ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672
2594 HLC SB 67

#1

SENATE AMENDMENT

By Senator Gilman

To: Committee Substitute for SENATE BILL No. 67 (L&C)

To: _____ HOUSE BILL No. _____

PAGE: 2 AFTER LINE: 11

Insert new section 5.

*Section 5. A.S. 19.45.001(4) is amended to read:

(4) "cost of change, relocation, or removal" means the entire cost incurred by the utility properly attributed to the change, relocation, or removal of a facility, less any costs for improvements or upgrading over and above the cost of a functionally equal facility; if a facility is to be relocated and replaced with new equipment, there shall also be substracted from the entire cost any salvage value derived from the old facility; if a facility's service life is extended by the work done to change or relocate it, a percentage equal to the percentage of extension of the facility's service life shall be subtracted from the cost;

Renumber the following sections accordingly.

ANCHORAGE WATER & SEWER UTILITIES

3000 Arctic Boulevard
Anchorage, Alaska 99503
(907) 277-7622

Tony Knowles
Mayor

Owned by the Municipality
of Anchorage

March 7, 1983

Senator Eliason
Chairman, Labor & Commerce
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

RE: SB-67

Dear Senator Eliason:

From the perspective of water and wastewater facilities, passage of the subject legislation should not have a significant impact on the cost of municipal road improvements.

In Anchorage for example, it is rare when a municipal road improvement impacts much more than the surface or above surface water and wastewater facilities. Generally this would include moving fire hydrants, adjusting sewer manhole elevations, adjusting water valve box elevations, etc. These type of relocations cost AWWU approximately $100,000 in 1982, a year with significant road improvement activity.

An exception to the above would be a situation where a road improvement project necessitated relocating an entire stretch of water or sewer main. Generally this only occurs when the road grade is lowered so much that freezing becomes a potential problem for an existing facility. In these cases relocation could cost as much as $100 per lineal foot of pipe, including apurtenances.

If the Anchorage Water and Wastewater Utility can provide any further information please contact either myself or Brian Crewdson at 265-5561.

Sincerely,

ROBERT E. SMITH
General Manager
Anchorage Water & Wastewater Utility

RES/BIC/slr
H/SE

cc: Alaska Municipal League
Patrick Anderson
John Harshman

STATE OF ALASKA
FISCAL NOTE

I. REQUEST
Bill/Resolution No.: CSSB 67 (L&C) am
Title: Reloc. of Utility Fac... Municipality
Sponsor: Labor & Commerce Committee
Requestor: Community & Regional Affairs

II. FISCAL DETAIL
Agency Affected: N/A
Program Category Affected: N/A
BRU, Program or Subprogram(s) Affected: N/A

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, ETC						
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:

N/A

IV. ANALYSIS: Attach a separate page for any Analysis (attached)

Prepared By: Bruce R. Freitag Phone: 789-0841
Division: Standards and Technical Services Date: 4/18/83

Approved by Commissioner: [signature] Date: 4/27/83
Department: Transportation and Public Facilities

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Original to Legislative Finance
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Copy to Sponsor
Copy to Requestor (if different from Sponsor)

3/8/83

ANALYSIS OF CSSB 67 (L&C) am

C.S.S.B. 67 (L&C) am is very similar to H.B. 244. (The basic difference is the addition of an amendment to Sec. 5. AS 19.45.001 (4).)

The Department of Transportation and Public Facilities currently has the authority to relocate utilities that are located in highway rights-of-way under the Department's jurisdiction. Current State Statutes also require the State to pay the cost of any change, relocation or removal of utilities necessitated by highway construction.

C.S.S.B. 67 am would give the municipalities the same authority and responsibility for highways and streets under their jurisdiction.

C.S.S.B. 67 am would have no effect on highways constructed by DOT&PF; however, if municipalities receive grants from the State for highway purposes, these grants would need to be adjusted to compensate for added costs of utility relocation.

It should be noted that the Department has had trouble with the present wording of Sec. 4. AS 19.25.020 (c) as the phrase "...notwithstanding the terms or provisions of any existing permit, agreement, regulation, or statute to the contrary." has been interpreted that no special condition regarding relocation costs on previously issued permits would be valid. This may also then affect municipalities which have allowed conditional utility installation permits within their rights-of-way to provide for certain rapid system expansions where code wasn't in all cases followed. If this situation within a municipality exists, they may, under this proposed statute, be liable for higher relocation costs than would normally be allowed. It is recommended that consideration be given to deleting this phrase from any new legislation.

STATE OF ALASKA
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Prepared By: Bruce R. Freitag
Phone: 789-0941
Division: Standards and Technical Services
Date: 4/1[illegible]/83

Approved by Commissioner: [signature]
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Alaska State Legislature

Barbara Lacher, Chairman
Mac Tischer, Vice-Chairman
Randy Phillips
Mike Fritz
Don Clocksin
Jack McBride
Mike Szymanski

Room 104
State Capitol
Juneau, Alaska 99811

Pouch V
Juneau, Alaska 99811

HCS CSSB 67 (C&RA)

House of Representatives
Committee on Community & Regional Affairs

Dear Mr. Speaker,

A majority of the House Committee on Community and Regional Affairs oppose HCSCSSB 67 (C&RA). The provisions of HCSCSSB 67 (C&RA) changes the historical relationship between utility companies and municipalities in matters pertaining to the use of public rights-of-way and streets by various utility companies. Present Alaska Statutes require municipalities to allow utility companies to use the public right-of-way and thereby avoid the expense of securing easements from private property owners. The proposed legislation is designed to further benefit the utilities by requiring municipalites to pay the costs of relocating the utilities when the relocaton is incident to a municipal street project. The requirement for municipalities to bear the burden of the relocation costs is contrary to practices establised in common law and contrary to procedures used throughout the United States. Imposition of such costs would amount to a public subsidy of private profit making ventures as well as for private non-profit utility companies.

Enactment of any legislation that would require municipalities to pay utility relocation costs will not, in the long run, reduce operating costs for utilities but in all probability will increase costs to the utilities. Municipalities will undoubtedly be highly restrictive in the conditions of future permits for the installation of utilities and will begin to charge maximum fees for the use of the public right-of-way as opposed to the general practice of providing use at no charge.

The Committee has found that municipalities are fair and reasonable in their relationships with utilities, and that the particular needs of each type of utility is considered when negotiations for the use of a public right-of-way are conducted. The continuation of reasonable fees, permit conditions, and equitable allocation of utility relocation costs is insured by the availability of arbitration and redress provided by the Alaska Public Utilities Commission. The considerable diversity of types and purposes of profitable private and of non-profit utility companies further reinforces the Committee's belief that the allocation of utility relocation costs can best be negotiated on the local governmental level, on a case by case basis.

In summary, the Committee believes that the proposed legislation is an unnecessary and unwarranted usurption of local governmental authority which may have an adverse monetary effect on the utility consumer and the municipal tax payer. Therefore, any attempt to legislatively interfere with the existing relationships between municipalities and utility companies should not be favorably considered.

/s/ Representative Lacher

Comments on House CS for CS for SB 67 (L&C)
by
Dave Palmer, City Administrator
City of Craig, Alaska
P.O. Box 23
Craig, Ak. 99921

I want to start by mentioning some specific problems with the bill, and follow with some general comment.

The first section (AS 19.25.020 [a] adds "municipality" as an entity with the authority to order the relocation of a utility within a right of way under its jurisdiction.

COMMENT: The municipal authority to regulate activity within rights of way already exists and in found in AS 29.48.035. This amendment duplicates existing authority.

AS 19.25.020 (c) references the definition of "cost" as in AS 19.45.001(4) a copy is attached.

COMMENT: No definition of "highway construction" is given. However, "highway" is defined at AS 19.45.001(8) and reads:

"highway" includes a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure of facility, and right-of-way thereof, and further includes a ferry system, whether operated solely inside the state or to connect with a Canadian highway, and any such related facility;"

This is an overly broad definition including minor activities such as the relocation of utilities for drainage culverts, driveways, and minor street improvements. The provisions of this bill extend beyond the transfer of cost of the relocation of utilities in major grant funded projects. Apparently, the relocation cost for any "highway" project is transferred to the municipality.

AS 19.25.020(c) in the bill contains several exclusions and exceptions, primarily battle scars of several committee hearings and it is difficult to understand.

First, relocation cost is identified as an allowable cost of construction and that cost is to be borne by the municipality...there is no discretion allowed, the bill states the cost is <u>TO BE PAID</u> by the state or municipality EXCEPT

(notwithstanding a valid permit system) a municipality is relieved of the relocation cost UNLESS

1. The facilities have been placed in the municipal right of way under a valid easement or permit; or
2. The facilities were placed BEFORE a system of permits existed.

In other words, the municipality pays if placement falls under a permit or agreement and the municipality pays if the placement occurred absent a permit process.

So: the municipality pays both when a process exists and when a process does not exist.

It appears that the bill would prohibit the municipality and a utility company from negotiating an agreement that would provide for the utility to assume the cost of relocation [from the mandatory language of 19.25.020(c)].

It appears that for facilities placed under a former (but now expired) agreement, the municipality would pay, regardless of the terms of the agreement, since the permit is not currently valid.

It appears that facilities placed without permission and without authority (absent a permit process) must be relocated at municipality expense, as well. I question the equity of requiring a municipality or any government to pay for actions taken by a utility company without permission or authority.

This bill reaches back in time and makes the municipality responsible to pay to move existing utilities, regardless of the authority--or lack of authority, granted to the utility. The bill places a burden on the municipality for actions taken in the past. It also commits the municipality for future costs.

DISCUSSION ON THE MERITS OF THE BILL:

The granting of permission to use rights of way is just that, a discretionary grant of permission to use land a utility does not own. There is a substantial benefit to a utility company for private use of public property. Acceptance of the cost to move utilities when necessary for the public good is a very reasonable cost of operation compared to the option of negotiating of purchasing easements privately. The use by the private sector of publically owned land is, in effect, a subsidy to that operation. To require the public, the owners of that land, to pay the cost incident to the use of public land is not a fair division of costs. The transfer of relocation costs from the private sector to the public sector does not benefit the public. It benefits the private utility company and the utility company's profit and loss picture. Further, this transfer removes from local control a legitimate negotiable item that can be and is dealt with at the local level. In exchange for a long term authority to operate in public rights of way, utility companies have not found the assumption of relocation costs unacceptable.

The City of Craig is served by Alaska Power and Telephone Company of Port Townsend, Washington. They serve Skagway, Hydaburg,Tok-Dot Lake and Craig. Their agreement with Skagway provides that the company will move utilities when necessary at their expense. In exchange, they are assured of a 20 year commitment to use the right of way and other aspects of their operation are clarified.

The 20 year permit in Craig expired about 2 years ago. Therefore, under the terms of the bill, Craig is liable for relocation expenses for all past installations (done under the then valid system) as well as current installations (placed before a system is put into place).

Alaska Power and Telephone officials ;have indicated to me that a permit system similar to Skagway's would be acceptable to them. This bill would obviously change the terms of our negotiation.

Basically, we believe the authority of a municipality to exercise its regulatory authority over rights of way pursuant to AS 29.48.035 should not be transferred by the state to private utility companies. Requiring a municipality to assume direct costs when it exercises its discretionary authority reduces the municipality's ability to properly protect the public interest (because some negotiating points with the utility have already been given away).

This is a local control issue. There is a satisfactory process in place to deal with this issue now. In this case, the old saying applies: "If it's not broke, don't fix it".

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); AS 19.40.200(b))

Chapter 45. Miscellaneous Provisions.

Section
01. Definitions
02. Penalties
15. Highway construction near airports

Sec. 19.45.001. Definitions. In § 19.05 — 19.40

(1) "commissioner" means the commissioner of transportation and public facilities;

(2) "construction" or any derivation means construction, reconstruction, alteration, improvement or major repair;

(3) "controlled-access facility" means a highway especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have either no right or easement or only a controlled right or easement of access, light, air, or view;

(4) "cost of change, relocation, or removal" means the entire cost incurred by the utility properly attributed to the change, relocation, or removal of a facility, less any costs for improvements or upgrading over and above the cost of a functionally equal facility; if a facility is to be relocated and replaced with new equipment, there shall also be subtracted from the entire cost any salvage value derived from the old facility;

(5) "department" means the Department of Transportation and Public Facilities;

(6) "excess lands" means land acquired by the state in excess of land required for a highway, when the remaining portion of a parcel of land so acquired is left in such shape or condition as to be of little or no value to its owner, or to give rise to claims or litigation concerning severance or other damage;

(7) "federal-aid primary, federal-aid secondary, and interstate system" include any highway which is a part of the federal-aid systems as provided in the Federal-Aid Highway Act of 1956, and any laws amending or supplementing it;

(8) "highway" includes a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof, and further includes a ferry system, whether operated solely inside the state or to connect with a Canadian highway, and any such related facility;

(9) "maintenance" means the preservation of each type of highway, roadside structure and facility as nearly as possible in its original condition as constructed, or as subsequently improved, and the operation of highway facilities and services to provide satisfactory and safe highways;

(10) "municipality" ...

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(9) "maintenance" means the preservation of each type of highway, roadside structure and facility as nearly as possible in its original condition as constructed, or as subsequently improved, and the operation of highway facilities and services to provide satisfactory and safe highways;

(10) "municipality" means an incorporated city or political subdivision which has jurisdiction over highways in its incorporated area;

(11) Repealed by § 6 ch 233 SLA 1968.

(12) "utility" includes railroads and all publicly, privately, or cooperatively owned lines, facilities and systems for producing, transmitting or distributing communications, telecommunications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, and other similar commodities, including publicly owned fire and police signal systems and street lighting systems;

(13) "encroachment" means and includes a tower, pole, pole line, pipe, pipeline, driveway, private road, fence, billboard, stand or building, or a structure or object of any kind which is or has been placed in, on, under or over a portion of a highway or road. (§ 1 ch 57 SLA 1961; § 3 art I title I ch 152 SLA 1957: am § 3 ch 124 SLA 1959: am § 1 ch 122 SLA 1960; § 1 art V title II ch 152 SLA 1957; § 3 (14) art I title I ch 152 SLA 1957: added by § 2 ch 122 SLA 1960; § 2 ch 59 SLA 1949; am § 1 ch 86 SLA 1953; am §§ 4, 5 ch 49 SLA 1963; am § 6 ch 233 SLA 1968; am § 29 ch 32 SLA 1971; am § 1 ch 64 SLA 1971; am §§ 1, 2 ch 106 SLA 1977; am Executive Order No. 39, § 11 (1977); AS 19.05.130)

Revisor's notes. — This section derives from AS 19.05.130 and was renumbered by the revisor of statutes pursuant to AS 01.05.031.

Effect of amendments. — The first 1977 amendment substituted the language beginning "facility, less any costs for improvements" and ending "subtracted from the entire cost" for "utility after deducting any increase in the value of the new facility and" in paragraph (4) and rewrote paragraph (12).

The second 1977 amendment substituted references to the commissioner of transportation and public facilities and to the Department of Transportation and Public Facilities for references to the commissioner of highways and to the Department of Highways in paragraphs (1) and (5), respectively.

Legislative history reports. — For report on ch. 32, SLA 1971 (HB 111 am), see 1971 House Journal, p. 138.

NOTES TO DECISIONS

Applied in State v. I'Anson, Sup. Ct. Op. No. 1102 (File No. 2032), 529 P.2d 188 (1974).

Sec. 19.45.002. Penalties. A person who violates any provision of chs. 5-25 of this title is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $10 nor more than $500, or by imprisonment in jail for a period not to exceed one year, or by both. (§ 7 art VII title II ch 152 SLA 1957; AS 19.05.140)

Revisor's notes. — This section derives from AS 19.05.140 and was renumbered by the revisor of statutes pursuant to AS 01.05.031.

Cross references. — As to sentences for misdemeanors, see AS 12.55.135.

Collateral references. — 25 Am. Jur., Highways and Streets, § 73.

lations prescribed by the department and if authorized by a written permit issued by the department. (§ 8 art VII title II ch 152 SLA 1957; am § 3 ch 106 SLA 1977)

Effect of amendments. — The 1977 amendment rewrote this section.

Collateral references. — 39 Am. Jur. 2d, Highways, Streets and Bridges, §§ 218-234.

40 C.J.S., Highways, §§ 232, 233.

Sec. 19.25.020. Relocation of utilities incident to highway projects. (a) If, incident to the construction of a highway project, the department determines and orders that a utility facility located across, along, over, under, or within a state right-of-way must be changed, relocated or removed, the utility owning or maintaining the facility shall change, relocate or remove it in accordance with the order. The order shall provide a reasonable time period for compliance.

(b) If the utility facility is not changed, relocated or removed in accordance with the order, the facility becomes an unauthorized encroachment and may be disposed of in accordance with AS 19.25.240 — 19.25.250. In addition, the owner of the facility shall indemnify the state for any amount for which the state may be liable to a contractor by reason of the encroachment.

(c) The cost of change, relocation, or removal necessitated by highway construction is a cost of highway construction to be paid by the state in accordance with AS 19.45.001(4), notwithstanding the terms or provisions of any existing permit, agreement, regulation or statute to the contrary.

(d) If requested by a municipality, the department shall implement this chapter by requiring to the maximum extent possible location underground of electric power transmission lines within the municipality. (§§ 2, 3 ch 57 SLA 1961; am § 4 ch 106 SLA 1977)

Revisor's notes. — A reference to AS 19.45.001(4) was substituted for a reference to AS 19.05.130(4) in subsection (c) to conform to the renumbering of that section by the revisor of statutes under AS 01.05.031.

Effect of amendments. — The 1977 amendment rewrote this section.

Opinions of attorney general. — This section is constitutional. 1961 Op. Att'y Gen., No. 12.

Article 2. Damages and Obstructions.

Section

30. Damages to obstructions, signs, and construction

Sec. 19.25.030. Damages to obstructions, signs, and construction. The driver or owner, or both, of a vehicle, self-propelling or otherwise, which passes through, over or around an obstruction placed under authority of AS 19.10.100, or a person who opens, removes or defaces an obstruction or warning sign without written permission

Ken Johnson, House Labor & Commerce Committee 2/6/84

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

The Commission has been requested to provide comments in regard to legislation that addresses relocation of utility facilities.

The Commission, at this time, takes no position on the subject legislation. However, it would bring to the attention of the Committee the following observations.

1. If costs are incurred by a utility to relocate its facilities, the utility will generally be allowed to recover that expense in its rates. There is no "free lunch;" if a utility is not reimbursed by a governmental entity for its cost of relocation, the utility, absent neglect, would recover the cost from its consumers. Therefore, the issue of who should pay for the relocation of utility facilities appears to be a public policy issue of how best to distribute the economic burden.

2. However, it is respectfully suggested that the legislature should consider the likely sources of governmental funds that would be expended if the government, rather than the utility's customers continued to assume the costs of relocation. Frequently matching funds are involved which help defray the governmental entity's project costs, including utility relocations. However, if consumers are forced to pay, they will receive no such offset. Thus, the resultant dollar burden on consumers may exceed the actual dollar savings to the actual governmental entity directing the relocation.

3. The statute of the Alaska Public Utilities Commission speaks to the Commission's authority in this area.

> Section 42.05.251: Use of streets in cities and boroughs. Public utilities have the right to a permit to use public streets, alleys and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires. A dispute as to whether fees, terms, conditions or exceptions are reasonable shall be decided by the commission. The commission may require a utility to add the amount of any permit fee paid as a pro rata surcharge to its bills for service rendered at locations within the boundaries of any city or borough which requires payment of a permit fee.

> Section 42.05.640: Regulation by municipality. The commission's jurisdiction and authority extend to public utilities operating within a city or borough, whether home rule or otherwise. In the event of a conflict between a certificate, order, decision or regulation of the commission and a charter, permit, franchise, ordinance, rule or regulation of such a local governmental entity, the certificate, order, decision or regulation of the commission shall prevail.

The Commission assumes that the enactment of HCSCSSB 67 (C&RA) would not dimish the existing jurisdiction of the Commission.

4. The Commission currently has three proceedings under consideration in which the subject of utility relocation and the expense thereof is at issue, specifically which ratepayers should bear the relocation expense charged by a municipality to a utility providing service in an area greater than the municipaliy.

If there are specific questions, the Commission would be glad to respond.

ALASKA PUBLIC UTILITIES COMMISSION

Carolyn S. Guess
Chairman

Amendments Not Made

AMENDMENT
page 2, after ln. 10 add:

(d) Notwithstanding the terms or provisions of any existing permit, agreement, regulation or statute to the contrary, the municipality may charge the utility a fee for past use of a right of way under the municipality's jurisdiction, equal to the cost of change, relocation or removal neccessitated by highway construction, except that a utility is not obligated to pay the fee for past use of a municipal right of way unless

(1) the facilities were placed in the municipal right-of-way before the municipality had a system for granting easements or permits for utility facilities; or

(2) the facilities have been placed in the municipal right of way under a valid easement or permit.

February 7, 1984

To: John

From: Ken

RE: HCSCSSB 67--RELATING TO UTILITY RELOCATION INCIDENT TO HIGHWAY CONSTRUCTION.

WHAT THE BILL DOES

If this bill were to pass the House, it of course has passed the Senate, it would place the burden of cost-of relocating utilities-incident to highway construction-on the municipality. In other words, if the municipality decides to widen a road and utilities have to be moved, the utility would have to bear the cost.

COMMENTS

At present the state includes the relocating of utilities in its planning costs. Municipalities at present do not include such costs in planning proposals.

At issue is whether a utility's rate rate-payers get stuck with the cost of relocating the facility, or municipal taxpayers as a whole bare the cost. If a road is widened or built for the use of all, why should a few incur a major portion of the cost, such as utility relocation. These are the points the bill hits on.

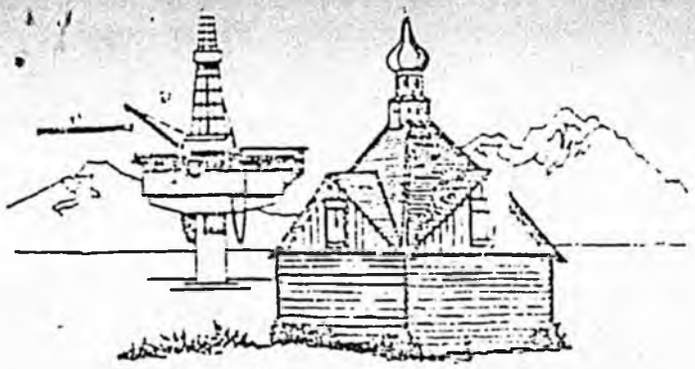
This committee substitute will make the fourth time the bill has either been amended or redrafted. The substitute planned for introduction by the Labor and Commerce Committee is much like the one passed out of the Senate Labor and Commerce Committee, except it has an amendment which softens the impact on municipalities. This amendment re-defines the cases in which the municipality must pay the cost of utility relocation.

QUESTIONS

1. Why is it a problem for municipalities to include in planning, the cost of relocating utility facilities ?

2. Has the state ever balked at appropriating funds for relocating utilities ?

3. Why has it been a practice in the past not to include utility relocation in planning costs ?



CITY OF KENAI

"Oil Capital of Alaska"

P. O. BOX 580 KENAI, ALASKA 99611
TELEPHONE 283 - 7535

August 17, 1983

Alaska Public Utilities Commission
1100 McKay Building
338 Denali Street
Anchorage, Alaska 99510

RE: Tariff No. 35-32

Dear Commissioners:

The City of Kenai adamantly opposes TA #35-32 by Homer Electric Association, Inc. (HEA) which would result in a surcharge to the consumers within our municipality for utility facility relocations required by the City of Kenai to accommodate municipal construction projects.

The present request of HEA is an attempt to do indirectly what it has not been able to accomplish directly under the common law, by contract, by legislation or by court order as a result of litigation. To permit this surcharge to the consumers within a municipality would be to give them exactly that which they have so far been denied and to which they are not entitled.

Under Alaska Statutes (AS 42.05.251) the electric company is entitled to a permit to use the streets, alleys, and other public ways "upon payment of a reasonable permit fee and on reasonable terms and conditions with reasonable exceptions" [emphasis supplied] the city requires. The contract of Homer Electric with the City to operate the electric system of the city contained no agreement as to terms for use of city streets nor did it provide for any permit fee. In contrast, Kenai Utility Service Corporation pays the City 2% of its gross income within the City for a permit to exercise the privilege which Homer Electric exercises without any payment whatsoever. This lack of a contractual requirement by the City to assume the responsibility or liability for any relocation expenses incurred by the utility because of work within the city right-of-way makes 12 McQuillim Municipal Corporations, Section 34.72 very applicable:

"The grantee of a franchise to use the streets takes it subject to the right of the municipality to make public improvements whenever and wherever the public interests demands, and if the improvement causes injury to the company, as by requiring it to relay or change the location of its pipes, tracks, or poles, or otherwise, the grantee of the franchise cannot recover damages from a municipality therefor."

In this same section it goes on to state that the damages may be recovered from a municipality:

"If the statutes or the charter of a municipality provide for a recovery of damages resulting from the grading or changing of grade of a street."

In Section 34.74 a of McQuillim, it is stated that:

"The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity. Accordingly, it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of the franchise, where public convenience or security require it, even at the grantee's own expense,..."

In the same section it is stated that the common-law duty of the utility to relocate its facilities at its own expense when public convenience or necessity so requires:

"may be changed by contract between the utility and a municipality so that relocation expenses are borne by the municipality, or may be changed by statute so that relocation expenses in certain cases are borne by the State" [emphasis supplied]

Since there is nothing in state law, nor by contract, nor by legislation, nor by court order which would require the municipality of Kenai to bear such relocation expenses, nor does the charter of Kenai so require, there exists no basis upon which to assess either the City of Kenai directly or its citizens individually directly or indirectly for the costs of relocations required to accommodate municipal construction projects. Any requirements to the contrary would be arbitrary, capricious and unreasonable and in derogation of the common-law, present state law, contract law and the intent of our state legislative body.

The lack of any contractual obligation is apparent from a reading of the contract entered pursuant to Ordinance No. 199-71 which is attached hereto and consists of 24 pages and is designated as Exhibit 2. The Commission's attention is specifically drawn to page number 12, Section 9-3 regarding relocations. This document is also the subject of present litigation between the City of Kenai and HEA which is discussed elsewhere in this communication.

As previously noted, there exists litigation in the Superior Court for the State of Alaska, Third Judicial District at Kenai captioned Homer Electric Association, Inc. Plaintiff v. City of Kenai Municipal Corporation, Defendant, Case No. 3KN-83-461 CI, which concerns solely the responsibility for the costs of relocation and the amount. The present litigation was preceeded by a PETITION FOR DECLARATORY RELIEF by HEA dated January 6, 1983 which subsequently was dismissed by the Commission after responsive pleading by the City of Kenai.

The amended complaint and answer thereto are attached to this communication and designated as Exhibit 3. Again, only a cursory reading of the relevant documents is needed to ascertain that the sole thrust of the complaint is to burden the municipality of Kenai with relocation costs.

The attempt of HEA to burden the City with relocate costs is evidenced by their unsuccessful attempt to have SB 67 passed. In support of that bill, find attached a letter from HEA's attorney dated March 18, 1983 and marked as Exhibit 1, indicating relocation claims against the City in the amount of $150,000 which may give some indication of the magnitude of assessments that would be levied against the individual citizens of the municipality should they be granted the relief they are requesting. Similar legislation failed in the 1982 legislature.

It is the City's position that had that legislation passed or if the present relief were granted it would be in violation of AS 42.05.391 in that it would be an unreasonable preference or advantage and create an unreasonable difference as to rates as between localities served and categories of customers all to the detriment of those within municipalities.

Where state rights-of-way are concerned AS 19.25.020 specifically provides that the costs of relocations caused by highway construction are to be paid by the state. Obviously, the legislature has drawn a distinction between state right-of-ways and municipal right-of-ways.

Without legislation such as SB 67 it is the City's position that the rights of the public are paramount and the City is without power to accommodate HEA even if it wanted to. As stated by 39 Am Jur 2d, Highways, Streets, and Bridges, Section 278:

> "A municipal corporation has no right directly or indirectly to burden itself or its citizens with the cost of removing and replacing the structures and appliances of public service companies that may necessarily be interfered with in laying sewers in the streets,..."

In the same section, it is also stated:

> "with respect to municipally owned public service companies, it is generally held that the municipality is acting in a proprietary and not a governmental, capacity, and is therefore responsible for the cost of removal or relocation of its structures and appliances when required for highway purposes."

The latter statement correctly distinguishes between a utility service owned by a municipality as a "proprietary" activity and not a "governmental" activity, and it can hardly be assumed then the sale of the proprietary function the municipality intends to give up any of its governmental powers.

The above quoted 39 Am Jur 2d at Section 232 is in accord with the City's position wherein it states:

> "Rights and streets or highways granted to individuals or corporations are at all times held in subordination to the superior rights of the public. The grantee takes them subject to the paramount right of the public authorities to grade and improve the way and to make such requirements and regulations as are necessary and reasonable in order make it suitable and convenient for the use of the travelling public, and the grantee may be required to abandon the use granted, or to remove or change the location of structures erected under the grant, when demanded by the public necessity, convenience, or welfare. <u>This power of the public authority cannot be limited by contract</u>." [emphasis supplied]

It is the City's position that it would be inappropriate for the APUC to do either indirectly or directly that which the City is not empowered to do especially when one applies the rule stated in the above cited volume of 39 Am Jur 2d at Section 225 that states that:

"As a general rule, every grant in derogation of the right of the public to the use of the streets will be construed strictly against the grantee and in favor of the public."

Unfortunately, it appears that the commission itself may have precipitated the present filing by HEA in their communication of June 3, 1983 to Council where it is suggested that HEA "...should consider filing a special tariff to authorize collection of the unreimbursed costs of any municipally-directed relocation as a surcharge on the bills of customers residing within the political boundaries of the City of Kenai. The City takes exception to this position and also to any inference contained in the next paragraph of the letter that would infer that the City of Kenai negotiate away its immunity for having to pay relocation costs in any franchise or permit agreement.

The arguments being made by HEA before this Commission, the legislature and in the courts are not new but seem to be made more frequently along with other arguments nationally as shown by the communications with NIMLO and a copy of Chesapeake and Potomac Telephone Company of Virginia vs. Landries 674 Fed Second 298 (1982) attached as Exhibit 4, in which the courts have gone so far as to declare utilities "displaced persons" so that they can be reimbursed for a facility relocation. Hopefully, the decision of the Commission will not be circuitous or tortured in its reasoning nor arbitrary, capricious and unreasonable in application but will follow the common-law as well as the better reasoned and majority case law and applicable Alaska Statutes as well as the intent of our last two state legislative bodies.

In the alternative, the City would request that in view of the Commission's previous decision not to take jurisdiction of the controversy between HEA and the City insofar as relocation costs, that it also decline to directly assess the citizens of Kenai individually, at least until the courts decide the ultimate responsibility for relocation costs in order that conflicting decisions not be reached by the courts on one hand and an administrative body on the other.

While HEA may draw a distinction between a direct assessment to the citizens of Kenai versus an indirect assessment by a levy on the governmental and taxing authority for the City of Kenai, the City does not draw such a distinction. Any assessment against the City would be passed on to the citizens of Kenai by assessment or taxes or decreased services, facilities or improvements. The ultimate deep pocket remains the same; the

individual citizen. When one remembers that the municipalities provide services for those outside the immediate boundaries of the city and that taxes should be spread on as large a base as possible, it seems only just and equitable that the relief requested by HEA be denied.

Respectfully submitted,

Tim Rogers
City Attorney

TR/dg
Enclosures

cc: C. R. Baldwin

cc: Justin Maute
Larry Farmer
Ken Garzini

EXHIBIT 1

March 16,1983

Senator Don Gilman
Pouch V, Mail Stop 3100
Juneau, Alaska 99811

Re: SB 67

Dear Don:

I note that the above bill is now in the Community and Regional Affairs Committee. Please give serious consideration to a favorable report to the bill. Homer Electric has gotten into a real bind with the City of Kenai due to the significant increase in road construction which has been funded primarily by the State. The City has not allocated any portion of those proceeds to the costs of relocating utilities and has called upon Homer Electric to move the utilities and to bear the costs. Obviously the costs don't go away they just spread over a larger rate base. Fortunately the rest of the cities on the Peninsula have not taken this position but just a quick review of the Common Law convinces me that they might be within their legal rights to do so.

At the present time the claim by HEA against the City is well over $150,000.00, and the matter is being determined by the Public Utilities Commission which has jurisdiction over the purchase contract between HEA and the City. Any determination by the PUC will not affect the relationship of HEA with the other cities because basically the PUC is only being asked to interpret the contract under which HEA is purchasing the old KCL system.

It makes more sense and will be less expensive in the long run if the cities will fund the costs of relocation up front instead of requiring the Utilities to do the work, advance the money, and then attempt at some later date to

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collect that money thru a rate increase.

Thanks for your attention to a subject which is a vital concern to Homer Electric.

Very truly yours

C. R. BALDWIN

CRB/hs

cc: B. Kent Wick, General Manager
Homer Electric Association, Inc.

Sen. Paul Fischer
Rep. Milo Fritz
Rep. Hugh Malone
Rep. Bette Cato

EXHIBIT 2

CITY OF KENAI, ALASKA

ORDINANCE NO. 199-71

AN ORDINANCE of the City of Kenai, Alaska, providing for the submission to the qualified electors of the City at a special election to be held therein on 3 August, 1971 of a proposition of whether the City should enter into an agreement with Homer Electric Association, Inc. which would provide for the operation of the City's electric system by Homer Electric Association, Inc. and would further provide for the transfer of the ownership of the electrical system from the City to Homer Electric Association, Inc. upon the successful consumation of the agreement and would authorize, as a part of such agreement, a franchise or permit wherein Homer Electric Association, Inc. would be authorized to construct, direct, operate and maintain in, upon, along, across, above, over and under the streets, alleys, public ways and public places now laid out or dedicated and all extensions thereof and additions thereto in the City, poles, wires, cables, underground conduits, manholes and other electric fixtures necessary or proper for the maintenance and operation in the City of an electric distribution system and wires connected therewith and declaring an emergency.

WHEREAS, the City has established and is presently maintaining and operating a municipal electric power system, and in connection therewith owns and operates properties for the purchase, transmission, distribution, supply and sale of electric power and energy; and is engaged in the business of selling and supplying electric power and energy to residential, commercial, industrial and governmental consumers within and about the City of Kenai, Alaska; and

WHEREAS, Homer Electric Association, Inc. (hereinafter called "HEA"), as an electric cooperative created and existing under the laws of the State of Alaska, engages, among other utility activities, in the business of purchasing, transmitting, distributing, supplying, and selling electric energy within the State of Alaska; and

WHEREAS, HEA's electrical system is or can be interconnected with the system of the City for the purpose of furnishing standby electric power; and

WHEREAS, the City Council of the City of Kenai ("Council") deems that the operation by HEA of City's electric system would be beneficial to the City and to City's users and consumers of electric energy; and

WHEREAS, the Council has resolved that such operation of the City's electric system can be accomplished by means of an operating agreement between the City and HEA; and

WHEREAS, the Board of Directors of HEA has determined that it is to the interest of HEA that an agreement should be entered into for the operation of the City's electrical system under the terms and conditions hereinafter set forth; and

WHEREAS, the parties have reached a basic understanding concerning the terms and conditions relative to the transfer of the operation and management of the electric system to HEA and the conveyance of the City's electrical system to HEA and the City Council desires to have the voters approve their entry into such Agreement within the guidelines set forth herein; and

WHEREAS, the Board of Directors of HEA desire to have a franchise or permit to operate within the City of Kenai and the Council has resolved that such a franchise or permit should be granted as is more fully set forth hereinafter; and

WHEREAS, the charter of the City requires that the question of whether the City should enter into the Agreement for the operation and transfer of its electric system to HEA and whether as a part of such Agreement a franchise or permit to operate an electrical distribution system should be granted to HEA should be submitted to the qualified electors of the City for their ratification or rejection;

NOW, THEREFORE BE IT ORDAINED by the Council of the City of Kenai, Alaska as follows:

Section 1. Definitions.

1. The "System" means all tangible properties and property rights which, (as of the effective date of the Agreement) are being used by the City for, or are useful for, the transmission and distribution of electric energy and power within the limits of the City and in such area adjacent thereto as may be presently served by said System. Said tangible property shall include real property, rights-of-way, easements, poles and pole lines, crossarms, sub-stations, transformers, station equipment, meters, and other tangible property of every kind and description which are now used, owned and operated by the City in the operation of said System, together with any and all additions, betterments, improvements and extensions thereof which may hereafter be acquired and made a part of said System under the terms of this agreement; the System shall also include all rights and obligations which the City shall have under that certain contract existing between the City and Consolidated Utilities, Ltd., dated September 11, 1963, covering the generation by Consolidated and the purchase by the City of electric energy. The aforesaid definition of the System shall not include cash in the Revenue Fund of the System as of the effective date of the agreement, nor shall it include any of the funds, securities, investments or assets in any of the Bond Redemption Funds or Reserve Accounts of the Bond Redemption Funds or any sinking fund pertaining thereto, provided, however, that funds, securities, investments or assets in any such Bond Redemption Funds, Reserve Accounts or sinking funds shall be held and applied by the City for the purpose of redeeming Electric Light and Power Bonds of the City as herein defined in accordance

with the provisions of said bonds and the ordinances of the City.

2. "Outstanding Bonds" shall mean the City of Kenai, Alaska Electric Light and Power Revenue Bonds issued as follows: the 1963 City of Kenai, Alaska, Electric Light and Power Revenue Bonds in the original principal amount of $425,000, authorized by Ordinance No. 54 of the City, passed and approved on October 10, 1963; the City of Kenai, Alaska, Electric Light and Power Revenue Bonds, 1964, in the original principal amount of $25,000, authorized by Ordinance No. 70 of the City, passed and approved on the 26th day of August, 1964; the City of Kenai, Alaska, Electric Light and Power Revenue Bonds, 1967, in the original principal amount of $300,000, authorized by Ordinance No. 124 of the City, passed and approved on September 20, 1967; the City of Kenai, Alaska, Electric Light and Power Revenue Bonds, 1969, in the original principal amount of $25,000, authorized by Ordinance No. 174, passed and approved February 4, 1970; the City of Kenai, Alaska, Electric Light and Power Revenue Bonds, 1970, in the original principal amount of $275,000, authorized by Ordinance No. 180 of the City, passed and approved on May 20, 1970. Attached hereto, marked Exhibit C, is a schedule showing (1) the total amount of outstanding indebtedness upon each of the aforesaid Electric Light and Power Revenue Bond issues, and (2) the amounts of principal and interest payments required to be made each year hereafter upon each such issue of revenue bonds from the date hereof to the final maturity date of the bonds of each such issue.

3. The "Kenai 1963 Electric Light and Power Revenue Fund" shall mean the fund of that name created by Ordinance No. 54 into which are paid all gross earnings and revenue derived by the City from the operation of its System and all additions and improvements thereto and extensions thereof.

Section 2. The City shall, if approved by the voters, at the special election herein provided for, enter into an Agreement (hereinafter Agreement) with HEA which Agreement shall provide substantially as follows:

1. For HEA to manage and operate the System for and on behalf of the City of Kenai.

2. For the maintenance of the Kenai 1963 Electric Light and Power Revenue Fund as a trust fund for the payment of the Outstanding Bonds.

3. For HEA to assume and agree to perform all of the services and to provide all supplies and materials necessary to maintain and operate the System and for HEA to covenant and agree to maintain the System in good condition and repair and to meet all of the covenants heretofore made by the City with the holders of the Outstanding Bonds.

4. For HEA to interconnect its existing electrical distribution system with that of the City to the extent that the same may become necessary to provide continuous uninterrupted service for the inhabitants of the City of Kenai.

5. For HEA to provide for additions, improvements, betterments and extensions of the System which, in its judgment, will provide for the full, complete, efficient operation of electric power, light and energy as may be required from time to time by such consumers and users.

6. For HEA to pay into such accounts as may be created by the Agreement, sufficient sums to pay the Outstanding Bonds, maintenance and operation costs, protection of all reserve accounts and payment of any other necessary costs and expenses for maintaining and operating the System and for the payment of any balance to

HEA as reimbursement for wholesale power costs (as defined in the Agreement); its normal costs of maintenance and operation; costs of renewals and replacements of the System and additions, and betterments thereto and as payment for the services of HEA rendered in the management and operation of the System.

7. For HEA to pay to the City upon the effective date of the Agreement (1) a sum in cash equal to the money in value on such date of the investments in the several reserve accounts now held in the several bond funds, (2) a sum in cash sufficient to reimburse the City for moneys expended from the City General Fund for purposes of the system and (3) a sum equal to the value of all personal property used in the operation of the System which may be payable according to the terms of a negotiable note in equal monthly installments to bear interest at the rate of 6% per annum upon diminishing balances.

8. For HEA to account to the City for the operations of the System during each month it operates the System, including an itemized statement of all receipts and disbursements including amounts expended for maintenance, labor cost, additions, improvements, betterments and extensions. The City shall reserve the right to inspect books and records of HEA in so far as they pertain to the operation of the System.

9. For HEA to utilize the same billing policies and procedures as have heretofore pertained to the operation of the System by the City.

10. For the City to grant to HEA a franchise or permit to operate an electical distribution system within the City for a period of 30 years from the effective date of this Agreement.

11. For HEA to make any and all renewals and replacements, extensions, additions, improvements, and betterments

to the System in accordance with the same standards and criteria which HEA would operate its own electric properties and business.

12. For HEA to render an accounting to the City each year, showing in reasonable detail all retirements and renewals, replacements, additions, betterments, extension and improvements to the System made during the preceding calendar year.

13. For HEA to seek and secure the approval of the administrator for the Rural Electrification Administration Department of Agriculture, United States of America to the Agreement.

14. For HEA to endeavor to take into its employ all of the employees of the City's electrical system, excepting supervisory employees, at the same wage scale which are applicable to present employees of HEA in the same classification of employment and the seniority measurment by their continuous employment by the City immediately prior to the beginning of the Agreement.

15. For HEA to base a working crew within the City sufficient and adequate to properly service the System.

16. For HEA to agree not to discriminate in the sale of electrical energy between those who live within the City of Kenai and those who live without the City of Kenai unless there is a rational and justifiable cost basis for so doing.

17. For either party to suspend its obligations under the Agreement during the time it is prevented from doing so by force majeure, which means acts of God, strikes, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrest and restraints of government and people, civil disturbances, explosions, breakdown of machinery or equipment and any other

cause not within the control of the party claiming suspension.

18. For the City to retain the right to terminate the Agreement should HEA become insolvent or become default in any of its obligations, or ask for a receiver or file a petition in bankruptcy or under the reorganization provisions of the Bankruptcy Act of the United States.

19. For the City to retain title and ownership of the System until the full performance of the Agreement.

20. For transfer of the System to HEA upon full performance of the Agreement according to its terms and upon payment of or provision for payment of all principal and interest on all of the Outstanding Bonds.

21. For the Agreement to become effective upon the first day of the calendar month after the voters have approved the entry by the City Council into the Agreement and after the Agreement shall have been ratified and approved by the Board of Directors of HEA and by the Rural Electrification Administration of the Department of Agriculture, United States of America which ever date shall last occur.

22. For the City to continue to operate the System for the sole account and benefit of the City until the Agreement is effective.

23. For such other terms and conditions to be made a part of the Agreement as the Council shall deem necessary or desirable for the protection of the City and the System.

Section 3. If the voters approve the entry into the Agreement between the City and HEA as hereinabove set forth, the City will be obligated to grant a franchise or permit to HEA, and HEA desires to have a franchise or permit to operate an electrical distribution system during the time the Agreement

is in force, and thereafter when the System will be transferred to HEA as provided in the Agreement. The City therefore does grant to HEA, a franchise or permit to operate an electrical distribution system within the City on the terms and conditions set forth hereinafter.

During the time HEA is operating the System and prior to the time the System is transferred to HEA, HEA shall maintain the System, and HEA's system as separate entities, and maintain separate books and accounts, and the provisions of this ordinance relative to the franchise shall not be applicable to the system as distinguished from HEA's system. Following the transfer of the System to HEA, all of the provisions of this ordinance relative to the franchise or permit shall be applicable to any extension of the HEA's System into the City.

Section 4. Grant of Authority.

There is hereby granted by the City to HEA the right and privilege to construct, erect, operate and maintain, in, upon, along, across, above, over and under the streets, alleys, public ways and public places now laid out or dedicated, and all extensions thereof, and additions thereto, in the City, poles, wires, cables, underground conduits, manholes and other electric fixtures necessary or proper for the maintenance and operation in the City of an electric distributuion system and wires connected therewith.

The right to use and occupy said streets, alleys, public ways and places for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use of said streets, alleys, public ways and places, to any person at any period of this franchise.

Section 5. Compliance with Applicable Laws and Ordinances.

HEA shall, at all times during the life of this franchise, be subject to all lawful exercise of the police power by the City, and to such reasonable regulation as the City shall hereafter by resolution or ordinance provide.

Section 6. HEA Liability - Indemnification.

It is expressly understood and agreed by and between HEA and the City that HEA shall save the City harmless from all loss sustained by the City on account of any suit, judgement, execution, claim, or demand whatsoever, resulting from negligence on the part of HEA in the construction, operation or maintenance of its electric system in the City. The City shall notify HEA's representative in the City within ten (10) days after the presentation of any claim or demand, either by suit or otherwise, made against the City on account of any negligence as aforesaid on the part of HEA.

Section 7. Service Standards.

HEA shall maintain and operate its plant and system and render efficient service in accordance with the rules and regulations as are, or may be, set forth by the Council as provided in Section 5 of this ordinance, or by the Public Utilities Commission of the State of Alaska.

1. Meter Accuracy. All electric service shall be supplied through meters which shall accurately measure the amount of electricity supplied to any consumer.

   a. Request for Meter Check. HEA shall at any time when requested by a consumer make a test of the accuracy of any electrical service meter.

   b. Result of Meter Check. If, upon test, it is found that such meter overruns to the extent of

2 percent or more, HEA shall pay the cost of such tests and shall make a refund for overcharges collected since the last known date of accuracy but for not longer than 60 months, on the basis of the inaccuracy found to exist at the time of the tests. If the meter is found to be accurate or slow or less than 2 per cent fast, the customer shall pay the reasonable cost of such testing.

c. Compulsory Check. Every meter, whether complained of or otherwise, shall be removed from service at least once each seven years and thoroughly tested for its accuracy. Any meter found inaccurate upon any test beyond a tolerance of 2 percent shall not be returned to service until properly adjusted.

2. Notice of Interruption for Repairs. Whenever it is necessary to shut off or interrupt service for the purpose of making repairs, adjustments, or installation, HEA shall do so at such time as will cause the least amount of inconvenience to its customers, and unless such repairs are unforeseen and immediately necessary, it shall give reasonable notice thereof to the consumers.

Section 8. HEA Rules.

HEA shall have the authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable HEA to exercise its rights and perform its obligations under this franchise, and to assure an uninterrupted service to each and all of its customers. Such rules, regulations, terms and conditions shall not be in conflict with the provisions hereof or of laws of the

State of Alaska, and shall be subject to approval by the Public Utilities Commission of the State of Alaska.

Section 9. Conditions on Street Occupancy.

1. Use. All transmission and distribution structures, lines and equipment erected by HEA within the City shall be so located as to cause minimum interference with the proper use of streets, alleys and other public ways and places, and to cause minumum interference with the rights or reasonable convenience of property owners who adjoin any of the said streets, alleys or other public ways and places.

2. Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing, HEA shall, at its own cost and expense and in a manner approved by the City Inspector, replace and restore all paving sidewalks, driveway or surface of any street or alley disturbed, in as good condition as before said work was commenced.

3. Relocation. In event that at any time during the period of this franchise the City shall lawfully elect to alter, or change the grade of, any street, alley or other public way, HEA, upon reasonable notice by the City, shall remove, relay, and relocate its poles, wires, cables and other electrical fixtures at its own expense.

4. Placement of Fixtures. HEA shall not place poles or other fixtures where the same will interfere with any electric light, telephone wire or conduit, water hydrant or water main, and all such poles or other

fixtures shall be placed at the outer edge of the sidewalk and inside the curb line, and those placed in alleys shall be placed close to the line of the lot abutting on said alley, and then in such a manner as not to interfere with the usual travel on said streets, alleys and public ways.

5. Temporary Removal of Wire for Building Moving. HEA shall, on the request of any person holding a building moving permit issued by the City temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal, raising or lowering of wires shall be paid by the person requesting the same, and HEA shall have the authority to require such payment in advance. HEA shall be given not less than forty-eight hours' advance notice to arrange for such temporary wire changes.

6. Tree Trimming. HEA shall have the authority to trim trees upon and overhanging streets, alleys, sidewalks and public places of the City so as to prevent the branches of such trees from coming in contact with the wires and cables of HEA, all trimming to be done under the supervision and direction of the City and at the expense of HEA.

Section 10. Preferential or Discriminatory Practices Prohibited. HEA shall not, as to rates, charges, service facilities, rules, regulations, or in any other respect, make or grant any preference or advantage to any person, nor subject any person to any prejudice or disadvantage, provided that nothing in this franchise shall be deemed to prohibit the establishment, of a graduated scale of charges and classified rate schedules to which

any customer coming within such classification would be entitled.

Section 11. Extension Policy. HEA shall file with the City Clerk its extension policy as filed, with, and approved by, the City Council and the Public Utilities Commission of the State of Alaska and HEA shall not make or refuse to make any extension except as permitted by this ordinance.

1. Publication. Upon acceptance of this franchise, HEA at its own expense, shall cause to have published in a newspaper of general circulation in the City its extension policy as filed with, and approved by, the City Council and the Public Utilities Commission of the State of Alaska and shall annually send to each of its customers living within the corporate limits of the City a copy of such extension policy.

Section 12. Approval of Transfer. HEA shall not sell or transfer its plant or system to another, nor transfer any rights under this franchise to another without Council approval. No sale or transfer shall be effective until the vendee, assignee or lessee has filed in the office of the City Clerk an instrument, duly executed, reciting the fact of such sale, assignment or lease, accepting the terms of the franchise, and agreeing to perform all the conditions thereof.

Section 13. City Rights in Franchise.

1. City Rules. The right is hereby reserved to the City to adopt, in addition to the provisions herein contained and existing applicable ordinances, such additional regulations as it shall find necessary in the exercise of the police power, provided that such regulations, by ordinance or otherwise, shall not be in conflict with the laws of the State of Alaska.

2. Use of System by City. The City shall have the right, during the life of this franchise, free of charge, where aerial construction exists, of maintaining upon the poles of the City within the City limits wire and pole fixtures necessary for a police and fire alarm system, such wires and fixtures to be constructed and maintained to the satisfaction of the City and in accordance with its specifications.

a. Compliance with HEA Rules. The City in its use and maintenance of such wires an fixtures, shall at all times comply with the rules and regulations of HEA so that there may be a minimum danger of contact or conflict between the wires and fixtures of HEA and the wires and fixtures used by the City.

b. Liability. The City shall be solely responsible for all damage to persons or property arising out of the construction or maintenance of said wires and fixtures authorized by this Section and shall save HEA harmless from all claims and demands whatsoever arising out of the attachment, maintenance, change or removal of said wires and fixtures to the poles of HEA. In case of rearrangement of HEA plant or removal of poles or fixtures the City shall save HEA harmless from any damage to persons or property arising out of the removal or construction of its wires or other fixtures.

3. Supervision and Inspection. The City shall have the right to supervise all construction or installation work performed subject to the provisions of this

ordinance and to make such inspections as it shall find necessary to insure compliance with governing ordinances.

4. Procedure after Termination or Revocation. Upon the revocation of this franchise by the Council, or at the end of the term of this franchise, the City shall have the right to determine whether HEA shall continue to operate and maintain its plant and distributing system pending the decisions of the City as to the future maintenance and operation of the plant and distribution system.

5. Right of Acquisition by the City. At the expiration of the term for which this franchise is granted, the City, at its election, and upon the payment of an amount which shall be determined by a valuation provided by the Alaska Public Utilities Commission or its successor, shall have the right to purchase and take over the property of HEA within the City limits of Kenai. Upon the exercise of this option by the City by the service of an official notice upon HEA to that effect, HEA shall immediately execute such deeds or instruments of conveyance to the City as shall be required to convey to the City title to the property in fee simple, free from any and all liens and encumbrances. HEA shall make it a condition of each contract entered into by it with reference to operations under this franchise that the contract shall be subject to the exercise of this option by the City and that the City shall have the right to be substituted for HEA as a party to any such contract and shall have the right to succeed to all privileges and the obligations thereof at its option.

6. Payment to City. HEA shall pay to the City for the privilege of operating its system under this franchise a sum equivalent to ____per cent (%) of the annual gross operating revenues taken in and received by it on all retail sales of electricity with the City.

7. Rates. Rates charged by HEA for service hereunder shall be fair and reasonable and designed to meet all necessary costs of the service, including a fair rate of return on the net valuation of its properties devoted thereto, under efficient and economical management. When this franchise takes effect HEA shall have the authority to charge and collect not to exceed the rates presently in effect or as approved by the Public Utilities Commission of the State of Alaska.

1. Savings to Customers. If during the term of this franchise HEA purchases electric energy, other than dump or emergency energy, for distribution, any savings which accrue to HEA by reason of such purchase of the electric energy used in the City shall be forthwith passed on to its consumers. If during the term of the franchise HEA receives refunds, or if the cost to HEA of providing electric service is reduced, by order of any regulatory body having competent jurisdiction the Company shall pass on to its customers such refunds or any savings resulting therefrom.

8. Records and Reports. The City shall have access at all reasonable hours to HEA's plans, contracts, and

engineering, accounting, financial statistical, customer and service records relating to the property and the operation of HEA and to all other records required to be kept hereunder. The following records and reports shall be filed with the City Clerk and in the local office of HEA.

1. Rules and Regulations. Copies of such rules, regulations, terms and conditions adopted by it for the conduct of its business.

2. Meter Checks. Reports of the results of all requested and compulsory meter checks.

3. Gross Revenue. An annual summary report showing gross revenues received by HEA from its operations with the City during the preceding year and such other information as the City shall request with respect to properties and expenses related to HEA service within the City.

9. Term of Franchise. The franchise and rights herein granted shall take effect and be in force from and after the approval by the voters of the City of this franchise at a special election to be called and; upon final execution and approval of the Agreement between HEA and the City which is set forth hereinabove and; upon filing of the required acceptance by HEA with the City Clerk and shall continue in force and effect for a term of thirty (30) years from the effective date of the Agreement.

10. Publication Costs. HEA shall assure the cost of publication of this franchise ordinance as such publication is required by law. A bill for publication

costs shall be presented to HEA by the City Treasurer upon the Company's filing of acceptance and shall be paid at that time.

11. Penalties. Any violation by HEA, its vendee, lessee or successors of the provisions of this franchise or any material portions thereof, or the failure promptly to perform any of the provisions thereof, shall be cause for the forfeiture of this franchise and all rights hereunder and the City, after written notice to HEA, advising of the default and continuation of such violation, failure or default for a period of sixty (60) days following said written notice, may declare this franchise void.

Section 14. A copy of this ordinance shall be filed in the office of the City Clerk and subject to public inspection for thirty (30) days after it is filed.

Section 15. A public hearing on whether or not this ordinance should be adopted shall be held at 8:00 o'clock P.M. at City Library 30 June, 1971 and the City Clerk is hereby directed to give notice of such public hearing by publication in the Cook Inlet Courier at least one week prior to the time set for the hearing.

Section 16. Within two (2) weeks after this ordinance has been finally adopted, HEA must file with the City Clerk its unconditional acceptance of all terms of the franchise or permit as set forth herein. HEA further must deposit with the Department of Finance of the City, an amount of money estimated by the City Clerk to be adequate to pay all expenses of holding the special election provided for herein.

Section 17. The proposition of whether or not the

City shall be authorized to enter into the Agreement with HEA on the terms and conditions set forth herein, or terms and conditions substantially similar thereto, and whether the City shall, as a part of such Agreement, adopt the franchise provisions of this ordinance, as described hereinabove, shall be submitted to the qualified electors of the City at a special election to be held therein on 3 August, 1971. Said proposition shall be in the following form:

PROPOSITION NO. 1

ELECTRIC LIGHT AND POWER
OPERATING AND FRANCHISE AGREEMENT

Shall the City of Kenai, Alaska enter into an Agreement with Homer Electric Association, Inc. (HEA) for the operation and management of the City's Electrical distribution system by HEA and if all the terms of the Agreement are met, provide for the transfer of all of the City's electrical distribution system to HEA and will as a part of said Agreement, grant a franchise or permit to HEA to operate and maintain an electrical distribution system on the public streets and alleys and other public places of the City of Kenai, for a period of thirty (30) years all as is more specifically provided in Ordinance No. 199 adopted June 30, 1971, which ordinance is hereby submitted for ratification?

OPERATING AND FRANCHISE ORDINANCE YES . . . /___/

OPERATING AND FRANCHISE ORDINANCE NO . . . /___/

Section 18. Those eligible to vote at said special election must possess the following qualifications:

1. They must be at least 19 years of age.

2. They must be citizens of the United States, and for at least one (1) year preceding the election citizens of the State of Alaska, and for thirty (30) days immediately preceding the election residents of the City of Kenai, Alaska.

3. They must be able to read and write the English language, as prescribed by law.

4. They must not be barred from voting by any other provision of law.

5. They must be registered in the manner prescribed in Section 6-3, 6-4, 6-5, 6-6, 6-7 and 6-8 of the Kenai Code, 1963.

Section 19. For elector or voter registration the book will be open daily in the office of the City Clerk, City Administration Building, Kenai, Alaska, from 9:00 o'clock A.M. until 5:00 o'clock P.M. daily, except Saturdays, Sundays and holidays. Registration shall be closed five (5) days preceding the Special election.

A duplicate registration index shall be furnished by the City Clerk-Registrar to the precinct judges and clerks of the election.

Section 20. Notice of this special election shall be published once a week for not less than two (2) consecutive weeks in a newspaper of general circulation in the City, and the first publication thereof shall be not less than fourteen (14) days prior to said election date. Said notice shall be published in the "Cook Inlet Courier" which is hereby determined to be a newspaper of general circulation within the City.

Notice of this special election shall also be posted on the official City bulletin board in or on the City Administration Building and in two (2) other conspicuous places with the City.

Section 21. The designated polling places will be the City Administration Building, and the Kenai Airport Terminal Building. Said polls shall be open from 8:00 o'clock A.M. to 8:00 o'clock P.M. on the 3 day of August, 1971.

Section 22. The following qualified electors of the

City are hereby designated and appointed to serve as judges and clerks at said special election:

	Judges		Clerks
Precinct No. 1	Frances Meeks	Chairman	Frances Meeks
	Marion Kempf		
	Sharon Young		
Precinct No. 2	Nedra Evenson	Chairman	Nedra Evenson
	Louise Carter		
	Peggy Nevers		

If a replacement shall be required for any of the above-named officials, such replacement may be appointed at any meeting of the City Council.

Section 23. This ordinance shall be published in full after its passage not more than four (4) weeks and at least two (2) weeks before the election hereinabove called is held.

Section 24. An emergency is hereby declared and the rules governing the introduction, reading, passage, and approval of this ordinance are hereby suspended and this ordinance will be immediately effective upon its passage and approval.

PASSED AND APPROVED this 29 day of December, 1971.

CITY OF KENAI, ALASKA

By _____
Mayor

ATTEST:

By _____
Acting City Clerk

CERTIFICATE

WE, THE MEMBERS OF THE KENAI CITY COUNCIL DO HEREBY CERTIFY THE RESULTS OF A CANVASS OF THE BALLOTS FOR THE SPECIAL ELECTION OF 3 AUGUST 1971, TO BE AS FOLLOWS:

OPERATING AND FRANCHISE ORDINANCE - - - - - YES 211

OPERATING ANDCFRANCHISE ORDINANCE - - - - - - NO 171

SPOILED BALLOTS 07 CHALLENGED BALLOTS 01

ABSENTEE BALLOTS 21 TOTAL BALLOTS CAST 304

John F. Steinbock, Mayor

Councilman Ira McCrady

Councilman Robert Bielefeld

Councilman Robert Morene

Councilman James Doyle

Councilman Hugh Malone

Councilman James Hornaday

ATTEST:

Sharon Sterling
Acting City Clerk

DATED: 4 August 1971

SAMPLE

SAMPLE

OFFICIAL BALLOT
CITY OF KENAI
SPECIAL ELECTION
TUESDAY, AUGUST 3, 1971

SAMPLE

PROPOSITION NO. 1

ELECTRIC LIGHT AND POWER
OPERATING AND FRANCHISE AGREEMENT

Shall the City of Kenai, Alaska enter into an Agreement with Homer Electric Association, Inc. (HEA) for the operation and management of the City's Electrical distribution system by HEA and if all the terms of the Agreement are met, provide for the transfer of all of the City's electrical distribution system to HEA and will as a part of said Agreement, grant a franchise or permit to HEA to operate and maintain an electrical distribution system on the public streets and alleys and other public places of the City of Kenai, for a period of thirty (30) years all as is more specifically provided in Ordinance No. 199 adopted June 30, 1971, which ordinance is hereby submitted for ratification?

OPERATING AND FRANCHISE ORDINANCE YES . . . /☐/

OPERATING AND FRANCHISE ORDINANCE NO . . . /☐/

EXHIBIT 3

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT KENAI

HOMER ELECTRIC ASSOCIATION, INC.,

Plaintiff,

vs.

CITY OF KENAI, a municipal corporation,

Defendant.

Case No. 3KN-83-461 CI.

ANSWER TO FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Comes now Defendant, City of Kenai, a home rule municipality, organized and existing under the laws of the State of Alaska, whose mailing address is as shown in the margin, and pleads and alleges as follows:

I

Defendant admits Paragraph 1 of the above captioned Amended Complaint.

COUNT I

II

Defendant admits Paragraphs 2, 3, and 6 of Count I of the First Amended Complaint.

III

Defendant is without sufficient knowledge or belief with which to answer Paragraph 5 of Count I of the First Amended Complaint and therefore denies the same.

IV

Defendant denies Paragraph 4 of Count I of the First Amended Complaint insofar as it alleges or infers an obligation or indemnification to Homer Electric Association, Inc. (hereinafter "HEA") by the City of Kenai for costs of relocation of electrical transmission facilities.

CITY OF KENAI

COUNT II

V

Defendant is without sufficient knowledge or belief with which to answer Paragraph 7 of Count II of the First Amended Complaint and therefore denies the same.

VI

Defendant admits Paragraph 8 of Count II of the First Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

Plaintiff has a common law obligation to relocate facilities at its own expense when necessary to make way for proper governmental use of the streets.

SECOND AFFIRMATIVE DEFENSE

Any rights of Plaintiff are subject to Defendant's exercise of its police powers which include required relocations of facilities to make way for public improvements.

THIRD AFFIRMATIVE DEFENSE

Any rights of Plaintiff are subject to the paramount right of the public to use of the right-of-way and Plaintiff must bear expenses of relocation or improvement incident to facilitating a public use.

FOURTH AFFIRMATIVE DEFENSE

The agreement between Plaintiff and Defendant, a copy of which is attached to the First Amended Complaint in the instant case, is not, wholly or partially, a "relocation agreement" in derogation of the common law.

FIFTH AFFIRMATIVE DEFENSE

Defendant could not, and cannot, directly or indirectly burden itself or its citizens with the costs of utility relocations.

SIXTH AFFIRMATIVE DEFENSE

Defendant maintains that any cost relocation subsequent to August 10, 1971, is provided for by Paragraph 11 of the agreement which provides in part:

"HEA covenants to indemnify and save the City harmless from any and all claims and liabilities by reason of any matter or thing arising out of the operation and management by HEA of the System during the term of this agreement."

SEVENTH AFFIRMATIVE DEFENSE

Defendant maintains a failure of consideration as to any alleged duty of payment by Defendant to Plaintiff for relocation costs.

EIGHTH AFFIRMATIVE DEFENSE

Defendant specifically reserves until specific dates are known, the affirmative defense of the Statute of Limitations, or latches as its alternative, as to any claimed relocation for which Plaintiff claims Defendant is financially responsible.

NINTH AFFIRMATIVE DEFENSE

Defendant asserts as an alternate partial affirmative Defense that amounts claimed as relocation costs by Plaintiff are excessive, and do not reflect appropriate, accurate charges relative to the value of equipment and facilities being replaced.

TENTH AFFIRMATIVE DEFENSE

Defendant maintains requiring HEA to bear relocation costs is reasonable and, pursuant to A.S. 42.05.251 constitutes a portion of the reasonable terms, conditions, and exceptions for the right to a permit to use public streets, alleys, and other public ways of Defendant.

COUNTERCLAIM

As a Counterclaim herein Defendant, City of Kenai, a home rule municipality, organizing and existing under the laws of the State of Alaska, alleges and pleads as follows:

1

The Agreement incorporated by reference in Plaintiff's First Amended Complaint provides as the last sentence to Paragraph 14 of said agreement that:

"HEA further covenants and agrees to base at all times a working crew within the City sufficient and adequate to properly service the system."

II

Since shortly after execution of the Agreement quoted immediately above, Plaintiff has been in breach of Paragraph 14 of the Agreement.

Wherefore, the Court is requested to construe the terms of the Agreement between the parties and:

1. Confirm the obligation of HEA to acquiesce to the reasonable exercise of Defendant's rights and powers in regard to electrical utility facilities relocations.

2. Declare that the Agreement between the parties contains no "relocation agreement" such as would burden Respondent with costs of relocations incident to public improvements.

3. Declare the obligation of HEA to establish and base an adequate working crew within the City of Kenai.

4. Such other and further relief as is just and equitable in the premises.

DATED at Kenai, Alaska, this 22 day of July, 1983.

Tim Rogers
City Attorney for Plaintiff

CITY OF KENAI

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT KENAI

HOMER ELECTRIC ASSOCIATION, INC.,	)
Plaintiff,	)
vs.	)
CITY OF KENAI, a municipal corporation,	)
Defendant.	)

Case No. 3KN-83-461CI

FIRST AMENDED COMPLAINT

Plaintiff, HOMER ELECTRIC ASSOCIATION, INC., through its attorney, C. R. BALDWIN, alleges as follows:

1. Plaintiff, hereinafter called HEA, is a co operative organized and existing under and by virture of the laws of the State of Alaska and has filed its report and paid its taxes last due.

COUNT I

2. On August 10, 1971, HEA entered into an Agreement with the City of Kenai, a home rule municipality existing under the laws of the State of Alaska. A copy of the Agreement, without exhibits, is attached hereto as Exhibit A.

3. In the Agreement the City of Kenai granted to HEA the right to manage and operate the electrical utility system owned by the City of Kenai.

4. Paragraph 13 of the Agreement provides in part:

> The City covenants to indemnify and save HEA harmless from any and all claims and liabilities by reason of any matter or thing arising out of the ownership or operation by the City of the System prior to the effective date of this Agreement.

5. The City of Kenai has made demand upon HEA to relocate certain electrical transmission facilities which had

C R BALDWIN
ATTORNEY
KENAI ALASKA 99611

been installed by the City of Kenai prior to August 10, 1971, and HEA has complied with such demands.

6. HEA has made demand upon the City of Kenai for payment of the costs associated with such work and the City of Kenai has refused to pay the same and has denied any liability therefor.

COUNT II

7. The City of Kenai has made demand upon HEA to relocate certain electrical transmission facilities which have been installed by HEA, and HEA has complied with such demands.

8. HEA has made demand upon the City of Kenai for payment of the costs associated with such work and the City of Kenai has refused to pay the same and has denied any liability therefor.

WHEREFORE, Plaintiff requests this Court to grant relief as follows:

1. To declare the rights and obligations of the parties with respect to the terms of the contract referred to above and to render a judgment declaring that said Agreement obligates the City of Kenai to indemnify HEA for the costs associated with relocating all electrical transmission facilities which were constructed by the City of Kenai prior to August 10, 1971, when such relocation is done at the instance of the City of Kenai.

2. To award Plaintiff a judgment against the Defendant in an amount in excess of $10,000.00, for costs associated with relocating Plaintiff's facilities, the exact sum to be such as shall be proven at trial.

3. To grant Plaintiff such other and further

relief as may be appropriate under the circumstances.

DATED: AT Kenai, Alaska, this 13 day of July, 1983.

C.R. BALDWIN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13 day of July 19 83 a true and correct copy was hand delivered to attorney of record.

by

AGREEMENT FOR THE OPERATION OF ELECTRIC UTILITY
OF THE CITY OF KENAI, STATE OF ALASKA

THIS AGREEMENT, made the 10th day of August, 1971, by and between the CITY OF KENAI, STATE OF ALASKA (hereinafter called "City"), and HOMER ELECTRIC ASSOCIATION, INC., a cooperative organized and existing under and by virtue of the laws of the State of Alaska (hereinafter called "HEA");

W I T N E S S E T H:

WHEREAS, the City has established and is presently maintaining and operating a municipal electric power system, and in connection therewith owns and operates properties for the purchase, transmission, distribution, supply and sale of electric power and energy; and is engaged in the business of selling and supplying electric power and energy to residential, commercial, industrial and governmental consumers within and about the City of Kenai, Alaska; and

WHEREAS, HEA, as an electric cooperative created and existing under the laws of the State of Alaska, engages, among other utility activities, in the business of purchasing, transmitting, distributing, supplying and selling electric energy within the State of Alaska; and

WHEREAS, HEA's electrical system is or can be interconnected with a system of the City for the purpose of furnishing standby electric power; and

WHEREAS, the City Council of the City of Kenai ("Council") deems that the operation by HEA of City's electric system would be beneficial to the City and to City's users and consumers of electric energy; and

WHEREAS, the Council has resolved that such operation of the City's electric system can be accomplished by means of an operating agreement between the City and HEA; and

WHEREAS, the Board of Directors of HEA has determined that it is to the interest of HEA that an agreement should be entered into for the operation of the City's electrical system under the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and of the mutual undertakings and agreements hereinafter set forth, the parties hereto agree as follows:

1. The electric utility system (hereinafter referred to as the "System") of the City shall include all tangible properties and property rights which, as of the effective date of this agreement, are being used by the City for, or are useful for, the transmission and distribution of electric energy and power within the limits of the City and in such area adjacent thereto as may be presently served by said System. Said tangible property shall include real property, rights-of-way, easements, poles and pole lines, crossarms, sub-stations, transformers, station equipment, meters, and other tangible property of every kind and description which are now used, owned and operated by the City in the operation of said System, together with any and all additions, betterments, improvements and extensions thereof which may hereafter be acquired and made a part of said System under the terms of this agreement; the System shall also include all rights and obligations which the City shall have under that certain contract existing between the City and Consolidated Utilities, Ltd., dated September 11, 1963, covering the generation by Consolidated and the purchase by the City of electric energy. The aforesaid definition of the System shall not include cash in the Revenue Fund of the System as of the effective date of the agreement, nor shall it include any of the funds, securities, investments or assets in any of the Bond Redemption Funds or in any of the Reserve Accounts of the Bond Redemption Funds or any sinking fund pertaining thereto, provided, however, that funds, securities, investments or assets in any such Bond Redemption Funds and Reserve Accounts or sinking funds shall be held and applied by the City for the purpose of redeeming Electric Light and Power Bonds of the City as herein defined in accordance with the provisions of said bonds and the ordinances of the City.

The properties and business as hereinbefore mentioned are more fully listed and described in Exhibit A hereto attached and made a part hereof. Said properties are situated and located as shown on Exhibit B attached hereto and made a part hereof.

2. Pursuant to proper authorization there have been issued revenue bonds of the City, generally known as "City of Kenai, Alaska, Electric Light and Power Revenue Bonds." The said issues of revenue bonds and the original

amounts of the bonds issued are as follows: the 1963 City of Kenai, Alaska, Electric Light and Power Revenue Bonds in the original principal amount of $425,000, authorized by Ordinance No. 54 of the City, passed and approved on October 10, 1963; The City of Kenai, Alaska, Electric Light and Power Revenue Bonds, 1964, in the original principal amount of $25,000, authorized by Ordinance No. 70 of the City, passed and approved on the 26th day of August, 1964; the City of Kenai, Alaska, Electric Light and Power Revenue Bonds, 1967, in the original principal amount of $300,000, authorized by Ordinance No. 124 of the City, passed and approved on September 20, 1967; the City of Kenai, Alaska, Electric Light and Power Revenue Bonds, 1969, in the original principal amount of $25,000, authorized by Ordinance No. 174, passed and approved February 4, 1970; the City of Kenai, Alaska, Electric Light and Power Revenue Bonds, 1970, in the original principal amount of $275,000, authorized by Ordinance No. 180 of the City, passed and approved on May 20, 1970. Attached hereto, marked Exhibit C, is a schedule showing (1) the total amount of outstanding indebtedness upon each of the aforesaid Electric Light and Power Revenue Bond issues, and (2) the amounts of principal and interest payments required to be made each year hereafter upon each such issue of revenue bonds from the date hereof to the final maturity date of the bonds of each such issue.

Pursuant to the provisions of Ordinance No. 54 aforesaid, a special fund was created, designated as the "Kenai 1963 Electric Light and Power Revenue Fund." Said ordinance and all of the aforesaid ordinances subsequently enacted provided, also, for the establishment of Bond Redemption Funds. Under each of said ordinances the City pledged and bound itself to pay into said Electric Light and Power Revenue Fund as collected all of the gross earnings and revenue derived by the City from the operation of its electric light and power system, and all additions and improvements thereto and extensions thereof, and all of the Electric Light and Power Revenue Bonds aforesaid excepting the $25,000 of bonds authorized by Ordinance No. 174 aforesaid were payable on a parity out of said Electric Light and Power Revenue Fund.

3. The City agrees that during the term of this agreement said Kenai 1963 Electric Light and Power Revenue Fund shall be maintained at the National Bank of Alaska, Kenai, Alaska, as a special trust fund for the uses and purposes herein set forth. Said Fund is hereinafter referred to as the "Escrow Account". Deposits into said Escrow Account and withdrawals therefrom shall be made in the manner hereinafter provided.

4. The City does hereby grant to REA the right, power and authority to manage and operate the System and REA does hereby agree to assume said management and operation for and on behalf of the City of Kenai, subject to the terms and conditions hereof.

5. REA does hereby assume and agree to perform all of the services and to provide all supplies and materials necessary to maintain and operate the System; REA covenants and agrees to maintain said System in good condition and repair, to operate the same in an efficient manner and at a reasonable cost, and to cooperate with the City to establish, maintain and collect rates and charges for light and power for so long as any of the aforesaid Electric Light and Power Revenue Bonds of the City shall be outstanding, sufficient to provide revenue available for the payment into the various Bond Redemption Funds of the City amounts equal to at least 1.4 times the average annual amount required to pay the principal of and interest on said bonds as the same shall become due, as provided in each of the aforesaid ordinances, and to be sufficient, further, to provide for the payment of normal costs of maintenance and operation of said System but before depreciation and before any taxes or payments in lieu of taxes. REA further agrees to comply with all covenants made by the City in the various ordinances authorizing the outstanding light and power revenue bonds of the City.

During the term of this contract and subject to the conditions hereinafter stated, REA covenants and agrees to provide a continuous, uninterrupted electric power and light service to the consumers and users of the System, which shall include the inhabitants, commercial and industrial users located within the City of Kenai and the vicinity thereof presently bei

served by the System, and to all such additional users and consumers who may be served thereby in the event that said System is enlarged, improved or expanded, whether within or without the corporate limits of the City; to accomplish such end MEA agrees to interconnect its existing electrical distribution system with that of the City to the extent that the same may become necessary to provide the continuous uninterrupted service required hereunder. MEA shall provide for such additions, improvements, betterments and extensions of the System as in the exercise of its best judgment shall be necessary and advisable to provide for the full, complete and efficient operation of the System and to provide such additional service to the consumers of electric power, light and energy as may be required from time to time by such consumers and users.

6. MEA shall pay into the aforesaid Escrow Account, on or before the first day of each month following the first month of the effective date of this agreement all of the gross earnings and revenues derived from the operation of the aforesaid electric light and power system and all additions and improvements thereto and extensions thereof.

In the event such gross earnings and revenues in any month shall not be at least equal to one-twelfth of 1.4 times the average annual amount required to pay the principal of and interest on the aforesaid Electric Light and Power Bonds of the City or the sum of $8,000, whichever is greater, MEA agrees to deposit additional funds each said month into said Escrow Account to supply such deficiency.

7. It is agreed that moneys in the Escrow Account shall be disbursed monthly in the following manner and in the following order of priority:

First. There shall be disbursed to the aforesaid several Bond Redemption Funds the sums required by ordinance to be deposited therein for the payment of the principal of and interest on the outstanding Electric Light and Power Revenue Bonds of the City.

Second. There shall be disbursed to the aforesaid several Reserve Accounts in the Bond Redemption Funds the sums required by ordinance to be deposited therein.

Third. The balance of the minimum amount required to be deposited into the Escrow Account by HEA pursuant to the last sentence of section 6 hereof shall be disbursed to a special trust fund which the City shall establish at the National Bank of Alaska, Kenai, Alaska. Moneys in said special trust fund shall be used solely to pay the principal of and interest and premium, if any, on the aforesaid bonds.

Fourth. The balance of the funds deposited in said Escrow Account shall be disbursed to HEA as reimbursement for Wholesale Power Costs, the normal costs of maintenance and operation, costs of renewals and replacements of the System and additions and betterments thereto and as payment for the services of HEA rendered in the management and operation of the System.

"Wholesale Power Costs" as referred to herein shall include wholesale power costs which shall be paid by HEA for the City under the contract dated September 11, 1963, as heretofore amended, between the City and Consolidated Utilities, Ltd. and any other power costs that may be incurred by HEA hereunder.

The payments required by this section to be made into the Bond Redemption Funds, the Reserve Accounts and the special trust fund shall continue until there has been set aside therein money and investments maturing at such time or times and bearing interest to be earned thereon in amounts sufficient to redeem and retire all the outstanding light and power revenue bonds of the City in accordance with their terms.

It is agreed and understood that nothing herein shall in any manner change, modify or affect the existing aforesaid Bond Redemption Funds and Reserve Accounts therein of the City or change in any way, alter, modify or affect any of the covenants, obligations or contracts of the City with respect to each of said Bond Redemption Funds and Reserve Accounts, all as provided in the aforesaid ordinances respectively.

8. HEA, upon the effective date of this agreement, agrees to pay to the City the following sums:

(1) A sum in cash equal to the money and value on such date of the investments in the several Reserve Accounts.

(2) The sum of $100,000 in cash to reimburse the City for moneys expended from the City's General Fund for the purposes of the System.

(3) A sum equal to the value of all personal property used in the operation of the System, which shall be payable according to the terms of a negotiable promissory note in 120 equal monthly installments, the first of which shall be paid on the first day of the month following the effective date of this agreement. Said promissory note shall provide for interest at the rate of 6% per annum upon the diminishing balances thereof.

9. At the time of its monthly deposit into the aforesaid Escrow Account, HEA shall deliver to the City an itemized account of the operations of the System during the preceding month, including an itemized statement of all receipts and disbursements, including amounts expended for maintenance, labor costs, additions, improvements, betterments and extensions. The City shall have the right at the end of each quarterly period of each year to inspect the books and records of HEA insofar as the same pertain to the operation of the System as herein defined. HEA will utilize the same billing policies and procedures relating to all bills for electric service rendered as have been in effect heretofore and shall have the same rights and power with reference to the collection of charges due for electric service as have heretofore pertained to the operation of the System by the City.

10. The City agrees to grant to HEA to such extent as may be required by law a permit to operate the System within the City's streets, alleys and rights-of-way, which permit shall be for a period of thirty (30) years from and after the effective date of this agreement. Said permit will remain in force and effect following the termination of this agreement for any unexpired portion of said 30-year period following such termination.

11. HEA, within a reasonable time and at its own expense, shall make any and all renewals and replacements, extensions, additions, improvements and betterments to the System in accordance with the said standards and criteria under which HEA would operate its own electric properties and busines HEA agrees, on or before the first day of February each year, to furnish the city with an annual statement in reasonable detail showing all retirements of and renewals, replacements, additions, betterments, extensions and improvement to the System made during the preceding calendar year. Such statement shall include the following information:

(1) A description of the replacement, addition, betterment, extension or improvement; and

(2) A statement of the cost of the replacement, betterment, extension or improvement.

All of any such replacements, betterments, extensions or improvements shall upon installation become and thereafter remain a part of the System.

12. The Council of the City of Kenai agrees upon the execution of this agreement to enact an ordinance and call an election in the manner and form provided by the Charter of the City of Kenai to effectuate this agreement

13. Upon the execution of this agreement the Board of Directors of HEA shall approve and ratify this agreement by appropriate action. Any such approval shall be subject to and not be effective until the same is approved by the Administrator, Rural Electrification Administration, Department of Agriculture, United States of America. HEA undertakes to diligently make, file and apply for any orders and authority from the Rural Electrification Administration of the United States of America which may be required.

The City Attorney of the City of Kenai shall furnish HEA with an opinion in writing satisfactory to HEA to the effect that the City is duly and legally authorized to make and enter into this agreement for the term thereof and to carry out and perform all of the terms, provisions and conditions of this agreement binding upon the City in a manner consistent with the intent hereof. The City covenants to indemnify and save HEA harmless from any and all claims and liabilities by reason of any matter or thing arising out of the ownership or operation by the City of the System prior to

the effective date of this agreement. MEA covenants to indemnify and save the City harmless from any and all claims and liabilities by reason of any matter or thing arising out of the operation and management by MEA of the System during the term of this agreement.

14. MEA agrees, effective as of the date of the beginning of this agreement, that it will endeavor to take into its employ all of the employees of City's electric system excepting supervisory employees at the same wage scales which are applicable to present employees of MEA in the same classification of employment and with seniority measurement by their continuous employment by the City immediately prior to the beginning of this agreement. MEA further covenants and agrees to base at all times a working crew within the City sufficient and adequate to properly service the System.

15. In the event of either party hereto being rendered unable wholly or in part by force majeure to perform its obligations hereunder other than to make payments due hereunder, it is agreed that upon such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause, so far as possible, shall be remedied with all reasonable speed. The term "force majeure" as employed herein shall mean acts of God, strikes or other industrial disturbance, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, f washouts, arrests and restraints of government and people's civil disturbances explosions, breakdown of machinery or equipment and any other causes, whether of a kind herein enumerated or otherwise, not within the control of the party claiming suspension, and which by the exercise of due diligence such party is unable to prevent or overcome.

It is understood and agreed that the settlement of strikes shall be entirely within the discretion of the party experiencing same and the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes by acceding to the demands of the organization on strike when such course is, in the judgment of the party experiencing the strike, inadvisable.

11. HEA, within a reasonable time and at its own expense, shall make any and all renewals and replacements, extensions, additions, improvements and betterments to the System in accordance with the said standards and criteria under which HEA would operate its own electric properties and business. HEA agrees, on or before the first day of February each year, to furnish the city with an annual statement in reasonable detail showing all retirements of and renewals, replacements, additions, betterments, extensions and improvements to the System made during the preceding calendar year. Such statement shall include the following information:

(1) A description of the replacement, addition, betterment, extension or improvement; and

(2) A statement of the cost of the replacement, betterment, extension or improvement.

All of any such replacements, betterments, extensions or improvements shall upon installation become and thereafter remain a part of the System.

12. The Council of the City of Kenai agrees upon the execution of this agreement to enact an ordinance and call an election in the manner and form provided by the Charter of the City of Kenai to effectuate this agreement.

13. Upon the execution of this agreement the Board of Directors of HEA shall approve and ratify this agreement by appropriate action. Any such approval shall be subject to and not be effective until the same is approved by the Administrator, Rural Electrification Administration, Department of Agriculture, United States of America. HEA undertakes to diligently make, file and apply for any orders and authority from the Rural Electrification Administration of the United States of America which may be required.

The City Attorney of the City of Kenai shall furnish HEA with an opinion in writing satisfactory to HEA to the effect that the City is duly and legally authorized to make and enter into this agreement for the term thereof and to carry out and perform all of the terms, provisions and conditions of this agreement binding upon the City in a manner consistent with the intent hereof. The City covenants to indemnify and save HEA harmless from any and all claims and liabilities by reason of any matter or thing arising out of the ownership or operation by the City of the System prior to

16. HEA agrees that unless required by order of the Public Service Commission of the State of Alaska, it will not sell or deliver electric utility power or electric power or lighting service to users or consumers living outside the corporate limits of the City of Kenai at a more favorable rate or under more favorable terms than those served within the City of Kenai after taking into consideration wholesale power sources and the cost thereof.

17. In the event of any default in any of the obligations of HEA or in the event that any proceeding in bankruptcy or for an arrangement or reorganization under the Bankruptcy Act of the United States, or in the event of the appointment of a Receiver for the business, property or affairs of HEA, and in the event that any such action or proceeding be not dismissed within sixty (60) days from the commencement thereof, the City may, at its election, at any time thereafter declare this operating agreement to be terminated and at an end. In any such event the City shall be entitled to receive payment of any and all moneys then due under the terms of this agreement by HEA. Upon any such notice of cancellation and termination being given, HEA shall forthwith return the operation and management of the System to the City and shall deliver to the City all books of account, records, papers and documents pertaining to the operation of the said system.

18. The title to and ownership of the System and all of the properties and rights constituting the System shall remain with the City until the full performance of this operating agreement according to the terms herein set forth. Upon the payment of all principal and interest of each of the City of Kenai, Alaska, Electric Light and Power Revenue Bonds, as set forth in paragraph 2 hereof and in the exhibits hereto attached and upon the full retirement of all of said bonds the title to the System as herein defined and all of the component parts thereof shall thereupon pass to HEA, and at such time the City shall make, execute and deliver to HEA such grants, conveyances, assignments and title documents as may be necessary to effectuate such transfer of title.

19. At the effective date of this agreement the City shall deposit in a special escrow account at the aforesaid bank all meter deposits or secured deposits theretofore received from the consumers of the System. Said

deposits shall be retained in said Escrow Account for the purpose of complying with the provisions of the several agreements under which the same were deposited. In the event that any such deposits shall become forfeited to the City, the same shall be deposited in the aforesaid Escrow Account and be considered as part of the revenues of the System.

20. The effective date of this agreement shall be on the first day of the calendar month after a favorable election shall have been held by the City pursuant to this agreement and after the agreement shall have been ratified and approved by the Board of Directors of HEA and by the Rural Electrification Administration of the Department of Agriculture, United States of America, whichever date shall last occur. Pending said date the City shall continue to operate said System for the sole account and benefit of the City and at the City's risk.

This agreement shall terminate when all outstanding rights and obligations of the parties hereto have been fulfilled, and all of the outstanding Electric Light and Power Revenue Bonds have been retired or provision for such retirement has been duly made in accordance with the terms of such bonds, whichever is sooner.

21. Notices and communications required hereunder shall be deemed to be duly given and properly delivered if in writing and sent by United States mail, postage prepaid, addressed to the respective parties at the addresses stated below, or such other address as they shall respectively hereafter designate in writing, or personally delivered to any officer of the respective parties at such respective addresses unless otherwise provided herein:

City of Kenai
P. O. Box 580
Kenai, Alaska 99611

Homer Electric Association, Inc
P. O. Box 255
Homer, Alaska 99603

IN WITNESS WHEREOF, the City has caused this agreement to be executed and delivered in its name and behalf by its Mayor and its corporate

seal to be hereunto affixed and attested by its City Clerk each thereunto duly authorized, and HEA has caused this agreement to be duly executed and delivered in its name and behalf by its President and its corporate seal to be hereunto affixed and attested by its Secretary, each thereunto duly authorized, all as of the 10th day of August, 1971.

CITY OF KENAI, ALASKA

By _____
Mayor

ATTEST:

_____
City Clerk

HOMER ELECTRIC ASSOCIATION, INC.

By _____
President

ATTEST:

_____
Secretary

APPROVED:

_____
Administrator for Rural Electrification
Administration, Department of Agriculture,
United States of America

Presently, under AS 42.05.251 a utility company is entitled to a permit to use of the streets, alleys and other public ways "upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions" required by the City. Absent a contractual relationship to the contrary the applicable law is stated at 12 McQuillim Municipal Corporations, Section 3472 in that "the Grantee of a franchise to use the streets takes it subject to the right of the municipality to make public improvements whenever and wherever the public interest demands, and if the improvement causes injury to the company, as by requiring it to relay or change the location of its pipes, tracts, or poles, or otherwise, the Grantee of the franchise cannot recover damages from a municipality therefor." McQuillim further maintains in Section 34.74 (a) that "the fundamental common-law right applicable to franchises and streets is that the utility company must relocate its facilities and public streets when changes are required by public necessity. Accordingly, it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the Grantee of the franchise where public convenience or security requires it, even at the Grantee's own expense,....".

The recent success of the utility industry in the case of Chesapeake and Potomac Telephone Company of Virginia vs. Landrieu 674 Fed Second 298 (1982) wherein public utilities created under state law were found to qualify as "displaced persons" under the Uniform Relocation Assistance and Real Property Acquisitions Policy Act of 1970, so as to entitle them to reimbursement for relocation costs seems to have precipitated some sort of concerted activity on the utility industry's part to change the ingrained long standing common law rules of the game. The copy of the attached communication from the National Institute of Municipal Law Officers dated January 26, 1983, is indicative of a national concern regarding the potential economic impact of assessing municipalities for utility relocates.

We respectfully request that no legislation be passed which would burden municipalities with the cost of utility relocates. Thank you in advance for your assistance and cooperation in this matter.

Respectfully yours,

Tim Rogers
City Attorney

TR/dg

cc: Senator Don Gilman
Senator Paul Fischer
Representative Milo Fritz
Ginny Chitwood, Alaska Municipal League

Institute of Municipal Law Officers

1000 Connecticut Avenue, N.W., Suite 800, Washington, D.C. 20036 (202) 466-5424

National Municipal Litigation Center of the National Municipal Legal Defense Fund

January 26, 1983

Dear NIMLO Member:

We are compiling information about the potential econor impact of a recent Fourth Circuit decision on municipalities nationwide. The decision in C&P Telephone Co. v. Landrieu, 674 F.2d 298 (4th Cir. 1982), if upheld, will mean that pub utilities created under state law may qualify as "displaced persons" under the Uniform Relocation Assistance and Real P perty Acquisition Policies Act of 1970, so as to entitle th to reimbursement for the cost of removing equipment from pu rights-of-way to accommodate projects funded with federal monies. On January 17, 1983, the United States Supreme Cou granted certiorari to review the Fourth Circuit ruling in t case (Norfolk Redevelopment and Housing Authority v. C&P Telephone Co. of Virginia, No. 81-2332).

There is concern about the potential impact of the de- cision on the availability of redevelopment funds if, contr to state common law, utilities are to be reimbursed for the cost of relocating utility facilities from project areas. For example, in the NRHA v. C & P Tel. Co. case, projection are that the utility's claim could reach $1 million with interest accrued since the mid-1970's.

In order to determine the implications of the Fourth Circuit ruling, we ask that all NIMLO members take time to answer, either affirmatively or negatively, the questions i the short survey on the back of this letter. The informati gathered from your responses will be compiled for use eith any NIMLO amicus brief that may be approved and prepared o the petitioner Authority or other amici involving in the c BECAUSE THE BRIEFING SCHEDULE REQUIRES THAT ANY SUCH INFOR TION TO BE CONSIDERED BY THE COURT MUST BE PRESENTED BY MA 3, WE REQUEST THAT YOUR RESPONSES BE MAILED TO THE NIMLO W INGTON OFFICE AT THE ABOVE ADDRESS BY FEBRUARY 10 (postmark

While we realize that this is a short turnaround time, we hope that you will understand the circumstances and nee for urgency. As in the past, the information provided to ours by NIMLO members may have significant persuasive val in this case.

Sincerely,

Charles S. Rhyne

Charles S. Rhyne
General Counsel

CSR:crj

Mid-year Seminar, Washington, D.C., May 8-10, 1983
44th Annual Conference, Milwaukee, Wisconsin, August 17-20, 1983

1. Does state law provide (t public utilities are responsibl(for the costs of removi., their equipment from public right-of-way at the request of the municipality? ☐ yes ☒ no ☐ don't know

a.) Are relocation costs considered by the state regulatory agency responsible for approving utility rates? ☐ yes ☐ no ☒ don't know

2. Does the grant of a franchise to a public utility by your municipality carry an express provision concerning liability for the cost of removing above ground utility equipment at the municipality's request? ☐ yes ☒ no ☐ don't know

If so,

a.) The utility must bear the cost. ☐ yes ☐ no ☐ don't know

b.) The municipality will reimburse the utility for relocation cost. ☐ yes ☐ no ☐ don't know

c.) Does the same provision apply to removal of underground equipment? ☐ yes ☐ no ☐ don't know

3. Has a public utility ever requested reimbursement of relocation costs from your municipality or any separate governmental entity serving part of your municipality? ☒ yes ☐ no ☐ don't know

If so, equipment above ground ☒ underground ☐ don't know ☐
name of action _____
highest level of decision Presently before the the Alaska Public Utilitie
cite, if reported case _____ Commissi
disposition, including any amounts awarded _____

4. Are any such claims (see #3) for relocation expenses currently pending? ☒ yes ☐ no

If so, equipment above ground ☒ underground ☐ don't know ☐
a.) name of action _____
court or agency in which filed Alaska Public Utilities Commission
date claim filed _____

** AMOUNT OF CLAIM 50,000+

b.) Did the 4th Circuit decision in C&P Tel. Co. v. Landrieu serve as a catalyst to encourage this claim? ☐ yes ☐ no ☒ don't know

5. Do you foresee a possibility of any such claims (see #3) being made in connection with specific projects? ☒ yes ☐ no ☐ don't know

If so, equipment above ground ☒ underground ☒ don't know ☐
kind of project _____
category of federal funding _____
**potential amount of claim will not be reported publicly with any specific reference as to origin) unknown

6. Comments or explanation:

ENCLOSED PLEASE FIND A COPY OF SB 67 PRESENTLY BEFORE THE ALASKA LEGISLATURE

Submitted by: name Tim Rogers title City Attorney
municipality City of Kenai date 2/8/83

-- Please return to: NLRB, Suite 900, 1000 Connecticut Avenue, N.W., Washington, DC 20036

TELEFAX COVER SHEET

TO: Tim Rogers PHONE: 283-7535

FROM: Sen. Gilman PHONE: 465-4935

INSTRUCTIONS: Please call

RECEIVED: DATE: 3/3/83 TIME: 5:00 p.m.

SENT: DATE: _____ TIME: _____

BY: (YOUR OFFICE AND PHONE NO.)

DISPOSAL OF ORIGINAL: _____ THROW AWAY

_____ HOLD FOR PICK UP

NUMBER OF PAGES: 2 (NOT COUNTING THIS COVER SHEET)

February 17, 1984

To: Rep. John Cowdery, Chairman
From: Ken Johnson, Committee Aide
RE: SB 67

House Committee Substitute For Committee Substitute for Senate Bill 67 would change Alaska statutes reguarding the relocation of utility facilities incident to highway construction. Current statutes place the burden of these cost on the utility companies themselves. If this bill were to become law, a much greater percentage of utility facility relocation would be paid for by municipalities.

The intention of this legislation is to define the cost of relocation and give a clearer understanding as to the responsibility of both the municipailties and the utilitiy companies in determining which party will bear the cost of relocation.

Senate Bill 67 passed first from Labor and Commerce in the other body. It was amended on the floor and sent to the House where it was referred to Community and Regional Affairs and then to Labor and Commerce. Each committee of referal has made amendments to the bill.

By direction of the chairman, this committee had a committee substitute of SB 67 drafted. This is the bill before the committee today. In concept it is very similar to the draft which passed from the Senate and this committee has heard testimony on this version of the bill in the past. The purpose of this hearing today is not to take the same testimony offered before. It is to examine the areas of the bill or the effects of SB 67 that have not yet been addressed.

DOCUMENT #1

Alaska MUNICIPAL League

TELEPHONES
(907) 586-1325
(907) 586-6526

105 MUNICIPAL WAY, SUITE 301
JUNEAU, ALASKA 99801

February 7, 1984

To: House Labor and Commerce Committee

From: Scott A. Burgess, Executive Director

Re: SB 67 - Utility Relocation Costs

The League opposes SB 67, as introduced, relating to the relocation of utility facilities incident to the construction of road or highway projects by a municipality.

The League opposes any effort to shift to municipalities the cost of all non-municipal utility relocation within existing rights-of-way associated with municipal street work.

Municipalities are already facing decreased revenues from reductions in Municipal Assistance and State Revenue Sharing Programs. The additional burden of paying utility relocation costs could only come from an increase in property taxes, unless the municipality owned the utility and could pass the cost on to the ratepayers directly. The problem is further exacerbated in municipalities with limited road powers. The cost of relocating utilities would reduce the amount of money available to the road service districts for road construction and maintenance. Road service districts rely heavily on state funds and their ability to levy taxes is limited.

Document #4

Alaska State Legislature

Room 104
State Capitol
Juneau, Alaska 99811

Pouch V
Juneau, Alaska 99811

HCS CSSB 67 (C&RA)

House of Representatives
Committee on Community & Regional Affairs

Dear Mr. Speaker,

A majority of the House Committee on Community and Regional Affairs oppose HCSCSSB 67 (C&RA). The provisions of HCSCSSB 67 (C&RA) changes the historical relationship between utility companies and municipalities in matters pertaining to the use of public rights-of-way and streets by various utility companies. Present Alaska Statutes require municipalities to allow utility companies to use the public right-of-way and thereby avoid the expense of securing easements from private property owners. The proposed legislation is designed to further benefit the utilities by requiring municipalites to pay the costs of relocating the utilities when the relocaton is incident to a municipal street project. The requirement for municipalities to bear the burden of the relocation costs is contrary to practices establised in common law and contrary to procedures used throughout the United States. Imposition of such costs would amount to a public subsidy of private profit making ventures as well as for private non-profit utility companies.

Enactment of any legislation that would require municipalities to pay utility relocation costs will not, in the long run, reduce operating costs for utilities but in all probability will increase costs to the utilities. Municipalities will undoubtedly be highly restrictive in the conditions of future permits for the installation of utilities and will begin to charge maximum fees for the use of the public right-of-way as opposed to the general practice of providing use at no charge.

The Committee has found that municipalities are fair and reasonable in their relationships with utilities, and that the particular needs of each type of utility is considered when negotiations for the use of a public right-of-way are conducted. The continuation of reasonable fees, permit conditions, and equitable allocation of utility relocation costs is insured by the availability of arbitration and redress provided by the Alaska Public Utilities Commission. The considerable diversity of types and purposes of profitable private and of non-profit utility companies further reinforces the Committee's belief that the allocation of utility relocation costs can best be negotiated on the local governmental level, on a case by case basis.

In summary, the Committee believes that the proposed legislation is an unnecessary and unwarranted usurption of local governmental authority which may have an adverse monetary effect on the utility consumer and the municipal tax payer. Therefore, any attempt to legislatively interfere with the existing relationships between municipalities and utility companies should not be favorably considered.

/s/ Representative Lacher

Document #5

THE CITY AND BOROUGH OF JUNEAU

CAPITAL OF ALASKA
155 SOUTH SEWARD ST. JUNEAU, ALASKA 99801

May 4, 1983

House Community & Regional
Affairs Committee
Room 102 Capitol Building
Juneau, Alaska 99801

FILE: Legislature - 1983-84 - SB 67
(Utility Relocation Costs)

SUBJECT: CSSB 67(L&C)am and proposed HCSCSSB 67(CNRA)

Ladies and Gentlemen:

In considering the subject Bills, please bear in mind the following:

1. The primary and superior use of streets is for transportation purposes for the general public. Use of streets for utility facilities is a mere convenience to the utility with the benefits accruing to the utility and its utilities, not the general public.

2. The state generally owns its highways in fee while municipalities generally hold their streets by way of dedication. The state is not required to permit a utility to be located within its right-of-way while municipalities are required by statute to permit utilities to locate within their streets.

3. Most state highway projects are substantially funded by federal grants; therefore, the cost of utility relocation is spread to all the people of the United States rather than just the State of Alaska. Municipal road projects are not funded by federal grants.

4. Many utility facilities are installed in municipal streets without permission or with an informal, oral authorization. Some facilities may be installed under a permit which does not address relocation. The common law controlling these situations is that such utilities must be moved at the expense of the utility when required by the municipality. Many utilities are installed under a franchise or a permit which deals specifically with the allocation of costs in the event of a required relocation.

CSSB 67(L&C) would not only reverse the common law, but it would also have the effect of altering the contracts or agreements which municipalities have with utilities regarding relocation. The legislature should not make a retrospective change in the common law. Also, existing agreements not involving the State of Alaska but which are in effect on the effective day of any change in the statute should not be altered by law.

At the teleconference hearing several points were raised by utilities which deserve further comment. First was the concept of "cost causer-cost payer." This is a catchy phrase that identifies the rate making principle that when one utility customer causes the utility to undergo an expense in excess of what it would undergo for the average customer, the customer necessitating the expense should pay the expense. For example, a customer who requires a line extension into an area that has no other customers should bear a major portion of the cost of such extension. Similarly, if a new industrial customer makes demands for energy which are in excess of what the lines and facilities serving his property can handle, then it is this customer who should bear the expense of the upgrade attributable to his increased energy demands. The principle does not apply to people who cause a utility expense who are not customers of the utility or who cause the expense in a capacity other than as a customer. For example, if the principle were to apply to non-customers, we could say that the landlord who leases office space to the utility causes a cost to the utility in charging it rent or in increasing the rent. A regulatory agency could require that the utility install certain pollution reduction devices on its generation facilities. A municipality, in the exercise of its zoning or street powers, could require that a utility suspend its above ground facilities a minimum distance above the street. In none of these cases does the "cost causer-cost payer" principle come into play. It applies only when a customer of the utility causes the utility to undergo an expense to serve that customer. The principle simply does not apply outside the customer-utility relationship; therefore, it is not appropriate to apply that principle to the allocation of costs of relocation caused by municipal street work.

It was pointed out by the utilities that if the utility must bear the burden of relocation then it would have to pass those costs on to its utility customers in the form of even higher rates. For that reason, the utilities said, the general public should bear this burden. That is, local government should raise its taxes to assume an expense that is normally borne by a utility that generally serves less than all those persons who are taxpayers. Not only does this shift what is normally a utility cost to non-utility users, it also overlooks the fact that utilities have generally been getting a break in the free use of public streets; that is, if the lines had been located on private property, the rate payers would have picked up the cost of an easement or a lease and the property owner would have received compensation for the use of his property. Here, municipalities have generally not received compensation for the private use of public streets. It would merely add insult to injury if municipalities are required to bear the burden of relocating utility facilities which have generally had free use of public

property. Even if a utility is a co-op, it generates income through its use of public, taxpayer-supported streets. Public use of the streets for transportation purposes does not generate a revenue. Why should the primary and higher use of a street (transportation) which generates no revenue be made subservient to a non-governmental, revenue-producing use of a public facility?

The City and Borough of Juneau opposes CSSB 67(L&C) am.

I have reviewed a proposed House C&RA Committee substitute for the Bill dated 4/29/83. This Bill is certainly more palatable than the

Senate version. However, it appears that the Bill would have the effect of reviving permits or franchises which were temporary or had expired or were otherwise invalid on the effective date of the Act. If it is not the committee's intent to revive such permits or franchises, I suggest that on page 2, in line 8, the word "before" be changed to "on".

May I add my voice to those who have questioned placing these provisions under Title 19 of the Alaska Statutes. That title deals with state highways and transportation systems and not with local government streets and roads. Because state highways are quite different from local streets, the two should not be lumped together. A later change in the statute to accommodate a state highway problem may have an unintended adverse affect on local streets if both are controlled by the same statute. Title 29 would be a much more logical place for these provisions if they are to be added to the law.

Sincerely,

Gerald L. Sharp
City-Borough Attorney

GLS:jr

cc: Mayor and Assembly
City-Borough Manager
Ginny Chitwood, AML

Document #6

Alaska State Legislature

Room 104
State Capitol
Juneau, Alaska 99811

Pouch V
Juneau, Alaska 99811

House of Representatives
Committee on Community & Regional Affairs

TO: Representative Barbara Lacher

FROM: Staff

DATE: April 29th, 1983

RE: CSSB 67 and HB 244

During previous hearings on HB 244, several problems with the proposed legislation were identified which appeared to be unreasonable in view of past practices regarding the use of municipal right-of-way by utilities.

1) The purpose legislation would nulify the existing agreements under which utilities were located in the rights-of-way. It seems improper to arbitrarily revoke perhaps hundreds of contractual agreements that have been lawfully entered into by municipalities and utilities.

The proposed substitute re ains any existing permit, franchise agreement.

2) CSSB 67 and HB 244 would require municipalities to pay for all costs of utility relocations.

The proposal is not in accordance with long established law and the usual practice of the past, or of cities within the rest of the United States.

For the state to legislate such a requirement, is a considerable usurption of a municipalities legislative authority.

Additionally, if such a law were to be enacted, municipalities would undoubtedly become very restrictive in the conditions of any permit they would issue, and, would in all probability begin to charge significant permit or franchise fees which would be designed to cover their cost of utility relocations. In this event, there would be no net gain for utilities.

The Committee substitute bill allows for negotiation to take place between the municipality and the utility so that the costs of relocation can be allocated and some give-and-take can occur.

3) CSSB 67 and HB 244 would require municipalities to pay for utility relocations in those cases where utilities were installed without a permit.

Under existing law, utilities would generally be required to pay any costs of relocating these facilities. The existance of this practice may have played a large part of municipalities not instituting a permitting system. To change the existing practice, without notice, may cause an unreasonable and unexpected expense to municipalities.

The provisions of the proposed committee substitute establish a date certain from which the cost of relocations will be in accordance with the terms of a permit. Utility companies may obtain new permits for existing facilities whether or not they were installed with a permit.

4) The definition of relocation costs, as proposed in CSSB 67 does not require payment for depreciated cost, but no clarification of "service life" is provided.

The proposed substitute bill defines how service life may be determined.

Document #7

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

April 28, 1983

MEMORANDUM

TO: Representative Barbara Lacher

FROM: Jonathan Sherwood
Research Staff

RE: HB 244--Sectional Analysis
Research Request 83-135

EXCEPTS

Section 7. This section of the bill provides an effective date of July 1, 1983.

The Impact of the Proposed Legislation on Municipalities

Permits and Easements. There was considerable uncertainty among the individuals we contacted regarding the effects of the provision in Section 3 which exempts municipalities from paying for the relocation of utility facilities not located under the conditions of a valid easement or permit. Very few municipalities have had permit systems for utility facility placement in place for any length of time. Therefore, most utility facilities have not been installed under the conditions of a valid permit.

Municipalities are required by AS 42.05 to grant easements to utilities for the use of their right-of-ways. However, both Lee Sharp, Juneau City Attorney, and Dave Soulak, Palmer City Manager, stated that utility facilities are not always properly placed within the right-of-way. Mr. Sharp expressed concern that municipalities might be required to pay for the cost of relocating utilities that are not properly placed within the right-of-way. According to Linn Asper, facilities which are not correctly placed within the right-of-way would not generally be considered to be located under the conditions of a valid easement. However, he acknowledged that utilities have located their facilities under a variety of different arrangements with municipalities, and that it is difficult to anticipate the effects of this proposed amendment on every case.

Reimbursement Issues. Another impact of the bill is to apply the current and proposed provisions of AS 19.45.001(4) to municipalities. AS 19.45.001(4) currently defines the costs to be paid for relocating utility facilities, and would be amended to permit the State and municipalities to reduce this payment if the service life of the facility is extended. According to Peter Sokolov, Chief Engineer for the Alaska Public Utilities Commission (APUC), most regulated utilities have service life schedules, approved by the APUC, which are used to calculate depreciation. However, Mr. Sokolov stated that the actual service life of utility equipment varies considerably, with location of the facility being the most important factor affecting service life.

Mr. Sokolov stated that municipalities might experience difficulties determining when the equipment was installed. According to Mr. Sokolov, many of the smaller utilities do not have adequate records to determine when its facilities were installed and even some of the larger utilities may not have complete records of their facilities installation. He noted that the service life for some facilities can be as much as fifty years, a long time to maintain records.