HB

157

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSSS HB 157
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Revenue 04
Title: Elec/Phone Coop & Other Entities
RDU: Tax and Treasury
Component: Tax
Sponsor: Rep. Anderson, Thomas
Requester: (H) CRA
Component No.: 2476

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	*	*	*	*	*	*

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2005) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

* See page 2

Prepared by: Chuck Harlamert
Phone 465-2320
Division: Tax Division
Date/Time 4/5/05 4:34 PM
Approved by: Tom Boutin, Deputy Commissioner
Date 4/5/2005
Agency: Revenue

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. CSSS HB 157

ANALYSIS CONTINUATION

We are unable to estimate the revenue impact, if any, of the bill.

AS 10.25.540(b) exempts telephone and electric cooperatives from all state taxes other than the cooperative tax under AS 10.25.550 or .555. We do not believe that this exclusion is intended to avoid requirements for collection or remittance of taxes on their members or other customers.

New section AS 10.25.020(8) specifies that cooperatives may own, in whole or in part, LLCs or corporations organized for any lawful purpose. Revenue does not have the expertise to opine whether the bill clarifies existing law or establishes new rights for the cooperatives. To the extent that the activities of these LLCs or corporations are attributed to the cooperative and not taxed as a separate entity, the cooperatives' tax exemption will shelter the LLC/Corporate activity from state taxation. The activity thus sheltered from tax would be limited to the portion of the LLC/Corporation's activity that is attributed to a cooperative.

Excise, ad valorem, and property taxes are imposed at the entity level and are not attributed to the owners of the entity. The LLC or corporation will pay any applicable motor fuel tax, property tax, local sales tax, or other non-income taxes. Therefore, the arrangement allowed under the bill will not avoid these taxes.

In contrast, income taxes are commonly attributed to the owner of the operating entity instead of the entity itself. An LLC that is either a single member LLC (owned wholly by the cooperative) or a multi-member LLC that elects to be treated as a partnership for tax purposes, the income of the LLC will be attributed to the owners. The LLC's activity will not be subject to corporate income taxes to the extent that the income is allocated to a cooperative. Thus, the income of a single member LLC owned by a cooperative, and the cooperatives' share of the income of a multi-member LLC electing partnership treatment, will be sheltered from state corporate net income tax.

This same "loophole", that of sheltering income through attribution to an exempt entity, is used by the majority of businesses operating in the state. Every S-corporation and every partnership or LLC electing partnership treatment and having individual partners/members achieves the same result under Alaska law.

New section AS 10.25.020(9) authorizes cooperatives to sell fuel that is not needed to generate electric energy. We believe that the state tax exemption for cooperatives does not extend to excuse cooperatives from collection and reporting requirements applicable to dealers of motor fuel. Cooperatives could experience financial hardship if they fail to collect tax on sales of taxable fuel and are later forced to pay the uncollected tax along with any interest owing. We recommend that the committee consider adding language to clarify the cooperatives' obligation to collect and remit motor fuel tax as a dealer under AS 43.40.010.

24-LS0562\L
Craver
3/31/05

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 157( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ANDERSON, Thomas

A BILL

FOR AN ACT ENTITLED

"An Act clarifying the powers of electric cooperatives to become members of or own stock in other entities, and permitting electric cooperatives to sell fuel not needed to generate electric energy."

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

*** Section 1.** AS 10.25.020 is amended to read:

Sec. 10.25.020. Powers of electric cooperative. An electric cooperative may

(1) generate, manufacture, purchase, acquire, accumulate, and transmit electric energy, and distribute, sell, supply, and dispose of electric energy to its members, to governmental agencies and political subdivisions, and to other persons not exceeding 10 percent of the number of its members; however, a cooperative that acquires existing electric facilities may continue service to persons, not in excess of 40 percent of the number of its members, who are already receiving service from these facilities without requiring them to become members, and these persons may become members upon the terms as may be prescribed in the bylaws;

(2) assist persons to whom electric energy is or will be supplied by the cooperative in wiring their premises and in acquiring and installing electrical and plumbing appliances, equipment, fixtures, and apparatus by financing them, and, in connection with these service, wire or have wired the premises, and buy, acquire, lease, sell, distribute, install, and repair electric and plumbing appliances, equipment, fixtures, and apparatus;

(3) assist persons to whom electric energy is or will be supplied by the cooperative in constructing, equipping, maintaining, and operating electric cold storage or processing plants by financing them or otherwise;

(4) operate a waste heat distribution system;

(5) operate a heating distribution system that was in existence on June 9, 1988;

(6) provide sewer, water, or gas utility service if the cooperative has received a certificate of convenience and necessity under AS 42.05.221 - 42.05.281 from the former Alaska Public Utilities Commission or the Regulatory Commission of Alaska for each type of service provided;

(7) provide direct satellite television programming services; in this paragraph, "direct satellite television programming services" means a video broadcast signal that is received directly from a satellite by an end user;

(8) become a member of other limited liability companies or corporations organized for any lawful purpose, or own stock in them;

(9) sell fuel not needed to generate electric energy.

24-LS0562\Y
Craver
3/24/05

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 157( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ANDERSON, Thomas

A BILL

FOR AN ACT ENTITLED

"An Act permitting electric cooperatives to sell excess fuel not needed to generate electric energy."

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

*** Section 1.** AS 10.25.020 is amended to read:

Sec. 10.25.020. Powers of electric cooperative. An electric cooperative may

(1) generate, manufacture, purchase, acquire, accumulate, and transmit electric energy, and distribute, sell, supply, and dispose of electric energy to its members, to governmental agencies and political subdivisions, and to other persons not exceeding 10 percent of the number of its members; however, a cooperative that acquires existing electric facilities may continue service to persons, not in excess of 40 percent of the number of its members, who are already receiving service from these facilities without requiring them to become members, and these persons may become members upon the terms as may be prescribed in the bylaws;

(2) assist persons to whom electric energy is or will be supplied by the

cooperative in wiring their premises and in acquiring and installing electrical and plumbing appliances, equipment, fixtures, and apparatus by financing them, and, in connection with these services, wire or have wired the premises, and buy, acquire, lease, sell, distribute, install, and repair electric and plumbing appliances, equipment, fixtures, and apparatus;

(3) assist persons to whom electric energy is or will be supplied by the cooperative in constructing, equipping, maintaining, and operating electric cold storage or processing plants by financing them or otherwise;

(4) operate a waste heat distribution system;

(5) operate a heating distribution system that was in existence on June 9, 1988;

(6) provide sewer, water, or gas utility service if the cooperative has received a certificate of convenience and necessity under AS 42.05.221 - 42.05.281 from the former Alaska Public Utilities Commission or the Regulatory Commission of Alaska for each type of service provided;

(7) provide direct satellite television programming services; in this paragraph, "direct satellite television programming services" means a video broadcast signal that is received directly from a satellite by an end user;

(8) sell excess fuel not needed to generate electric energy if that fuel was originally purchased for planned electric energy generation.

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Private Enterprise Policy
April 30, 2003

1. Objective

The purpose of this policy is to establish guidelines for infrastructure projects where private enterprise is involved.

2. General Policy

Economic development is a part of the mission of the Denali Commission. However, economic development is primarily a function of private enterprise. A fundamental prerequisite of economic development is basic sustainable public infrastructure such as transportation, sanitation facilities, energy and healthcare. Another important consideration is that for private enterprise to function efficiently a market large enough to support competition is necessary. When the necessary prerequisites are in place for the market to function efficiently, private enterprise tends to drive costs down and quality of service up.

However, in the small/isolated communities of Alaska, the market does not function efficiently or does not function at all. Frequently the needed public infrastructure is not in place and the market size is insufficient to support the competition necessary to encourage efficient market dynamics. This fact does not lessen the need for basic services like health care, light, heat and sanitation. The challenge is to harness the forces of private enterprise where they exist to provide needed services at an affordable price. Where private enterprise is inadequate or non-existent to achieve this purpose, consideration must be given to providing these services through other means.

3. General Provisions

The Denali Commission will embrace and support, in appropriate ways, private enterprise where it is functioning or can function efficiently and adequately to meet the needs of all members of the local community. The Commission will not support the replacement of or new structures for a publicly funded service to compete with services delivered by private enterprise as long as those services are:

1. Accessible to all members of a community including temporary members;
2. Reasonably priced when compared to comparable communities;
3. Predictably available and sustainable for the long term.

All proposals for new or upgraded infrastructure facilities to be funded with Denali Commission funds shall be evaluated on the basis of public benefits resulting from the project. A proposal for funding may be approved where the facility is or will be owned, operated, and/or maintained by private entities only if there is found to be a direct and substantial public benefit from the project.

Facilities funded in whole or in part by the Denali Commission may not be sold, leased, sub-leased, or interest otherwise assigned without the express approval of the Denali Commission or its successor agency. In any event, the facility shall continue to provide the originally intended public benefit until such time as that public need no longer exists or until the serviceable life of the facility has expired.

Funding decisions must take into account existing private enterprise in the community. Funding should not generally be used to create new or additional competition with existing private enterprise in the community. However in cases where an unregulated monopolistic or other wise inefficient condition exist in which current services are not available at fair and reasonable rates the Commission, after appropriate consultation, may consider funding projects that would contribute to more competitive rates.

4. Provisions Specific to Health Care

The Denali Commission seeks to support health care facilities in a manner which improves access to quality, affordable health services, be it by a private entity or a publicly funded one. The Denali Commission does not seek to create or enhance competition in an inefficient market. In this scenario, an inefficient market is one that cannot support two mutually exclusive health care providers. Given the economic fragility of rural health care systems, Denali Commission funding for health care facilities will be deployed in a manner which encourages a cooperative and collaborative arrangement for the health benefit of the community in question, and improves the sustainability of the overall care delivery system for that population. Denali Commission health facility funding supports systems that ensure access to care for everyone regardless of ability to pay. It is expected that a system that is exclusively private in rural Alaska will not be able to meet that criteria. Thus, some integration of public and private provider entities will likely be required in areas where any private provider system currently exists.

5. Provisions Specific to Bulk Fuel Storage

The developer of any bulk fuel storage consolidation project funded in whole or in part by Denali Commission funds will consult with all retail fuel suppliers within a community in the course of developing the project's conceptual design to ensure that their interests are understood and, to the extent feasible, dealt with in the course of conceptual design.

The existing market share balance among retail fuel suppliers within a community may be significantly altered as a result of a Denali Commission funding only if all of the affected retail fuel suppliers currently operating in the community agree to it or if such alteration is deemed necessary to facilitate competitive conditions in the community. For each type of fuel, the existing market share for a retail fuel supplier is defined as that supplier's existing in-service storage capacity as a percentage of the total gallons of existing in-service storage capacity for all retail fuel suppliers in the community.

Where multiple retail fuel suppliers are involved in a project, comparable levels of investment in project costs (based on market share) will be sought from each participating retail fuel supplier in the community, whether public or private.

Denali Commission funds may be used to upgrade or replace fuel storage facilities owned by private sector retail fuel suppliers if there is determined to be significant public benefit. However, to ensure that long term project benefits flow through to the public, such new or improved fuel storage and dispensing facilities will generally be owned by a local government entity which may lease the facilities to the private sector fuel supplier at a nominal cost or contract with the private sector fuel supplier for facility operation. The term of such lease or contract will be for the life of the assets, and is not transferable as an asset of the leaseholder without express written approval of the Denali Commission or its successor agency.

5. Implementation

Denali Commission partners will have full responsibility for implementing this policy. The Denali Commission will monitor to ensure satisfactory implementation. This policy may be modified or waived only by agreement of the Denali Commission Chief of Staff if it is determine that modification or waiver is in the public interest.

6. Appeals Process

Any decisions of the Chief of Staff may appealed to first to the Federal Co-chair and if deemed necessary to the full Commission.

Issued by: Jeff Staser Date: May 29, 2003

ALASKA STATE HOUSE OF REPRESENTATIVES

Alaska State Capitol
Juneau, Alaska 99801
Room 432

Phone (907)-465-4939
Fax# (907)-465-2418

Representative Tom Anderson

FACSIMILE

To:	Mark Hickey	Fax:	586-2263
From:	The Office of Rep. Anderson	Date:	3/22/05
Re:	HB 157 White Paper	Pages:	4
CC:	Pat Carter and Ray Gillespie		

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Notes:

Sorry this took so long. If you need anything else please let me know.

- Jon

HOUSE BILL NO. 157 BACKGROUND
MARCH 2005

I. Introduction.

House Bill No. 157, "An Act clarifying the powers of electric or telephone cooperatives to become members of or own stock in other entities," proposes to amend AS 10.25.010(a) to read:

> **Sec. 10.25.010. Powers of electric or telephone cooperative; prohibited action.** (a) Except as provided in (b) of this section, an electric or telephone cooperative may
>
> . . .
>
> (9) become a member of other cooperatives, limited liability companies, or corporations organized for any lawful purpose, or own stock in them;
>
> . . . .

The purpose and function of this amendment are to (1) clarify the existing power of an electric or telephone to become a member of, or own stock in, other legal entities, and (2) expressly include limited liability companies (which did not exist in Alaska until 1994) as a type of legal entity in which a cooperative can become a member.

II. Background.

A. Current powers of electric and telephone cooperatives.

As it currently exists, the Alaska Electric and Telephone Cooperative Act (AS 10.25) grants electric and telephone cooperatives broad powers to conduct various activities. For example, AS 10.25.010 provides 14 various general powers of electric and telephone cooperatives. In addition to traditional powers closely related to the provision of electric and telephone utility services, those powers include the power to:

> (9) become a member of other cooperatives or corporations or own stock in them; [and]
>
> . . .
>
> (14) do and perform any other act and thing, and have and exercise any other power which may be necessary, convenient, or appropriate to accomplish the purpose for which the cooperative is organized.

AS 10.25.010(a).

In addition, AS 10.25.630 provides:

> This chapter is complete in itself and is controlling. The provisions of any other law of the state relating to the organization of a corporation, except as provided in this chapter, do not apply to a cooperative organized under this chapter. The enumeration of an object, purpose, power, manner, method or thing does not exclude like or similar objects, purposes, powers, manners, methods or things.

B. The current power to become members of, or own stock in, other legal entities.

As stated above, by statute, Alaska electric and telephone cooperatives, themselves, have the power to engage in a broad range of activities. In addition, through AS 10.25.010(a)(9), as it is currently written, electric and telephone cooperatives can also form subsidiary corporations or cooperatives either through becoming a member of other cooperatives or corporations or by owning stock in them. Ownership in a cooperative, and often in a non-profit corporation, occurs through "membership" in that entity. Ownership in a for-profit corporation occurs through ownership of "stock" in the corporation.

The power to become a member of, or own stock in, another cooperative or corporation allows a cooperative to own all or a portion of another legal entity that conducts activities separate from the cooperative's utility operations. Examples of this could include a cooperative purchasing stock in a publicly traded corporation for investment purposes, or owning all of the stock or membership interest of another corporation that performs services in which the cooperative is interested or has operational experience and expertise. For example, cooperatives often have wholly-owned subsidiary corporations that provide educational services and scholarships to members of the cooperative. In addition, some cooperatives form subsidiary corporations that separately provide other types of services, including Internet and miscellaneous contracting services.

III. The proposed amendment in HB 157 clarifies the power to become a member of, or own stock in, other legal entities "organized for any lawful purpose."

Again, AS 10.25.010(a)(9) already provides the power for an electric or telephone cooperative to "become a member of other cooperatives or corporations or own stock in them." The statute does not limit this power in any way, but there are no published Alaska court decisions that have addressed this power. In other states, however, courts have recently addressed challenges to the power of electric cooperatives to own stock in for-profit subsidiaries. Typically, the issue has arisen when an electric cooperative owns stock in a subsidiary corporation that sells propane gas to the cooperative's members. In those cases, competing propane distributors have challenged the cooperative's power to own a subsidiary corporation whose activities extend beyond the narrow activity of providing electric energy.

In recent decisions, courts in Alabama, Colorado, and Kentucky have held that an electric cooperative has the power to own a subsidiary corporation that provides propane gas service. However, courts in Georgia, Mississippi, and Texas have held that electric cooperatives cannot own subsidiary corporations that provide services not associated the provision of electric energy. Although the specific language of the particular cooperative statutes that were interpreted in those

cases vary in different ways from the language of the Alaska co-op statute, those cases could be cited in th[illegible]re to help interpret cooperative powers in Alaska.

Given these recent conflicting court decisions from other states, there is a concern that AS 10.25.010(a)(9) could be misinterpreted in the future to inf[illegible] an unintended and unstated

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In recent decisions, courts in Alabama, Colorado, and Kentucky have held that an electric cooperative has the power to own a subsidiary corporation that provides propane gas service. However, courts in Georgia, Mississippi, and Texas have held that electric cooperatives cannot own subsidiary corporations that provide services not associated the provision of electric energy. Although the specific language of the particular cooperative statutes that were interpreted in those

cases vary in different ways from the language of the Alaska co-op statute, those cases could be cited in the future to help interpret cooperative powers in Alaska.

Given these recent conflicting court decisions from other states, there is a concern that AS 10.25.010(a)(9) could be misinterpreted in the future to infer an unintended and unstated limitation on the power of a cooperative to become a member of, or own stock in, other legal entities. That is, a litigant might attempt to argue that the statute should be interpreted to limit a cooperative's power to own a subsidiary to allow only ownership of entities that provide traditional electric or telephone utility services. Although there is no such limitation in AS 10.25.010(a)(9) as it currently exists, the uncertainty created by the conflicting court decisions makes it prudent to clarify that AS 10.25.010(a)(9) imposes no such limitation.

HB 157 proposes to clarify AS 10.25.010(a)(9) by adding the clause "organized for any lawful purpose." As amended, AS 10.25.010(a)(9) would provide that an electric or telephone cooperative may "become a member of other cooperatives, limited liability companies, or corporations organized for any lawful purpose, or own stock in them;". The addition of "organized for any lawful purpose" will clarify that the power of a cooperative to own an interest in another entity is not limited to only those entities that provide electric or telephone utility services.

This amendment simply preserves and clarifies the status quo with respect to cooperatives as they provide diversified services with meaningful benefits to their members. Particularly in rural areas of Alaska, co-op subsidiaries can fulfill important needs that are not directly associated with the provision of traditional electric or telephone utility service and that are, in many cases, requested by local residents.

For example, in some rural areas, cost-effective and environmentally sound bulk fuel storage, facilities maintenance, and delivery are lacking. This is an activity in which rural electric cooperatives have experience and expertise. Through membership or ownership interests in subsidiary entities, electric cooperatives may be able to provide those types of services more safely and at a lower cost than would otherwise occur.

The other change to AS 10.25.010(a)(9) proposed in HB 157 is the addition of "limited liability companies" as a legal entity in which a cooperative may become a member. Limited liability companies (LLCs) are a relatively new type of member-owned legal entity. They were first recognized in Alaska in 1994 and are codified in the Alaska Revised Limited Liability Company Act, AS 10.50. LLCs did not exist when AS 10.25.010(a)(9) was adopted. However, LLCs are increasingly becoming preferred over corporations and cooperatives for many types of non-profit and for-profit organizations, including subsidiaries. Even though LLCs are not prohibited by the current statute, the addition of "limited liability companies" in HB 157 clarifies this by expressly including LLCs as a type of legal entity in which an electric or telephone cooperative may become a member.

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Bristol Bay Borough

March 25, 2005

Legislators:

The Bristol Bay Borough supports House Bill No. 157, expanding the powers given to electric or telephone cooperatives. We feel it is important to provide as many avenues as possible to reduce costs in rural Alaska. It will be impossible for rural Alaska to reduce costs if we are forced to do business with the limited existing companies presently providing services.

House Bill No.157 will afford an opportunity for electric or telephone cooperatives to work together to reduce costs, that until now remained fixed or on the increase.

THE BRISTOL BAY BOROUGH SUPPORTS HOUSE BILL 157 AND URGES THE ALASKA STATE LEGISLATURE TO PASS THIS ACT.

Thank you,

Fred W. Pike, BBB mgr.

ALASKA POWER ASSOCIATION
R E S O L U T I O N

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1.6) A Resolution Supporting Legislative Action to Clarify the Cooperative's Ability to become the Full-Service Energy Provider in the Communities that they Serve

Alaska's electric cooperatives are increasingly receiving requests from their members asking the cooperative to become the full-service energy supplier in the community, supplying not only electric energy but also home heating oil and other forms of energy. Recent court cases in other states (notably, Georgia, Texas, and Mississippi) have called into question the ability of Alaska's electric cooperatives to form subsidiaries to respond to these member needs.

Alaska Power Association urges legislative action that would confirm Alaska's electric cooperatives' ability to meet this need by amending AS 10.25.010(a), Powers of electric or telephone cooperative, to include a new subsection to read:

(15) Become a member of or own stock in a corporation, limited liability company or subsidiary, organized for a lawful purpose or purposes for which a corporation or company may be organized.

Approved 12/04 by Alaska Power Association Board of Directors

Eleanor Wolfe

From: Chuck Harlamert [chuck_harlamert@revenue.state.ak.us]
Sent: Tuesday, March 29, 2005 5:07 PM
To: Eleanor Wolfe
Cc: Jerry Burnett
Subject: HB 157 Comments

Eleanor,

AS 10.25.540(b) exempts cooperatives from state taxes other than the cooperative tax under AS 10.25.550 or .555.

HB 157 enables cooperatives to own, in whole or in part, LLCs or corporations organized for any lawful purpose. To the extent that the activities of these LLCs or corporations are attributed to the cooperative(s) and not taxed as a separate entity, the cooperatives' tax exemption will shelter the LLC/Corporate activity from taxation. The activity thus sheltered from tax would be limited to the portion of the LLC/Corporation's activity that is attributed to a cooperative.

Excise, ad valorem, and property taxes are imposed at the entity level and are not attributed to the owners of the entity. The LLC or corporation will pay any applicable motor fuel tax, property tax, sales tax, or other non-income taxes. Therefore, the arrangement allowed under the bill will not avoid tax, but may expose to taxation the activities or property previously under the cooperatives' exemption.

By contrast, income taxes are commonly attributed to the owners of the operating entity instead of the entity itself. Under the bill, if the LLC is either a single member LLC (owned wholly by the cooperative) or a multi-member LLC that elects to be treated as a partnership for tax purposes, the income of the LLC will be attributed to the owner(s) and taxed (or not in the case of a cooperative) at the owner's level. Thus, the income of a single member LLC owned by a cooperative, and the cooperatives' share of the income of a multi-member LLC electing partnership treatment, will be sheltered from state corporate net income tax.

This "loophole" is, at least in theory, bad tax policy. However, this same loophole of sheltering income through attribution to an exempt entity is used by the majority of businesses operating in the state. Every S-corporation and partnership with individual partners achieves the same result under current law. It is probably not fair to say that the bill generates unfair competition or tax disparity between the cooperative and other businesses that compete with the LLCs authorized under the bill.

If you want to prevent this sheltering you can:

1) Restrict the activities of the LLC to those consistent with the cooperatives' purpose. The net effect would be to allow the cooperatives to partner up among themselves or with private business. This would not prevent sheltering, but would not expand it beyond its current reach. It is possible that income and loss allocations between taxable members and non-taxable cooperative members could be structured to shelter income under this option.

2) Restrict LLC membership to cooperatives. This would allow cooperatives to team up. It may enable cooperatives to conduct activities that they are not authorized to conduct under existing law. Indirect sheltering would result to the extent that the activity displaced taxable activity conducted by others.

3) Restrict LLC membership to cooperatives and restrict LLC activities to those consistent with the cooperatives' purpose. This would avoid any potential for income sheltering could not, in fairness, be said to displace taxable activity conducted by others by virtue of advantageous taxation.

Let me know if you have any questions. I will plan on being available for questions Thursday morning.

Chuck

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)	CG Docket No. 04-208

SECOND REPORT AND ORDER, DECLARATORY RULING, AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 10, 2005 **Released:** March 18, 2005

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioners Copps and Adelstein approving in part, dissenting in part, and issuing separate statements.

Comment Date: 30 days after publication in the Federal Register.
Reply Comment Date: 60 days after publication in the Federal Register.

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I. INTRODUCTION

1. In this item, we address a Petition for Declaratory Ruling filed by the National Association of State Utility Consumer Advocates (NASUCA) seeking to prohibit telecommunications carriers from imposing any separate line item or surcharge on a customers' bill that was not mandated or authorized by federal, state or local law.[1] In light of the significant consumer concerns with the billing practices of wireless and other interstate providers raised in this proceeding and outstanding issues from the 1999 *Truth-in-Billing Order and Further Notice*,[2] we also take this opportunity to reiterate certain aspects of our existing rules and policies affecting billing for telephone service. Specifically, we: 1) remove the existing exemption for Commercial Mobile Radio Service (CMRS) carriers from 47 C.F.R. § 64.2401(b) – requiring that billing descriptions be brief, clear, non-misleading and in plain language; 2) reiterate that non-misleading line items are permissible under our rules; 3) reiterate that it is misleading to represent discretionary line item charges in any manner that suggests such line items are taxes or charges required by the government; 4) clarify that the burden rests upon the carrier to demonstrate that any line item that purports to recover a specific governmental or regulatory program fee conforms to the amount authorized by the government to be collected; and 5) clarify that state regulations requiring or prohibiting the use of line items for CMRS constitute rate regulation and are preempted under section 332(c)(3)(A).

2. In addition, in a Further Notice of Proposed Rulemaking, we propose and seek comment on certain measures to facilitate the ability of telephone consumers to make informed choices among competitive telecommunications service offerings. In particular, we: 1) tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges; 2) seek comment on the distinction between government "mandated" and other charges; 3) seek comment on whether it is unreasonable to combine federal regulatory charges into a single line item; and 4) tentatively conclude that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale, and that such disclosure must occur *before* the customer signs any contract for the carrier's services. In an effort to address the potential for balkanized state regulation of CMRS and other interstate carrier billing practices, we also

[1] Petition for Declaratory Ruling, filed by National Association of State Utility Consumer Advocates' (March 30, 2004) (NASUCA Petition). NASUCA is an association of 44 consumer advocates designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

[2] *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 14 FCC Rcd 7492 (1999) (*Truth-in-Billing Order and/or Further Notice*).

authorized fees." NASUCA argues that allowing the inclusion of line items that are not mandated or authorized by the government violates the Truth-in-Billing principles and rules, the *USF Contribution Order*, and both sections 201(b) and 202 of the Act.

B. Discussion

1. NASUCA Petition

23. We deny NASUCA's request for a Declaratory Ruling prohibiting telecommunications carriers from imposing any line items or charges that have not been authorized or mandated by the government. There is no general prohibition against the use of line items on telephone bills under our rules or the Act. As NASUCA has acknowledged, nothing in the *Truth-in-Billing Order* prohibits carriers from using non-misleading line items.[59] To the contrary, the *USF Contribution Order* states that while carriers cannot include administrative costs under the umbrella of regulatory charges, they may recover such costs through their rates or "other line items."[60] The truth-in-billing rules require that charges contained on telephone bills be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered.[61] If carriers choose to offer descriptions of various charges in the form of line items, however, there is nothing in the existing Truth-in-Billing requirements to prevent them from doing so.[62] Nor do we believe there is any basis to conclude that such a practice is "unreasonable" under section 201(b). As several commenters have noted, the provision of accurate and non-misleading information on a telephone bill may be useful information to the consumer in better understanding the charges associated with their service and making informed cost comparisons between carriers.[63] In sum, we reiterate that carriers are not prohibited *per se* under our existing Truth-in-Billing rules or the Act from including non-misleading line items on telephone bills.[64]

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[59] *See generally Truth-in-Billing Order*, 14 FCC Rcd 7492; *see also* NASUCA Petition at 8, and n.16. *See also* AT&T Comment at 5 (no Commission order or rule that prohibits impositions of line-item charges).

[60] *See USF Contribution Order*, 17 FCC Rcd at 24979, para. 55. *See also* Sprint Comments at 6 (citing the USF Contribution Order and E911 proceeding); USTA Comments at 4 (the only unresolved matter is how to standardize line items); Verizon Comments at 3-5 (the Commission has expressly authorized the recovery of specific line item surcharges in Commission proceedings such as the USF Contribution Order, and proceeding regarding Local Number Portability fees); BellSouth Comments at 5 (NASCUA has failed to show a controversy or uncertainty).

[61] 47 C.F.R. § 64.2401(b).

[62] *See* Sprint Comments at 15 and AT&T Comments at 10, 13 (the Commission left it up to the carriers to decide how to meet Truth-in-Billing requirements).

[63] *See, e.g.*, CTIA Comments at 3; Global Crossing Comments at 2; Verizon Wireless Comments at 14.

[64] We note that this finding does not alter the role of any other specific prohibition or restriction on the use of line items. For example, this Commission has prohibited line items for interstate Telephone Relay Service (TRS) costs. *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802, 1806, para. 22 (1993). *See also* Report and Order and Request for Comments, 6 FCC Rcd 4657, 4664, para. 34; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 (continued....)

1. Billing of Government Mandated and Non-Mandated Charges

38. In the *Truth-in-Billing Order*, the Commission required carriers that list charges in separate line items to identify certain of such line item charges through standard industry-wide labels and to provide full, clear and non-misleading descriptions of the nature of the charges.[109] The Commission sought comment on the specific labels that carriers should adopt, while tentatively concluding that such labels will, without unduly burdening carriers, identify adequately the charges and provide consumers with a basis for comparison among carriers.[110] In addition, while declining to formulate standardized descriptions for billed services, the Commission encouraged carriers to develop uniform terminology for such descriptions.[111] The Commission also encouraged industry and consumer groups to consider further whether some categorization of charges would be advisable.[112]

39. Nearly six years after adoption of the *Truth-in-Billing Order*, the record reflects that consumers still experience a tremendous amount of confusion regarding their bills,[113] which inhibits their ability to compare carriers' service and price offerings, in contravention of the pro-competitive framework of the 1996 Act. To help alleviate this situation, consistent with our prior finding,[114] as well as the recommendations of commenters such as the Ohio PUC,[115] we tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges. We also solicit comment on how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes.

a. Distinction Between Mandated and Non-Mandated

40. We solicit comment on how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes. Should we define government "mandated" charges as amounts that a carrier is *required* to collect directly from customers, and remit to federal, state or local governments? Under this definition, some examples of mandated charges would include state and local

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[109] *See Truth-in-Billing Order and Further Notice*, 14 FCC Rcd at 7522-23, 7525-26, paras. 50, 55.

[110] *See id.* at 7537, para. 71. We will address these issues in the order that we adopt in response to this *Truth-in-Billing Second Further Notice*. Given that it has been over five and a half years since the comment cycle on the *Truth-in-Billing Further Notice* closed, we encourage commenters to refresh the record on these issues.

[111] *See Truth-in-Billing Order*, 14 FCC Rcd at 7518-19, para. 43.

[112] *See id.* at 7526, para. 55. The Commission provided as an example one method that carriers may use to provide clear descriptions of services rendered would be to identify a section of the telephone bill as "long distance service," followed by an itemized description of calls. *See id.* at 7517-18, para. 41.

[113] *See supra* paras. 16 and 24; *but see* Verizon Wireless Jan. 25 *Ex Parte* at 6 n.27 (asserting that the record in this proceeding "contains no credible evidence that CMRS providers fail to provide consumers with clear and non-misleading information they need to make informed choices").

[114] *See supra* para. 27.

[115] *See generally, e.g.*, Ohio PUC Comments at 2.

taxes, federal excise taxes on communication services,[116] and some state E911 fees. Non-mandated charges then could be defined as comprised of government authorized but discretionary fees, which a carrier must remit pursuant to regulatory action but over which the carrier has discretion whether and how to pass on the charge to the consumer. Under this definition, some examples of non-mandated, government authorized but discretionary charges would include state Telecommunications Relay Service[117] and universal service charges.[118] Another form of non-mandated charges also would include administrative fees and other purely discretionary charges.[119] We believe that these definitions would be consistent with the settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and Sprint PCS,[120] and with our precedents. For instance, discussing the universal service charge in the *Truth-in-Billing Order*, the Commission stated:

> [W]e would not consider a description of that charge as being "mandated" by the Commission or the federal government to be accurate. Instead, it is the carriers' business decision whether, how, and how much of such costs they choose to recover directly from consumers through separately identifiable charges. Accordingly, to state or imply that the carrier has no choice regarding whether or not such a charge must be included on the bill . . . would be misleading.[121]

Similarly, after discussing carrier imposition of line items for charges such as access charge recovery and universal service, the Commission expressed concern that consumers may be confused about the nature of these charges, because the "names associated with these charges as well as accompanying descriptions (or entire lack thereof) may convince consumers that all of these fees are federally mandated."[122]

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[116] *See* 26 U.S.C. § 4251.

[117] *See supra* note 64.

[118] Government authorized but discretionary charges only could include those costs that are directly related to the specific governmental program or action that the line item purports to recover. *See supra* para. 26.

[119] Though carriers may recover such costs, we emphasize that carriers may not include such costs in the line item purporting to recover costs directly related to the specific underlying governmental program or action. For example, while carriers may recover administrative and other costs related to collection of universal service charges from end users, carriers may not include such costs as part of a line item for "regulatory fees or universal service charges." *See supra* para. 28.

[120] *See, e.g.*, Verizon AVC at 14, para. 36(a), stating that on consumers' bills, carriers will separate "taxes, fees, and other charges that [carriers are] required to collect directly from Consumers and remit to federal, state, or local governments . . . from . . . all other discretionary charges (including, but not limited to, Universal Service Fund fees)."

[121] *Truth-in-Billing Order*, 14 FCC Rcd at 7527, para. 56 (citations omitted). The Commission further noted that its view was consistent with the then-recent decision of the Federal-State Joint Board on Universal Service recommending that the Commission "'prohibit carriers from depicting [universal service] charges as . . . mandated by the Commission or the federal government by terms or placement on the bill.'" *Id.* (citations omitted).

[122] *Id.* at 7524-25, para. 53.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
APPROVING IN PART, DISSENTING IN PART

Re: *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking (CC Docket No. 98-170, CG Docket No. 04-208)

My starting point here is that competitive communications markets function best when consumers have access to accurate and meaningful information. When end users have the facts—and have access to those facts in an understandable format—they can make informed choices. Too often, we know, that's not the case. Most phone bills make my point. It's baffling how complicated they are. The explosion of new services and the line items and fees accompanying them have made it more difficult than ever for consumers to compare rates and shop around. You need an accountant or a lawyer—preferably both—to root out what you're being charged for and why.

This is what led NASUCA last year to file a Petition for Declaratory Ruling. NASUCA asked the Commission to prohibit carriers from imposing line items unless the charges are mandated by government action. This is perhaps not the cure for all of our billing ills. It could actually have the unintended effect of inhibiting national wireless one-rate plans. Nevertheless, this petition was the ideal vehicle for the Commission to initiate a fresh dialogue on how to make bills more honest, readable and easy to understand.

I don't believe we are taking advantage of this opportunity. We take one step forward by applying basic truth-in-billing to wireless services. That's good. Then, amazingly, given the language we hear today on how pro-consumer this Order is, the majority proceeds to put the kibosh on state consumer protection efforts. Now I support the decision to require that wireless carrier billing descriptions be brief, clear and non-misleading. But I must dissent to the majority's decision to preempt state efforts to curb line item abuses or to require that such charges be explained.

The majority says preemption is compelled by the law. This is an incredibly cramped interpretation that ignores the plain meaning of the statute. Congress specifically prohibited states from regulating wireless "rates" but reserved for states the ability to regulate "other terms and conditions." State efforts to curtail or require line item explanations are ***not*** exercises in ratemaking. The legislative history bears me out. It describes the "other terms and conditions" reserved for the states as "such matters as customer billing information and practices." The majority blows breezily by the will of Congress in pursuit of its fixation—or at least its present curious flirtation—with federal preemption.

The majority says that preemption does not preclude state laws of general applicability. Commenters here tell us that state laws as diverse as the Texas Deceptive Trade Practices Act and the Vermont Universal Service Fund Collection Statute may be preempted. Tennessee may find that its billing mechanism to support enhanced 911 services is suddenly suspect. The record suggests that the fate of Washington State's 911 funding system may be similarly uncertain. Indiana's effort to curb line item abuses through that state's Utility Receipts Act may be cut short, and Maine's initiative to make wireless service pricing more transparent is now in question. Many other states may lose authority over consumer billing complaints. It will take some time for states to survey the debris from this erosion of cooperative federalism. And there may be further wreckage on the horizon, because in the Notice of

Proposed Rulemaking accompanying today's Order, the majority tentatively concludes that it should preempt ***all*** state laws involving billing clarity that are more extensive than our minimal federal requirements. As I understand it, this could even apply to wireline as well as to wireless bills.

The majority says that with the states preempted, the Commission will not hesitate to enforce its truth-in-billing requirements. But to date all the Commission has done is hesitate. In the six years since adoption of our truth-in-billing requirements, I cannot find a single Notice of Apparent Liability concerning the kind of misleading billing we are talking about today—the only ones I find involve slamming. Yet in the last year alone, the Commission received over 29,000 non-slamming consumer complaints about phone bills.

So we are very likely doing more harm than good here. Lots of people agree with me. Nearly 14,000 consumers have written the Commission urging us not to take this kind of action. Their concerns are echoed in the comments of the AARP, Consumers Union, the National Consumer Law Center, the Massachusetts Union of Public Housing Tenants, the National Consumers League, the Governor of Maine, the Maine Department of Attorney General, the Massachusetts Office of the Attorney General, the Utility Reform Network, the Utility Consumers Action Network, the Vermont Public Service Board, the Minnesota Department of Commerce, the Office of the People's Counsel for the District of Columbia, the Indiana Utility Regulatory Commission, the Office of the Attorney General of Texas, the Tennessee Emergency Communications Board, the Iowa Utilities Board, the New Jersey Division of the Ratepayer Advocate, the National Association of State Utility Commissioners and others. Yet we forge ahead, bypassing the opportunity NASUCA gave us to rein in incomprehensible bills. I'm afraid consumers will remember that when they called this Commission for help understanding their phone bills, we hung up.