

ALASKA LEGISLATIVE COMMITTEE REPORTS 1902

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Original sponsor: State Affairs Committee  
by request

Offered:  
Referred: Judiciary

IN THE HOUSE

BY THE STATE AFFAIRS COMMITTEE

CS FOR CS FOR HOUSE BILL NO. 546 (State Affairs)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to state contracts for professional services and establishing a penalty for violation of provisions of law relating to professional service contracts; and providing for an effective date."

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

\* Section 1. AS 19.10.170(a) is amended to read:

(a) Except as provided in AS 36.98 and AS 44.33.300, it shall be the general policy of the department to require the construction of all highways under bid contract. However, subject to the provisions of (b) of this section, when the estimated cost of a construction project is less than \$100,000 or when it appears to be in the best interests of the state, the department may perform the work notwithstanding any other provisions of law.

\* Sec. 2. AS 35.15.010(a) is amended to read:

(a) Except as provided in AS 36.98 and AS 44.33.300, it shall be the general policy of the department to require the construction of all public works under bid contract. However, when the estimated cost of a construction project is less than \$100,000, or when it appears to be in the best interests of the state, the department may perform the work,

notwithstanding any other provisions of law. A complete record shall be kept by the commissioner or his designee of all transactions entered into under this section including names of employees involved in the transactions.

\* Sec. 3. AS 36 is amended by adding a new chapter to read:

CHAPTER 98. PROFESSIONAL SERVICES CONTRACTS.

Sec. 36.98.010. APPLICATION. (a) Except as provided in AS 36.96.080, this chapter applies to contracts for professional services provided to a state agency unless

- (1) the total amount of a contract does not exceed \$5,000;
- (2) the contract is an employment contract for services to be performed under direct supervision regardless of the existence of an employer-employee relationship and a written justification signed by the person responsible for awarding the contract is filed with the commissioner;
- (3) the contract is for construction, repair, or maintenance of a public work and the total amount of a contract does not exceed \$50,000;
- (4) the contract is awarded based on competitive bids obtained under the procedure provided in AS 37.05.230.

(b) The commissioner may by regulation adjust the dollar limitations set out in (a) of this section to reflect changes in the consumer price index for Anchorage since July 1, 1982. However, the commissioner may not make this adjustment more frequently than every other year.

Sec. 36.98.020. PROFESSIONAL SERVICES CONTRACTORS REGISTER. The commissioner shall establish and maintain a register of all persons or firms interested in providing professional services to the state.

Sec. 36.98.030. SOLICITATION OF SERVICES. (a) When a state agency proposes to enter into a contract for professional services estimated to

exceed \$5,000, the agency may give public notice by publication in a newspaper calculated to reach prospective contractors. The department shall also send notices by mail to all active prospective contractors on the Professional Services Contractors Register.

The notice shall include

(1) a general description of the proposed project for which the agency is seeking professional services; and

(2) the procedure by which a person or firm interested in the professional services contract may make its proposal to the agency for consideration for the contract.

(b) The notice of requests for proposals must be extended to a sufficient number of prospective providers of the required services to assure that public interest in competition is adequately served. Proposals from at least six persons or firms shall be solicited for contracts estimated to exceed \$5,000.

(c) The provisions of this section do not apply if

(1) the contracting agency demonstrates that there is a single source of the expertise or knowledge required or that one person or firm can clearly perform the required tasks more satisfactorily because of the person's or firm's prior work; however, this exemption applies only when the head of the state agency has submitted a written request to the commissioner that details the reasons for the exemption and the commissioner or his designee has authorized the state agency to enter contract negotiations with the single source;

(2) the commissioner determines that public necessity will not permit delay incident to the procedures otherwise required by this chapter; or

(3) the service is to be provided by another state agency, a federal agency, the University of Alaska, or a political subdivision of the state.

(e) A request for proposals must contain a description of the work to be performed under the contract and the terms under which the work is to be performed. A request for proposals must contain that information necessary for a prospective contractor to submit a response or contain references to any information that cannot reasonably be included with the request. The request for proposals must provide a description of the factors that will be considered by the state agency when it evaluates the proposals received.

(f) Nothing in this section limits the authority of an agency to use additional means that it may consider appropriate to notify prospective contractors that it proposes to enter into a contract for professional services.

Sec. 36.98.040. AWARD OF CONTRACT. (a) After the responses are submitted, the state agency shall evaluate them. The evaluation shall consist of assigning point values to factors considered by the agency in evaluating each proposal. All proposals received must be evaluated using the same factors as those set out in the request for proposal.

(b) The contract must be executed by the contractor and the project director for the contracting agency and be approved by the head of the contracting agency or his designee. If a contract is made by a board or commission, execution of the contract on behalf of the board or commission must be authorized by the board or commission.

(c) A contract subject to this chapter must be submitted to the commissioner for review and approval and, if approved, is effective from

the date of the approval. A state agency must clearly provide in the request for proposal that the state is not obligated to perform under the contract until the approval required by this subsection is granted.

(d) A contract awarded under this chapter shall contain:

- (1) the amount of the contract stated on its first page;
- (2) the date for the work to begin;
- (3) the date by which the work must be completed; and
- (4) a certification under penalty of perjury by the project director for the contracting agency, the head of the contracting agency, or his designee that sufficient funds are available in an appropriation to be encumbered for the amount of the contract.

(e) If the contract contains terms that are not provided in a state standard form contract or if the standard terms are deleted or modified by other terms that are not standard, the contract must be reviewed by the Department of Law and approved as to form. The review and approval required by this subsection must be completed before award of the contract to the successful contractor.

Sec. 36.98.050. CONTRACT ADMINISTRATION. (a) When a state agency has entered into a professional services contract, the agency is responsible for the diligent administration and monitoring of the performance of the provisions of the contract.

(b) When a professional services contract has been completed, the state agency shall evaluate the performance of the contractor under the contract and shall report on and evaluate the use of the final product of the professional services contract. A copy of the report and evaluation prepared under this subsection shall be transmitted to the commissioner

and shall be retained by the commissioner for as long as he is required to maintain copies of completed contracts.

Sec. 36.98.060. FILING. A copy of each contract and the response to the request for proposal in which the contract was awarded must be filed with both the department and the contracting agency and is open for public inspection. The request for proposal and the name and address of each person who submitted a response to it must also accompany the filed copies.

Sec. 36.98.070. CONTRACT PROCEDURES. The commissioner shall, by regulation adopted in accordance with the Administrative Procedure Act (AS 44.62), establish the manner and form by which state professional services contracts shall be prepared and processed, including, but not limited to, a review process for persons aggrieved under this chapter.

Sec. 36.98.080. CONTRACTS FOR ARCHITECTURAL, ENGINEERING, AND LAND SURVEYING SERVICES. (a) The state shall select persons or firms and award contracts for the performance of architectural, engineering, or land surveying services on the basis of competence and qualification for the type of professional services required. The amount of the contract shall be determined by negotiation for those services at fair and reasonable prices or by the competitive bidding procedures provided under AS 37.05.230. Before negotiations or competitive bidding procedures under this section, the state may not request or consider any statement, bid or estimate of fees or charges for architectural, engineering, or land surveying services for the proposed project or request any other submission or action that would violate AS 08.48 or a regulation adopted under AS 08.48.

(b) In awarding a contract by negotiation for the services of an architect, engineer, or land surveyor registered under AS 08.48, the

state shall negotiate with the three best qualified persons or firms to perform the desired work on the basis of competence and professional qualifications. The state may reject all or part of a proposal.

(c) The provisions of AS 36.98.040(a) do not apply to contracts awarded under this section.

(d) This section does not apply to a contract for the performance of architectural, engineering, or land surveying services if the commissioner determines that public necessity will not permit delay incident to the procedures otherwise required by this section.

Sec. 35.98.090. DEFINITIONS. In this chapter

(1) "commissioner" means the commissioner of administration; however, in the case of contracts issued by the Department of Transportation and Public Facilities, it means the commissioner of transportation and public facilities;

(2) "professional services contract" means a contract for professional, technical, or consultant's services that are predominantly intellectual in character and that

(A) include analysis, evaluation, prediction, planning, or recommendation; and

(B) result in the production of a report or the completion of a task;

(3) "public necessity" means an urgent public need that could not have been anticipated or foreseen; the term also includes emergency situations when work is necessary to protect life or property;

(4) "request for proposals" means a written solicitation for contract proposals by prospective contractors that sets out the nature of the services to be performed or product to be secured with sufficient

information for a qualified prospective contractor to prepare a contract proposal for consideration and evaluation by the state agency;

(5) "state agency" means a department, institution, board, commission, division, or other administrative unit of the executive branch of state government, and the University of Alaska.

\* Sec. 4. AS 37.05.230 is amended by adding a new paragraph to read:

(9) requests for and acceptance of bids or other proposals for professional services shall comply with AS 36.98.

\* Sec. 5. AS 37.05.240 is amended by adding a new subsection to read:

(b) A contract for professional services shall be awarded in accordance with AS 36.98.

\* Sec. 6. This Act applies to requests for bids or proposals for professional services issued after the effective date of this Act.

\* Sec. 7. This Act takes effect July 1, 1982.

Original sponsor: State Affairs Committee  
by request

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 546 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

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12 highways under bid contract. However, subject to the provisions of (b)  
13 of this section, when the estimated cost of a construction project is  
14 less than \$100,000 or when it appears to be in the best interests of the  
15 state, the department may perform the work notwithstanding any other  
16 provisions of law.

17 \* Sec. 2. AS 35.15.010(a) is amended to read:

18 (a) Except as provided in AS 36.98 and AS 44.33.300, it shall be  
19 the general policy of the department to require the construction of all  
20 public works under bid contract. However, when the estimated cost of a  
21 construction project is less than \$100,000, or when it appears to be in  
22 the best interests of the state, the department may perform the work,  
23 notwithstanding any other provisions of law. A complete record shall be  
24 kept by the commissioner or his designee of all transactions entered  
25 into under this section including names of employees involved in the  
26 transactions.

27 \* Sec. 3. AS 36 is amended by adding a new chapter to read:

28 CHAPTER 98. PROFESSIONAL SERVICES CONTRACTS.

29 Sec. 36.98.010. APPLICATION. Except as provided in AS 36.98.080,

1 this chapter applies to contracts for professional services provided to  
2 a state agency unless

3 (1) the total amount of a contract does not exceed \$ 5000 ;

4 (2) the contract is an employment contract for services to be  
5 performed under direct supervision regardless of the existence of an  
6 employer-employee relationship and a written justification signed by the  
7 person responsible for awarding the contract is filed with the commis-  
8 sioner;

9 (3) the contract is for construction, repair, or maintenance  
10 of a public work and the total amount of a contract does not exceed  
11 \$            ;

12 (4) the contract is awarded based on competitive bids ob-  
13 tained under the procedure provided in AS 37.05.230.

14 Sec. 36.98.020. PROFESSIONAL SERVICES CONTRACTORS REGISTER. (a)  
15 A person or firm who desires to provide professional services to a state  
16 agency shall submit to the commissioner a statement of qualifications  
17 and performance data, and any other information that the commissioner,  
18 by regulation, may require.

19 (b) The commissioner may at any time require the person or firm to  
20 revise the statement of qualifications and performance data or any other  
21 information submitted by the person or firm if the commissioner believes  
22 that the credentials or record of experience of the person have materi-  
23 ally changed since the last filing by the person or firm.

24 Sec. 36.98.030. SOLICITATION OF SERVICES. (a) When a state  
25 agency proposes to enter into a contract for professional services, the  
26 agency shall give public notice soliciting proposals for the profes-  
27 sional services contract by publication at least three times in one or  
28 more newspapers in general circulation in the state. The first notice  
29 shall be published not less than 30 days before the date on which the

1 agency expects to enter into the contract and each subsequent notice  
2 shall be published at intervals of no more than three days thereafter.

3 The notice shall include

4 (1) a general description of the proposed project for which  
5 the agency is seeking professional services; and

6 (2) the procedure by which a person or firm interested in the  
7 professional services contract may make its proposal to the agency for  
8 consideration for the contract.

9 (b) In addition to complying with the publication requirements of  
10 (a) of this section, when a state agency proposes to enter into a con-  
11 tract for professional services it shall

12 (1) review the register of professional services contractors  
13 maintained by the commissioner under AS 36.98.020; and

14 (2) provide a request for proposals for the proposed profes-  
15 sional services contract to each prospective contractor who, after  
16 review of the register of professional services contractors under (1) of  
17 this subsection, the agency finds is qualified for consideration for the  
18 contract.

19 (c) A request for proposals must be extended to a sufficient  
20 number of prospective providers of the required services to assure that  
21 public interest in competition is adequately served. Proposals from at  
22 least six persons or firms shall be solicited for contracts equal to or  
23 greater than \$100,000 if the expertise required is available. Proposals  
24 from at least three persons or firms shall be solicited for contracts of  
25 less than \$100,000 if the expertise required is available. If the exper-  
26 tise required is not available to enable an agency to solicit the number  
27 of proposals otherwise required under this subsection, the agency shall

28 (1) solicit proposals from each person or firm listed on the  
29 professional services contractors register maintained under AS 36.98.020

1 who appears to possess the required expertise;

2 (2) publish notice soliciting proposals as required under (a)  
3 of this section; and

4 (3) solicit proposals from each other person or firm possess-  
5 ing the required expertise of which the agency is aware.

6 (d) The provisions of this section do not apply if

7 (1) the contracting agency demonstrates that there is a  
8 <sup>Single-source</sup> ~~single~~ source of the expertise or knowledge required or that one person  
9 or firm can clearly perform the required tasks more satisfactorily  
10 because of the person's [or firm's prior work] and the head of the state  
11 agency submits a written request to the commissioner of administration  
12 detailing the reasons for an exemption and the commissioner of adminis-  
13 tration or his designee authorizes the state agency to enter contract  
14 negotiations with the single source; ~~however, if a single source~~  
15 ~~contract is to be with the Department of Administration, the commis-~~  
16 ~~sioner of administration shall submit the detailed written request to~~  
17 ~~\_\_\_\_\_ for authorization; ]~~

18 (2) the commissioner determines that public necessity will  
19 not permit delay incident to the procedures otherwise required by this  
20 chapter; or

21 (3) the service is to be provided by another state agency, a  
22 federal agency, the University of Alaska, or a political subdivision of  
23 the state.

24 (e) A request for proposals must contain a description of the work  
25 to be performed under the contract and the terms under which the work is  
26 to be performed. A request for proposals must contain that information  
27 necessary for a prospective contractor to submit a response or contain  
28 references to any information that cannot reasonably be included with  
29 the request. The request for proposals must provide a description of

1 the factors that will be considered by the state agency when it evaluates  
2 the proposals received.

3 (f) Nothing in this section limits the authority of an agency to  
4 use additional means that it may consider appropriate to notify prospec-  
5 tive contractors that it proposes to enter into a contract for profes-  
6 sional services.

7 Sec. 36.98.040. AWARD OF CONTRACT. (a) After the responses are  
8 submitted, the state agency shall evaluate them. The evaluation shall  
9 consist of assigning point values to factors considered by the agency in  
10 evaluating each proposal. All proposals received must be evaluated  
11 using the same factors as those set out in the request for proposal.

12 (b) The contract must be executed by the contractor and the pro-  
13 ject director for the contracting agency and be approved by the head of  
14 the contracting agency or his designee. If a contract is made by a  
15 board or commission, execution of the contract on behalf of the board or  
16 commission must be authorized by the board or commission.

17 (c) A contract subject to this chapter must be submitted to the  
18 commissioner for review and approval and, if approved, is effective from  
19 the date of the approval. A state agency must clearly provide in the  
20 request for proposal that the state is not obligated to perform under  
21 the contract until the approval required by this subsection is granted.

22 (d) A contract awarded under this chapter shall contain:  
23 (1) the amount of the contract stated on its first page;  
24 (2) the date for the work to begin;  
25 (3) the date by which the work must be completed; and  
26 (4) a certification under penalty of perjury by the project  
27 director for the contracting agency, the head of the contracting agency,  
28 or his designee that sufficient funds are available in an appropriation  
29 to be encumbered for the amount of the contract.

1 (e) If the contract contains terms that are not provided in a  
2 state standard form contract or if the standard terms are deleted or  
3 modified by other terms that are not standard, the contract must be  
4 reviewed by the Department of Law and approved as to form. The review  
5 and approval required by this subsection must be completed before award  
6 of the contract to the successful contractor.

7 Sec. 36.98.050. CONTRACT ADMINISTRATION. (a) When a state agency  
8 has entered into a professional services contract, the agency is respon-  
9 sible for the diligent administration and monitoring of the performance  
10 of the provisions of the contract.

11 (b) When a professional services contract has been completed, the  
12 state agency shall evaluate the performance of the contractor under the  
13 contract and shall report on and evaluate the use of the final product  
14 of the professional services contract. A copy of the report and evalua-  
15 tion prepared under this subsection shall be transmitted to the commis-  
16 sioner and shall be retained by the commissioner for as long as he is  
17 required to maintain copies of completed contracts.

18 Sec. 36.98.060. FILING. A copy of each contract and the response  
19 to the request for proposal upon which the contract was awarded must be  
20 filed with both the Department of Administration and the contracting  
21 agency and is open for public inspection. The request for proposal and  
22 the name and address of each person who submitted a response to it must  
23 also accompany the filed copies.

24 *Needs* Sec. 36.98.070. CONTRACT PROCEDURES. The commissioner shall, by  
25 *Review Process Charwick* regulation adopted in accordance with the Administrative Procedure Act  
26 *Harley* (AS 44.62), establish the manner and form by which state professional  
27 services contracts shall be prepared and processed, including, but not  
28 limited to, a review process for persons aggrieved under this chapter.

29 Sec. 36.98.080. CONTRACTS FOR ARCHITECTURAL, ENGINEERING, AND LAND

1 SURVEYING SERVICES. (a) A state agency or local government shall  
2 select persons or firms for the performance of architectural, engineer-  
3 ing, or land <sup>Registered</sup> surveying services and award contracts for those services  
4 on the basis of competence and qualification for the type of professional  
5 services required.

6 (b) The state agency or local government shall attempt to nego-  
7 tiate a contract for the services with the best qualified person or firm  
8 at a price that is fair and reasonable.

9 (c) Before selection of and negotiation with the best qualified  
10 person or firm, a state agency or local government may not request or  
11 consider a statement, bid, or estimate of fees, hourly charges, estimated  
12 hours of professional time, or other estimate of charges for archi-  
13 tectural, engineering, or land surveying services for the proposed  
14 project or request any other submission or action that would constitute  
15 a violation of AS 08.48 or a regulation adopted under AS 08.48. A  
16 request for proposals or other solicitation for services of an architect,  
17 engineer, or land surveyor issued by a state agency or local government  
18 may not contain a requirement or request for a statement, bid, estimate,  
19 or other information concerning fees or charges prohibited under this  
20 section.

21 (d) This section does not require a particular procedure for the  
22 selection of architects, engineers, or land surveyors or for the award  
23 of contracts except as provided in (b) and (c) of this section. A state  
24 agency or local government may rank proposals or offers received.

25 (e) The provisions of AS 36.98.040(a) do not apply to contracts  
26 awarded under this section.

27 (f) This section does not apply to a contract for the performance  
28 of architectural, engineering, or land surveying services if the commis-  
29 sioner determines that public necessity will not permit delay incident

1 to the procedures otherwise required by this section.

2 Sec. 36.98.090. DEFINITIONS. In this chapter

3 (1) "architectural, engineering, or land surveying services"  
4 means professional services involving the practice of architecture,  
5 engineering, or land surveying as defined under AS 08.48.341;

6 (2) "commissioner" means the commissioner of administration,  
7 however, in the case of contracts issued by the Department of Transpor-  
8 tation and Public Facilities, it means the commissioner of transporta-  
9 tion and public facilities;

10 (3) "local government" means a department, institution,  
11 board, commission, division, or other unit of a borough, city, unified  
12 municipality, or school district;

13 (4) "professional services contract" means a contract for  
14 professional, technical, or consultant's services that are predominantly  
15 intellectual in character and that

16 (A) include analysis, evaluation, prediction, planning,  
17 or recommendation; and

18 (B) result in the production of a report or the comple-  
19 tion of a task;

20 (5) "public necessity" means an urgent public need that could  
21 not have been anticipated or foreseen; the term also includes emergency  
22 situations when work is necessary to protect life or property;

23 (6) "request for proposals" means a written solicitation for  
24 contract proposals by prospective contractors that sets out the nature  
25 of the services to be performed or product to be secured with sufficient  
26 information for a qualified prospective contractor to prepare a contract  
27 proposal for consideration and evaluation by the state agency;

28 (7) "state agency" means a department, institution, board,  
29 commission, division, or other administrative unit of the executive or

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1 judicial branch of state government, and the University of Alaska.

2 \* Sec. 4. AS 37.05.230 is amended by adding a new paragraph to read:

3 (9) requests for and acceptance of bids or other proposals  
4 for professional services shall comply with AS 36.98.

5 \* Sec. 5. AS 37.05.240 is amended by adding a new subsection to read:

6 (b) A contract for professional services shall be awarded in  
7 accordance with AS 36.98.

8 \* Sec. 6. This Act applies to requests for bids or proposals for profes-  
9 sional services issued after the effective date of this Act.

10 \* Sec. 7. This Act takes effect July 1, 1982.

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2 CS FOR HOUSE BILL NO. 546 (Judiciary)  
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4 TWELFTH LEGISLATURE - SECOND SESSION  
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6 For an Act entitled: "An Act relating to state contracts for professional  
7 services and establishing a <sup>Non-punalty law</sup> penalty for violation of  
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13 the general policy of the department to require the construction of all  
14 highways under bid contract. However, subject to the provisions of (b)  
15 of this section, when the estimated cost of a construction project is  
16 less than ~~\$100,000~~ or when it appears to be in the best interests of the  
17 state, the department may perform the work notwithstanding any other  
18 provisions of law.

19 \* Sec. 2. AS 35.15.010(a) is amended to read:

20 (a) Except as provided in AS 36.98 and AS 44.33.300, it shall be  
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22 public works under bid contract. However, when the estimated cost of a  
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24 the best interests of the state, the department may perform the work,  
25 notwithstanding any other provisions of law. A complete record shall be  
26 kept by the commissioner or his designee of all transactions entered  
27 into under this section including names of employees involved in the  
28 transactions.

29 \* Sec. 3. AS 36 is amended by adding a new chapter to read:

- 1. Residency Requirements
- 2. Minority Business
- 3. How many jobs with state.
- 4. Price as a factor.

1 CHAPTER 98. PROFESSIONAL SERVICES CONTRACTS.

2 Sec. 36.98.010. APPLICATION. (a) Except as provided in AS 36.98.-  
3 080, this chapter applies to contracts for professional services provided  
4 to a state agency unless

5 (1) the total amount of a contract does not exceed \$25,000;

6 (2) the contract is an employment contract for services to be  
7 performed under direct supervision regardless of the existence of an  
8 employer-employee relationship and a written justification signed by the  
9 person responsible for awarding the contract is filed with the commis-  
10 sioner;

11 (3) the contract is for construction, repair, or maintenance  
12 of a public work and the total amount of a contract does not exceed  
13 \$50,000;

14 (4) the contract is awarded based on competitive bids ob-  
15 tained under the procedure provided in AS 37.05.230.

16 Legislation? (b) The commissioner may by regulation adjust the dollar limita-  
17 Function tions set out in (a) of this section to reflect changes in the consumer  
18 price index for Anchorage since July 1, 1982. However, the commissioner  
19 may not make this adjustment more frequently than every other year.

20 Sec. 36.98.020. PROFESSIONAL SERVICES CONTRACTORS REGISTER. (a)  
21 A person or firm who desires to provide professional services to a state  
22 (may) -> AS's office agency shall submit to the commissioner a statement of qualifications  
23 and performance data, and any other information that the commissioner,  
24 by regulation, may require.

25 (b) The commissioner may at any time require the person or firm to  
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27 information submitted by the person or firm if the commissioner believes  
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18           (1) review the register of professional services contractors  
19 maintained by the commissioner under AS 36.98.020; and

20           (2) provide a request for proposals for the proposed profes-  
21 sional services contract to each prospective contractor who, after  
22 review of the register of professional services contractors under (1) of  
23 this subsection, the agency finds is qualified for consideration for the  
24 contract.

25           (c) A request for proposals must be extended to a sufficient  
26 number of prospective providers of the required services to assure that  
27 public interest in competition is adequately served. Proposals from at  
28 least six persons or firms shall be solicited for contracts equal to or  
29 greater than \$100,000 if the expertise required is available. Proposals

1 from at least three persons or firms shall be solicited for contracts of  
2 less than \$100,000 if the expertise required is available. If the exper-  
3 tise required is not available to enable an agency to solicit the number  
4 of proposals otherwise required under this subsection, the agency shall

5 (1) solicit proposals from each person or firm listed on the  
6 professional services contractors register maintained under AS 36.98.020  
7 who appears to possess the required expertise;

8 (2) publish notice soliciting proposals as required under (a)  
9 of this section; and

10 (3) solicit proposals from each other person or firm possess-  
11 ing the required expertise of which the agency is aware.

12 (d) The provisions of this section do not apply if

13 *Single source* (1) the contracting agency demonstrates that there is a  
14 *or* *single source* single source of the expertise or knowledge <sup>required</sup> *Frank Flaw* or that one person  
15 or firm can clearly perform the required tasks more satisfactorily  
16 because of the person's <sup>Frank Flaw</sup> ~~or firm's prior work;~~ however, this exemption  
17 applies only when the head of the state agency has submitted a written  
18 request to the commissioner that details the reasons for the exemption  
19 and the commissioner or his designee has authorized the state agency to  
20 enter contract negotiations with the single source;

21 (2) the commissioner determines that public necessity will  
22 not permit delay incident to the procedures otherwise required by this  
23 chapter; or

24 (3) the service is to be provided by another state agency, a  
25 federal agency, the University of Alaska, or a political subdivision of  
26 the state.

27 (e) A request for proposals must contain a description of the work  
28 to be performed under the contract and the terms under which the work is  
29 to be performed. A request for proposals must contain that information

1 necessary for a prospective contractor to submit a response or contain  
2 references to any information that cannot reasonably be included with  
3 the request. The request for proposals must provide a description of  
4 the factors that will be considered by the state agency when it evaluates  
5 the proposals received.

6 (f) Nothing in this section limits the authority of an agency to  
7 use additional means that it may consider appropriate to notify prospec-  
8 tive contractors that it proposes to enter into a contract for profes-  
9 sional services.

10 Sec. 36.98.040. AWARD OF CONTRACT. (a) After the responses are  
11 submitted, the state agency shall evaluate them. The evaluation shall  
12 consist of assigning point values to factors considered by the agency in  
13 evaluating each proposal. All proposals received must be evaluated  
14 using the same factors as those set out in the request for proposal.

15 (b) The contract must be executed by the contractor and the pro-  
16 ject director for the contracting agency and be approved by the head of  
17 the contracting agency, or his designee. If a contract is made by a  
18 board or commission, execution of the contract on behalf of the board or  
19 commission must be authorized by the board or commission.

20 (c) A contract subject to this chapter must be submitted to the  
21 commissioner for review and approval and, if approved, is effective from  
22 the date of the approval. A state agency must clearly provide in the  
23 request for proposal that the state is not obligated to perform under  
24 the contract until the approval required by this subsection is granted.

25 (d) A contract awarded under this chapter shall contain:

- 26 (1) the amount of the contract stated on its first page;  
27 (2) the date for the work to begin;  
28 (3) the date by which the work must be completed; and  
29 (4) a certification under penalty of perjury by the project

1 director for the contracting agency, the head of the contracting agency,  
2 or his designee that sufficient funds are available in an appropriation  
3 to be encumbered for the amount of the contract.

4 (e) If the contract contains terms that are not provided in a  
5 state standard form contract or if the standard terms are deleted or  
6 modified by other terms that are not standard, the contract must be  
7 reviewed by the Department of Law and approved as to form. The review  
8 and approval required by this subsection must be completed before award  
9 of the contract to the successful contractor.

10 Sec. 36.98.050. CONTRACT ADMINISTRATION. (a) When a state agency  
11 has entered into a professional services contract, the agency is respon-  
12 sible for the diligent administration and monitoring of the performance  
13 of the provisions of the contract.

14 (b) When a professional services contract has been completed, the  
15 state agency shall evaluate the performance of the contractor under the  
16 contract and shall report on and evaluate the use of the final product  
17 of the professional services contract. A copy of the report and evalua-  
18 tion prepared under this subsection shall be transmitted to the commis-  
19 sioner and shall be retained by the commissioner for as long as he is  
20 required to maintain copies of completed contracts.

21 Sec. 36.98.060. FILING. A copy of each contract and the response  
22 to the request for proposal upon which the contract was awarded must be  
23 filed with both the Department of Administration and the contracting  
24 agency and is open for public inspection. The request for proposal and  
25 the name and address of each person who submitted a response to it must  
26 also accompany the filed copies.

27 *Needs reviews process Jack Chenswell*  
28 Sec. 36.98.070. CONTRACT PROCEDURES. The commissioner shall, by  
29 regulation adopted in accordance with the Administrative Procedure Act  
(AS 44.62), establish the manner and form by which state professional

CPA  
Deer  
Lawyer's

1 services contracts shall be prepared and processed, including, but not  
2 limited to, a review process for persons aggrieved under this chapter.

Concern →

3 Sec. 36.98.080. CONTRACTS FOR ARCHITECTURAL, ENGINEERING, AND LAND  
4 SURVEYING SERVICES. (a) A state agency shall select persons or firms

5 for the performanc of architectural, engineering, or land surveying

6 services and award contracts for those services only on the basis of  
7 demonstrated competence and qualification for the type of professional  
8 services required.

Grandfather rights? Strike these words Neil - Philip - Munro

9 (b) The state agency shall attempt to negotiate a contract for the  
10 services with the best qualified person or firm at a price that is fair  
11 and reasonable.

12 (c) Before selection of and negotiation with the best qualified  
13 person or firm, a state agency may not request or consider a statement,  
14 bid, or estimate of fees, hourly charges, estimated hours of professional  
15 time, or other estimate of charges for architectural, engineering, or  
16 land surveying services for the proposed project or request any other  
17 submission or action that would constitute a violation of AS 08.48 or a  
18 regulation adopted under AS 08.48. A request for proposals or other  
19 solicitation for services of an architect, engineer, or land surveyor  
20 issued by a state agency may not contain a requirement or request for a  
21 statement, bid, estimate, or other information concerning fees or charges  
22 prohibited under this section.

23 (d) This section does not require a particular procedure for the  
24 selection of architects, engineers, or land surveyors or for the award  
25 of contracts except as provided in (b) and (c) of this section. A state  
26 agency may rank proposals or offers received.

27 (e) The provisions of AS 36.98.040(a) do not apply to contracts  
28 awarded under this section.

29 (f) This section does not apply to a contract for the performance

1 of architectural, engineering, or land surveying services if the commis-  
2 sioner determines that public necessity will not permit delay incident  
3 to the procedures otherwise required by this section.

4 Sec. 36.98.090. DEFINITIONS. In this chapter

5 (1) "architectural, engineering, or land surveying services"  
6 means professional services involving the practice of architecture,  
7 engineering, or land surveying as defined under AS 08.48.341;

8 (2) "commissioner" means the commissioner of administration;  
9 however, in the case of contracts issued by the Department of Transpor-  
10 tation and Public Facilities, it means the commissioner of transporta-  
11 tion and public facilities;

12 (3) "professional services contract" means a contract for  
13 professional, technical, or consultant's services that are predominantly  
14 intellectual in character and that

15 (A) include analysis, evaluation, prediction, planning,  
16 or recommendation; and

17 (B) result in the production of a report or the comple-  
18 tion of a task;

19 (4) "public necessity" means an urgent public need that could  
20 not have been anticipated or foreseen; the term also includes emergency  
21 situations when work is necessary to protect life or property;

22 (5) "request for proposals" means a written solicitation for  
23 contract proposals by prospective contractors that sets out the nature  
24 of the services to be performed or product to be secured with sufficient  
25 information for a qualified prospective contractor to prepare a contract  
26 proposal for consideration and evaluation by the state agency;

27 (6) "state agency" means a department, institution, board,  
28 commission, division, or other administrative unit of the state, or of a  
29 borough, city, unified municipality or school district, and the Univer-

*executive branch  
left out*

*4 JA. REAA*

*copy  
Dady*

1       sity of Alaska.

2       \* Sec. 4. AS 37.05.230 is amended by adding a new paragraph to read:

3               (9) requests for and acceptance of bids or other proposals  
4       for professional services shall comply with AS 36.98.

5       \* Sec. 5. AS 37.05.240 is amended by adding a new subsection to read:

6               (b) A contract for professional services shall be awarded in  
7       accordance with AS 36.98.

8       \* Sec. 6. This Act applies to requests for bids or proposals for profes-  
9       sional services issued after the effective date of this Act.

10       \* Sec. 7. This Act takes effect July 1, 1982.



## THE CITY AND BOROUGH OF JUNEAU

CAPITAL OF ALASKA

155 SOUTH SEWARD ST. JUNEAU, ALASKA 99801

LAW DEPARTMENT (907) 586-3300

April 2, 1982

House Judiciary Committee  
Capitol Building, Room 122  
Juneau, Alaska 99811

FILE: House Bill 546

Ladies and Gentlemen:

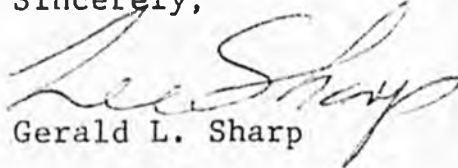
I have just reviewed the 4-1-82 proposed House Judiciary Committee Substitute for CSHB 546. One of the proposed changes is to include local government units under the new restrictive procedures for awarding certain professional services contracts. These procedures appear on page 7 of the proposed judiciary substitute. Under the procedure outlined, contracts for architectural, engineering, and land surveying services would be awarded solely on the basis of competence and the qualifications of the person rendering the service. The cost of the services may not be considered. This will put the State and municipalities at the mercy of the above group of professionals. Having selected the best qualified professional, the municipality is in little position to negotiate over fees. The professional retained may name his or her price, as price is not a consideration in awarding the contract. It appears that the public interest in spending the fewest dollars necessary to accomplish a public project has been totally overlooked in this procedure. In fact, the procedure will undoubtedly result in insuring that, on the average, a higher price than necessary will be paid. Contracts under this procedure will be awarded to those with the best qualifications and greatest experience. More often than not, people with the greatest experience and qualifications command a higher price than others who are qualified to do the work but lack the years of experience or extensive background of others. If six architects or engineers request to be considered for a project, and all are qualified both by experience, education, and licensing to accomplish a project, why must the municipality award the contract to the one who is best qualified who probably charges the highest price? Having found six professionals who can accomplish the project, why may a municipality not then sit down and determine which of the six can accomplish the project for the least cost to the public? Why may we not negotiate with the professional who has submitted the proposal containing the best solution for the project? The procedure proposed

House Judiciary Committee  
April 2, 1982  
Page Two

appears to be one which works more to the benefit of architects and engineers than it does to the benefit of the public.

While there seems to be a very legitimate question as to why the State should adopt such a policy for itself, it is certainly one which we must oppose if it is to be applied to municipalities. We urge you to delete all references to local government in the proposed Judiciary Committee substitute.

Sincerely,



Gerald L. Sharp

GLS:phl

cc: Ginny Chitwood  
Executive Director, AML  
Mayor W. D. Overstreet  
Assemblyman Wakefield  
Assemblyman Aase

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CSHB 546

Title "An Act relating to state contracts for professional services and

Requested by Repr. Barnes, House Judiciary Date March 21, 1982

establishing penalties....and providing for an effective date."

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.						
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

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 clarifies and improves the state's procurement practices for professional services. The current bill (offered 3/5/82) provides departments with the flexibility to meet exigent circumstances while, at the same time, assuring that the public interest in competition is properly served. Although some slight expense will be incurred in complying with the bill, no additional resources will be required to carryout its provisions.

*Richard I. Pegues*

IV. DATE March 24, 1982

PREPARED BY Richard I. Pegues, Director, Admin. Svcs.

AGENCY Department of Law

Original: Legislative Finance

PHONE 465-3672

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. CS HB 546  
 Title An Act Relating to State Contracts for Professional Services  
 Requested by House State Affairs Date 3/5/82

II. FISCAL DETAIL

Agency Affected Administration  
 Program Category Affected Centralized Administration  
 BRU, Program, Or Subprogram(s) Affected Accounting  
 (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	67.5	72.9	78.7	84.9	91.6	98.9
200 TRAVEL	-					
300 CONTRACTUAL	238.4	257.4	277.9	300.1	324.1	350.0
400 COMMODITIES	1.5	1.6	1.7	1.3	1.9	2.0
500 EQUIPMENT	12.6	13.6	14.6	15.7	16.9	18.2
600 LANL & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	320.0	345.5	372.9	402.5	434.5	469.1

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	320.0	345.5	372.9	402.5	434.5	469.1
FEDERAL FUNDS	0	0	0	0	0	0
OTHER (Specify Source)	0	0	0	0	0	0

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME	2	2	2	2	2	2
PART TIME						
TEMPORARY						

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

Contractual

Computer Program Development:

Register Development  
 Evaluation System/Form/Tracking System  
 Application form  
 On-line Capabilities 160.0  
 Printing of Labels 4.0  
 Printing of Applications 1.0

IV. DATE March 26, 1982

PREPARED BY George Elgee

AGENCY Administration

Original: Legislative Finance

PHONE 465-2250

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. CS HB 546  
 Title An Act Relating to State Contracts for Professional Services  
 Requested by House State Affairs Date 3/5/82

II. FISCAL DETAIL

Agency Affected All  
 Program Category Affected All  
 BRU, Program, Or Subprogram(s) Affected All  
 (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	250.0	270.0	291.6	314.9	340.1	367.3
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	250.0	270.0	291.6	314.9	340.1	367.3

FUNDING (Thousands of Dollars)

	250.0	270.0	291.6	314.9	340.1	367.3
GENERAL FUND	250.0	270.0	291.6	314.9	340.1	367.3
FEDERAL FUNDS	0	0	0	0	0	0
OTHER (Specify Source)	0	0	0	0	0	0

POSITIONS

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

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

Advertisements:

\$50 per ad) x (3 ads) x (3 papers--Juneau, Anchorage,  
 Fairbanks) x 700 contracts less (\$100,000 spent in FY 81) \$215,000

RFP Printing and Mailing  
 EST based on Multi-page RFP 35,000

\$250,000

IV. DATE March 26, 1982 PREPARED BY George Elgee *Elgee*  
 AGENCY Administration  
 Original: Legislative Finance PHONE 465-2250  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)

Contractual

Procedures:

Training in procuring contracts and operating  
within new regulations

Re-write of Existing Procedures

Administration Code Drafts

Administration Code Public Hearings 60.0

Advertising:

Professional Listing 5.4

Services associated with required positions --  
phone, office space, computer terminal rental, etc. 8.0

\$238.4



## Members

Rep. Barnes, Chairman  
Rep. Anderson, Vice-Chairman  
Rep. Phillips  
Rep. O'Connell  
Rep. Freeman  
Rep. Meekins  
Rep. Buchholdt

POUCH V  
JUNEAU, ALASKA 99811

## House of Representatives

## Committee on Judiciary

P.O. Box 3382  
Anchorage, AK 99510  
(907) 274-1432  
(907) 274-1441  
POUCH V  
JUNEAU, ALASKA 99811

HOUSE  
COMMITTEE MEETING SCHEDULES  
prepared by the Chief Clerk's Office  
FOR THE WEEK OF March 29 - April 2, 1982

HOUSE JUDICIARY COMMITTEE

Meets: Capitol 124, 1:15-3:00 p.m.  
Daily.

Monday, March 29

\*\* SB89 Child Abuse.

HB553 Relating to the criminal laws of state.

Tuesday, March 30

SB545 An Act relating to release after conviction of an offense.

\*\* HB591 Making corrective amendments in the Alaska Statutes as recommended by the revisor of statutes.

Wednesday, March 31

\*\* HJR48 Proposing an amendment to the Constitution of the State of Alaska increasing the size of the legislature.

\*\* HB848 An Act reamending the law relating to the marital deduction in testamentary transfers; and providing for an effective date.

\*\* HB8 An Act providing for the management and control of certain land in the state; and providing for an effective date.

Bills carried over

Thursday, April 1

Hearing Confirmation of Susan Knowles to A.P.U.C.

Friday, April 2

Hearing on Confirmation of Diana Snowden and Carolyn Guess to the A.P.U.C.

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ALASKA LEGAL SERVICES CORPORATION

The Corporation:

Alaska Legal Services Corporation was formed in 1966 as a private, non-profit corporation to provide legal services to the poor. It is governed by a 15 member board of directors in consultation with local client groups.

ALSC operates eleven offices with a combined staff of 40 attorneys, 27 paralegals, and 25 clericals. Offices are located in:

Anchorage	Fairbanks	Kotzebue
Barrow	Juneau	Nome
Bethel	Ketchikan	Unalaska
Dillingham	Kodiak	

ALSC Clients:

Only those persons at or below the federal poverty guideline (adjusted for Alaska) are accepted as clients.

Maximum Income Guidelines

One person . . . . .	\$5900/year
Two persons . . . . .	\$7800/year
Three persons . . . . .	\$9700/year
Four persons . . . . .	\$11600/year
Five persons . . . . .	\$13500/year

Each additional person add \$1900/year.

Over 70% of ALSC clients are Alaska Natives.

Services Provided:

Census figures estimate between 50,000-70,000 Alaskans live in poverty. Although ALSC handles no criminal matters, at the present funding level it is able to provide only "minimum access" to the legal system for those unable to pay. Approximately 6000 cases are open at any given time, for an average caseload of 150 cases per attorney. However, this represents, at best, only one-fourth of the demand for legal services for the poor.

Eighty percent (80%) of the services provided by ALSC are routine matters dealing with divorce, adoption, child custody, landlord-tenant disputes, welfare, unemployment, wills/probate, fishing claims, Native allotments and others. Although a few controversial cases have captured headlines, the bulk of ALSC's services address immediate crises in Alaskans' lives. The success rate of the agency is high. Of the 57 cases which have gone to the Supreme Court, ALSC has won 48; in 39 of these, the court's decision was unanimous.

Funding:

The total ALSC budget for 1981 is \$2.2 million. Approximately 85%, or \$1.9 million, comes from the federal government through grants from the Legal Services Corporation, the CETA program, VISTA, and the Community Food and Nutrition Project.

ALSC also received approximately \$300,000 from the State of Alaska, administered by the Dept. of Community and Regional Affairs.

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STATE OF ALASKA  
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 31, 1982

SUBJECT: Amendment of Rules of Court in relation to  
CSHB 553

TO: Representative Ramona L. Barnes  
Chairman, House Judiciary Committee *JHL*

FROM: James H. Lear  
Legislative Counsel

You have requested an opinion as to whether a two-thirds vote of each house, per Article IV, Sec. 15, Constitution of the State of Alaska, is necessary to pass Section 24 of CSHB 553. In preparation by this office of the work draft for CSHB 553, I preliminarily advised Bill Cook that the answer to this question was a close one, and that, therefore, the issue ought to be resolved by presenting the change in the Court Rules before the legislature for the required two-thirds vote in order to preclude a subsequent court challenge to the validity of the legislative modification of the Rules of Court.

Sec. 24 of CSHB 553 indicates that "AS 12.55.088(a), amended by Sec. 14 of CSHB 553, has the effect of changing Rule 35(a) and (b), Rules of Criminal Procedure, by deleting the provisions for modification or reduction of sentence as a result of changed circumstances and by decreasing from 120 to 60 days the period of time in which a sentence otherwise may be modified or reduced."

The Constitution of the State of Alaska empowers the Supreme Court to make and promulgate rules governing practice and procedure in civil and criminal cases in all courts but authorizes the legislature to change those rules by two-thirds vote of the members elected to each house. A two-thirds vote is not required for legislation which modifies substantive law, even though the substantive law may be incorporated into a Supreme Court rule.

Representative Ramona L. Barnes

Page 2

March 31, 1982

Jurisdictions differ in their decisions to classify provisions for the correction of criminal sentences as either substantive or procedural. However, the State of New Jersey, who like Alaska, placed the full rule making power in the Supreme Court by constitutional provision, has determined that the manner of sentence and correction of criminal sentences are procedural in nature and solely within the prerogative of the Supreme Court. (State v. Culver, 23 N.J. 495, 129 A.2d 715 (1957)). The New Jersey decision is founded on the theory that the Supreme Court has the inherent power to alter a criminal sentence at any time prior to completion of the term of imprisonment in order to protect society and ensure that society's criminal classes understand that the penalty follows the crime.

Since there is authority for the proposition that the Supreme Court retains the power to adopt rules pertaining to the correction or modification of criminal sentences, it is advisable to require a two-thirds vote on Sec. 14 of CSHB 553 rather than risk a declaration by the Supreme Court that the attempted modification of Rule 35(a) and (b) is invalid. This is especially true in light of the Alaska Supreme Court's reluctance to relinquish its rule making authority.

JHL:ljb

\* AS 11.46.200 is amended by adding a new subsection to read:

(c) Notwithstanding the provisions of this section, it is lawful for a person to intercept satellite telecommunications if the interception is not for commercial advantage or is not done with the intent to defraud a commercial provider of a service listed in AS 11.81.900(b)(50).

\* AS 11.46.482(a) is amended by adding a new paragraph to read:

(5) he sells, leases, trades, or offers for sale, lease, or trade, any device designed to intercept cable, microwave, subscription, or pay television, or any other telecommunications service, with intent to defraud another of the lawful charges for the service.

\* AS 11.46.482 is amended by adding a new subsection to read:

(c) Notwithstanding the provisions of (a) of this section, it is lawful for a person to sell a device for the interception of satellite telecommunications if the interception is not for commercial advantage or is not intended to defraud a commercial provider of a service listed in AS 11.81.900(b)(50).

\* AS 11.81.900(b)(50) is amended to read:

(50) "services" includes labor, professional services, transportation, telephone or other communications service, entertainment including cable, microwave, subscription, or pay television or any other telecommunications service, the supplying of food, lodging, or other accommodations in hotels, restaurants, or elsewhere, admissions to exhibitions, and the supplying of equipment for use.

ANALYSIS OF THE DECISION IN  
JUNEBY V. STATE, Opinion No. 72  
(Alaska Court of Appeals, March 11, 1982)

In this sentence appeal case, Juneby had plead no contest to burglary in the First Degree, a class B felony and Sexual Assault in the First Degree [HEREAFTER REFERRED TO AS RAPE], a class A felony. The maximum penalties provided by statutes were 10 years for Burglary and 20 years for Rape. However, the presumptive sentence for the Rape was 10 years, since this was considered a "second felony conviction" on Juneby. He had been convicted earlier of Grand Larceny.

The Superior Court Judge sentenced Juneby to 8 years for the Burglary and 20 years for Rape. The two sentences were made concurrent, leaving Juneby with one 20 year sentence, which would interpret to 15 year under the "good time" statutes.

The pertinent factors for the actual sentencing were:

1. Even though Juneby was convicted of both burglary and rape, the two crimes were considered to have arisen "out of a single continuous criminal episode during which there was no substantial change in the nature of the criminal objective..." AS 12.55.145(a)(3). Accordingly, the conviction for the burglary could not be considered as a second felony, subjecting Juneby to treatment as a third felony for the rape. The Court of Appeals at footnote 3, page 3, indicates that the judge could have sentenced consecutively for the burglary and rape, under provisions of AS 12.55.025(a). However, this is subject to question, upon a careful reading of both 025 and 125. In any event, the trial judge having already made those sentences concurrent, can not go back and change that upon the reman from the Court of Appeals.

2. The Superior Court Judge increased the rape sentence from the 10 year presumptive to the 20 year maximum on the basis of "aggravating factors" presented by the District Attorney. These were under attack in the sentence appeal by the defense, and ultimately the Court of Appeals reversed on the basis of the findings as to some of the aggravating factors.

Page 21 of the Opinion give the statement of the victim as to the details of the rape:

V.W. [THE VICTIM]'s statements indicated that Juneby had knocked at her door and asked about a former girlfriend of his who lived next door. When V.W. told him that she had seen a moving van there recently, Juneby asked to use V.W.'s phone; V.W. allowed him to enter. After an unsuccessful attempt to call a moving company, Juneby abruptly attacked V.W. He beat her repeatedly about the face and ribs with his fist, then he twisted her arm and dragged her down a corridor into a bathroom. There, Juneby forced V.W. into submission by choking her. He forcibly pressed her throat against a clothes dryer, causing V.W. to lose her breath for a short time. At this point, V.W. did not know why Juneby was attacking her. She thought that he was trying to kill her. Suddenly, Juneby ceased choking his victim; he commanded her to undress and then proceeded to rape her. The photographs of V.W. show that her face was bruised and swollen following this incident. In addition, V.W. stated that her ribs were badly bruised. These injuries were treated by a physician after the incident, but V.W. was not hospitalized. Although V.W. experienced considerable pain and discomfort for several weeks, she suffered no permanent disfigurement or physical impairment.

Juneby does not contest the fact that V.W. sustained physical injury within the definition of AS 12.55.155(c)(1); he does, however, question the amount of weight that should properly be assigned to this aggravating factor in adjusting the presumptive sentence of 10 years called for by AS 12.55.125(c)(2).

Following that summary of the facts of the rape, the Court of Appeals stated that increases of presumptive terms should not be an "automatic consequence" when the aggravating factor is proved. The court points out, at page 22, that subsections (c)(d) of 125 state that the aggravating mitigating

factors "shall be considered by the sentencing court and may aggravate [or mitigate] the presumptive terms" established by law. [Emphasis added in the opinion].

On the next several pages the court discusses the fact that injury is a common element of rape, and that less weight should be given to relatively minor injuries. Specifically, the court stated at page 24 that

We would be blinding ourselves to reality if we did not recognize that, in most cases involving rape, or sexual assault in the First Degree under AS 11.41.410(a)(1) actual or threatened and violence will be involved and the victim will suffer at least some level of physical injury or discomfort. The use of force in the affliction of at least some physical injury to the victim are, realistically, characteristic of the crime of rape. Indeed, it is the prevailing view that rape is primarily a crime of violence, as distinguished from a sexual offense...as with all other presumptive sentences, the 10-year presumptive term for first degree sexual assault was meant by the legislature to be appropriate in the majority of cases -- those cases involving conduct that is characteristic of the offense of rape and it falls into the middle-ground between the most serious and least serious extremes for the offense. It must therefore be recognized that this presumptive term takes into account the high potential for the use of violence and the likelihood of some physical injury and first degree sexual assaults falling within the definition of AS 11.41.410(a)(1).

Where, as here, violence and injury are characteristic of the offense defined by statute, the mere fact that of some physical injury to the victim as a result of defendant's conduct, though technically an aggravating factor under AS 12.55.155(c)(1), will not justify a significant increase in the presumptive term. Thus, when a charge of sexual assault in the first degree is based upon

the theory of rape under sub-section (a)(1) of AS 11.41.410, in order to justify a substantial increase to presumptive terms, the prosecution must bear the burden making it clear convincing showing the injuries were unusual and uncharacteristically severe.

On page 25, the Court of Appeals notes that it does not believe that the physical injuries inflicted by Juneby could approach the definition of "serious physical injury at AS 11.81.900(49)." Also they state that "Nor do we think that these injuries -- though perhaps more severe than those in many cases -- are highly uncharacteristic of injuries all too frequently suffered by rape victims. Accordingly, we do not believe that these injuries, standing alone, would justify a substantial increase in Juneby's presumptive term."

On page 27 the Court of Appeals considers the aggravating factor of "manifested deliberate cruelty" that was considered by the Superior Court Judge. Specifically, the court stated that "deliberate cruelty," as used in AS 12.55.155(c)(2) "...must be restricted to instances in which pain -- whether physical, psychological or emotional -- is inflicted gratuitously or as an end in itself." ...When this definition is applied to the present case, we believe that it is questionable whether the evidence considered by the sentencing judge would properly lead to the conclusion that the injuries suffered by V.W. resulted from deliberate cruelty on Juneby's part." On that matter, they remanded the case to the sentencing judge for a decision as to whether deliberate cruelty had been shown, although he had apparently found it was there in the original sentencing.

At page 28, the court considers the question as to whether this particular rape was "among the most serious conduct involved in the definition of rape." If this were the case, this would fall in aggravating factor (10) under 12.55.155(c). The court concluded that the evidence showed that this rape was not among the most serious for rape. The Superior Court Judge had concluded that, since this was rape under (a)(1) of AS 11.41.410, that this was the most serious of the four types listed under 410. The others are basically (1) attempted sexual penetration with serious resulting injury, (2) statutory rape, and (3) a form of incest. The Court of Appeals found that

...the grouping of these four separate acts of conduct together under the same criminal heading [Sexual Assault in the First Degree], with identical classifications as class A felonies is a forceful indication of the legislature's conclusion that all four sub-paragraphs were meant to be viewed as involving equally serious conduct." [emphasis added].

The Court of Appeals noted that the Superior Court Judge said that he would still find this rape to be within the most serious if his interpretation of the statute was incorrect. He had emphasized that there was no prior contact with the victim, the rape was committed in V.W.'s own home; that he found deliberate cruelty in the injuries inflicted upon V.W.; Juneby did not terminate his rape of V.W. voluntarily, but fled when he heard another person knock on the door. In response to this, the Court of Appeals said that

We believe that the various factors articulated by Judge Van Hoomissen are not sufficient to support a finding, by clear and convincing evidence, that Juneby's conduct was among the most serious included in the definition of the offense with which he was charged." [Emphasis added].

On pages 31 and 33 the Court of Appeals whisks away the Superior Court's emphasis on the fact that the rape was committed in V.W.'s own home by noting that Juneby was separately charged with and convicted of burglary, and that the court imposed a separate sentence for the burglary. Oddly enough, the Court of Appeals ignored the fact that that sentence was made concurrent by the Superior Court Judge, (possibly because of his concern over the "single, continuous criminal episode" factor). In fact, the Court of Appeals even went so far as to state:

Juneby had thus been separately punished for his act of violating V.W.'s privacy by entering her home. [Emphasis added]. Page 32.

Thus, the Court of Appeals considers that this rape was "punished" by being separately convicted for burglary, although even a sixth grader could tell by the words concurrent sentencing that there was no additional punishment for the burglary.

On page 35, the court stated:

On balance, consideration of the totality of the circumstances of this offense leaves us with the a firm impression that, but for the injuries inflicted upon

Juneby's victim, this crime may reasonably be considered to fall far closer to the middle ground, or norm, of conduct for the offense charged than to either the most serious or least serious extreme [setting the stage for the 10 year presumptive sentence].

Considering the factors briefly summarized here, and others stated more specifically in the opinion, the sentence was vacated and the case remanded to the Superior Court for resentencing. In addition to the factors noted above, The Court of Appeals on page 39 comments on the "mitigating factor" in the sentencing that Juneby's prior felony conviction was for "an offense [grand larceny] of a less serious class than his present offense," per AS 12.55.155(d)(8). In reference to that factor, as well as others covered, the Court made it clear that upon the remand, Judge Van Hoomission should make findings on the factors and aggravation in mitigation "with specificity." This may mean that, indeed, it would be a factor to mitigate, or reduce the presumptive term for Juneby that his prior felony was for a less serious crime. Some persons have referred to this factor of mitigation as a "reward for moving up from one level of felony to another."

and other recommended criteria, *Whitton* adopted a more flexible standard than either. The different statutes are to be compared as applied to the facts of the case in order to ascertain whether they involve differences in *intent or conduct*. If such differences exist, they are to be judged in light of the basic interests of society to be vindicated or protected. A decision must then be made as to whether those differences are substantial enough to warrant multiple punishments.<sup>13</sup>

[2] The initial inquiry under *Whitton* is thus directed at a comparison of the different statutes violated as applied to the facts of the case in order to ascertain whether there are differences in intent or conduct. But in the subject case, only one statute is involved. We can compare one count with another and still apply the test. The sole difference between each count was the name of the victim involved. Thessen's intent and conduct<sup>14</sup> were identical as to each count. Since there is an absence of any difference in intent and conduct, we do not reach the other considerations set forth in *Whitton*—the judging of the differences "in light of the basic interests of society to be vindicated or protected". The *Whitton* test for ascertainment of double jeopardy when applied to the multiple counts charged against Thessen dictates the conclusion that but one offense was committed.<sup>15</sup> Where there has been but one statute violated by a single

act, without intent to harm multiple victims, the Alaskan constitutional prohibition against placing a person in jeopardy twice for the same offense prevents imposition of multiple punishments.

A different question would be presented if the Legislature had seen fit to increase the punishment for a single act of manslaughter by means of arson of a multiple-family dwelling. Although the jury's verdict absolved Thessen of any intent to kill, they did find that he intended to burn the Lane Hotel, and his conduct was such that he did so. Setting fire to a hotel where numerous people sleep does not involve the same conduct or intent as setting fire to a single family dwelling or an abandoned shed. The most grave of societal interests, preservation of the sanctity of life, is involved. If the Legislature so desired, it could recognize this interest by increasing the penalties for this offense. The Legislature has not seen fit to make this distinction. While the statutes do recognize and distinguish between setting fire to (1) a dwelling, (2) other types of buildings, (3) personal property, and (4) attempts at arson;<sup>16</sup> there is no distinction between manslaughter by arson in a dwelling house and arson in a multiple-person dwelling house. We have no power to read this distinction into the statute so as to increase the punishment for a single act beyond the maximum authorized by the Legislature.

of separate statutory violations arise out of a single criminal act or transaction. Under this test, Thessen could be held to have committed but one offense.

13. *Whitton v. State*, 470 P.2d at 312.
14. The state requests that we include "the consequences of an act" in the definition of the term, "conduct". "Conduct" is defined as "Personal behavior; deportment; mode of action; any positive or negative act". *Black's Law Dictionary* 367 (4th ed. 1957). We have found no definition of the term either in a case or dictionary broadening it to include the consequences of one's act.
15. Utilizing the criteria for retroactivity set forth in *Judd v. State*, 482 P.2d 273,

277-278 (Alaska 1971), we have concluded that the *Whitton* standard should be applied to this appeal. The purpose to be served by application of that standard is the prevention of unconstitutional punishment. *Whitton* does not involve a change of an old standard on which law enforcement authorities have relied. Moreover, retroactive application of the *Whitton* standard will have little effect on the administration of justice, as we do not anticipate many past cases will be affected.

16. There are four degrees of arson with different punishments established for each: AS 11.20.010, 11.20.020, 11.20.030 and 11.20.050.

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The United States Supreme Court has recognized that the judiciary should be loath to impute to the Legislature an intent to impose multiple sentences for a single act that has multiple victims. In *Bell v. United States*,<sup>17</sup> the defendant had been found guilty of transporting two women across state lines in one truck for the purpose of having them engage in prostitution, a violation of the Mann Act. He was sentenced to consecutive terms on each of the two counts. The court stated:

The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment. Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so?<sup>18</sup>

The court answered this question as follows:

. . . When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a

penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.<sup>19</sup>

A similar result was reached by court in the *Ladner v. United States*<sup>20</sup> case involving the wounding of two federal officers by a single shot from a shotgun. The court found that but a single violation of the statute had occurred and that only one penalty could be imposed:

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." (Citations omitted.) This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act affecting more than one federal officer, Congress can make that meaning clear. We thus hold that the single discharge of a shotgun alleged by the petitioner in this case would constitute only a single violation of § 254.<sup>21</sup>

17. 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

18. *Id.* at 82-83, 75 S.Ct. at 622, 99 L.Ed. at 910.

19. *Id.* at 83-84, 75 S.Ct. at 622, 99 L.Ed. at 910-11.

20. 358 U.S. at 169, 79 S.Ct. 209, 3 L.Ed. 2d 199 (1958).

21. *Id.* at 178, 79 S.Ct. at 214, 3 L.Ed.2d at 205. 18 U.S.C. § 111, the recodification of § 254, provides:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated . . . while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

It is to be noted that in *Beli* and *Ladner*, there was an apparent intent to affect more than one victim. Utilizing the *Whitton* test, it would thus be conceivable to conclude that different intents were involved as to each victim, so that the Constitutional prohibition against double jeopardy would not be violated by multiple punishments. We would thus agree with the result reached by the California Supreme Court in the case of *Neal v. State*, 55 Cal.2d 11, 9 Cal.Rptr. 607, 357 P.2d 839 (1960) (referred to in the dissent filed to this opinion), since in that case Neal intended to murder two persons by burning down a dwelling with the intended victims inside. As pointed out in the *Neal* opinion, there was an "intent to harm more than one person." In the subject case, however, there was no intent to harm anyone and consequently, no intent to harm more than one person. Under these circumstances, it would be a violation of the Alaska double jeopardy prohibition to impose multiple punishments for Thessen's single act, despite its horrendous consequences.

[3] The primary purpose of criminal law is to inhibit antisocial conduct by assigning appropriate punishment. As parodied by Gilbert and Sullivan in the *Mikado*, the object is "[t]o let the punishment fit the crime." To achieve this purpose the focus must be on the intent and conduct of the perpetrator rather than on fortuitous results.

[4] Within constitutional limits,<sup>22</sup> the Legislature has the power to impose whatever punishments it deems appropriate for

specific crimes. In fact, it has had little difficulty in expressing distinctions where it has seen fit to do so.<sup>23</sup> If the Legislature so desired, it could authorize a more stringent punishment for manslaughter resulting from acts of arson. To date, however, it has not done so.

Accordingly, but one sentence for the maximum period prescribed by the Legislature is permissible for Thessen's offense. The judgment denying Thessen's application for post-conviction relief is reversed and the case is remanded for further proceedings consistent with this opinion.

ERWIN and FITZGERALD, JJ., not participating.

RABINOWITZ, Chief Justice (dissenting).

The majority today concludes that

[w]here there has been but one statute violated by a single act, without intent to harm multiple victims, the Alaskan constitutional prohibition against placing a person in jeopardy twice for the same offense prevents [the] imposition of multiple punishments.<sup>1</sup>

I must respectfully dissent from that holding.

The majority relies heavily on our decision in *Whitton v. State*, 479 P.2d 302 (Alaska 1970) in reaching its conclusion.<sup>2</sup> In *Whitton* the trial court convicted the defendant of both robbery<sup>3</sup> and the use of firearms during the commission of the

22. In addition to the double jeopardy provision, the Constitution of the State of Alaska provides in article I, section 12:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

23. See *supra* note 16.

1. *Thessen v. State*, Supreme Court Opinion, at 1195.

2. I agree that *Whitton* should be applied retroactively in appropriate cases. *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 20 (January 10, 1973).

3. AS 11.15.240 provides:

A person who, by force or violence, or by putting in fear, steals and takes anything of value from the person of another is guilty of robbery, and is punishable by imprisonment in the penitentiary for not more than 15 years nor less than one year.

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In the case at bar, the court focuses on what it characterizes as a singular physical act, and concludes that there can be one "allowable unit of prosecution."<sup>9</sup> Alaska's relevant statute provides that:

. . . a person who unlawfully kills another is guilty of manslaughter, and is punishable by imprisonment in the penitentiary for not less than one year nor more than 20 years.<sup>10</sup>

The controlling language defining the offense of manslaughter is "unlawfully kills another." In my view this language reflects the legislature's intent to have the offense depend on the consequences of the defendant's act and not the means by which those consequences were achieved. The majority would apparently uphold separate manslaughter convictions had Thessen burned down 14 houses, each containing one of his victims. Under that analy-

sis a person convicted of 14 counts of manslaughter under those circumstances is more culpable than a defendant who causes the death of one person by burning down one house. The majority thus seems to reward the defendant for the efficiency of his criminal behavior, by defining the offense in terms of the number of physical acts which produced the unlawful killings. AS 11.15.040, however, requires no such inquiry. In my view this manslaughter statute measures the wrongfulness of the defendant's behavior by the number of victims.

Each unlawful killing under AS 11.15.040 is an offense under the statute. To read the statute as the majority has does violence to its plain language.<sup>11</sup> I would therefore affirm Thessen's 14 separate convictions of manslaughter.<sup>12</sup>

(1937) (separate third degree murder prosecutions permitted where two victims killed in single automobile accident); *State v. Gratz*, 254 Or. 474, 401 P.2d 829 (1969) (armed robbery of two persons at same time and place held to constitute two separate crimes).

9. The term "allowable unit of prosecution" was coined in *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221, 73 S.Ct. 227, 97 L.Ed. 260, 264 (1952).
10. AS 11.15.040.
11. Under a different statute, the number of victims may, of course, have no bearing on the defendant's culpability. Thus in *Ladner v. United States*, 358 U.S. 169, 70 S.Ct. 209, 3 L.Ed.2d 199 (1958), the United States Supreme Court held that in light of the lenity doctrine, a single shotgun blast directed at two federal officers could result in only one assault conviction under 18 U.S.C. § 254. And in *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), the Court expressed a legitimate doubt as to whether the appropriate unit of offense under the Mann Act should depend on the number of women transported across state lines.

The majority thought that it did not. Justice Minton, in dissent, thought that the statute protected individual women and girls from exploitation, and as he succinctly put it:

Surely [Congress] did not intend to make it easier if one transported females by the bus load. 349 U.S. 81, 84, 75 S.Ct. 620, 623, 99 L.Ed. 908, 911.

12. On the other hand I would remand the case to the sentencing court for a hearing to determine whether imposition of the three consecutive twenty year terms of imprisonment was an appropriate sentence in the case at bar. *State v. Pete*, 420 P.2d 338 (Alaska 1966). AS 11.05.050 does not furnish any guidelines as to when consecutive sentences should be imposed. Minimally, I think the trial judge should be required to state his reasons why consecutive sentences were appropriate in this case. See, Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 Cal.L.Rev. 357, 367-69 (1970); American Bar Association Standards Relating to Sentencing Alternatives and Procedures § 3.4, at 171-172, 176-178 (Approved Draft, 1968).

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same robbery.<sup>4</sup> On appeal we held that the convictions for robbery and for the use of firearms during the commission of the same robbery amounted to conviction twice for the same offense. The inquiry in *Whitton* was thus essentially whether the distinct statutes under which Whitton was convicted mutually proscribed the same criminal behavior and therefore whether punishments for violating both statutes could be imposed consistently with our double jeopardy proscriptions. The court explained that:

The problem we are faced with has arisen by reason of legislative division or refinement of what may be a unitary criminal episode into a number of statutory offenses, with differences based upon intent or means or method of perpetration.<sup>5</sup>

We determined that the legislature defined two different forms of the same offense and that under the facts of that case double jeopardy prohibited punishment for both.<sup>6</sup> In my view, *Whitton* is distinguishable from the case at bar and is not controlling.

In the case before us, we are concerned not with whether several distinct but overlapping statutes have been applied to exact multiple punishment for what is essentially a "unitary criminal episode," but rather whether Thessen's conduct violated a single statute several times over.

4. AS 11.15.205 provides:

A person who uses or carries a firearm during the commission of a robbery, assault, murder, rape, burglary, or kidnapping is guilty of a felony and upon conviction for a first offense is punishable by imprisonment for not less than 10 years. Upon conviction for a second or subsequent offense in violation of this section, the offender shall be imprisoned for not less than 25 years.

5. 470 P.2d 302, 312.

6. The Supreme Court in *Ex Parte Lange*, 85 U.S. (18 Wall.) 103, 173, 21 L.Ed. 872, 878 (1874) condemned as a violation of double jeopardy multiple punishment for the same offense. See also *United States v. Benz*, 282 U.S. 304, 307-309,

The majority seems to hold that since the 14 victims lost their lives as a result of Thessen's single act of arson, only a single conviction for manslaughter may be sustained. In *Neal v. State*, 55 Cal.2d 11, 9 Cal.Rptr. 607, 357 P.2d 839 (1960), the California Supreme Court faced a similar case. The defendant Neal was accused of attempting to murder two persons by burning down a dwelling with the intended victims inside. Neal was convicted on two counts of attempted murder. The Supreme Court of California allowed the separate convictions for attempted murder to stand. Speaking for the court Justice Traynor said:

The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.<sup>7</sup>

As Justice Traynor later commented in his dissent in *In Re Hayes*, 70 Cal.2d 604, 75 Cal.Rptr. 790, 451 P.2d 430 (1969), the defendant's culpability must be assessed in light of the expressed legislative purpose, and that therefore it is of little consequence that several victims died as a result of a single muscular contraction.<sup>8</sup>

51 S.Ct. 113, 75 L.Ed. 354, 356-357 (1931).

7. 55 Cal.2d 11, 9 Cal.Rptr. 607, 612, 357 P.2d 839, 844.

8. 70 Cal.2d 604, 75 Cal.Rptr. 790, 451 P.2d 430, 438. Other courts have adopted the same basic position. *Accord* *United States v. Tarrant*, 400 F.2d 701 (5th Cir. 1972) (possession of five unregistered firearms held to constitute five separate offenses); *United States v. Hodges*, 430 F.2d 676 (10th Cir. 1971) (assault on several penal officers during jail house altercation held to constitute multiple offenses); *State v. Miranda*, 3 Ariz.App. 550, 416 P.2d 444 (1966) (separate manslaughter convictions for each victim of a single traffic accident upheld); *State v. Fredlund*, 200 Minn. 44, 273 N.W. 353

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1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 553 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act revising certain criminal laws of the state; an  
7 changing Rule 35(a) and (b), Rules of Criminal Pro-  
8 cedure."

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

10 \* Section 1. AS 11.41.120 is amended by adding a new subsection to read:

11 (c) If more than one person dies as a result of a person committin  
12 manslaughter, each death constitutes a separately punishable offense.

13 \* Sec. 2. AS 11.41.130 is amended by adding a new subsection to read:

14 (c) If more than one person dies as a result of a person committin  
15 criminally negligent homicide, each death constitutes a separately  
16 punishable offense.

17 \* Sec. 3. AS 11.41.210 is repealed and reenacted to read:

18 2 Sec. 11.41.210. ASSAULT IN THE SECOND DEGREE. (a) A person  
19 commits the crime of assault in the second degree if

20 (1) with intent to cause physical injury to another person,  
21 he causes physical injury to any person by means of a dangerous instru-  
22 ment;

23 (2) with intent to cause physical injury to a peace officer,  
24 he causes physical injury to the peace officer and has reasonable notice  
25 that the victim is a peace officer; or

26 (3) he recklessly causes serious physical injury to another  
27 person.

28 (b) Assault in the second degree is a class B felony.

29 \* Sec. 4. AS 11.46.484(a) is amended by adding a new paragraph to read:

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Seeing eye dog

(5)

(5) he intentionally strikes a police dog while the dog is on official police duty.

\* Sec. 5. AS 11.46.484(b) is amended to read:

(b) Except as provided in (c) of this section, criminal [CRIMINAL] mischief in the third degree is a class A misdemeanor.

\* Sec. 6. AS 11.46.484 is amended by adding a new subsection to read:

(c) A person convicted under (a)(2) of this section who has been previously convicted under that paragraph or under AS 28.35.010 is guilty of a class C felony.

\* Sec. 7. AS 11.81.320 is amended by adding a new subsection to read:

*Supplement it*  
(b) The justification allowed in (a) of this section is an affirmative defense.

\* Sec. 8. AS 11.81 is amended by adding a new section to read:

*Supplement it?*  
Sec. 11.81.650. MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY.

(a) In a prosecution for a crime it is an affirmative defense that when the defendant engaged in the criminal conduct he lacked substantial capacity, as a result of a mental disease or defect, either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

(b) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish an affirmative defense under (a) of this section.

\* Sec. 9. AS 11.81.900(a)(1) is amended to read:

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when his conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

\* Sec. 10. AS 11.81.900(b)(37) is amended to read:

1 (37) "organization" means a legal entity, including a corpora-  
2 tion, company, association, firm, partnership, joint stock company,  
3 foundation, institution, government, society, union, club, church, or  
4 any other group of persons organized for any purpose;

5 \* Sec. 11. AS 11.81.900(b)(44) is amended to read:

6 (44) "property" means a domestic pet or livestock regardless  
7 of value, an article, substance, or thing of value, including money,  
8 tangible and intangible personal property including data or information  
9 stored in a computer program, system, or network, real property, a  
10 credit card, choses-in-action, and evidence of debt or of contract; [,]  
11 a commodity of a public utility such as gas, electricity, steam, or  
12 water constitutes property but the supplying of such a commodity to  
13 premises from an outside source by means of wires, pipes, conduits, or  
14 other equipment is considered a rendition of a service rather than a sale  
15 or delivery of property;

16 \* Sec. 12. AS 11.81.900(b)(49) is amended to read:

17 (49) "serious physical injury" means

18 (A) physical injury caused by an act performed under  
19 circumstances that create [WHICH CREATES] a substantial risk of  
20 death; or

21 (B) physical injury that [WHICH] causes serious and  
22 protracted disfigurement, protracted impairment of health, [OR]  
23 protracted loss or impairment of the function of a body member or  
24 organ, or that [PHYSICAL INJURY WHICH] unlawfully terminates a  
25 pregnancy;

26 \* Sec. 13. AS 12.55.025 is amended by adding new subsections to read:

27 (g) Except as provided in (h) of this section, if the defendant  
28 has been convicted of a crime other than the one for which he is pre-  
29 sently being sentenced, the sentences of imprisonment for the two con-

1 victions shall be served consecutively, regardless of whether either  
2 judgment specifies that the sentences shall be consecutive.

3 (h) The court may specify that sentences of imprisonment for  
4 multiple crimes charged in a single charging document are to be served  
5 concurrently if the court finds that the crimes violate similar societal  
6 interests or are part of a single continuous criminal episode, unless

7 (1) there was a substantial change in the nature of the  
8 criminal objective, including but not limited to a change in the parties  
9 to the crimes, the property or type of property right offended, or the  
10 persons offended;

11 (2) the crimes were committed while the defendant attempted  
12 to escape or avoid detection or apprehension after the commission of  
13 another crime; or

14 (3) the sentence is for violation of AS 11.41.100 - 11.41.140  
15 or AS 11.41.200 - 11.41.250 or for a violation of AS 11.41.300 - 11.41.-  
16 530 that results in injury to one or more persons.

17 \* Sec. 14. AS 12.55.088(a) is amended to read:

18 *Supp. to 12.55.088(a)*  
19 *Stevenson* (a) The court may modify or reduce a sentence by entering a written  
20 order within 60 days of the original sentencing [AT ANY TIME DURING A  
21 TERM OF IMPRISONMENT IF IT FINDS THAT CONDITIONS OR CIRCUMSTANCES HAVE  
22 CHANGED SINCE THE ORIGINAL SENTENCING HEARING SUCH THAT THE PURPOSE OF  
23 THE ORIGINAL SENTENCE IS NOT BEING FULFILLED].

23 \* Sec. 15. AS 12.55.125(c)(1) is amended to read:

24 (1) if the offense is a first felony conviction [, OTHER THAN  
25 FOR MANSLAUGHTER,] and, during the commission of the offense, the defen-  
26 dant possessed or used a firearm or used a dangerous instrument or  
27 caused serious physical injury, eight [DURING THE COMMISSION OF THE  
28 OFFENSE, SIX] years;

29 \* Sec. 16. AS 12.55.135(c) is amended to read:

*Domestic Violence*  
*Crossed out*  
*check*  
*Put in to last year's legislation*

1 A defendant convicted of assault in the fourth [THIRD]  
2 degree committed in violation of the provisions of an order issued under  
3 AS 09.55.600 or 09.55.610 shall be sentenced to a minimum term of impris-  
4 sonment of 20 [10] days. The execution of sentence may not be suspended  
5 and probation or parole may not be granted until the minimum term of  
6 imprisonment has been served. Imposition of sentence may not be sus-  
7 pended, except upon condition that the defendant be [BY] imprisoned for  
8 no less than the minimum term of imprisonment provided in this section,  
9 and the minimum sentence provided for in this section may not be other-  
10 wise reduced.

11 \* Sec. 17. AS 12.55.145(a) is repealed and reenacted to read:

12 (a) For purposes of considering prior convictions in imposing  
13 sentence under this chapter

14 (1) a prior conviction may not be considered if a period of  
15 10 or more years has elapsed between the date of the defendant's uncon-  
16 ditional discharge on the immediately preceding offense and commission  
17 of the present offense unless the prior conviction was for an unclassi-  
18 fied or class 1 felony;

19 (2) a conviction in this or another jurisdiction of an offense  
20 having elements substantially identical to those of a felony defined as  
21 such under Alaska law is considered a prior felony conviction;

22 (3) two or more convictions for crimes violating similar  
23 societal interests or arising out of a single, continuous criminal  
24 episode are considered a single conviction unless

25 (A) there was a substantial change in the nature of the  
26 criminal objective, including but not limited to a change in the  
27 parties to the crimes, the property or type of property right  
28 offended, or the persons offended;

29 (B) the crimes were committed while the defendant

1 attempted to escape or avoid detection or apprehension after the  
2 commission of another crime; or

3 (C) the sentence is for violation of AS 11.41.100 -  
4 11.41.140 or AS 11.41.200 - 11.41.250 or for a violation of AS 11.-  
5 41.300 - 11.41.530 that results in injury to one or more persons.

6 \* Sec. 18. AS 12.55.145(b) is amended to read:

7 *Minor* (b) When sentence is imposed under this chapter, prior convictions  
8 *Amendments* not expressly admitted by the defendant must be proved by authenticated  
9 copies of court records served on the defendant or his counsel at least  
10 20 [10] days before the date set for imposition of sentence.

11 \* Sec. 19. AS 12.55.145(c) is amended to read:

12 (c) If the defendant denies the authenticity of a prior judgment  
13 of conviction, that he is the person named in the judgment, that the  
14 elements of a prior offense committed in another jurisdiction are sub-  
15 stantially identical to those of a felony defined as such under Alaska  
16 law, or that a prior conviction occurred within the period specified in  
17 (a)(1) of this section or if he alleges that two or more purportedly  
18 separate prior convictions should be considered a single conviction  
19 under (a)(3) of this section, the defendant shall file with the court  
20 and serve on the prosecuting attorney notice of denial no later than 10  
21 [FIVE] days before the date set for imposition of sentence. The notice  
22 of denial shall include a concise statement of the grounds relied upon  
23 and may be supported by affidavit or other documentary evidence.

24 \* Sec. 20. AS 12.55.145 is amended by adding a new subsection to read:

25 *Minor* (f) When a defendant is convicted of a felony by a court of this  
26 *Amendments* state he shall place his fingerprints on the judgment of conviction in  
27 open court, on the record, at the time of sentencing. The defendant and  
28 the person administering the fingerprinting shall sign their names under  
29 the fingerprints.

1 \* Sec. 21. AS 12.55.155(c)(8) is repealed and reenacted to read:  
2 *Minor* (8) the defendant's prior criminal history includes conduct  
3 *Changes* involving aggravated or repeated instances of assaultive behavior;

4 \* Sec. 22. AS 12.55.155(c) is amended by adding new paragraphs to read:  
5 *Minor* (19) the defendant's prior criminal history includes an adjudi  
6 *Changes* cation as a delinquent for conduct that would have been a felony if  
7 committed by an adult;

8 (20) the defendant was on furlough under AS 33.30 or on parole  
9 or probation for another felony charge or conviction.

10 \* Sec. 23. AS 12.45.083; AS 12.55.025(e) and 12.55.155(d)(8) are repealed

11 \* Sec. 24. AS 12.55.088(a), amended by sec. 14 of this Act, has the  
12 effect of changing Rule 35(a) and (b), Rules of Criminal Procedure, by de-  
13 leting the provisions for modification or reduction of sentence as a result o  
14 f changed circumstances and by decreasing from 120 to 60 days the period of  
15 time in which a sentence otherwise may be modified or reduced.

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FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 553  
 Title "An Act relating to the criminal laws of the state."  
 Requested by Repr. Barnes, House Judiciary Date March 21, 1982

II. FISCAL DETAIL

Agency Affected Department of Law  
 Program Category Affected Administration of Justice  
 BRU, Program, Or Subprogram(s) Affected Prosecution  
 (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)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME	0	0	0	0	0	0
PART TIME						
TEMPORARY						

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

This bill will facilitate the prosecution of these sorts of cases making the department's efforts more effective, without causing any additional costs. The department, therefore, endorses enactment of this bill.

IV. DATE March 23, 1982

PREPARED BY Richard I. Pequo, Director, Admin. Svc

AGENCY Department of Law

Original: Legislative Finance

PHONE 465-3672

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

*Richard I. Pequo*

\*        AS 11.46.200 is amended by adding a new subsection to read:

(c) Notwithstanding the provisions of this section, it is lawful for a person to intercept satellite telecommunications if the interception is not for commercial advantage or is not done with the intent to defraud a commercial provider of a service listed in AS 11.81.900(b)(50).

\*        AS 11.46.482(a) is amended by adding a new paragraph to read:

(5) he sells, leases, trades, or offers for sale, lease, or trade, any device designed to intercept cable, microwave, subscription, or pay television, or any other telecommunications service, with intent to defraud another of the lawful charges for the service.

\*        AS 11.46.482 is amended by adding a new subsection to read:

(c) Notwithstanding the provisions of (a) of this section, it is lawful for a person to sell a device for the interception of satellite telecommunications if the interception is not for commercial advantage or is not intended to defraud a commercial provider of a service listed in AS 11.81.900(b)(50).

\*        AS 11.81.900(b)(50) is amended to read:

(50) "services" includes labor, professional services, transportation, telephone or other communications service, entertainment including cable, microwave, subscription, or pay television or any other telecommunications service, the supplying of food, lodging, or other accommodations in hotels, restaurants, or elsewhere, admissions to exhibitions, and the supplying of equipment for use.

February 24, 1982

Gordon Evans, Esquire  
ELY, GUESS & RUDD  
Menden Hall Building, Suite A  
Juneau, Alaska 99801

Dear Gordon:

In connection with your theft-of-service lobbying efforts on our behalf, let me respond to Senator Parr's concerns over theft of service language presently included in S.B. 535.

First of all, let me assure that theft of service is a significant problem to all subscription television operators nationwide. The issue is not one of technology but rather of opportunists taking illegal advantage of outmoded legislation that provides totally inadequate remedies for legitimate operators such as ourselves. The enclosed trade journal articles illustrate the current situation very graphically.

Here in Anchorage, VISIONS offers a single channel, 24-hour per day selection of proprietary programming via a microwave frequency not receivable on any television set without the benefit of specialized operator supplied receiving equipment (i.e., antenna plus electronic components). Our service is intended for and available to only those individuals desiring it. They sign a subscription agreement with us, pay an installation charge and thereafter a monthly fee to cover the costs of programming and antenna equipment rental and maintenance. (Our receiving equipment always remains our property and we are responsible for repairing it at all times without additional cost to our subscriber).

MDS receiving equipment is single purpose in nature. That is, it is capable of receiving only the single microwave frequency authorized by the FCC for our service in Anchorage and, in turn, converts that microwave frequency to a signal watchable on a normal television set. (Here in Anchorage we convert to Channel 6.)

Our problem, in the main, stems from out-of-state individuals or companies who illegally manufacture receiving equipment capable of receiving our service and then sell it in Alaska and elsewhere on the pretext of saving money by avoiding paying the monthly fee. Typically, these out-of-state manufacturers solicit in-state TV repair shops, electronic stores or the like to be their local distributors. While many local

Gordon Evans, Esquire  
February 24, 1982  
Page 2

firms refuse to participate in offering a product whose sale they know will harm us, some of the less scrupulous ones take advantage of the opportunity to make some extra, easy profits. In almost all cases, such sales are made surreptitiously either by word-of-mouth, obscure classified ads in Penny-Saver type publications or the like. In the rare case when such sales are advertised overtly, specific mention of our service is avoided. (See samples enclosed.)

Our ability to combat such sales is limited. While during the past two years we have been successful in one civil litigation against a local dealer selling pirate antennas, we have been unable to get similar results from either the District Attorney's or U.S. Attorney's office as far as a criminal action is concerned. While there is federal theft of service legislation on the books, the local U.S. Attorney has, to date, been reluctant to allocate the manpower to pursue this type of offense. While the District Attorney's office has been more sympathetic to our problem, it has grave concerns about the broadness of the existing state statute (A.S. 11.46.482). In its one effort to date at a criminal prosecution, the State's case was dismissed prior to ever reaching trial on the merits. At this stage, the District Attorney is only willing to make another attempt if they can rely on a more adequately worded statute: to wit, the language presently proposed in S.B. 535 (and which was drafted in cooperation with the Attorney General's office).

The bottom line for us is that after more than two years worth of effort in combatting theft of service and the expenditure of a substantial amount of money on attorney fees, lobbying costs, etc., we have very little to show for it. I recognize that simply having a stronger criminal statute will not by itself solve our problem. More to the point, we really don't want to pursue the individual pirate antenna purchaser who, in many cases, may not fully realize he is doing something wrong. But the benefit to us of a criminal conviction against a dealer is the ability to publicize that event and, thereby, educate the public that it is not only immoral but also illegal to receive our service without paying for it. Most citizens will, I believe, once they understand this fact ignore enticements for illegal purchases. And for those who don't, at least we will have a viable means for pursuing our remedies. It should be obvious that in this case there is no substitute for criminal sanction. Civil litigation is not only time consuming and expensive, but if successful, it normally results in nothing more than an injunction against further sales, which injunction may or may not be enforceable.

Gordon Evans, Esquire  
February 24, 1982  
Page 3

Typical arguments against the legislation we are supporting are, in my opinion, totally without merit. One argument suggests that the proper solution to our problem isn't better criminal legislation but rather the "scrambling" of our signal; i.e., making it harder to steal. Putting aside the enormous cost and difficulty for us to scramble (we have 11,500 receiving units already installed in Anchorage, all of which would have to be changed out if we were to "scramble" our signal), it is my my feeling that our signal is already "scrambled". As  
\* noted above we transmit on a microwave frequency not receivable on a normal television set. Furthermore, I fail to understand why the cost of scrambling should be borne by our legitimate subscribers (as it would, of course, have to be) to defeat the illegal efforts of a few.  
\* } In addition, what level of sophistication in scrambling does one implement? If pirate manufacturers can duplicate our microwave technology, why might they not also duplicate (and thereby defeat) any scrambling/-de-scrambling capability we employ?

Another argument often voiced against legislation is that innocent individuals may be unintentionally harmed. In other words, while our microwave frequency is not intended for unauthorized public use, others are (e.g., ham radio frequencies). Therefore, an individual might inadvertently tune to our frequency and violate the law. While this is in part accurate, it belies reality. There are audio services transmitted on microwave frequencies intended for the use of the general public, but there are no video services intended for such use. (Broadcast television operates on non-microwave frequencies.) Therefore, an innocent user would normally be incapable of receiving our video signal. More significantly, all of the illicit microwave receivers we have ever encountered are capable of receiving only our microwave frequency. (See enclosed technical report on pirate antennas sold in Spokane, Washington.) The reason for this is simple: it costs less to manufacture them this way and the only potential customers are those desiring to get pay-TV for free.

One legitimate concern that has been voiced is the impact S.B. 535 as presently worded would have on private earth station owners. While many satellite signals are not intended for the public, some are and, therefore, use of an earth station which has a multi-purpose function (and is, therefore, different from MDS receiving equipment) should not be labeled as inherently illegal. I believe by now you have, in cooperation with our FCC counsel, drafted alternative language that exempts private earth station usage from any criminal liability.

In closing, let me emphasize what should be obvious. Theft of service threatens the very life blood of our business. Through physical audits that we have conducted in Anchorage, we estimate that we are currently losing \$40,000 per month in revenue from use of illegal antennas. Left

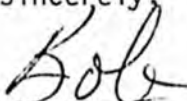
Gordon Evans, Esquire  
February 24, 1982  
Page 4

unchecked, it would be only a matter of time before such loss of revenue could put us completely out of business to the detriment of our legal and illegal viewers alike.

More to the point, there is a significant moral issue involved that is sometimes overlooked. We are a legitimate business and good corporate citizen. Our business is no different from any other in that to the extent we incur costs in fighting or lose revenue to sellers and users of pirate equipment, we are harmed and our subscribers are harmed. This is neither fair nor right.

We will continue to mobilize all of our resources against service theft because we have no other choice. Our continued existence depends upon it. All we are seeking in the enactment of S.B. 535 is the opportunity to make use of a very effective weapon in the battle.

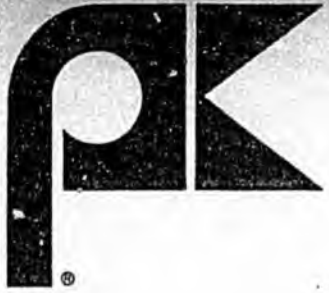
Sincerely,



Robert J. Gould

RJG/kj

Encs.



# MULTICAST

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 Laramie, WY launch....p.5  
 Recent FCC action.....p.

Editor: George Eagle (202) 547-4050  
 Associate Editor: Alan Cole-Ford (213) 454-0639  
 NEWSLETTER ON MULTIPOINT DISTRIBUTION SERVICE

No. 223  
 November 13, 1981

**PAUL KAGAN ASSOCIATES, INC.**  
 26386 CARMEL RANCHO LANE  
 CARMEL, CALIFORNIA 93923  
 (408) 624-1536

TD LC LF  
 JL LW  
 SRD  
 CLV

In an unusual interview with MULTICAST editors, a self-admitted pirate distributor made it easy to see why bootleg manufacturers and middlemen pose such a persistent and elusive threat to MDS operators, and why they take the risks they do.

Identifying himself as a principal in Microtronics, a NY-based distributor of microwave equipment, this man conceded that his tactics are typical. "Come in quickly, make a bundle, and keep moving," he said.

Until several months ago, he reports, he was content with a cash-and-carry business that saw him sell 350-400 units per week to dozens of retailers in New York City.

But, he said, last month seemed like a good time to make a more aggressive attack, "so I started advertising full-bore in newspapers. Retailers love it, since I pay for all the ads, and include their store names, with phone numbers and addresses."

Identifying up to eight stores in each recent *New York Post* display ad, Microtronics reportedly boosted its volume by 200%. Antennas were "sale priced" at \$144.95. The retailers paid approximately \$130/unit.

Now, six weeks later, all but two of the participating stores claim to have ceased all sales of pirate gear, citing legal reprisals from EBC soon after the ads appeared. Each businessman insists he was unaware his actions were illegal, having received repeated assurances from Microtronics that the deal was above-board.

"Of course we tell them it's not illegal," the distributor admits. "We explain that as long as HBO's name isn't used anywhere in the ad, they're not suggesting anything improper. Whatever the customer wants to do with his antenna is his business."

And the pirate indicated that he wouldn't be around to see what the customer did with his antenna. "Newspaper advertising is often a sign that a pirate is preparing to pull out of a market. The ads draw attention to the retailers, but they also move goods quickly," he said. "Once legal hassles start, the store owner can only complain. I've already made my profit, and I'll move if I have to.

"At some point," the pirate continued, "the retailer simply becomes expendable. It usually occurs when a city is reaching saturation, and selling more units begins to present more risk. New York is a good example. There must be 20,000-25,000 illegal antennas in the city already, but the pace won't continue. It makes more sense to find an easier city.

(continued on next page)

## PIRATE INTERVIEW (continued from P. 1)

"Any pirate must operate with a simple strategy," he added. "We keep our profile low and our liquidity high.

"Each market requires a different approach, and it's best to operate simultaneously in several cities, so inventory can be moved quickly and easily. I don't like to keep more than 150-200 units on hand at a time."

When asked about his motives, the pirate points to profit. "The margins are just too good to pass up," he said. "I can buy equipment at \$75-\$80 per unit, and sell it at nearly double, without any tax worries."

"I didn't create the market, I just give it what it wants," the pirate argues. "As long as customers think they're being clever instead of criminal by buying illegal hardware, I'll have a business."

## ANTI-PIRACY LEGISLATION MOVES FORWARD

In Washington, efforts to stop operations such as Microtronics looked as though they might run off the track toward early consideration last week.

Now, the anti-piracy bill is apparently back on the rails.

The bill, of vital importance to the pirate-beleaguered pay TV users of MDS, would set civil and criminal penalties for violating Section 605 of the Communications Act, which forbids unauthorized signal interception.

Things were chugging along toward a hearing scheduled for 11/12 when the Sony Betamax decision came down from San Francisco in late October.

That ruling by the U.S. Court of Appeals for the Ninth Circuit held makers—and technically even users—of home videorecorders liable for copy-right payments when recording movies and other shows off TV.

The decision, a victory for program producers, will be appealed, but it stirred concern at the Motion Picture Assn. of America about a possible "Betamax amendment" to allow a home-use exemption to the anti-piracy bill.

The hearing was postponed, but the National Assn. of MDS Service Cos., fearing the bill could become hostage to a final outcome of the Betamax case, mounted a rescue mission to Capitol Hill.

NAMSCO operatives met with bill cosponsors Rep. Timothy Wirth (D-CO) and Rep. Henry Waxman (D-CA), pointing out that while NAMSCO didn't downplay MPAA's concern, it didn't seem to belong with pay TV legislation.

A key staffer later said Betamax was a separate matter that probably should go before the House Judiciary Committee, and that there was "no way" it would be included in the anti-piracy bill (H.R. 4727).

After that the Communications Subcommittee, chaired by Wirth, re-scheduled the hearing for 11/17.

A session to mark up (put in final recommended form) the bill and send it to the Full Commerce Committee is expected to follow soon afterward.

The bill provides for criminal penalties up to \$25,000 and a year in prison for the first offense, plus damages from civil suit up to \$50,000.

The Communications Subcommittee's majority staff also submitted its report last week on competition in the telecommunications industry.

The report found that although new technologies, including MDS, had emerged and made some mark, "there is still unequivocal dominance by broadcast television over other video technologies."

(continued on next page)

*Cable television has a dirty little secret. Why pay for what you can see for free?*

# Video pirates

By Jonathan Greenberg

**E**VEN THE WELL-OFF LIKE getting something for nothing, and well-to-do dentist Sam Williams is no exception. Williams installed his own microwave antenna on top of his St. Louis home to pick

up Showtime, a pay television service that costs subscribers \$19 a month in his area, free of charge. Williams, whose name has been changed to protect his small act of piracy, made his antenna by soldering a coffee can filled with some simple circuitry into a sawed-off funnel.

Sam's rooftop, however, is a drop in the bucket. Experts estimate that some 10% of the 26 million U.S. homes currently receiving cable or pay television are freeloading (*see box*). Pirates hijack signals with homemade antennas that can be jerry-built with everything from aluminum snow sleds to barbecue grills. They buy bootlegged converters and bypass in-home decoder boxes, and they climb telephone poles to knock out security "traps."

Most signal thieves are probably otherwise law-abiding viewers who don't like to pay up to \$30 a month for their home entertainment. Some are also electronics buffs. For the latter, getting cable television for free is as much fun as picking up Timbuktu on a ham radio. In January *Radio Electronics* published a story about wiring up a cable decoder, and its newsstand sales jumped by 40%, to 93,000.

Like most crime, cable piracy is more widespread in urban areas. Industry insiders say that unauthorized taps account for as much as 25% of all viewing in New York City neighbor-

## Beating the system

Video addicts willing to invest \$5,000 in a satellite-receiving station get access to virtually unlimited programming. Low-budget thievery is possible too. The simplest piracy technique involves buying an antenna in areas where pay television is distributed through multipoint distribution systems. Franchisees in these MDS areas install antennas in subscribers' homes, transmit the signal and collect monthly service fees. Local electronics stores, however, often sell the same antenna for \$150 or so—less than the cost of an installation and six months' service.

In Phoenix, for example, now-famous Pirate Electronics sold over \$1 million worth of illegal cable antennas before local MDS operators forced it to close. Now, an industry executive estimates that one out of six viewers there owns his own antenna. But that might be conservative. "Half the homes in my neighborhood are getting cable, and I'm the only fool who's paying for it," says one local resident.

Not surprisingly, MDS systems aren't attracting large-scale investor attention. Cable franchise operators, as opposed to MDS operators, now have two basic approaches to security: They filter out services such as HBO and Showtime with "traps," or they scramble signals, providing descrambler boxes for a monthly fee.

Trapping is the more popular control method—but not always the most effective. Franchise operators send all signals over the same cable and then place 4-inch cylindrical traps on telephone poles out-

side subscribers' homes to filter out premium service. Such so-called negative security costs roughly \$15 per household per trap for parts and labor. Each premium service requires its own trap, and systems offering three or four add-ons typically color-code their traps. That means utility poles can look like Christmas trees.

For subscribers who aren't scared of heights, it can also mean a free gift is easy to reach. Just climb the pole, remove the trap and presto: HBO is on your screen, but not on your bill. System managers say that aggravated homeowners who have had trouble removing the traps have attacked them with drills, hammers and even blowtorches. In some areas there are organized thieves to do the pole-climbing. The pros often provide replacement "dummy" traps that fool audit teams who do spot checks for piracy.

Then there are descramblers. These in-home boxes,

roughly the size of a cigar box, are prevalent in urban areas where there are no telephone poles. Such suppliers as Oak Industries and Scientific-Atlanta provide this equipment at a cost of about \$70 per unit. Even with tight distribution, however, there are leaks, and bootleg black boxes trade for as much as \$100. Not a bad price, considering that HBO now costs \$15 a month in some markets. Cable executives report other problems, too: Subscribers with a flair for electronics can override the scrambling by fine-tuning spare television sets or rewiring basic cable units to get extra service for free.



*Microwave antenna on sale in New York*  
**Prestol Free HBO.**

**"This thing is like an information war, with lots of room to escalate. How can the cable industry constantly keep ahead of people's ability to steal, especially as the value of the services increase?"**

hoods where building superintendents "sell" cable hookups. High mobility brings added difficulties. If new occupants move into a home with a live cable tap and don't notify the company, they can often receive service without charge. Then there's the problem of cable gear left in vacant homes or apartments: It often disappears quickly.

Cable operators are ambivalent about small-time living room larceny. "We pursue organized thieves aggressively, but if it's just an individual customer stealing, we slap him on the wrist," says Dave MacDonald, group director for cable at the New York Times Co., which runs cable services in southern New Jersey serving 80,000 customers. "What we really want is not to prosecute, but to get them to pay for service," explains John Lockton, president of Warner Amex Cable.

However, certain abuses have the industry worried. In some areas, pole-climbing specialists such as telephone repairmen and former cable system employees travel door-to-door selling "lifetime free service," for between \$50 and \$150. Such offenders can be prosecuted under section 605 of the Communications Act, which prohibits the theft of a cable signal. "It's kind of like dope—they want to get the supplier," says one communications attorney. The penalty is usually a fine, and court cases are being filed at the rate of one every two weeks. In addition, HBO won an important battle last month against a manufacturer of private antennas in New York, a decision that could have broad anti-theft implications.

Many cable executives believe that

new technology, through the use of two-way addressable converters, will lessen the problem of piracy. Such units, similar to those Warner now uses at its Qube installation in Columbus, allow the operator periodically to monitor system use. Instead of sending linemen to find freeloaders, a control center detects them directly.

The problem is that such addressable converters don't come cheap. They cost roughly twice as much as the \$60 or \$70 that conventional descramblers sell for. And, like every electronic security system ever invented, they still can be beaten by a smart thief. System operators, meanwhile, are slow to lay out money for today's antipiracy systems. "Everyone is anxiously waiting for better addressable technology," says Jim Cottingham, vice president in charge of the 1.2 million Time Inc. cable subscribers. "This thing is like an information war, with lots of room to escalate," adds Cliff Roth, a writer for *Video* magazine. "How can the cable industry constantly keep ahead of people's ability to steal its information, especially as the value of the services increases?"

By and large, cable operators prefer not to talk about the problem. Why publicize the possibilities? In an industry growing by about 20% a year, who cares if a little cash slips between the cracks? And the day may be coming when cable carries lots of advertising. When that day comes, even the non-paying cableviewer becomes attractive to advertisers and thus a source of income. Still, the future is full of unknowns for this lusty young industry, and piracy is one of those unknowns. ■



*Cable operator Dave MacDonald with neutralized cable "traps"*

**Homeowners attacked the devices with drills, hammers and blowtorches.**

January 11, 1982

REPORT TO:

STERLING RECREATION ORGANIZATION  
ON PURCHASED 2 GHZ RECEIVING EQUIPMENT TESTING AND CONCLUSIONS

GENERAL

A 2 GHz microwave receiving equipment was tested by HARTECH, INC. for reception of Multipoint Distribution Service (MDS) common carrier (2150-2156 MHz) and 2300-2450 MHz Amateur Radio band signals.

CONCLUSIONS

Tests performed with input signals at the MDS and Amateur Radio frequencies indicated:

- (1) The receiving system tuned the MDS signal in on a standard television set from Channel 2 to Channel 6 by using the tuning control on the unit. This was proven in laboratory tests and by watching "off-the-air" MDS.
- (2) In laboratory tests, HARTECH was able to tune in signals between 2300 and 2334 MHz for output frequencies between Channels 2 and 6. No reception was possible from 2334 MHz to 2450 MHz for output on a standard TV set. Therefore only 34 MHz of the total 150 MHz Amateur Band could be tuned in.
- (3) The receiving equipment [local oscillator] tuning range was measured to be 40 MHz (from 2206-2246 MHz) so that the total 150 MHz wide amateur radio band could not be tuned in on any single TV channel, a reasonable design requirement of an amateur radio receiver for reception in this band.

HARTECH concludes that the 2 GHz (2000 MHz) microwave receiving equipment was designed for reception of the MDS band for output on a standard television set on channels 2 through 6.

UNIT IDENTIFICATION

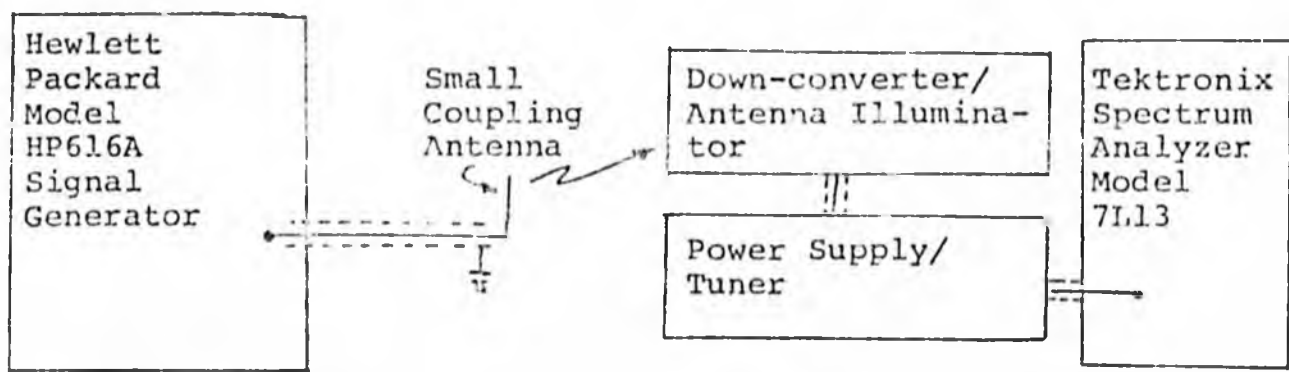
The unit tested had the following components and markings:

Components	Markings
Power Supply/Tuner	Jan. 6, 1982 Case #81-130
Down-converter/Antenna-Illuminator	Western Techtronics Colo. Spgs.
Parabolic Antenna	D.M.W.

HARTECH added the initials J.W.H. In addition to the above components, there were two cables supplied, one which connected the down-converter/antenna-illuminator to the power supply/tuner, and the other to connect the power supply/tuner to a television set. It should be noted that the cable to the TV set was terminated in a transformer from 75 ohms to a standard 300 ohm "twinlead" to connect to the antenna input.

TESTING SETUP

Because the down-converter and the antenna-illuminator (primary feed to receive the focused signal from the parabolic reflector) were fabricated into a sealed fiberglass tube, no direct connection could be made between a laboratory signal generator and the receiver input. Coupling from the signal generator was accomplished by using a small antenna at the signal generator. The test setup is shown below.



The spectrum analyzer frequency counter was calibrated in November, 1981. Quantitative amplitude data could not be taken because direct connection could not be made to the down-converter. A strong signal could be obtained on the HP signal generator, up to zero dBm. A received signal from a typical MDS station is -50 dBm. The amplitude was varied to extremes in all testing.

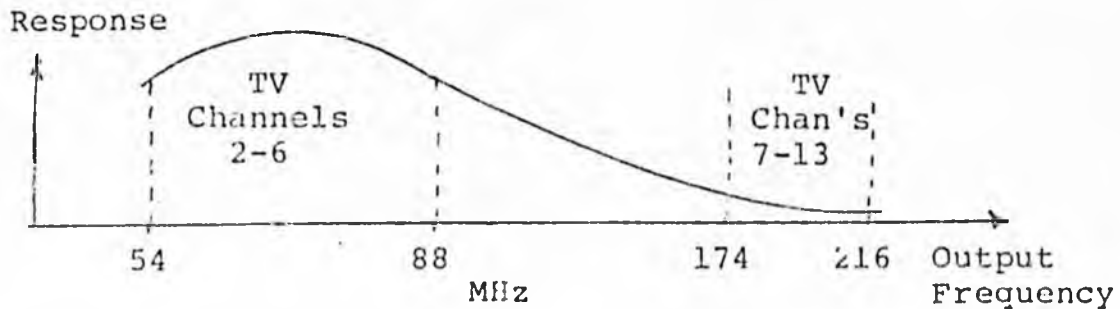
Before making conversion tests, the local oscillator frequency range was checked by using the calibrated frequency meter in the spectrum analyzer. This was done by checking the radiation from the down-converter detected at the fiberglass tube enclosure. The oscillator tuned from 2206 to 2246 MHz.

With the signal generator tuned to 2150 MHz, the MDS frequency, the output of the down-converter (the resulting frequency from the mixing of the input frequency and the local oscillator) could be tuned from 56 to 96 MHz. These frequencies cover Channels 2 to 6 (see Appendix) on a standard television set.

With the signal generator tuned to 2300 MHz, the bottom of the amateur radio band, the output could be seen from 54 to 94 MHz as the tuning control was varied. The down-converter could convert a 2300 MHz signal to any channel between 2 and 6. As the signal generator frequency was raised to 2334 MHz, the converter output was at the top of Channel 6, 88 MHz. As the frequency of the signal generator was raised toward 2450 MHz, the top of the band, no output was detected.

Theoretically, amateur radio signals between 2380 and 2450 MHz could be tuned in on Channels 7 to 13, 174 to 214 MHz; however,

the output could not be detected. This was probably caused by tuned circuits at the output of the down-converter (usually tuned to channels 3 through 5). The response "roll-off" is usually quite great at the Channel 7 frequency of 174 MHz. The figure below shows a typical response curve at the output of a down-converter.



The conclusion reached in laboratory testing is that the receiving system will receive MDS signals and the bottom 34 MHz of the 2300 to 2450 MHz Amateur Radio band with output on channels 2 to 6 of a standard television set.

OFF-THE-AIR TESTS

The receiving equipment was connected as specified in the instruction sheet and an excellent MDS signal was picked up which could be tuned in on channels 2 to 6 on a standard television receiver.

TESTING PERFORMED AND REPORT WRITTEN BY:

*James W. Hart*  
JAMES W. HART, P.E.



## SELECTED EXPERIENCE

### MICROWAVE AND TWO-WAY RADIO SYSTEMS

1. 26 hops of multichannel common carrier microwave within one state in the 6 GHz common carrier band. Included completed technical portions and exhibits as required on the FCC Form 401's.
2. Upgraded a problem CATV hop in the 6 GHz band for a client using improved antenna characteristics and a GaAs FET amplifier.
3. The design, FCC forms, and supervision of a 12 GHz commercial microwave system used by the banking industry.
4. The design, FCC documentation preparation, and installation supervision of a video television security system in a large company.
5. Designed and documented (FCC Forms 401 and 402) numerous common carrier and commercial microwave systems in the 2, 6, & 12 GHz bands.
6. Feasibility study and design of a 12 hop 960 MHz system for security purposes, voice and data channels for a state department of corrections including economic/breakeven analysis utilizing LEAA matching funds.
7. Feasibility study and design of a 12 GHz microwave system for a hospital to communicate with outreach clinics including B/W and color TV, voice channels, and EMS data communications. The job included feasibility, design, and detailed specifications for procurement.
8. 150 MHz two-way radio interference study for a county which had five repeaters colocated. The study showed calculations and recommended equipments required to minimize the interference being experienced.
9. A Translator feasibility study for a resort area to import major TV stations from an urban community 100 miles away. The study included a survey, design generation, and cost estimate.
10. Measurements and a recommendation report at potential microwave radio sites within a half mile of a 1 megawatt radar. This was performed for a major common carrier company.
11. Designed and performed trouble-shooting on a coaxial TV security system at a high level nuclear plant. Studied feasibility and reliability of a microwave radio replacement system.
12. Design and FCC documentation, Form 346's, for a TV multi-translator system for a western state county. This included coverage patterns for some 13 translators.
13. Aided in the analysis of a military data communications system to solve high error rates in the communications link for transmitting remote batch data at 4800 and 9600 baud.
14. Generated requirements and wrote specifications for data relaying radio equipments for a power company used for 300 sensor points.

APPENDIX

TELEVISION CHANNELS

TELEVISION CHANNEL NUMBER	CHANNEL FREQUENCY (MHZ)	VIDEO CARRIER FREQUENCY
2	54-60	55.25 MHZ
3	60-66	61.25 MHZ
4	66-72	67.25 MHZ
5	76-82	77.25 MHZ
6	82-88	83.25 MHZ
7	174-180	175.25 MHZ
8	180-186	181.25 MHZ
9	186-192	187.25 MHZ
10	192-198	193.25 MHZ
11	198-204	199.25 MHZ
12	204-210	205.25 MHZ
13	210-216	211.25 MHZ
14	470-476	471.25 MHZ
15	476-482	477.25 MHZ

[NOTE: (1) FREQUENCY BREAK BETWEEN CHANNELS 6 AND 7 WHERE THE BROADCAST FM BAND, AND TWO-WAY FREQUENCIES FOR MANY SERVICES ARE LOCATED: AND (2) FREQUENCY BREAK BETWEEN CHANNELS 13 AND 14 WHERE MANY TWO-WAY RADIO & GOVERNMENT RADIO FREQUENCIES ARE LOCATED.]

**JAMES W. HART, P.E.**

- education      MBA, University of Chicago, 1963  
                  BSEE, M.I.T., Cambridge, MA, 1951
- licenses, societies, patents & teaching      Registered Professional Engineer. Member of the American Consulting Engineers Council. First Class FCC Radio Telephony and Amateur Radio Licenses. Senior Member of IEEE; Member, Denver Section Executive Committee; IEEE representative to and Director of the Colorado Engineering Council ('79&'80); Past Chairperson Denver APS Section. Chairman of the Judging Committee of the Colorado State Science Fair ('79&'80) and State Representative to the International Science and Engineering Fair ('79). Holder of two U.S. Patents. Taught accounting at local community college (State Credential '74).
- business experience 11-71 to present      HARTECH, INC., Littleton, CO. President. Consulting Engineering Company. In charge of: Feasibility Studies - Engineering/Economics Options, Microwave and Two-Way Radio System Planning, Antenna and Waveguide Design and Prototypes, and Government Policy Studies. Clients are the Federal Government, Local and County Governments, Universities, CATV Companies, Hospitals, a Radio/TV Network, Manufacturing Companies, and Other Consulting Companies. From 2-74 to 2-76, Hart was on leave of absence from HARTECH working on OTP policy research within the U.S. Government. His technical and business analyses impacted U.S. policy in the areas of CATV, Translators, VANS, Common Carriers, Data Transmission, and Satellite Carriers.
- 12-69 to 10-71      MSC, Golden, CO. Vice President. Successfully performed microwave system planning for Specialized Common Carrier and CATV clients.
- 10-66 to 12-69      ANDREW CORPORATION, Orland Park, IL. Director of Projects and Administration. Directed a \$1.2 million budget for the development of profitable antenna and cable products. Was also responsible for Corporate O.C., Product Service, Proposal Preparation, and Technical Publications. Served as Secretary of the New Products Committee.
- 7-61 to 10-66      DENASCAN CORPORATION, Chicago, IL. General Manager of the MARK PRODUCTS DIVISION ('65&'66). Successfully directed all design, production, and marketing activities of a highly profitable line of antenna and communications products. Generated SOP's for new product selection, development, pre-production processes while Director of Engineering of the B&K DIVISION ('64). Manager of MARK microwave products ('63).
- 7-51 to 6-61      MOTOROLA, INC., Chicago, IL. In charge of design and administration of many military communications, radar and ECM equipment programs. On leave of absence from Motorola from 1954-6 to serve as a radar and ECM instructor in the Army.

## LIST OF TELECOMMUNICATIONS POLICY WORK PERFORMED BY J.W. HART, P.E.

### 1.0 Studies Performed at HARTECH, INC:

- a. "Marketing Studies - An Economic Analysis of MDS Transmission; and State of the Art of Millimeter Microwave Transmission", for a major national broadcasting network, July, 1980.
- b. "Report - Direct Broadcast Satellites, Service, Economic, and Marketing Factors" prepared with Browne, Bortz, and Coddington, for the National Association of Broadcasters, January, 1981.
- c. "Broadband Communications in Rural Areas", Denver Research Institute (DRI), 11-73, under OTP Contract. HARTECH performed all microwave technical and economic analyses.
- d. "Microwave Transmission Handbook", 12-77. Made primary input contributions on DoC Contract.
- e. "Utilization of Electronic Message Systems (EMS) Outside and Within the U.S. Postal System", 5-76, OT/DoC Contract.
- f. "Wrote Technology Section of "Design Issues for Demonstration of Rural Special Delivery Projects Incorporating Telecommunications Technologies" under subcontract to DRI, 6-78. NSF Grant.
- g. Made Technical Contributions to "Satellite Based Delivery of Continuing Education and Training Programs in Five User Communities", 3-78, DRI. Performed under NIE Contract.
- h. Continuation of U.S.P.S. study program on EMS in paragraph (e) above expanding the competition in the public domain, 8-78. NTIA/DoC Contract.

### 2.0 Studies performed while employed by OT/PRD (DoC) Boulder, CO (2-74 to 2-75) [PRE = Policy Research Estimate]:

- a. "An Initial Look at VANS Breakeven Data", PRE, 6-74.
- b. "A Survey of Non-Tariff Trade Barriers for Microwave and Two-Way Radio Equipment", PRE, 1-75.
- c. "Value Added Network Services, Marketing Characteristics", PRE, 5-74.
- d. "Comparison of Long Haul Microwave and Cable Facility Costs of A.T.&T. Long Lines", PRE, 8-75.
- e. "Urban CATV Distribution Plant - Part I: Current Cost and Technology, PRE (Coauthored by Hart, Gray, Miller, & Ax), 4-76. Later Published as an OT Report.
- f. "A.T.&T. Microwave and Cable Designations, PRE (Coauthored by Hart and Bolter), 6-74.

## SELECTED EXPERIENCE

### 1. MICROWAVE ANTENNAS

- 1.1 10 foot Cassagrain dish design for 4 GHz Earth Station.
- 1.2 Scalar Feed Design and Prototype for illuminating a 4/6 GHz Earth Station with equal E&H plane patterns over the frequency range. Design of specially shaped subreflector for improved antenna efficiency of Cassagrain type antenna.

- 1.3 Dual polarized, wide bandwidth feedhorn designs and prototypes including testing per the table below:

<u>Frequency (GHz)</u>	<u>Maximum VSWR at Each Port</u>	<u>Minimum Iso- lation - Ports</u>	<u>Waveguide or Input Flange</u>
1.700-2.100	1.07	33 Db	7/8" EIA
1.900-2.300	1.07	33 Db	7/8" EIA
5.925-6.425	1.05	35 Db	WR-137
7.125-7.750	1.05	35 Db	WR-137
12.20-13.20	1.07	35 Db	WR-75

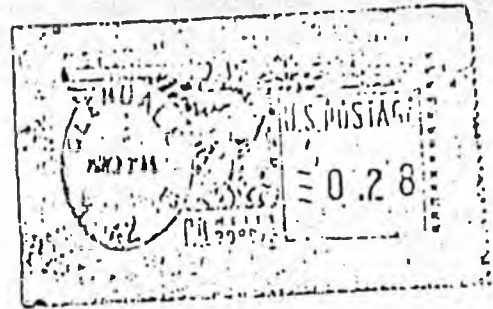
- 1.4 Single polarized 5.925-6.425 GHz feed horn design and prototype for parabolic dishes with maximum VSWR of 1.02.
- 1.5 12/14 GHz Earth Station feed horn design and prototype used as mobile ground station for CTS satellite. Transmit was 14.0 - 14.5 GHz, 500 watts, and maximum VSWR of 1.20; receive port was 11.7-12.2 GHz with a maximum VSWR of 1.10.

### 2. WAVEGUIDE COMPONENTS

- 2.1 Circular waveguide designs including waveguide, single and dual polarized launcher sections, brackets, connectors/flanges, etc. for WC166 and WC109.
- 2.2  $TM_{01}$  mode filter for use in oversized guide used in  $TE_{11}$  mode.  $TM_{01}$  filter was minimum of 25 db with an insertion loss of 0.5 db maximum in  $TE_{11}$  mode. Prototypes were constructed and tested.
- 2.3 12.2-13.2 GHz high mode rejection  $TE_{11}$  taper design from 1.09" to 0.75" circular waveguide. Design was for 65 Db RML (reconverted mode level).

HARTECH HAS HP AND ALFRED SWEEP EQUIPMENT FOR THE DESIGN AND TESTING OF MICROWAVE COMPONENTS AND PARTIAL ANECHOIC CHAMBERS FOR TESTING TO 1700 MHZ WITH A MAXIMUM REFLECTION OF -40 DB.

 **PIRATE ELECTRONICS INC.**  
P.O. Box 811, Glendale, Arizona 85311



Harold Whillie  
c/o The Toker's Den  
417 "D" Street  
Anchorage, Alaska 99501

Ace  
EX. 33

May

Harold;

Here's information regarding our phone conversation. To begin, as you can see by the enclosed card, I'm now President of Pirate Electronics. We manufacture an antenna which receives all the microwaves transmitted between 1.8 and 2.4 GigaHertz. You may know that Visions broadcasts at about 2.15 (or thereabouts) so this antenna, pointed toward the Visions broadcast antenna, will scoop the signal out of the air.

Included in the antenna body is a "down converter" which reduces the microwave to a frequency which your television can "see." There is also a fine tuning box, which will allow the user to get maximum clarity on his screen.

These are made with the idea that the customer can install the antenna, by climbing up on his roof, pointing it toward the broadcast antenna, and tightening the U bolt, running the enclosed coaxial cable to the fine tuning box, attaching the fine tuning box to the television set, and everything is go. This is the theory. In reality, we've found that if they have the antenna installed, they give us much less problems, because the great unwashed public is generally too stupid to do it, even with instructions. But, remember this, I'll refer to it later on (the part about installing, not how stupid the public is).

The legal end of this is: We make the Visions people crazy, because we can sell the antenna, and get their signal, but our subscribers (customers) don't have to pay the monthly charge (obviously).

Now, the cost of this antenna is explained in the enclosed price sheet, going from \$275. for buying 2-6, down to \$150. for buying in lots of 100 and up. The suggested retail here is \$350. but there, I expect you could get them out for \$400. or more.

If you were to install them, you could add another \$50. - \$100. to your profit structure, with some deduction for the labor involved. I don't expect that you are going to do the install yourself. Somehow, I can't quite picture your little, fat body on somebody's roof.

As you can see by the price structure, the more you buy, the higher your profit structure goes.

We're looking for someone to buy and install in both Anchorage and in Fairbanks. We've had some success with mail order there, but if your purchases were strong enough, you could have both cities, and really turn some cash while the weather is good.

My suggestion is that you get a couple of them, try them out on your own set (I'll send them C.O.D.), and if you can see the benefits, go for a little larger order.

Back to the legal: we are now being sued civilly by the local Visions group (here it's called Home Box Office, or HBO), but I don't think you will have to suffer that injustice, especially if we win. As I said earlier, they take a dim view of what we're doing, but there is no CRIMINAL wrongdoing, and we've got the word of an Arizona Superior Court Judge (which will carry lotsa weight in Alaska) to guarantee that we're doing nothing wrong.

There seems to be a question about the "wrong" in installing the antenna, though. According to a United States Code (USC 47 605) the installer may be aiding and abetting. That means that you should hire an electronically oriented kid to actually do the installing, who can vanish if there is a problem, but pay him well enough so that it's worth his while to split, or to lay low.

Now, you've got an overview of everything, and based on this and our conversation, you are at least better informed. Disregard the bullshit in the enclosed letter, it's just a cover for this. Also, this letter is very damaging for us, in our civil suit, so after you've digested the contents, get rid of it.

You can call me (collect) at (602) 247-9700 anytime during my working day (from 7:45 A.M. to about 4:30 P.M. if I can do anything to help you make a decision.

We expect that there is a market for 3 to 5 thousand of these in Anchorage, and probably 1 to 3 thousand in Fairbanks. I'd like to work with you, and if you decided that you wanted to move, I'd come there and help you get off the ground. If you elect not to go, I expect I'll have to come there anyway, to find someone.

Keep Susan under control as much as possible. I'll be in touch.

John



# PIRATE ELECTRONICS

MANUFACTURERS & DISTRIBUTORS  
MICROWAVE ANTENNAS

Dear Store Owner:

Now Available for Your Customers!  
No Competition!

We are Mid-South Distributors for Pirate TV, manufacturers of micro-wave receiving equipment for personal home use (ruled legal). Perhaps you have seen us on NBC's Today Show (mid-may 1980) or heard of us in one of many other periodicals such as Newsweek, etc.

Our system for local use includes antenna and down converter, 75' coax and 1.8 to 2.4 GHz tuner complete with instructions and needed accessories for simple self-installation (need line of sight to broadcast tower 20-40 miles depending on strength of signal). Retail \$350.00 - 6 months guarantee.

Our Earth Station picks up from 11 satellites above the earth and gives the customer a fantastic crystal-clear world of entertainment no matter where they may live (need line of sight to Southern California).

Fantastic for rural or remote locations where little or no reception or cable is available. Base price \$9,995.00 plus travel and custom installation.

To get you acquainted with this lucrative market, we'll ship you one local system immediately to play with and give you a \$75.00 Dealer price break. Then you may purchase quantities of 10 at \$225.00 and a \$50.00 rebate credit making your initial antenna \$225.00 also. (We'll pay freight on first antenna.)

Order immediately to become a Dealer in your area. You will be briefed completely on how to market this product (word of mouth is sufficient for substantial sales).

Include your name and both work and home phone numbers please.

Note: Enclosed sample ad and all advertising describes product and its capabilities only. More details upon order.

Send Cashier's Check or Money Order for \$275 to:

Sincerely,  
PIRATE TV  
Fontana Center  
7955 East 50th Street, 1085  
Tulsa, Oklahoma 74145  
(918) 665-3325

EXH  
C

Jim Blake  
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EVIDENT A PAGE 1



## T.V. ANTENNA



**HENRI SALES COMPANY**  
WHOLESALE DISTRIBUTOR

P.O. Box 35293  
Phoenix, AZ 85069



MICROWAVE ANTENNAS • EARTH STATIONS • ACCESSORIES

PHONE : [ 602 ] 866-9243

GENTLEMEN:

WE ARE MANUFACTURER'S DISTRIBUTORS OF THE FINEST MICROWAVE ANTENNA AVAILABLE ON THE MARKET TODAY. IT IS CAPABLE OF RECEIVING MICROBAND TRANSMITTED SIGNALS WITH A CLARITY AND RANGE FAR SUPERIOR TO MOST OTHER ANTENNAS .

OUR PRODUCT IS COMPLETE WITH ALL HARDWARE AND ACCESSORIES NEEDED TO INSTALL IT.

THE ANTENNA IS PACKAGED AND CONTAINS AN INSTALLATION INSTRUCTION SHEET.

WE WILL SHIP YOU A SAMPLE UNIT UPON REQUEST [PRE-PAID BY U.P.S.].

ENCLOSED WITH THIS LETTER YOU WILL FIND A PRICE SHEET OF OUR PRODUCTS.

THIS A NEW AND VERY LUCRATIVE MARKET WITH A LOT OF MONEY TO BE MADE !!

GET IN ON THE GROUND FLOOR OPPORTUNITY BY ORDERING YOUR SAMPLE ANTENNA TODAY.

A LIST OF STATES THIS ANTENNA WORKS IN IS INCLUDED. IF YOU ARE INTERESTED IN

OUR PRODUCT, PLEASE CONTACT US AS SOON AS POSSIBLE.

SINCERELY,

HENRI SALES CO.  
WHOLESALE DIST.

EXH  
F

EXHIBIT F PAGE 1

