ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672

2565 HLC HB 211 - HB 220

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Attorney General and the defendant Alaska Board of Registration for Architects, Professional Engineers, and Land Surveyors have determined to seek a legislative resolution of the issues raised by the complaint.

Legislation is being prepared which, on behalf of the defendant Board, will be introduced in the very near future for enactment during the current session of the state legislature. The legislation will be designed specifically to approve and implement the provisions of the "competitive bidding" rule challenged in the complaint herein. Enactment of such legislation would conclusively immunize the Board's actions from antitrust liability by virtue of the "state action" doctrine and the principles established pursuant to that doctrine by California Retail Liquor Dealers Association v. Mid-Cal Aluminum, Inc., 445 U.S. 97 (1980), and would thus resolve the controversy between the parties and make continuation of this case pointless.

Accordingly, in order to conserve the resources of the parties and the Court, the Board asked the Department of Justice to join in a request that the Court stay proceedings so as to permit the current session of the legislature to act upon the proposed legislation. The Department refused this request, however, so that the Board now has filed the present Motion.

The limited stay of proceedings that the Board seeks would not unduly prejudice the interests of the Department and would provide an opportunity to resolve the current dispute without the burdens attending discovery and trial. If the current session of the legislature does not enact the proposed legislation, the Board would be prepared to have the case tried on an expedited basis.

II. BACKGROUND: THE STATE-ACTION DEFENSE

The complaint filed by the Department of Justice in this case challenges as unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, a rule enacted by the defendant Board -- Rule 36.230(b) -- which prohibits competitive bidding by architects, engineers, and surveyors. One of the key issues in the case is whether the regulation is immune from antitrust attack by virtue of the "state action" doctrine established by Parker v. Brown, 317 U.S. 341 (1943), and subsequent cases.

In the Mid-Cal Aluminum decision, supra, the Supreme Court set out the basic requirements for a state-action defense to be successfully invoked:

> "[There are] two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy': second, the policy must be 'actively supervised' by the State itself."

445 U.S. at 105, quoting from City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Justice Brennan).

The Board's position is that inasmuch as it has authoritatively acted for the State in the fashion specified by the Court in Mid-Cal, the standards quoted above have been satisfied and Rule 36.230(b) is exempt from antitrust scrutiny.[2/] The Department of Justice, by contrast, believes action by the Board is insufficient to satisfy the standards of Mid-Cal; according to the Department, those standards can be met only if the state legislature specifically authorizes or establishes a noncompetitive regime.

III. THE STATE ATTORNEY GENERAL'S PROPOSAL

In reviewing this matter, the new Attorney General of the State of Alaska has concluded that the most straightforward and efficient way of resolving the controversy between the Board and the Department would be for the state legislature to enact legislation specifically meeting the Mid-Cal requirements. Although the Board continues to believe that such legislation is by no means necessary to satisfy Mid-Cal, it agrees that such legislation would conclusively resolve the controversy, since even under the Department's view of Parker and Mid-Cal it would definitively establish a valid state-action defense and thus would eliminate any conceivable basis for the current suit. Accordingly, in the interests of expediting resolution of the controversy and eliminating the need for prolonged

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2/ The Board also asserts several other defenses to the complaint.

litigation, legislation of the sort described above will be introduced on behalf of the Board in the very near future.

IV. BASIS FOR THE BOARD'S MOTION TO SUSPEND PROCEEDINGS

Compared to most antitrust cases, this litigation is not especially complex as a factual matter. Stipulations of fact could be utilized to provide at least most of the record upon which the legal issues involved would be decided.

Nonetheless, substantial time and effort by both parties, and by the Court, would be required to litigate the matter. Agreeing on a complete set of stipulations of fact would not be a simple matter, and some discovery inevitably would be sought. The Department of Justice has in fact already served on the Board a set of interrogatories and a request for production of documents, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure; responses to those discovery requests are currently due on January 31, 1983.

In an effort to avoid potentially unnecessary discovery and other pre-trial preparation that similarly may prove unnecessary, the Board asked the Department of Justice to join in requesting that the Court order proceedings stayed pending the outcome of the legislative effort described above. The Board informed the Department that the outcome

of that effort almost certainly would be known by May or June, since sessions of the state legislature historically have ended no later than that time of year. The Department replied, however, that it would not agree to such a stay and that it intended to move for an order requiring compliance with its currently outstanding discovery requests.

The Board is thus in a difficult position. It does not want to be in violation of its obligations under the Federal Rules, yet it believes that a limited stay of proceedings of the sort outlined above makes great sense and offers the best route to an efficient resolution of the case. Accordingly, the Board has moved for an order directing that proceedings herein be suspended until May 31, 1933, for purposes of pursuing a legislative resolution of this matter. The proposed order submitted by the Board also provides that proceedings may be resumed at an earlier date if the current session of the Alaska legislature enacts or rejects the proposed legislation or ends before May 31.

If its proposed legislative solution is unsuccessful, the Board is fully prepared to pursue this litigation -- and to respond to all discovery requests -- under an expedited schedule. 3/ In this way the interest of the Department

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3/ Should the Court deny the Board's Motion, the Board will undertake to respond to the Department's outstanding discovery requests by whatever date the Court may direct (the Board suggests fifteen days after the Court's order), and will of course otherwise cooperate in moving the litigation forward.

in avoiding unnecessarily lengthy proceedings can be satisfied. Given this willingness, the Board believes that there is no purpose to be served in engaging in the not insubstantial burden of discovery and pretrial preparation at the very time that efforts are being made to resolve the controversy in a way that would make this case totally unnecessary.

V. CONCLUSION

For these reasons, the defendant Board respectfully requests that the Court grant the Board's Motion to Stay Proceedings.

Respectfully submitted,

Alan K Palmer

DATED:
January 28, 1983

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, PROFESSIONAL ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. A82-423 CIV Filed: 10/12/82 ORDER

For good cause shown:

1. It is hereby ORDERED that all proceedings in this action shall be stayed until May 31, 1983.

2. It is further ORDERED that either party may at any time prior to May 31, 1983, move for lifting of this stay and for resumption of proceedings herein on the grounds that (a) the current session of the Alaska legislature has ended, or (b) the Alaska legislature has enacted or rejected legislation approving and implementing the provisions of Rule 36.230(b) of the defendant Board of Registration for Architects, Professional Engineers, and Land Surveyors.

Dated this _____ day of _____, 1983.

_____
United States District Judge

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UNITED STATES DISTRICT COUPT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendants.	Civil No. A 82-423-CIV MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO STAY

I

INTRODUCTION

This memorandum is filed in opposition to the motion of defendant Alaska Board of Registration for Architects, Engineers, and Land Surveyors ("Board") dated January 28, 1983 to stay all proceedings in this case.

Three months after this case was filed and shortly before its discovery commitments were due, defendant, a state licensing board consisting entirely of practitioners, has made a last minute request to stay all proceedings in this case. According to defendant, the purpose of this stay is to permit the Alaska Legislature to consider legislation not yet even introduced, which defendant alleges would "make continuation of this case pointless." Defendant's Memorandum In Support of Motion at 2). Defendant fails to cite any legal authority or establish any factual predicate for its proposed stay. Defendant has failed to discharge its heavy burden of showing that (1) going forward with the litigation would impose on it clear hardship or inequity, and (2) this hardship or inequity outweighs any damage the stay may cause others. Defendant, who has already received two extensions of time in this case and is in default on its discovery obligations, has failed to demonstrate any cognizable hardship or inequity in complying with the Government's discovery requests or fulfilling its undertaking to seek to shorten discovery by stipulation. The requested stay will harm the public interest by prolonging the defendant's manifestly illegal conduct and depriving consumers of the benefits of competition. Furthermore, a stay should not be granted on the basis of mere speculation that legislation may someday be enacted. This is especially true here in view of the fact that the Alaska Legislature recently rejected considerably narrower legislation than that the defendant apparently will now seek.

The Court should therefore deny defendant's motion and enter the Government's proposed order attached to this memorandum.

II

BACKGROUND

This case was filed on October 12, 1982 to prevent and restrain the continuing violation by defendant Board of Section 1 of the Sherman Act, 15 U.S.C. § 1. In particular, the Complaint seeks to enjoin the Board, which consists entirely of competing, private practitioners, from continuing to engage in a conspiracy, the substantial terms of which "have been and are that the defendant promulgate, adopt, publish and distribute a provision in its Rules of Professional Conduct, Rule 36.230(b), prohibiting certificate of registration holders and other architects, professional engineers and land surveyors practicing in Alaska from knowingly soliciting or submitting proposals for professional services on the basis of competitive bidding." (Complaint ¶ 17). The Complaint also alleges that "various other persons not made defendants herein have participated as co-conspirators with the defendant in the violation hereinafter alleged, and have peformed acts and have made statements in furtherance thereof." (Complaint ¶4).

The defendant Board and its constituent professions in Alaska have long been on notice of the issues raised in this lawsuit. Nearly five years ago, in the landmark case of National Society of Professional Engineers v. United States, 435

U.S. 679 (1978), the United States Supreme Court held that a substantially identical competitive bidding ban applying to the engineering profession was illegal per se under the antitrust laws. The Supreme Court stated that "[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement . . . . On its face, this agreement restrains trade within the meaning of §1 of the Sherman Act." 435 U.S. at 692-93.

That state licensing boards as well as trade associations were subject to this rule was made clear one month later in United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), modf'd of aff'd, 592 F.2d 919 (5th Cir. 1979), cert. denied, 444 U.S. 925 (1979). In that case, the court held that a Texas general enabling statute (strikingly similar to two relied on here by the Board in issuing its price ban, Rule, A.S. §§08.48.101 and 111) was insufficient legislative authority under the state action doctrine to shield a per se illegal competitive bidding ban from the reach of Sherman Act. The court stated that

> In the instant case Rule 14 [the competitive bidding ban] is not mandated by any state regulation or action. Section 5 of the Accountancy Act is cast in permissive, not mandatory, language and, furthermore, only allows adoption of Rules appropriate for maintenance of high standards of integrity in the Accountancy profession. Nowhere in the Act does the State as sovereign mandate the anticompetitive conduct required by Rule 14, nor is such policy dictated by the

> State. Additionally, it cannot be said that Section 5 of the Act in any way concerns or contemplates "the kind of action complained of" here.

464 F. Supp. at 404.

The clear holding in Professional Engineers that competitive bidding bans are per se illegal under the Sherman Act has been widely discussed and understood throughout the engineering and other professions. Numerous professional organizations and state licensing boards have taken steps to repeal their bans on competitive bidding. 1/ In contrast, the Alaskan Board has on several occasions resisted attempts to bring it into compliance with the mandate of Professional Engineers. In December 1980, for example, defendant Board voted to retain Rule 36.230(b), its ban on competitive bidding, despite the recommendation of the Alaska Attorney General that it be repealed. During this same period, as part of its effort Department of Justice commenced an antitrust investigation which led to this litigation. The Department made extensive efforts to contact professional licensing boards to determine whether they still enforced bans on competitive bidding, to dispose of this matter without recourse to suit. Beginning in April 1982 and continuing thereafter, attorneys from the Department

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1/ E.g., United States v. American Institute of Architects, 1972 Trade Cas. ¶73,981 (D.D.C. 1972) (consent decree). United States v. American Society of Civil Engineers, 1972 Trade Cas. ¶73,950 (S.D.N.Y. 1972) (consent decree); and United States v. American Institute of Certified Public Accountants, 1972 Trade Cas. ¶74,007 (D.D.C. 1972) (consent decree). In May 1982, the West Virginia Board of Accountancy eliminated, among other things, a ban on competitive bidding after being advised the Government would otherwise sue (See attachment 1).

contacted the Attorney General of Alaska or the Board on numerous occasions to discuss the Rule. The Alaska Attorney General again asked the Board to repeal the Rule, but after hearings in June and August the Board voted to retain it in September 1982.

In late September, the Assistant Attorney General in charge of the Antitrust Division authorized filing this lawsuit. Pursuant to the policy of the Attorney General, the Department on September 23, 1983 telephonically contacted the Governor, Attorney General of Alaska and the Board to put all on notice of the Department's intent to sue and to afford all affected parties a final opportunity to amend the Rule without the need of litigation. Since no response was forthcoming, this suit was filed two weeks later.

Since the suit was filed, the defendant has caused several significant delays in this litigation. Because the then Attorney General of Alaska initially took the position that he would decline to represent the Board, the Government in October agreed to defendant's request for a 20-day extension of time to permit it to seek new counsel. In November, the day after the Answer was filed, counsel for the parties met in Washington, D.C. to discuss how to proceed with this case. In order to expedite the case, the parties agreed, among other things, to exchange proposed stipulations on December 17, 1982 and so advised the court. The plaintiff on December 13 served Interrogatories and a Request for the Production of Documents upon defendant and on December 17 served its agreed-upon first draft of stipulations. Defendant, however,

failed to serve its stipulations on December 17. Plaintiff's counsel was told by defendant's Washington, D.C. counsel that the holiday season and scheduling problems were causing delays in preparing stipulations; later the Government was advised that the new Attorney General of Alaska was considering a change of counsel. To date, defendant has failed to respond to the Governments proposed stipulations or fulfill its agreement to propose its own. On January 6, 1983, the Board requested a 30-day extension on defendant's discovery response due on January 13. The Government agreed to a shorter extension - to January 31.

Consistent with Local Rule 5 of the District of Alaska, Plainiff's counsel continued to discuss with defendant's counsel whether answers to discovery would be forthcoming. As late as January 19, 1983, counsel for the defendant represented that they intended to respond to plaintiff's discovery requests by the January 31 due date. On January 25, however, defense counsel reversed its position and instead requested a continuance of the case and a stay of all discovery for four or five months so that the Alaska Legislature could consider enactment of legislation which, according to defense counsel, might affect the outcome of this case. Other than to say that such legislation could, conceivably, moot this case, defendant has failed to furnish additional information about this legislation, provide the Government with a draft or outline of any proposed legislation or comment on the probability as to whether it will be introduced or enacted. Defendant has moved for a stay notwithstanding the

fact that in the 1981-82 session the Alaska Legislature refused to enact legislation, introduced with practitioner support, which would have precluded state, borough, and municipal procurement officers from using competitive bidding for the purchase of architectural and engineering services. This so-called "Little Brooks Act" provision of House Bill No. 156 was of considerably narrower scope than the legislation for which defendant now apparently hopes because it would prohibit only competitive bidding in the public sector.

On January 28, 1983 defendant filed a Motion to Stay Proceedings which, in effect, stated that answering discovery would be fruitless since this Court might grant the requested stay. As a result, on January 31, defendant failed to produce the documentary discovery or interrogatory answers it was obligated to provide first on January 13 and then by agreement on January 31. Defendant never furnished the draft stipulations due on December 17, 1982.

III

ARGUMENT

Defendant bears the burden of showing that its proposed five month stay of discovery and all other proceedings is justified and will not harm the interests represented by Government. As the United States Supreme Court stated in Landis v. North American, Co., 299 U.S. 248 (1936), "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair

possibility that the stay for which he prays will work damage to someone else," 299 U.S. at 255. Indeed, in Landis the Supreme Court made clear that "the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on petitioners, suppliants for relief . . ." 299 U.S. at 256 (emphasis supplied).

Given these standards, the courts generally disfavor stays which tend to needlessly depart "from the beaten track" and delay the normal course of justice. Landis, supra, at 254-55; Filtrol Corp. v. Kelleher, 467 F.2d 242, 244-45 (9th Cir. 1972), cert. denied, 409 U.S. 1110 (1973), citing CMAX, Inc. v. Hall, 300 F.2d 265 (9th Cir. 1962). See also, McDonnell v. Tabah, 297 F.2d 731 (2d Cir. 1961); Druckman v. Forsyth Furniture Lines, 22 F.2d 59 (4th Cir. 1927); 9 F. Moore & E. Koeber, Cyclopedia of Federal Procedure §§ 28.01-28.12 (3d ed. 1967). Consequently, a defendant applying for a stay has a heavy burden of showing the stay is justified since, as Judge Flannery held in Ellsberg v. Mitchell, 353 F. Supp. 515, 517 (D.D.C. 1973), a plaintiff has the right to prosecute his cause of action without delay. See also, Dellinger v. Mitchell, 442 F.2d 782 (D.C. Cir. 1971). This principle is particularly true in a case such as this where the Government is suing in the public interest to enforce well-defined and consistently applied federal law.

Defendant has not met this heavy burden. Indeed, defendant has not even shown that a stay of discovery and other proceedings "makes great sense and offers the best route to an efficient resolution of the case." (Defendant's Memorandum In Support at 6). A five month delay in a case dealing with per se illegality where discovery has already started, which, according to defendant (Memorandum In Support at 3) "is not especially complex as a factual matter," and where discovery will be necessary regardless of legislative action is hardly "efficient". Nor does it make "great sense" to permit a state board comprised of practitioners to maintain and enforce a price ban for their own benefit at the expense of the Alaskan economy. Rather, the facts indicate that granting the proposed stay would be inequitable, harmful to the public, and a needless waste of time. The efficient way to handle this case is to get on with it, to answer discovery, and to submit motions for summary judgment.

A. Defendant Has Not Shown Clear Hardship or Inequity In Being Required To Go Forward

Defendant has not met the heavy burden it bears under Landis of showing hardship or inequity in going forward with this case. Indeed, its moving papers are totally devoid of any showing of hardship or inequity in responding to the Government's discovery requests. This failure in and of itself requires denial of defendant's motion, putting aside for the moment the fact that, as discussed below, any colorable claim

of hardship by defendant would be outweighed by the significant harm to the public caused by continuing the competitive bidding ban.

That proceeding with this litigation would not give rise to any cognizable hardship or inequity is evidenced by the fact that, until this motion was filed, the parties were proceeding with a mutually agreed upon discovery schedule which would have brought this case to resolution within the very five month period for which defendant now seeks a stay. The parties had notified the Court of this schedule and plaintiff had undertaken to serve discovery requests and proposed stipulations. That defendant suddenly decided, on the eve of its deadline for complying with discovery requests, that going forward with this case was a "potentially unnecessary expenditure of resources" (Motion at 2) suggests that the proposed stay was not so much needed to prevent "hardship" or "inequity" as to delay some embarrassing discovery.

Weighing the effects of the stay on the government's important law enforcement interests in prosecuting this case, there can be no dispute that the stay would disrupt and protract pretrial proceedings already under way, would put off motions for summary judgment and would preclude any settlement discussions. Plaintiff has already made considerable effort to serve reasonable discovery requests and defendant concedes that it could respond to that discovery on 15 days' notice. (Memorandum In Support at 6, n.3). Given that the main

discovery can be completed in a short time, it cannot impose such burden on defendant to go forward with discovery responses it was originally obligated to provide by mid-January.

On the other hand, if defendant is permitted to withhold its discovery responses and, as happened in the past, it does not obtain the complete legislative relief it hopes for, the progress of this case will have been seriously slowed and plaintiff's efforts to expedite trial preparation inappropriately frustrated. Thus, the only risk of "hardship" or "inequity" attendant to defendant's motion occurs if the stay is granted.

Finally, it is clear that in any weighing of the equities in this matter, defendant has failed to sustain its burden under Landis. Indeed, inconvenience to defendant resulting from going forward with this case is of defendant's own making. Defendant has had over four years to seek the legislation it is now proposing, and yet, despite clear notice, did not do so. Moreover, defendant can hardly claim surprise at the institution of this litigation, having at least three times since the Supreme Court's decision in Professional Engineers disregarded the advice of the Attorney General of Alaska to repeal its competitive bidding ban. Finally, having already caused two lengthy delays in this case and appearing in default on its discovery obligations, 2/ defendant can

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2/ See Plaintiff's Motion For Order Compelling Discovery, filed February 14, 1983.

hardly be said to suffer "inequity if ordered to proceed in this case." Landis, 299 U.S. at 255-56.

B. The Proposed Stay Would Harm The Public

Even if the Court found some hardship or inequity to defendant in having to go forward with this litigation, defendant clearly has not sustained its heavy burden given the demonstrable harm the public would suffer from the proposed stay.

The Supreme Court in Professional Engineers held that bans like Alaska's are illegal per se under §1 of the Sherman Act because they inevitably cause serious economic harm. 3/ They severely inhibit the way architects, professional engineers, and land surveyors would otherwise compete. They prevent consumers from receiving and practitioners from giving competitive bids. They inevitably raise prices, add to inflation, and misallocate resources.

Such restrictions are illegal per se because they transgress the fundamental national policy of free competition which Professional Engineers reconfirmed is embodied in the Sherman Act:

> The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." Standard Oil Co. v. FTC, 340 U.S. 231, 248. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even

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3/ The Supreme Court confirmed in Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980), that competitive bidding bans are per se illegal.

assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad. 435 U.S. at 695.

As Justice Blackmun cogently stated in his concurring opinion in Professional Engineers:

> As petitioner concedes, § 11 (c) [the competitive bidding ban] forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must purport to engage a single engineer, and so long as that engagement continues no other member of the Society is permitted to discuss the project with the client in order to provide comparative price information. Though § 11 (c) does not fix prices directly, and though the customer retains the option of rejecting a particular engineer's offer and beginning negotiations all over again with another engineer, the forced process of sequential search inevitably increases the cost of gathering price information, and hence will dampen price competition, without any calibrated role to play in preventing uninformed bids. 435 U.S. at 699-700 (emphasis added; citation omitted).

Despite this clear precedent, defendant has continued to actively monitor compliance with its ban on competitive bidding. As recently as October 1982, shortly after the filing of the Complaint, Wallace Wellenstein, a member of defendant board, approached the Anchorage School Board on behalf of defendant and indicated that procurement regulations the School Board was considering enacting would violate defendant's competitive bidding ban. In March 1982, several members of defendant contacted the Administrator of the City of Sitka and

told him that Sitka, by requesting bids on an addition to the city library, was in violation of defendant's rules and was making "outlaws" of defendant's certificate of registration holders. These two incidents indicate that the Board intends to continue to enforce compliance with the Rule. Nothing in defendant's moving papers suggest anything to the contrary.

Furthermore, even if defendant did not actively enforce the Rule during the stay, the continued presence of the Rule alone would effectively deter competitive bidding and hence persist in depriving the people in Alaska of the benefits of competition. For example, practitioners frequently cite defendant's ban to discourage purchasers who ask for competitive bids. Subsequent to the filing of the Complaint, Harley Hightower, representing the Alaska Chapter of the American Institute of Architects, urged the Anchorage School Board not to adopt regulations which would have authorized the use of competitive bidding in the procurement of architectural and engineering service in part because "presently the state law prohibits architects and engineers from bidding so we would be in violation of laws even though this law has been challenged . . . ." (See Attachment 2).

Hence, if the stay is granted the defendant's Rule will continue to harm the public for at least another five months, perhaps longer, despite the Supreme Courts' ruling nearly five years ago that the practice was illegal per se under the Sherman Act. In sum, the Government respectfully submits that with

regard to this proposed stay, as was the case in Landis, "[r]elief so drastic and unusual overpasses the limits of any reasonable need, at least upon the showing made when the motion was submitted." 299 U.S. at 257. A proceeding at equity should not become an instrument for private gain by those practitioners who seek by their motion to extend the life of the price bidding ban.

C. A Stay Based On Such Uncertain Circumstance Is Inappropriate And Would Needlessly Delay The Case

Without discussing the content or likelihood of passage of legislation, defendant forecasts events which will purportedly obviate the need for the Government's requested relief. At a minimum, the following sequence of events would have to occur under defendant's scenario: (1) Someone will sometime in the future introduce legislation in the Alaska Legislature which will require the Board to promulgate a rule identical to its present ban on competitive bidding; (2) that legislation will be enacted promptly and without any significant amendment or revision; (3) the Governor of Alaska will sign such a bill; and (4) on the basis of that legislation this Court, after an appropriate hearing, will then conclude that California Retail Liquor Dealers Assn. v. Mid-Cal Aluminum, Inc., 445 U.S. 97 (1980), is controlling and that this case is moot. 4/

4/ Midcal provides that there are "two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.'" 445 U.S. at 105 (citation omitted).

This is too uncertain and speculative a basis for staying this litigation.

The fact that the Board has been on notice of the antitrust deficiencies in its competitive bidding ban for over four years and that the Legislature has already refused to enact an even less restrictive statute than the one the Board now seeks makes defendant's hoped for legislative bailout all the more speculature. The argument that such legislation would pass is predicated on the assumption that, contary to the experience of the last legislative session, the legislature will vote to eliminate the possibility for public and private purchasers to reduce the costs they pay for architectural, engineering, and land surveying services through competitive bidding. 5/

5/ The tenuousness of that assumption is also evidenced by the testimony of Charles Torkko, President of the Consulting Engineer Council of Alaska and one of the major proponents of the "Little Brooks Act" provision at the last legislative session, concerning the proposed repeal of the Rule:

> [O]ne of the difficulties that we faced [in getting the Little Brooks Act enacted] was State administrative pressure on the legislature that demanded from the Governor's Office an alternative to the final procedure for sequential negotiations with the topped rank firm. If those failed, they demanded that there would be an option for concurrent negotiations with the three top firms. We felt that this was in violation of the concept and the regulations and the intent of the efforts that we have been working for the State of Alaska and could not support that."

In sum, in these circumstance it is inappropriate to stay litigation on the mere possibility that controversial legislation will someday be enacted; moreover, given the recent experience in the legislature it is clear that there is no substantial likelihood that defendant's hoped for legislation will be passed.

Even if legislation completely forbidding competitive bidding by all engineers, surveyors and architects is enacted, it is not at all clear that this suit will be automatically mooted. At the very least plaintiff would be entitled to ascertain through discovery whether the defendant's conduct is allegedly illegal activity has indeed been "immunized". Thus it seems that the only certain result of granting a stay would be to delay this litigation.

IV.

CONCLUSION

Defendant has not met its burden of showing that the proposed stay is justified. Indeed, there is no good reason to stay proceedings and plaintiff's discovery. Defendant's motion should therefore be denied.

Dated: February 14, 1983

Respectfully submitted,

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FILED

OCT. 12 1982

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By.....

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. Filed: 15 U.S.C. §1 (Antitrust Violation Alleged) 15 U.S.C. §4 (Equitable Relief Sought)

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendant and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Sherman Act, as amended (15 U.S.C. §4), in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. §1).

2. The defendant, Alaska Board of Registration for Architects, Engineers, and Land Surveyors (hereinafter referred to as the "Board"), maintains its principal office, transacts business and is found within the District of Alaska.

II

DEFENDANT

3. The Board is made the defendant herein. The Board is comprised of practicing architects, professional engineers, and land surveyors and is organized and exists under Section 3 of

Chapter 179 of the 1972 Session Laws of Alaska, as amended (Alaska Statutes § 08.48.011 et seq.). The Board maintains its principal office in Juneau, Alaska.

III

CO-CONSPIRATORS

4. Various other persons not made defendants herein have participated as co-conspirators with the defendant in the violation hereinafter alleged, and have performed acts and have made statements in furtherance thereof.

IV

TRADE AND COMMERCE

3200

5. There are approximately 2100 architects, professional engineers and land surveyors, more than one-half of whom are residents of states other than Alaska, licensed to practice in Alaska. These persons provide architectural, professional engineering or land surveying services to individuals, private businesses and governmental entities in Alaska. These services include the design, study and supervision of the construction of buildings, roads, bridges, dams, industrial plants and other structures. Over $17 million dollars are spent annually by Alaska residents and governmental entities for such services.

6. The Board is the sole licensing authority for the practice of architecture, professional engineering and land surveying in the State of Alaska. The Board administers written examinations and otherwise supervises the qualification, certification and registration for practice within the State of Alaska of resident and nonresident architects, professional engineers, land surveyors and corporations offering architectural, professional engineering or land surveying services. Upon payment of a fee, the

Board annually issues certificates of registration to all properly certified or registered architects, professional engineers, and land surveyors.

7. It is unlawful in Alaska for individuals to practice or offer to practice the profession of architecture, professional engineering or land surveying, or to represent that they are architects, professional engineers or land surveyors unless they have been properly certified or registered by the Board and hold a current Board certificate of registration to practice architecture, professional engineering or land surveying in Alaska.

8. The Board consists of nine members appointed to six-year terms by the Governor of Alaska. Three of the Board members must be architects, one must be a land surveyor, two must be civil engineers, one must be a mining engineer, and two must be engineers from other branches of the engineering profession. Board members must have been residents of Alaska for at least three consecutive years before their appointments. Board members must hold Board certificates of registration and have a minimum of five years of professional practice in their respective fields. While serving their membership terms, Board members may, and do, continue to engage in the practice of architecture, professional engineering or land surveying in Alaska. Board members are compensated on a per diem basis when attending to the work of the Board. In addition, Board members are entitled to receive travel expenses incurred in carrying out their duties.

9. Pursuant to the terms of Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, the Board may promulgate and amend a code of ethics or professional conduct for architects, professional engineers, and land surveyors.

Under Alaska law, the Board, except in emergencies, must hold a public hearing or proceeding before promulgating or amending its code of ethics or professional conduct. The laws of Alaska are silent as to the form or content of any such code of ethics or professional conduct and neither direct, require, nor mandate restrictions upon, or the regulation of, price competition in the offering of architectural, professional engineering, or land surveying services. Nor has any policy of restricting or regulating price competition in the offering of architectural, professional engineering or land surveying services been established or dictated by the State of Alaska.

10. In 1974, the Board adopted "Rules of Professional Conduct" intended to regulate the practice of architecture, professional engineering and land surveying in Alaska. Among the Board's rules is Rule 36.230(b), which provides that an architect, professional engineer or land surveyor may not knowingly solicit or submit proposals for professional services on the basis of competitive bidding. This rule is still in effect. In December, 1980, the Board rejected a proposal to repeal Rule 36.230(b). In May, 1982, the Board refused to repeal Rule 36.230(b) on an emergency basis. In September, 1982, the Board voted to retain Rule 36.230(b).

11. Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, provides that the Rules of Professional Conduct of the Board shall be made known in writing to every registrant and applicant for registration and shall be published with the roster of registrants, which the Board must annually publish, mail to registrants and state, borough, and city officials and distribute or sell to the public. Board Rule 36.240(b) provides that an architect, professional engineer or land surveyor having knowledge or reason to believe that another person or corporation may be in violation of any

of the Rules of Professional Conduct shall present that information to the Board in writing and shall cooperate with the Board in furnishing such further information or assistance as may be required.

12. The Board is authorized by Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, to take disciplinary action against any Board certificate of registration holder who violates any of the Rules of Professional Conduct. Such disciplinary action may include the reprimand of a registrant or corporation or the suspension, refusal to renew, or revocation of the offender's certificate of registration.

13. The architectural, professional engineering and land surveying services provided by the Board certificate of registration holders involve and affect individuals, corporations and other business entities throughout the United States. These services facilitate, direct and shape the conduct of interstate business and contribute directly to the flow of persons, money, goods and services into and out of the State of Alaska.

14. In the course of rendering architectural, professional engineering and land surveying services, Board certificate of registration holders located in Alaska often travel to states other than Alaska and make substantial use of interstate mail and wire services in the transport of funds, documents, plans, reports, plats, drawings and other communications throughout the United States. In addition, many certificate of registration holders located outside Alaska perform architectural, professional engineering and land surveying services within Alaska.

15. The activities of the Board and its certificate of registration holders, as described herein, are within the flow

of interstate commerce and have a substantial effect upon interstate commerce.

V

VIOLATION ALLEGED

16. Beginning at least as early as 1974, and continuing up to and including the date of the filing of this complaint, the defendant and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act. Said violation is continuing and will continue unless the relief hereinafter prayed for is granted.

17. The substantial terms of said agreement, understanding and concert of action have been and are that the defendant promulgate, adopt, publish and distribute a provision in its Rules of Professional Conduct, Rule 36.230(b), prohibiting certificate of registration holders and other architects, professional engineers and land surveyors practicing in Alaska from knowingly soliciting or submitting proposals for professional services on the basis of competitive bidding.

18. For the purpose of effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators have done those things which, as hereinbefore alleged, they agreed and conspired to do.

VI

EFFECTS

19. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Competition in the sale of architectural, professional engineering and land surveying services has been suppressed and eliminated;

(b) Consumers of architectural, professional engineering, and land surveying services have been deprived of the benefits of free and open competition in the sale of such services; and

(c) Architects, professional engineers, and land surveyors have been restrained in their ability to make their services readily and fully available to customers requiring such services.

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the defendant and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act.

2. That the defendant, its members and all other persons acting or claiming to act on its behalf be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid combination and conspiracy or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having similar purposes or effects, and from adopting, ratifying or following any practice, plan, program or device having similar purposes or effects.

3. That the defendant, its members and all persons acting or claiming to act on its behalf be enjoined and restrained from promulgating, publishing, distributing or otherwise

suggesting, and from adhering or agreeing to adhere to, any rule prohibiting competitive bidding by Board certificate of registration holders.

4. That the defendant be required to cancel Rule 36.230(b) of its Rules of Professional Conduct and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders.

5. That the defendant be required to notify all Board certificate of registration holders, the general public, and all Alaska city, borough, and state officials that it has cancelled and rescinded Rule 36.230(b) of its Rules of Professional Conduct and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders.

6. That the plaintiff have such other and further relief as the Court may deem just and proper.

7. That the plaintiff recover the costs of this suit.

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UNITED STATES ATTORNEY
District of Alaska

Dated: October 7, 1982

CENTURY ENGINEERING, INC. CONSULTING ENGINEERS • PLANNERS

RECEIVED 3-22-83

March 17, 1983

Representative Mike Szymanski
Pouch V
Juneau, Alaska 99811

Dear Mike:

John and I have read over House Bill No. 211 concerning architectural and engineering services. The procedures outlined sound pretty much like the way things have been handled lately, at least as far as our recent experience is concerned.

I would think something in the bill giving guildlines as to how "fair and reasonable prices" are determined might be helpful. Most national professional organizations, such as the National Society of Professional Engineers or American Institute of Architects have booklets to help owners determine fee ranges for project types.

On page 2 of the bill, line 23 makes reference to "bids". A bid is usually a monetary figure and would then seem to conflict with other portions of the bill. Possibly "offers of or proposals for" would be more suitable language.

Thanks for allowing me the time to comment on this legislation which affects an area of direct impact on my profession..

Sincerely,

CENTURY ENGINEERING, INC.

Robert J. Peters, P.E.
Project Engineer

RJP/css

500 "L" STREET, SUITE 200 | ANCHORAGE, ALASKA 99501 | (907) 277-0584/276-1248 | TELEX 26-364

HB

220

STATE OF ALASKA

THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners: Gordon J. Zerbetz, Chairman
Marvin R. Weatherly
Carolyn S. Guess
Susan M. Knowles

In the Matter of the Reasonableness and Propriety of the Interfund Charges Borne by the MUNICIPALITY OF ANCHORAGE Telephone, Electric, Water and Sewer Utilities	U-76-26 ORDER NO. 2

ORDER APPROVING INTERFUND METHODOLOGY

On May 3, 1976, the MUNICIPALITY OF ANCHORAGE d/b/a MUNICIPAL LIGHT & POWER DEPARTMENT (ML&P), ANCHORAGE TELEPHONE UTILITY (ATU) and the ANCHORAGE WATER UTILITY (AWU) was advised of the information to be provided with the Commission at a public hearing on June 1, 1976, for the purpose of determining the justness and reasonableness of the interfund charges paid to various departments within the Municipality by the above named utilities. The burden of proof that the interfund charges paid by ATU, ML&P and AWU were based on reasonable methodology and accurate allocation factors under the affiliated interest transactions as stated in AS 42.05.511(c) was to be borne by the Municipality.

JURISDICTION

The Municipality asserted, prior to the examination of the interfund charges, its belief that the affiliated interest section of the statute, AS 42.05.511(c), did not specifically affect the Municipality whose departments

provide services to the utilities. It was argued that no profit is to be earned by the Municipality through the interfund charges; there is no majority shareholder as in a private corporation; and the interfund charges must be approved through the budgetary process by the appropriate legislative body. The staff of the Commission contended that the Municipality does fall under the provisions of the statute by providing services to and receiving payment from each of the subject utilities and that the Municipality should bear the burden of proof that these charges are just and reasonable. The Commission concurs with the staff's position.

GENERAL BACKGROUND

The government entity which provided services to the above named utilities in 1974, 1975 and for the first nine months of 1976 is conceptually a different entity than is in existence today and on which the proposed 1976 budget of the Municipality is based. For the purpose of this proceeding the test year under consideration was 1975. The charges to the utilities in that year, by the providing departments of the Municipality, were used to ascertain the reasonableness and accuracy of the allocations of interfund charges. These charges were budgeted in 1974 for 1975 under the existing City of Anchorage government. The test year 1975 was used because of the permanent rate requests by ATU, ML&P and AWU pending before this Commission. For the most part, their request is based on this test year. In addition, the fact that the unified government, known today as the Municipality of Anchorage, has been in existence a relatively

short time, the workload of various departments has changed substantially, and the new government is in effect in a transitory state, make an examination of the budgeted 1976 interfund charges inappropriate at this time.

The testimony of the Municipality strongly recommended that a re-evaluation of the methodology of determining interfund charges and of the appropriateness of the existing allocation factors was of paramount importance for the 1977 fiscal budget of the Municipality. Every department should be analyzed as a result of the unification of the former City of Anchorage and the Greater Anchorage Area Borough now known as the Municipality of Anchorage. Various functions and responsibilities within some departments of the new Municipality have undergone major changes. These changes have affected the kinds of services provided as well as the methods used for allocating costs for services to any or all of the utilities.

The need for a study which would thoroughly review each department within the Municipality and examine the interfund procedure has been addressed by Arthur Young and Company in the course of a data processing study.

In light of unification, examination of services which might better be performed outside the Municipality through the contracting procedure should be made. There appear to be three possible courses of action for the utilities regarding the purchase of services from within the Municipality. One, the interfund charges could continue to be handled in the same manner as previously done by the City. This would require that the methodology and allocation

factors be updated in terms of a unified government. Two, the utilities could provide some or all of the services to themselves that are now being provided by the Municipality. Three, there could be services that should be contracted outside the Municipality. In addition, the subject of the appropriateness of interfund charges for the sewer utility should be addressed. If the refuse service provided by the former City of Anchorage comes under the jurisdiction of this Commission, interfund charges to that utility must also be examined.

For the purpose of this hearing the Municipality defined interfund as a charge by one department within the municipal government (whether the former City of Anchorage or the present Municipality of Anchorage) to another department within the government for services performed. The Municipality submitted Exhibits 1 and 2 which provided the budgeted and actual amount of interfund charges to ATU, ML&P, AWU and the general government unit (which includes those departments receiving monies from the general fund) and the total amount of all budgeted and actual interfund charges for the years 1974 and 1975. Exhibit 3 provided the budgeted interfund charges for the year 1976. The Uniform System of Accounts has been used since 1973 for the preparation of the 1974, 1975 and 1976 budget.

The budgetary process includes input from the supervisory personnel within each department, the review of the City Budget Officer (now the Chief of Management Services for the Municipality in the Office of Budget and Management), any refinement or change to be made by the

Office of the City Manager (now by the Office of the Mayor) and submission to the City Council (now the Municipal Assembly) for its approval. The implementation of methodology and allocation factors regarding interfund charges are based on the approved budget document for the appropriate fiscal year.

It should be noted that the interfund charges were a subject of audit by the external auditor hired by the governmental body. The appropriateness of ATU's interfund charges was also reviewed by RCA Alaska Communications, Inc., in its determination of the separation and distribution of toll revenues. In addition, the State performed auditing functions for particular grant money that the Municipal government receives.

During the hearing there was testimony that in some instances charges are made to each of the utilities by a department not listed on Exhibits 1 through 3. For example, a service provided a utility by the Department of Public Works at the request of the utility is paid for by a transfer of equity in the cash pool. A reimbursable work order form, Exhibit 29, illustates the procedure to be utilized in this regard. Bills for services provided by the utilities to other departments within the government are also paid by a transfer of equity in the cash pool.

In Order No. 1 the Commission required the Municipality to provide a copy of any written instructions to the appropriate person within each department calculating the interfund charges. Exhibit 27, Interfund Criteria Information, was provided as well as Exhibit 28, a copy of the 1975

annual budget which explained the "charges to others" within each department. The individual computing the budgeted and actual interfund charges and the methodology and allocation factors for those charges were provided in Exhibits 4 through 25 as required by Order No. 1. Also included in these exhibits were comparable charges, where available, and time sheets and other recordkeeping data, when used.

The Commission commends the Municipality on the thoroughness of its prefiled testimony and the presentations made by the witnesses during the hearing and will discuss each department providing services to any or all of the subject utilities in 1975. For the purpose of this discussion reference will be made to the titles of individuals and the governmental unit based on the former City of Anchorage. Where appropriate, reference will be made to the existing municipal government. It is the intention of the Commission that this discussion may be beneficial to those individuals who will review and study the interfunded services and charges in the new unified government.

The transfer of interfund charges is done monthly on the basis of the actual costs to the providing department. Any end of the year adjustments either upward or downward are made in accordance with the allocation factors outlined within each department. Reference has been made to final charges in some of the exhibits for the 1975 test year. Generally speaking, these refer to charges incurred by departments as a result of unification and these charges were not interfunded to the utilities.

MAYOR AND CITY COUNCIL

The method for calculating the budgeted interfund charges from the Mayor and City Council to each of the subject utilities was developed by the City Budget Officer in 1972. His judgment based on observation of work sessions and City Council meetings was used to apportion the [illegible] workload of the Mayor and City Council into the following categories:

Agenda relating items	50%
Personnel functions	20%
Maintenance and operations budget	15%
Capital improvement program	15%

Within these categories of workload the City Budget Officer established the allocation factors for each utility on an annual basis.

The City Budget Officer analyzed the final agendas of 8 City Council meetings in different months of 1974 to establish the percentage of agenda items relating to each utility. The charges to each utility for the workload of Mayor and City Council relating to personnel functions were expressed as a percentage of the projected authorized positions for each utility in relation to the total authorized positions for the City. The charges for the maintenance and operations budget and for the capital improvement program were expressed as a percentage of each utility's budget in relation to the entire maintenance and operation budget and capital improvement program for the City. These percentages were weighted and applied to the actual 1975 expense of this department by the Controller Division.

In addition, each utility was charged $600 as its cost for the expenses of its advisory board. These

lay boards met monthly, and their members were paid a small stipend. The determination of these charges was made by taking the total amount of monies expended to the City boards and commissions and dividing it by 20. (There were 20 advisory boards.)

This department has undergone substantial change as a result of unification, and Exhibit 3 illustrates the separation of the Assembly from the Mayor/Manager Department for interfund purposes. The appropriateness of the workload categories and the accompanying allocation factors for each utility should be examined for the 1977 budget year.

CITY MANAGER

The calculation of interfund charges for services provided by this department to the utilities was the responsibility of the City Budget Officer. The allocation of workload was made to the identical categories as those in the Mayor and City Council Department. The percentage of time allocated to those categories varied slightly. The reason for this was that the personnel within this department were asked for their evaluation of time spent on work relating to these categories. The judgment of the City Budget Officer who had spent five months as Assistant City Manager, in addition to his observations of work sessions and City Council meetings, was also a criterion.

Within each category, (agenda related activities, personnel functions, maintenance and operation budget, and capital improvement program) the percentage of workload for each utility was calculated in the same manner as for the Mayor and City Council. The actual expense to each utility was calculated by the Controller Division who applied the

weighted percentage to the actual expense of the City Manager's Office less the dollars attributable for one administrative assistant and secretary whose specialized tasks had provided no service to the utility.

In 1975 the expense of this department included the functions of Labor Relations Specialist, Equal Employment Officer and Public Information Officer. It should be noted in the budgeted interfund charges for fiscal year 1976 that some of these functions have been removed from this department and the City Manager is combined with the Mayor. An evaluation for the 1977 budgeted interfund charges will be necessary for this department.

The City Budget Officer gave testimony that a time study had been attempted for this department but was not successful because the personnel did not accurately or adequately fill out the time sheets. Time cards were also proposed at one time for the Mayor and City Council but this idea was rejected.

INTERNAL AUDIT

The calculation of interfund charges from this department was the responsbility of the Internal Auditor working with the City Budget Officer. The actual interfund charge to the utilities was calculated by multiplying the actual auditor hours spent on each utility by the predetermined cost per hour. The hourly charge was based on the salaries and overhead of the department as outlined in Exhibit 6a. Testimony was received that the hourly rates charged by this department are readjusted as personnel changes and pay increases for Municipal employees take

effect. Exhibits showing that substantially higher costs would be incurred if these services were purchased outside the Municipality were provided. The Internal Auditor, who calculates the actual charges of this department, has an on-going workload and is able to estimate with accuracy his charges to others for budgetary purposes. He also works with staff of various departments to help determine his costs based on their needs.

COMMUNITY PROMOTION

The calculation of interfund charges from this department were performed by the Public Information Officer and the City Budget Officer on the basis of two costs: one, the cost of membership to the City in the Alaska Municipal League and the Alaska Chamber of Commerce and, two, the space distribution in the 1974 annual report.

The determination of each utility's cost for the Municipal League and Chamber memberships was allocated on the ratio of the number of employees per utility to the total number of City employees. The allocation for space in the annual report was expressed as a percentage of each utility's space in relationship to the entire cost of the annual report.

Testimony was given that through an inadvertent error the cost of the membership fees was not interfunded for the 1975 test year. It is the intention, however, of the Municipality to allocate the expense of these memberships in the future. In addition, the Municipality has decided to discontinue the publication of the annual report after 1975.

CITY CLERK ADMINISTRATION

The calculation of these interfund charges was the responsibility of the City Clerk working with the City Budget Officer. The services provided by the City Clerk to the subject utilities in this docket are the costs incurred by the Clerk's Office in providing services to the utility advisory boards and commissions. These services include recording secretaries, transcribing minutes, overhead, mailing, etc. The actual charge, calculated by the Controller Division, was based on 1/20 of the total cost of providing services to all of the City boards and commissions. There was testimony that in the future these charges will not be interfunded but will be services provided internally by each utility.

CITY CLERK - RECORDS RETENTION

The calculation of these interfund charges was the responsibility of the City Clerk working with the City Budget Officer using their previous experiences in providing the service of microfilming records of various departments. The actual charges were for the services received, and the cost was determined on an hourly charge based on salaries and overhead. The form for a participating department to request microfilming was provided as Exhibit 32. Time sheets were kept by the personnel in this department for the calculation of the actual cost. When budgeting for this service, a utility would consult with the City Clerk, Records Retention personnel to determine, based on the requested work, what the projected costs would be. It is noted that for the test year 1975 there were no charges to AWU and very minimal charges to ATU and ML&P.

CITY ATTORNEY

The calculation of these charges was the responsibility of the City Attorney working with the City Budget Officer and the actual charges were calculated by the Office of the City Attorney. A retainer was charged to each utility and the Port as its portion of the maintenance of the City Attorney's files, referer ce library and overhead. It should be noted that there was no retainer allocated to the general government departments. The attorney time was allocated at $60 a billable hour, for the year 1975; each attorney kept a record of his workload attributable to the utilities. Testimony was given that at the present time and for the test year 1975, there was no form for the attorneys to fill out, and in some instances time keeping was noted on desk calendars and in other inappropriate ways. Various expenses associated with litigation were allocated to the appropriate utility. The City Budget Officer stated in the event of a monetary award by the Courts in favor of a utility those monies were directly apportioned to that utility.

If a utility would contract with an attorney outside the City Attorney's staff, the cost associated in this matter would be billed directly to the utility.

PROPERTY MANAGEMENT

The calculation of interfund charges by this department was done by the Property Management Officer working with the City Budget Officer. This division is the Office of Record for all real property including rights-of-way, buildings and any non-movable equipment that is Municipal property.

A retainer was charged to each utility and the general government unit which covered the salary, benefits and space allocated to the Records Clerk. The volume of records kept for each utility and general government unit was a factor taken into consideration in determining the retainer. The retainer was instituted by the City Attorney in 1974, when Property Management came under his supervision. It is now separate and the reasonableness of the retainer should be re-evaluated.

The actual interfund charge was the budgeted retainer plus the actual charge of $17.50 an hour for appraising and right-of-way land acquisition. The hourly cost was based on an analysis by the Internal Auditor of the salary and overhead in this department. The Property Management Officer and the Controller Division calculated the actual charges.

The Municipality provided through Exhibit 11a comparable hourly costs of independent appraisers. The charge by the property management division to each utility was significantly less than the cost charged by an independent appraiser.

ADMINISTRATIVE SERVICES, ADMINISTRATION

The calculation of these charges was the responsibility of the City Budget Officer in consultation with the Assistant City Manager, Administrative Services, the Staff Accountant, and the Financial Management Systems Accountant. The charges to the utilities were expressed as a percentage of the total workload of the above mentioned personnel. Their workload was analyzed by the City Budget Officer

utilizing his best estimate and expertise based on the time these individuals spent on utility matters in four areas: current operating budget; existing capital improvement program; projected bond sales; use of the computerized accounting system. The actual charge, calculated by the Controller Division, was determined by applying the weighted percentages to the actual 1975 expense of this department. The actual charges for 1975 were less than the budgeted amount. The reason given was that vacancy factors were greater than budgeted, so the interfund charges were adjusted backwards on the basis of the calculated weighted percentages. The personnel of this department review their work load annually with the City Budget Officer to determine the percentage of time spent on utility matters.

This department is the Office of Management and Budget for the 1976 budget year.

CONTROLLER

The calculation of the interfund charges of this department, which was the general accounting arm of the City, was the responsibility of the Controller and staff working with the City Budget Officer.

Three categories of costs are analyzed to determine the percentage of time spent on utility matters. The first category, regular charges, (accountants' time in the general accounts payable category), allocated its costs for the 1975 test year based on desk audit time studies performed over a one month period. The Controller selected the time period and both daily and hourly time studies were

performed. Exhibit 13a was provided, which was the desk audit time sheets for November 1974. The employees were responsible for interpretation of workload and filling out time sheets.

The second category was the payroll system. The allocation factors for each utility were arrived at by determining, through desk audit time studies for a month and an analysis of payroll transactions for each utility, the workload for each utility expressed as a percentage of the total workload of this division.

The third category was the financial management system (FMS), and these costs were allocated on the basis of desk audit time studies over the same monthly period along with an analysis of the FMS transactions for each utility. This included computer machine time that the Controller used for each utility in addition to those charges allocated directly by the data processing department through the interfund process. The weighted average of the allocation percentages in each of the three categories, regular charges, payroll systems, and FMS was applied to the actual 1975 controller expense, and calculated by this department.

TREASURY

The calculation of the interfund charges of this department was the responsibility of the Treasurer and staff working with the City Budget Officer.

The Treasury was responsible for the receipt and custody of all funds for the City, including utility monies. The Treasurer, supervisor of this department, was responsible for the investment of all funds including utility bond

funds and handles all street and water assessments. Exhibit 30 was provided to show the monthly reports made by the Treasurer indicating the status of all cash and investments of the Municipality.

There are three sections under the Treasury Department: Receipts and Custody, Parking Violations and Assessments. The Treasurer made the determination that half of the administrative expense of this department be allocated as overhead equally to these three sections. This allocation became a part of the costs of service provided by each section.

Charges to each of the subject utilities for services rendered by the Receipts and Custody Section were based on a one week time study in 1974 in which the individuals working in this section performed a physical count of transactions handled. A sample of the time sheet was not available because of the relocation of this department and the disposal of these records. The actual expense to each utility was expressed as a percentage of the total cost of processing all transactions by this section.

Parking Violations did not affect any of the subject utilities.

The allocation of the Assessment section interfund expense was also based on a one week time study in 1974 of those individuals working in the section based on the number of hours spent on each assessment problem. It should be noted that the only utility requiring these services is AWU. The actual interfund expense of the Assessment Division was

expressed as a percentage of AWU's cost in relation to the entire cost of this section.

The remaining half of all interfund expenses of the Treasury Department was allocated to each utility and the general government unit based on their average equity in the investment accounts during the two months prior to the 1975 budget preparation. This was expressed as a percentage of the total equity investment of the City and applied by the Controller Division to the actual costs of this department.

For the 1977 budget, the sewer utility will have substantial impact on this department. Also, testimony was received that many different funds will be handled by this department as a result of unification. The methodology used to determine interfund charges for this department needs re-evaluation in light of unification.

PRINT SHOP

The calculation of the interfund charges for this department was the responsibility of the utility managers working with the City Budget Officer, and actual charges were computed by the Print Shop Supervisor in accordance with the Print Shop Prices provided as Exhibit 15a. These prices were based on salaries and overhead.

It should be noted that there was over a 400% increase in the budgeted and actual amounts interfunded in this category for ATU and AWU in 1975. Testimony was given that the probable reason for this was that ATU ordered a series of new forms, having used up forms that had been purchased from an outside supplier. As a result the initial cost was con-

siderably greater than a normal year's usage. A price sheet from Ken Wray's Print Shop substantiated the fact that the Print Shop prices are anywhere from one-third to over 100% less than the same service offered by a private business.

COURIER AND MAIL

The calculation of the interfund charges of this department was the responsibility of the City Budget Officer and actual charges were computed by the Mail Room Clerk and the Controller Division.

The allocation factor used to determine the amounts budgeted to each utility was based on an analysis of the current courier schedule (1974). The number of courier stops which served each utility was expressed as a percentage of the total amount of stops. This percentage became each utility's allocation of the actual costs of this department.

It should be noted that for 1975 ATU received no service from this section because the demands of this utility became sufficient to justify hiring its own employee to provide this service. Testimony was given that the minimum amount of times the courier serves ML&P and AWU was four times daily.

The mailroom charges were the result of joint utility mailings (not customer billing) and were minimal. Each utility has its own postage machine so these charges are no longer interfunded.

INSURANCE AND CLAIMS (RISK MANAGEMENT)

The calculation of the interfund charges for this department was the responsibility of the Insurance/Claims

Officer working with the City Budget Officer. The allocation of these charges was based on two categories: claims activity and insurance activity.

The actual cost of processing claims filed against the City was calculated on a cost per claim basis and charged to the appropriate utility. A quarterly report was made indicating the number of claims filed against each utility and the general government unit, the total expense of processing those claims and the calculation of charges to each utility. Exhibit 17a detailed the 1975 claims against each of the subject utilities and provided work sheets used to determine the cost of each claim based on this department's overhead to process these claims. It was emphasized that this charge is only to process claims and does not reflect payment to any third party.

The cost of providing insurance coverage to the various utilities during 1975 was allocated by weighing the type of insurance and coverage for each utility. Testimony was given regarding the diversified needs and numerous kinds of insurance needed by the utilities and the general government unit. It is apparent that this is an extremely complex subject. The judgment and experience of the Insurance/Claims Officer (Risk Manager) was the basis for the percentage of interfund charges allocated to each utility for insurance activity. The actual amount interfunded to ATU in this division doubled for the year 1975. The reason for this substantial increase was the requirements by OSHA to establish a safety program which heretofor was in the Personnel Department. The costs of this Safety Section were interfunded on the basis of the number of authorized positions

within the utility and general government unit and the percentage applied to the actual expense of this Section.

The Municipality has undertaken a self insurance program in some areas which is not reflected in the 1975 test year. There may be a decrease in expense related to insurance coverage but this will be offset by an increase in the expense of the claims activity. It will be necessary to re-examine the interfund charges in this division because of this new undertaking.

PERSONNEL

The calculation of the interfund charges by this department was determined by the Personnel Director and staff working with the City Budget Officer.

The allocation factors established for 1975 budget purposes were determined by a two-step process. The cost for employee/labor relations, records, and safety training was allocated based on each utilities percentage of the total employees in the City at the time the budget was prepared. The Safety Section was transferred to Risk Management thereby reducing the actual cost of this service.

The recruitment and classification costs of this division were allocated on the total number of classified employees in each utility expressed as a percentage of the total number of City classified employees at the time the budget was prepared. The actual expense to each utility, computed by the Controller Department, was determined by applying the weighted average of these two percentages to the actual 1975 expense of this department.

DATA PROCESSING

The calculation of the interfund charges by this department was prepared by the Data Processing Manager and

staff working with the City Budget Officer. The actual charges were computed by the Data Processing Manager and staff.

The Data Processing Department was responsible for computer time and the personnel to analyze, program, key-punch, if necessary, and maintain the computer programs. Testimony was given that there is presently no unused computer time; the machine is running beyond capacity and is working 24 hours a day, seven days a week. The Municipality is also utilizing mini-computers during the current year (1976) and is considering the purchase of a larger computer. No attempt had been made by the City, prior to unification, nor the present Municipality to contract for these services. The 1975 budgeted expenses were calculated by the computer on the basis of man months and projected cost estimates to accomplish the workload each utility requested. The actual expense was based on computer time utilized during 1975 and was calculated by a special built-in program designed for that purpose. The employees of this department kept time sheets (Exhibit 31) tracking their workload and assessing the proper utility. The hourly rates charged by this department for various data processing personnel were provided in Exhibit 19B.

Testimony was given on the plans for merging the computer systems of the former City and Borough and a possible purchase of computers as opposed to present leases. January 1977 is the target date for an integration of the two accounting systems, and this will dictate a re-evaluation of the charges for this department's services.

increase

companies had increased 88% from 1970 to 1974 or nine times the rate of increase of the natural gas industry. Based on the uncontroverted evidence presented by AGAS, the Commission will allow use of a year-end rate base.

Staff testified that AGAS is currently in the process of developing continuing property records (CPRs). At the present time property records are maintained on a ledger card system. AS 42.05.461 requires utilities with annual revenues over $100,000 to utilize CPRs for plant records. It will be incumbent on AGAS to achieve compliance with this statutory obligation within the timetable prescribed by the Commission.

There was general agreement among the parties regarding the reasonableness and propriety of all components of plant in service as proposed, with the exception of property purchased from the affiliate, 3000 Spenard Corporation. At issue was the determination of the appropriate value to be assigned to that property in the rate base. AGAS has included the land in rate base at the sales price paid to 3000 Spenard Corporation, which was based on an independent appraisal performed in May 1974. The staff proposed a valuation equivalent to the original cost to 3000 Spenard Corporation with the possible capitalization of certain costs for not more than two accounting periods at the discretion of the Commission. Staff opposed the inclusion of intercompany profits in the rate base and cited a 1945 Supreme Court case as principal support for its position. The burden of proof in this issue clearly resides with AGAS, pursuant to AS 42.05.511(c) which provides:

> "(c) In a rate proceeding the utility involved has the burden of proving that any written or un-

> written contract or arrangement it may have with any of its affiliated interests for the furnishing of any services or for the purchase, sale, lease or exchange of any property is necessary and consistent with the public interest and that the payment made therefor, or consideration given, is reasonably based, in part, upon the submission of satisfactory proof as to the cost to the affiliated interest of furnishing the service or property and, in part, upon the estimated cost the utility would have incurred if it furnished the service or property with its own personnel and capital."

Additionally, AGAS has directed the Commission to the first part of AS 42.05.411(b) for guidance:

> "(b) In determining the value for rate making purposes of public utility property used and useful in rendering service to the public, the commission shall be guided by acquisition cost or, if lower, the original cost of the property to the person first devoting it to public service,..."

The properties under consideration are situated in Kenai, Eagle River, and Anchorage. The Anchorage property is comprised of three parcels on International Airport Road designated as the Operations Center. Rental payments on the former Operations Center on Spenard Road are also tangentially relevant due to the timing of the transition from the old to the new location. The dates and amounts of the purchases and sales by 3000 Spenard Corporation and the intervening rentals by AGAS are summarized on Appendix 1.

The principal business activity of 3000 Spenard Corporation, the Alaskan subsidiary of Baldwin Properties, Inc., a subsidiary of AKI, is property investment and disposition. The company is represented in Alaska by Vice President Richard Barnes, who is also an officer and employee of AGAS and APC. Mr. Barnes testified that he spends between one to two percent of his time on 3000 Spenard Corporation responsibilities. The company's current portfolio of investments is an office building in New Orleans

and 25 parcels contiguous to AGAS' office building. The only property previously owned by 3000 Spenard Corporation and not sold to AGAS was a 22 acre parcel on Kodiak. This property was sold to a company which was concurrently acquiring the assets of a former subsidiary of AKI, Burgess.

AGAS originally leased all the properties it purchased from 3000 Spenard Corporation with the exception of Parcel C on International Airport Road. A representative lease agreement (Exhibit 47), dated January 1, 1969, between the parties provided for a 15% return on the appraised valuation with re-appraisals at 5 year increments during the 16 year term of the lease. The Chief Appraiser, State of Alaska, Division of Lands, a witness for intervenors AkPIRG and Jager testified that based on his studies of the private market, the market rate for leases on bare ground with appraisals at five year increments was currently 8% and was in the 6-8% range in 1969. There was testimony that in late 1973, the decision was made by AGAS, pursuant to an unwritten option or right of first refusal, to purchase the subject properties from 3000 Spenard Corporation. As a result, there was an informal agreement between the parties for conservative rent escalation without re-appraisals for 1974 and for termination of the leases at December 31, 1974, by mutual consent. In February 1974, 3000 Spenard Corporation purchased Parcel C on International Airport Road. The appraisals on which the sales prices were based were completed in May 1974. Approximately 33% of the Eagle River parcel was sold by 3000 Spenard Corporation to the State of Alaska in October 1974, for $48,000. The sale of the properties to AGAS was consummated in December 1974, timed to

coincide with the availability of financing. Rents paid on acquired properties were eliminated from the test year. The land, site improvements, and transportation building at International Airport Road were included in the rate base. However, since the remaining buildings at that site were completed after the end of the test year and were not incorporated in rate base, AGAS retained the expenses associated with the Spenard Road Operations Center in its operating expenses as a representative substitute for the new Operations Center. AGAS argued that this approach was conservative and thereby fair. The transition was completed in May of 1976. It is the opinion of the Commission that the treatment proposed by the utility is not unreasonable.

Section 511(c) of AS 42.05 establishes certain tests for evaluating the reasonableness and propriety of affiliated interest transactions. Property leases and sales such as those under discussion must be necessary and consistent with the public interest. Payments made therefore must be based, in part, on the cost to the affiliated interest of furnishing the property and, in part, on the cost the utility would have incurred if it had furnished the property with its own capital.

AGAS argued that the cost to 3000 Spenard Corporation of furnishing the properties was equivalent to the price it would have received for the parcels from another party at the time of the transaction, which, in turn, was equivalent to the cost AGAS would have incurred if it had purchased identical or similar properties from a third party at that time. This definition of cost is not in conformance with standard accounting nomenclature and would appear

to circumvent the intent of AS 42.05.511(c) to prohibit excessive intercompany profits. Affiliated interest transactions require the highest scrutiny by this Commission. The interpretation proposed by AGAS would preclude such a review. While the utility may argue that AGAS would have paid as much or more for similar purchases from non-affiliates, the fact remains that the sales between affiliated interests offer to the common parent immediate benefits, including favorable capital gains tax treatment of 3000 Spenard Corporation's profits, which mandate circumspection.

A review of the land activities and portfolio of 3000 Spenard Corporation in Alaska would indicate that the company has functioned historically as a land agent for AGAS. At least one parcel was rented to AGAS at the same time as its purchase, and one parcel was purchased after AGAS had apparently committed itself to re-purchase the land. The Commission is not inclined to substitute its judgment for that of management, but it is appropriate to question whether or not investments were incurred prudently by a utility in exercising its responsibility to serve the public. The timing and amounts of the land purchases certainly raise doubts. The staff has argued that intercompany profits should be prohibited regardless of an assessment of the degree to which an affiliated transaction was conducted at arms length. It has cited Colorado Interstate Gas Co. v. Federal Power Commission, 334 U.S. 581, 65 S. Ct. 829, 89 L. Ed 1206 (1945), to support its position.

It is the determination of the Commission based on the evidence presented on the record that the properties purchased from 3000 Spenard Corporation should be included

in rate base at the original cost to 3000 Spenard Corporation. An allowance will be added to the base amount, where applicable, for capitalization of the return, at the rate established by this Order, which would have been earned on properties purchased in advance of being placed in service for a reasonable period of time not to exceed two accounting periods. The resulting valuations are detailed on Appendix 1.

The original cost of plant in service is reduced by the year-end accumulated depreciation. The staff has proposed an adjustment to the asset life of the headquarters building from 20 to 33 years to conform with the depreciation rate utilized by AGAS for other structures and with Internal Revenue Service (IRS). AGAS has argued that it is inappropriate to make isolated changes in depreciation rates without a complete depreciation study, which is scheduled to be performed in the next year or so. However, if the Commission approved the adjustment proposed by staff, it would be equally appropriate to reduce the life expectancy of communications equipment from 33 to 12 years as proposed by AGAS. The staff concurred with this recommendation. The Commission cannot overlook the obvious inequities in the depreciation schedule as filed in the permanent rate request. The Commission does not agree with AGAS' assertion regarding itemized review and modification of the depreciation schedule and will endorse both depreciation adjustments.

Another component of rate base proposed by AGAS is a gas plant acquisition adjustment, less accumulated reserve for amortization. Prior to 1967, the stock of APC was owned 50.41% by AKI and 49.59% by Union-Marathon (U-M). AKI had Class A voting stock; U-M had Class B non-voting stock,

THE STATE OF ALASKA

THE ALASKA PUBLIC UTILITIES COMMISSION

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

In the Matter of the Filing of a Tariff Revision, Designated as TA 12-89, by KENAI UTILITY SERVICE CORPORATION for Permanent and Interim Rate Relief and a New Rate Design Schedule

U-79-32

ORDER NO. 4

ORDER ACCEPTING STIPULATION

The Commission will accept the Stipulation dated September 5, 1979 executed by Kenai Utility Service Corporation and the Staff of the Commission, but subjects its acceptance of this Stipulation to the following express conditions:

(1) Kenai Utility Service Corporation shall file on or before October 22, 1979 amended tariff sheets reflecting the rates and rate design approved by acceptance of this Stipulation;

(2) Kenai Utility Service Corporation shall refund or credit the accounts of those customers that have been charged a rate on an interim basis that is in excess of those approved by this Stipulation;

(3) Kenai Service Corporation shall file with its 1979 annual report the time record form to be used by the President of the utility, Mr. J.M. Covington, to accurately reflect the percentage of his time and his expenses attributable to utility business;

(4) Kenai Utility Service Corporation shall file the time

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record of Mr. Covington for the calendar year 1980 with its 1980 annual report to the Commission;

(5) Kenai Utility Service Corporation shall demonstrate to the Commission by year-end 1980 that its continuing property records exist in a form satisfactory to the Commission.

IT IS SO ORDERED.

DATED AND EFFECTIVE at Anchorage, Alaska this 26th day of September, 1979.

ALASKA PUBLIC UTILITIES COMMISSION

Gordon J. Zerbetz, Chairman

Carolyn S. Guess, Commissioner

Stuart C. Hall, Commissioner

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(S E A L)

STATE OF ALASKA

THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners: Carolyn S. Guess, Chairman
Marvin R. Weatherly
Susan M. Knowles
Stuart C. Hall
Diana E. Snowden

In the Matter of the Filing of Tariff Revisions by PELICAN UTILITY COMPANY for Fuel Cost Rate Adjustments at Sand Point, Alaska	U-81-89 ORDER NO. 10

ORDER GRANTING PERMANENT APPROVAL OF NEW FUEL SURCHARGE AND ESTABLISHING THE CALCULATION FOR FUTURE SURCHARGE FILINGS

BY THE COMMISSION:

On December 2, 1981, in Order No. 1 of this proceeding, the Commission suspended permanent approval of three fuel surcharge filings, designated as TA20-230, TA21-230, and TA23-230, filed by PELICAN UTILITY COMPANY (Pelco) for its Sand Point service area. In that Order the Commission raised questions about Pelco's fuel purchase arrangement with an affiliated interest, Pelican Distributing Company (PDC), and the methods used in the three filings to calculate kilowatt-hour (KWH) sales.

On the former matter, the Commission noted that in AS 42.05.511(c) it is clear that a utility has the burden of proving that a purchase arrangement with an affiliated interest is necessary and consistent with the public interest. On the latter matter, the Commission's concern centered on Pelco's subtracting five percent of its generation as a line loss to arrive at KWH sales. (A reduction in KWH sales causes an increase in the surcharge, and vice versa.) The Commission directed Pelco to reduce the billed surcharges to eliminate the effect of the five percent

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reduction to KWH sales and to refund to its customers the excess revenues collected. In addition, the Commission approved, on an interim basis, surcharges recalculated without the five percent reduction to KWH sales.

Subsequently, in Orders Nos. 3, 4, 5, and 8 in this proceeding, the Commission granted interim refundable approval to five other surcharges. In each of the latter, Pelco had calculated the surcharge without making a five percent reduction to its KWH sales. Order No. 6 noted that the Commission Staff (Staff) and Pelco had agreed that the five percent reduction should not be made to KWH sales. Thus, the remaining issue was the reasonableness of Pelco's fuel purchase agreement.

On December 28, 1981, Pelco filed an analysis to justify its fuel purchase arrangement with PDC. The analysis calculated an annual expense to Pelco of $75,520 if the utility were to install and maintain its own tanks and fueling facilities. The utility's analysis was based on annual operating expenses associated with the purchase of fuel tanks, including a 15.7 percent rate of return on the additional rate base, five-year depreciation lives for the tanks, and a $1,200 annual maintenance expense thereon.

The Staff analyzed this filing and noted that the calculations and estimates provided were not supported but appeared reasonable with the exception of the depreciation lives of the tanks. Pelco estimated an annual depreciation expense of $23,400 based on an original cost of the tanks of $117,000. Staff noted that the shortest life to be used for storage tanks would be 20 years, which would mean an approximate $17,000 reduction to the annual depreciation expense. In addition, Staff noted that the rate of return calculation of 15.7 percent was greater than the 14.4 percent return recently approved for Pelco in Docket U-81-54.

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This difference in return amounted to an approximate $2,300 difference in revenue, but Staff believed the difference was immaterial if the revenue requirement for the storage tanks was adjusted for the depreciation expense reduction caused by the change in the service lives of the storage tanks. Staff maintained that the $17,000 depreciation adjustment, based on the longer life, was the only appropriate reduction to the revenue requirement calculated by Pelco.

Staff, therefore, calculated that the revenue requirement on the tank and fueling facility would be approximately $58,250 ($75,520 - $17,000). After review of the present difference between the price PDC pays for its fuel and the price PDC charges Pelco, Staff concluded that the utility had provided *prima facie* evidence that there would be no significant difference between (a) a total revenue requirement for Pelco including costs of fuel purchased from PDC and (b) a total revenue requirement including the utility's costs of installing and maintaining its own tanks and fueling facilities.

However, Staff did believe that a serious potential problem existed concerning the price of fuel to be used in future FCRA filings. In particular, the method by which PDC calculates the dock price and Pelco's revenue requirement on the tank facility cannot be reconciled in determining a reasonable cost justification for future rate proceedings.

Pelco is billed by PDC at a variable rate above the Chevron price billed to PDC. The PDC price to Pelco (the dock price) is 25 percent above the Chevron price to PDC less 15¢ per gallon. However, the gallons consumed vary from period to period. For example in a recent surcharge filing, TA35-230, Pelco showed an annual fuel consumption of 465,454 gallons. In the test year (1980) used to calculate the revenue requirement in U-81-54, the yearly fuel consumption was 516,049 gallons. Thus, the actual

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annual expense to Pelco associated with its purchase of fuel from PDC varies. The expense increases with both increases in consumption and increases in the per-gallon price of fuel.

In effect, what is happening is that there is a fixed cost (Pelco: $75,520; Staff: $58,250) associated with installation of the fuel tanks, but PDC's revenue is based on a variable reimbursement (the product of 25 percent of the Chevron price less 15¢ per gallon multiplied by the gallons sold). The yearly expense associated with Pelco's installation and maintenance of the tanks will not change significantly from year to year, but the revenue received by PDC may change significantly based on the price and amount of fuel purchased by Pelco. The annualized reimbursement to PDC on the basis of the recent surcharge filing, TA35-230, is $52,131. This amount is based on a dock price of 11.2¢ per gallon above the Chevron price (11.2¢ per gallon price differential times annual fuel consumption of 465,454 gallons equals $52,131).

Staff advised the Commission of three alternative solutions for dealing with this problem. The first alternative would be for PDC to charge (interfund) Pelco a flat yearly expense associated with the tanks and charge Pelco the same fuel price per gallon that PDC pays Chevron. This solution would necessitate an adjusted revenue requirement and a change in the base price of fuel for surcharge calculations.

A second alternative would be for Pelco to install the tanks and purchase fuel directly from Chevron. As in the alternative above, an adjusted revenue requirement would have to be calculated.

A third alternative proposed by Staff would be to allow PDC to continue to use the present method of determining its price to Pelco, and Pelco would be required either to install the tank

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farm or to interfund an annual expense in its next revenue requirement application presented to the Commission. Under the fuel price to Pelco from PDC which is reflected in TA35-230, the utility appears to be paying PDC less than it would cost Pelco to install and maintain its own fuel tanks. Staff recommended that if this alternative were adopted, a ceiling of 12.5¢ per gallon should be placed on the differential between PDC's price to Pelco and the Chevron price to PDC. The 12.5¢ per gallon figure was calculated by dividing the cost of installing and maintaining the fuel tanks by the annual fuel consumption reflected in TA35-230 ($58,250 divided by 465,454 gallons equals 12.5¢ per gallon). This ceiling would protect the consumer if the price of fuel were to increase. Under this alternative, Pelco would not have to recalculate the base price of fuel and would be allowed to continue its present surcharge computation until PDC's price to Pelco exceeded the Chevron price by more than 12.5¢ per gallon. If the price charged Pelco by PDC exceeded the Chevron price by more than 12.5¢ per gallon, Pelco would calculate the current fuel cost as the Chevron price plus 12.5¢ per gallon.

Staff expressed its belief that the third alternative was the most practical solution. Pelican's customers would be protected by the 12.5¢ ceiling discussed above, and in the next permanent rate proceeding the utility would have the option to adopt an interfund or to install and maintain its own fuel tanks.

The Commission concurs with Staff's analysis and believes that Pelco's present method of calculating fuel surcharges should be used unless the price charged Pelco by PDC exceeds the Chevron price by more than 12.5¢ per gallon. In that case, the maximum current price used in the surcharge calculation will be the Chevron price per gallon plus 12.5¢ per gallon. In its next permanent rate relief request Pelco either should file its revenue requirement with the tank farm included in rate base or determine

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an appropriate yearly interfund between PDC and Pelco to reflect the fuel storage service provided by PDC.

THE COMMISSION FURTHER FINDS AND CONCLUDES:

1. The fuel surcharges previously approved on an interim basis in this proceeding should be allowed on a permanent basis.

2. Pelco should be allowed to continue its present method of calculating the current cost of fuel in surcharge filings unless PDC's price to Pelco (the dock price) exceeds the Chevron price by more than 12.5¢ per gallon. Then Pelco should calculate the current cost as the Chevron price per gallon plus 12.5¢ per gallon.

3. In conjunction with its next rate filing, Pelco either should install the tank farm and include it in Pelco's rate base or should interfund an appropriate annual expense associated with use of the PDC tank farm.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The fuel surcharges previously approved on an interim, refundable basis in this proceeding for the Sand Point Division of Pelican Utility Company are approved on a permanent basis.

2. Pelican Utility Company shall continue to calculate its fuel cost rate adjustment surcharges for its Sand Point Division in the same manner as previously calculated unless the dock price exceeds the Chevron price to Pelican Distributing Company by 12.5¢ per gallon. If the price to Pelican Utility Company exceeds the 12.5¢ per gallon limit, the allowed price shall be the Chevron price plus 12.5¢ per gallon.

3. In its next permanent rate relief request, Pelican Utility Company - Sand Point Division either shall install the tank farm and include it in rate base or charge an appropriate

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annual interfund expense from Pelican Distributing Company to Pelican Utility Company - Sand Point Division for use of these fuel storage facilities.

DATED AND EFFECTIVE at Anchorage, Alaska this 26th day of October, 1982.

BY DIRECTION OF THE COMMISSION
(Commissioner Susan M. Knowles, not participating)

(S E A L)

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for permanent rate increase

increased by $83,124 to $9,430,369 to reflect the increase in purchased power costs to $.016705 per KWH. (Exhibit 13).

Staff reviewed the utility's expenses and adjustments and found them reasonable and proper with one exception, deregulation expense. MEA accumulated the total cost of $36,600 for the deregulation election in two subaccounts, labor costs of $15,982 and other expenses of $20,618. Staff maintained that the labor cost component represented a normal recurring expense which should be expensed in the current period. Staff amortized the remaining costs over a two-year period with the net result of increasing MEA's pro forma operating expenses by $17,141 to $9,447,510 including the additional increment of wholesale power costs per Exhibit 13 with which Staff concurred. The utility did not object to Staff's treatment of deregulation expense.

MVCAC suggested three specific adjustments to MEA's operating expenses. First, the intervenor stated that the utility's contributions to Susitna Power Now, which totalled $1,000 during 1980, should be disallowed under AS 42.05.381. This section of the Commission's governing statute provides in pertinent part that:

> No rate may include an allowance for costs of political contributions, or public relations except for reasonable amounts spent for
>
> (1) energy conservation efforts;
>
> (2) public information designed to promote more efficient use of the utility's facilities or services or to protect the physical plant of the utility;
>
> (3) informing shareholders and members of a cooperative of meetings of the utility and encouraging attendance; or
>
> (4) emergency situations to the extent and under the circumstances authorized by the commission for good cause shown.

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Second, MVCAC argued that deregulation expenses should be reduced by $5,305 (Exhibit 3) for advertising expenses which it also believed were in violation of AS 42.05.381. The consumer group further recommended that no future deregulation elections "be funded without a petition of 20% of the membership prior to any future expenditures by MEA." (T-7, p. 2).

Third, MVCAC averred that the savings experienced by MEA for reductions in its premiums for property and liability insurance should be passed on to the ratepayers as a reduction in operating expenses. The cost of property insurance coverage was reduced by $2,745 per Exhibit 2 and of liability insurance coverage by $81 ($75,217 minus $74,980 times 29 percent).

The Commission concurs with Staff's recommendation that the labor component of the deregulation election costs be fully expensed in the test year, since it is an ongoing obligation of the utility.

The Commission also believes that expenses for advertising MEA's position in the deregulation election in 1980 -- both in newspapers and on the radio -- should be disallowed. An examination of the text of advertising placed by MEA Board and management in the newspapers circulating in the MEA service area during the course of the election reveals numerous false statements and errors of both fact and law. (Exhibit 3). For example, one appearing in the Chugiak-Eagle River Star on September 18, 1980, stated that even if economically deregulated, MEA still would "be fully regulated by REA" and that the "REA will regulate rate adjustments." That statement is false and misleading. As MEA's management is aware, the REA does not pass on the reasonableness and propriety of the rates MEA or any other electric cooperatives charge for electric energy. As the utility's "banker", REA's sole interest is whether the revenue MEA earns from its rates is sufficient to pay back the loans

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made to MEA for construction projects and expansion of its services. Another ad asserted, without listing any examples, that the Commission was "less sensitive to local economic conditions than the MEA Board" and that APUC regulation did not permit MEA "to carry out the stated preference of its members regarding rate adjustments, that of smaller incremental rate changes." That, too, is false. The MEA Board determines when that utility's rate filings are made. Obviously the less frequently rate increases are requested, the larger the percentage increment is apt to be. Moreover, the MEA General Manager admitted under cross-examination that he ordered the MEA drafting department to "reconfigure" the standard artwork of the caricature symbol (an animated electric plug) supplied by the National Rural Electric Cooperative Association (NRECA) to member cooperatives for the deregulation election campaign in the election. Thus, in the display advertisements in question, the caricature appears swinging a baseball bat at alleged "unnecessary regulation" (Valley Sun, Eagle River Sun, Frontiersman, Chugiak-Eagle River Star); using a pair of shears to, presumably, eliminate "red tape" (Valley Sun, September 16, 1980); painfully straining to obtain release from an animal trap (Chugiak-Eagle River Star, September 4, 1980); and removing a ball and chain (Valley Sun, Eagle River Sun, Frontiersman, Chugiak-Eagle River Star, Anchorage Times, Anchorage Daily News). In short, the Commission believes that the misleading text of the so-called "Pro" and "Con" arguments that appeared in the display advertisements, as well as the doctored caricature, unfairly weighted the advertising campaign in favor of the MEA Board's position on deregulation. The entire MEA-sponsored campaign lacked the fairness and balance surely contemplated by the Legislature under AS 42.05.712.

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For the foregoing reasons the Commission will allow the expenses essential to the mechanics of conducting the election, e.g., ballot printing, mailing and tabulation, but believes the expenses of $5,305 associated with MEA's advertising campaign should be rejected. The balance of $15,312 in other deregulation expenses will be amortized over two years in equal annual installments. The two-year period appears reasonable inasmuch as AS 42.05.712 allows a utility to conduct deregulation elections at two-year intervals.

MVCAC has suggested that a petition of 20 percent of the membership be required prior to the cooperative expending funds on any future deregulation election. The Commission believes this recommendation would posit an unreasonable impediment to operation of the law governing deregulation elections. In particular, the Commission notes that the numerical threshold proposed for spending funds is higher than that established under AS 42.05.712(b) for a quorum or deciding vote in the election. While it cannot adopt MVCAC Recommendation No. 5, the Commission will continue to monitor the amount and scope of deregulation expenses to assure their reasonableness and propriety.

MVCAC's argument to disallow the utility's contributions to Susitna Power Now is rejected without prejudice to its resubmission. There is virtually no evidence on the record with respect to the appropriateness of this expenditure, and it would be improper to base a decision solely on general awareness of the environmental and economic debate surrounding the Susitna hydroelectric project. The Commission also recognizes that this issue affects other utilities and therefore, believes that it should be considered with the benefit of a fully-developed record.

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DISSENT OF SUSAN M. KNOWLES, COMMISSIONER

I dissent from the decision of the majority with respect to the disallowance of $5,305 for advertising expenses associated with the deregulation election.

The issue of the reasonableness and propriety of the amount and amortization period for deregulation expense is an issue of first impression before the Commission. It is also a matter of some sensitivity in that the Commission must perform its oversight responsibility without inhibiting, or appearing to inhibit, the deregulation option allowed by the Legislature in AS 42.05.712.

It is apparent that MEA incurred substantial expenses in the course of publicizing and administering its first deregulation election. In addition, legitimate questions have been raised with respect to the objectivity of the copy used for advertising the deregulation issue and the election. Nonetheless, disallowance of all or a portion of this expense involves a subjective assessment which I find difficult to justify considering both the record and possible infringement of rights under AS 42.05.712.

Given the facts and circumstances in the instant case, I would allow the full depreciation expense but extend the amortization period to three years to recognize both the extraordinary costs associated with this initial election and the questionable reasonableness of some expenditures.

Susan M. Knowles
by cog

ALASKA PUBLIC UTILITIES COMMISSION
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submit progress reports on a quarterly schedule, or sooner if substantive developments occur with respect to the gas supply contract negotiations. Further, once negotiated, the contracts themselves should be submitted to the Commission for approval.

3. Continuing Property Records System. Upon review of this utility's prior rate proceeding, the Commission finds that ENSTAR has not complied with the directive in U-75-95(7) in which the Commission ordered the utility to institute a continuing property records (CPR) system, as required by AS 42.05.461, on or before September 30, 1976. Despite the failure of ENSTAR to comply with the Commission's prior order, the Commission perceives that the utility now intends to proceed in good faith. Accordingly, the Commission accepts as reasonable the utility's estimate of one year to complete its new CPR system. ENSTAR will be required to institute the CPR system not later than October 31, 1983. Staff will then be required to review the CPR system to assure its compliance with the statute and to report the results of that review to the Commission.

4. Management Fees Paid to Parent Corporation. The Commission finds that ENSTAR has not fully met its burden of proof that the intercompany management fees paid to its parent corporation are just and reasonable. However, the Commission believes that the amount actually paid during the test year is not unreasonable when compared to the figures approved in the last permanent rate case wherein a more exhaustive audit was conducted by Staff to verify this expenditure. For this reason, the $611,000 in intercompany management charges will be accepted for purposes of this proceeding, but the acceptance will be conditional upon the requirement that ENSTAR submit by April 29, 1983, a new, more auditable contract for Commission approval. The Staff should then file a report with the Commission providing its criticisms or suggestions for changes in the contract formula.

5. Advertising Expenses. Upon review of the timony and evidence on the record, the Commission finds that the expenses associated with ENSTAR's sponsorship of public television programming are clearly and appropriately categorized under the Commission's regulations as "good will advertising." While this aspect of ENSTAR's advertising is reflective of a laudable civic commitment, nonetheless it also reflects the utility's desire to enhance its public image. Furthermore, this expenditure does not into one of the allowable public relations expense categories described in AS 42.05.381(a). Accordingly, $30,296 in advertising expenses should be disallowed for ratemaking purposes as expressly provided under AS 42.05.381(a) and 3 AAC 50.500.

6. Lobbying Expenses. Although the Commission recognizes that there may be instances in which a utility perceives that certain congressional or State legislation is not in its best interest, the Commission's interpretation of AS 42.05.381(a), particularly in conjunction with 3 AAC 50.500(a)-(c), its consideration of the weight of regulatory precedent, and its limited intent as expressed in U-78-4(33), collectively dictate that $18,000 in lobbying expenses incurred during test year operations should be disallowed. In addition to any legal restrictions, the Commission observes that when a utility claims direct benefits to its ratepayers as a result of lobbying efforts, the utility is presuming to determine without the prior knowledge or consent of its ratepayers what pending legislation is or is not beneficial to them. Alternatively, even if the Commission were to determine the appropriateness of a given lobbying effort on a case-by-case basis, the Commission, in attempting to rule on the question of "clear showing of demonstrable benefits to ratepayers," would be required to offer judgments on such issues as: Is the Legislature (or Congress) acting wisely in changing existing laws? What type of proposed legislation should be defeated? Should a utility be

reimbursed for meritorious but unsuccessful lobbying efforts? How should legislation beneficial to one utility's ratepayers but detrimental to others be treated?, etc. In sum, even if the Commission were to artfully circumvent the statute (AS 42.05.381(a)) and disregard its own regulations (3 AAC 50.500), the fact that the Commission would be required to render such subjective and judgmental decisions with respect to direct ratepayer benefits effectively relegates political lobbying in this and all future proceedings as the proper expense of a utility's stockholders.

7. Rate Case Expenses. The Commission will allow ENSTAR an upward adjustment in rate case expenses to $61,598, amortized over three years, on the basis of estimates found reasonable during the hearing, subject to the submission of documentation to fully support all actual expenses at the end of both this phase and the rate design phase of the proceeding. Additionally, the Commission will allow the utility the option of requesting a further adjustment if documented rate case expenses for the rate design phase of this proceeding exceed the utility's projections.

8. Treatment of $3.2 Million Line of Credit. Historically, the Commission has not permitted short-term debt to be treated as a component of a utility's debt capital structure. Because ENSTAR has not offered any justification for changing this policy, the Commission believes that the $3,200,000 line of credit should be deleted from the cost of capital computation.

9. Consolidated Federal Income Taxes. The Commission reaffirms the policy previously articulated in U-75-95(16) and U-78-4(33) that the benefits which result from the filing of a consolidated federal income tax return must be shared equitably with the utility and its ratepayers. For the purpose of establishing the federal income tax allowance in cost of service, the

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Please deliver to Ken Johnson
House Labor & Commerce
Committee

Fiscal Note Analysis SSHB 220

Assumptions:

1. This bill could create significant new jurisdiction for the Alaska Public Utilities Commission.

2. The new jurisdiction is in an area of regulation for which the Commission has little or no expertise and will have to develop that expertise through the addition of staff and the training of that staff. It is assumed that the term distributing added to AS 42.05.720(4)(c) does not include retail sales.

3. Legal analysis suggests application of this legislation will create legal challenges.

4. Fiscal counter-effect of the deregulation of refuse utilities will be negligible when compared to the other jurisdictions which will be created as a result of passage of this bill.

Program Summary:

A. Historical background and comparison of SSHB 220 with last session's HB 365.

   1. During the last legislative session HB 365 was introduced by Representative Koponen which specifically addressed the regulation of oil refineries. The Commission fiscal note concerning that bill stated that in order to accept this jurisdiction, the Commission would incur additional expenditures in operating categories 100 - 500. In addition, the Commission contacted the National Association of Regulatory Utility Commissioners and discovered that no other state commission regulates oil refineries as a utility.

   2. The broadness of SSHB 220, expands jurisdiction far beyond the regulation of oil refineries. Based on legal analysis, the Commission anticipates that this bill, if passed and made law, could result in much litigation concerning the scope and constitutionality of the expanded jurisdiction.

B. EXPENDITURE REQUIREMENTS

   As in the fiscal note regarding HB 365, this bill would require that the Commission be provided with additional state expenditures. These requirements, and how they differ from last year's fiscal note related to HB 365 are listed below.