska Public Utilities Commission (APUC) to provide competitive refuse services in Anchorage. The application was opposed and contested by the local monopoly, Anchorage Refuse Inc. (ARI) and procedurally required a hearing. There was a considerable delay in the APUC's response to the application in terms of processing.

Therefore, in early 1995, I contacted Rep. Jeannette James in regards to introducing legislation which would allow for competition in the refuse industry, which became HB 161. The bill did not advance very far that session.

The APUC scheduled a hearing date for April 1, 1996 which was continued in late May. In May of 1997, the APUC issued an order granting a certificate to CRI. The certificate has allowed CRI to slowly expand it's business. My original reason for legislative remedy is now moot. The APUC has streamlined the certification process so that other potential competitors may obtain a certificate without undue delays.

Recently, USA Waste of Alaska (a Delaware Corp.) purchased controlling interest in ARI. USA Waste has made applications with the APUC to purchase the rest of the major refuse utilities in the state. If this is approved by the APUC, the result will be one large financial monopoly.

Page 1 of 2

Commercial Refuse

INCORPORATED

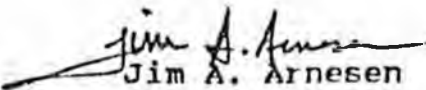
Rep. Norm Rokeberg
House of Representatives
Labor & Commerce Committee
March 19, 1998

I find it difficult to comprehend any valid reason for legislative deregulation in a case where USA Waste would effectively possess a financial monopoly control over the majority of the market without some regulation or oversight from the APUC.

While I do not represent all the minor players in the marketplace, I have heard similar concerns from my competitors. Any lobbyist that would promote the notion that the entire industry is supportive of deregulation has not taken the time to speak to anyone other than the major refuse utilities, who are all waiting to be purchased by USA Waste.

In summary, the present status wherein the APUC maintains some regulatory control, is appropriate. Any legislation at this point to totally deregulate the refuse industry is premature. For these reasons, I am not supporting HB 161 at this time.

Sincerely,


Jim A. Arnesen
President

cc: Rep. John Cowdery
Labor & Commerce Committee

Copper Basin Sanitation Service Company



PO BOX 88 • GLENNALLEN, AK • 99588-0088
Phone (907) 822-3600 • FAX (907) 822-3800



April 29, 1999

State of Alaska
Legislature
House Labor & Commerce Committee
Rep. Rokeberg, Chair

APR 29 1999

REF: HB 183
Garbage Service Regulation

Dear Chairman Rokeberg,

Garbage service across the state NEEDS to be regulated whether by A.P.U.C. or another regulatory body.

Refuse collection is tied to public health no matter where you live. Garbage will endanger the health of the public if it is not promptly and properly disposed. This is a fact of life.

There is presently in the State of Alaska, a business that is capable of taking over ANY garbage service area it wants. I am not saying it wants any particular area, but IF it wants AND garbage service is deregulated, it CAN take any service area. Waste Management Inc. is a strong business and owns or controls garbage service companies and sanitary landfills across the nation. They have recently moved into Alaska and have purchased a number of garbage collection businesses and acquired control of landfills in most of the heavily populated areas. (Street rumor has it, they now own the garbage service companies that service over 60% of the populace of Alaska.) They are obviously good business people or they would not have such a strong financial footing necessary to purchase control of so many companies in such a short period of time.

So, if they are such good business people, what's my problem??? A big company has the financial power to take a loss in one area and yet make a profit on the company's bottom line. When a large company moves into an area where there is

competition by a smaller company, all they have to do is provide the service at a lower cost to the public and the smaller company will be forced out of business. After the smaller company is forced out, the rates will rise and the no-profit and low-profit areas will be dropped.

Alaska has a lot of areas that can only be served by non-profit entities (village councils, volunteer groups, etc.), these areas are remote and do not have enough money to support a garbage service business. There are areas of the state that have lots of people and lots of service businesses (Anchorage, Fairbanks, Kenai, etc.), these areas have enough money to support multiple garbage service companies, IF no one company forces all others out. And last, but not least, there are the areas with highway connections that have enough population to support one business only (Copper Basin, Delta Jct., Tok, Parks Highway, etc.). These areas frequently include very rural areas that produce very little profit to the business. Because they are connected by the highway system, the high volume, high dollar areas could be cherry picked leaving the low/no profit areas to wallow in their trash.

Unorganized borough areas of the state are particularly at risk because the only regulation comes from the State. The areas that have another layer of government (city, borough or both) do have some protection because they could regulate in the State's place.

Deregulation of garbage collection and disposal *will* result in areas of the state no longer receiving any garbage service and also encourage an extremely large monopoly on the rest of the state.

Please do NOT deregulate garbage service in the State of Alaska. Please continue to make the State of Alaska responsible for the regulation of garbage collection and disposal services.

Sincerely,

COPPER BASIN SANITATION SERVICE COMPANY



Sharon Daniel
Business Administrator

AWTi

Alaska Waste Transfer, Inc.

11811 S. Gambell St.
Anchorage, Ak. 99515

Phone: 907-344-9490

Fax: 907-243-8659

April 8, 1999

Representative Bill Hudson
Alaska State Legislature
State Capitol
Juneau, Ak. 99801-1182

Ref: Deregulation of Refuse Hauling and Alaska Public Utilities Commission

Dear Representative Hudson,

I am writing to ask for your consideration with respect to the legislation that you may introduce at the request of Waste Management Inc.

This proposed legislation, if passed, would amount to a limitation of competitive choices.

Most of the Alaska based businesses in the field of solid waste collection and disposal are small and competitive, but they lack the financial resources, capitalization and access to substantial bank lending necessary in order to sustain a defense against a larger national Corporation that might choose to compete with aggressive pricing tactics.

My concern, and the concern of my colleagues, is for a level working field. I do not fear fair competition.

Already, Waste Management is proving itself aggressive, by virtue of its use of lobbyist and suggesting legislation which favors to its advantages.

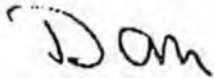
My colleagues and I would be grateful if you would consider our concerns and look into the reasons that solid waste collection is regulated by Alaska Public Utilities Commission in the first place. Our business is one that requires substantial and expensive capital. And as waste collection is a necessity for all citizens, it is worthy of a reasonable level of overseeing. Alaska Public Utilities Commission exists to maintain a level playing field and ensure a fair cost of services to the public.

If Alaska Public Utilities Commission ceases to regulate solid waste collection and disposal services, it would place the responsibility with local communities, many of whom are ill equipped to quickly manage this issue. This would give an aggressive

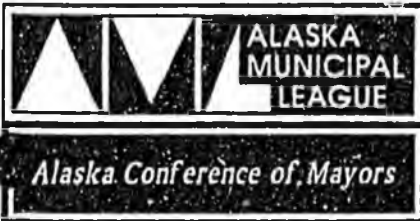
Waste Management Inc. an opportunity to influence matters in their favor.

Thank you for your attention and consideration of our concerns.

Sincerely,

A handwritten signature in cursive script that reads "Dom".

Daniel R. Zipay
President



HB 178

217 Second Street, Suite 200 • Juneau, Alaska 99801 • Tel (907)586-1325, Fax (907)-463-5480

April 23, 1999

Representative Pete Kott
State Capitol
Juneau, AK 99801

Dear Representative Kott,

The Transportation and Utilities Committee of the AML Legislative Committee met on April 21, 1999 to review HB 178. This bill would mandate the transfer of garbage hauling regulation to municipalities. The Committee unanimously opposed passage of the bill for the following reasons:

1. Higher potential administrative costs to the local ratepayers: HB 178 would require each individual municipality to assume the powers and work of the APUC. Rate hearings are deeply legal and technical procedures. Because hearings would likely only occur every 1 to 3 years, it would be a huge administrative burden to maintain such a technical capability for each individual unit of local government.
2. Higher potential general rates to local customers: Under HB 178, individual cities and boroughs would individually be matched against a large national corporation with much larger legal and technical resources and experience. This could result in higher than necessary local rates paid by citizens.
3. No state cost savings: State regulation of garbage hauling is covered by direct fees and charges. If more staff are needed to expedite regulatory actions, it would be covered by direct charges. This bill has no impact on the state General Fund, or reduction of the fiscal gap.

In conclusion, the Committee is unable to find a public purpose in adopting a local government mandate to regulate garbage hauling, and therefore opposes adoption of the bill. If you have questions regarding this bill or other municipal issues, please call me at 586-1325.

Sincerely

Kevin Ritchie
Executive Director

CC: House Community and Regional Affairs Committee
AML Board and Legislative Committee
APUC

Tuesday, April 20, 1999

Council raises trash pickup rate, hears privatization bid

By SEAN COCKERHAM
Staff Writer

The Fairbanks City Council Monday instituted a modest garbage rate hike in response to increased costs in offering the service, and heard a private company's bid to take garbage collection off the city's hands.

Council members also suggested that no deal is forthcoming on the lone sticking point in the city's health plan rewrite, so the best course is to propose an ordinance and let the unions take it or leave it.

The residential garbage rate will go from \$13.12 to \$14.12 per month, under the ordinance passed Monday. The council also mandated that \$1.20 of that money will be placed in a "city refuse equipment replacement fund."

Bob Cox, a representative of Waste Management Inc., told the council that the city's garbage trucks are getting older and more expensive to maintain, and his company—with its large parts purchasing network—would be "very interested" in buying them and taking over the service.

Councilman John Immel was intrigued by the idea of privatiza-

tion. A large company might be able to deal easier with high equipment replacement and maintenance costs, he said. "We need to work with this private company," he said.

Other council members, while not adverse to discussing the matter in greater detail at a future work session, opposed privatization.

"Our garbage pickup ain't broke," said Councilman Charlie Rex. "At this point, to try to privatize, we're opening a can of worms we don't need to open," he said.

The privatization offer came before the regular meeting, in a work session which also included the health care discussion.

A health care committee, including both council members and union representatives, has spent a year revising the city's high-cost health care plan. All sides agree that a good compromise was reached, which is expected to knock costs down to \$607 per employee per month, from an average of \$804 per employee per month last year—under a plan widely considered to be generous.

See TRASH, Page B-2

TRASH: Pickup

Continued from Page B-1

"It's the savings from the health care that are the point of contention, whether the savings should come back to the city—to the taxpayers of the city—or into the pockets of the employees," said Councilman Bob Boko.

The city is proposing a buyout in which each employee would get a \$1,000 "signing bonus," a \$1,040 payout in July and \$2,080 per year for the remainder of a five-year period.

But the city says the only way to affordably do so is to put that money in a "Section 125 Plan," to be used only to pay medical expenses, rather than giving it directly to employees. That way, the city does not incur associated costs, like paying into the Public Employment Retirement System. The money goes

back to the city if it's not all utilized in a year.

Union representatives said the employees should have more options for the money than the Section 125 Plan, such as investments and deferred compensation plans.

John Brown of the operating engineers AFL-CIO said some city workers have gone a decade with the same wage and only a slight benefit increase. "We're not asking for all the money, we're asking to share in the savings that this plan will provide."

The new plan will likely save the city \$500,000-\$750,000 after the first five years. The bigger savings would come after the buyout period is completed, said Councilman Billy Ray Allen.

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Calif. agency funds work at illegal site

By Robert Bryce

LANCASTER CALIF — The California Integrated Waste Management Board will pay \$200,000 to clean up an illegal dump containing about 2,000 cubic yards of waste.

The dump site, in a mile-long ravine in a sparsely populated part of northern Los Angeles County, Calif., has been a continuing problem for California regulators.

In June, the county Health Department ordered the property owners to clean up the site by August. When the owners did not comply, the waste board decided to launch a cleanup.

"This illegal dump site is an all-too-familiar and sad commentary on some people's disregard for the environment," waste board Chairman Daniel G. Pennington said.

The state may seek to recover costs from the owners of the property, waste board spokes-



MESSY BUSINESS: Although the California Waste Management Board will pay \$200,000 to clean up this illegal dump site in northern Los Angeles County, the agency hopes to recover the funds from the site's owners.

man Lanny Clevecilla said. "We have two options. We can work through the county to put a lien on the property. Or we can file a lawsuit against the property owners," he said.

The waste board, a division of the California Environmental Protection Agency, has arranged the cleanup of 74 sites since 1994. The board is

working on 16 additional illegal dump sites. The state has many more unreported illegal sites, Clevecilla said.

The waste board will hire a contractor to remove the refuse from the ravine. The board expects the work to begin as soon as the state can contact the property owners and gain access to the dump site. ■

Painful price

Small Tenn. haulers protest hike

By Robert Bryce

NASHVILLE TENN. — A sharp price hike at a Waste Management of Tennessee transfer station in Nashville is putting small haulers in a financial bind.

In mid-October, the facility imposed an \$84 minimum per-trip charge for all haulers.

The new two-ton rule was necessary because the small haulers, many of whom use pickups or stake bed trucks, take too much time to empty their loads, Waste Management said. But the small haulers say the new tariffs could put them out of business.

"I think it's ridiculous. There used to be a \$10 minimum. Now we are having to pay \$84 even if we only have a bag of trash," said John Evans, who owns We Haul Anything, in Gallatin, Tenn. Small haulers cannot dump their loads in the city's incinerator or in the city's landfill, which only accepts construction and demolition debris, said Evans, who does small hauling jobs as well as landscaping and tree trimming.

That means the small haulers either must pay the fees at the transfer station or drive to landfills outside Davidson County,

Tenn., some of which are more than 30 miles from the Nashville transfer station.

Nashville formerly had two transfer stations, one owned by USA Waste Services Inc. and the other by Waste Management. After the firms merged, the new company closed the old USA Waste station, dramatically increasing traffic at the Waste Management transfer station.

The extra traffic means the small haulers "are utilizing a valuable commodity, which is our transfer station floor space, to dispose of a small volume of waste. It was a time vs. revenue problem," said Mitch Rowan, a district manager for Waste Management.

Small haulers are not the only ones feeling the pinch. The USA Waste transfer station closing has affected the metro government, which held a contract with the plant to take the trash that the city's incinerator couldn't accept, said Dianne Wiles, assistant director for the Nashville-Davidson County metropolitan government's Department of Public Works. "The level of service has declined since they consolidated operations," she said. ■

WASTECON

Recycler to expand plant



WMI raises fees at select sites

HOUSTON—Waste Management Inc. announced an average tipping fee increase of two to three percent at selected landfill sites across the country in late February. Other major players in the landfill industry are expected to follow suit this month.

The WMI increases will be larger for customers that do not have contracts with the company, said Cherie Rice, vice president of investor relations.

Specific rate hikes at specific landfills and other disposal facilities owned by WMI would not be released by the company.

The rate increases were not greeted with applause, Rice noted, but reflect increased costs of operating modern, state-of-the-art landfills.

Indeed, in New York some independent haulers have complained to the city's Waste Trade Commission, which said it would investigate after tipping fees nearly doubled at WMI's Hunts Point recycling station.

Haulers complained the hike violates antitrust regulations or fair trade practices.

The largest increase so far came at WMI's American landfill in Ohio, which raised rates 138 percent.

od of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. *Ledesma v. Bergeson*, 99 Idaho 555, 558, 585 P.2d 965, 968 (1978). Thus, while other evidence is to be considered in determining whether the employer has assumed the right to control, it is *the contract* between the parties which is the starting point for a determination of the parties' intent and the basic relationship between them.

In this case, the commission's only reference to the parties' contract was their passing comment that under the *Beutler* case the agreement was not necessarily determinative, nor were they bound by it. I believe that statement by the commission reflects a basic evidentiary misunderstanding of the important role which the agreement between the parties plays in a determination of whether or not the relationship is employer-employee or principal and independent contractor. In this case, important probative evidence on this issue was contained in the parties' agreement, which I believe the commission neglected to consider. That fact, coupled with the commission's erroneous evaluation of the Thorntons' investment in the horse training arena as evidence suggesting an employment relationship requires that this case be remanded to the Industrial Commission for reconsideration. On reconsideration, the commission (1) should not consider the owners' investment in the arena as evidence of an employer-employee relationship, and (2) should consider the agreement between the parties as the most important, albeit not conclusive, evidence in determining whether the parties' arrangement was an employer-employee relationship, or a principal-independent contractor relationship.

I would reverse and remand for a new determination free from the errors described above.

DONALDSON, C.J., concurs.

109 Idaho 875

CAMBRIDGE TELEPHONE CO.,
INC., Appellant,

v.

PINE TELEPHONE SYSTEM, INC.,
and Idaho Public Utilities
Commission, Respondents.

In the Matter of the Application of PINE
TELEPHONE SYSTEM, INC., to estab-
lish a service area in Idaho.

No. 15558.

Supreme Court of Idaho.

Dec. 17, 1985.

The Public Utilities Commission granted application to establish telephone service area on a portion of territory within certified but unserved area of another certified telephone provider. Certified telephone provider, which also sought to serve disputed area, appealed order granting application. The Supreme Court, Bakes, J., held that: (1) the Commission had jurisdiction, as a condition of the certificate of convenience and necessity, to review extension of services into an unserved area within already certified area; (2) an unserved area previously certified to a utility could be revoked where Commission concluded that the public interest would be disserved by denying application of applicant seeking to establish service in area; and (3) modification of certificate of convenience and necessity based on statutory conditions contained in the certificate when it was first obtained was not a "taking" of property right.

Affirmed.

Bistline, J., filed concurring opinion.

1. Telecommunications ¶76

Where the Public Utilities Commission did not issue a modified certificate of con-

CAMBRIDGE TELEPHONE CO. v. PINE TELEPHONE Idaho 577

Cite as 712 P.2d 576 (Idaho 1985)

venience and necessity with disputed area removed from its description, but counsel for the Commission stated at oral argument that it was Commission's intention to remove area from certificate, the order granting application would be viewed accordingly.

2. Telecommunications ⇄76

The Public Utilities Commission properly applied public convenience and necessity analysis to limited facts of case where applicant sought to provide telephone service to a region even though that region was included in territorial description of another telephone company's existing certificate.

3. Public Utilities ⇄113

A certificate of public convenience and necessity is subject to and contingent upon statutory conditions, regulations and restrictions.

4. Telecommunications ⇄76

Although certified telephone provider had a prima facie right to extend its service within its certified area, the extension was subject to the limitations set out in I.C. § 61-526, which provides that if public convenience and necessity do not require the extension, the Public Utilities Commission may prescribe the terms and conditions for the locating or type of extension as may seem just and reasonable.

5. Public Utilities ⇄113

The Public Utilities Commission has jurisdiction to review the extension of service into an unserved area within an already certified area, and may rescind, alter or amend certificate of convenience previously issued for an unserved area upon a showing that public convenience and necessity do not require extension.

6. Public Utilities ⇄113

An unserved area previously certified to a utility may not be revoked when the certified utility is ready, willing and able to extend adequate service at reasonable rates, except where the record clearly shows that public convenience and necessity

do not require extension of service into a certified but unserved area.

7. Telecommunications ⇄76

The Public Utilities Commission's order, granting applicant the right to establish telephone service area on a portion of another certified telephone provider's territory, did not unconstitutionally deprive certified telephone provider of its certificate, where convenience and economy of residents of disputed area would be better served by applicant's toll-free service to nearest communities as opposed to certified telephone provider's service, which included the possibility of long-distance toll charges and certified telephone provider would incur \$47,000 in extra costs.

8. Eminent Domain ⇄2(1.1)

When an intangible property right such as a certificate, franchise, permit or contract is modified or revoked according to its terms, the modification is not a "taking" of the property right, but a mere modification based upon statutory conditions contained in the certificate when it was first obtained; thus, where telephone provider's certificate of convenience and necessity was accepted subject to statutory conditions, including Public Utilities Commission's authority to modify certificate by revoking the right to a portion of unserved area, revocation of right to serve a portion of the area was not a "taking."

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

Lary C. Walker, Weiser, for appellant Cambridge Telephone Co.

Jim Jones, Atty. Gen., Marsha H. Smith, Deputy Atty. Gen., Boise, for respondent Idaho Public Utilities Commission.

John L. King, Boise, for respondent Pine Telephone System, Inc.

BAKES, Justice.

Cambridge Telephone Company has appealed the order of the IPUC which granted an application of Pine Telephone System, Inc., to establish a telephone service

area on a portion of the Idaho side of the Snake River Canyon along the Oregon/Idaho border. We affirm the order of the commission.

This case involves the right to provide telephone service to the Idaho side of the Snake River Canyon bounded on the south by the Oxbow Dam and on the north by the Hell's Canyon Dam. The territory in question is approximately one-half mile wide and twenty-two miles in length, bordering a paved road which runs the distance of the disputed area. The road also extends south to the Oregon community of Oxbow.

Also running the length of the disputed area is a telephone cable owned by Mountain Bell. During the construction of the Hell's Canyon Dam the cable was first installed, but only a southern portion of the cable is presently used to provide telephone service to a former Idaho Power Company caretaker's residence which is located in a small section of the canyon territory previously certified to Mountain Bell. The southern end of the cable connects into Pine's telephone system at the Idaho/Oregon border near Oxbow, Oregon. Through an agreement with Mountain Bell, Pine presently provides the telephone service to the former Idaho Power residence within the disputed territory. There are three other residences along the canyon which presently need telephone service. The residents along the canyon rely on the Oregon communities of Oxbow and Halfway for social and community services.

With the exception of the small section certified to Mountain Bell, the southern portion of the disputed canyon area, along with the adjacent Idaho territory, was previously certified in 1979 to Cambridge. Three of the residences needing service are within the area previously certified to Cambridge, and the fourth residence in the small section certified to Mountain Bell is surrounded by territory previously certified to Cambridge. Prior to this dispute arising, Cambridge had extended its telephone services to within ten miles east of the disputed Oxbow area. Cambridge had also acquired materials and equipment and be-

gan laying telephone cable toward the Oxbow area in order to connect with the Mountain Bell cable and provide service to residents in the canyon. In the process, Cambridge had extended service to two or three residents along the way (not located in the disputed area) when the commission ordered a halt to the extension prior to completing the final 8-10 miles, which required a descent of approximately 4000 feet into the canyon to service the Oxbow area. Cambridge also planned on servicing the needs of future businesses and hoped to eventually provide telephone services further down the river canyon to the north to Hell's Canyon Dam, which was not in Cambridge's certified area. The northern portion of the disputed territory was previously uncertified.

Mountain Bell intervened at the IPUC hearing but is not a party to this appeal. Mountain Bell was willing to give up its small section of the disputed area and sell its telephone cable to either Pine or Cambridge. Mountain Bell's only interest was that the service to the residence within its small section be continued. Mountain Bell has no plans to alter or give up its right to provide telephone service to Idaho Power Company at the Hell's Canyon Dam, which service is presently supplied with the use of a microwave system.

Both Pine and Cambridge telephone companies were apparently unaware of each other's concurrent plans to provide telephone services along the Snake River Canyon. When Pine discovered that Cambridge was extending telephone cable toward Oxbow, Pine filed the application to establish a telephone service area along the Snake River Canyon. Cambridge filed a motion to dismiss the application, arguing that it was entitled under its existing certificate of convenience and necessity to service the entire disputed area. The four residents along the canyon all requested the commission to grant the application to Pine. Their preference was based on the fact that, if the area was granted to Cambridge, the residents may have to pay long distance charges to make telephone calls to

CAMBRIDGE TELEPHONE CO. v. PINE TELEPHONE Idaho 579

Cite as 712 P.2d 576 (Idaho 1985)

the Oregon communities of Oxbow and Halfway. The commission determined that either company would incur the costs of acquiring and repairing the Mountain Bell cable running along the canyon and the cost of hookups to the residences. Pine would have no other expenses above and beyond these costs. However, Cambridge would have to expend an additional \$47,325 in order to complete the laying of its telephone cable another ten miles descending approximately 4,000 feet in elevation to the bottom of the canyon near Oxbow. Based upon the difference in cost and the residents' community of interest in Oregon, the commission granted Pine's application to establish the service area and denied Cambridge's motion to dismiss. The order also allowed Cambridge to amortize its investment and allowed Cambridge an opportunity to submit further evidence on the amount of its investment and costs to terminate the project. Cambridge has appealed.

[1] Our review on appeal is limited to "whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the Constitution of the United States or of the State of Idaho," I.C. § 61-629, and also whether the commission's findings are supported by substantial competent evidence. *Boise Water Corp. v. Idaho Pub. Utilities Comm'n*, 97 Idaho 832, 555 P.2d 163 (1976); *Mountain View Rural Tel. Co. v. Interstate Tel. Co.*, 55 Idaho 514, 46 P.2d 723 (1935). Cambridge argued before the commission and now argues on appeal that the commission's order barring Cambridge from serving a portion of its certified area amounts to an unconstitutional taking of vested property rights. We hold that the findings contained in the order of the commission are adequate to justify the modification of Cambridge's certificate of convenience and necessity and revoke its privi-

1. The commission did not issue a modified certificate of convenience and necessity to Cambridge with the disputed area removed from the description; however, at oral argument counsel

lege to provide telephone service to the disputed area.

There is no question that the certificate of convenience and necessity issued to Cambridge is a property right protected by the due process provisions of the United States and Idaho Constitutions. U.S. Const. Amend. V, Amend. XIV, § 1; Idaho Const. Art. 1, §§ 13-14. *E.g.*, *Frost v. Corporation Commission of State of Oklahoma*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929); *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389 (1913); *Western Colorado Power Co. v. Public Utilities Comm'n*, 168 Colo. 61, 428 P.2d 922 (1967); *Mississippi Power & Light Co. v. City of Clarksdale*, 288 So.2d 9 (Miss.1973). The procedural aspect of due process, *i.e.*, adequate notice and timely hearing, have not been raised as issues on appeal, and we presume that Cambridge was afforded proper procedural due process. Due process also protects Cambridge's property interest in the certificate from being infringed upon. Cambridge argues that its property interest was taken without due process by misapplication of the law, insufficient evidence to justify the commission action, and that it must be justly compensated for the partial revocation of its certificate.

[2] The commission basically made a public convenience and necessity analysis applying the factors enumerated in *McFayden v. Public Utilities Consolidated Corp.*, 50 Idaho 651, 299 P. 671 (1931), and *Application of Kootenai Natural Gas Co.*, 78 Idaho 621, 308 P.2d 593 (1957). Those cases involved competing applications to provide natural gas service to areas previously uncertified for that service. The factors enumerated in that case aid in determining which applicant could best serve the public convenience and necessity. The public convenience and necessity analysis was also properly applied to the limited

for the commission stated that it was their intention to remove the area from Cambridge's certificate. Therefore, we view the order accordingly.

facts of this case, even though the territorial description in Cambridge's certificate previously included part of the territory applied for by Pine.

[3-5] A certificate of public convenience and necessity is subject to and contingent upon statutory conditions, regulations and restrictions. Cambridge had a *prima facie* right to extend its service within its certified area. I.C. § 61-526. However, even a proposed extension within a utility's own certified area is subject to the limitation set out in I.C. § 61-526:

"[I]f any public utility in constructing or extending its lines, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, or if public convenience and necessity does not require or will require such construction or extension, the commission on complaint of the public utility claiming to be injuriously affected, or on the commission's own motion, may, after hearing, make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable: provided, that power companies may, without such certificate, increase the capacity of their existing generating plants." I.C. § 61-526 (emphasis added).

Therefore, it was within the commission's jurisdiction, as a condition of the certificate of convenience and necessity, to review the extension of service into an *unserved* area within an *already certified area*. The commission may² "rescind, alter or amend," I.C. § 61-624, the certificate of convenience and necessity previously issued for an unserved area upon a showing that the "public convenience and necessity" does not require the extension, and the commission may "make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reason-

2. This holding is limited to the facts of this case in which a utility was decertified to a presently unserved area on a public convenience and nec-

essary standard. If the utility were presently serving the area or had substantially completed the extension, this rule would not apply.

able..." I.C. § 61-526. The applicable statutory law became a part of Cambridge's certificate.

[6] Some jurisdictions have held that an unserved area previously certified to a utility may not be revoked when the certified utility is ready, willing and able to extend adequate service at reasonable rates. See *Western Colorado Power Co. v. Public Utilities Comm'n*, 163 Colo. 61, 428 P.2d 922 (1967); *Capital Electric Power Ass'n v. Mississippi Power & Light Co.*, 240 Miss. 139, 125 So.2d 739 (1961). The rule in Idaho is the same except where the record clearly shows that "public convenience and necessity do not require" the extension of service into a certified but unserved area. The Utah Supreme Court recently addressed this issue, and we are persuaded by the analysis of that court:

"Despite the prior granting of a franchise to one company, therefore, it may not be assumed that the franchise is permanent and exclusive for the indefinite future when circumstances require reassessment.

....
"As the Commission stated in its conclusions of law:

"[T]he concept of "public convenience and necessity" should be considered in light of current and changing circumstances. If the end goal of providing adequate services at reasonable rates is not best subserved by a utility granted a prior certificated area, then "public convenience and necessity" dictates modification of the prior grant of authority. The development of our natural resources, which frequently are located in remote and sparsely populated areas of our State, should not be hindered by a blind adherence to previously certificated boundary lines where a utility in an adjoining service area already has facilities in place to provide continuous and adequate service at reasonable rates."

cessity standard. If the utility were presently serving the area or had substantially completed the extension, this rule would not apply.

CAMBRIDGE TELEPHONE CO. v. PINE TELEPHONE Idaho 581

Cite as 712 P.2d 576 (Idaho 1985)

....
"To allow the duly certificated franchise holder to provide the needed electrical service would result in the very duplication of facilities and economic waste that utility regulation is designed to avoid. Allowing service to be provided by another utility not certificated within the area, but in very close proximity thereto, at a substantial cost savings is properly within the power of the Commission when there is no showing of harm to the losing utility, other than the loss of a small amount of revenue, and the public convenience and necessity supports the granting of the authority." *Empire Elec. Ass'n v. Public Service Comm'n*, 604 P.2d 930, 933-34 (Utah 1979).

[7] In the present case the commission concluded that "the public interest would clearly be disserved by denying Pine's application," and further that "this commission fails to see the wisdom of allowing Cambridge to spend an additional \$47,000 to serve an area that can be served with only minimal expenditures by Pine." The commission found that the residents of the disputed area have strong social and economic ties to the Oregon communities. The commission found that their convenience and economy would be better served by Pine's toll free service to those communities as opposed to Cambridge's service which includes the possibility of long distance toll charges to those communities. The difference in cost to Pine as compared to Cambridge for providing the service to such a limited number of customers would adversely impact upon the existing customers of Cambridge by the addition of \$47,000 into the rate base of that company.

Therefore, we conclude that the commission's order did not unconstitutionally deprive Cambridge of its certificate. The certificate was modifiable by a non-arbitrary application of a public convenience and ne-

3. Cambridge's capital expenditures and expenses incurred in an effort to serve the disputed area prior to the commission's ruling in this matter must be allowed, and we specifically affirm the commission's order on reconsidera-

cessity standard, a condition of the certificate, based upon substantial competent evidence.

[8] Cambridge next argues that it is entitled to just compensation for the commission's taking of its certificate. When an intangible property right such as a certificate, franchise, permit or contract is modified or revoked according to its terms, no taking of the property has occurred. The modification is not a "taking" of the property right, but a mere modification based upon statutory conditions contained in the certificate when it was first obtained. *Empire Elec. Ass'n v. Public Service Com'n*, 604 P.2d 930 (Utah 1979). The property right within Cambridge's certificate of convenience and necessity was accepted subject to these statutory conditions, which in this case included the commission's authority to modify the certificate by revoking the right to a portion of unserved area when the showing was made that the public convenience and necessity did not require Cambridge's extension of service to the area. The property right initially acquired by Cambridge in its certificate was subject to these statutory conditions.³

The order of the commission is affirmed. Costs to respondent; no attorney fees.

DONALDSON, C.J., and SHEPARD and HUNTLEY, JJ., concur.

BISTLINE, Justice, concurring in the judgment and in the opinion of the Court.

The Commission's decision is additionally fortified by giving appropriate attention and deference to legislative policy as evidenced by the enactment of I.C. § 61-332, *et seq.*, the statement of purpose being:

Purpose of electric supplier stabilization act.—...

B. This act is designed to promote harmony among and between electric

tion to allow Cambridge an additional opportunity to further prove its termination costs after making proper mitigation and allocation of the expenditures.

suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of customers of another supplier, discourage duplication of electric facilities, and stabilize the territories and customers served with electricity by such suppliers. One would suppose that that which is good and beneficial for the people with regard to electric service is also so with regard to telephone service.



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IDAHO FALLS CONSOLIDATED HOSPITALS, INC., a nonprofit Idaho corporation, Plaintiff-Appellant,

v.

BOARD OF COMMISSIONERS OF JEFFERSON COUNTY, Idaho, Defendant-Respondent.

No. 15836.

Supreme Court of Idaho.

Dec. 17, 1985.

Patient and husband applied for financial assistance as medical indigents and hospital intervened on their behalf. The county board of commissioners determined that patient and husband were not medically indigent, and appeal was brought. The District Court, Seventh Judicial District, County of Jefferson, Grant L. Young, J., affirmed, and appeal was brought. The Supreme Court, Huntley, J., held that: (1) county could not consider equity in home below homestead exemption as resource available to patient and husband in determining issue of medical indigency; (2) county could not consider social security and railroad retirement benefits as resources available to patient and husband in determining issue of medical indigency; (3) issue of whether money given to patient and husband by their son was resource

available to patient and husband was matter for evidentiary hearing if and when county sought reimbursement of financial assistance, and (4) even if resources available included vehicles and checking and savings accounts, patient and husband were medically indigent and entitled to financial assistance.

Reversed.

Shepard and Bakes, JJ., dissented.

1. Social Security and Public Welfare ⇨241

"Resources available" which could be considered in determining whether patient and her husband were medically indigent so as to qualify for financial assistance did not include equity in home below homestead exemption, even though patient and husband had not filed declaration of homestead. I.C. §§ 31-3501, 31-3502(1), 55-1001, 55-1004, 55-1005, subd. 1, 55-1201, subd. 1, 55-1203.

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

2. Social Security and Public Welfare ⇨241

"Resource available," to be considered by county board of commissioners in determining whether patient and husband were medically indigent so as to qualify for financial assistance, did not include social security and railroad retirement benefits. I.C. §§ 11-603(3), 31-3501, 31-3502(1); Social Security Act, § 207, as amended, 42 U.S.C.A. § 407; Railroad Retirement Act of 1974, § 14, as amended, 45 U.S.C.A. § 231m.

3. Social Security and Public Welfare ⇨241

Issue of whether money given to patient and her husband by their son to help pay for medical expenses was resource available to patient and her husband, for purposes of medical indigency statute [I.C. § 11-605(3)], was matter for evidentiary hearing if and when county sought reimbursement of financial assistance provided

STRAWBERRY ELECTRIC SERVICE DISTRICT, an Electric Service District of the State of Utah, and **Strawberry Water Users' Association**, a Utah Corporation, Plaintiffs, Appellee, and Cross-Appellant,

v.

SPANISH FORK CITY, a Utah Municipal Corporation, Defendant, Appellant, and Cross-Appellee.

No. 940317.

Supreme Court of Utah.

June 21, 1996.

Electric service district brought action against city, arising from city's provision of electric service to some of consumers in annexed areas previously served by district, seeking injunction prohibiting city from serving consumers within annexed area until district received compensation. City counter-claimed, seeking declarations that it could serve future consumers in annexed areas without paying district compensation and enumerating its rights and obligations if it elected to serve all residents within annexed areas. The Fourth District Court, Utah County, Ray M. Harding, Sr., J., enjoined city from providing electric service to residents of annexed areas to extent that district had present capacity to provide service, requiring city to compensate district for lost projected revenues, and dismissing city's request for declaration as to its rights and obligations if it determined to provide electric service to all residents within annexed areas. City appealed, and district cross-appealed. The Supreme Court, Russon, J., held that: (1) municipality providing electric utility service to existing residents must provide that service to all consumers in annexed areas; (2) for purposes of proper measure of damages owed by city to district, district was entitled to profits from customers within annexed areas served by city during city's noncompliance with statute requiring city's compensation to previously serving electric utility, district was not entitled to future profits from consumers within annexed areas

after city would comply with statute, and once city served all consumers within annexed areas, it had to pay district for facilities dedicated to service within annexed areas, and such award would include damages for district's lost and stranded facilities and severance damages; (3) statute of limitations did not bar district's claim for injunction prohibiting city from providing service in annexed area without compensating district; (4) city could not be enjoined from providing electric service to annexed areas if it complied with statute; and (5) trial court properly refused to consider city's request for declaratory judgment as to its rights and duties if it decided to provide electric service to all residents within annexed areas, as issue was not ripe and did not represent actual conflict.

Reversed in part, affirmed in part, and remanded.

1. Electricity \S 8.1(4)

Proper construction of statute governing provision of electric service by city in annexed area already served by electric utility was question of law and, thus, Supreme Court on appeal would accord no deference to trial court's ruling on that issue but, rather, would review it for correctness, in electric service district's action against city, arising from city's provision of electric service to some of consumers in annexed areas previously served by district. U.C.A.1953, 10-1-424.

2. Statutes \S 188

When faced with question of statutory construction, Supreme Court looks first to plain language of statute.

3. Statutes \S 181, 217.4

When faced with question of statutory construction, if statute is unclear, Supreme Court resorts to legislative history and purpose for guidance.

4. Electricity \S 8.1(2.1)

Under governing statutes, municipality providing electric utility service to existing residents must provide that service

consumers in annexed areas. U.C.A.1953, 10-2-401(4), 10-2-424.

5. Electricity ⇨8.1(2.1)

Eminent Domain ⇨147

For purposes of proper measure of damages owed by city to electric service district, that served areas annexed by city, as result of city commencing electric service in annexed areas, district was entitled to profits from customers within annexed areas served by city during city's noncompliance with statute requiring city's compensation to previously serving electric utility, district was not entitled to future profits from consumers within annexed areas after city would comply with statute, and, once city served all consumers within annexed areas, it had to pay district for its facilities dedicated to service within annexed areas, and such award would include damages for district's lost and stranded facilities and severance damages. Const. Art. 1, § 22; U.C.A.1953, 10-2-424.

6. Appeal and Error ⇨842(1)

On appeal, Supreme Court would review for correctness trial court's ruling on issue involving interpretation and application of statute and constitutional provision.

7. Eminent Domain ⇨2(1)

State constitutional takings analysis has two principal steps: first, claimant must demonstrate some protectible interest in property, and, if claimant possesses protectible property interest, claimant must then show that interest has been taken or damaged by government action. Const. Art. 1, § 22.

8. Eminent Domain ⇨2(1)

For purposes of state constitutional takings analysis, "taking" is any substantial interference with private property which destroys or materially lessens its value, or by which owner's right to its use and enjoyment is in any substantial degree abridged or destroyed. Const. Art. 1, § 22.

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

9. Eminent Domain ⇨81.1

Electric service district had no protectable property interest under state constitu-

tional takings provision in its certificate of public convenience and necessity where its service area was lawfully invaded by annexing municipality, for purposes of determining compensation due district for city's provision of electric service in annexed areas previously served by district. Const. Art. 1, § 22; U.C.A.1953, 10-2-424.

10. Eminent Domain ⇨81.1

State constitutional takings provision protects all property protected by its federal counterpart, and perhaps even more so due to its more expansive language. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 22.

11. Eminent Domain ⇨81.1

Under state constitutional takings provision, every species of property which public needs may require, including legal and equitable rights of every description, is liable to be appropriated. Const. Art. 1, § 22.

12. Eminent Domain ⇨81.1

For purposes of state constitutional takings provision, taking of public utility includes not only physical facilities of utility, but also its exclusive business. Const. Art. 1, § 22.

13. Eminent Domain ⇨86

For purposes of constitutional takings analysis, to create protectable property interest, contract must establish rights more substantial than unilateral expectation of continued privileges; absent exclusive franchise or equivalent thereof, no vested, legally enforceable interest arises and, consequently, there is no property that can provide basis for compensation in inverse condemnation proceeding. Const. Art. 1, § 22.

14. Eminent Domain ⇨81.1

For purposes of state constitutional takings analysis, notwithstanding municipality's right to commence electric service within its annexed areas, electric utility has protectable property interest in its certificate of public convenience and necessity until its service area is lawfully invaded. Const. Art. 1, § 22; U.C.A.1953, 10-2-424.

15. Eminent Domain ⇨2(1)

Municipal power cannot be exercised in derogation of specific rights protected by state constitutional takings provision. Const. Art. 1, § 22.

16. Electricity ⇨8.1(2.1)

Municipal Corporations ⇨36(1)

After annexing area served by electric utility, municipality may not commence electric service within any portion of utility's service area unless it has either obtained utility's consent or reimbursed utility for its compensable losses. U.C.A.1953, 10-2-424.

17. Constitutional Law ⇨48(3)

Courts should construe statutory terms to avoid unconstitutional application of statute.

18. Electricity ⇨8.1(2.1)

For purposes of statute requiring annexing municipality to reimburse electric utility that was serving annexed area for fair market value of facilities dedicated to provide service to annexed area, "reimburse" means to make whole for any losses compensable under state constitutional takings provision. Const. Art. 1, § 22; U.C.A.1953, 10-2-424.

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

19. Appeal and Error ⇨170(1)

Supreme Court would decline to address argument made for first time on appeal, that statute governing electric service district service areas precluded award of lost profits to electric service district for city's annexation and provision of electric service to territory formerly served by district. U.C.A.1953, 17A-2-302(1)(a).

20. Eminent Domain ⇨138

For purposes of constitutional takings analysis, "severance damages" are awarded for partial taking, as opposed to taking of entire business, and compensate owner for diminished value of its remaining physical property. Const. Art. 1, § 22.

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

21. Appeal and Error ⇨954(1, 2), 1024.2

Supreme Court will not disturb trial court's judgment granting or refusing injunction unless trial court abused its discretion or judgment rendered is clearly against weight of the evidence.

22. Injunction ⇨14, 16

Injunctions are available only upon showing of irreparable injury for which there is no adequate remedy at law.

23. Injunction ⇨65, 74

When exclusive business is unlawfully invaded, injunction is proper regardless of whether unlawful invasion is effected by another company or by governing body.

24. Injunction ⇨77(1)

Municipal actions may be enjoined when municipality illegally extends its utility service.

25. Limitation of Actions ⇨58(2)

Statute of limitations did not bar electric service district's claim for injunction prohibiting city from providing service in its annexed area previously served by district without compensating district for value of facilities dedicated to provide service to annexed area, where city continued to unlawfully provide such service up to trial. Const. Art. 1, § 22; U.C.A.1953, 10-2-424.

26. Electricity ⇨8.1(4)

City could not be enjoined from providing electric service to its annexed areas if it complied with statute requiring city to reimburse electric service district that was serving annexed areas for value of facilities dedicated to provide service to annexed areas. U.C.A.1953, 10-2-424.

27. Declaratory Judgment ⇨209

Trial court properly refused to consider annexing city's request for declaratory judgment as to its rights and duties if it decided to provide electric service to all residents within annexed areas, in electric service district's action against city, arising from city's provision of electric service to some of consumers in annexed areas previously served by district, as issue for which city request for resolution was not ripe, nor did it represent

actual conflict. U.C.A.1953, 78-33-2, 78-33-6, 78-34-16.

28. Declaratory Judgment \S 61, 62

To sustain declaratory judgment action, there must exist justiciable controversy based upon accrued set of facts, actual conflict, adverse parties, legally protectible interest on plaintiff's part, and issue ripe for judicial resolution. U.C.A.1953, 78-33-2.

29. Declaratory Judgment \S 5.1

Declaratory Judgment Act provision gives trial court discretion to either grant or deny party's declaratory judgment action. U.C.A.1953, 78-33-2.

Michael R. Carlston, Reed L. Martineau, Rodney R. Parker, Salt Lake City, for plaintiffs.

Gary A. Dodge, Bentley J. Tolk, Salt Lake City, for defendant.

John R. Erickson, Brent O. Hatch, Salt Lake City, and F. Elgin Ward, Sandy, for amicus Deseret Generation & Transmission.

Val R. Antczak, James E. Karkut, Salt Lake City, for amicus Utah Associated Municipal Power.

RUSSON, Justice:

Spanish Fork City appeals from a decision of the Fourth District Court enjoining it from providing electric utility service to residents of its annexed areas to the extent that the supplier prior to annexation, Strawberry Electric Service District (Strawberry Electric), had present capacity to provide service at the time of the trial court's order. To the extent Strawberry Electric did not have present capacity to provide service, the trial court's decision allows Spanish Fork to provide electric service but only upon compensating Strawberry Electric for lost projected revenues. Spanish Fork also appeals the trial court's decision dismissing a request for a declaration as to Spanish Fork's rights and obligations if it determined to provide electric services to all residents within the annexed areas. Strawberry Electric cross-appeals that portion of the trial court's decision authorizing Spanish Fork to serve consumers

in the annexed areas to the extent Strawberry Electric did not have present capacity to provide service. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. BACKGROUND

Since 1986, Strawberry Electric has been providing electric utility service to customers in portions of southern Utah County. It operates under a certificate of public convenience and necessity issued by the Public Service Commission. The certificate recognizes Strawberry Electric as the exclusive distributor of electric power to consumers residing in its service area.

Adjacent to Strawberry Electric's service area is Spanish Fork City, which has been experiencing rapid growth. During the 1980s, Spanish Fork annexed approximately 4,000 acres, partly in response to changes in the Utah County zoning classifications permitting more development in these areas. All of the areas annexed by Spanish Fork were included within Strawberry Electric's service area. Moreover, these areas constitute some of the more densely populated portions served by Strawberry Electric. At the time of annexation, Strawberry Electric provided electric power to approximately 200 consumers in these areas. In addition, Strawberry Electric maintained excess capacity to serve future customers who would likely be high margin electric users due to the changed zoning rules.

After its incorporation of these areas, Spanish Fork commenced, on a limited basis, to provide electric utility service within these areas. After disconnecting Strawberry Electric's distribution lines, Spanish Fork attached its own lines and commenced electric service to six residential consumers. For the most part, however, Spanish Fork provided service only to new consumers to the annexed areas never before served by Strawberry Electric (hereinafter referred to as future consumers). Spanish Fork required construction permit applicants to agree, as a condition to obtaining the permit and other city services, to accept Spanish Fork electric service and reject Strawberry Electric's ser-

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vices. By the time trial was held, Spanish Fork had commenced service to thirty-seven future consumers.

Aside from the six residential consumers, Spanish Fork elected to serve only future consumers because it claimed that it could not afford to provide service to all consumers in the annexed areas. Such an undertaking would have entailed reimbursing Strawberry Electric for its facilities used in supplying the areas, which, according to Spanish Fork's studies, was not economically feasible.

In some cases, Spanish Fork's strategy resulted in a duplication of Strawberry Electric's distribution system. Spanish Fork constructed distribution lines into the same areas in which Strawberry Electric had previously constructed its lines in anticipation of future growth. For example, Spanish Fork connected a line to a new building located on the property of the Intermountain Farmers Association (IFA), an existing customer of Strawberry Electric. Also, Spanish Fork constructed a line approximately one-half mile in length into the annexed area to serve only one consumer and another line approximately one mile in length to serve only two consumers. In all of these cases, Strawberry Electric stood ready to serve with distribution lines either within or immediately adjacent to the consumers' properties.

Strawberry Electric objected pursuant to section 10-2-424 of the Utah Code, which provides:

Whenever the electric consumers of the area being annexed are receiving electric utility services from sources other than the annexing municipality, the municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility company which previously provided the services for the fair market value of those facilities dedicated to provide service to the annexed area. If the annexing municipality and the electric utility cannot agree on the fair market value, it shall be deter-

mined by the state court having jurisdiction.

Strawberry Electric requested that Spanish Fork provide service to either all consumers in the annexed area or none of them. Also, Strawberry Electric requested compensation for its lost right to serve in these areas if Spanish Fork elected to provide service.

Spanish Fork denied all requests. It insisted that it need not serve all or none of the consumers in the annexed area. Also, Spanish Fork believed that it was not obligated to compensate Strawberry Electric under the statute because it chose to serve only future consumers, not the existing customers of Strawberry Electric. Failing to informally resolve its dispute with Spanish Fork, Strawberry Electric initiated this lawsuit.¹

Strawberry Electric sought an injunction to prohibit Spanish Fork from serving consumers within the annexed area until it received compensation. The compensation Strawberry Electric demanded included damages suffered as a result of its lost investment in facilities constructed to serve future growth. Spanish Fork counterclaimed, seeking two declarations: first, that it may serve future consumers without paying compensation and, second, enumerating its rights and obligations under section 10-2-424 if it elected to take over service to all residents within the annexed areas.

Strawberry Electric moved for summary judgment, arguing that Spanish Fork violated section 10-2-424 and urging dismissal of Spanish Fork's second claim for declaratory relief. Reasoning that the requested declaratory judgment would not "terminate the uncertainty or controversy giving rise to the proceeding," the trial court dismissed Spanish Fork's claim. Also, without identifying a particular damages formula, the trial court held that Spanish Fork was obligated to compensate Strawberry Electric for its lost right to provide electric service to future consumers. In so ruling, the trial judge limited the issues at trial to Strawberry Electric's claim for an injunction and the compensation due

tion system and service area. Upon Spanish Fork's motion, the trial court dismissed Strawberry Water as a party to the litigation.

to Strawberry Electric under section 10-2-424.

During a bench trial, Spanish Fork proposed a capitalized interest method to apportion revenues as damages. Spanish Fork's provision of service to future consumers. In contrast, Strawberry Electric offered a facilities-based calculation based on the amortized value of specified facilities provided service to the area lost.

Following the trial, the court enjoined Spanish Fork from providing services in the annexed area. Spanish Fork complied with section 10-2-424. The injunction prohibited Spanish Fork from serving the annexed area until it obtained Strawberry Electric's consent to provide service or paid Strawberry Electric the fair market value of those facilities dedicated to providing service to the area. In the expectation that Spanish Fork would compensate Strawberry Electric, the court enjoined Spanish Fork from providing service to future consumers in the annexed areas after trial. Strawberry Electric had capacity to provide service with its facilities then in place. The court ruled that Spanish Fork must provide services to future consumers in the annexed areas to Strawberry Electric's satisfaction. Spanish Fork must require facilities in addition to those now in place, and related items.²

With regard to each consumer, Spanish Fork was allowed to provide service. The trial court ordered Spanish Fork to reimburse Strawberry Electric for Strawberry Electric's method, the court awarded Strawberry Electric \$1,108.50 for each residential consumer who would move into the area. The court awarded a sum to be determined by the trial court, utilizing the amortized value of facilities awarded Strawberry Electric for future consumers who had moved

1. In filing suit against Spanish Fork, Strawberry Electric was joined by Strawberry Water Users' Association (Strawberry Water), the entity from which Strawberry Electric obtained its distribu-

2. On the basis of a motion for summary judgment, this court stayed the trial.

to Strawberry Electric under section 10-2-424.

During a bench trial, Strawberry Electric proposed a capitalized income method to assess damages. That is, it demanded anticipated revenues as damages caused by Spanish Fork's provision of service to future consumers. In contrast, Spanish Fork proffered a facilities-based calculation, or a calculation based on the amount by which the value of specified facilities dedicated to providing service to the annexed areas was lost.

Following the trial, the court enjoined Spanish Fork from providing electric utility services in the annexed areas until it complied with section 10-2-424. Specifically, the injunction prohibited Spanish Fork from serving the annexed areas until it either obtained Strawberry Electric's consent to provide service or paid Strawberry Electric the fair market value of those facilities dedicated to providing service to the annexed areas. In the expectation that Spanish Fork would compensate Strawberry Electric, the trial court enjoined Spanish Fork from providing service to future consumers who locate in the annexed areas after trial to the extent Strawberry Electric had capacity to serve them with its facilities then in place. The court ruled that Spanish Fork may provide electric services to future consumers who locate within the annexed areas to the extent that Strawberry Electric's service to them would require facilities in addition to meters, drop lines, and related items.²

With regard to each future consumer Spanish Fork was allowed to serve, however, the trial court ordered Spanish Fork to pay Strawberry Electric damages. Adopting Strawberry Electric's capitalized income method, the court awarded Strawberry Electric \$1,108.50 for each residential consumer who would move into the annexed areas and a sum to be determined by the court for future commercial consumers. In addition, the trial court, utilizing the same method, awarded Strawberry Electric \$41,015.50 for consumers who had moved into the annexed

area before trial and who had been served by Spanish Fork.

On appeal, both parties insist that the trial court erred. Strawberry Electric contends that the trial court incorrectly allowed Spanish Fork to serve only some consumers in the annexed areas. Spanish Fork argues that the trial court (1) adopted an inappropriate method to calculate damages, (2) improperly enjoined it from providing electric service within the annexed areas, and (3) improperly refused to declare Spanish Fork's rights and duties under section 10-2-424 if it determined to provide service to all residents within the annexed areas.

II. ANALYSIS

[1-3] The first issue we address is whether section 10-2-424 of the Utah Code directs a municipality providing electric utility service to serve all consumers in a newly annexed area. When faced with a question of statutory construction, we look first to the plain language of the statute. *State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993); *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991). If the statute is unclear, we then resort to legislative history and purpose for guidance. *World Peace Movement v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994). The proper construction of section 10-2-424 is a question of law. See *Larsen*, 865 P.2d at 1357. We will therefore accord no deference to the trial court's ruling but will review it for correctness. *Ward v. Richfield City*, 798 P.2d 757, 759 (Utah 1990); *Henretty v. Manti City Corp.*, 791 P.2d 506, 510 (Utah 1990).

In pertinent part, section 10-2-424 provides:

Whenever the electric consumers of the area being annexed are receiving electric utility services from sources other than the annexing municipality, the municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility com-

pending this appeal.

2. On the basis of a motion filed by Spanish Fork, this court stayed the trial court's injunction

pany which previously provided the services for the fair market value of those facilities dedicated to provide service to the annexed area.

The plain language of section 10-2-424 does not reveal whether a municipality may elect to serve only some consumers in annexed areas. Rather, the statute provides only that whenever "the electric consumers" of an annexed area are receiving services from a utility, a municipality may not provide services to "the electric consumers" until the utility consents or the municipality pays. "[T]he electric consumers" could mean either all consumers, including future consumers, i.e., those in the annexed areas who have never received services from the utility, or only the consumers who have actually received service from the utility. To discern the proper construction, we must examine the legislative history and purpose underlying section 10-2-424.

The legislative policy of the code provisions dealing with expansions of municipalities includes the desire that municipalities provide city services to the residents of newly annexed areas: "Areas annexed to municipalities in accordance with appropriate standards should receive the services provided by the annexing municipality, subject to section 10-2-424, as soon as possible following the annexation..." Utah Code Ann. § 10-2-401(4). Thus, in enacting the provisions dealing with municipal expansion, the legislature endeavored to secure the benefit of city-offered services for those in newly annexed areas. See *Sandy City v. Salt Lake County*, 827 P.2d 212, 222 (Utah 1992) ("The legislature clearly prefers that cities provide urban services to developing areas and has designated annexation as the means by which those services should be extended.").

By serving only some consumers within the annexed areas, however, Spanish Fork acted to the detriment of the group which the legislature endeavored to benefit. With regard to consumers within the annexed areas,

3. Nothing in this opinion should be construed as implying that Spanish Fork could or could not choose to satisfy its obligation to serve its residents by contracting with Strawberry Electric or some other utility to provide electric utility service.

Spanish Fork contravened the legislative policy that annexed areas should receive city services as soon as possible. When residents desire to incorporate with a municipality, see Utah Code Ann. § 10-2-416, a major reason for doing so is to receive city services. For the most part, however, Spanish Fork sought to serve none of the residents that desired incorporation but only those consumers who located in the areas after annexation.

[4] We hold, therefore, that under sections 10-2-424 and 10-2-401(4), a municipality providing electric utility service to existing residents must provide that service to consumers in annexed areas.³ Although section 10-2-424 is silent as to whether a city may serve only a portion of the customers in these areas, the legislative history and policy make clear that through section 10-2-424, the legislature sought to prevent the result of such a strategy.

[5, 6] The next issue is the proper measure of damages owed by Spanish Fork to Strawberry Electric as a result of its commencing electric service to portions of Strawberry Electric's service area. This issue involves an interpretation and application of section 10-2-424 and article I, section 22 of the Utah Constitution. Accordingly, we review the trial court's ruling for correctness. See *Utah Dep't of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 608 (Utah 1983).

Section 10-2-424 provides that a municipality taking over utility service in annexed areas must pay "the fair market value of those facilities dedicated to provid[ing] service to the annexed area." In *City of Logan v. Utah Power & Light Co.*, 796 P.2d 697 (Utah 1990), this court established a framework by which to determine the "fair market value" of a utility's affected facilities. First, the facilities, both inside and outside the annexed area, used to provide service to the annexed area must be identified. *Id.* at 700-01. Next, an article I, section 22⁴ "takings" analysis with regard to those facilities is

4. Article I, section 22 of the Utah Constitution provides, "Private property shall not be taken or damaged for public use without just compensation." Utah Const. art. I, § 22.

necessary. *Id.* held that "fair" meaning of section "just compensation" municipality's act the utility's proper gan court, however the issue of calculating parties had stipulated depending on the

[7, 8] Prior cases with that guidance 22, the takings a steps. First, the "some protectible i man v. Utah Stat. 625 (Utah 1990). protectible proper must then show t "taken or damage *Id.* at 626. A "ta interference with j stroys or material which the owner's ment is in any subs destroyed." *Id.* (Road Comm'n v. Judicial Dist., 94 Ut 506 (1937)).

[9] In this case the property in w possessed a prote Spanish Fork claim tric had a protectil in its physical faci tric, however, claim facilities, article I, certificate of public ty and the privilege its right to serve annexed areas whi area, and the earnir from those consume

[10, 11] This ec kinds of property domain] right ... ed.'" *Farmers Ne Bountiful City*, 80:

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necessary. *Id.* The *City of Logan* court held that "fair market value" within the meaning of section 10-2-424 is equivalent to "just compensation" to the extent that the municipality's actions constitute a taking of the utility's property. *Id.* The *City of Logan* court, however, provided no guidance on the issue of calculating damages because the parties had stipulated to damages figures depending on the court's ruling. *Id.* at 701.

[7,8] Prior cases nevertheless provide us with that guidance. Under article I, section 22, the takings analysis has two principal steps. First, the claimant must demonstrate "some protectible interest in property." *Colman v. Utah State Land Bd.*, 795 P.2d 622, 625 (Utah 1990). If the claimant possesses a protectible property interest, the claimant must then show that the interest has been "taken or damaged" by government action. *Id.* at 626. A "taking" is "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed." *Id.* (quoting *State ex rel. State Road Comm'n v. District Court, Fourth Judicial Dist.*, 94 Utah 384, 394, 78 P.2d 502, 506 (1937)).

[9] In this case, the dispute centers on the property in which Strawberry Electric possessed a protectible property interest. Spanish Fork claims that Strawberry Electric had a protectible property interest only in its physical facilities. Strawberry Electric, however, claims that in addition to its facilities, article I, section 22 protects its certificate of public convenience and necessity and the privilege incident thereto, that is, its right to serve all consumers within the annexed areas which fall within its service area, and the earnings it would have realized from those consumers.

[10,11] This court has stated, "The kinds of property subject to the [eminent domain] right ... [are] practically unlimited." *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah

1990) (quoting *Lund v. Salt Lake County*, 58 Utah 546, 552, 200 P. 510, 512 (1921)). Indeed, article I, section 22 protects all property protected by its federal counterpart,⁵ and perhaps even more so due to its more expansive language. See *Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995). Under article I, section 22, "[e]very species of property which the public needs may require, ... [including] legal and equitable rights of every description [is] liable to be thus appropriated." *Lund*, 58 Utah at 552, 200 P. at 512 (quoting *Cooley, Constitutional Limitations* 646 (6th ed.)).

In contending that Strawberry Electric has a protectible interest only in its facilities, Spanish Fork points out that such intangible assets as profits and future business are generally not protected by the Takings Clause. *Thorsen v. Johnson*, 745 P.2d 1243, 1246 (Utah 1987); *State ex rel. Road Comm'n v. Ouzounian*, 26 Utah 2d 442, 445, 491 P.2d 1093, 1095-96 (1971); *State ex rel. Road Comm'n v. Noble*, 6 Utah 2d 40, 44, 305 P.2d 495, 498 (1957); *State v. Tedesco*, 4 Utah 2d 248, 251, 291 P.2d 1028, 1029-30 (1956); 27 *Am.Jur.2d Eminent Domain* § 285 (1966); 4 *Nichols The Law of Eminent Domain* § 12B.09[1] (rev. 3d ed. 1995). These assets are generally too speculative and uncertain to award. See *Ouzounian*, 26 Utah 2d at 445, 491 P.2d at 1095-96; *Noble*, 6 Utah 2d at 44, 305 P.2d at 498; *Tedesco*, 4 Utah 2d at 251, 291 P.2d at 1030.

[12] These authorities, however, do not deal with the taking of a public utility which enjoys an exclusive right to conduct business within its service area. The taking of a public utility includes not only the physical facilities of the utility, but also its exclusive business. 27 *Am.Jur.2d Eminent Domain* § 339 (1966). Moreover, this court has held that some kinds of contractual rights, such as exclusive commercial privileges, may also be "property" that can be taken for public use. *Bagford*, 904 P.2d at 1098-99; see also *West River Bridge Co. v. Dix*, 47 U.S. 507, 533-34, 6 How. 507, 12 L.Ed. 535 (1848) (holding that for Fifth Amendment takings purposes, a

5. The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides in part that

"private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

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franchise is property subject to eminent domain).

[13] However, to create a protectable property interest, a contract must establish rights more substantial than a unilateral expectation of continued privileges. "Absent an exclusive franchise or the equivalent thereof, no vested, legally enforceable interest arises, and consequently, there is no property that can provide the basis for compensation in an inverse condemnation proceeding." *Bagford*, 904 P.2d at 1099.

In this case, Strawberry Electric's commercial privilege is subject to termination by annexing municipalities and therefore is nothing more than a mere unilateral expectation of a continued right to service consumers. While Strawberry Electric operates pursuant to a certificate of public convenience and necessity issued by the Public Service Commission, municipalities are not subject to the regulation and control of the Commission, *Utah Power & Light Co. v. Public Serv. Comm'n*, 122 Utah 284, 289, 249 P.2d 951, 953 (1952); *Barnes v. Lehi City*, 74 Utah 321, 349, 279 P. 878, 888 (1929), and are specifically authorized to regulate the sale and use of electric power within their boundaries. Utah Code Ann. § 10-8-21. Moreover, section 10-2-401(4) provides:

Areas annexed to municipalities . . . should receive the services provided by the annexing municipality, subject to Section 10-2-424, as soon as possible following the annexation. . . .

This section, and section 10-2-424 by reference, must be construed as a term of Strawberry Electric's certificate of public convenience and necessity. Strawberry Electric was therefore on notice that all or part of its service area could be annexed and its exclusive business privilege limited or terminated. Thus, Strawberry Electric has no protectable property interest in its certificate of public convenience and necessity where its service area is lawfully invaded by an annexing municipality.

The trial court, without the benefit of *Bagford*, failed to appreciate Spanish Fork's right to lawfully invade Strawberry Electric's service area and ruled that Strawberry Electric was entitled to lost future income from

consumers in the annexed areas. Apparently, the trial court determined that Strawberry Electric had an exclusive commercial privilege even though Utah law confers upon municipalities the right to lawfully invade Strawberry Electric's service area. In this respect, the trial court erred. We therefore reverse the trial court's damage award to the extent it was based upon the incorrect premise that Strawberry Electric had an exclusive right vis-a-vis lawfully invading municipalities to serve annexed consumers.

[14, 15] Notwithstanding a municipality's right to commence service within its annexed areas, a utility does have a protectable property interest in its certificate until its service area is lawfully invaded. Until an annexing municipality has complied with section 10-2-424, it has the power to invade the utility's service area but not the right. *City of Logan*, 796 P.2d at 700. And since municipal power cannot be exercised in derogation of specific rights protected by article I, section 22, *id.*, the utility has a legally cognizable expectation to exclusively provide electricity within its service area. In this case, when Spanish Fork began to serve annexed residents, Strawberry Electric had a legally cognizable interest in an exclusive privilege to serve within its service area.

[16] In pertinent part, section 10-2-424 provides that when an electric utility company has been serving consumers in an area annexed by a municipality, "the municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility company . . . for the fair market value of those facilities dedicated to provid[ing] service to the annexed area." Utah Code Ann. § 10-2-424 (emphasis added). According to the plain language of this statute, *see State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993) (directing that in construing a statute's provisions, courts are bound by its plain language), a municipality may not commence service within any portion of an electric utility's service area unless it has either obtained the utility's consent or reimbursed the utility for its compensable losses. Any other construction

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would entail an improper disregard of the section's terms. See *State v. One 1984 Oldsmobile*, 892 P.2d 1042, 1046 (Utah 1995) (We must assume that "each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." (quoting *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P.2d 664, 670 (Utah 1991))).

Spanish Fork all but concedes that it violated section 10-2-424. Spanish Fork admits that it furnished electric service to forty-three residents of the annexed areas before either securing Strawberry Electric's consent or reimbursing Strawberry Electric for its compensable losses. This conduct violates section 10-2-424.

Moreover, the effect of Spanish Fork's noncompliance is that Strawberry Electric has an exclusive right to serve consumers within its service area. Until Spanish Fork either secures Strawberry Electric's consent or pays Strawberry Electric for the "fair market value of those facilities dedicated to provid[ing] service to the annexed area[s]." Strawberry Electric has a legally enforceable interest in exclusively serving within its service area. This includes its right to serve any customer in the annexed areas until Spanish Fork complies with section 10-2-424. Therefore, under *Bagford*, Strawberry Electric has a protectible property interest in serving these customers, and if this interest has been "taken or damaged," it must be compensated accordingly.

Next, we must determine whether Strawberry Electric's protectable property interest has been "taken or damaged" by Spanish Fork's actions. See *Colman*, 795 P.2d at 626. Every consumer within the annexed areas served by Spanish Fork before it ultimately complies with section 10-2-424 represents a partial taking or damaging of Strawberry Electric's protectable property interest. As of the time of trial, Spanish Fork commenced service to forty-three consumers. If Spanish Fork has since commenced service to more consumers, it has further damaged Strawberry Electric's protectable interest. Accordingly, Spanish Fork must compensate Straw-

berry Electric for its inability to serve these customers.

This compensation must include the profits Strawberry Electric would have realized during the time Spanish Fork failed to comply with section 10-2-424. That is, Strawberry Electric is entitled to the lost profits from each of the forty-three above-mentioned customers, in addition to any other customer that has located in the annexed areas and for whom Spanish Fork has commenced service, from the time Spanish Fork initially served the customer until it complies with section 10-2-424 by compensating the utility.

Spanish Fork objects to an approach which would award lost profits. First, Spanish Fork contends that the language of section 10-2-424 precludes such an award. According to Spanish Fork, a municipality is required to "reimburse[] the electric utility company" only when it supplants a portion of the company's service area and a city can "reimburse" a company only for expenses already incurred, not for lost profits. Second, Spanish Fork argues that section 17A-2-302(1)(a) of the Utah Code precludes an award of lost profits to the extent it denies electric utility companies the right to provide service in areas adjacent to the service territory of municipal agencies.

[17, 18] Spanish Fork's contentions lack merit. Its argument that the text of section 10-2-424 precludes an award of lost profits is unpersuasive because it requires an unconstitutional construction of the statute. Utah courts should "construe statutory terms to avoid an unconstitutional application of the statute." *Utah State Road Comm'n v. Friberg*, 687 P.2d 821, 831 (Utah 1984). This court has ruled that "the fair market value reimbursement requirement of section 424 is to be read as congruent with the 'just compensation' requirement of article I, section 22" of the Utah Constitution. *City of Logan*, 796 P.2d at 700. And above, we ruled that article I, section 22 protects as an incident of Strawberry Electric's certificate of public convenience and necessity profits from consumers Spanish Fork unlawfully served. If we were to interpret section 10-2-424 in the manner proposed by Spanish Fork, we would be forced to hold the statute unconstitutional.

Therefore, "reimburse" for purposes of section 10-2-424 means to make whole for any losses compensable under article I, section 22 of the Utah Constitution. Accord *The American Heritage Dictionary of the English Language* 1097 (1980) (defining "reimburse" as "to ... compensate ... for ... losses or damages incurred").

[19] The second challenge—that section 17A-2-302(1)(a) of the Utah Code precludes an award of lost profits—is unripe. This argument was made for the first time on appeal. "With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal." *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455 (Utah 1993) (quoting *Espinal v. Salt Lake City Bd. of Educ.*, 797 P.2d 412, 413 (Utah 1990)). We therefore decline to address this argument.

As discussed above, to lawfully invade Strawberry Electric's service area, Spanish Fork must commence service to all consumers within the annexed areas and pay Strawberry Electric "the fair market value of those facilities dedicated to provid[ing] service to the annexed area[s]." Utah Code Ann. § 10-2-424. Further discussion of damages is therefore warranted to guide the trial court in calculating them.

[20] Section 10-2-424 requires that to serve the consumers within the annexed areas, Spanish Fork must pay Strawberry Electric the fair market value of the facilities dedicated to serving within those areas. Both parties agree that section 10-2-424 therefore requires compensation for the utility's lost or stranded physical facilities, such as distribution lines, poles, conduits, and related hardware. In addition, *City of Logan* suggests that Strawberry Electric is entitled to recover damages for the diminished value of its remaining physical property. *City of Logan* directed that damage awards should compensate utilities for facilities damaged outside the annexed areas, which suggests that utilities are entitled to severance damages. See *City of Logan*, 796 P.2d at 700-01. Severance damages are awarded for a partial taking, as opposed to a taking of the entire business, and compensate the owner for the diminished value of its remaining physical

property. See 4A Julius L. Sackman & Patrick J. Rohan, *Nichols' The Law of Eminent Domain* §§ 14.02[1][a], 15.11 (rev. 3d ed. 1994 & Supp.1995). Thus, to serve the annexed areas, Spanish Fork must pay Strawberry Electric the fair market value of its lost or stranded facilities and severance damages.

In sum, Strawberry Electric is entitled to profits from customers within the annexed areas served by Spanish Fork during Spanish Fork's noncompliance with section 10-2-424. However, Strawberry Electric is not entitled to future profits from consumers within the annexed areas after Spanish Fork complies with section 10-2-424. In addition, if Spanish Fork serves all consumers within the annexed areas, which it must do pursuant to section 10-2-424 of the Utah Code, it must pay Strawberry Electric for its facilities dedicated to service within the annexed areas. Such an award would include damages for Strawberry Electric's lost and stranded facilities and severance damages.

The next issue is whether the trial court improperly enjoined Spanish Fork. The trial court found Spanish Fork in violation of section 10-2-424 for failing to compensate Strawberry Electric for its losses before it commenced electric service within the annexed areas. The trial court held, "If the City wishes to provide any services in the areas served by [Strawberry Electric], it must obtain the consent of [Strawberry Electric] or it must pay [Strawberry Electric] for the fair market value of those facilities dedicated to provid[ing] service to the annexed area." The trial court further ordered that even if it compensates Strawberry Electric, Spanish Fork is prohibited from serving consumers in the annexed areas whom Strawberry Electric had present capacity to serve.

[21] Spanish Fork levels three objections to the trial court's injunction. First, Spanish Fork argues that a municipality's authority to furnish utility service to its residents may not be prohibited and therefore Strawberry Electric's sole remedy is monetary damages. Second, Spanish Fork maintains that inasmuch as the injunction mandates the termination of service to six residential consumers

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that it disconnected from Strawberry Electric's distribution system and connected to its own, the injunction contravenes a three-year statute of limitations. Third, Spanish Fork asserts that the injunction preventing it from serving its residents incorrectly assumes that Strawberry Electric has an exclusive right vis-a-vis municipalities in compliance with section 10-2-424 to serve its customers. In considering these arguments, "[w]e will not disturb a trial court's judgment granting or refusing an injunction unless the court abused its discretion or the judgment rendered is clearly against the weight of the evidence." *Birch Creek Irrigation v. Prothero*, 858 P.2d 990, 993 (Utah 1993).

[22] Injunctions are available only upon a showing of irreparable injury for which there is no adequate remedy at law. *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425-27 (Utah 1983). Injunctions are commonly granted where an exclusive business, such as Strawberry Electric's until a municipality supplants it in compliance with section 10-2-424, is unlawfully invaded. See *Georgia Power Co. v. Atlanta Elec. Membership Corp.*, 221 Ga. 521, 145 S.E.2d 691, 695 (1965); *Southern Indiana Gas & Elec. Co. v. Indiana Statewide Rural Elec. Coop.*, 251 Ind. 459, 242 N.E.2d 361, 368 (1968); *Mid-America Pipeline Co. v. Iowa State Commerce Comm'n*, 253 Iowa 1143, 114 N.W.2d 622, 626 (1962); *Campbell Sixty-Six Express, Inc. v. J. & G. Express, Inc.*, 244 Miss. 427, 141 So.2d 720, 726 (1962); *Missouri Utilities Co. v. Scott-New Madrid-Mississippi Elec. Coop.*, 475 S.W.2d 25, 28 (Mo. 1972) (en banc); 43A C.J.S. *Injunctions* § 106 (1978). When invaded, the business bears irreparable injury for which there is no adequate remedy at law; "[m]onetary damages would be difficult and perhaps impossible to ascertain, and [the business] would be forced to bring continuing and successive lawsuits for damages." *Payne v. Jackson City Lines, Inc.*, 220 Miss. 180, 70 So.2d 520, 523 (1954).

[23, 24] Moreover, an injunction is proper whether the unlawful invasion is effected by another company or by a governing body. *City of Pinellas Park v. Cross-State Utils. Co.*, 205 So.2d 704, 706-07 (Fla. Dist. Ct. App.

1968); *Missouri Pub. Serv. Co. v. City of Trenton*, 509 S.W.2d 770, 772 (Mo. Ct. App. 1974); 43A C.J.S. *Injunctions* § 106 (1978). These authorities countenance enjoining municipal actions where the municipality illegally extends its utility service. See *Cross-State Utils. Co.*, 205 So.2d at 706-07; *Missouri Pub. Serv. Co.*, 509 S.W.2d at 772. We adopt this rule and will therefore approve the trial court's injunction if Spanish Fork exceeded its authority in furnishing electric service to the annexed areas.

[25] In resolving the previous issue, we held that Spanish Fork violated section 10-2-424. Spanish Fork contends, however, that the injunction ignores the applicable statute of limitations. Spanish Fork maintains that it connected its lines to the six consumers no later than 1986. Further, Spanish Fork contends that actions for liability created by section 10-2-424 must be commenced within three years of connection. See Utah Code Ann. § 78-12-26. Because Strawberry Electric's action was not commenced within three years of connection, Spanish Fork argues, Strawberry Electric's claims with respect to these consumers are time-barred. The trial court rejected the application of this statute, explaining that Spanish Fork "continues to violate [section 10-2-424] in providing service" to the six consumers.

To address whether Strawberry Electric's cause of action is time-barred, we must determine exactly what acts comprise the cause of action and when they occurred. Under section 10-2-424, a "municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility company." Utah Code Ann. § 10-2-424. Thus, the action forbidden by section 10-2-424 is the "furnish[ing of] electric utility services" without the utility's consent or before compensation is provided.

It is undisputed that Spanish Fork furnished electric service to at least forty-three consumers. The next step is to determine when Spanish Fork furnished those services. From the record, it appears that at least until trial, Spanish Fork furnished electric

utility services to the specified consumers. At no time before trial did Spanish Fork cease to provide service to these residents. Indeed, had Spanish Fork done so, the injunction, at least as to these consumers, would have been unnecessary. Therefore, assuming the applicability of section 78-12-26 of the Utah Code,⁶ Strawberry Electric's claims were not time-barred because Spanish Fork violated section 10-2-424 within the time set forth in section 78-12-26. Thus, the trial court did not abuse its discretion in enjoining Spanish Fork's electric utility service until it complies with section 10-2-424.

[26] The trial court's injunction, however, would prohibit Spanish Fork from serving consumers within the annexed area whom Strawberry Electric had present capacity to serve even if Spanish Fork ultimately complies with section 10-2-424. This portion of the trial court's injunction was based upon the now discredited premise that Strawberry Electric possessed an exclusive right vis-a-vis municipalities in compliance with section 10-2-424 to serve consumers within the annexed areas. We ruled above that it does not. We therefore reverse that part of the trial court's injunction preventing Spanish Fork from serving its residents even if it complies with section 10-2-424.

[27] The final issue on appeal is whether the trial court properly refused to consider Spanish Fork's request for a declaratory judgment as to its rights and duties if it decided to provide electric service to all residents within the annexed areas. The trial court dismissed Spanish Fork's request on the ground that "[s]uch a judgment would not terminate the uncertainty or controversy giving rise to the proceeding." (Quoting Utah Code Ann. § 78-33-6.) Spanish Fork argues that its action is justiciable and that Utah law concerning condemnation, specifically section 78-34-16 of the Utah Code, precludes the dismissal of its action.

6. For the purpose of this discussion, we need not determine whether this section prescribes the applicable limitation period. It is important to note that an action under section 10-2-424 is, to a large extent, founded upon article I, section 22, *City of Logan*, 796 P.2d at 701. Thus, section

[28, 29] Under the Utah Declaratory Judgment Act,

[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction . . . arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.

Utah Code Ann. § 78-33-2. The Act goes on to state, however, "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." *Id.* § 78-33-6. To sustain a declaratory judgment action, there must exist "a justiciable controversy based upon an accrued set of facts, an actual conflict, adverse parties, a legally protectible interest on the plaintiff's part, and an issue ripe for judicial resolution." *Barnard v. Utah State Bar*, 857 P.2d 917, 919 (Utah 1993). The statute gives a trial court discretion to either grant or deny a party's declaratory judgment action by virtue of the statute's use of the word "may." See *World Peace Movement v. Newspaper Agency Corp.*, 879 P.2d 253, 265 (Utah 1994) (Russon, J., dissenting); cf. *Canyon Country Store v. Bracey*, 781 P.2d 414, 420 (Utah 1989) (holding that use of word "may" in Utah Rule of Civil Procedure 49 indicates grant of discretion to trial court); accord *Boyle v. National Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah.Ct.App.1993).

In this case, the issue for which Spanish Fork requested resolution was not ripe, nor did it represent an actual conflict. In its own words, Spanish Fork "sought a determination of the value of the facilities dedicated to provid[ing] service to all consumers in the Annexed Areas and the extent to which title to affected facilities would pass." As such, Spanish Fork's theoretical taking had no specified date, and therefore, any valuation of Strawberry Electric's compensable losses would be inaccurate or outmoded. More-

78-12-26, which prescribes a limitation period for liability created by statutes, may not be applicable to the extent liability is actually created by the Utah Constitution. See *Webber v. Salt Lake City*, 40 Utah 221, 224, 120 P. 503, 504 (1911).

over, the value of Strawberry Electric's compensable losses as a result of such a taking was never the source of any actual conflict among the parties. Indeed, Spanish Fork admitted that undertaking electric service to all consumers within the annexed areas would not be economically feasible.

Contrary to Spanish Fork's suggestion, section 78-34-16 does not support its claim for declaratory relief. In relevant part, this statute provides:

Condemnor, whether a public or private body, may, at any time prior to final payment of compensation and damages awarded the defendant by the court or jury, abandon the proceedings and cause the action to be dismissed without prejudice, provided, however, that as a condition of dismissal condemnor first compensate condemnee for all damages he has sustained and also reimburse him in full for all reasonable and necessary expenses actually incurred by condemnee because of the filing of the action by condemnor [sic], including attorneys fees.

Utah Code Ann. § 78-34-16. Spanish Fork contends that this section supports the view that it may receive a determination of value from a court prior to determining whether to complete the condemnation. Spanish Fork, however, misapprehends the reasons for the trial court's dismissal. The trial court did not reject Spanish Fork's request because it did not commit to assuming electric service throughout the annexed area. Rather, the trial court denied declaratory relief because Spanish Fork's issue had not yet accrued; the issue was not ripe, and no actual conflict existed between the parties. In short, the trial court properly refused to issue an advisory opinion. Thus, the trial court did not abuse its discretion in dismissing Spanish Fork's declaratory judgment action.⁷

III. CONCLUSION

We conclude that the trial court incorrectly authorized Spanish Fork to serve only select

7. We note that our resolution of the first issue will require the determination of compensation owed to Strawberry Electric as a result of Spanish Fork's assumption of utility service to all residents in the annexed areas. Spanish Fork

customers in the annexed areas and incorrectly calculated Strawberry Electric's damages to include projected earnings from consumers whom Spanish Fork may lawfully serve. In addition, the trial court abused its discretion in enjoining Spanish Fork from serving annexed residents if it complies with section 10-2-424. The trial court, however, did not abuse its discretion in enjoining Spanish Fork from serving annexed residents until it complies with section 10-2-424 and in dismissing Spanish Fork's second claim for declaratory relief. We therefore lift the stay of the permissible part of the trial court's injunction, reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

ZIMMERMAN, C.J., HOWE, J., and PEULER and THORNE, Judges, concur in RUSSON's, J., opinion.

STEWART, Associate C.J., and DURHAM, J., having disqualified themselves, do not participate herein; PEULER and THORNE, District Judges, sat.



STATE of Utah, Plaintiff and Appellee,

v.

James QUADA, Defendant and Appellant.

No. 950076-CA.

Court of Appeals of Utah.

May 31, 1996.

Defendant was convicted in the Fourth District Court, Utah County, Ray M. Harding, J., of two counts of aggravated assault, and he appealed. The Court of Appeals,

must provide service to all of its residents, and Strawberry Electric must be compensated accordingly. However, the trial court's dismissal of Spanish Fork's declaration request was still proper since it lacked the benefit of this ruling.



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May 5, 1999

Representative Andrew Halcro
Co-Chair, Community & Regional Affairs Committee
Alaska State Legislature
Juneau, AK 99801

Dear Representative Halcro,

The Fairbanks North Star Borough has concerns with HB178, which relates to waste collection and disposal. The bill requires local government to regulate the waste industry. We do not currently possess the expertise necessary to regulate a utility. Should HB178 pass, we would be required to gain that expertise, but I question whether local government is the proper place for such regulatory authority. Given the current number of mergers and acquisitions currently pending before the APUC that involve one waste disposal company, it does not seem to be the appropriate time to decentralize regulatory authority. It seems that if anything, a comprehensive statewide regulatory authority would be more appropriate.

We also have concerns that HB178 is not clear about the impacts the legislation would have on our hauling contracts for our transfer sites. We are not aware of any current problems that exist that this legislation addresses. Please excuse me for being anecdotal, but if it is not broken, why fix it.

I appreciate you taking the time to hear our concerns. The Fairbanks North Star Borough cannot support HB178 at this time. If you need further information, please do not hesitate to contact me.

Sincerely,

for Hank Hove
Borough Mayor

Cc: Interior Delegation