ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672
2566 HLC HB 220 - HB 223 2526

100 - Personal Services

Minimum needs have been addressed. Positions required are:

Technical: 1 Utility Engineer IV
1 Utility Financial Analyst III

Support: 1 Consumer Protection Information Officer II
1 Utility Tariff Analyst II
1 Administrative Support Technician II

(There is no change in requirements above the level in the fiscal note accompanying HB 365.)

200 - Travel

Funds will be required for training travel and regulatory travel. Travel for FY 1985 is higher based on a one-time need for extensive training in order for the Commission to regulate the new jurisdictions.

300 - Contractual

Additional contractual funding will be needed to provide three items:

a. Funding for legal counsel to handle the litigation associated with the new APUC jurisdictions. As stated above, if passed, it is anticipated there will be much litigation concerning the constitutionality and scope of jurisdiction.

b. APUC staff does not have any experience or expertise in regulation of the additional jurisdictions. Therefore, it will be necessary to provide substantial training to the two technical positions created to handle the new jurisdiction. Existing staff and Commission members will also need some training in these areas in order to reach proper conclusions and decisions in the regulatory process.

c. Some computer software must be provided in order to put the additional jurisdictions into the APUC data base.

400 - Commodities

There will be a requirement for additional commodities for the new positions which will be established as a part of the new workload.

500 - Equipment

In addition to the equipment associated with the new employees, the Alaska Public Utilities Commission wishes to go

on record to stress the importance of the passage of its capital budget request for an expanded computer system within the APUC. (Copy is attached).

In last year's fiscal note re HB 365 the Commission had asked for additional funding to enhance its existing computer system. Since that time the situation has changed dramatically. Based on present and projected usage, the Commission and the Department of Administration Division of Data Processing, have recommended that the present system be replaced by a larger one. Those projections did not include the addition of such a broadly based jurisdiction as possible in this bill.

600 - LAND AND STRUCTURES

The Alaska Public Utilities Commission is already short of space in its present location. Additional personnel will require additional space.

	FY 84 (Assumption: program begins FY 85)	FY 85	FY 86	FY 87	FY 88	FY 89
100						
SAL & BENEFITS		Note: Figures for FY 85..FY89 do not include merit increases or any negotiated salary inc				
CP OFFICER,R 17A		$43,242.00	$43,242.00	$43,242.00	$43,242.00	$43,242.00
CE IV, R 21C		$60,041.00	$60,041.00	$60,041.00	$60,041.00	$60,041.00
UFA III, R 21A		$56,741.00	$56,741.00	$56,741.00	$56,741.00	$56,741.00
UTA II, R 17A		$43,242.00	$43,242.00	$43,242.00	$43,242.00	$43,242.00
AST II, R 8A		$25,548.00	$25,548.00	$25,548.00	$25,548.00	$25,548.00
		$228,815.00	$228,815.00	$228,815.00	$228,815.00	$228,815.00
200						
TRAVEL-TRNG		$5,000.00	$0.00	$0.00	$0.00	$0.00
TRAVEL - OTHER		$15,000.00 *	$5,300.00 *	$5,618.00 *	$5,955.08 *	$6,312.39
		$10,000.00	$5,300.00	$5,618.00	$5,955.08	$6,312.39
300						
LEGAL COUNSEL		$50,000.00	$50,000.00	$50,000.00	$50,000.00	$50,000.00
Add'l SOFTWARE		$5,000.00	$0.00	$0.00	$0.00	$0.00
1st YR TRAINING		$25,000.00	$0.00	$0.00	$0.00	$0.00
		$80,000.00	$50,000.00	$50,000.00	$50,000.00	$50,000.00
400						
5 POS times $400 *=6% inflation fac		$2,000.00 *	$2,120.00 *	$2,247.20 *	$2,382.03 *	$2,524.95
500						
5 POS times $1200		$6,000.00	$0.00	$0.00	$0.00	$0.00
3 POS times $1000		$2,000.00	$0.00	$0.00	$0.00	$0.00
		$8,000.00	$0.00	$0.00	$0.00	$0.00
600						
add'l office 4P010125 SQ.FT.EA 1SP6083 SQ.FT.EA EQ 583 SQ.FT TIMES $2.00 TIMES 12 MONTHS		$13,992.00	$13,992.00	$13,992.00	$13,992.00	$13,992.00
GRAND TOTAL		$342,807.00	$300,227.00	$300,672.20	$301,144.11	$301,644.34

1.	POSITION TITLE (CONSUMER PROTECTION & INFORMATION OFFICER)			RANGE/STEP 17A	DARG. UNIT G	FORM 12 PAGE/LINE	COV.	APPROV.	DISAPP.
2.	TYPE OF POSITION PFT	STAFF MONTHS 12	RP NUMBER	PCN NUMBER (NEW)	BRU PRIORITY 1	LOCATION Anchorage	ELECTION DISTRICT 7	LEG.		
3.	CONTINUATION LEVEL	ADDITION								

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	33084	
6.	Benefits	5402	
7.	Supplemental Benefits	2028	
8.	Fixed Benefits	2728	
9.	TOTAL PERSONAL SERVICES 01		43242
10.	Travel 02		0
11.	Contractual 03		0
12.	Commodities 04		400
13.	Equipment 05		2025
14.	Other Office Space 125SQFT (P01) x 12 mo		3000
15.	TOTAL COST @$2.00 sq.ft.		48667

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.		General Funds 1004	48667
19.		I-A Receipts 1005	
20.		Program Receipts 1028	
21.		Other	

FOR B&M USE ONLY
4A KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

JUSTIFICATION

The additional level of public contact which would result from this additional regulatory workload would require the addition of another Information Officer position. This level would provide an interim between the Consumer Protection Officer II lead position and the Consumer Protection entry level.

As with other sections, there is no further room for expansion of duties without an increase in personnel. In addition, there is no existing office space to house additional personnel.

13 REQUEST FOR NEW POSITION

AGENCY ALASKA PUBLIC UTILITIES COMMISSION

PROGRAM CONSUMER PROTECTION

BRU ALASKA PUBLIC UTILITIES COMMISSION

COMPONENT

Revised Date :

FY 85

01 1156 (7/82) - 13

1.	POSITION TITLE: Utility Engineer IV			RANGE/STEP: 21c	BARG. UNIT: G	FORM 12 PAGE/LINE	COV.	APPROV.	DISAPP.
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP NUMBER:	PCN NUMBER: NEW	BRU PRIORITY:	LOCATION: Anchorage	ELECTION DISTRICT: 7	LEG.		
3.	CONTINUATION LEVEL		ADDITION						

	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	46560	
6.	Benefits	8203	
7.	Supplemental Benefits	2550	
8.	Fixed Benefits	2728	
9.	TOTAL PERSONAL SERVICES	01	60041
10.	Travel	02	2500
11.	Contractual	03	10000
12.	Commodities	04	400
13.	Equipment	05	2025
14.	Other Office space 125 sq ft (PCN) x 12 mo @$2.00 sq.ft.		3000
15.	TOTAL COST		77966

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		C.F. Match	1003	
18.		General Funds	1004	77966
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR B&M USE ONLY
4A KEY NUMBER ___ - ___ - ___ - ___ - ___

JUSTIFICATION

Engineer would be involved in reviewing engineering requirements associated with refinery regulatory activities.

Current engineering staff is not able to absorb any more functions. It is already working at capacity level.

Because regulatory activity concerning refineries, etc. does not exist within this Commission nor any others, it will require much training in order for the Engineer to be able to review engineering requirements associated with these activities.

Office space will be required because existing space is at maximum usage levels already.

13 REQUEST FOR NEW POSITION

AGENCY ALASKA PUBLIC UTILITIES COMMISSION

PROGRAM CONSUMER PROTECTION

BRU ALASKA PUBLIC UTILITIES COMMISSION

COMPONENT

Revised Date

FY 85

01-1136(7/82)-13

1.	POSITION TITLE: Utility Financial Analyst III			RANGE/STEP: 21A	BARG. UNIT: G	FORM 12 PACE/LINE	COV.	APPROV. / DISAPP.
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP NUMBER	PCN NUMBER: NEW	BRU PRIORITY	LOCATION: Anchorage	ELECTION DISTRICT: 7	LEG.
3.	CONTINUATION LEVEL		ADDITION					

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	43560	
6.	Benefits	8203	
7.	Supplemental Benefits	2028	
8.	Fixed Benefits	2728	
9.	TOTAL PERSONAL SERVICES	01	56743
10.	Travel	02	2500
11.	Contractual	03	10000
12.	Commodities	04	400
13.	Equipment	05	2025
14.	Other Office space 125sq ft (P01) x 12 mo		3000
15.	TOTAL COST @2.00 sq ft		74666

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		C.F. Match	1003	
18.		General Funds	1004	74666
19.		I-A Receipts	1005	
20.		Program Receipts	1029	
21.		Other		

FOR OMB USE ONLY
4A KEY NUMBER ___ - ___ - ___ - ___ - ___

JUSTIFICATION

This position would provide audit of refinery records and all other regulatory activity associated with the scope of SSHB 220.

Current financial staff is not able to absorb any more functions and has, in the past, had to absorb a vacancy factor to help alleviate personnel services shortages resulting from budget cutbacks. Even if all positions were filled, workload is such that any additional activities cannot be handled by existing staff.

Because regulatory activity concerning refineries, etc. does not exist within this Commission nor any others, it will require much training in order for the Analyst to be able to provide the auditing background necessary for this activity.

Office space is not available for additional personnel and all new positions require that the Commission acquire more space.

13 REQUEST FOR NEW POSITION

AGENCY ALASKA PUBLIC UTILITIES COMMISSION

PROGRAM CONSUMER PROTECTION

BRU ALASKA PUBLIC UTILITIES COMMISSION

COMPONENT

Revised Date

FY 85

01-1136 17/83

	POSITION TITLE				RANGE/STEP	BARG. UNIT	FORM 12 PAGE/LINE	GOV.	APPROV.	DISAPP.
1.	Utility Tariff Analyst II				17A	G				
2.	TYPE OF POSITION	STAFF MONTHS	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION	ELECTION DISTRICT	LEG.		
	PFT	12		NEW		Anchorage	7			
3.	CONTINUATION LEVEL		ADDITION							

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	33084	
6.	Benefits	5402	
7.	Supplemental Benefits	2028	
8.	Fixed Benefits	2728	
9.	TOTAL PERSONAL SERVICES	01	43242
10.	Travel	02	0
11.	Contractual	03	0
12.	Commodities	04	400
13.	Equipment	05	2025
14.	Other Office space 125sqft (P01) X 12 mo		3000
15.	TOTAL COST x $2.00 sq.ft.		48667

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		C.F. Match	1003	
18.		General Funds	1004	48667
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR B&H USE ONLY
4A KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

JUSTIFICATION

The addition of another full-time tariff analyst would be required to handle the tariff rate filings which would be a result of this additional regulatory function.

Tariff section is already functioning at capacity and is not able to absorb any further regulatory workload without the addition of another position at this level. In addition, there is no existing office space to house this position.

13 REQUEST FOR NEW POSITION

AGENCY ALASKA PUBLIC UTILITIES COMMISSION

PROGRAM CONSUMER PROTECTION

BRU ALASKA PUBLIC UTILITIES COMMISSION

COMPONENT

Revised Date

FY 85

81-11647-DJI-13

1.	POSITION TITLE: ADMINISTRATIVE SUPPORT TECHNICIAN II			RANGE/STEP: 8a	BARG. UNIT: G	FORM 12 PAGE/LINE	COV.	APPROV.	DISAPP.
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP NUMBER	PCN NUMBER: NEW	BRU PRIORITY	LOCATION: Anchorage	ELECTION DISTRICT: 7	LEG.		
3.	CONTINUATION LEVEL		ITION						

	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	18636	
6.	Benefits	3043	
7.	Supplemental Benefits	1142	
8.	Fixed Benefits	2728	
9.	TOTAL PERSONAL SERVICES 01		25549
10.	Travel 02		0
11.	Contractual 03		0
12.	Commodities 04		400
13.	Equipment 05		1200
14.	Other Office Space 83 sq.ft(SP6)x 12mo		1992
15.	TOTAL COST @$2.00		29141

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.		General Funds 1004	29141
19.		I-A Receipts 1005	
20.		Program Receipts 1028	
21.		Other	

FOR B&M USE ONLY
4A KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

JUSTIFICATION

The administrative support level is already at over-capacity level and the operating budget for FY 1985 has requested the addition of administrative support personnel to provide adequate coverage for existing regulatory activity. The addition of any new regulatory activity necessitates the need for administrative support for that new activity.

Because of the shortage of usable office space, any new positions require additional office space.

13 REQUEST FOR NEW POSITION

AGENCY ALASKA PUBLIC UTILITIES COMMISSION

PROGRAM CONSUMER PROTECTION

BRU ALASKA PUBLIC UTILITIES COMMISSION

COMPONENT

Page 5 of 5

Revised Date

FY 85

TITLE	LOCATION	PROJECT CLASSIFICATION	ELECTION DISTRICT	START DATE	COMPLETE DATE
Alaska Public Utilities Commission Information Processing System	Anchorage	02-490-04=01	99	9/1/84	6/30/85

PRIOR 1 OF 2

	GENERAL FUNDS	FEDERAL FUNDS	G.O. BONDS	OTHER	POSITIONS PFT	POSITIONS PT/SEA.	AGENCY REQUEST FY 85 TOTAL	GOVERNOR
REQUESTED FUNDING:								
SITE ACQUISITION								
PLANNING AND DESIGN								
CONSTRUCTION AND EQUIPMENT	345.4						345.4	
PREVIOUS APPROPRIATIONS (NON-ADD)								
OPERATING COSTS:								
FIRST YEAR OPERATING COSTS	33.0							
FULL ANNUAL OPERATING COSTS	56.1							

PROJECT DESCRIPTION AND JUSTIFICATION:

The Alaska Public Utilities Commission has established several objectives which speak to improved case management techniques and provide for sustained Commission participation in specialized, highly technical regulatory issues such as national telecommunications policy development, local and regional power requirements and continuing as a reliable source of utility related information in response to public and governmental inquiries. In all of these instances, the availability of a properly configured information processing system is essential.

The APUC has an urgent need to expand its information processing system. Following implementation of its initial electronic data processing capability, the APUC uses its existing system in practically every aspect of its operations: for engineering and financial analysis, for job scheduling and control, for drafting letters, orders, testimony and reports, and for numerous administrative controls. At this time, the small processor serving twelve terminals is at capacity or is frequently overloaded which greatly impairs the productivity and quality of work product of the agency's employees.

The agency's background in mechanizing its operations and details of its future plans are contained in the APUC's 1983 computer plan dated October 4, 1983. Copies of this plan have already been sent under separate cover to the Deputy Commissioner of Administration for Information Systems and the Office of Management and Budget (a copy is also attached to this capital budget request). The plan proposes to replace the existing Digital Equipment

CP-1 CAPITAL PROJECT DESCRIPTION
FY 85

AGENCY Alaska Public Utilities Commission

CATEGORY Public Protection

PROGRAM Consumer Protection

PROJECT TITLE Information Processing System

Page 1 of 2
Revised Date

FY85

RECEIVED
OCT 17 1983

000025

BUDGET REVIEW

Project Description and Justification Continued:

Corporation PDP 11/24 minicomputer in FY85 with one having far greater capacity and to expand the number of terminals. This will give most employees, including Commissioners, ready access to numerous data bases giving the status of utility operations and those of the agency itself, to specialized computational facilities for utility regulation, and to electronic drafting of documents. In addition, a large capacity computer is essential for the proper auditing of utilities, most of which maintain their financial and operations records in extensive computer files.

The plan also includes addition of graphics capabilities to the basic system in FY86. This should aid in the presentation of complex utility data to the public. Also in FY86, the Commission plans to begin computer integration of a proposed micrographics system. Filming and computer indexing of its documents onto microfiche will greatly reduce the effort needed to maintain over one million documents in order and ready for reference. In later years funds are requested for new or updated software, for a high volume automatic microfiche-to-paper printer and for automatic microfiche storage and retrieval equipment which will integrate hard copy information with the APUC central data base.

CP-1 ADDITIONAL EXPLANATION FORM

AGENCY Alaska Public Utilities Commission

CATEGORY Public Protection

PROGRAM Consumer Protection

TITLE Information Processing System

Revised Date

FY85

TITLE: Alaska Public Utilities Commission Information Processing System

PRIORITY 1 OF 2

OPERATING	TOTAL PREVIOUS APPROPRIATIONS	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
100 PERSONAL SERVICES							
200 - 800 LINE ITEMS			33.0	56.1	50.0	50.0	50.0
TOTAL			33.0	56.1	50.0	50.0	50.0
1002 FEDERAL RECEIPTS							
1004 GENERAL FUNDS			*33.0	*56.1	*50.0	*50.0	*50.0
OTHER FUNDS							
FULL-TIME POSITIONS							
CAPITAL TOTAL							
1002 FEDERAL RECEIPTS							
1004 GENERAL FUNDS			345.4	154.8	23.4	91.0	80.0
OTHER FUNDS							
REVENUE							

EXPLAIN PREVIOUS APPROPRIATIONS (GIVE SECTION, CHAPTER, SLA) AND ASSUMPTIONS FOR COST, FUNDING SOURCE, POSITION AND REVENUE ESTIMATES:

Operating funds in FY85 through FY89 include an estimate for hardware and software maintenance agreements along with a projection for professional data processing consulting services necessary to allow program conversions, maintenance and new program development. FY85's estimate is scaled down to reflect the initial acquisition and installation timeframe during which these costs will not be incurred. Estimates for FY87 and beyond are reduced to reflect completion of program conversions and a stabilization of expenses related to system maintenance and ongoing new program development.

*O & M expenses projected through FY89 very closely approximate current funding requirements for data processing support costs and do not represent a net increase in general fund obligation.

CP-2 CAPITAL PROJECT COSTS
FY 85

AGENCY: Alaska Public Utilities Commission

CATEGORY: Public Protection

PROGRAM: Consumer Protection

PROJECT TITLE: Information Processing System

Page 1 of 2

Revised Date 11/4/83

FY85

RECEIVED
NOV 29 1983

000027 BUDGET REVIEW

Appropriation and Assumptions for Cost, Funding Source, Position and Revenue Estimates Continued:

Capital expenditures in FY85 provide for a substantial portion of new hardware and software acquisition and installation. FY86 expenditures include further development of APUC order indexing capabilities and implementation of the integrated micrographics system. These items along with estimates of capital expenditures in FY87 and beyond are explained more completely in the attached APUC 1983 computer plan.

CP-2 ADDITIONAL EXPLANATION FORM

AGENCY Alaska Public Utilities Commission

CATEGORY Public Protection

PROGRAM Consumer Protection

TITLE Information Processing System

Page 2 of 2

Revised Date

FY85

000028

standards for a utility. (Eff. 10/15/82. Reg. 84)
Authority: AS 42.05.141(a)(3)
AS 42.05.151(a)
AS 42.05.711(d)

3 AAC 50.200. INDIVIDUAL ELECTRIC METERS. (a) Except as provided in (b) of this section, an electric utility shall install an individual meter to measure the energy consumption attributable to each residential and commercial unit in a multiple-occupancy building and each mobile home unit in a mobile home park if construction of the building or mobile home park was begun after December 31, 1982.

(b) Individual meters are not required

(1) for transient multiple-occupancy buildings and transient mobile home parks, including, but not limited to, hotels, motels, dormitories, rooming houses, hospitals, nursing homes, and mobile home parks for travel trailers;

(2) for commercial unit space which is subject to alteration with changes in tenants as evidenced by temporary construction or non-load-bearing walls or floors separating the commercial unit spaces;

(3) where alternative renewable energy resources are used in connection with central heating, ventilating, and air conditioning systems; and

(4) in common building areas such as hallways, elevators, reception areas, water pumping facilities, and electric hookups for motor vehicles.

(c) For the purpose of this section, construction begins when the footings are poured. (Eff. 10/15/82. Reg. 84)
Authority: AS 42.05.141(a)(3)
AS 42.05.151(a)
AS 42.05.291(c)

3 AAC 50.300. INFORMATION TO ELECTRIC CONSUMERS. (a) An electric utility shall provide to each new electric consumer, coincident with the application for service, a clear and concise explanation of any rate schedule in its currently effective tariff which applies to that consumer.

(b) Not later than 30 days after the filing of a tariff advice letter in which a change in a rate schedule is requested, an electric utility shall transmit to its affected consumers a clear and concise explanation of the proposed change. This provision does not apply to rate adjustments resulting from an automatic fuel-cost rate adjustment clause.

(c) At least once each year, an electric utility shall transmit to each of its electric consumers an informative summary of any rate schedule in its currently effective tariff which applies to those consumers.

(d) On request of an electric consumer, an electric utility shall transmit a clear and concise statement of the consumer's actual energy consumption and, if billed separately, power consumption for any billing period during the previous 12 months unless the information is not reasonably ascertainable by the utility. (Eff. 10/15/82. Reg. 84)
Authority: AS 42.05.141(a)(3)
AS 42.05.151(a)
AS 42.05.411(a)

3 AAC 50.400. Reserved

3 AAC 50.500. ADVERTISING. (a) In addition to the restrictions imposed under AS 42.05.381(a), neither an electric utility nor a gas utility may recover through rates any direct or indirect expenditure by the utility for promotional, political, or goodwill advertising.

(b) The commission will determine on a case-by-case basis whether the forms of advertising listed in (c)(3) of this section, as well as advertising not readily categorized as promotional, political, or goodwill, and any other form of advertising not covered by this section will be included in utility operating expenses for rate-making purposes.

(c) In this section

(1) "advertising" means the commercial use by a utility of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to the utility's customers;

(2) "goodwill advertising" means advertising directed toward improving or enhancing the public image of a utility or its employees;

(3) "goodwill advertising," "political advertising," and "promotional advertising" do not include

(A) advertising which informs an electric or gas consumer about methods which conserve electric energy or gas or which reduce peak demand for electric energy or gas;

(B) advertising required by law or regulation, including advertising required under Part I, Title II of the National Energy Conservation Policy Act (42 USC § 8201 et seq.);

(C) advertising regarding service interruptions, safety measures, or emergency conditions;

(D) advertising concerning employment opportunities with a utility;

(E) advertising which promotes the use of energy-efficient appliances, equipment, or services;

(F) an explanation or justification of existing or proposed rate schedules or a notice of hearings concerning these rate schedules; and

(G) communications with members of a utility cooperative about the activities or internal affairs of the cooperative or which encourage or promote the participation of the members in the process of governing the cooperative;

(4) "political advertising" means advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to a controversial issue of public importance; and

(5) "promotional advertising" means advertising for the purpose of encouraging a person to select or use the service or additional service of a utility, or the selection or installation of an appliance or equipment designed to use the utility's service, except as provided in (3)(E) of this subsection. (Eff. 10/15/82, Reg. 84)

Authority: AS 42.05.141(a)(3)
AS 42.05.151(a)
AS 42.05.381

3 AAC 50.600. DEFINITIONS. Unless the context indicates otherwise, in 3 AAC 50.100 – 3 AAC 50.600

(1) "building" means a single erected structure, roofed and enclosed within exterior walls, built for permanent use, framed of component structural parts and unified in its entirety both physically and in operation for residential or commercial occupancy;

(2) "commercial unit" means that portion of a building or premises which is normally used for commercial purposes;

(3) "electric consumer" means a person or a public or private entity to which electric energy is sold, other than for purposes of resale, by a regulated public utility;

(4) "gas consumer" means a person or a public or private entity to which natural gas is sold, other than for purposes of resale by a public utility;

(5) "mobile home park" means a parcel of land which is used for the accommodation of occupied mobile homes;

(6) "multiple-occupancy building" means a building which is designed to house more than one residential or commercial unit;

(7) "rate" means

(A) a price, rate, charge, or classification made, demanded, observed, or received with respect to the sale of utility services to a utility consumer;

(B) a rule, regulation, condition, or practice respecting a rate, charge, or classification; and

(C) a contract pertaining to the sale of utility services to a utility consumer;

(8) "rate schedule" means the designation of the rates which an electric utility charges for electric energy; and

(9) "residential unit" means one or more rooms for use by one or more persons as a housekeeping unit which provides living,

January 31, 1984

To: John

From: Ken

RE: SSHB 220, RELATING TO PUBLIC UTILITIES

WHAT THE BILL DOES.

This bill attempts to do several different deeds all i. one fell swoop. First the bill calls for restriction on rates charged by public utilities. Such utilities can not include in its charge to customers the cost for political contributions, lobbying, public relations, advertising, and consulting fees. some of this is redundant since it' covered under current statute. Section 2 of this bill also deals with rate setting. It seems to me that in this section, a utility that has part or all of its administrative function outside the state, would be heavily penalized by this bill.

In Section 3 of the bill, one particular item that sticks out is the exemption of cable television firms from regulation by the Alaska Public Utilities Commission. It would be like deregulation. The merits of this section are questionable. The heavyweights in the cable t-v business are obviously against it since it would open areas for more competition. The other side of this issue is philosophical if you ask "should cable t-v be considered a utility ?". Perhaps deregulation would not be a bad idea if it were done in a different bill.

The other aim of the bill is to place oil refiners under APUC regulation.

STATE OF ALASKA
FISCAL NOTE

Revision Date 1983

I. REQUEST

Bill/Resolution No.: HB 220
Title: Restricting cost items..public utility rates
Sponsor: Lindauer
Requestor: Labor & Commerce

II. FISCAL DETAIL

Agency Affected: Commerce & Econ. Dev.
Program Category Affected: Protection
BRU, Program of Subprogram(s) Affected: Public Utilities Commission

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, TC						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Carolyn Guess, Commissioner Phone: 276-6222
Division: Alaska Public Utilities Commission Date:

Approved by Commissioner: Richard A. Lyon Date: 4/27/83
Department: Commerce & Economic Development

Distribution:
Original to Legislative Finance
Copy to Office of Management and Budget (for Legislature introduced bills)
Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

3/8/83

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

ALASKA PUBLIC UTILITIES COMMISSION

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

420 "L" STREET
SUITE 100
ANCHORAGE, ALASKA 99501
(907) 276-6222

April 6, 1983

Representative Walt Furnace, Chairman
House Labor and Commerce
Pouch V
Juneau, Alaska 99811

Dear Representative Furnace:

In response to your letter of March 28, 1983, concerning House Bill 220 I am enclosing relevant portions of our existing statute, AS 42.05.381(a) and AS 42.05.511(c) and a portion of our regulations 3 AAC 50.500 which is applicable to electric and gas utilities. The latter is the result of federal legislation which mandated specific consideration of the subject of advertising expenses of electric and gas utilities only.

I found it difficult to articulate in writing the deliberation process that the Commission undertakes when the costs enumerated in items 1 through 7, AS 42.05.381(a), are at issue before the Commission. Therefore you will also find portions of Commission orders in eight proceedings over the past six years where the subjects have been discussed. I have underlined the references to the sections of the statute and regs which are enclosed and believe that the Commission's review and assessment speak for themselves and support our initial position that the proposed legislation is redundant and unnecessary in part, and could result in higher rates to consumers through the foreclosure of the evaluation of the reasonableness of a specific component of a rate.

If there is additional information the Commission can provide, please do not hesitate to contact me at 263-2132.

Sincerely,

ALASKA PUBLIC UTILITIES COMMISSION

Carolyn S. Guess

Carolyn S. Guess
Chairman

dkd

Enclosures

cc: C. Wallen

C8-H6LH

MEMORANDUM State of Alaska

TO: Catherine Wallen
Legislative Liasion
Department of Commerce

DATE: March 15, 1983

FILE NO:

TELEPHONE NO:

FROM: Carolyn S. Guess, Chairman
Alaska Public Utilities Commission

SUBJECT: House Bill 220
Senate Bill 140

Because there apparently are not Bill Analysis Forms available to us in Anchorage I am sending our comments on the proposed legislation in memo form. You may transfer our comments to the appropriate form and sign my name with your initials.

House Bill 220. There is no fiscal impact to the APUC.

Comments: House Bill 220 is redundant in part, unnecessary and could result in higher utility rates.

Section 1(a)(1)-(4) is addressed in 42.05.381(a). The Commission believes the exceptions found in 42.05.381(a)(1)-(4) are reasonable and is not aware of any reason to eliminate them.

Section 1(a)(5), a prohibition of consulting or management fees paid to the owner of a utility could affect a number of small utilities, i.e., Tanana Power Co., and Mukluk Telephone Co. where the owners are the salaried management of the utility.

In regard to Section 1(a)(6), AS 42.05.511(c) provides:

> In a rate proceeding the utility involved has the burden of proving that any written or unwritten 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 of 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. (§ 6 ch 113 SLA 1970)

Therefore, the Commission believes this section of the proposed legislation is redundant and unnecessary.

In regard to Section 1(a)(7), the Commission does not understand what purpose this proposed section would serve and further believes it would create problems and possibly higher rates for utilities such as the Anchorage Municipal electric, telephone, water and sewer utilities which receives services from the Municipality of Anchorage i.e., data processing, legal services, etc.; privately owned utilities such as College Utilities (sewer and water) in Fairbanks. Juneau Douglas Telephone Company and Glacier State Telephone Company serving Kenai, Homer, Kodiak and North Pole could also be adversely affected.

In summary, the Commission does not believe that the public interest would be better served by the enactment of this legislation.

Senate Bill 140.

It would appear if the role of the APUC is limited to an oversight review of the regulations to be promulgated, there is no fiscal impact on the APUC.

Comments: The Commission is supportive of legislation that would result in lower utitlity rates for Alaskan utility consumers. The Commission observes that this legislation would only benefit consumers of electric utility cooperatives and regional electrical authorities. There are other kinds of utilities that have as much, if not more, need for the availability of low interest loans, specifically telephone, sewer, and water utilities. The Commission would recommend that consideration be given to broadening the kinds of utilities eligible to borrow long or short term monies from the State.

csg/dkd

MEMORANDUM State of Alaska

TO: Catherine Wallen
Legislative Liasion
Department of Commerce

DATE: March 15, 1983

FILE NO:

TELEPHONE NO:

FROM: Carolyn S. Guess, Chairman
Alaska Public Utilities Commission

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csg/dkd

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M January 23, 1984

SUBJECT: Sectional Analysis of SS HB 220

TO: House Labor and Commerce Committee

FROM: Linn H. Asper
Legislative Counsel

You have asked for a sectional analysis of SSHB 220, relating to public utilities, including a comparison of the original bill with the sponsor substitute.

In the sponsor substitute:

* Section 1 adds to the list of public utility costs that may not be included as elements of utility rate-setting. The current list of excluded costs is increased to take in all public relations, lobbying, advertising, certain fees paid, and certain products and services purchased from the owner or affiliate of a public utility.

* Section 2 adds two new subsections to AS 42.05.381, regarding utility rate-setting. The new subsection (e) excludes certain cost items related to return on capital from consideration in rate-setting for public utilities that are operated for profit. The new subsection (f) considers revenues and profits from businesses operated in the state that are owned by a utility or its affiliates, in establishing rates for services provided by the utilities.

* Section 3 limits the on-site inspection jurisdiction of the APUC to areas within the state.

* Section 4 amends the definition of "public utility" or "utility" to exclude cable television operators and waste material collection and disposal businesses from the jurisdiction of the APUC, and to include all refiners and distributors of petroleum in the state.

* Section 5 repeals a reference to waste collection and disposal businesses, because such businesses are removed from APCU jurisdiction by *Sec. 4.

* Section 6 sets a July 1, 1984 effective date.

A comparison to SSHB 220 to HB 220 is as follow:

In section 1 of SSHB 220 several changes have been made to the proposed amendment to AS 42.05.381(a). The subsection is the same in both versions through paragraph (4). Paragraph (5) of the sponsor substitute is less restrictive on fees incurred by utilities than is the original bill, and provides a more complex formula for determining those fees that are and are not allowable for purposes of rate setting by the APUC. Paragraph (6) of the substitute makes a technical change to the original bill. Paragraph (7) of the substitute is less restrictive for purposes of rate-setting, on allowable costs of services incurred by a utility.

Sections 2-6 of the sponsor substitute contain new material not found in the original bill.

LHA:ojb
J2/058

Representative John Lindauer
District 10-A
3933 Geneva Place
Anchorage, AK 99508

Alaska State Legislature

House of Representatives

While in Juneau
Pouch V
Juneau, AK 99811
465-3709

March 15, 1983

MEMORANDUM

TO: House Labor and Commerce Committee

FROM: Representative John Lindauer J.L.

RE: House Bill #220: "An Act restricting cost items that may be allowed in public utility rates."

House bill #220 insures that the rates charged by a public utility will not be excessive in order to cover unnessesary costs or to provide funds to be siphoned off by out-of-state owners in excess of the legal rate of return. Specifically, consumers of public utility services would not be required to pay for the utilities' political contributions, lobbying efforts, advertising campaigns, public relations, consulting or management fees paid to the owner of the utility, or for excessively priced products and services.

This bill will reduce the utility rates of almost every person, business, and government in Alaska.

Alaska Telephone Association
201 E. 56th Avenue / Suite 320
Anchorage, Alaska 99502
(907) 563-4000

J. Clifton Eller
President

Gordon Parker
Executive Director

January 25, 1984

Hon. John Cowdery, Chairman
House Committee on Labor & Commerce
Pouch V
Juneau, Alaska 99811

ATTN: Ken Johnson

Dear Mr. Cowdery:

At the request of your staff and some members of your committee, I am writing in regards to HB220, "An Act Relating to Public Utilities." ATA opposes this legislation for the reasons outlined in the item by item analysis which follows.

(AS 42.05.381) Section 1. (a) (3) & (4): Current statutes place severe restrictions on advertising and public relations by regulated utilities. The language here is redundant.

(5): If the intent here is to reduce costs and the ultimate effect on the ratepayer, the actual result could be the opposite. At least four companies providing service in Alaska rely heavily on support, management and administrative services through parent companies located Outside. The net effect is that costs are lower due to avoidance of service duplication and lower costs Outside.

Additionally, a number of companies utilize consultants Outside. While we have some very qualified consultants in state, the language here would appear to preclude the companies from calling on the talents of some of the nation's leading talents.

(6) & (7): The apparent purpose of this language is already accomplished in AS42.05.511(c). The statute requires that a company purchasing products or services from an affiliate or subsidiary demonstrate to the APUC that the product or service can't be obtained elsewhere at a lower cost and that the purchase is based on the cost of the item to the affiliate or subsidiary. Current statutes do allow inclusion of a rate of return for the selling entity, a necessity if that entity is to remain in business.

Section 2. (a): The language here appears to exclude debt from the rate of return calculation. Rate of return has always been calculated on the total investment. A company must be allowed to recover interest costs through rate of return in order to finance construction.

(1): This language apparently refers to a double leverage situation in which a stockholder borrows money from the utility to buy more stock. No regulatory body would allow such an arrangement to be included in ratemaking.

(2): This language would appear to penalize a company for establishing affiliates. The federal government is now urging companies to form affiliates to provide new technology (i.e., cable television) and requiring affiliates for some traditional services (i.e., provision of terminal equipment). If this section is enacted, it simply means that an entity which may be the best provider of a service can't provide the service.

(3): This appears to duplicate (2) though specifying unregulated affiliates or subsidiaries. Again, for some services (i.e., terminal equipment) companies are now required by the FCC to establish unregulated subsidiaries, or at the least maintain separate accounts to guarantee no cross subsidy. An investment by a regulated company in a non-regulated subsidiary can not now be included in ratemaking. This is specified by the FCC and in AS42.05.481.

(4): There are clear constitutional questions involved in this requirement favoring Alaska banks. A company has the duty to its stockholders to place its funds in the financial institution offering the best return and treatment.

(5): It is normal business practice for a parent company to pledge its full faith and credit to guarantee loans to a subsidiary. In the case of a regulated company which must pay a loan on which a subsidiary has defaulted, such loss would not be allowed for ratemaking purposes. AS42.05.441 states that, in the case of a parent company operating more than one utility or unregulated subsidiary, a separation of property must be made among the different entities for ratemaking purposes.

(f): Both federal and state law (AS42.05.481) is clear that cross subsidy (i.e., subsidizing a non-regulated subsidiary through regulated rates) is not allowed. This language appears to require a reverse subsidy flowing from an unregulated subsidiary to a regulated parent. We believe there is a constitutional question to this requirement.

The second part of paragraph (f) does not take into account that a subsidiary may be losing money. We suggest that if it is fair to consider the revenues and profits of an unregulated subsidiary for ratemaking purposes, then it should also be fair to consider the costs and losses of the unregulated subsidiary.

I hope this information is helpful to the Committee. I am available to the Committee for questions.

Sincerely,

Gordon Parker

GP/jv

BILL SHEFFIELD, GOVERNOR

STATE OF ALASKA

ALASKA PUBLIC UTILITIES COMMISSION
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

420 "L" STREET
SUITE 100
ANCHORAGE, ALASKA 99501
(907) 276-6222

January 24, 1984

Representative John Cowdery, Chairman
Labor and Commerce Committee
State House of Representatives
Juneau, Alaska 99811

Attention: Ken Johnson

Dear Representative Cowdery:

For the reasons stated in the Commission's memorandum of March 15, 1983, regarding HB 220 and the attached analysis of SSHB 220 by Mark Figura, the Alaska Public Utilities Commission opposes the enactment of SSHB 220 because it is redundant, confiscatory, ambiguous, inconsistent, will require an expenditure of dollars that is unnecessary and legislation that is likely to create a multitude of litigation opportunities. The Commission concludes that based upon its initial and subsequent analysis, the proposed modifications to AS 42.05.381 contemplated in SSHB 220 are not in the public interest.

Sincerely,

Carolyn S. Guess

Carolyn S. Guess
Chairman

Hearing: January 26, 1984
8:15 a.m.

Enclosure

1

Carolyn S. Guess, Chairman
Alaska Public Utilities Commission

January 20, 1984

276-3550

Norman C. Gorsuch
Attorney General

SSHB 220

By:
Mark L. Figura
Assistant Attorney General
Commercial Section-Anchorage

You asked me to comment upon sections 2 - 5 of the sponsor substitute for House Bill No. 220 introduced January 10, 1984, and referred to the Labor & Commerce and Finance committees. Section 1 of the bill is similar to last years version, upon which the Commission has already commented.

Section 2 of the bill is ambiguous, and it is difficult to determine the drafter's intent. This will of course pose serious interpretation problems should the bill be passed and will no doubt lead to extensive litigation concerning the meaning of the legislation. My guess is that the drafter intended the following meaning for his proposed AS 42.05.381(e). The Commission is to determine the equity of the utility in the usual way, but reduce the equity figure if the sum of the utility's paid-in capital and retained earnings less the values of the five numbered paragraphs of proposed section 381(e), is less than the utility equity.

Paragraph 1 includes the purchase price of a utility which has changed ownership in the past. (However, paragraph 1 could well mean only the cash used for such a purpose, or what is commonly known as an "acquisition adjustment," the amount of the purchase price in excess of the seller's net book.) Paragraph 2 includes loans made by the utility to affiliated interests. Paragraph 3 includes equity held in (or perhaps the purchase price of) an unregulated company. Paragraph 4 includes deposits in financial institutions located outside the state of Alaska, and paragraph 5 includes assets used to secure loans to affiliated interests.

The obvious legal problem with the entire proposed section 381(e) is that it would result in confiscatory rates whenever it would have any effect. Rates are generally established by the Commission at the minimal level which will enable the utility to attract capital and continue to provide adequate service. To the extent that those rates would be decreased by proposed section 381(e), the decrease would be confiscatory.

Form 1

There are also a number of lesser problems with the proposed section. Proposed section 381(e)(1) is apparently aimed at limiting the amounts that a utility may earn on plant purchased from another utility. AS 42.05.441(b) already deals with this problem, in a much more satisfactory way. Proposed section 381(e)(3) penalizes a utility for investing money in an unregulated company. The result of enacting such a provision would be to encourage companies to inflate the plant (and therefore the rate base) of the regulated utility.

Section 2 of the bill would also create a new section 381(f). I interpret proposed section 381(f) as requiring the Commission to decrease the revenue requirement of certain utilities by 15% of their gross in-state nonutility revenues. To the extent that any utility allowed proposed section 381(f) to apply, the application of this section would plainly be confiscatory. In addition, the passage of proposed section 381(f) would provide a strong disincentive to certain utilities and their affiliates to invest within the state of Alaska. Given the option of starting a business (such as a telephone equipment business) in Alaska or some other state, very few companies would choose Alaska if they be subject to a 15% tax on gross revenues on any Alaskan sales.

Section 3 of the bill would add a new section AS 42.05.655 providing that the on-site inspection jurisdiction of the Commission is limited to Alaska. The enactment of proposed section 655 would be inconsistent with AS 42.05.491, which specifically states that under certain circumstances utilities may keep records outside the state, if they agree to pay the actual expenses incurred by Commission personnel in making the out-of-state examination. Proposed section 655 would also allow utilities to avoid Commission oversight of affiliated interest transactions, merely by carrying on those transactions outside the boundaries of Alaska.

Section 4 of the bill proposes three changes in the definitions applicable in AS 42.05. The bill would delete both cable television service and waste disposal service from the services subject to public utility regulation. In addition, the bill proposes to delete the language added by ch. 36 SLA 1971 to AS 42.05.720(4)(e). The 1971 legislation limited the jurisdiction of the Commission over small petroleum fuel dealers. The purpose of the 1971 legislation was set out in the act as follows:

> It is the finding of the legislature that it is necessary to avoid unnecessary regulatory procedures over petroleum dealers delivering to

trailer courts and apartment buildings having local pipe distribution systems for heating fuel, and whose owners or residents have a choice of suppliers.

Apparently the intent of the bill is to reestablish Commission jurisdiction over small petroleum dealers serving trailer courts and apartment buildings. Absent complaints from these consumers, the legislation appears unnecessary.

Section 5 of the bill would repeal AS 42.05.711(i), consistent with the elimination of waste disposal from the definition of public utilities. Since the bill also eliminates cable television service, AS 42.05.711(k) should also be repealed.

MLF:cai

standards for a utility. (Eff. 10/15/82, Reg. 84)
Authority: AS 42.05.141(a)(3)
AS 42.05.151(a)
AS 42.05.711(d)

3 AAC 50.200. INDIVIDUAL ELECTRIC METERS. (a) Except as provided in (b) of this section, an electric utility shall install an individual meter to measure the energy consumption attributable to each residential and commercial unit in a multiple-occupancy building and each mobile home unit in a mobile home park if construction of the building or mobile home park was begun after December 31, 1982.

(b) Individual meters are not required

(1) for transient multiple-occupancy buildings and transient mobile home parks, including, but not limited to, hotels, motels, dormitories, rooming houses, hospitals, nursing homes, and mobile home parks for travel trailers;

(2) for commercial unit space which is subject to alteration with changes in tenants as evidenced by temporary construction or non-load-bearing walls or floors separating the commercial unit spaces;

(3) where alternative renewable energy resources are used in connection with central heating, ventilating, and air conditioning systems; and

(4) in common building areas such as hallways, elevators, reception areas, water pumping facilities, and electric hookups for motor vehicles.

(c) For the purpose of this section, construction begins when the footings are poured. (Eff. 10/15/82, Reg. 84)
Authority: AS 42.05.141(a)(3)
AS 42.05.151(a)
AS 42.05.291(c)

3 AAC 50.300. INFORMATION TO ELECTRIC CONSUMERS. (a) An electric utility shall provide to each new electric consumer, coincident with the application for service, a clear and concise explanation of any rate schedule in its currently effective tariff which applies to that consumer.

(b) Not later than 30 days after the filing of a tariff advice letter in which a change in a rate schedule is requested, an electric utility shall transmit to its affected consumers a clear and concise explanation of the proposed change. This provision does not apply to rate adjustments resulting from an automatic fuel-cost rate adjustment clause.

(c) At least once each year, an electric utility shall transmit to each of its electric consumers an informative summary of any rate schedule in its currently effective tariff which applies to those consumers.

(d) On request of an electric consumer, an electric utility shall transmit a clear and concise statement of the consumer's actual energy consumption and, if billed separately, power consumption for any billing period during the previous 12 months unless the information is not reasonably ascertainable by the utility. (Eff. 10/15/82, Reg. 84)
Authority: AS 42.05.141(a)(3)
AS 42.05.151(a)
AS 42.05.411(a)

3 AAC 50.400. Reserved

3 AAC 50.500. ADVERTISING. (a) In addition to the restrictions imposed under AS 42.05.381(a), neither an electric utility nor a gas utility may recover through rates any direct or indirect expenditure by the utility for promotional, political, or goodwill advertising.

(b) The commission will determine on a case-by-case basis whether the forms of advertising listed in (c)(3) of this section, as well as advertising not readily categorized as promotional, political, or goodwill, and any other form of advertising not covered by this section will be included in utility operating expenses for rate-making purposes.

(c) In this section

(1) "advertising" means the commercial use by a utility of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to the utility's customers;

(2) "goodwill advertising" means advertising directed toward improving or enhancing the public image of a utility or its employees;

(3) "goodwill advertising," "political advertising," and "promotional advertising" do not include

(A) advertising which informs an electric or gas consumer about methods which conserve electric energy or gas or which reduce peak demand for electric energy or gas;

(B) advertising required by law or regulation, including advertising required under Part I, Title II of the National Energy Conservation Policy Act (42 USC § 8201 et seq.);

(C) advertising regarding service interruptions, safety measures, or emergency conditions;

(D) advertising concerning employment opportunities with a utility;

(E) advertising which promotes the use of energy-efficient appliances, equipment, or services;

(F) an explanation or justification of existing or proposed rate schedules or a notice of hearings concerning these rate schedules; and

(G) communications with members of a utility cooperative about the activities or internal affairs of the cooperative or which encourage or promote the participation of the members in the process of governing the cooperative;

(4) "political advertising" means advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to a controversial issue of public importance; and

(5) "promotional advertising" means advertising for the purpose of encouraging a person to select or use the service or additional service of a utility, or the selection or installation of an appliance or equipment designed to use the utility's service, except as provided in (3)(E) of this subsection. (Eff. 10/15/82, Reg. 84)

Authority: AS 42.05.141(a)(3)
AS 42.05.151(a)
AS 42.05.381

3 AAC 50.600. DEFINITIONS. Unless the context indicates otherwise, in 3 AAC 50.100 – 3 AAC 50.600

(1) "building" means a single erected structure, roofed and enclosed within exterior walls, built for permanent use, framed of component structural parts and unified in its entirety both physically and in operation for residential or commercial occupancy;

(2) "commercial unit" means that portion of a building or premises which is normally used for commercial purposes;

(3) "electric consumer" means a person or a public or private entity to which electric energy is sold, other than for purposes of resale, by a regulated public utility;

(4) "gas consumer" means a person or a public or private entity to which natural gas is sold, other than for purposes of resale by a public utility;

(5) "mobile home park" means a parcel of land which is used for the accommodation of occupied mobile homes;

(6) "multiple-occupancy building" means a building which is designed to house more than one residential or commercial unit;

(7) "rate" means

(A) a price, rate, charge, or classification made, demanded, observed, or received with respect to the sale of utility services to a utility consumer;

(B) a rule, regulation, condition, or practice respecting a rate, charge, or classification; and

(C) a contract pertaining to the sale of utility services to a utility consumer;

(8) "rate schedule" means the designation of the rates which an electric utility charges for electric energy; and

(9) "residential unit" means one or more rooms for use by one or more persons as a housekeeping unit which provides living,

HB 223

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.055, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050 — AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1.
Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.
Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.
Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4
Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5.
Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 20, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date: 8/21/78

/s/ William E. Spear
Deputy Commissioner
Department of Labor

Pub: Aug. 30, 31, Sept. 1, 1978

ENCLOSURE # 1

NOTICE OF PROPOSED CHANGES IN THE
REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050 - AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1.

Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.

Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.

Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4.

Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

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Date 8/2/78

Wm. Spear.

William E. Spear
Deputy Commissioner
Department of Labor

To be published August 30, 31 and September 1, 1978.

TO: Petroleum Equipment Suppliers Association

FROM: Ely, Guess & Rudd

DATE: April 5, 1983

RE: Constitutionality of Legislation Retroactively Extinguishing Claims for Overtime Compensation and Liquidated Damages

BACKGROUND

Prior to December 8, 1978, flexible work week (FWW) plans for paying employees were recognized as permitted under Alaska's law. Opinion of Attorney General, February 10, 1978. Essentially an FWW plan guarantees to an employee a minimum weekly wage, regardless of the number of hours actually worked, even during periods when an employee is on "R&R". The plans are typically used in resource development and service industries where there is a considerable amount of standby time at remote locations and the number of hours of work available from week to week vary greatly. FWW plans have long been recognized as an acceptable method of payment in compliance with the Federal Wage and Hour Act and are widely used in other states. 29 CFR 778.114.

On December 8, 1978, the Department of Labor adopted 8 AAC 15.100(d)(2) and (3). This regulation prohibited use of FWW plans by Alaska employers. The proposed regulation was not

given widespread publicity among the industries affected, other than by a legally-required publication of a notice in a newspaper which made no mention of the regulation's purpose of prohibiting FWW plans. As a result, there was no reported industry participation at a public hearing. Neither was there widespread dissemination of the regulation by the Department of Labor prior to or immediately after its effective date.

In October of 1979 the first of a number of employers was named as a defendant in a suit filed by a former employee for overtime compensation and liquidated damages. The employer (Dresser Industries) defended on constitutional grounds, and the matter was appealed to the Alaska Supreme Court. In September, 1981, the Alaska Supreme Court upheld the power of the Department of Labor to promulgate the regulation. Dresser Industries v. Alaska Department of Labor, 633 P.2d 998 (Alaska 1981). The defendant petitioned the United States Supreme Court for certiorari, but the Court refused to consider the case.

In December, 1981, a class action was filed by another employee against Dresser seeking back wages and liquidated damages on behalf of all Dresser employees. The complaint alleges damages in an amount exceeding $15 million. At least four other companies have since been sued. The aggregate of

damages alleged in two of the five pending cases total over $35,000,000. All of these cases are in the preliminary stages. No trial dates have been set, and none of these lawsuits have resulted in a judgment against any of the defendant companies.

In addition to potential liability for overtime compensation, Alaska law provides for mandatory liquidated damages which would double any compensation award. The Alaska Supreme Court has held that such damages must be paid by an employer who has failed to pay overtime compensation as provided by the statute, despite any showing of good faith on the part of the employer. AAI, Inc. v. Mussara, 602 P.2d 1240 (Alaska 1979).

HB 223 was introduced on February 23, 1983. Its purposes, as originally drafted, were:

1. To extinguish liability of employers for using FWW plans, which had been prohibited by 8 AAC 15.100(d)(1) and (3), during the period beginning on December 8, 1978, and ending on the effective date of HB 223;

2. To prohibit use of FWW plans in the future;

3. To create a good faith defense against payment of liquidated damages by an employer who inadvertently fails to pay overtime compensation in accord with the statute.

We have been asked to determine whether legislation which extinguishes existing claims against employers, based on use of FWW plans in violation of a Department of Labor regulation, is constitutional. We have concluded that the Legislature can constitutionally extinguish such claims, if it finds that the adverse economic impact on an industry important to the state economy outweighs the interests of employees who may recover damages.

DISCUSSION

A. Possible Bases for Challenging Legislation.

Employees whose claims are extinguished could challenge the constitutionality of the legislation under the Contract Clause (U.S. CONST. art. I, § 10), which provides that "no State shall . . . pass any . . . Law impairing the Obligations of Contracts", the equivalent provision of the Alaska Constitution (AK. CONST. art. I, § 15), or under the Due Process Clause contained in both the Federal and State

Constitutions (U.S. CONST. amends. V, XIV and AK CONST. art. I, § 7).[1/] Since under both the Contract Clause and the Due Process Clause a means-end test of rationality is employed, it has been stated that analysis under both clauses is substantially the same. Allied Structural Steel Company v. Spannaus, 439 U.S. 234, 263 n.9 (1978) (Brennan, J., dissenting); Veix v. Sixth Ward Building and Loan Association, 310 U.S. 32, 41 (1940); Northwestern National Life Insurance Company v. Tahoe Regional Planning Agency, 632 F.2d 104, 106 (9th Cir. 1980).

> Therefore we apply the test of reasonableness to the retroactive aspect of [the legislation]. This test is determinative of all arguments of the plaintiffs, since we perceive no need for separate analysis of

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1/ In a letter dated March 2, 1983, to Representative Walt Furnace, Mr. Thomas A. Sofo of the Legislative Counsel indicated that the bill might constitute local or special legislation contrary to Article II, § 19 of the Alaska Constitution, as well as possibly violating the equal protection clauses of the United States and Alaska Constitutions. The Alaska Supreme Court has established the standard that legislation which bears a "fair and substantial relationship" to legitimate purposes does not contravene the prohibition on local or special state acts, "despite any incidental local or private advantages." State v. Lewis, 559 P.2d 630, 643, cert. denied, 432 U.S. 901 (1977). The court has also declared the test for an equal protection challenge of a non-suspect class to be substantially the same as for a local law challenge. Id. at 643. Since the test for measuring legislation under the Due Process and Contract Clauses (discussed at length below) is a "reasonableness" test, legislation which passes muster under these two clauses should also pass the local legislation and equal protection tests.

> their various contentions under the impairment-of-contracts clause and under the due process clause of the United States Constitution and cognate State constitutional provisions.

American Manufacturers Mutual Insurance Co. v. Commissioner of Insurance, 372 N.E.2d 520, 525 (Mass. 1978).

Thus, they will not be dealt with separately.

Courts generally disfavor retroactive interpretation of statutes. Jones Enterprises, Inc. v. Atlas Service Corp, 442 F2d 1136, 1138 (9th Cir. 1971). However, the Legislature may enact retroactive legislation if it expressly declares its intention to do so. AS 01.10.090. As the author of a leading and often-cited law review put it:

> Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principal that a person should be able to plan his conduct with reasonable certainty of the legal consequences.

Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). In fact, the objections to retroactive statutes are not absent from prospective legislation, and retroactivity might actually further the goals which normally make retroactive legislation suspect.

> A retroactive statute, by remedying an unexpected judicial decision, may actually effectuate the intentions of the parties. And it is arguable that in

many instances legislation passed with a knowledge of the transactions to which it will apply can be more responsive to the needs of a particular situation. Id. at 693.

Little or no weight is attached to the fact that litigation may be pending at the time of the enactment of retroactive legislation, and it may be applied at any time up to a final and unreviewable judgment. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 316 (1945); Chapman v. Farr, 132 Cal.Rptr. 606, 608 (Cal.App. 1982).2/

B. The Test Against Which the Legislation Would be Measured.

The courts consider and balance a great variety of factors in measuring the constitutionality of retroactive legislation. Legislation which is found to be reasonable after balancing various considerations will be upheld as constitutional. "Indeed from an analysis of the cases it becomes apparent that it is impossible to reduce the potentially infinite variety of situations in which the problem

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2/ Indeed, in a case where the public interest in preventing evictions was particularly compelling, the Supreme Court held that the Emergency Price Control Act could constitutionally be applied to a right which had been reduced to judgment prior to the enactment of the Legislation. Fleming v. Rhodes, 331 U.S. 100, 107 (1947).

of retroactivity can arise to a single common denominator." Hochman, supra at 727. The following test to determine reasonableness has been drawn from the decisions by the author of the above-cited leading article:

> [I]t is submitted that the constitutionality of such a statute is determined by three major factors, each of which must be weighed in any particular case. These factors are: the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted pre-enactment right, and the nature of the right which the statute alters. Hochman, supra, at 696.3/

The California Supreme Court, also citing the Hochman article, has outlined the factors it takes into consideration when analyzing retroactive legislation.

> In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.

In re Marriage of Bouquet 546 P.2d 1371, 1376 (Cal. 1976).

3/ The Supreme Judicial Court of Massachusetts has recently set out and applied the three-pronged approach suggested by the Hochman article. American Manufacturers Mutual Life Insurance v. Commissioner of Insurance, 372 N.E. 2d 520, 526 (Mass. 1978). The court stated that "[t]his articles is a comprehensive treatment of retroactive statutes and the 'reasonableness' analysis, and has been cited with approval." Ibid.

We will group and analyze the factors under the headings of two categories, based on Hochman's distillation of his three-pronged test:

> [T]he two major factors to be weighed in determining the validity of a retroactive statute are the strength of the public interest it serves and the unfairness created by its retroactive operation, . . . Hochman, supra at 727.

By considering the strength of the public interest and the unfairness created by its retroactive application, a framework is created for evaluating the constitutionality of retroactive legislation.[4/]

4/ Some courts have determined the constitutionality of retroactive statutes on the basis of whether a "vested right" is affected. In an early Alaska case, Bidwell v. Scheele, 355 P.2d 584, (Alaska 1960), the court found a defense based on the failure of plaintiff to pay certain sums into court, as required by a statute, not to be a "vested right." It held that the defense could be taken away by the Legislature through repeal of the statute requiring payment into court by a plaintiff. Id. at 587. The court did not attempt a definitive definition of "vested right." As modern cases recognize, "[i]t was customary at one time to use the word "vested" to describe rights that a court had determined could not be impaired retroactively. When the word is so defined, the statement that vested rights are immune to retroactive legislation becomes a tautology, not a proposition." In re Marriage of Bouquet, supra at 1376. Even if a court were to cling to the vested right terminology, "[v]ested rights, of course, may be impaired 'with due process of law' under many circumstances. The state's inherent sovereign power includes the so called 'police power' right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people . . . . Ibid.

1. The Strength of the Public Interest Served by the Legislation.

It initially falls on the legislature to balance competing interests in an effort to broadly promote the interest of the state. Legislation typically "adjusts the rights of private groups in an attempt to achieve a balance which best serves the 'public purpose', and many such statutes have been upheld against claims that their retroactive operation was a denial of due process". Hochman, supra at 698.

Courts traditionally show great deference to a legislature's judgment as to the reasons and need for legislative action, particularly in the economic and social areas.

> . . .the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' [Citations omitted] Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * * This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. Moreover, the 'economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.' [Citation omitted] The State has the "sovereign right * * * to protect the * * * general welfare of the people * * * Once we are in this domain of the

> reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" [Citation omitted]

City of El Paso v. Simmons, 379 U.S. 497, 508 (1965).

In upholding legislation which increased mine operators' duty to provide compensation for illnessess suffered by miners (even if a former miner terminated his employment in the industry before the Act was passed), the Court stated that retroactive laws, like prospective legislation, "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 15 (1976). To like effect, the U.S. Supreme Court held in United States Trust Company of New York v. New Jersey, 431 U.S. 1, 22 (1977), "the States must possess broad powers to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed as a result."[5/]

5/ The Court, holding that a state's impairment of its own obligations had to be measured by a different standard than impairment of private contracts, struck down New Jersey legislation which impaired contractual obligations in bonds issued by the State. "When a State impairs the obligations of its own contract, the reserved powers doctrine has a different basis . . . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." U.S. Trust Co. of New York v. New Jersey, supra at 23.

Given the judicial deference to the legislature in economic and social matters, and the presumption of constitutionality, retroactive legislation has been found to serve a legitimate public interest and upheld in a variety of situations.

In City of El Paso v. Simmons, supra, the United States Supreme Court held that a Texas statute limiting defaulting purchasers to a 5-year period for reinstating rights to recover land sold by the State did not unconstitutionally violate the Contract Clause. Prior to the enactment of this legislation a defaulting purchaser could reinstate his right to recover land forfeited to the State at any time upon written request and payment of delinquent interest. Id. at 488. Simmons, who had lost all right to land he could have reclaimed absent the latter legislation, argued that the statute violated the Contract Clause. Id. at 505. The United States Supreme Court upheld the legislation.

The Court looked to the state interest in passing the legislation to justify its application. It found that clouds on titles which arose because of the broader right of reinstatement under prior law made administering the land a more difficult and unstable task. Id. at 513. "The Contract

Clause of the Constitution does not render Texas powerless to take effective and necessary measures to deal with the above." Ibid.

In the leading case of Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 444 (1934), a Minnesota mortgage moritorium law enacted to provide relief to homeowners threatened with foreclosure was upheld against Contract Clause and Due Process clause attack. "The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." Id. at 437. Veix v. Sixth Ward Building and Loan Association, 310 U.S. 32 (1940) upheld New Jersey legislation limiting the ability of subscribers to withdraw subscriptions from building and loan associations. The Court stated that, "[c]ertainly the protection of building and loan associations against the catastrophe of excessive withdrawal is, today, within legislative power". Id. at 41.6/

6/ These two cases arose during the Depression. However, emergency economic conditions are not a prerequisite for legislative action. City of El Paso v. Simmons, supra at 515. The Seventh Circuit has found that, "[A]llied Structural Steel Co. confirms the prior precedents holding that retroactive liability can properly be imposed to remove problems which fall short of an emergency". Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947, 961 (7th Cir. 1979).

In American Manufacturers Mutual Insurance Company v. Commissioner of Insurance, supra at 529, Massachusetts' highest court upheld retroactive legislation requiring the rewriting of insurance contracts, at reduced rates, previously entered into between insurance companies and policyholders. As to the public interest, the court stated:

> The burden is on the plaintiffs to make factual showings that the statute is irrational in its operation, and it has been our frequently stated rule that such a statute will not be set aside as a denial of due process "if any state of facts reasonably may be conceived to justify it." [Citation omitted]

Id. at 526.

These cases indicate the importance courts place on the state interest when evaluating the constitutionality of the legislation. "The immediacy and severity of the conditions which the legislature has attempted to rectify are clearly relevant in determine the reasonableness, and hence the validity of retroactive aspects of a legislative program." Hochman, supra at 697. The clearer the public purpose served and the greater the necessity for the legislation, the more likely a court is to sustain its application. However, the existence of a state interest does not provide the state with unfettered power. Even though a valid interest is found for retroactively affecting contract rights, courts will consider the nature of the right affected to determine if application of

the legislation to the party asserting the particular claim would be so unfair as to make it unconstitutional.

2. The Fairness of Retroactive Application of The Legislation to a Particular Right.

Hochman's second category[7] deals with the equity of retroactive application in any given situation. Since giving effect to the reasonable desires of contracting parties has always been considered a valid legislative goal, the element of reliance is crucial when considering Hochman's second main category.

> . . . the factor most often appearing in these cases is the extent to which the parties have laid reasonable reliance on the law existing at the time of the conduct whose legal consequences the retroactive statute would alter. The importance of this element is apparent when one considers that in very general terms the two major factors to be weighed in determining the validity of the retroactive statute are the strength of the public interest it serves and the unfairness created by its retroactive operation and the reliance of the parties on preexisting law is perhaps the most accurate gauge of the latter. Hochman, supra at 727.

See also, State ex. rel. Cannon v. Moran, 321 N.W. 2d 550, 561 (Wis. Ct. App. 1982).

7/ Hochman has, in effect, distilled his three-pronged test into two categories. See Hochman, supra, at 727.

Some courts have focused almost exclusively on the reliance element.

> The proper test of the constitutionality of retroactive legislation is whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectations of the parties, not whether the law abrogates a 'vested right,' which is merely a conclusory label. 2 C. Sands, supra at § 41.05; Hochman, supra at 696. Curative laws, such as RCW 26.32.916, which implement the original intentions of affected parties are constitutional because there is no injustice in retroactively depriving a person of a right that was created contrary to his expections at the time which the right arose. [Citation omitted]

Application of Santore, 623 P.2d 702, 706 (Wash. App. 1981).

Where there has been no reliance on the prior existing law there is little risk of injustice.[8/] "For example, an act which has the affect of implementing the original intentions of the parties affected has generally been held constitutional since there is little injustice in

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8/ In State Workmen's Compensation Board v. Delaney, 615 P.2d 5 (Alaska 1980), our Supreme Court upheld application of an increased rate for disability benefits, which had been put into effect after the claimant's injury but prior to its rating. The Superior Court found that application of the increased rates would unconstitutionally impair the insurance contract between the employer and its insurance carrier. Id. at 7. The Supreme Court reversed, finding no 'unfairness inherent' in its conclusion, because the employer "had no reasonable expectation that the benefit rates in effect at the time of the injury would remain constant." Id. at 8.

retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose." Hochman, supra at 720. The following cases illustrate the power the Legislature has to validate contracts, which were illegal under prior law, in order to give affect to the bona fide expectations of the parties.

In McNair v. Knott, 302 U.S. 369 (1937), security pledges which were illegal when made were retroactively validated. A bank had given security to protect certain funds deposited in the bank. State law provided that banks could not give security for private deposits. Congress enacted legislation making such pledges legal, thus retroactively making enforceable agreements which originally were illegal. Id. at 370.

The receiver for a bank, attempting to avoid the effect of a pledge made before enactment of the validating law, maintained that illegal contracts could not be validated by changing the law which was in effect when the agreement was made. Id. at 372. The Supreme Court disagreed and upheld the constitutionality of the act, finding nothing inequitable in requiring persons to perform their agreements as originally intended.

> There is nothing novel or extraordinary in the passage of laws by the federal government and the states ratifying, confirming, validating, or curing defective contracts. Such statutes usually designated as "remedial", "curative", or "enabling" merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds, and other contracts. Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. Id. at 372 (emphasis added).

In the recent case of Chapman v. Farr, supra, the court upheld retroactive application of California law changing the basis for finding a loan usurious. A real estate broker had loaned money at usurious rates. Id. at 607. Three months after a judgment was entered by a trial court against the broker, the applicable law was amended to exclude loans made by real estate brokers. Ibid. The appellate court overturned, finding that retroactive application of the later law was constitutional. Application of the statute resulted in the parties to the loan (illegal at the time it was made) receiving what they had bargained for.

The constitutionality of a Minnesota statute retroactively validating the power of attorney of a woman who under then-existing law was precluded from entering into a real property transaction was upheld in Randall v. Kreiger, 90 U.S. 137 (1875). Enforcing the legislation was deemed equitable in that this gave affect to the parties' attempt, illegal at the time of transfer, to make a valid conveyance.

There are of course cases where it has been determined that retroactive application of a statute would be inequitable under the circumstances. In Allied Structural Steel Co. v. Spannaus, supra, the Court struck down Minnesota legislation which retroactively increased employer liability under company pension plans.

Plaintiff employer had established a pension plan under which employees were entitled to a pension upon meeting certain requirements. In April 1974, in reaction to a single company's pension plan termination, Minnesota enacted the Private Pension Benefits Protection Act. Id. at 248. In the summer of that year plaintiff began closing its Minnesota office. In August the state notified the company that it owed a pension funding charge of $185,000 under the provisions of the Act. The employer brought an action challenging the constitutionality of the Act, claiming that it impaired the employer's contractual obligations to its employees under the pension plan. After a three-judge court upheld the constitutional validity of the statute as applied to the employer, Fleck v. Spannaus, 449 F. Supp. 644 (D. Minn. 1977), an appeal was taken to the United States Supreme Court.

The Court overturned the lower court, finding the Act inadequate under both of Hochman's categories. The Court looked to Minnesota's interest in enacting the legislation.

"[T]here is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem." Id. at 247. In discussing the unfairness of application of the legislation increasing employer liability, the Court stated, "the company thus had no reason to anticipate that its employees pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on the legitimate contractual expectation in calculating its annual contributions to the pension fund". Id. at 245. The Court thus found the Act to be unconstitutional.9/

9/ The decision in Allied Steel has been distinguished by the Court in Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980). The Court in Nachman upheld the Employee Retirement Income Security Act (ERISA) against an employer's constitutional challenge. The Court engaged in an extensive review of the legislative history of the act, including extensive quotations of the remarks made by sponsors of the legislation. Id. at 375 et. seq. As to the public interest, the Court quoted from the Seventh Circuit decision, 592 F.2d 947 at 963:

> The record supporting the enactment of ERISA, wholly unlike that present in Allied Structural Steel, demonstrates that "the presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure'" must be allowed to govern here [Citations omitted] 446 U.S. at 367.

The Seventh Circuit had also found that "the nature of the reliance interests in this case can be distinguished in several respects." 592 F.2d at 961. The different outcomes in Allied Steel and Nachman point out the importance which the Court places on the facts in any particular case.

The importance of the reliance element can be seen in the refusal to apply legislation in Allied Steel, which would have resulted in the parties not receiving what they expected when they entered into a transaction. This stands in sharp contrast to the cases, discussed in this section, upholding retroactive legislation which gave the parties exactly what they expected to receive at the time they entered into a transaction.

As the author of a law review article dealing with retroactivity stated:

> The writer believes that a principle, simple in statement though somewhat difficult in application, does exist. If the retroactive statute defeats claims based on the reasonable expectations of the parties at the time the legal transaction occurred, the statute constitutes an unconstitutional deprivation of property without due process. On the other hand, if the statute merely carries out those reasonable expectations it is valid.

Brown, Vested Rights and the Portal-to-Portal Act, 46 Mich. L. Rev. 723, 746 (1948).

The cases discussed in this section support the proposition that a court is more likely to uphold application of retroactive legislation defeating a right where the party claiming that right had not relied upon it at the time he entered into the affected transaction.[10/]

10/ Alternatively, courts have consistently held that a legislature possesses wide power to abrogate rights based on statutes and rights to penalties or forfeitures. See infra discussion at pp. 23-25.

C. Portal-to-Portal and Overtime-on-Overtime Cases.

A series of cases in the late 1940's are particularly relevant in that they arose under similar factual circumstances and indicate how courts balance the factors considered above.

The Portal-to-Portal Act of 1947, 29 U.S.C.A. § 251 et. seq., abrogated employees' rights to compensation and liquidated damages. Literally hundreds of "portal-to-portal" cases arose from congressional destruction of billions of dollars in employee claims. Every federal circuit court of appeals upheld the power of Congress to retroactively abrogate employees' claims to overtime compensation and liquidated damages. See, e.g., Moss v. Hawaiian Dredging Co., 187 F.2d 442, 445 (9th Cir. 1951).

Prior to 1947 workers were generally not paid for activities which were considered incidental to the actual work hours of the employee. These activities included walking to work on employer's premises, changing into work clothes, etc. The United States Supreme Court in Anderson v. Mt. Clemens Pottery Company, 328 U.S. 680 (1947), interpreted the Fair Labor Standards Act as requiring payment, including time and a half for overtime, for these incidental activities, creating a potential liability to employers in the billions of dollars. Seese v. Bethleham Steel Co., 168 F.2d 58, 59 (4th Cir. 1948).

Congress responded with the Portal-to-Portal Act of 1947, 29 U.S.C.A. § 251 et. seq., which provided that no employer would be subject to liability for failure to pay wages for "portal-to-portal" activities, unless there was an express contract provision providing for such payment or it was the custom at the establishment where the employee worked that wages be paid for these activities. Ibid.

Employees attacked as unconstitutional the retroactive application of the act abrogating their claims. Based on a review of the legislative history of the act, courts determined that prevention of a serious adverse impact on industry justified congressional action. Seese v. Bethlehem Steel Co., supra at 60; Annot. 3 ALR 2d. 1097 (1949). Balanced against this was the nature of the employees' rights. Employees' claims did not rest on substantial equity in that payment to them would essentially amount to "windfalls". These windfalls would have consisted of payment for work the employees did not expect to be compensated for when performed. Id. at 65. It was held not to be inequitable to deprive employees of compensation they had not expected to receive at the time they performed the work. Ibid.

An alternative ground for upholding the legislation was the recognition of a legislature power to take away that

which existed because of prior legislation. As stated by the trial court in Seese:

> The plaintiffs' major premise is that they obtained vested rights under the Fair Labor Standards Act. But this requires analysis. The contention is that the plaintiffs when employed by the defendant entered into a contract, the terms of which were governed by the Fair Labor Standards Act. It is of course true in general that contracts when made by individuals are subject to existing valid legislation and the latter is said to be read into the contract. It is, however, important to distinguish between that part of the contract of employment which was the personal and actual agreement of the parties and that part which was superimposed by the statute. In the instant case it is apparent that the purely personal portions of the contract have been performed as there is no averment to the contrary. The alleged unperformed part, that is for the portal-to-portal activities, were not a part of the personal contract but imposed only by the Fair Labor Standards Act as construed by the Supreme Court. It seems necessarily to follow that the extra compensation now claimed is of purely statutory origin.

Seese v. Bethlehem Steel Co., 74 F. Supp. 412, 418 (D. Md. 1947).

In affirming the trial court's decision, the Fourth Circuit stated:

> What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours in interstate commerce. [Citations omitted] Even where the contract clause is a limitation upon legislative power, it is universally held that such a claim may be taken away by the legislature without violation of constitutional right. Since the legislature may repeal its own act, it may take away that which has no existence save by virtue of that act. [Citations omitted]

Seese v. Bethlehem Steel Co., 168 F.2d at 64.

The Circuit Court distinguished early cases which had not permitted retroactive legislation to affect certain rights, i.e., Steamship Company v Joliffe, 2 Wall 450 (1865); Ettor v. City of Tacoma, 228 U.S. 148 (1912); Coombes v. Getz, 285 U.S. 434 (1932) and Duke Power Company v. South Carolina Tax Commissioner, 81 F.2d 513 (4th Cir. 1936):

> They were concerned with vested property rights based on agreements and not on mere statutory provisions without contract or agreement to support them. It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the portal-to-portal act is that the act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that Act. Id. at 64 (emphasis supplied).

Also extinguished were claims for double damages pursuant to 29 U.S.C.A. § 216(b). Rogers Cartage Co. v. Reynolds, 166 F.2d 317, 321 (6th Cir. 1948). Legislative power to extinguish claims for double damages is indisputable.

> The courts have been particularly uniform in reaching this conclusion where the right of action is in the nature of a claim by an individual for the recovery of a statutory fine, penalty, or forfeiture.

National Carloading Corp. v. Phoenix-El Paso Express, 176 S.W.2d 564, 569 (Texas 1944).

"[T]he other kind of right which the Court has held may be freely altered or removed up to the time it is finally enforced is one arising from a statute which gives to a person or body other than the legislating authority the right to receive a penalty imposed by the statute." Hochman, supra at 725.

In a case arising in the Ninth Circuit the retroactive extinguishment of all rights to overtime pay and liquidated damages was upheld to defeat lawsuits filed against employers prior to the retroactive enactment. Moss v. Hawaiian Dredging Company, supra. This case is particularly instructive as it is factually quite similar to the situation presented to this Legislature.

Workers employed in longshoring and stevadoring in the San Francisco Bay area had a contract which provided for the payment of time and a half for all work performed on Saturdays, Sundays, holidays and those hours on weekdays not between 8 a.m. and 5 p.m. Because of the special nature of compensation for these employees, employers did not pay time and a half for hours worked after the first 40 hours of a week. Id. at 443. This was done despite the opinion of a federal Wage and Hour Administrator that the employees were entitled to such overtime compensation. Id. at 445.

In 1948 a United States Supreme Court decision, Bay Ridge Co. v Aaron, 334 U.S. 446 (1948), confirmed the Administrator's opinion that the employees were entitled to time and a half for hours worked in excess of the first 40 hours. Congress then enacted Public Law 393, popularly known as the Overtime-on-Overtime Act. The Act provided that the previous manner of payment to those employees, which had been illegal, satisfied the applicable federal labor law, thereby validating the employment contracts, and retroactively extinguished employer liability for overtime claims and liquidated damages which were clearly due the employees absent the retroactive legislation. Id. at 444.

In Moss v. Hawaiian Dredging Co., supra, the Ninth Circuit Court of Appeals upheld the constitutionality of the Act in the face of the employees' constitutional challenge. The court, after considering the facts discussed above, found that the employees' right to additional overtime, which had arisen pursuant to the law in effect at the time of the performance of the work, had to yield when the legislature subsequently chose to retroactively extinguish that right. Id. at 447. Although there was no "emergency" justifying retroactive application of the Act, the court deferred to the legislative judgment concerning the economic necessity of enacting the bill. The court believed that the public interest

in avoiding an adverse economic effect upon an important industry outweighed the right of employers to additional statutory compensation.

> . . . the character and quality of such rights are such that they must yield to the sovereign power to regulate commerce by legislation such as that of the Portal-to-Portal Act. Id. at 447.11/

The Overtime-on-Overtime and Portal-to-Portal cases show how courts analyzed application of retroactive congressional legislation to employees' claims to overtime compensation and liquidated damages, balanced the interests discussed above, and concluded that the legislation in each case was constitutional.

11/ The decision of a court should be the same when a state legislature acts pursuant to the state's police power. "And the Portal-to-Portal Act in amending the substantive right created is of the same constitutional nature exercised in the judgment of Congress as the proper policy for the Nation in matters affecting the employer/employee relationship in interstate commerce; and is kindred to the exercise of the police power of the States which, of course, may and often does affect previously existing personal rights." Seese v. Bethlehem Steel Co., 74 F. Supp at 419 (emphasis supplied). See also, Darr v. Mutual Life Insurance Co., 72 F. Supp. 752, 754 (S.D. N.Y. 1947); Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 101 S. Ct. 2352 (1981), quoting United States v. Darby, 312 U.S. 100, 116, "the authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." Id. at 2368.

CONCLUSION

In summary, the constitutionality of retroactive legislation depends upon a balancing of interests. The public interest in enacting the legislation must be weighed against the equity of applying the statute in any given case. Hochman, supra at 727.[12/]

Based upon a review of cases it is our opinion that the Legislature may retroactively extinguish employees' claims for overtime compenseation and liquidated damages, if it makes certain findings based on the facts and existing testimony available to it.

First, the Legislature could determine that payment by employers of pending and potential claims of employees for overtime and damages would pose adverse economic consequences on an industry important to the state's economy, and to the state itself. City of El Paso v. Simmons, supra; Seese v. Bethlehem Steel Co., supra.

12/In undertaking such an analysis a court determines the strength of the public interest by reviewing the legislative record. Usery v. Turner Elkhorn, supra at 4; Home Building and Loan Association v. Blaisdell, supra at 420.

Second, it could find that from December 8, 1978 to the present, employees and employers voluntarily entered into employment contracts by which employees would be compensated under FWW plans, both unaware of the Department of Labor regulation because there was no widespread publicity directed at informing employers and employees of the drastic change in the law; and employees expected to be paid pursuant to the terms of their agreement and not on some other bases. McNair v. Knott, supra; Moss v. Hawaiian Dredging Co., supra.

If the Legislature reasonably makes such findings, the Legislature can act to validate the employment agreements, which arguably were illegal when entered into, in order to carry out the reasonable expectations of the contracting parties. Assuming the existence and validity of the findings recited above, it is our opinion that there is a substantial probability that the legislation would withstand a challenge under the Contract Clause and Due Process Clause of the United Stated and Alaska Constitutions.

regarding cancellation of the contract on two weeks' notice. The argument based on Davis's claim that he was the band's leader can be disposed of summarily: no evidence has been produced from which it can be inferred that this statement induced Johnson to enter into the contract. *See Restatement (Second) of Contracts* § 309 (Tent. Draft No. 11, 1976). The second argument, based on Davis's alleged promise that the band's engagement could be cancelled on two weeks' notice, must fail for the same reason. Even granting that failure to warn a party of his possible misapprehension of a contract term may constitute a misrepresentation,[8] we are unable to conclude that Johnson may have been passively misled in that fashion. She fails to assert any assumption on her part that the written agreement embodied the purported oral promise. No evidence was presented from which it can be inferred either that she failed to read the contract or, having read it, failed to understand its terms. Her affidavit indicates neither that she in any way misapprehended the content of the written agreement nor that she was induced to sign it by any deception, active or passive, on Davis's part. Absent any evidence that Johnson was induced to enter into the contract on the basis of a misrepresentation as to the terms it contained, the district court was correct in granting summary judgment in favor of the band on this ground.

We agree with the district court's conclusion that Johnson's evidence, even interpreted in the light most favorable to her, was insufficient to support her defenses to enforcement of the written contract. That court's entry of summary judgment in favor of the band members must therefore be AFFIRMED.

8. Restatement (Second) of Contracts § 301 (Tent. Draft No. 11, 1976) defines a misrepresentation as "an assertion that is not in accord with existing facts." Section 303 provides that:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist only if
>
> . . . . .
>
> (b) he knows that disclosures of the fact would correct a mistake of the other party as to a basic assumption on which that party made the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing, or
>
> (c) he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part . . . .

This section is clarified in Comment e as follows:

> *Known mistake as to a writing.* One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation which may be grounds either for avoidance under § 306 or for reformation under § 308 . . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief (§ 314). In the case of standardized agreements, these rules supplement that of § 237(d), which applies, regardless of actual knowledge, if there is reason to believe that the other party would not manifest assent if he knew that the writing contained a particular term. Like the rule stated in Clause (b), that stated in Clause (c) requires actual knowledge and is limited to non-disclosure by a party to the transaction.

DRESSER INDUSTRIES, INC., Appellant,

v.

ALASKA DEPARTMENT OF LABOR, Appellee.

No. 5625.

Supreme Court of Alaska.

Sept. 18, 1981.

Employer appealed from entry of summary judgment by the Superior Court, Third Judicial District, Anchorage, Seaborn J. Buckalew, Jr., J., upholding validity of

regulation promulgated by Department of Labor which prohibited flexible work week. The Supreme Court, Rabinowitz, C. J., held that: (1) Director of Wage and Hour Division of Department of Labor was authorized to promulgate regulation, and (2) regulation did not exceed power delegated by legislature and was reasonable and not arbitrary method of furthering policies of wage and hour statutes requiring increased overtime compensation and promoting spreading of employment.

Affirmed.

1. States ⇐9

Text of Alaska Statehood Act makes it clear that federal legislative enactments were to be carried over unless overruled by State Constitution or state legislature, but Act did not automatically incorporate and maintain federal case law, or administrative law, unless and until changed by legislature. Alaska Statehood Act, § 8(d), 48 U.S.C.A. prec. § 21.

2. Labor Relations ⇐1101

Section of Wage and Hour Act which manifests intent to safeguard existing minimum wage and overtime standards is expression of general public policy and not specific prohibition of change. AS 23.10.050.

3. Labor Relations ⇐1101

Although section of Wage and Hour Act governing definitions directs courts to apply federal regulatory definitions "where applicable," such definitions are "applicable" only when Director of Wage and Hour Division and Commissioner of Labor have refrained from defining terms of state regulations, pursuant to their discretionary authority under sections of statute governing scope of administrative regulations and adoption of federal regulations. AS 23.10.085(b), 23.10.095, 23.10.145.

4. Labor Relations ⇐1101
States ⇐9

Alaska Statehood Act did not automatically incorporate federal case law or administrative law unless and until changed by legislature, provision of Wage and Hour Act which manifests intent to safeguard existing minimum wage and overtime standards is not prohibition of change, and direction to court to apply federal regulatory definitions "where applicable" means that such definitions are applicable only when Director of Wage and Hour Division and Commissioner of Labor have refrained from defining terms of state regulations; thus, Director was authorized to promulgate regulation which prohibited flexible work week. Alaska Statehood Act, § 8(d), 48 U.S.C.A. prec. § 21; AS 23.10.050, 23.10.085(b), 23.10.095, 23.10.145.

5. Stipulations ⇐3

Stipulations as to law are not binding upon court.

6. Labor Relations ⇐1425

Sections of Wage and Hour Act governing scope of administrative regulation and adoption of federal regulations constitute delegation of authority from legislature to agency to formulate policies, leaving to agency discretion issue of whether federal definitions of regular rate of pay and other terms can be applied consistently with Wage and Hour Act; thus, standard of review in determination of validity of regulation prohibiting flexible work week was whether regulation was reasonable and not arbitrary. AS 23.10.085, 23.10.095.

7. Labor Relations ⇐1439

While under standard hourly wage salary, as worker's overtime hours increase, average hourly wage increases, under flexible work week, as worker's overtime hours increase, average hourly wage decreases in contravention of policies requiring increased overtime compensation and promoting spreading of employment; thus, regulation of Department of Labor which defined "regular rate of pay" so as to exclude use of flexible work week was consistent with, and reasonably necessary to carry out purposes of statute governing wages and hours, did not exceed power delegated by legislature, and was reasonable and nonarbitrary method of furthering statute's policy. AS 23.10.050 et seq.

John K. Norman and Wev W. Shea, Hartig, Rhodes, Norman & Mahoney, Anchor-

age, and A. J. Harper II and Jeffrey S. Kuhn, Fulbright & Jaworski, Houston, Tex., for appellant.

Elizabeth Page Kennedy, Asst. Atty. Gen., Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

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

OPINION

RABINOWITZ, Chief Justice.

This is an appeal from a summary judgment granted by the superior court. Its sole issue is the validity of 8 AAC 15.100(d)(3),[1] a regulation promulgated by the Department of Labor which prohibits the "flexible work week" (FWW), purportedly under the authority of the Alaska Wage and Hour Act. The superior court concluded

1. This regulation reads:

> (d) The following are not acceptable methods of complying with the payment of overtime provisions of AS 23.10.060:
>
> . . . . .
>
> (3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek.

The federal regulation referred to, 29 C.F.R. 778.114, reads as follows:

> § 778.114 *Fixed salary for fluctuating hours.*
>
> (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.
>
> (b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).
>
> (c) The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which the full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the 'fluctuating workweek' method of overtime payment are present, the Act, in requiring that 'not less than' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his over-

ed the regulation was valid, and Dresser Industries (Dresser) has appealed. We affirm.

The case was presented to the superior court on the basis of the parties' "Stipulations of facts, issues, and procedure," providing in part:

1. Dresser Industries, Inc. is doing business in the State of Alaska and is subject to the jurisdiction of this court.

2. The person on whose behalf the action has been instituted is Clyde Woody (herein claimant), who has assigned his rights to the Department of Labor pursuant to AS 23.05.220.

3. The Department of Labor is the proper party plaintiff to bring this suit under AS 23.05.230 and suit has been timely and properly instituted.

4. The court has jurisdiction of the subject matter and the parties.

5. This action arises under the provisions of the Alaska Wage and Hour law (AS 23.10.050 *et seq.*) and the regulations of the Department of Labor promulgated thereunder (8 AAC 15.100).

6. The interpretative regulation at issue was properly promulgated in accordance with the Alaska Administrative Procedure Act (AS 44.62).

7. Claimant is due the sum of $3,956.76 if the position of plaintiff is sustained and is not due any monies if the position of defendant is sustained.

8. This case is ripe for adjudication on the stipulated facts and issues and the parties agree this stipulation shall constitute cross-motions for summary judgment.

9. The predicates which served as the Administrator's basis in adopting the challenged regulation were:

(A) The 'fluctuating work week' is not applicable under the Alaska Act because,

(1) AS 23.05.160 requires an employee to be told of his 'rate of pay' at the time of hire and of any changes therein before payday; and

(2) AS 23.10.060 requires that employers have to pay overtime for hours worked over eight (8) hours per day, even if less than forty (40) hours per week are worked, and this is to the employer's detriment.

Dresser presented two arguments in support of its contention that 8 AAC 15.100(d)(3) is invalid. It asserted, first, that the definition of "regular rate of pay" in the federal regulations, which countenances use of the FWW, *see* note 1 *supra*, is binding upon the State Wage and Hour Division under two statutory provisions: section 8(d) of the Statehood Act[2] and the Alaska Wage and Hour Act itself, specifically AS 23.10.050[3] and AS 23.10.145.[4] Second, Dresser

time hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

2. The entire text of section 8(d) of the Statehood Act reads:

(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term 'Territorial laws' includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

Alaska Statehood Act, P.L. 85-508, § 8(d).

3. AS 23.10.050 reads, in relevant part: "It is the public policy of the state to . . . (2) safeguard existing minimum wage and overtime compensation standards . . ."

4. AS 23.10.145 reads:

Definitions. Terms used in §§ 50-150 of this chapter shall be defined, where applica-

argued that even if the State Wage and Hour Division was authorized to promulgate 28 AAC 15.100(d)(3), the regulation is inconsistent with the state Wage and Hour Act and unreasonable and arbitrary, and thus cannot withstand judicial review.

A. *Carry-over of federal law.*

It is undisputed that the FWW is sanctioned under federal wage and hour law. *See Overnight Motor Transport Co., Inc. v. Missel*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942). Early federal regulations specifically endorsed its use, under the provisions defining "regular rate of pay." 29 C.F.R. 778.3 (1950).

Dresser asserts that this federal definition of "regular rate of pay" carried over into state law because no change in that definition was made by the state legislature. Pointing to the section of the Statehood Act which continued in full force and effect all Territorial laws except as modified or changed by the Statehood Act itself, by the state constitution, or by the legislature of the new state, Dresser argues that coverage, meaning, and interpretation of the Alaska Act should parallel that of the Fair Labor Standards Act absent a clear legislative directive to the contrary. Dresser's position seems to be that although the state can choose to diverge from federal law in this area, it should only be able to do so by virtue of legislative enactment, and that in this action the burden is on the state to show that statutory provisions passed by the state legislature mandated issuance of the regulation at issue. Otherwise, Dresser contends, the state agency could not, merely by issuing regulations, overrule the treatment of the FWW under federal/Territorial law, carried over into state law by the Statehood Act.

[1] We do not find this argument persuasive. We think that the text of section 8(d) of the Statehood Act made it clear that federal legislative enactments were to be carried over unless overruled by the state constitution or the state legislature.[5] We do not interpret it as having automatically incorporated and maintained federal case law or, as Dresser argues, administrative law, unless and until changed by the legislature. This court has not held itself bound by federal judicial rulings entered prior to the date of statehood, regardless of whether or not the state legislature has acted in a given area.[6] We think it would be equally awkward to hold state agencies bound by federal regulations extant as of statehood. Such a result would unduly restrict state agencies and inordinately burden the legislature.

[2] Nor are we convinced that the terms of the Alaska Wage and Hour Act evince an intent to bind the State Wage and Hour Division to federal regulatory definitions. It is true that AS 23.10.050 manifests an intent to safeguard "existing" minimum wage and overtime standards, but we cannot give this the strained reading of having petrified wage and hour law as of the time of its enactment. That provision is an ex-

be, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

5. The language of section 8(d), *see* note 2 *supra*, indicates that its primary concern was with "laws enacted by Congress."

6. *See, e. g., Howarth v. Pfeifer*, 443 P.2d 39, 44 (Alaska 1968) ("What may be considered a just disposition of a dispute at one stage of history may not be the same at another stage, considering changing social, economic, and other conditions of society.... Thus, we hold under the principles we have discussed in this opinion that one may now maintain an action for negligent misrepresentation, even though that may not have been the case under the common law in years gone by."). *In re Mackay*, 416 P.2d 823, 837 (Alaska 1964) ("We do not agree with the respondent's contention that there should be read into section 8(d) of the Alaska Statehood Act an intent to limit the powers of the Supreme Court of Alaska.... Congress cannot limit this court's power to discipline Alaskan lawyers either directly or by continuing in force the provision of a territorial statute claimed by the respondent to have that effect."). *Cf. Surina v. Buckalew*, 629 P.2d 969 (Alaska 1981) (prosecutor's non-statutorily based promise of immunity in return for testimony is binding under Alaska Constitution regardless of federal rule).

pression of general policy, not a specific prohibition of change.

[3] Dresser's next argument is based upon AS 23.10.145, which indicates that "[t]erms used in [the Alaska Wage and Hour Act] shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it." On its face, this provision presents a strong indication that the federal definition of "regular rate of pay" is binding on the State Wage and Hours Division. However, two other statutory provisions undercut this position. AS 23.10.085(b) provides that the state regulations to be issued by the Wage and Hour Division "may . . . define terms used in [the Alaska Wage and Hour Act]";[7] and AS 23.10.095 provides that the state Commissioner of Labor "may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with [the Alaska Wage and Hour Act]."[8]

We must interpret the statutory scheme as a whole and in such a way that separate provisions do not conflict.[9] Here, we agree with the state's argument that AS 23.10.145 directs the courts to apply federal regulatory definitions "where applicable," and that such definitions are "applicable" only when the state director of the Wage and Hour Division and the Commissioner of Labor have refrained from defining terms in the state regulations, pursuant to their discretionary authority under AS 23.10.085 and 23.10.095.[10] We reject Dresser's contention that AS 23.10.145 is a mandatory directive to both courts and agencies, to be overruled only by the legislature. Such an interpretation would substantially nullify AS 23.10.085 and 23.10.095.

[4] For the above reasons, we conclude that the Director was authorized to promulgate 8 AAC 15.100(d)(3).

7. AS 23.10.085 reads:

Scope of administrative regulations. (a) The director may issue, amend or rescind such administrative regulations not inconsistent with the purposes and provisions of §§ 50-150 of this chapter which are necessary for the administration of §§ 50-150 of this chapter.

(b) The regulations may, without limiting the generality of (a) of this section, define terms used in §§ 50-150 of this chapter, and the restriction or prohibition of industrial homework or of the other acts or practices which the director finds appropriate to carry out the purpose of §§ 50-150 of this chapter, or to prevent the circumvention or evasion of §§ 50-150 of this chapter.

(c) The regulations may permit deductions by an employer from the minimum wage applicable under §§ 50-150 of this chapter to his employees for the reasonable cost, as determined by the director on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee.

8. As 23.10.095 reads:

Adoption of federal regulations. The commissioner may adopt regulations and interpretations which are made by the administrator of the Wage and Hour Division of the federal Department of Labor and which are not inconsistent with §§ 50-150 of this chapter.

9. *See In re Estate of Hutchinson*, 577 P.2d 1074, 1075 (Alaska 1978); *State v. City of Anchorage*, 513 P.2d 1104, 1110 (Alaska 1973).

10. This interpretation is consistent with our ruling in *McGinnis v. Stevens*, 543 P.2d 1221, 1238-39 (Alaska 1975), where we held that a prison inmate was not entitled to the minimum wage for institutional jobs. We relied partially on AS 23.10.065:

> AS 23.10.065 is based on the federal Fair Labor Standards Act of 1938 and the terms used in the Alaska statute are defined in the same way as in the federal act. A prisoner is not an 'employee' of the state under the federal act, and therefore is not so by virtue of AS 23.10.065. Moreover, even were we to regard the inmates here as employees, state employees are excluded, by virtue of AS 23.10.055(5), from the operation of the statute. Finally, the legislative history indicates that Congress did not intend the Fair Labor Standards Act to cover prisoners, and we find no indication that the state statute was not meant to have parallel 'non-coverage.' We simply cannot say that the distinction between prisoners in institutions and free citizens on the labor market is suspect.

Id. (footnotes omitted). *McGinnis* did not involve a state regulation explicitly rejecting the FLSA rule on prisoners, however, so our application of the federal definition there was in accordance with our present holding.

B. *Validity of 8 AAC 15.100(d)(3).*

The parties have attempted to stipulate to two matters affecting the scope of this court's review: (1) that 8 AAC 15.100(d)(3) is an interpretative regulation, and thus subject to review under the independent judgment standard; and (2) that the sole statutory provisions which form the basis for the regulation are AS 23.05.160 and AS 23.10.060.

[5] Although the parties' efforts toward simplifying the issues in a case are always appreciated, stipulations as to the law are not binding upon the court. "Counsel ... may agree as to the facts, but they cannot control this court by stipulation as to the sole or any question of law to be determined under them." *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 P. 864, 865 (1903).[11] This rule regarding stipulations of law is particularly appropriate where, as here, the case involves a matter of public policy. *See generally* Annot., 92 A.L.R. 663, 666 (1934). We think these considerations require us to look beyond the parties' stipulation in our analysis of the applicable law.

[6] We conclude that the regulation here is "quasi-legislative". In *Kelly v. Zamarello*, 486 P.2d 906, 909–11 (Alaska 1971) (footnotes omitted), we distinguished between quasi-legislative and interpretative rule-making:

> Professor Davis characterizes the difference in judicial attitude toward certain administrative rules as a distinction between 'legislative regulations' and 'interpretative regulations.' He has defined 'legislative rule' as 'the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body.' 'Interpretative rules,' he states, 'are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law.' The distinction is not always easy to draw, since as Davis points out, 'Interpretative rules sometimes rest upon statutory authority to issue them. • • •'
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> ....
>
> [T]he distinction between legislative and interpretative rule-making is a helpful one when reviewing regulations adopted by state administrative agencies. We hold, therefore, that when a regulation has been adopted under a delegation of authority from the legislature to the administrative agency to formulate policies and to act in the place of the legislature, we should not examine the content of the regulation to judge its wisdom, but should exercise a scope of review not unlike that exercised with respect to a statute.
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> ....
>
> Thus, where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, we will review the regulation in the following manner: First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment.

We think it clear that AS 23.10.085 and 23.10.095[12] constitute a delegation of authority from the legislature to the agency to formulate policies, leaving to the agency's discretion the issue whether federal definitions of "regular rate of pay" and

11. *See also Anchorage v. Geber*, 592 P.2d 1187, 1191-92 & 1192 n.8 (Alaska 1979), where we overruled as "ill advised" that portion of *Layland v. State*, 535 P.2d 1043 (Alaska 1975) suggesting that parties' concessions regarding interpretations of law are binding upon the courts.

12. *See* notes 7 and 8 *supra*.

other terms can be applied consistently with Alaska's Wage and Hour Act. Thus, we hold that the "reasonable and not arbitrary" test is applicable.

[7] The parties stipulated to the specific statutory provisions upon which the state relies to justify the regulation. These are AS 23.05.160,[13] which requires that an employee be informed of his rate of pay at the time of hiring and of any change in that rate on the payday prior to the change, and AS 23.10.060,[14] which requires the one and one-half overtime rate not only for hours worked over forty per week, but also for hours worked over eight per day.

Dresser argues that 8 AAC 15.100(d)(3) furthers neither of these statutory provisions; and indeed, our assessment of the parties' arguments indicates that the regulation is related only tenuously, if at all, to these provisions. However, the state's brief argues that the regulation is grounded in policy considerations beyond those contained in the two statutes. Although Dresser argues that this disregard of the stipulation is improper, we have concluded for the reasons noted above that the stipulation is not binding upon this court. In another case in which the parties had attempted to stipulate to the purpose of a legislative enactment, the New York Court of Appeals noted:

> We are not bound by stipulations in respect of the purpose of legislation. Laws are not to be declared invalid upon the consent of parties. We must determine their purpose and tendency for ourselves.

E. Fougera & Co., Inc. v. City of New York, 224 N.E. 269, 120 N.E. 642, 643 (1918).

The public policy underlying the Alaska statutory scheme is given as follows in AS 23.10.050:

> *Public Policy.* It is the public policy of the state to
>
> (1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being, and
>
> (2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hour standards which do not provide adequate standards of living.

On the basis of these policy pronouncements, the state argues that the basic concern of the legislature was protection of the worker's well-being against unfair wage and hour standards, and that this concern is of particular importance in Alaska, where the cost of living is higher than in other states. The state also argues that prohibiting the FWW would be to the worker's advantage, and cites the present case as an illustration: claimant Woody would be entitled to $3,956.76 if the regulation were upheld.

More specifically, the state argues that as the number of hours worked in a particular week increases, the "regular rate of pay" decreases; as the "regular rate" decreases, the resultant "overtime rate" decreases; and thus the effect of allowing the FWW is counter-productive to the stated purposes of the Act. The state insists, further, that the FWW makes it financially advantageous

13. As 23.05.160 reads:

> *Notice of wage payments.* An employer shall notify his employee in writing at the time of hiring of the day and place of payment, and the rate of pay, and of any change with respect to these items on the pay day before the time of change. An employer may give this notice by posting a statement of the facts, and keeping it posted conspicuously at or near the place of work where the statement can be seen by each employee as he comes or goes to his place of work.

14. The applicable portion of AS 23.10.060 reads:

> *Payment for overtime.* No employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska may employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment.

for an employer to hire an employee to work long overtime hours rather than to hire more workers, contrary to one purpose of the overtime provision, which was to force employers to spread employment by hiring more persons.[15]

We are persuaded that the state's position is correct. Under a standard hourly wage salary, as a worker's overtime hours increase, the average hourly wage increases. Under the FWW, as a worker's overtime hours increase, the average hourly wage decreases. This contravenes the policies of requiring increased overtime compensation and promoting the spreading of employment.

Thus, we must conclude that the regulation's definition of "regular rate of pay" so as to exclude use of the FWW is consistent with, and reasonably necessary to carry out, the purposes of the relevant statutory provisions. The regulation does not exceed the power delegated by the legislature. Further, 8 AAC 15.100(d)(3) is a reasonable and non-arbitrary method of furthering the statute's policies.[16]

Dresser raises several collateral arguments concerning the regulation's prohibition of the "Belo" pay plan, *see Walling v. A.H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1942); 29 U.S.C.A. § 207(f), and the permissibility of piece-work and commission pay plans. The validity of these provisions is not before us, and we perceive no inconsistency so blatant as to render the prohibition of the FWW unreasonable or arbitrary.

The judgment of the superior court is AFFIRMED.

15. The United States Supreme Court has repeatedly emphasized this point. In *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460, 68 S.Ct. 1186, 1194, 92 L.Ed. 1502, 1514 (1948), the Court said, "The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost."

16. The parties have not addressed, and we express no opinion concerning, the question whether there may be any conflict between 8 AAC 15.100(d)(3) and AS 23.10.060(17) and (18), enacted in ch. 31, § 1, SLA 1980.

David LEUCH, Appellant,

v.

STATE of Alaska, Appellee.

No. 5255.

Supreme Court of Alaska.

Sept. 25, 1981.

Defendant was convicted, pursuant to guilty pleas, before the Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., of two counts of grand larceny, and he appealed sentence. The Supreme Court, Rabinowitz, C. J., held that: (1) where an offense is against only property, involving no physical threats or violence, where it is the offender's first felony conviction, and where there is no background of unsuccessful paroles or probations which would indicate that probation is unsuitable to protect the public, to deter the offender, and to further his rehabilitative process, probation, coupled with restitution, is the appropriate sentence unless other factors militate against it, and (2) concurrent sentences of eight years with four suspended was excessive and upon remand defendant should receive concurrent sentences which, including any period of suspension and probation, did not exceed five years in total length.

Sentence reversed and remanded.

Matthews, J., dissented and filed opinion in which Burke, J., joined.

1. Criminal Law ⇐986.2(1)

Absent a conviction, an indictment is absolutely no evidence of guilty conduct.

TESTIMONY

My name is John Martin, I am the Alaska area manager for Dresser Atlas, a division of Dresser Industries. I have previously testified on HB 223. I am therefore furnishing you with my earlier testimony and a copy of Register 68 and will keep my present testimony as short as possible.

Recently several newspaper articles have surfaced concerning HB 223. It appears opponents of the bill strongly suggest that somehow employees have been misled and/or cheated on wage remuneration. Nowhere has there been mention of the substantial additional compensation paid to employees by my company, and others, in addition to basic wages under the FWW plan; for example, Alaska Allowance or C.O.L.A., Isolated Location Allowance, and the fact that employees working under the FWW plan were paid for off-work weeks. This additional compensation made up for any deficits compared to straight time and half overtime. The bottom line concerning wages is that the employees were paid well. For example, in 1981 our average operator made $60,678, and a senior operator averaged $67,829. The new system does not increase total wage compensation.

Most of the companies involved with this problem are oil and gas service companies. Many people perceive these service companies as being on the same level as oil companies. This is a far cry from reality. Our businesses are extremely competitive and totally dependent on oil companies for our livelihoods.

Being successful in the service company business, as the name suggests, means offering high quality, expedient service. You not only need highly refined technical equipment but more importantly, good people in your employment. As most businessmen know, dedicated employees are the primary key to being successful in the supply and demand service market place. I have been with Dresser Atlas for 15 years and during that time I have always observed and practiced this rudimentary business philosophy. The success of this philosophy is indicated by the fact that my firm, in Alaska, has had and remains to have, the lowest turnover of hourly workers in all of our company's North American operations. This was true when the company paid its employees under a FWW plan.

To maintain this position we know we must continue to employ the finest people the industry has to offer. If we felt we had ever misled or not paid our employees fairly we would not be here, because we would have corrected the problem. We are here because D.O.L. adopted a regulation without telling the industry in advance, and because several employees saw this as an opportunity to collect a great deal of money, in addition to their original fair compensation.

There has been a lot of discussion as to why companies did not change pay plans when the wage and hour administration banned the FWW. It is simple! The industry did not know it was banned until Dresser had been sued by the D.O.L. on behalf of Mr. Clyde Woody.

It was determined to test the validity of the regulation. When the Supreme Court finally determined, after several years, that the regulation was valid, the companies changed their long time industry

accepted method of paying hourly workers. It was not until each company changed pay plans that they were issued class action law suits.

As a matter of good business practice it was only prudent to test the validity of the Woody case in proving whether the D.O.L. could actually promulgate such a powerful regulation. A regulation that changed the industry's accepted way of doing business that was used in all of the United States and approved by the Federal Fair Labor and Standards Act. It appeared that such a dramatic change concering something as important as a person's wages, should be the responsibility of the state's legislature.

If this bill fails, it means many past and present employees will receive overtime compensation, which is required to be doubled by law above what was planned and expected by employer and employee.

On the negative side, it will mean catastrophic financial jeopardy for the individual companies and subsequent costs to the state and public consumers. Money paid to several hundred claimants and their law firm will not be available for industry expansion, and this is what produces jobs.

If a study had pointed out why the FWW should be banned and a dialogue had taken place between D.O.L. and industry concerning this regulation, none of us would be troubled with this problem. Mr. Wilson said yesterday that D.O.L. had begun thinking about prohibiting FWW plans long before the regulation was adopted. I would respectfully ask: Why didn't he inform affected employers that this was being considered, and ask for their comments? Mr.

Wilson also said that he had no idea what the impact would be on employers. He could have discoverd this by asking companies with FWW plans. Why didn't he do this?

As an example, I think the current legislative bill dealing with the "Right to Know" of employees concerning hazardous or toxic materials is a sterling example of how proposed changes in the law should be publicized within our state. No matter what the outcome of this legislation, government, business and the public are cognizant of the proposed changes, and therefore will have the chance to come forward and support or oppose them.

Yesterday, after listening to Mr. Wilson's testimony, several items surfaced which I feel need to be addressed. He stated that in 1977 the D.O.L. had a pending claim against Dresser. It was withdrawn due to then-Attorney General Avrum Gross' opinion on the Dowell case. Dresser knew nothing of this claim, and if we had it would have drawn our attention to the Department's plans. But we were never informed by D.O.L. of such a claim. Communication between government and business was definitely lacking.

Second, Mr. Wilson testified that typically the D.O.L. keeps lists of interested parties and sends notices and proposed regulations to them. He said that if the Committee checked Register 68, it would find a list of names of those to whom notice of the proposed regulation would have been sent. Mr. Wilson also said that he did not remember how many people attended the three hearings. Yesterday we visited the Lt. Governor's office where the records are kept for safekeeping, and obtained a copy of the complete record filed in Register 68, involving adoption of this regulation. I would like to have this a part of the record. In addition, I am

providing a copy of a letter from Commissioner Robison to Chairman Bussell with certain attachments. Our review indicates an affidavit by Mr. Wilson indicating that he held one hearing in Anchorage on September 15, 1978. There is no similar affidavit referring to other hearings, and the hearing notice refers to only one hearing in Anchorage. Commissioner Robison, in item No. 4, says that the hearing notes indicate that no one appeared to testify. A copy of the empty roster was found in Register 68. Nobody appeared because nobody was aware that the D.O.L. proposed to ban FWW!

Mr. Wilson also stated that a hearing was held in spring of 1983 on some proposed D.O.L. regulations and no one showed up. He stated that he subsequently read the proposed regulations and did not like them himself, and since there was no testimony from interested parties, he did not promulgate the regulations. This is not consistent with his or the department's action in 1978. Why were the 1978 regulations not tabled and/or the affected companies notified as was done in 1983? A lack of consistency is apparent.

Mr. Wilson also stated that out of courtesy he personally wrote letters to Dowell in Kenai, Dresser Atlas in Kenai and hand delivered a letter to Otis in Anchorage informing them of the promulgated regulations. Dresser Atlas, for one, did not receive any such letter, as Mr. Burdick, the Kenai manager testified at the earlier hearing. Mr. Burdick is well known for his ability to be aware of explicit details concerning his business. I know from 6 years' experience managing Mr. Burdick that if the Kenai district had received a letter from Mr. Wilson, Dresser Atlas would have known about it. It is also curious that Dresser in Anchorage

was not notified, since we have maintained Central Management there for 15 years.

It is interesting too that Dowell and Otis's records do not reflect notification, although they were allegedly notified. Any notice to Dowell and Otis would have been unnecessary anyway, since they had previously changed to a different pay plan. But I question why Schlumberger and others using FWW plans were not notified. It is widely known for example, that Schlumberger was the largest and major user of the FWW system in Alaska, and thus would be substantially affected. Notice of the adoption of the regulation, while it would have been useful, would have been no substitute for giving the industry fair notice of the regulation before it was adopted. That's when we needed to know, not after the fact.

I cannot help but question whether proper communication from start to finish of this regulation actually took place.

I strongly urge this committee to pass this bill on to the House floor for a full body vote. A positive vote will do much to encourage an improved long term working relationship between business and our state agenices. At the same time, no matter how we feel about how it was done, the D.O.L. will have accomplished their objective of having the FWW banned from Alaska.

At a time of declining state revenues the state should be looking for avenues to encourage and work with businesses so that together we may foster long term jobs and subsequent benefits for residents of the State of Alaska. Passage of HB 223 will do much to promote this positive work atmosphere.

I would like to thank the Labor and Commerce Committee for this opportunity to testify. I will do my best to answer your questions.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

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

MEMORANDUM May 16, 1983

SUBJECT: Constitutionality of CSHB 223 (Judiciary)

TO: Representative John Cowdery

FROM: Thomas A. Sofo /TAS
Legislative Counsel

You have asked this office for an opinion on the constitutionality of HB 223. That bill in the form in which it was originally introduced prohibited certain methods for payment of overtime while excusing employers from the payment of liquidated damages for good faith violations of overtime payment provisions as well as other employer omissions under AS 23.10. The recent committee substitute, CSHB 223 (Judiciary), differs mainly in its omission of adding the prohibition for certain methods of payment of overtime to the statutes themselves. The committee substitute seems content to refer to the regulations, 8 AAC 15.100(d)(1) and (3), which from December 9, 1978 to the present have prohibited those same methods for the payment of overtime. It is not clear that the committee substitute intends to annul those regulations, a fact which will be discussed later in this memo, but both bills raise a potential constitutional problem in their attempts to retroactively excuse certain employers from liability for their noncompliance with the regulations.

This opinion is based on the assumption that the regulations concerning the payment of overtime were duly adopted. AS 23.10.060, the Alaska statute concerning the payment for overtime states that its provisions are to be considered included in all contracts of employment. The most serious constitutional challenge to either version of HB 223 is that the retroactive application of that bill violates the constitutional prohibition against the impairment of contracts. That prohibition is found in both the United States and the Alaska Constitutions. Article I, section 15 of the Alaska Constitution provides in relevant part: