

ALASKA LEGISLATURE COMMITTEES 2012-2013

1616 HJ HB 428 - HB 438

Spruce-hemlock commercial forest lands classified "Forest-Lands"

within the proposal.

| | Southwest-Unit | Northern Unit | Total |
|--|----------------|-----------------------|----------------|
| Patented, T.A.'d & Selected State Lands (includes some private) | 148,000 | 23,000 | 171,000 |
| Spruce-Hemlock classified "Forest" (includes approx. 5,000 acres which have already been | 33,676 | estimated under 2,000 | 35,000. (est.) |

171000 ACRES - IT'S FOR THE BIRDS!

Like Mr. Folta who advised his children to turn their rat collection loose in the local fairgrounds, LCC turned SEACC and the Sierra Club loose in Haines, Alaska, to nibble at the Forest Industry, and all three of these groups are now out of control. We have watched the erosion of our forest base through the land classification process and the accommodations made during the timber sale contract negotiations. SEACC and LCC, dedicated to obstructionism have since succeeded in holding up implementation of the contract through the intimidating process of the courts.

On a recent trip to Juneau I asked Mr. Steinberg how could he justify asking for the entire Chilkat Valley? He answered by asking me why we needed such a large mill? I explained the problem centered around the volume of logs needed to produce sufficient power from wood waste to replace the present dependence of the community on diesel fuel for electrical generation. I pointed out that the activities of SEACC, SIERRA, LCC et al. in continually expanding demands for more land withdrawals and neoulous complaints to the U.S.C.G. Corps of Engineers, F & G, etc. were not conservationist in nature but were truly obstructionist tactics. I also reminded him that if his tactics were successful it would only result in the closure of the mill forcing people to move out of Haines. He shrugged his shoulders and made no comment. I left Mr. Steinberg's office after 30 minutes of discussion with the impression that I could have used my time as effectively talking into an empty tin can.

These obstructionists, to camouflage their intent to paralyze the forest industry, and to create an acceptable image as a defender of the environment, have chosen the eagle in this case as a vehicle to propel themselves into a national issue and the national scene. The Bald eagle in Haines has become as sacred to America as Motherhood. SEACC, the SIERRA CLUB and LCC are giving the impression that they are willing to risk their lives to protect it.

I have been cutting logs 41 years in the Chilkat Valley. Twelve thousand acres of a one hundred twenty seven thousand acre forest have been harvested. During this time the eagle has flourished and his numbers increased. To SEACC and those they represent, including LCC, this has become a self-serving issue and the needs of the people in the Chilkat Valley are of little importance.

John J. Schmitt

BOROUGH

I am going to preface my statements with a direct quote from the book by Arthur Hailey, "Overload":

In a letter to the Governor Mayor of Haines, Dave C. the following comments: Chilkat Valley and support land exchange and eagle

"Despite the many efforts of appropriate agencies of organizations in our country the federal agencies do not contribute in meaningful ways. We are very disappointed to accomplish thorough research assuring that logging will do no damage to public resources, eagles. Furthermore, the disciplinary resource in the Skagway Area Land Use Plan clear-cut logging is all we understand that the Governor \$25,000 for the Haines/Chilkat to plan their own eagle study can only be cooperated meaningfully already underway, and certain development in public resources - even national significance -

"All this leaves us little concerned citizens here more involved in the government do whatever that many national interests eagles are fully protected and the Justice and Interior the growing problem on helping all that they

What is really aggravated is that the Haines public Resource Study Corp. has Audubon eagle study for the Haines/Klukwan Croighead, went on field group, exchanged reports submitted our eagle re

In addition, the State field monitoring the member of that team for trips to the field which includes a soil etc.

There is no longer any what he represents!

D-2 amendment

Amendment on refuge 3

SEC. 1325(a) Within one year after the date of the enactment of this Act, the Secretary and the State shall effect an exchange of lands within the Tetlin National Wildlife Refuge. In this exchange, the State shall relinquish all claims (including land selections filed under Section 6(b) of the Alaska Statehood Act) for up to forty-six thousand and eighty acres of lands selected by the State prior to November 14, 1978, within the refuge for an equivalent acreage of Federal lands north of the Alcan Highway within the Tetlin National Wildlife Refuge, which shall be conveyed to the State as though conveyed under the Statehood Act. Such lands relinquished by the State shall become part of the Tetlin National Wildlife Refuge. This exchange shall become effective upon the execution of all documents necessary to accomplish the exchange.

(b) If the State or any landowner offers to relinquish any lands which the State or such landowner owns within the area generally depicted on the map entitled "Chilkat River Bald Eagle Study Area" dated April 1980, or which the State has selected within such area under the Alaska Statehood Act, the Secretary may accept such relinquishment if such lands are of sufficient size to enable the Secretary to manage effectively the lands and bald eagles within them. In exchange for the relinquished lands, the Secretary (or the Secretary of Agriculture, as appropriate) shall convey to the State or landowner, subject to valid existing rights, such lands as the appropriate Secretary and the State or landowner shall agree to from among public lands not contained in conservation system units.

*Review this
1/7/80*

of as many as 5,500 bald eagles in the Chilkat River Valley is a unique national resource.

(2) Within three years after the date of enactment of this Act, and after consultation with the Governor of the State, the City and Borough of Haines, the Village of Klukwan, and interested persons, the Secretary shall report to Congress on the bald eagles in the area generally depicted on the map entitled "Chilkat River Bald Eagle Study Area," dated April, 1980. The report shall identify and assess the population, habitat and other ecological requirements, and educational, scientific, and economic value of the bald eagles; and the effects of human activities on the bald eagles.

On page 408, line 12, delete everything through page 415, line 16, and renumber subsequent titles accordingly.

On page 415, line 18, delete everything through page 416, line 16, and renumber subsequent sections accordingly.

On page 417, line 19, change the period to a comma and strike the remainder of that line through line 22 and add the following:

"Provided further, that the expertise of the U.S. Fish and Wildlife Service shall be utilized in development of the Forest Plan which includes the management of the Copper River-Bering River Area and any subsequent revisions of that plan. Such plan or its revision shall be coordinated with the U.S. Fish and Wildlife Service flyway and management plans and programs for the wildlife species using this area. Activities and uses shall be permitted in a manner

RADICAL ENVIRONMENTALISM . . . WHOSE IDEA IS IT?

Suppose for a moment that it was 1968 and you were an Arab nation who had begun to realize the wealth and power that would be yours if you managed your oil reserves properly. Suddenly an announcement is made from Alaska that a giant oil field has been discovered.

This would certainly reduce your leverage in your anticipated manipulation of world oil supplies and prices. You must find a way to stop that Alaskan oil from reaching the marketplace. You notice that certain groups in the United States are also against building the necessary pipeline.

Their reasons are straightforward: They want to protect the caribou, moose and tundra and are against the "unsightliness" inherent in any man-made object. Their concerns are not im-

portant to you but what is important is that they have the same goals as you do: Stop the Pipeline! Since they are not political groups, financial contributions can be made without anyone worrying about the source of the money, but to be safe, you "launder" the money.

As the treasuries of the environmental groups swell, they gain more power and influence and are unwittingly doing a very effective job of delaying. If not stopping pipeline construction for you. You take advantage of the delay by raising your oil prices several times. The few petrodollars contributed to the environmental groups turned out to be an excellent investment.

A wild scenario? Yes. Did it really happen? Probably. Foreign powers are able to accomplish their goals in the United States simply by selecting special

interest groups whose goals are essentially the same and carefully providing financing via well "laundered" money. Any group that is well financed and endowed with evangelistic zeal can make a real impact in the United States today.

The people of the Soviet Union have a great deal of faith in the ability of Siberia to provide the raw materials necessary to their industrial growth and military effort.

Time and time again it has been decreed to go and find special commodities needed by the U.S.S.R. to achieve an important goal. Time and time again Siberia has provided. The U.S.S.R. realizes that Siberia is of tremendous importance to their goal of becoming the supreme power in the world.

Continued next page

RADICAL ENVIRONMENTALISM

Continued from page 14

Alaska is the "Siberia" of the United States. Extremely well endowed with mineral and energy resources, Alaska can provide for the United States just as Siberia provides for the U.S.S.R. To a Russian, Alaska must be of critical importance to the U.S. . . .

Thus, Alaska is of strategic importance to the U.S.S.R. If the United States could be stopped or delayed significantly in its utilization of Alaska as a source of energy and strategic minerals, it would be an important factor in any future confrontation.

Certain groups are working to get as much of Alaska withdrawn from exploration and development as is possible. Their reasons are simple and straightforward: they want to preserve this land in its present wilderness condition. The net result however is the same as

desired by the U.S.S.R.

Again, carefully laundered money is poured into treasuries of the environmental organizations. Politicians are elected with the help of the environmental groups. Lobbying by environmental groups in Washington, D.C. on the Alaska "d-2" lands issue is well-financed and very effective. After all, any issue supported so well financially must be the "will of the people."

Another wild scenario? Yes. Is it happening? No one knows for sure but it's time for a thorough investigation into the sources of the financing supporting the radical environmentalists and for a re-evaluation of the wisdom of locking up energy and mineral resources needed by our nation.

THE ALASKA MINER
WELCOMES
LETTERS TO THE EDITOR

Editorial



Remarks by C.R. Lewis

"He that would know what shall be must consider what hath been."

Ancient Proverb

Pipe fabricated to order using the latest equipment and newest techniques.

C.R. LEWIS CO. INC.

1600 Post Road 276-3624

Schnabel Lumber Company

P.O. Box 595

Haines, Alaska 99827

Tel. (907) 766-2511



December 29, 1980

The Honorable Ray Metcalfe
P. O. Box 4-2766
Anchorage, Alaska 99509

Dear Sir:

I appreciate your efforts to minimize nuisance suits which currently afflict the nation and particularly at this moment Haines.

Mr. Zaelke's letter expresses what we have been saying all along. These charges are not valid, have little chance of being won and only serve to delay and destroy. Please continue your efforts for sanity in these matters.

Yours sincerely,

John J. Schnabel
President

S/j

Enc.

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
Tongass National Forest
Federal Building
Ketchikan, Alaska 99901
907-225-3101

RECEIVED
SCHNABEL LBR. C.

APR 13 1981

HAINES, ALASKA

2450

MAR 31 1981



Mr. John Schnabel, President
Schnabel Lumber Company
P.O. Box 595
Haines, Alaska 99827

CERTIFIED MAIL NO. 0306039

Dear Mr. Schnabel:

Reference is made to our letter to you dated August 13, 1980.

Subsequent to that letter, we have taken the following steps to determine what, if any, damages may be due the Government as a result of Schnabel Lumber Company's repudiation of contract.

On August 14, 1980 the sale was offered to the other two bidders at the high bid rate. This offer was ultimately rejected by both parties.

The original sale was appraised again and advertised on January 10, 1981, with a scheduled bid opening February 12, 1981. Ketchikan Pulp Company was the sole high bidder, submitting the minimum acceptable bid of \$508,348.60.

Schnabel Lumber Company has thus subjected the Government to an apparent monetary loss, the difference between the two high bids.

| | |
|-----------------------|--------------------------------------|
| \$2,894,000.40 | Schnabel Lumber Company Bid 12-27-79 |
| - 508,348.60 | Ketchikan Pulp Company Bid 2-12-81 |
| <u>\$2,385,651.80</u> | Apparent loss to the United States. |

Please advise if you know of any reasons why the Forest Service should not proceed to collect damages due the United States.

J. S. WATSON
Forest Supervisor

Schnabel Lumber Company



P.O. Box 595

Heines, Alaska 99827

Tel. (907) 766-2511

April 13, 1981

The Honorable Ray H. Metcalfe
Pouch V
Juneau, Alaska 99811

Dear Ray:

I support H.B. 428. Because of the lawsuit brought against us by the Southeast Alaska Conservation Council, we have been unable to get U.S.F.S. timber sale bonding and have been billed \$2,385,000 as damages by the U.S.F.S. for the difference of our bid and the bid of a subsequent purchaser.

These suits also cause delay, instability and loss of profit and employees. May you succeed in your efforts to gain us relief.

Yours sincerely,

SCHNABEL LUMBER COMPANY

John J. Schnabel
President

S/j

Enc. - Letter - CB/D - 10/21/80
USFS - 3/31/81

cc: The Honorable Jim Duncan, Mike Miller, Bill Ray, Bob Ziegler, Oral Freeman,
Ernie Haugen

APR 21 1981



Louisiana-Pacific Corporation

Ketchikan Division

Post Office Box 6600
Ketchikan, Alaska 99901, U.S.A.
Telephone: 907-225-2151
Telex: 099-55-251
Answer back: KAYPULCO K: T

April 16, 1981

Representative Terry Gardiner
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Terry:

We are in receipt of House Bill 428 introduced by Representative Ray Metcalf relating to litigation involving state actions; and amending Rules 6 and 65 of the Rules of Civil Procedure.

We support this legislation and feel such action is long overdue. It should act as a real incentive for many groups to resolve their differences by negotiation or administrative procedures without expensive and time consuming litigation. We see the legislation as being fair to both defendants and plaintiffs by requiring any early assessment of the differences and likely damages.

An outstanding example of the need for this type of litigation is the Southeastern Alaska Conservation Council vs. State, Schnabel, City of Haines and Haines Borough. This lawsuit has caused the people of Haines and Schnabel Lumber Company untold harm. The City, through depressing their economy and high legal costs, and Schnabel by precluding his operating the timber sale in question, his inability to qualify for a State loan, his inability to obtain bonding for a Forest Service timber sale and his legal fees in defending against the litigation.

Even now, with a favorable ruling granting attorney fees and a charge against the plaintiffs of taking a "frivolous suit with little chance of success", the harmful effects continue because SEACC has appealed the decision.



Louisiana-Pacific Corporation

Representative Terry Gardiner

Page 2

April 16, 1981

We request your support in obtaining legislation that would stop these abuses of our court system.

Sincerely,

D. L. Finney
D. L. Finney, Manager
Forestry & Government Affairs

hr

cc: Representative Ray Metcalf ✓
Mr. John Schnabel

APR 21 1981



Louisiana-Pacific Corporation

Ketchikan Division

Post Office Box 6600
Ketchikan, Alaska 99901, U.S.A.
Telephone: 907-225-2151
Telex: 099-55-251
Answer Back: KAYPUI CO KFT

April 16, 1981

Representative Oral Freeman
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Oral:

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Louisiana-Pacific Corporation

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Page 2

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D. L. Finney, Manager
Forestry & Government Affairs

hr

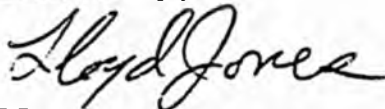
cc: Representative Ray Metcalf
Mr. John Schnabel

The Honorable Ray Metcalfe -2-

April 21, 1981

Thank you for your concerns on a very serious problem.

Sincerely,



Lloyd Jones
Administrative Forester

je
Enclosure

cc: Senator Robert Ziegler
Representative Oral Freeman
Representative Terry Gardiner
Mr. Jim Clark

APR 17 1981

21



Louisiana-Pacific Corporation

Ketchikan Division

Post Office Box 6600

Ketchikan, Alaska 99901, U.S.A.

Telephone: 907-225-2151

Telex: 099-55-251

Answer back: KAYPULCO KET

April 16, 1981

Senator Robert Ziegler
Alaska Senate
Pouch V
Juneau, Alaska 99811

Dear Bob:

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Louisiana-Pacific Corporation

Senator Robert Ziegler

-2-

April 16, 1981

We request your support in obtaining legislation that would stop these abuses of our court system.

Sincerely,

D. L. Finney
D. L. Finney, Manager
Forestry & Government Affairs

hr

cc: Representative Ray Metcalf
Mr. John Schnabel



AFOGNAK LOGGING, Inc.

P.O.Box 682

Kodiak, Alaska 99615

(907) 486 - 3344

April 21, 1981

The Honorable Ray Metcalfe
Alaska State Legislature
Pouch V
Juneau, AK 99811

Reference: House Bill No. 632

Dear Mr. Metcalfe:

Hurray! for your legislation to, as you say, "curb the abuses of the legal system," in regards to environmental suits.

We, at Afognak Logging, as well as many other corporations in Alaska have been forced to spend many thousands of dollars to defend ourselves from frivolous suits brought by self-esteemed world saving environmentalists, some of whom admit that it is only a delaying action.

In our United States, every man may have his day in court if he wishes. All I would ask, is that a bond be put up or a means for proper reimbursement if that suit proves to be a sham and costs the defendent unjustly.

Sincerely,

Albert Schafer
President and
General Manager

cc: Senator Bob Mulcahy
Representative Fred Zharolff

APR 20 1981



~~April 16, 1981~~

The Honorable Ray H. Metcalfe
Alaska State Legislature
Pouch V
State Capitol
Juneau, Alaska 99811

Re: House Bill 632

Dear Mr. Metcalfe:

In response to your letter of April 15, 1981 concerning your proposed legislation in the form of House Bill 632, Soderberg Logging and Construction Co. strongly supports the Bill and your efforts in this endeavor.

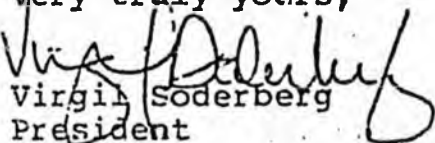
It has become increasingly apparent that industries in this State as well as nationwide have been exhausted and severely damaged by frivolous and unfounded environmental suits. As a member of Alaska's Timber Industry for the past 20 years we have seen this industry especially burdened in this manner. Most often to the detriment of an entire community. SEACC vs. State of Alaska, Schnabel Lumber Co, et al in Haines for instance.

We believe this proposed Bill is perfectly fair to potential plaintiffs, and, with the listed provisions, they should have no reason to react at an extremely late date claiming they were unaware of impending state action.

The Bill's provisions requiring plaintiffs to post security with the court would encourage many groups to attempt to resolve matters through negotiations and administrative agency processes, thereby negating the need for litigation. Also the factors by which the court should decide the amount of security to be posted are very appropriate.

We encourage you to pursue H.B. 632. We will support it in every way possible.

Very truly yours,


Virgil Soderberg
President

cc: The Honorable Ernie Haugan
The Honorable Jim Duncan

APR 28 1981



ALASKA LUMBER & PULP CO., INC.

P.O. BOX 1050 • SITKA, ALASKA 99835 • (907) 747-2265

April 20, 1981

The Honorable Ray Metcalfe
House of Representatives
State of Alaska
Pouch V
Juneau, Alaska 99811

Dear Representative Metcalfe:

Thank you for your letter to me of March 31, 1981, regarding the several bills that you are proposing to introduce in the Legislature. I have asked our attorney, Jim Clark, to review this package and to contact you at the earliest opportunity. In the meantime, we stand by Jim's letter to you of February 14, 1980, regarding House Bill 632.

Thank you very much for giving me a chance to respond. We certainly appreciate the opportunity to work with you.

Yours very truly,

ALASKA LUMBER & PULP CO., INC.

Kiyoshi Nagumo
Kiyoshi Nagumo
President

KN:es

Spring Valley, Inc.

P.O. BOX 1138
WRANGELL, ALASKA 99929
(907) 874-3233

April 28, 1981

The Honorable Ray H. Metcalfe
Alaska State Legislature
Pouch V
State Capital
Juneau, Alaska 99811

Re: House Bill No. 428

Dear Mr. Metcalfe:

Our company supports you wholeheartedly in you sponsoring of Bill No. 428. This is a step in the right direction in creating a smoother government operation. We do need to be able to withstand criticism at times, but opponents of a measure should be able to realize their responsibilities to others, also.

When there is a realistic avenue to take for solving an issue, before it becomes a full-fledged problem, that is the right approach. Creating more problems only costs more time and money, in the long run. If the persons or groups involved in this is proved to be wrong, they should be the ones to cover the loss. This seems only realistic.

It is good to know we can work towards cutting the paperwork, and possibly, saving money in this day of progress.

Yours truly,

Spring Valley, Inc.



David C. Oliver
General Manager

DCO:vo

cc: The Honorable Ernie Haugan

Alaska Loggers Association, Inc.



APR 29 1981

111 STEDMAN, SUITE 200
KETCHIKAN, ALASKA 99901
Phone 907-225-8114

April 26, 1981

Honorable Ray Metcalfe
Alaska State Representative
Pouch V State Capitol Building
Juneau, Alaska 99811

Dear Representative Metcalfe:

Thank you for mailing me your letter of April 15 and the copy of the House Bill No. 428. This is an excellent bit of legislation and you are to be congratulated by the industry for being the sponsor.

We feel the security clause of the proposed legislation will be a big step in decreasing nuisance suits that are primarily filed to harrass industry.

ALA Directors are being mailed a copy of the bill and asked to contact their legislators for its support.

Sincerely,

Donald A. Bell
General Manager
ALASKA LOGGERS ASSOCIATION

DAB/mjh
cc: ALA Directors with enclosures



Louisiana-Pacific Corporation

Ketchikan Division

Post Office Box 6600
Ketchikan, Alaska 99901, U.S.A.
Telephone: 907-225-2151
Telex: 099-55-251
Answer back: KAYPULCO KET

Jardner

April 21, 1981

The Honorable Ray Metcalfe
House of Representatives
State of Alaska
Pouch V
Juneau, Alaska 99811

Dear Mr. Metcalfe:

We concur with your efforts to put controls on agencies attempting to exceed their powers involving the writing and implementation of regulations. All regulations and amendments to regulations should be "absolutely necessary to carry out the purpose of the statute." They should also be accompanied by an evaluation that explains the costs involved for the benefits received.

We support the amendment of Section 1, AS 44.62.030 and Section 2, AS 44.62.300 in H.B. 339. We also support H.B. 340, especially Section 1, Findings.

We cite habitat regulations proposed by the Alaska Fish & Game Boards and the Department of Fish and Game as an example of superfluous regulations. They exceed the authority of Title 16 and will be costly to enforce. Enclosed you will find a response to these regulations by Jim Clark on behalf of the Alaska Loggers Association.

We caution the use of a citizens' committee for regulatory review. If the legislative and judicial systems would follow through, there would be no need for such a committee.

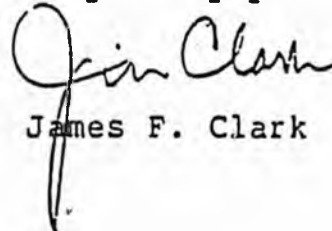
The Honorable Ray H. Metcalfe
February 14, 1980
Page Two

listed by which the court should decide the amount of security to be posted are very appropriate. Clearly, whoever drafted H. B. 632 has been a close observer of what has been going on in some Alaskan cases recently.

On the other hand, the bill is perfectly fair to plaintiffs who, as they should, come forward to negotiate at the earliest possible time and voice their concerns before the agencies, as some of the more sophisticated plaintiffs have already learned to do. The provision for state agency notice to the public prior to issuance of state contracts above a certain magnitude or granting of a state license or permit for a project above a certain value is warranted as a safeguard that potential plaintiffs have no reason to complain they were unaware of the impending state action. This provision should be retained.

In short, we agree with H. B. 632, thank you for introducing it, and we will support it.

Very truly yours,



James F. Clark

JFC:DEC:es
cc: J. A. Rynearson

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 29, 1980

SUBJECT: Litigation involving state action
(Work Order No. 7697)

TO: Representative Ray H. Metcalfe

FROM: Billy G. Berrier *BGB*
Director
Division of Legal Services

This is, as you have noticed, a highly technical procedural bill. Any non-technical synopsis will of necessity be broad brush.

Essentially, the bill is directed toward preliminary proceeding when an action is brought in court to prevent action on a decision made by the state or an agency.

It requires that notice be given of a proposal by the state to award a contract in the amount of \$100,000 or more or to grant a permit where expenditures under the permit will be \$100,000 or more. If these notices are already given, no new requirements are imposed. (Sec. 09.50.510)

If a person wishes to go to court to enjoin action, he must have

- (1) raised the issue with the state agency which has responsibility for the action complained of and requested the agency to take the requested action
- (2) show that he has a real interest in the action complained of by showing there is substantial likelihood of a specific, personal injury if the action is carried out

and he must show specifically what his efforts to get the state agency to meet his demands have been. (Sec. 09.50.450)

January 29, 1980

If the grounds alleged in support of the action sought have been raised with the agency and found to be without merit or were not raised before the agency, the state may ask the court for an order requiring security to be posted (sec. 09.-50.460); the motion shall be heard by the court (sec. 09.50.-460) and the amount of security may include damages for actual or prospective breach of contract, extra costs from inflation caused by delay and other costs or damages, including costs of litigation (sec. 09.50.480). The state or an intervenor (another person who has an interest in the contract who has become a party to the suit such as a company to whom a contract was awarded) may request that the security be furnished.

When the action is terminated, the defendant may have access to the security as the court determines.

In the broadest summary:

(1) The state must give notice of its actions where \$100,000 or more is involved.

(2) A person must have an interest in the action that could create a personal and specific injury to him in order to bring suit.

(3) The person bringing suit must have presented his objections and proposed alternative to the agency making the decision and must show that he has done so.

(4) On motion of a party, security for damages, including inflation increases and costs of suit may be required from a party who did not present his claim to the state agency or who was ruled against by the state agency.

(5) The security may be used to pay damages caused by the suit.

I realize this broad brush summary omits significant conditions. It does not, for instance, deal with the time periods or the burdens of proof. Please let us know if a more detailed technical analysis is required.

BGB:jdn

CITY OF HAINES

TELEPHONE (907) 766-2231 - POST OFFICE BOX 576 - HAINES, ALASKA 99827

February 8, 1980

The Honorable Charles H. Parr
Chairman, House Judiciary Committee
Pouch V
Juneau, Alaska 99811 (Mail Stop 3100)

Re: House Bill No. 632
"An Act Relating to the litigation Involving Action by the State..."

Dear Representative Parr:

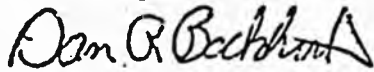
Having gained the first-hand experience and frustrations from intervening in the ongoing litigation "Southeast Alaska Conservation Council vs. State of Alaska, et al", the City of Haines STRONGLY supports the passage of HB 632. The subject litigation concerns a challenge to the validity of a contract for a long-term timber sale negotiated between the Alaska Department of Natural Resources and the Haines-based Schnabel Lumber Company.

The negotiated contract is recognized by the defendants (State, Schnabel, City of Haines and Haines Borough) as having been lawfully entered into pursuant to AS. 39.05.118 and to be most reasonable from an environmental standpoint. Yet, the action has been challenged by the Southeast Alaska Conservation Council. Defense of the action, particularly on the part of Schnabel and the Haines local governments, has had significant adverse consequences on an already sorely depressed economy. Legal costs incurred to date in the subject litigation by the City in its intervenor defendant status are well in excess of \$30,000. The Haines Borough, also an intervenor defendant, will be holding a special election on March 4, 1980, in an attempt to obtain voter ratification of a recently enacted ordinance doubling the Haines Borough sales tax levy. The increased tax is being sought in order to meet anticipated future legal expenses of the Haines Borough in the subject litigation.

Schnabel Lumber Company, of course, has also incurred tremendous legal fees in this action. More significantly, the challenge to the contract brought by the Southeast Alaska Conservation Council has, up until just recently, tied up any efforts on the part of Schnabel Lumber Company to begin operations under the terms of the contract.

The City of Haines considers it vital to the interests of our community and to the State as a whole that all litigants be held accountable for the consequences of their legal actions. House Bill 632 is a major step in that direction. The Mayor and Council of the City of Haines urge your support of the Bill.

Sincerely,



Dan R. Bockhorst
City Administrator

DRB:tce

cc: The Honorable Bill Ray
The Honorable Jim Duncan
The Honorable Ray Metcalfe
The Honorable Mike Miller
The Honorable Pappy Moss

OF COUNSEL
M E MONAGLE

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY

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February 14, 1980

The Honorable Ray H. Metcalfe
Alaska State Legislature
Pouch V
State Capitol
Juneau, Alaska

Re: House Bill 632

Dear Mr. Metcalfe:

On behalf of our client, Alaska Lumber & Pulp Co., Inc., we thank you for sponsoring House Bill 632 and hereby register our support for it.

During this law firm's experiences representing corporations, large and small, and particularly in representing Alaska Lumber & Pulp Co., Inc., we have frequently been in the position of seeking a state license or permit, or defending our client against plaintiffs seeking an injunction against state action where the main burden of the injunction would fall upon our clients. We and our clients have learned, after much litigation and expense, that plaintiffs do not always seek to achieve their ends by early negotiation and by exhausting their administrative remedies, but sometimes wait until a matter has gone so far that nothing remains to them but litigation preceded by a request for injunctive relief. This is expensive and counter-productive for all concerned.

We expect enactment of H. B. 632 would provide the necessary motivation to many groups to resolve many matters by negotiation and by administrative agency processes, without the need for litigation. We especially support the provisions requiring plaintiffs to post security with the court if the plaintiffs have failed to raise the same grounds in negotiations with the license or permit applicant and/or in proceedings before the state agency. The factors

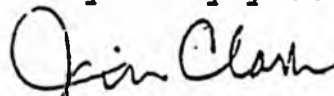
The Honorable Ray H. Metcalfe
February 14, 1980
Page Two

listed by which the court should decide the amount of security to be posted are very appropriate. Clearly, whoever drafted H. B. 632 has been a close observer of what has been going on in some Alaskan cases recently.

On the other hand, the bill is perfectly fair to plaintiffs who, as they should, come forward to negotiate at the earliest possible time and voice their concerns before the agencies, as some of the more sophisticated plaintiffs have already learned to do. The provision for state agency notice to the public prior to issuance of state contracts above a certain magnitude or granting of a state license or permit for a project above a certain value is warranted as a safeguard that potential plaintiffs have no reason to complain they were unaware of the impending state action. This provision should be retained.

In short, we agree with H. B. 632, thank you for introducing it, and we will support it.

Very truly yours,



James F. Clark

JFC:DEC:es
cc: J. A. Ryneerson

OF COUNSEL
M E MONAGLE

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY

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February 14, 1980

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Alaska State Legislature
Pouch V
State Capitol
Juneau, Alaska

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During this law firm's experiences representing corporations, large and small, and particularly in representing Alaska Lumber & Pulp Co., Inc., we have frequently been in the position of seeking a state license or permit, or defending our client against plaintiffs seeking an injunction against state action where the main burden of the injunction would fall upon our clients. We and our clients have learned, after much litigation and expense, that plaintiffs do not always seek to achieve their ends by early negotiation and by exhausting their administrative remedies, but sometimes wait until a matter has gone so far that nothing remains to them but litigation preceded by a request for injunctive relief. This is expensive and counter-productive for all concerned.

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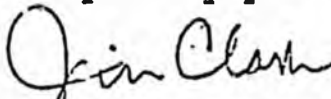
The Honorable Ray H. Metcalfe
February 14, 1980
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In short, we agree with H. B. 632, thank you for introducing it, and we will support it.

Very truly yours,



James F. Clark

JFC:DEC:es
cc: J. A. Rynearson

Dukes Up

Dear Sirs:
We really can not let the New Year begin without calling to your attention a long list of shocking misstatements which are of concern to the City and the people of Haines.

When Durwood Zealke, the new Sierra Club hired gun, blew into the capital last month the first thing he did was to label as "untrue" the economic crisis faced by the people of Haines, and Schnabel Lumber Company, whose futures are linked by geography as well as economy.

Fresh from "back east," and breathing fire from his wars against industries along Love Canal and the Susquehanna River at Three Mile Island, Durwood roared into town belching forth a spew of "party line" with reckless disregard for truth. Before we can convince him we are not killing people or eagles, the Zealke zeal may kill us.

It is a fact that the SEACC

lawsuit had a devastating effect on the Schnabel Lumber Company and scores of Haines workers in the timber industry — all taking its toll on other business interests in the area, with correspondent effect on tax-based income to the government.

I have seen the correspondence from bonding firms refusing to provide Schnabel necessary bonds until the SEACC case (and now the appeal) is settled. The Tuxesan Island award to Schnabel in December 1970, was later cancelled for want of a bond — due to SEACC. The present award to Schnabel of the Gilbert Bay timber sale stands a real chance of being lost for lack of a bond, again — due to SEACC. The Schnabel bid deposit of \$55,000 will be lost too. Durwood is right when he calls that "ludicrous;" and, flat-out wrong when he calls it "untrue," as he did in the Empire.

The crippling reality of "nuisance litigation" such as

the SEACC Suit is that it is designed to harass, disrupt, and delay. Meanwhile, an entire city — a borough-full of people — are dealt a stunning economic blow, a real below-the-belt kind of cheap shot that holds us hostage to wrong-headed self-interest groups like SEACC.

It is a travesty that the people of Haines have had to tax themselves, and Schnabel Lumber Company has had to go into debt, fending-off a well-healed "Pine Tree Patrol" of Sierra Clubbers skipping through the woods protecting unicorns from scapegoats.

We suggest it is high time outfits like the Sierra Club be held to account for the damage and devastation they cause. If they had to pay for the jobs lost, the economic opportunity lost, the wages never paid, the school clothes never bought, the college educations never begun, the home mortgages defaulted because of their short sighted, ill-conceived play-time projects, we believe

they'd more accurately assess the results of their meddlesome tactics.

To suggest that "the lawsuit to protect the eagles has had no effect on Mr. Schnabel's mill," is, well, let's just call it — inaccurate. The lawsuit challenged the scope of the allowable cut, not endangerment of our eagles. The logging contract has no effect on the Eagle Sanctuary. SEACC claims to have asked for only "minor amendments" to the State-Schnabel contract, but when they finished slashing away sections here and there, two-thirds of the contract area was gone. SEACC asked to have the entire contract voided.

Durwood is too new to know that Schnabel not only helped to formulate, but was a first signer upon, the petition to establish the existing Bald Eagle Critical Habitat and Sanctuary, and that Haines is at this time participating in an expensive and elaborate study to learn more about our ever-growing eagle population.

Durwood needs to learn that Schnabel has been at the front of the line in economic diversification ever since he came to Haines — years ago — from the beginning of the ferry system and through every diversification campaign right up to the present push. He has designed a 5000-kva wastewood electrical generating plant to help Alaskans reduce dependence upon non-renewable resources and to lower the cost of energy to local people — but SEACC has put the kibosh on that too!

Schnabel has tried to market our low-grade timber by operating his plant part of the time with U.S. Forest Service timber which, together with the Haines cut might provide one shift of work, the Haines wood going into the chipper. But SEACC put the quietus on that, to boot! Still worse is the fact that our skilled work force is leaving Haines to seek jobs that they can count on — wouldn't anybody? Nothing short of a miracle could coax them back now. We rather

suspect that is about what SEACC had in mind.

Again, Durwood is too new to know; but, Haines fights back when its back is to the wall.

Dukes up, Durwood!

Jon D. Halliw
May

Sea Snails

Dear Sirs:

I'm a Hungarian 'sea-snail' (P: sobranchna) receiver. It in Hungary is an unusual thing because here haven't see it. It's very difficult to me. For in Hungary have only 2-3 people whose profession is sea snail collecting.

I was happy, but I haven't from your country no one perfect, good sea-snail species.

If you have eventually to send me any species from Alaska coast, I'll be very happy.

Thank's for your kindness.

Yours very sincerely,

Gabor Tompa

Strobl A.u.7.H.ep.II./204.

1087 Budapest
Hungary

Alaska Lands, The Timber

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 428

Title "An Act relating to litigation involving state actions; and amending

Requested by Rep. Barnes, House Judiciary Committee Date 2/2/82

Rules 6 and 65 of the Rules of Civil Procedure."

II. FISCAL DETAIL

Agency Affected Department of Law

Program Category Affected General Government

BRU, Program, Or Subprogram(s) Affected Legal Services

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|--------------------------|-------|-------|-------|-------|-------|-------|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| TOTAL | 0 | 0 | 0 | 0 | 0 | 0 |

FUNDING (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|------------------------|-------|-------|-------|-------|-------|-------|
| GENERAL FUND | 0 | 0 | 0 | 0 | 0 | 0 |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |
| | | | | | | |

POSITIONS

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|-----------|-------|-------|-------|-------|-------|-------|
| FULL TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

This bill provides that persons seeking to enjoin state action or appealing state action on a license or permit must first exhaust administrative remedies before an action against the state may be filed. The bill further provides that, under certain circumstances, a person bringing an action may be required to furnish security. Because these circumstances only arise in cases where the state is a defendant, the department's operations will not be impacted financially.

Richard I. Pegues

IV. DATE February 3, 1982

PREPARED BY

Richard I. Pegues, Director, Admin. Svcs.

AGENCY Department of Law

PHONE 465-3672

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 428
Title An Act Relating to Litigation Involving State Actions
Requested by House Judiciary Committee Date 2/9/82

II. FISCAL DETAIL

Agency Affected Alaska Court System
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected _____
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|--------------------------|-------|-------|-------|-------|-------|-------|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| TOTAL | | -0- | -0- | -0- | -0- | -0- |

FUNDING (Thousands of Dollars)

| | | | | | | |
|------------------------|--|--|--|--|--|--|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| FULL TIME | | | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 2/11/82 PREPARED BY Richard P. Barrier *Richard P. Barrier*
AGENCY Alaska Court System
Original: Legislative Finance PHONE 264-0545
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

H B

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MEMORANDUM

DATE:

May 5, 1981

TO: Representative Fred Brown
Chairman, House Judiciary Committee

PHONE NO.:

FILE NO.:

FROM: Carolyn S. Guess Chairman *W*
Alaska Public Utilities Commission

SUBJECT: House Bill 434

Enclosed is a copy of three items which should provide information regarding Commission implementation of AS 42.05.671 which was one of the subjects of the teleconference last Friday. Enclosed is a copy of 3 AAC 48.040 of our regulations and a letter, issued by the Commission to all utility managers, which details the procedure to be employed if proprietary or privileged status is requested, and a memorandum from Staff on the same subject. An Order from the Superior Court in Fairbanks which remands the decision in Docket U-76-52 to this Commission is also enclosed. You will note that the court said the decision in that proceeding was not supported by the evidence on the record. 611 P. 2d 493 (Alaska 1980) Therefore, the matter was remanded for the limited review of the financial fitness of Greatland Telephone Company now owned by Telephone Utilities of Alaska, Inc. A hearing on this matter has been scheduled for June 30, 1981.

Representative Clocksin posed questions and expressed concern regarding the use of administrative law judges (ALJs) and hearing officers as contemplated in Sections 5, 6 and 7 of HB 434. Section 5 only places ALJs and hearing officers in the partially exempt service to conform to legislative policy established last year for the Alaska Transportation Commission. Sec. 22, Ch. 115, SLA 1980. The APUC supports this policy decision. The addition of an ALJ to a merged commission is proposed because of the greater experience, hence status, that the title implies. The TAPS proceeding will be heard by Judge Kane, an FERC ALJ, and a designee of either the APC or the merged commission. Both the APC and the APUC believe the designation of an ALJ, in the event of merger, is preferable to the assignment of a hearing officer. The Commission believes it has the authority under its existing statute to designate a hearing officer in the event of a merged commission. AS 42.05 (2) (a) As I stated to the Judiciary Committee, the intent of a merged five-commissioner commission would be to designate an ALJ or a hearing officer to sit with Judge Kane for the second phase of TAPS proceeding. Enclosed is the appropriate section of the Administrative Procedures Act which speaks to the qualifications of hearing officers. Adapting those provisions to this proposal, the APC and APUC would support a 5 year practice of law qualification for an ALJ. An appropriate amendment to HB 434 is attached.

The Commission already has the authority under its statute and regulations to delegate the responsibility for conducting proceedings

to a hearing officer. The hearing officer may only prepare a recommended order. The final decision invariably and ultimately is the Commission's. This option has been important in the past to timely deal with situations the Commission has faced. As I indicated in the teleconference, Staff hearing officers have been used in the past by the APUC when Chugach Electric and ML&P both wanted to provide service to the same customer. There also may have been instances when the Consumer Protection Staff has served as a hearing officer in a complaint proceeding.

It is particularly important to a merged commission that this flexibility be continued. There could be instances, other than Phase II of TAPS that could require the use of an ALJ (or a hearing officer) which are not now contemplated by either commission, including possible remand decisions by FERC of any aspect of the TAPS I and II proceedings. Because the workload of a merged Commission is at least partially unknown and could require simultaneous proceedings, both as to pipeline and public utility matters the APUC supports the options that an ALJ or hearing officer provides to efficiently conduct the Commission's business.

(c) Postage stamps shall not be sent as a remittance unless the remitter is so directed.

(d) Every fee required by statute in connection with applications relating to certificates of public convenience and necessity or any other matter which by statute requires formal action by the commission shall be paid in full before the matter will be docketed for consideration. Every charge for copying, printing, reproducing and furnishing copies of reports, orders, pleadings, tariff sheets, regulations, etc., and all costs allocated pursuant to AS 42.05.651 shall be paid promptly upon receipt of the commission's invoice or order designating the amount owed. Failure to remit the amount due may, as appropriate and at the commission's discretion, result in

(1) discontinuance of the service for which payment is due;

(2) denial of standing to participate in a proceeding in which costs may be allocated until the amount due is paid;

(3) refusal of the commission to accept or act upon any application or tariff filing of the person who is in arrears until the amount due is paid;

(4) referral of the problem to the attorney general for appropriate action pursuant to AS 42.05.561 - 611.

(e) The commission may, by general order, prescribe appropriate charges to recover, in whole or in part, the costs it incurs in furnishing copies of notices, reports, orders or any printed or typed material in its possession, except privileged information or records. (Eff. 1/13/73, Reg. 44)

Authority: AS 42.05.151
AS 42.05.201

3 AAC 48.040. PRIVILEGED RECORDS AND INFORMATION. (a) All facts, information, reports, orders, memoranda, books, accounts, and papers of every nature in the possession of the commission are available for examination by the public except

(1) communications relating to personnel matters received upon a confidential basis, and

medical and other personal information, which under governing personnel practices of the State of Alaska, are not public information;

(2) staff papers, unless entered as evidence in an adjudicatory proceeding;

(3) written communications between or among the commission, or between members of the commission and members of the staff while expressly assigned to aid the commission in the drafting of any order and findings, with or without opinion, in any matter or proceeding in which a hearing has been held;

(4) communications between a presiding officer, examiner or hearing officer and members of the commission or its staff in respect to any formal proceeding in which they are directly involved;

(5) staff notes and memoranda containing the gist of routine phone calls and conferences;

(6) information and data relating to the commission's budget and legislative proposals prior to the time they are acted upon by the Governor and the Legislature;

(7) bids for contracted services received in response to commission invitations prior to their acceptance;

(8) tape recordings, transcripts, notes, minutes and other information relating to conferences which, either by order of the commissioner or by mutual agreement of the parties, are privileged;

(9) any specifically designated information in an application, tariff filing, report or document which, for good cause shown, the commission may order withheld pursuant to written objection by the filing party;

(10) staff memoranda to the commission containing analyses and recommendations regarding the disposition of tariff filings;

(11) communications between legal counsel for the commission, or its staff, in regard to matters requiring confidential legal advice or assistance;

2 AAC
3 AAC

(12) any information, record or document which, for good cause, the commission may, by order, specifically designate as privileged.

(b) If a commissioner or employee of the commission is served with a *subpoena duces tecum* to obtain material which is not part of the public files and records of the commission, it shall be made public only if authorized by the commission. Service of such a subpoena shall immediately be reported to the commission with a statement of all relevant facts. The commission will thereupon enter an appropriate order.

(c) Privileged information will not be made public or furnished to any person except pursuant to a *subpoena duces tecum* or application to the commission stating specifically the material or information that is desired and the reason it is desired. The commission may grant or deny such requests in whole or in part.

(d) If a person is authorized to obtain privileged information, the commission may attach to its authorization reasonable conditions.

(e) If the privileged information is in the possession of a consultant employed by the commission, the commission may require the person who desires it to reimburse directly the consultant for all or part of the costs incurred including but not limited to, reasonable compensation for professional and clerical services.

(f) All privileged material shall be filed separately from that which is public and no person (except the commission, its staff and its consultants, or other representatives) shall have access to it except pursuant to an order of the commission. (Eff. 1/13/73, Reg. 44)

Authority: AS 42.05.141
AS 42.05.151
AS 42.05.671

3 AAC 48.050. INSPECTION OF RECORDS AND FACILITIES. (a) The facilities and records of a public utility are not available to the public for inspection, copying or any purpose, other than to furnish a utility service or commodity, except

(1) as otherwise provided by statute or by applicable rule, regulation or general order of the commission;

(2) by specific order of the commission;

(3) with the prior voluntary consent of the utility;

(4) upon enforcement of a *subpoena duces tecum* or other legal process.

(b) Any member of the commission's staff and any agent, consultant or other authorized representative of the commission shall, upon presentation of his authentic credentials issued by the commission, have access to the premises of any utility during its regular business hours to investigate, inspect, examine, evaluate, or analyze its rates, services, facilities, accounts, books, records, contracts, and operating practices, and to make copies of any record, account, contract, or other document or paper of the utility or to implement, in any other way, any jurisdictional function of the commission. Every resulting note, working paper, memorandum, exhibit, schedule, or other record prepared or copied by the commission's staff, or by its agents, consultants or other authorized representatives shall be classified as "staff papers" but exhibits, evidence and testimony may be prepared from staff papers and be included in the record of any formal proceeding.

(c) If office and desk space is required to perform any function mentioned in (b) of this section, the utility shall provide it at a conveniently located place that is reasonably comfortable, adequately lighted and otherwise suitable. If the utility does not have satisfactory office and desk space in its own quarters, it shall have the responsibility of making other suitable arrangements, including the responsibility, if so ordered by the commission, of assuming, and directly paying, rental or lease charges for office and desk space selected by the commission.

(d) Public utilities shall, in every way possible, within reason, assist the commission's staff and its agents, consultants and representatives in the performance of any function designated in (b) of this section.

Amendment to House Bill 434

On page 2, line 14, delete "a new subsection", and insert:
"new subsections"

On page 2, between lines 16 and 17, insert:

(d)(c) The commission may assign a qualified, unbiased, and impartial administrative law judge, with experience in the general practice of law, to conduct hearings under AS ~~42.05~~ and AS 42.06. The administrative law judge may perform other duties in connection with the administration of these chapters and other laws. An administrative law judge hired to conduct hearings under ~~AS 42.05~~ and AS 42.06 shall have been admitted to practice law for at least five years immediately before his appointment.

I agree with those cases which hold that an applicant need not perform an act which would be futile. But something more definite should occur than in the case at bar before the Commission's complaint procedures are brought to bear against an employer. As the event which triggers the Commission's procedures, the application should be as concrete and definite as possible. Conversely, before an employer is subjected to the substantial burden of defending against a discrimination charge, the application should be definite enough that the employer has notice of the applicant's demands. Otherwise, an indefinite, tentative, or vacuous inquiry can be a trap for the unwary.

A written application would furnish the clearest evidence in this regard. See, *Cedeck v. Hamilton Federal Savings & Loan Ass'n*, 414 F.Supp. 495 (E.D.Mo.1976); *Hockett v. Administrator of Veterans Affairs*, 385 F.Supp. 1106, 1110-12 (N.D.Ohio 1974). I agree that an oral application can suffice in a number of circumstances, but where the facts of the transaction are susceptible to varying interpretations, doubtful points should be resolved against the applicant.

I would thus affirm the judgment of the superior court.



CITY OF FAIRBANKS, d/b/a Fairbanks
Municipal Utilities System, Appellant,

v.

The ALASKA PUBLIC UTILITIES COM-
MISSION and Wire Communications,
Inc., d/b/a Great Land Telephone, Ap-
pellees.

No. 3977.

Supreme Court of Alaska.

May 9, 1980.

City's municipal utility system appeal-
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, 36 L.Ed.2d 668, 678
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vidence. Consequently,
mission's decision that
AS 18.80.220(a)(1) by
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decide the appropriate
back pay, and remedies.

ATTORNEY'S FEES

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this case, Yellow Cab is
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Western Alaska v. Bob
, 592 P.2d 1200, 1204-05
. the superior court erred
d under Civil Rule 82(a).

Superior Court, Fourth Judicial District,
James R. Blair, J., which affirmed order of
the Public Utilities Commission granting
certificate of public convenience and neces-
sity to provide telephone service for a mili-
tary reservation to a private company. The
Supreme Court, Matthews, J., held that: (1)
it was a denial of due process for Commis-
sion not to allow city's representatives to
view financial data of the private company
on which the decision was based, and (2)
fact that the private company was subject
to the Commission's jurisdiction whereas
the city's utility system was not subject to
the Commission's jurisdiction was not a fac-
tor in favor of private company.

Reversed and remanded.

1. Administrative Law and Procedure ⇐791

Standard of review of agency findings
of fact is that they will be set aside if they
are not supported by substantial evidence
on the whole record; inherent in that stan-
dard is a requirement that facts found be
based on evidence in the record.

2. Administrative Law and Procedure ⇐490

Requirement that facts found by ad-
ministrative agency be based on evidence in
the record helps to ensure that the agency
does not make decisions which have no ade-
quate basis in fact, gives opposing parties
the opportunity to challenge the agency's
reasoning process and the correctness of the
decision, and affords the reviewing courts
the opportunity to evaluate the decision.

3. Constitutional Law ⇐297

Failure of Public Utilities Commission
to allow one of the parties to a proceeding
involving a certificate of public convenience
and necessity for telephone service to view
financial information of the other party on
which the Commission based its decision
amounted to a failure of due process. U.S.
C.A.Const. Amends. 5, 14.

CORRECTION

CORRECTION

Cite as, Alaska, 611 P.2d 493

I agree with those cases which hold that an applicant need not perform an act which would be futile. But something more definite should occur than in the case at bar before the Commission's complaint procedures are brought to bear against an employer. As the event which triggers the Commission's procedures, the application should be as concrete and definite as possible. Conversely, before an employer is subjected to the substantial burden of defending against a discrimination charge, the application should be definite enough that the employer has notice of the applicant's demands. Otherwise, an indefinite, tentative, or vacuous inquiry can be a trap for the unwary.

A written application would furnish the clearest evidence in this regard. See, *Cedeck v. Hamilton Federal Savings & Loan Ass'n*, 414 F.Supp. 495 (E.D.Mo.1976); *Hockett v. Administrator of Veterans Affairs*, 385 F.Supp. 1106, 1110-12 (N.D.Ohio 1974). I agree that an oral application can suffice in a number of circumstances, but where the facts of the transaction are susceptible to varying interpretations, doubtful points should be resolved against the applicant.

I would thus affirm the judgment of the superior court.



CITY OF FAIRBANKS, d/b/a Fairbanks
Municipal Utilities System, Appellant,

v.

The ALASKA PUBLIC UTILITIES COM-
MISSION and Wire Communications,
Inc., d/b/a Great Land Telephone, Ap-
pellees.

No. 3977.

Supreme Court of Alaska.

May 9, 1980.

City's municipal utility system appeal-
ed from decision of the State of Alaska

Superior Court, Fourth Judicial District, James R. Blair, J., which affirmed order of the Public Utilities Commission granting certificate of public convenience and necessity to provide telephone service for a military reservation to a private company. The Supreme Court, Matthews, J., held that: (1) it was a denial of due process for Commission not to allow city's representatives to view financial data of the private company on which the decision was based, and (2) fact that the private company was subject to the Commission's jurisdiction whereas the city's utility system was not subject to the Commission's jurisdiction was not a factor in favor of private company.

Reversed and remanded.

1. Administrative Law and Procedure ⇐791

Standard of review of agency findings of fact is that they will be set aside if they are not supported by substantial evidence on the whole record; inherent in that standard is a requirement that facts found be based on evidence in the record.

2. Administrative Law and Procedure ⇐490

Requirement that facts found by administrative agency be based on evidence in the record helps to ensure that the agency does not make decisions which have no adequate basis in fact, gives opposing parties the opportunity to challenge the agency's reasoning process and the correctness of the decision, and affords the reviewing courts the opportunity to evaluate the decision.

3. Constitutional Law ⇐297

Failure of Public Utilities Commission to allow one of the parties to a proceeding involving a certificate of public convenience and necessity for telephone service to view financial information of the other party on which the Commission based its decision amounted to a failure of due process. U.S. C.A.Const. Amends. 5, 14.

(4) after her rejection, remained open and Yellow with her qualifications. superior court's decision Commission's conclusion established a prima facie is reinstated. Once a prima facie case, the Yellow Cab "to articulate nondiscriminatory reason rejection." *McDonnell*, 411 U.S. 792, 802, 436 L.Ed.2d 668, 678. Yellow Cab did not attempt to rebut the evidence. Consequently, Commission's decision that Yellow Cab violated AS 18.80.220(a)(1) by Yellow Cab. We remand to the superior court to decide the appropriate back pay, and remedies.

ATTORNEY'S FEES

awarded attorney's fees under Civil Rule 82(a). Civil Rule 82(a) prohibits the award of attorney's fees to the prevailing party. Because Yellow Cab is the prevailing party; consequently, attorney's fees is vacated.¹⁷ The superior court, VACATED in part,

with whom MAT-
sons, dissenting.

sent on the question of
actively applied for the
to not believe that there
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pursuant to Appellate
Appellate Rule 29(d), not
erns the award of attor-
Western Alaska v. Bob
592 P.2d 1200, 1204-05
the superior court erred
under Civil Rule 82(a).

4. Records ⇐31

Privilege reflected by statute dealing with disclosure of information in the possession of the Public Utilities Commission should be construed narrowly so that it does not conflict with constitutional requirements of due process; provision of the statute that information not be withheld unless required in the interest of public will normally prevent a conflict with due process requirements but, if a conflict does occur, due process must control. AS 42.05.671. U.S.C.A.Const. Amends. 5, 14.

5. Telecommunications ⇐76

If one of the parties to proceeding involving application for certificate of convenience and necessity to provide telephone service did show that public disclosure of its income statements and balance sheets would harm it, the Public Utilities Commission could impose an order of confidentiality on representatives of the other parties, permitting cross-examination in camera and sealing that portion of the record containing the privileged information.

6. Telecommunications ⇐76

Fact that private applicant for certificate of public convenience and necessity to provide telephone service was subject to the Public Utilities Commission's jurisdiction whereas the municipal utility system of a city which was seeking the certificate was not subject to Commission's jurisdiction could not be regarded as a factor in favor of the private applicant.

Joseph W. Sheehan, Fairbanks, for appellant.

B. Richard Edwards, Anchorage, for appellees.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

1. At times the Commission treated Great Land Telephone as an entity separate from Wirecom. The evidence was clear, however, that Great Land is not a subsidiary or affiliate corporation of Wirecom, but simply an operating name.

OPINION

MATTHEWS, Justice.

The City of Fairbanks appeals from a decision of the superior court affirming an order of the Alaska Public Utilities Commission which denied Fairbanks a certificate of public convenience and necessity to provide telephone service to the Fort Wainwright Military Reservation, and awarded the certificate to Wire Communications, Inc. (Wirecom) d/b/a Great Land Telephone.

Multiple claims of error are presented. With one exception, we agree with the well reasoned opinion of the superior court. The point on which we differ relates to the Commission's treatment of the question of the financial fitness of Wirecom.¹

The Commission's order pertaining to financial fitness states:

In assessing the fitness, willingness and ability of competing applicants for a certificate of public convenience and necessity, among the most important factors to be considered is the financial strength of each applicant. FMUS witnesses have testified to the ability of FMUS to finance their proposed service from revenues, revenue bonding, other borrowing, or a combination of all three.

Witness Rompa for Great Land sponsored evidence of a one million dollar line of credit from the First National Bank of Anchorage. This witness and the staff financial witness Milne also attested to Great Land's ability to obtain the equity portion of its proposed 60/40 debt/equity ratio with cash to be provided by its parent Wirecom.

In our opinion both applicants possess the financial resources to implement their proposed service at Fort Wainwright.²

Wirecom proposed spending the sum of \$1,900,000 for capital expenditures for Fort Wainwright by 1978. It also proposed to

2. *In re Application of City of Fairbanks*, U-76-62 Order No. 2 at 9-10 (May 5, 1977).

maintain a 60/40 debt/equity ratio, the equity to be internally generated by assets of Wirecom. It submitted a letter of credit from the First National Bank indicating a loan commitment of \$1,000,000. However, the only balance sheet that was submitted was a balance sheet purporting to be that of Great Land, as a separate entity, listing total assets of \$1,500. No balance sheets or income statements for Wirecom were submitted.

At the hearing the commission staff requested two years' annual balance sheets and income statements from Wirecom. Wirecom agreed to supply them to the staff, but requested that they not be divulged to Fairbanks or become part of the record, claiming that they were proprietary and that revealing them could place Wirecom at a competitive disadvantage in its telecommunications contracting business. Fairbanks objected and suggested as an alternative that the income statements and balance sheets could be revealed to certain representatives of Fairbanks under an order of confidentiality.

The Commission ruled that the information was proprietary and should be kept confidential and did not allow any representative of Fairbanks to see it. A Commission staff member reviewed the income statements and balance sheets and based on that review testified that Wirecom could meet its financial commitments and was financially fit. The information upon which this determination was based was never placed in the record.

3. Wirecom's argument that this point is waived because it was neither included in Fairbanks' Statement of Points on Appeal, nor briefed is factually wrong (see Statement of Points on Appeal, No. 4 and Fairbanks' Brief, at 27-41) as is its assertion that Fairbanks did not object to non-disclosure of the underlying records (Tr. 1149, 1151, 1153-54, 1163-64, 1169).

4. *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963).

5. The requirement is in part statutory. AS 42.05.191 provides:

Format of orders. Every formal order of the commission shall be based upon the facts of record. Every order entered pursuant to a

Fairbanks claims that the Commission's handling of the information relating to Wirecom's financial fitness violated procedural due process.³ We agree.

[1, 2] The standard of review of agency findings of fact is that they will be set aside if they are not supported by substantial evidence on the whole record.⁴ Inherent in this standard is a requirement that the facts found be based on evidence in the record.⁵ That requirement serves three purposes: First, it helps to ensure that the agency does not make decisions that have no adequate basis in fact; second, it gives opposing parties the opportunity to challenge the agency's reasoning process and the correctness of the decision; and third, it affords reviewing courts the opportunity to evaluate the decision.

[3] In this case, Fairbanks had no way of knowing what the financial information consisted of, no opportunity to subject it to the tests of cross-examination or other means of verification, no opportunity to rebut it, and no opportunity to argue that the staff's conclusion did not logically follow from the information on which it was based. Likewise, neither this court nor the superior court can evaluate the Commission's conclusion without the underlying information. These fundamental defects amount to a failure of due process.

Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937) is particularly relevant. The Ohio Commission had relied on data not in evidence in evaluating

hearing shall state the commission's findings, the basis of its findings and conclusions, together with its decision. These orders shall be entered of record and a copy of them shall be served on all parties of record in the proceeding.

AS 44.62.570(b) states in part:

Inquiry in an appeal extends to the following questions:

(3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if . . . the findings are not supported by the evidence.

ON

2.
Fairbanks appeals from a superior court affirming an order of the Public Utilities Commission granting Fairbanks a certificate of public convenience and necessity to acquire the Fort Wainwright telecommunication system, and awarded a franchise to the Great Land Telecommunications Company.

The error is presented. The court agrees with the well established rule that the superior court. The court's order relates to the question of the propriety of Wirecom's.

Whether the financial fitness of Wirecom is a factor pertaining to its ability to provide service, willingness and ability of applicants for a certificate of public convenience and necessity are important factors to be considered in determining the financial strength of Wirecom. The witnesses have testified that the financial strength of FMUS to provide service from revenue, other borrowing, and other sources.

The Great Land sponsor of a \$10 million dollar line of service from the First National Bank of Fairbanks and the staff of the Commission also attested to the fact that they obtained the equity financing for the 60/40 debt/equity ratio provided by its

Whether the applicants possess the ability to implement their plan for the Wainwright.

Whether the sum of the expenditures for Fort Wainwright also proposed to

of Fairbanks, U-76-5, 1977).

property owned by the telephone company for rate-making purposes. The telephone company was not given an opportunity to explain or rebut the data and claimed that because of this it had been deprived of a fair hearing in contravention of the requirements of the fourteenth amendment. The Court, in an opinion written by Mr. Justice Cardozo, agreed and made the following pertinent observations:

From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, "I looked at the statistics in the Library of Congress, and they teach me thus and so." This will never do if hearings and appeals are to be more than empty forms.

To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable? . . . What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. "A hearing is not judicial, at least in any

adequate sense, unless the evidence can be known."

Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints.

Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of "the rudiments of fair play" assured to every litigant by the fourteenth amendment as a minimal requirement. [Citations omitted].

301 U.S. at 302-05, 57 S.Ct. at 729-731 & 1 L.Ed. at 1100-02.

The Commission's ruling that the balance sheets and income statements of Wirecom need not be disclosed or made part of the record was based on AS 42.05.671 which provides:

Public disclosure of information. Facts and information in the possession of the commission are public, and reports, files, books, accounts and papers of every nature in its possession except records which by regulation are designated to be of a nonpublic or privileged nature are open to public inspection at reasonable times. However, a person may make written objections to the public disclosure of information contained in an application, report or document filed 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 shall order the information withheld from public disclosure if the information would adversely affect the interest of that person

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and is not required in the interest of the public.⁶

[4] The privilege reflected by this statute should be construed narrowly so that it does not conflict with the constitutional requirements of due process. The requirement of the statute 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.

[5] In this case no real showing was made by Wirecom that it would be competitively disadvantaged in its contracting business by disclosure of its income statements and balance sheets. It is not obvious how such harm might have come about, and no illustrations were offered. However, if a proper showing had been made, the Commission could have, consistent with the requirements of due process, imposed an order of confidentiality on Fairbanks' representatives, permitted cross-examination *in camera*, and sealed that portion of the record containing the privileged information.

[6] One other point bears mentioning. The Commission's order contains as a sub-conclusion the statement that "on-going regulatory supervision is in the public interest" and that Wirecom's proposal was preferable to that of Fairbanks because Wirecom was subject to the Commission's jurisdiction while Fairbanks was not. The superior

court found that it was improper for the Commission to make this value judgment, but that the error did not warrant reversal because it played a relatively insignificant role in the ultimate decision. We agree with the superior court that the fact that Wirecom was subject to the Commission's jurisdiction while Fairbanks was not may not be regarded as a factor in Wirecom's favor. The legislature has determined that it is in the public interest to allow municipalities to operate public utilities free from Commission supervision,⁷ and the Commission cannot validly ignore that legislative judgment. In view of our disposition of this case it is unnecessary to determine whether the Commission's error in this respect would, standing alone, require a remand.

The decision of the superior court is reversed and this case is remanded to the superior court with instructions to vacate the order of the Commission and remand the case to the Commission for a redetermination of the question of certification following a supplemental hearing with regard to the financial fitness of Wirecom.



6. The statute is implemented by 3 AAC 48.040 which provides in pertinent part:

Privileged Records and Information. (a) All facts, information, reports, orders, memoranda, books, accounts, and papers of every nature in the possession of the commission are available for examination by the public except:

(b) any specifically designated information in an application, tariff filing, report or document which, for good cause shown, the commission may order withheld pursuant to written objection by the filing party;

(c) Privileged information will not be made public or furnished to any person except pursuant to a *subpoena duces tecum* or application to the commission stating specifically the material or information that is desired

and the reason it is desired. The commission may grant or deny requests in whole or in part.

7. AS 29.48.060 provides:

Public utilities rates. The assembly acting for the area outside cities and the council acting for the area within a city may regulate, fix, establish and change, as it considers proper, the rates and charges imposed for utilities services given to the municipality or its inhabitants by a public service association, corporation, or individual not regulated under AS 42.05 and may regulate and provide what is a reasonable deposit for meters and security for service to be given, provided that interest be paid on the deposit. All rates, charges and regulations shall be reasonable and shall permit a fair and reasonable return on invested capital.

Transp. Comm'n v. Gandia, Sup. Ct. Op. No. 1964 (File No. 3469), 602 P.2d 402 (1979).
 Sup. Ct. Op. No. 813 (File No. 1066), 499 P.2d 304 (1972).
 Am. Jur. 2d reference. — 2 Am. Jur. 2d, Administrative Law, §§ 221-226.
 Cited in In re Application of Peterson,

Sec. 44.62.350. Appointment of hearing officers. (a) The governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter. The hearing officer may perform other duties in connection with the administration of this chapter and other laws.

(b) An agency with hearing officers may continue their employment as hearing officers on an unbiased and impartial basis within the particular agency and may hire additional officers and prescribe additional qualifications.

(c) A hearing officer hired after April 29, 1959, except to conduct hearings under the Alaska Employment Security Act (AS 23.20), shall have been admitted to practice law for at least two years immediately before his appointment. (§ 3 (ch 2) ch 143 SLA 1959; am § 7 ch 5 SLA 1966)

Stated in Alaska Alcoholic Beverage Control Bd. v. Malcolm, Inc., Sup. Ct. Op. No. 208 (File No. 363), 391 P.2d 441 (1964).
 Dealers Ass'n v. State, ABC Bd., Sup. Ct. Op. No. 1963 (File No. 3697), 602 P.2d 434 (1979).
 Cited in In re Application of Peterson, Sup. Ct. Op. No. 813 (File No. 1066), 499 P.2d 304 (1972). Ketchikan Retail Liquor
 Am. Jur. 2d reference. — 2 Am. Jur. 2d, Administrative Law, §§ 407-409, 434-440.

Sec. 44.62.360. Accusation. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned is initiated by filing an accusation. The accusation shall (1) be a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged, so that the respondent is able to prepare his defense; (2) specify the statute and rule which the respondent is alleged to have violated, but may not consist merely of charges phrased in the language of the statute and rule; and (3) be verified, unless made by a public officer acting in his official capacity or by an employee of the agency on whose behalf the proceeding is to be held; the verification may be on information and belief. (§ 4 (ch 2) ch 143 SLA 1959)

Section contemplates determinations of fact by agency. — This section regarding a formal accusation, contemplates the proceeding in which the agency must make determinations of fact. 1963 Op. Att'y Gen., No. 10.

And is inapplicable where court has entered judgment. — The accusation

provision is obviously inapplicable to a case in which a court of competent jurisdiction has entered a judgment regarding the acts or omissions for which a penalty may be inflicted. 1963 Op. Att'y Gen., No. 10.

I. REQUEST
 Bill/Resolution No. House Bill 434 - An Act Relating to Pipeline and Merging the
 Title the Alaska Pipeline Commission with the Alaska Public Utilities Commission
 Requested by Governor Jay S. Hammond Date April 30, 1981

II. FISCAL DETAIL
 Agency Affected Department of Commerce & Economic Development
 Program Category Affected Public Protection
 BRU, Program, or Subprogram(s) Affected Alaska Public Utilities Commission
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)
EXPENDITURES (Thousands of Dollars)

| | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 |
|-----------------------|-------|-------|-------|-------|-------|-------|
| 100 PERSONAL SERVICES | | 389.3 | | | | |
| 200 TRAVEL | | 28.3 | | | | |
| 300 CONTRACTUAL | | 450.0 | | | | |
| 400 COMMODITIES | | 3.2 | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS CLAIMS ETC | | | | | | |
| TOTAL | | 870.8 | | | | |

FUNDING (Thousands of Dollars)

| | | | | | | |
|-----------------------------|--|-------|--|--|--|--|
| GENERAL FUND | | 841.8 | | | | |
| FEDERAL FUNDS | | 29.0 | | | | |
| OTHER (Specify Fund Source) | | | | | | |

POSITIONS

| | | | | | | |
|-----------|--|-----|--|--|--|--|
| FULL TIME | | 8.0 | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)
 The budget of the Alaska Pipeline is added to the budget of the Alaska Public Utilities Commission deleting the Alaska Pipeline Commission Executive Director position and salary.
 The salary of one commissioner will be allocated for the Administrative Law Judge (ALJ) and the monies allocated for the two remaining positions will be used for staff for the ALJ. It is contemplated that a law clerk paralegal, clerical support and office space, supplies and equipment will be funded from these monies.

IV. DATE April 30, 1981 **PREPARED BY** John B. Furlough
AGENCY Alaska Public Utilities Commission
PHONE (907) 276-6222
Original: Legislative Finance
cc: Budget and Management
 Prime Sponsor (First Legislator Named)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. House Bill 434 An Act Relating to Merging
 Title the Alaska Pipeline Commission with the Alaska Public Utilities Com
 Requested by Governor Jay S. Hammond Date April 30, 1981

II. FISCAL DETAIL

Agency Affected Department of Commerce & Economic Development
 Program Category Affected Public Protection
 BRU, Program, or Subprogram(s) Affected Alaska Pipeline Commission
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 |
|-------------------------|-------|---------|-------|-------|-------|-------|
| 100 PERSONAL SERVICES | | (458.9) | | | | |
| 200 TRAVEL | | (28.3) | | | | |
| 300 CONTRACTUAL | | (450.0) | | | | |
| 400 COMMODITIES | | (3.2) | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC | | | | | | |
| TOTAL | | (940.4) | | | | |

FUNDING (Thousands of Dollars)

| | | | | | | |
|-----------------------------|--|---------|--|--|--|--|
| GENERAL FUND | | (911.4) | | | | |
| FEDERAL FUNDS | | (29.0) | | | | |
| OTHER (Specify Fund Source) | | | | | | |

POSITIONS

| | | | | | | |
|-----------|--|--------|--|--|--|--|
| FULL TIME | | (9.0) | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The budget of the Alaska Pipeline Commission is deleted with the intent of transferring all noted items to the budget of the Alaska Public Utilities Commission with the exception of one (1) full-time equivalent position which is included above. See APUC fiscal note.

IV. DATE April 30, 1981

PREPARED BY Karen St. Clair Chairman
 AGENCY ALASKA PIPELINE COMMISSION
 PHONE (907) 279-0583

Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

May 3, 1978

Managers of all Public Utilities which
we regulate

Enclosed is the procedure for the treatment of material
or information for which proprietary or privileged status
is requested.

If you have any questions regarding this procedure, you may
contact me or Mr. Robert Stoller, staff attorney.

Sincerely,

ALASKA PUBLIC UTILITIES COMMISSION

Carolyn S. Guess
Acting Executive Director

CSG:pm

PROCEDURE FOR THE TREATMENT OF MATERIAL OR
INFORMATION FOR WHICH PROPRIETARY
OR PRIVILEGED STATUS IS REQUESTED

1. This procedure supplements the Commission's present statute and regulation governing public disclosure of information, AS 42.05.671 and 3 AAC 48.040.
2. Written Petition for Proprietary or Privileged Status.
 - a. If no written request has been made to designate material or information as proprietary or otherwise privileged, all material and information that is filed with, served upon, or otherwise made available to the Commission shall be available for examination by the public. Any person wishing to protect material or information filed with, served upon or otherwise made available to the Commission shall file with the Commission a formal written petition identifying the material or information sought to be protected and setting forth the facts, reasons, or other grounds upon which the Commission should classify that material or information as proprietary or otherwise privileged.
 - b. Unless the public interest or considerations of justice require expedited action, the Commission shall decide whether to grant protected status in whole or in part or to deny protected status at the first tariff action meeting following submission of a formal written request.
 - c. Pending Commission action on a formal written request, the material or information specifically identified shall be temporarily treated as proprietary.
3. Adverse Commission Determination; Request for Reconsideration Withdrawal of Information.
 - a. If the Commission denies protected status under paragraph 2(b) above, the Staff will immediately notify the petitioner of the Commission's adverse determination. Notice shall be given by means of the most expeditious methods available. For example, where notice may be conveyed telephonically, then notice shall be given by telephone. For the Commission's internal record keeping purposes only, notice given orally shall be confirmed by letter.
 - b. Within three working days following receipt of notice of adverse determination, the petitioner may:
 - (1) Petition the Commission for reconsideration by supplementing the original petition; or
 - (2) Withdraw the material or information.If the petitioner neither seeks reconsideration nor withdraws the material or information within the three-working day grace period, the Commission will withdraw the temporary proprietary status and shall make the material or information public under its normal operating procedures.
4. Written Motion to Make Public Proprietary or Privileged Material or Information.
 - a. Any person may make written motion requesting access to material or information which the Commission has

information or material to which access is sought, and shall set forth the movant's reasons for seeking access thereto.

- b. Upon receipt of such a motion, the Staff shall notify the sponsor of the protected material or information by means of the most expeditious methods available. Within five working days following receipt of the notice of motion requesting access, the sponsor of the protected material or information shall submit its response, if any.
- c. As soon as reasonably possible after the expiration of the five working-day period specified in paragraph 4(b), the Commission will issue its determination to grant or deny the motion requesting access.

STATE
of ALASKA

MEMORANDUM

TO: Judy White
Research Analyst II

DATE: July 26, 1978

THRU: J. Lowell Jensen, P.E.
Executive Director

FILE NO.

FROM: Robert E. Stoller
Assistant Attorney General
Staff Counsel

TELEPHONE NO.

SUBJECT: Procedures for Invoking APUC
Proprietary Information
Protective Designations

From time to time, utilities have submitted information to the Commission or Staff bearing a rubber-stamped statement to the effect that the filing utility considers the information to be privileged or confidential. Also, utilities have occasionally included unsupported or blanket statements in the cover letters accompanying their filings to the effect that the information filed is privileged or confidential or its release would cause the utility harm or injury.

You have asked for my legal opinions as to whether the rubber-stamped statement or the blanket statement in a cover letter qualifies as a written petition for proprietary or privileged status. In my opinion, they do not so qualify, and therefore the Staff is at liberty to disregard them and to release the assertedly proprietary information to any member of the public requesting access thereto.

The general rule of the statute is that any and all "reports, files, books, accounts and papers of every nature" in the Commission's possession are public. AS 42.05.671, first sentence. The statute provides that any person wishing to preserve the confidence of information filed with the Commission may "make written objections . . . stating the grounds for the objections." AS 42.05.671, second sentence. To merit protection, that written objection must clearly establish that public disclosure of the information "would adversely affect the interest of [the objecting] person and is not required in the interest of the public." AS 42.05.671, third sentence, emphasis added.

The regulation implementing AS 42.05.671, 3 AAC 48.040(a), provides in pertinent part:

"All facts, information, reports, orders, memoranda, books, accounts and paper of every nature in the possession of the Commission are available for examination by the public except . . .

(9) any specifically designated information in an application, tariff filing, report or document which, for good cause shown, the Commission may order withheld pursuant to written objection by the filing party." (Emphasis added).

Memo to
Judy White

(2)

July 26, 1978

The core of the inquiry, then, is whether the written objection seeking proprietary status contains sufficient information to qualify as a showing of good cause. A rubber-stamped or an unsupported blanket statement does not qualify as a showing of good cause. At best, it amounts to a bald assertion of the utility that proprietary status is desirable.

The Alaska Supreme Court has specifically instructed this Commission that it may not defer to bald assertions by utility management, particularly when specific evidence can be committed to the record. Jager v. State, 537 p. 2d 1100, 1113 (Alaska 1975). In this same opinion, the Court interpreted the "good cause shown" requirement of section 3 AAC 48.130(f) of the Commission's regulations as requiring action when a complainant "brings evidence before [the Commission] amounting to probable cause" that action is required. Jager v. State, 537 p. 2d at 1108, emphasis added. But "the Commission is not compelled to act by the mere filing of a complaint" Jager v. State, 537 p. 2d at 1108.

There is no legal difference between the good cause shown requirement of 3 AAC 48.130(f) and the good cause shown requirement of 3 AAC 48.040(a)(9). Therefore, the mere filing of a rubber-stamped or blanket request does not compel the Commission or Staff to actively protect the information in question. And since the Commission may not defer to management's bald assertions, it may not withhold public access to information where there is only a bald assertion that the information should be held proprietary.

If you have any questions or comments, please feel free to contact me.

RES:lm

cc: Gordon J. Zerbetz, Chairman
Marvin R. Weatherly, Commissioner
Carolyn S. Guess, Commissioner
Susan M. Knowles, Commissioner
Stuart C. Hall, Commissioner

Nov 23 1 02 PM '80

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

CITY OF FAIRBANKS d/b/a)
FAIRBANKS MUNICIPAL UTILITIES)
SYSTEM,)

Plaintiff/Appellants)

vs.)

THE ALASKA PUBLIC UTILITIES)
COMMISSION and WIRE COMMUNICA-)
TIONS, INC. d/b/a GREATLAND)
TELEPHONE,)

Defendants/Appellees.)

FILED in the Trial Courts
State of Alaska, Fourth District

NOV 25 1980

WAYNE W. WOLFE, Clerk, Trial Courts
Deputy

Superior Court #77-1268
Supreme Court #3977

ORDER

The order issued by this court in this proceeding on June 27, 1980, in which the court remanded the decision of The Alaska Public Utilities Commission certifying Greatland Telephone Company to provide telephone service on Fort Wainwright Military Reservation U-76-62(3) is hereby clarified to permit the Commission to conduct further proceedings on the current, rather than prior, financial fitness of Greatland Telephone Company.

James R. Blair

Superior Court Judge

Nov. 25, 1980

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1-5-80

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

CITY OF FAIRBANKS d/b/a)
 FAIRBANKS MUNICIPAL UTILITIES)
 SYSTEM,)
)
 Plaintiff/Appellants,)
)
 vs.)
)
 THE ALASKA PUBLIC UTILITIES)
 COMMISSION and WIRE COM-)
 MUNICATIONS, INC. d/b/a)
 GREAT LAND TELEPHON,)
)
 Defendants/Appellees.)

FILED In the Trial Courts
State of Alaska, Fourth District

JUN 30 1980

WAYNE W. WOLFE, Clerk, Trial Courts
by [Signature] Deputy

Superior Court #77-1268
Supreme Court #3977

RECEIVED
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JUN 7 3 58 PM '80

ORDER

In accordance with Supreme Court Opinion No. 2079 filed on the 9th day of May, 1980, and the Mandate spread the 19th day of May, 1980, this court

HEREBY ORDERS that the Order of the Alaska Public Utilities Commission is VACATED. The court

FURTHER ORDERS that this case is hereby REMANDED to the Commission for a redetermination of certification following a supplemental hearing with regard to the financial fitness of Wirecom.

DATED at Fairbanks, Alaska, this 27 day of June, 1980.

[Signature]
JAMES R. BLAIR
Superior Court Judge

COPIES TO COUNSEL:
[Signature] (Data) [Signature] (Int)
Supreme Ct.

1 On page 1, after line 29, insert:

2 * Sec. 4.5. AS 42.05.020(b) is amended to read:

3 (b) The governor shall designate one member of the com-
4 mission as chairman of the commission. This member shall serve
5 for a term of two [FOUR] years, but may be reappointed for suc-
6 cessive terms.

7 On page 2, line 19, after delete "three", and insert:

8 one [THREE]

9 On page 2, between lines 28 and 29, insert:

10 * Sec. 7.5. AS 42.05.651 is amended to read:

11 Sec. 42.05.651. EXPENSES OF PROCEEDINGS [INVESTIGATION OR
12 HEARING]. During or after [AFTER] completion of a hearing, [OR]
13 investigation or other proceeding held or conducted under this
14 chapter, the commission shall allocate the costs of the hearing,
15 [OR] investigation or other proceeding among the parties, includ-
16 ing the commission, as is just under the circumstances. In allo-
17 cating costs, the commission may consider the results, ability to
18 pay, evidence of good faith, other relevant factors and mitigat-
19 in circumstances. The costs allocated may include, but are not
20 limited to, the costs of any time devoted to the investigation,
21 [OR] hearing or other proceeding by hired consultants, whether
22 or not the consultants appear as witnesses or participants. The
23 costs allocated may also include any out-of-pocket expenses in-
24 curred by the commission in the particular proceeding. The com-
25 mission shall provide an opportunity for any person objecting to
26 an allocation to be heard before the allocation becomes final.

27 * Sec. 7.75. AS 42.05.711(i) is amended to read:

28 (i) After [ON] June 30, 1980, a utility which furnishes
29 collection and disposal service or garbage, refuse, trash or
30 other waste material and has annual gross revenues of \$200,000
31 or less is exempt from the provisions of this chapter, other than
32 the certification provisions of AS 42.05.221 - 42.05.281, unless

1 25 per cent of the subscribers or subscribers representing 25
2 per cent of the annual gross revenue of the utility preition the
3 commission for regulation.

4 On page 7, delete lines 6 - 8, inclusive, and insert:

5 * Sec. 20. Except for secs. 4.5 and 17(c) of this Act, this Act
6 takes effect July 1, 1981. Sec. 4.5 is retroactive to March
7 16, 1981. Sec. 4.5 and sec. 17(c) of this Act take effect im-
8 mediately in accordance with AS 01.10.070(c).

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ALASKA PUBLIC UTILITIES COMMISSION
100 MACKAY BUILDING 338 DENALI STREET
ANCHORAGE, ALASKA 99501
PHONE 272-1487



143434

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 31, 1981

The Honorable Jim Duncan
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill transferring the authority for the administration of the Alaska Pipeline Commission (APC) Act (AS 42.06) to the Alaska Public Utilities Commission (APUC -- AS 42.05), effective July 1, 1981.

In response to "sunset" audits by the legislature, I directed the commissioners of the APC and the APUC to study the feasibility of merger. On the assumption that a seven-member commission would be recommended, I did not fill the currently vacant APC seat. The present APC commissioners recommended the elimination of their positions and the transfer of their statutory responsibilities to the APUC as presently constituted. The APUC concurred with their recommendation.

I believe that enactment of this bill will result in a more efficient method of regulating both public utilities and pipelines.

After merger, the APUC will thoroughly study any actual or potential conflicts between AS 42.05 and AS 42.06. The attached bill makes a number of amendments to make those two chapters compatible with each other. But time and experience will probably disclose other desirable changes.

The bill contains six major groups of provisions. First, sec. 13 of the bill effects a merger of the APC with the APUC by transferring to the APUC responsibility for the administration of the Pipeline Act, while sec. 15 of the bill establishes the new title for AS 42.06. Section 17 of the bill provides for the orderly transfer of the functions, powers and duties of the pending proceedings before, as well as the personnel, appropriations, and property of, the APC to the APUC.

In secs. 1, 2, and 3 of the bill, the APUC would be substituted for references to the APC in the statute governing common purchasers of oil (AS 31.15) and in the applicable provisions of the Right-of-Way Leasing Act (AS 38.35). Also, sec. 18 of the bill authorizes the substitution of the APUC for other references to the APC elsewhere in the Alaska Statutes. Additionally, secs. 8 -- 12 of the bill update references to relevant federal law. Since enactment of AS 42.06 in 1972, other federal legislation has been enacted that, arguably, affects the APC's jurisdiction. To avoid the necessity of making continual amendments to this state statute to reflect changes in federal law, substitution of general for specific references to applicable federal law is more appropriate and keeps the Alaska Statutes current. Section 14 clarifies the definition of "municipality" and conforms it to the more contemporary definition employed elsewhere in the Alaska Statutes.

Second, sec. 5 of the bill clarifies the authority of the APUC to employ an individual as executive director who possesses a professional background in engineering. This corrects an oversight in the 1978 legislation (sec. 2, ch. 103, SLA 1978). As a general rule, engineering is not considered a field "allied" to law or accounting. However, both the APC and the APUC employ engineers on their respective staffs, and a well-qualified engineer should not be precluded from applying for, or serving in the capacity of the commission's executive director.

Third, secs. 5 and 6 of the bill also authorize employment of administrative law judges to conduct proceedings subject to APUC jurisdiction. This is a position widely employed by comparable regulatory agencies in other states. Here it is designed primarily to permit an exceptionally well-qualified individual to serve as co-presiding officer in the joint hearings with the Federal Energy Regulatory Commission (FERC) which is considering the various phases of the Trans-Alaska Pipeline System tariff case that is subject to both federal and state jurisdiction. It is important that an individual selected to represent the State of Alaska be of equivalent stature to the FERC administrative law judge assigned to preside over this unique concurrent proceeding. To this end, secs. 4 and 5 classify the positions of hearing officer and administrative law judge in the partially exempt service -- a step employed by the Alaska Transportation Commission at the last legislative session. Sec. 22, ch. 115, SLA 1980.

Fourth, to facilitate commission consideration of the record where hearings are being conducted by a hearing officer or an administrative law judge, sec. 7 of the bill would permit commissioners serving on the decision-

making panel to read the hearing record rather than to require that they hear the evidence and argument in person. This amendment conforms to the existing practice and procedure both before the APUC, under 3 AAC 48.150(b), and the APC by stipulation, when less than a quorum of commissioners hears a case. The same rationale I advanced in my letter of transmittal with respect to sec. 1 of House Bill 81 (1981 H.J., p. 154 [Feb. 4, 1981]) is applicable here.

Fifth, sec. 16 of the bill makes clear that when the APC's regulatory authority over pipelines is transferred to the APUC, the exemption from the pipeline transportation property tax, specified in AS 43.56.210(6)(B)(iii), does not apply to such entities as the Trans-Alaska Pipeline System.

Finally, sec. 19 of the bill eliminates existing administrative provisions relating to the APC that no longer are necessary in a merged organization or that are covered by virtually identical provisions in AS 42.05. Two sections governing the filing and consideration of complaints (AS 42.06.490 -- 42.06.500) also are repealed. These are the two sections of AS 42.06 most seriously in conflict with existing APUC procedure. Compare AS 42.06.490 -- 42.06.500 with 3 AAC 48.130.

I am pleased to say that the members of both the APC and the APUC endorse this legislation.

Sincerely,

S/SSH

Jay S. Hammond
Governor

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
 Bill/Resolution No. House Bill No. 434 An act relating to pipelines and mergi
 Title the Alaska Pipeline Commission w/the Alaska Public Utilities Commis
 Requested by Governor Date _____

II. FISCAL DETAIL
 Agency Affected Department of Commerce and Economic Development
 Program Category Affected Public Protection
 BRU, Program, or Subprogram(s) Affected Alaska Public Utilities Commission/Alaska Pipeline
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 |
|--------------------------|-------|--------|-------|-------|-------|-------|
| 100 PERSONAL SERVICES | | 2128.7 | | | | |
| 200 TRAVEL | | 89.0 | | | | |
| 300 CONTRACTUAL | | 742.6 | | | | |
| 400 COMMODITIES | | 15.9 | | | | |
| 500 EQUIPMENT | | 5.4 | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| | | 2981.6 | | | | |

TOTAL

FUNDING (Thousands of Dollars)

| | | | | | | |
|-----------------------------|--|--------|--|--|--|--|
| GENERAL FUND | | 2952.6 | | | | |
| FEDERAL FUNDS | | 29.0 | | | | |
| OTHER (Specify Fund Source) | | | | | | |
| | | | | | | |

POSITIONS

| | | | | | | |
|-----------|--|----|--|--|--|--|
| FULL TIME | | 48 | | | | |
| PART TIME | | 2 | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The budgets of the Alaska Public Utilities Commission and the Alaska Pipeline Commission are combined deleting the Alaska Pipeline Commission's Executive Director position and salary.

The salary of one commissioner will be allocated for the Administrative Law Judge (ALJ) and the monies allocated for the two remaining commissioner positions will be used for staff for the ALJ. It is contemplated that a law clerk or paralegal, clerical support and office space, supplies and equipment will be funded from these monies.

IV. DATE 3/31/81 PREPARED BY *Robert A. Guss*
 AGENCY ADUC
 PHONE 276-6222
 Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

HB 81

January 16, 1981

Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the Alaska Pipeline Commission.

Section 1 of the bill would amend AS 42.06.182 to allow one commissioner or a designated hearing officer to conduct hearings. Presently, AS 42.06.180 is too restrictive. It requires at least two commissioners to be physically present during the hearing. Further, all commissioners participating in a decision relating to a hearing must also be present at the hearing. Strict compliance with this section has not always been possible. For example, during the Trans Alaska Pipeline System (TAPS) proceeding, the Alaska Pipeline Commission (APC) agreed to hold concurrent hearings with the Federal Energy Regulatory Commission (FERC) at Washington, D.C. During 1978, the FERC/APC hearing schedule required the commissioners' attendance almost daily during a six-month period. To avoid such a situation, to reduce expenses, and to allow the APC to continue with other duties, parties involved in the TAPS case agreed to a stipulation requiring the physical presence of only one commissioner but allowing for participation in the decision by all commissioners who read all testimony and hearing transcripts. A similar TAPS stipulation was obtained in 1979, granting full participation rights to a newly appointed commissioner who did not attend any hearings or hear any argument, but who did read all the testimony and transcripts.

The proposed amendment to remove the restrictions would save money and enhance the APC's effectiveness. It would allow one commissioner or a hearing officer to conduct hearings, thereby assuring that the APC will be able to carry out its other obligations while a hearing is being conducted. It would also eliminate the need of the commissioners deciding the case to actually hear the

evidence, such a condition being unduly burdensome and not a requirement of constitutional due process. The amendments do not change the requirement that any decision of the APC be based entirely on the facts of record of the proceeding.

Section 2 of the bill would provide for a refund to shippers under certain circumstances following the conclusion of each phase of a multi-phase investigation or after judicial review.

Section 3 of the bill would allow the commission to allocate the cost of a proceeding before the proceeding has been completed. The statute now requires that the hearing or investigation be completed before costs can be allocated. In some instances, dockets have been open and are expected to remain open for several years, and the amounts involved can easily run into hundreds of thousands of dollars. To allocate one lump sum at the close of such a proceeding places a burden on all parties involved, including the commission. Adoption of this amendment will allow the steady return of recoverable costs to the general fund, and would make fiscal planning and budgeting easier and more consistent for all parties concerned.

Sincerely yours,

S/SSH

Jay S. Hammond
Governor

THE LEGISLATURE OF THE STATE OF ALASKA
Twelfth LEGISLATURE

FISCAL NOTE

APPENDIX XXII

I. REQUEST
 Bill/Resolution No. HOUSE BILL 81
 Title An Act Relating to the Alaska Pipeline Commission
 Requested by Governor Date _____

II. FISCAL DETAIL
 Agency Affected Alaska Pipeline Commission
 Program Category Affected Consumer Protection
 BRU, Program, or Subprogram(s) Affected Consumer Protection
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)
 EXPENDITURES (Thousands of Dollars)

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|--------------------------|-------|-------|-------|-------|-------|-------|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| TOTAL | | | | | | |

FUNDING (Thousands of Dollars)

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Fund Source) | | | | | | |

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| FULL TIME | | | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The Provisions of this bill will not have any increased fiscal impact on funding or expenditures of the Alaska Pipeline Commission. Section 3 of the bill relating to allocation of costs during or after a proceeding will allow for a steady return of monies to the general fund by dividing costs among all parties to the proceeding. The level of these returns cannot be estimated at present, however, the ultimate result may be lower overall costs to the State. There will be no decrease in budgeted costs to the Commission.

IV. DATE January 8, 1981 PREPARED BY Janis Williams, Commissioner
 AGENCY Alaska Pipeline Commission
 Original: Legislative Finance PHONE 279-0583
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

A PERFORMANCE REVIEW
OF THE
ALASKA PUBLIC UTILITIES COMMISSION

August 1, 1979

Commissioner of the Department
of Commerce and Economic Development
Deputy Commissioner of the Department
of Commerce and Economic Development

Charles Webber

Bertram L. Wagnon

Members of the
Alaska Public Utilities Commission

Chairman
Commissioner
Commissioner
Commissioner
Commissioner

Gordon J. Zerbetz
Marvin R. Weatherly
Carolyn S. Guess
Susan M. Knowles
Stuart C. Hall

ORGANIZATION AND FUNCTION

Prior to the creation of the Alaska Public Utilities Commission in 1970, utilities were regulated by the Alaska Public Service Commission (PSC). The PSC was established in 1959 as a part-time three-member commission responsible for all fixed utility regulation including generation, transmission or distribution of electric power, heat, water, natural or manufactured gas, oil or other petroleum products (except by pipeline); and the furnishing of telephone or telegraph communications, and community sewer services.

In 1960, the PSC gained responsibility for regulating transportation utilities with the passage of the Alaska Motor Freight Carriers Act and the Alaska Air Commerce Act. The transportation regulation duties were transferred to the Alaska Transportation Commission upon its creation in 1966. The 1960 legislation eliminated the PSC and created the APUC as a full-time three-member commission. That legislation also changed the definition of public utility to include those furnishing the following types of services for compensation: electrical; telecommunications; water, steam or sewer; transmission or distribution of natural or manufactured gas; and petroleum or petroleum products when no competition exists. A 1973 amendment added collection and disposal service of garbage, refuse, trash or other waste to the definition.

AS 42.05.040 requires one member to be a law school graduate, one to be a university graduate with a major in engineering, and one to be a university graduate with a major in finance, accounting or business administration. Two additional positions were added to the Commission in 1975 for which no special qualifications have been established. All members are appointed for six-year terms by the Governor and confirmed by the Legislature. The Commission may hire an executive director, who may be a member of the Commission.

Under AS 42.05, the Alaska Public Utilities Commission Act, the APUC is charged with the responsibility to assure the furnishing of adequate service to all public utility patrons, without discrimination, and at the lowest reasonable rates consistent with the interests both of the public and the utility. Statutory provisions direct the Commission, after determining an applicant is fit, willing and able to provide utility service, to issue that applicant a Certificate of Public Convenience and Necessity (CPCN). After issuance of a CPCN the Commission then regulates the rates, classifications, rules, regulations, practices, services and facilities of a public utility. The Commission has the authority to adopt regulations and to hold formal, quasi-judicial hearings to accomplish these purposes.

The staff of the APUC, in addition to the support staff of the Commissioners, is divided into five major functions: administration, engineering, communications carriers, consumer protection and information and financial/tariff analysis. A brief description of the services provided by those functions follows:

Administration. An Executive Director, hired by the Commission, is responsible for directing all staff functions and acts as liason between staff and Commissioners. He is assisted by a Deputy Director who has responsibility for records/document management. They are assisted in these duties by an administrative assistant, document processing personnel and other clerical support staff.

Engineering. The Engineering Section consists of a section chief, four utilities engineers, a draftsman and a clerical support person. This section is responsible for investigation of utility procedures and practices affecting quality of service; review of legal descriptions for service areas, plans for plant expansion, and plant-in-service and depreciation schedules. This section presents its evaluations in proceedings before the Commission.

Communications Carriers. This section was established by 1976 legislation to develop, recommend and administer policies and programs with respect to the regulation of rates, services, accounting and facilities of communications common carriers within the State involving the use of wire, cables, radio and space satellites. There is one position in this section and it is currently vacant.

Consumer Protection and Information. This function is carried out by a section chief and an information officer. The major responsibilities are investigation and resolution of consumer complaints, and public relations/information functions.

Financial/Tariff Analysis. Activities carried out by this section include: examination, analysis and evaluation of financial statements submitted with tariff filings; audits of financial records of utilities; examination of financial information comprising historical operating year and proforma adjustments; and presentation of these analyses at proceedings before the Commission. In addition to the section chief, there are five utility financial analysts and two research analysts authorized for this section.

REPORT CONCLUSION

Policy Issues

This review contains policy issues raised as a result of our evaluation of various Commission practices. The final policy decisions affecting these practices are not within the scope of this review but require legislative consideration. In debating these decisions, the legislative oversight committees should take into consideration the findings and alternatives presented in this report, so that the potential impact of the policy changes can be evaluated.

Report Conclusion

In our opinion, the Alaska Public Utilities Commission should continue to regulate public utilities. We believe that the public interest is being served by requiring public utilities to be certificated by the APUC. This process stabilizes demand for the utility service by eliminating competition and thereby allowing economies of scale (declining unit costs with increased outputs) to operate. Economic regulation by the Commission, in place of that competition, ensures that the utilities provide adequate service at the lowest reasonable rates.

However, certain changes need to be implemented for the Commission to more effectively execute its mandated responsibilities. A number of factors have caused an increase in workload at the APUC which have diluted its ability to effectively regulate all utilities within its jurisdiction. Those factors include, but are not limited to, increases in the number of applications for certificates for which there are competing applicants, and more frequent rate increase requests due to spiraling costs, particularly for fuel.

We therefore evaluated the workload of the Commission for areas of regulation which could be eliminated or limited with the least public impact, and would allow the APUC to devote its limited time and resources on areas of greater import. This Division has now completed performance reviews under AS 44.66.050 of two of the three regulatory commissions in Alaska. We also evaluated them from an overview position, the entire utility regulatory scheme in Alaska.

In keeping with the intent of the Sunset Law which attributed public disenchantment with State government to a proliferation of that government, we recommend the Alaska Public Utilities Commission, the Alaska Transportation Commission and the Alaska Pipeline Commission be combined into a single regulatory commission. This recommendation stems from a comparison of

Alaska with the other forty-nine states in which we learned that Alaska is one of only three states utilizing three utility regulatory commissions and employs the second largest number of commissioners to staff those agencies (see Recommendation No. 1).

Areas of regulation which we recommend be eliminated from APUC's jurisdiction are cable television and garbage collection. Cable television service is an entertainment service, not a monopoly or a necessity, and deregulation of this service would not be detrimental to the public interest (see Recommendation No. 2). Services providing collection and disposal of garbage are not fixed, capital intensive utilities for which competition should be eliminated, as is necessary in the other utilities regulated by APUC. This industry should be regulated at the local level as a transportation utility (see Recommendation No. 3).

Areas of APUC regulation which we recommend be limited involve nonprofit telephone and electric cooperative corporations and utilities with gross annual revenues of less than \$100,000. AS 42.05 should be amended to allow the membership of the cooperatives, by vote of a majority of the members, to be given an opportunity on a utility by utility basis, to determine whether their cooperative should remain economically regulated by the APUC. This action would allow members of cooperatives who feel their board of directors is sufficiently responsive to the membership to withdraw from regulation, while those who feel their board is not responsive may appeal to the APUC (see Recommendation No. 4).

AS 42.05 should also be amended to exempt all certificated utilities with gross annual revenues of less than \$100,000 from economic regulation. This exemption would delete a minimum of 26 utilities or 20 percent of the current number of certificated economically regulated utilities under APUC. This action would not be contrary to the Commission's responsibility to protect the public interest because the cost of regulation as a percentage of operating costs for small utilities may outweigh the benefits of regulation, and because Commission time could be devoted to larger utilities serving a larger number of customers (see Recommendation No. 5).

The ability of the Commission to effectively regulate utilities has been hampered by omissions and inconsistencies in the Statutes and regulations. To allow for more effective case management and to avoid court appeals of Commission decisions, the APUC should promulgate regulations to accomplish the following: (1) to clarify the reporting and accounting requirements of utilities desiring to include rate case expense in their rate base; and (2) to prescribe industry performance standards to allow the Commission to effectively

monitor and enforce the quality of service being provided by utilities. A statutory amendment is needed to clarify whether transfer of certificates of public convenience and necessity from one utility to another through transfer of the controlling interest in the corporate stock is subject to APUC approval (see Recommendation No. 6).

The Commission's effectiveness has also been hampered by difficulties in recruiting and retaining employees for the Utility Financial Analysis Section and Utilities Engineering Section. Increasing compensation levels for those positions to a competitive level with employers in the Anchorage area and similar positions in the State government should allow recruitment and encourage retention of qualified experienced staff (see Recommendation No. 7).

Improvement in the efficiency of Commission operations would result from: (1) development of a topical cross-reference system for Commission orders (see Recommendation No. 9); (2) implementation of a time-management system to assist the Commission in prioritizing, planning and scheduling future workloads, and monitoring work in progress (see Recommendation No. 8); (3) establishment of separate collocation codes for budgeting and recording expenses of each function of the Commission (see Recommendation No. 11); and (4) restriction of Commissioner involvement in the administrative function of the Commission (see Recommendation No. 10).

A review of Commission appointment activity performed by the Office of the Governor showed that the chairmanship term of the present APUC chairman expired November 30, 1977 and, to date, a period of 20 months, no new appointment or reappointment to this position has been made. The Office of the Governor should make appointments in a timely manner.

Subsequent Event

The present Chairman of the APUC was reappointed to the chairmanship on July 31, 1979. That term will expire November 30, 1981.

FINDINGS AND RECOMMENDATIONS-

Recommendation No. 1

The Alaska Public Utilities Commission, the Alaska Transportation Commission and the Alaska Pipeline Commission should be combined into a single regulatory commission.

During our review process we compared the utility regulatory scheme utilized in Alaska with the schemes utilized in the other forty-nine states. This analysis revealed that Alaska is one of only three states utilizing three utility regulatory commissions and employs the second largest number of commissioners as shown below:

| Regulatory Scheme | States Used By | | Commissioners | | | Employees | | |
|------------------------|----------------|-----|---------------|---------------|------|-----------|-----|------|
| | No. | % | No. On Comm. | No. Of States | % | Hi | Lo | Avg. |
| One | | | 1 | 1 | 2% | | | |
| Regulatory Commission | 42 | 84% | 3 | 29 | 69% | 976 | 11 | 164 |
| | | | 5 | 10 | 24% | | | |
| | | | 7 | 2 | 5% | | | |
| | | | | 42 | 100% | | | |
| Two | | | | | | | | |
| Regulatory Commissions | 5 | 10% | 6 | 5 | 100% | 726 | 87 | 242 |
| Three | | | 8 | 1 | 33% | | | |
| Regulatory Commissions | 3 | 6% | 11* | 1* | 33% | 762 | 71* | 419 |
| | | | 12 | 1 | 33% | | | |
| | | | | 3 | 100% | | | |

*Alaska

From: The 1977 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners.

A brief history of the development of Alaska's three regulatory commissions follows. The Alaska Public Service Commission (PSC) was established in 1959 as a part-time three-member commission responsible for all fixed utility regulation. In 1960 the PSC gained responsibility for regulating transportation utilities with the passage of the Alaska Motor Freight Carrier Act and the Alaska Air Commerce Act. The transportation regulation duties were transferred to the full-time three-member Alaska Transportation Commission (ATC) at its creation in 1966, and 1970 legislation eliminated the PSC and created the Alaska Public Utilities Commission (APUC) with jurisdiction over fixed utilities. That legislation established the APUC

A PERFORMANCE REVIEW
OF THE
ALASKA PIPELINE COMMISSION

July 11, 1980

Commissioner, Department of Commerce
and Economic Development

Deputy Commissioner, Department of
Commerce and Economic Development

Charles Webber

Peter Jeans

Members of the
Alaska Pipeline Commission

Chairman
Commissioner
Commissioner

Cheri C. Jacobus
Harry J. Donahue
Karen W. Cory

PURPOSE AND SCOPE OF THE REVIEW

Purpose

In accordance with the provisions of Alaska Statutes 24.20.271(1) and 44.66.050 (sunset legislation), a review of the Alaska Pipeline Commission (hereinafter referred to as APC or the Commission) was conducted to determine whether there is a demonstrated need to continue pipeline regulation in its present form. Also, we reviewed Commission activities to see if the Commission has been operating in an efficient and effective manner.

AS 44.66.010(5) specifies that the Alaska Pipeline Commission will terminate on June 30, 1981, but will continue until June 30 of the following year for the purpose of concluding its affairs. This report shall be considered during the legislative oversight function in determining whether the Commission should be allowed to terminate, be reestablished in its present form, or be reestablished in a modified form.

Scope

The functions reviewed included commissioner activity, administrative, financial/tariff analysis, engineering, consumer complaints, and records/docketing. Our review consisted of analyzing and evaluating the following:

1. Applicable statutes and regulations.
2. Interviews with the commissioners.
3. Interviews with staff members.
4. Interviews with APC regulated pipeline companies.
5. Interviews with attorneys who practice before the Commission.
6. Observation of a Commission hearing and court proceeding.
7. Interviews with Assistant Attorneys General assigned to APC.
8. Tests of APC records and documents.
9. Test of records and documents of the Office of the Governor on appointments to the APC.
10. A review of major Federal Energy Regulatory Commission decisions affecting the Commission.

REPORT CONCLUSION

Policy Issues

This review contains policy issues raised as a result of our evaluation of various Commission practices. The final policy decisions affecting these practices are not within the scope of this review but require legislative consideration. In debating these decisions, the legislative oversight committees should take into consideration the findings and recommendations presented in this report so that the potential impact of policy changes can be evaluated.

Report Conclusions

In our opinion the intrastate transportation of oil and gas by pipeline carriers should continue to be regulated by the State of Alaska. However, we believe that a separate commission is not necessary to carry out this function. The economic regulation of pipelines provides benefits to the people of the State in the form of: (1) lower fuel costs, since processors of Alaskan oil and gas are able to obtain those resources over pipelines at fair and reasonable transportation rates, and (2) greater revenue to the State, since decreases in tariffs result in increases in wellhead value with corresponding increases in State royalty and tax collections.

In keeping with the intent of sunset legislation, which attributed public disenchantment with State government to a proliferation of that government, we recommend the Alaska Public Utilities Commission, the Alaska Transportation Commission, and the Alaska Pipeline Commission be combined into a single regulatory commission. Our analysis of APC operations and comparison of those operations to the APUC and ATC demonstrated to us that there is currently an insufficient workload to justify a separate commission for the regulation of pipeline transportation. Additionally, having evaluated all three regulatory commissions under AS 44.66.050, we believe economies of operation can be realized by the combination (see Recommendation No. 1).

As a result of the Commission's procedure of relying on pipeline companies to make themselves aware of the APC and voluntarily comply with Commission requirements, one pipeline was already under construction before application was made to the APC for certification to begin that construction. The Commission should develop and implement procedures to ensure compliance with the Commission's statutory certification requirements before pipeline construction is begun (see Recommendation No. 2).

Areas of vagueness and omissions in the statutes and regulations have already hampered, or have potential to hamper, the APC's ability to carry out mandated responsibilities. The regulations need clarification of what constitutes confidential versus public information, who is required to make application to the APC for connection permits, and what format that application should take. Amendment should be made to the statutes and regulations to allow a commissioner who has merely read the testimony in a proceeding to participate in the decision, and to allow the APC to allocate hearing and investigation costs, during, as well as at the completion of, those proceedings (see Recommendation No. 3).

A review of appointments made to the APC by the Office of the Governor since the Commission's initial staffing in 1974 showed that appointments have not been made in a timely manner. We also found several exceptions to AS 42.06.040 requiring six-year terms with appointments to fill vacancies to be made for the balance of the predecessor's term (see Recommendation No. 4).

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Alaska Public Utilities Commission, the Alaska Transportation Commission, and the Alaska Pipeline Commission should be combined into a single regulatory commission.

In keeping with the legislative intent of the sunset law which found "... that the substantial increase in the number of State agencies, boards and commissions, and the proliferation of rules and regulations which each has adopted have contributed to a public disenchantment with the operation of State government ..." (Ch. 149, SLA 1977), we have investigated the need for three separate regulatory commissions in the State of Alaska.

In a previous Legislative Audit report, we compared the utility regulatory scheme utilized in Alaska with the schemes utilized in the other forty-nine states. That analysis revealed that Alaska is one of only three states utilizing three separate utility regulatory commissions and employing the second largest number of commissioners. An update of that analysis shows that information to still be correct as demonstrated below:

| <u>Regulatory Scheme</u> | <u>States Used By</u> | | <u>Commissioners</u> | | | <u>Employees</u> | | |
|--------------------------|-----------------------|----------|----------------------|----------------------|----------|------------------|-----------|-------------|
| | <u>No.</u> | <u>%</u> | <u>No. On Comm.</u> | <u>No. Of States</u> | <u>%</u> | <u>Range</u> | | |
| | | | | | | <u>Hi</u> | <u>Lo</u> | <u>Avg.</u> |
| One | | | 1 | 1 | 2% | | | |
| Regulatory Commission | 42 | 84% | 3 | 27 | 64% | | | |
| | | | 5 | 12 | 29% | 900 | 17 | 172 |
| | | | 7 | 2 | 5% | | | |
| | | | | 42 | 100% | | | |
| Two | | | 6 | 4 | 80% | | | |
| Regulatory Commissions | 5 | 10% | 7 | 1 | 20% | 803 | 19 | 235 |
| | | | | 5 | 100% | | | |
| Three | | | 8 | 1 | 33% | | | |
| Regulatory Commissions | 3 | 6% | 11* | 1 | 33% | 771 | 75* | 430 |
| | | | 12 | 1 | 33% | | | |
| *Alaska | | | | 3 | 100% | | | |

From: "The 1978 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners."

Also included in our previous report were the results of a survey questionnaire to utility regulatory commissioners in other states which showed that:

- (a) Twenty-six of the responding thirty-two states (81%) felt the advantages of a single regulatory agency outweigh those of maintaining two or three separate agencies. Some of the advantages noted were: centralization of expertise; cost savings due to economies of scale and elimination of unnecessary duplication; in general a more efficient use of resources; and
- (b) Twenty-eight of the responding states (87%) felt commissioners can realistically develop the expertise to render decisions in fixed, transportation and/or pipeline utility cases.

The Division of Legislative Audit has now completed performance reviews of all three of Alaska's regulatory commissions. Based on the information gathered during the course of those audits, we recommend the following actions to produce a more efficient, cost-effective regulatory system in Alaska. The most efficient manner to effect the transition from three regulatory commissions to a single commission would be a two-phase process.

The first phase would be to combine the Alaska Pipeline Commission with the Alaska Public Utilities Commission. Our performance review of the APC demonstrated to us that there is currently an insufficient workload to justify a separate commission for the regulation of pipeline transportation. Table II shows workload statistics for the three commissions, APC, APUC, and ATC. These statistics have not been adjusted to reflect importance or complexity of docketed matters or individual agencies' operating efficiencies. However we do feel they offer a valid indication of the Commissions' workloads.

| TABLE II: | No. of CPCN* Applications ¹ | No. of Other Docketed Matters ¹ | <u>Hearings</u> ¹ No. Days | |
|-----------|---|---|--|-----------------|
| APC | 0 | 20 | 2 | 45 ² |
| APUC | 37 | 311 | 44 | 102 |
| ATC | 221 | 340 | 138 | 95 |

1. All information is for calendar year 1979.

2. Includes 42 days of hearings in TAPS proceedings.

*Certificate of public Convenience and Necessity.

Even though pipelines have traditionally been regulated more as transportation utilities than fixed utilities, it would be more practicable to combine the Alaska Pipeline Commission with the Alaska Public Utilities Commission for the following reasons:

- (1) Pipelines in Alaska, unlike other areas of the country, are natural monopolies as are most fixed public utilities. The heavy fixed costs required for pipeline construction in Alaska, as well as the natural geographic barriers and climactic conditions, have either prohibited or made economically infeasible competition from traditional sources, i.e., other pipeline companies, trucking industry, the shipping industry or railroads.
- (2) The methodology adopted and utilized by the APC to determine fair and reasonable tariffs for pipelines is very similar to the methodology utilized by the APUC in determining rates for fixed utilities. Both commissions utilize a rate of return on rate base methodology, whereas the ATC utilizes an operating ratio methodology for establishing tariffs for transportation utilities. It should also be noted that the methodology used by these two commissions is the methodology used by the Federal Energy Regulatory Commission for regulation of interstate pipeline transportation.
- (3) The experience of the APUC in its Federal/State Communications Commission Joint Board work considering telephone separations methods for Alaska and Hawaii will be valuable in solving an APC problem which will have to be dealt with in the future. To date there has been no agreement between the Federal Energy Regulatory Commission and the APC on a method of allocating expenses between interstate and intrastate pipeline commerce. The problem of telephone toll separations between long-lines and local telephone companies and the problem of pipeline expense separation have obvious similarities that could be best dealt with by agency with experience in these types of negotiations.
- (4) During the last session of the Legislature, action was taken deregulating several areas of the APUC's jurisdiction. As stated in our previous report on the APUC, combining commissions without decreasing the present workload of those commissions would cause serious processing time delays. We believe there has now been sufficient deregulation of APUC's jurisdiction to allow a combining of commissions without harmfully impacting the agencies' operating efficiency.

There was some deregulation of transportation utilities (ferries and buses) during that session, but this action will not have a significant impact on ATC's workload.

Implementation of the first phase of the combining process would best be carried out after the APC has issued its decision on Phase One of the Trans-Alaska Pipeline System (TAPS) hearings, but before Phase Two hearings begin. The Commission estimates the Phase Two hearings will last approximately ten months and will be accompanied by lengthy, complex transcripts. Interruption of this process by a jurisdiction transfer and probable personnel change would, therefore, cause serious delays in completing the TAPS investigation and have possible legal ramifications.

The Second Phase of the process should be the combining of the Alaska Transportation Commission into the combined Public Utilities/Pipeline Commission. Prior to carrying out the Second Phase, a management study should be undertaken to determine the correct staffing levels and organization plan for a combined commission. The following recommendations should be given consideration in establishing a combined commission.

Number of Commissioners and Commissioner Qualifications.

The functions of the combined Public Utilities/Pipeline Commission could be carried out by a five-member commission. The present qualifications as stated at AS 42.05.040 should be retained with the two consumer positions changed to specify qualifications which would bring to the Commission the expertise needed for regulation of pipelines, e.g., petroleum engineering or transportation economics. The determination of how many commissioners should serve on the combined Public Utilities/Pipeline/Transportation commission should be made if and when intrastate transportation is substantially deregulated, and the number of commissioners needed would then reflect the extent of that deregulation.

Staffing

Until the APC's involvement in the TAPS proceedings is completed, additional financial and research or engineering staff should be retained. When the TAPS proceedings are complete an evaluation of the number of staff members needed should be made based on the estimated workload in pipeline cases at that time.

Consideration should also be given to creating a small, professional staff to work exclusively for the commissioners of the combined commission. When commissioners lack knowledge in areas that come before them in formal proceedings, a natural reaction would be to seek information from in-house staff experts, which creates a potential violation of the ex parte communication prohibition. Physical separation of commissioners and staff should also be considered.

Budgeting

In addition to creation of a separate staff for commissioners, separate line item appropriations for staff operations and commissioner operations should be established to help ensure staff independence.

Recommendation No. 2

The Alaska Pipeline Commission should develop and implement procedures to ensure compliance with the Commission's statutory certification requirements.

AS 42.06.240 states that "(a) After January 1, 1974 no pipeline carrier, or person which will be a pipeline carrier upon completion of any proposed construction or extension, shall engage in the transportation of oil or gas by pipeline subject to the jurisdiction of the commission, or undertake the construction or extension of any pipeline facilities for that purpose, or acquire or operate any pipeline facilities or extension, unless there is in force with respect to that pipeline carrier a certificate of public convenience and necessity issued by the commission authorizing those acts or operations." Since 1974, the Commission has received three applications for certificates of public convenience and necessity for new pipeline construction. Of the three, however, one pipeline was already under construction when the application was received.

Certificates of public convenience and necessity are required by statute to ensure companies seeking to provide pipeline transportation services are fit, willing and able to provide the services, to determine routes to be covered and, if the line will be competing with other pipelines, whether that competition is in the public's best interests. When construction is begun before the Commission has reviewed the application, the possibility exists that the Commission will find reason for not granting a certificate and the capital invested will be lost.

To date the Commission has relied on the pipeline companies to make themselves aware of the APC and to voluntarily comply with all Commission requirements. We recommend the Commission take more assertive action to ensure that pipeline companies are aware of the APC and comply with all requirements in a timely manner. Some examples of procedures which could be implemented which would assist the Commission in solving this problem would be to seek listing in the Department of Environmental Conservation's Directory of Permits, and to coordinate efforts with the appropriate State and Federal agencies to be notified when pipeline companies seek right-of-way permits.

H B

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Robert S. WIRZ and David
Meade, Appellants,
v.
STATE of Alaska, Appellee.
No. 3516.

Supreme Court of Alaska.

April 7, 1978.

Defendant entered a plea of nolo contendere to a charge of operating a motor vehicle while under the influence of intoxicating liquor, but preserved his right to appeal on an issue raised on motion to suppress. Judgment of the District Court was affirmed on appeal to the Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., and a consolidated appeal followed. The Supreme Court, Rabinowitz, J., held that under the implied consent law, there is implied consent to chemical tests, and after an arrested operator refuses to take a chemical test, he must be advised of consequences flowing from his contemplated refusal, and must be permitted to reconsider his refusal in light of that information, but there is no requirement that he be advised that he has a right to refuse to take the test.

Affirmed.

Automobiles \Rightarrow 144.1(1)

Under implied consent law, there is implied consent to chemical tests, and after arrested operator refuses to take chemical test, he must be advised of consequences flowing from his contemplated refusal, and

1. Five days after Wirz was arrested, appellant Meade was arrested for the offense of operating a motor vehicle while under the influence of intoxicating liquor. The relevant procedural context of Meade's case is identical to that of Wirz. Upon his plea of nolo contendere, Meade received the following sentence: 10 days imprisonment with 7 days suspended on condition that he commit no similar offense for a period of one year, a fine of \$750 with \$250 suspended, and a suspension of his driver's license for 60 days.

must be permitted to reconsider his refusal in light of that information, but there is no requirement that he be advised that he has right to refuse to take test. AS 28.35.030, 28.35.031, 28.35.032, 28.35.032(a, b, d); SDCL 32-23-10; ORS 487.805; RCWA 46-20.308(1).

R. Michael Jackson, Kay, Christie, Fuld & Saville, Anchorage, for appellants.

Mary Anne Henn, Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, and Avrum M. Gross, Atty. Gen., Juneau, for appellee.

OPINION

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

RABINOWITZ, Justice.

Appellant Wirz was arrested¹ for the offense of operating a motor vehicle while under the influence of intoxicating liquor in violation of AS 28.35.030. Subsequent to his arrest, Wirz was taken to the police station where a breathalyzer test was administered. Wirz did not refuse to take the breathalyzer test when requested to do so by the arresting officer. In the district court, Wirz moved to suppress the results of the breathalyzer test on the ground that he was not informed of his "right" to refuse to take the breathalyzer test. After the district court denied the motion, Wirz entered a plea of nolo contendere² while preserving his right to appeal the issue raised in the motion to suppress.³ Wirz then appealed to

The Meade and Wirz appeals of the district court's judgments were consolidated in superior court.

2. Wirz received the following sentence: 10 days imprisonment with 9 days suspended on condition that he commit no similar offense for a period of one year, a fine of \$500, a revocation of his driver's license for 30 days, and a requirement that he attend the Defensive Driving School.

3. In *Oveson v. Municipality of Anchorage*, 574 P.2d 601 at 603 (Alaska, 1978) at 4 n. 4, we

the superior court where the judgment of the district court was affirmed. This consolidated appeal followed.

The gist of appellants' position in this appeal is that AS 28.35.032 implies a right to refuse to take the breathalyzer test; and, in order to effectuate this right, one arrested for the offense of operating a motor vehicle while under the influence of alcohol must be informed of his right to refuse to take the breathalyzer test. The state counters by arguing that no right to refuse exists.

In our recent opinion in *Puller v. Municipality of Anchorage*, 574 P.2d 1285 (Alaska, 1978), we noted that analysis of two statutes, which are in turn relevant to the resolution of the instant appeal, demonstrates the legislature's intention that drivers be considered to have consented to a chemical test for determining the alcohol content of their blood and that refusal on the driver's part to submit to such a test will trigger certain specified consequences.⁴

Implied consent is addressed specifically by AS 28.35.031:

clarified the criteria applicable to this procedure—criteria originally articulated in *Cooksey v. State*, 524 P.2d 1251 (Alaska, 1974). We explained in *Oveson* that "appeals under the *Cooksey* doctrine will not be approved unless it is clearly shown, and the parties have stipulated with trial court approval, that our resolution of the issue reserved for appeal will be dispositive of the entire case." *Oveson v. Municipality of Anchorage*, *supra*. However, the *Oveson* clarification of the *Cooksey* criteria expressly was given only prospective effect. Because Meade and W'rz pled and appealed prior to our decision in *Oveson v. Municipality of Anchorage*, *supra*, we have treated their appeals as if taken properly under the *Cooksey-Oveson* doctrine.

4. In *Puller*, we were confronted with the issue of whether the prosecution could make evidentiary use of the defendant's refusal to submit to a breathalyzer test. We answered the question in the negative, relying primarily on the provisions of AS 28.35.032(a) and noting that the required warning does not advise the arrestee that refusal to take the breathalyzer test will result in the admissibility of that fact on the issue of guilt in an OMV prosecution.

More specifically, we concluded that the enumeration of certain consequences in AS 28.35.-

A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a chemical test or tests of his breath for the purpose of determining the alcoholic content of his blood if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle in this state while under the influence of intoxicating liquor.

Of further significance to the resolution of the question presented in this appeal is AS 28.35.032(a) which provides:

If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath as provided in [AS 28.35.031], after being advised by the officer that his refusal will result in the suspension, denial or revocation of his license, a chemical test shall not be given.⁵

032, i. e., suspension or revocation of license and the requirement that such consequences be included in a warning preclude the imposition of additional consequences. "The admissibility of evidence of the fact of refusal would constitute such an additional consequence." *Puller v. Municipality of Anchorage*, 574 P.2d at 1287 (Alaska, 1978). In the *Puller* opinion, we distinguished an aspect of *State v. Parker*, 16 Wash.App. 632, 558 P.2d 1361, 1363 (1976) (holding that in light of Washington's statutory right of refusal to submit to a chemical breath test, the defendant's refusal to take a breathalyzer test is not admissible on the issue of guilt in a subsequent prosecution for driving while intoxicated), and explained, "[W]e find it unnecessary to condition inadmissibility on the existence of '[a right of refusal]'" *Puller v. Municipality of Anchorage*, *supra*, at 1288 n. 19.

5. Subsections (b) and (d) of AS 28.35.032 further provide:

(b) Upon receipt of a sworn report of a law enforcement officer that a person has refused to submit to a chemical test authorized under [AS 28.35.031], containing a statement of the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was operating a motor vehicle in