ALASKA LEGISLATURE COMMITTEE FILES 1987 - 1988 8672

4731 HJUD HB 394 - HB 406 302

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February 10, 1988

Kenneth Johnson
Information Director
Alaska Rural Electric Cooperative
Association, Inc.
175 South Franklin Street, Room 324
Juneau, Alaska 99801

Re: House Bill 394 (Amendments To AS 10.25)

Dear Ken:

You have asked for some additional explanation of and examples of the need for the proposed language found at page 2, line 14, of HB 394. That change adds a new subsection (13) to AS 10.25.010, which authorizes cooperatives to:

> (13) make donations for the public welfare or for charitable, scientific or educational purposes;

As you know, this language is not original to the electric and telephone cooperatives but, rather, was copied from an identical provision found in the Alaska Cooperative Corporations Act and codified as AS 10.15.010(12). This existing statutory section applies to all nonprofit cooperatives in the state of Alaska except electric and telephone cooperatives. Electric and telephone cooperatives need a similar statutory provision.

The cooperatives are routinely called upon to make various contributions, including services, materials and money, to community-wide activities. Examples of these types of contributions range from using cooperative line trucks to install community Christmas decorations on poles to contributions of used poles or money to the Boy Scouts to contributions to the local sled dog race. One major, recurring request for contributions from the electric cooperatives involves the waiver of certain installation or hook-up fees for temporary power to the various community outdoor festivals, such as the Cordova Ice Worm Festival or the Kodiak Crab Festival. It is my understanding

that some thought has been given to attempting to limit the language of this proposed amendment to "in-kind service" to "nonprofit organizations." I can initially see two problems with this type of proposed restriction. First, even this type of contribution by the cooperative properly involves the waiver of fees and not the contribution of services, since it is still important to account for those services (for instance, the lineman's time) correctly and to attach a monetary value to those services for proper accounting purposes. In other words, in-kind services are not non-monetary services, and the world of utility accounting makes little distinction between the two. Secondly, carrying on with the example of community festivals, a restriction of contributions to only nonprofit groups would, for instance, preclude participation in festivals organized by the various municipalities or native corporations which are not strictly nonprofit organizations.

Donations for scientific purposes are necessary because Alaska electric cooperatives are not individually large enough to conduct their own scientific research and development activities. For this reason, groups such as the Electric Power Research Institute (EPRI) have been formed to conduct research in areas ranging from environmental concerns to new approaches for meeting and managing customer demand for energy services. EPRI publishes research papers such as "Monitoring Stress In The Turbine Generator," "PCB Detection In The Field," "Vault Protection For High Current Distribution," and "Reliability Measures For System Planning." It is vital that Alaska's electric cooperatives be authorized to participate in this scientific research and encouraged to be aware of and incorporate the results of such research.

Examples of cooperative donations for educational purposes also include two somewhat diverse activities. First, Alaska's electric cooperatives have increasingly become active in educational programs in the schools in the cooperatives' communities. These programs stress a knowledge of electricity, how it behaves, and the safety considerations involved with its use. Several of the cooperatives hold contests among the local school children and give prizes associated with those contests. Secondly, the electric cooperatives, especially in some of the smaller rural communities, have long felt the need to encourage and develop local skills necessary for the efficient operation of the cooperatives in that village. Alaska Village Electric Cooperative ("AVEC"), for instance, may wish to develop a program

of grants or scholarships to local village residents to allow them to attend trade schools to learn diesel mechanic or welding skills which will benefit AVEC in its village operations. Kodiak Electric Association ("KEA") was very successful several years ago in creating a scholarship which enabled a local summer employee of the cooperative to attend engineering school at UAF. That scholarship recipient returned to eventually become chief engineer at KEA.

I could, of course, give several more examples of contributions currently being made by the electric cooperatives in their communities, but I believe the above gives you a flavor of the activities covered under this section and why the electric cooperatives feel this amendment is important and required.

If anyone has any further questions or wishes to discuss the subject with me in greater detail, please feel free to have them give me a call.

Sincerely,

KEMPPEL, HUFFMAN AND GINDER, P.C.

Roger R. Kemppel
General Counsel for ARECA

RRK:lka

cc: David Hutchens
General Manager, ARECA

# STATE OF ALASKA
# THE LEGISLATURE
## LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M February 2, 1988

SUBJECT: Sectional analysis of HB 394
(Electric and telephone cooperative)

TO: Representative Dave Donley
Chairman
House Labor and Commerce Committee

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill, and the bill itself is the best statement of its contents.

Section 1 increases the powers of an electric or telephone cooperative to include making certain kinds of donations.

Section 2 increases the powers of an electric cooperative to include operating a waste heat distribution system and an existing heat distribution system whether or not it uses waste heat.

Section 3 removes the requirement that amendments to a cooperative's bylaws be made at a meeting.

Section 4 permits the bylaws to require that a person obtaining service from a cooperative become a member of the cooperative, and permits the bylaws to provide procedures for terminating or suspending a membership.

Section 5 requires that notice of special meetings be given between 90 and 120 days before the meeting, together with a notice of the meeting purpose.

Section 6 prohibits members from voting by proxy when a matter is submitted to a vote of the membership. The section continues to permit voting by mail.

Section 7 permits the board of directors of a cooperative to fix a record date in advance of submitting a matter to a vote of the members to determine the members who are entitled to vote.

Section 8 limits removal of directors to removal for cause, permits the bylaws to allow paying directors a fee for attending meetings on behalf of the cooperative, and permits the cooperative to provide insurance for the directors.

Section 9 addresses liability, indemnification and insurance for "protected persons," defined as directors, officers, employees, and agents of the cooperative. Subsection (a) limits individual liability. Subsection (b) requires, with certain exceptions, a cooperative to indemnify a protected person unless prohibited by the cooperative's articles or bylaws. Subsection (c) permits a cooperative to insure against liability asserted against a protected person. Subsection (d) contains definitions.

Sections 10 and 11 require election of directors each year instead of at the annual meeting.

Sections 12-14 address meetings of the board of directors.

Section 12 permits the board to meet by teleconference and limits application of AS 10.25.175 to a meeting at which a quorum of the board participates.

Section 13 expands the subjects that may be discussed in an executive session.

Section 14 changes the effect of violation of the open meetings requirement contained in this section. The law now provides that action taken in violation of the section is void. The amendment requires the court to consider appropriate equitable relief instead of voiding the action.

Section 15 permits a cooperative to withhold certain materials from inspection by its members.

Section 16 permits decisions concerning mergers to be taken by mailed ballot rather than at a meeting of the membership.

Section 17 permits decisions concerning consolidation to be taken by mail rather than at a meeting of the members.

Section 18 increases the required to approve a dissolution of the cooperative from a simple majority to a two-thirds majority. It also permits the decision to be made by mail.

Sections 19 and 20 address the sale, lease, or disposal of a substantial portion of a cooperative's property.

Section 19 applies AS 10.25.400 to any transaction disposing of more than 15 percent of the cooperative's total assets. It also permits voting by mail, increases the margin required for approval from a simple majority to a two-thirds majority, declares that an election is not valid unless at least 10 percent of the eligible members returned ballots, and exempts transactions with the state from the section.

Section 20 requires appraisal of the property to be disposed of, and notification of the members of the issue and of alternative proposals.

Section 21 is an immediate effective date clause.

TC:bb
wkb2/036

# ALASKA STATE LEGISLATURE
# HOUSE OF REPRESENTATIVES
# RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

April 21, 1988

MEMORANDUM

TO: Representative John Sund

ATTN: John Hartle

FROM: Ginny Fay
Legislative Analyst

RE: Electric and Telephone Cooperatives: Sectional Review of House Bill 394
Research Request 88.241

You asked us to identify the effects of House Bill 394-An Act relating to electric and telephone cooperatives (attached). In answering this request, this memorandum briefly discusses each section of the bill.

House Bill 394 has two primary objectives--1) it sets up a procedure for a private corporation to acquire or merge with a cooperative utility, and 2) it clarifies inconsistencies in the Electric and Telephone Cooperative Act and provides the statutory authority for technological advances and activities currently undertaken by cooperatives. In other states, there has been an increasing occurrence of acquisition of cooperative utilities by larger private corporations; much of HB 394 is in response to this perceived threat. House Bill 394 establishes a systematic procedure for mergers or acquisitions that assures that the cooperative membership has an opportunity to vote on the disposition of cooperative assets.

The Electric and Telephone Cooperative Act was established in 1959 and has had numerous amendments. House bill 394 cleans up inconsistencies in the the Act resulting from its long history of changes. In addition, there are technological advances and administrative changes--that the cooperative utilities have instituted and state policy allows--for which the bill provides more explicit statutory authority. The following sections of this memorandum provide information on each section of the bill.

Section 1

Section 1 removes reference to AS 10.25.245 in AS 10.05.376(c). Section 25 of the bill repeals AS 10.25.245.

Section 2

Section 2 amends 10.24.010 to allow cooperatives to make donations for the public welfare or for charitable, scientific, or educational purposes. Cooperatives currently make donations which are recoverable in the rates; one example is electric cooperative donations to the Electric Power Research Institute. This amendment would more clearly establish the statutory authority for these types of donations. The Alaska Public Utilities Commission (APUC) has indicated that they have some concerns regarding the interpretation of the language "public welfare" (page 2, line 18).

Section 3

This section disallows the use of cooperative funds to promote or oppose a candidate being considered as a director of a cooperative. This amendment is in response to the belief that an electric cooperative used funds to promote the candidacy of a director from the cooperative's management.

Section 4

Section 4 provides the statutory authority for electric cooperatives to operate a waste heat distribution system (page 3, line 23). Without the assurance of cost recovery in rates, it is unlikely that cooperatives would invest in this relatively new technology. Section 4 also allows electric cooperatives to operate existing heating distribution systems. This amendment would allow the Golden Valley Electric Association (GVEA) to operate the Fairbanks Municipal Utility System (FMUS) heat distribution system if GVEA were to purchase or merge with FMUS.

Section 5

Section 5 pertains to the bylaws of cooperatives and provides that cooperative members can adopt, amend, or repeal the bylaws by an affirmative vote of a majority of the members on a "question." The broadening of the language to question allows for voting to occur by mail, including votes on the potential sale of a cooperative.

Section 6

Section 6 addresses Internal Revenue Service (IRS) requirements that 85 percent of cooperative sales must be to its membership for the cooperative to have tax exempt status. The bill allows cooperative bylaws to require membership as a condition for obtaining service. This change assures that the IRS requirement can be met (page 4, line 25-26). Section 6 also provides for the termination or suspension of membership if termination procedures are contained in the cooperative's bylaws. Termination of membership does not, however, imply termination of service. In order to terminate service, fairly stringent procedures under the APUC statutes must be followed (AS 42.05.261).

Section 7

This section provides for a 90-120 day notice period for special meetings of cooperative boards. The inference to special meetings pertains to Section 23 of the bill, which covers the procedures for the sale of cooperatives.

Section 8

Section 8 authorizes voting by mail on any issue coming before the cooperative membership. While voting by mail is currently allowed, this change to the statute makes the voting process less susceptible to legal challenge. It also removes the provision for voting by proxy; proxy voting is unnecessary under the mail voting procedure.

Section 9

To determine the eligibility of members to vote, Section 9 establishes a record date of 90 days before a vote is submitted to the cooperative membership. This section was added to reduce the ability of special interest groups to add members before an election to influence its outcome.

Section 10

Section 10 requires that cooperative bylaws contain provisions for the recall of members of the board of directors. In addition, this section establishes that cooperative board members be paid per diem for each day of meetings rather than for each meeting. The current statute allows cooperative board members to receive multiple per diem for attending more than one meeting on a given day.

Section 11

Section 11 extends the provisions of the recently passed tort reform package--providing nonprofit board members protection from liability law suits--to cooperative board members. The new section of the Act relieves liability for conduct within the scope of board members' duties where no negligence is involved. This aspect of the tort reform package has made recruitment of board members more successful for nonprofit corporations covered by this provision.

Section 12

Section 12 clarifies that all directors are elected. It also removes unnecessary language and allows for the election of board of director by mail.

Section 13

This section clarifies that a meeting is held each year for the election of members of the board of directors.

Section 14

Section 14 establishes that meetings of cooperative boards of directors can be held by teleconference if a quorum exists and notice has been given.

Section 15

Section 15 expands the conditions for executive sessions of the boards of directors. The new conditions include a member's financial record; status of current labor negotiations and personnel matters; matters specifically exempted from disclosure by law; sealed bids, trade secrets, or other confidential commercial information; and discussion of litigation by or against a cooperative. These grounds for executive sessions are similar to those covered by the Alaska open meetings law (AS 44.62.310-312).

Section 16

Section 16 provides for more court discretion for cooperative meetings that are deemed to have not been held openly or with proper notice. Rather than action taken in the improper meeting being automatically voided, the court can grant equitable relief after considering the circumstances of the case. This provision can potentially save cooperatives considerable funds because lengthy or costly meetings would not have to be repeated in their entirety.

Section 17

This section pertains to a member's right to examine cooperative books and records and provides that the cooperative can withhold information concerning specific matters that were prepared during or for an executive session and not subsequently made public by the cooperative. In addition, a cooperative may withhold the identity of public information that was referred to during an executive session. The language of this section is rather broad and potentially allows an umbrella for withholding information from cooperative members.

Section 18

This section allows for mail voting on cooperative mergers rather than requiring voting to occur at meetings.

Section 19

This section specifies that telephone or electric cooperatives cannot merge unless the surviving cooperative complies with all existing labor agreements of the merging cooperatives. This means that the resultant cooperative cannot collectively bargain for one labor contract but instead must honor the conditions of both the merging and surviving cooperatives' labor agreements. This could be a costly provision for cooperatives.

Section 20

Section 20 clearly establishes that a membership vote on cooperative consolidation can be done by mail.

Section 21

Section 21 pertains to the dissolution of cooperatives. It clarifies language and requires cooperatives with fewer than 10,000 subscribers--which is generally equivalent to meters served rather than individual persons--to have a two-thirds affirmative vote of the members for a dissolution. Cooperatives with over 10,000 subscribers require an affirmative vote of the majority of the membership. The subscriber cutoff covers all electric cooperatives in Alaska except the four Railbelt electric cooperatives. This section also allows for a dissolution vote to be conducted by mail.

Section 22

For the purposes of the disposition of cooperative property, this section clarifies "all or a substantial portion of its property" to be more than 15 percent. The 15 percent figure is based on an Alaska Rural Electric Cooperative Association (ARECA) review of recent legislation in other states. Other states' legislation cite 8-25 percent; 15 percent was used as an average. Voting requirements for disposition of a substantial portion of assets are the same as those set forth in Section 21 for cooperative dissolution. In addition, this section allows the sale of cooperative property to the state or another cooperative to be approved by a vote in which at least ten percent of eligible members return ballots. This sale requirement is not as stringent as that required for the sale of cooperative assets to a private corporation because the former is not perceived as a potentially hostile take-over. This section also requires the labor provision set forth in Section 19 discussed above be a condition for the sale of cooperative property.

Section 23

Section 23 establishes a procedure for the disposition or sale of cooperatives. Generally, it requires that before more than 15 percent of a cooperative's assets can be sold, the board of directors must--1) have the property appraised, 2) provide at least 90 days notice to members, 3) notify other cooperatives of proposals for the disposition of property at least 90 days before the membership vote, 4) at least 30 days before the vote, notify members of any alternative proposals, and 5) place each proposal for which notice has been given on a ballot. Section 23 also provides that these requirements apply only to the selling of a cooperative or its assets and not to the merger or consolidation of cooperatives covered under AS 10.25.240-300. ARECA is proposing that "real and personal property" (page 13, line 11) be amended to say "tangible and intangible property" to assure that existing assets such as contracts be covered.

Section 24

This section clarifies that the conditions established by Section 23 do not apply to sales of cooperative property that were approved by the members before the effective date of this Act.

Section 25

Section 25 repeals AS 10.25.245, which was passed in 1980 for the potential merger of Alaska Electric Light & Power Company and the Glacier Highway Electric Association, Inc. Because this section was never used and section 23 establishes a sale procedure with more stringent membership voting requirements, AS 10.25.245 is being repealed. In addition, the repeal of AS 10.25.245 prevents the possibility of a private utility merging with--rather than purchasing--a cooperative under the less stringent voting requirements of this section.

Section 26

This section establishes the Act's effective date to be immediate upon its passage.

* * *

I hope this information is helpful. Please call if you have additional questions.

Attachment

Cordova Electric Cooperative, Inc.

P O BOX 20 • CORDOVA, ALASKA 99574 • (907) 424-5555

RECEIVED ... 1988

March 29, 1988

Mr. Dave Hutchens
Executive Director
Alaska Rural Electric
Cooperative Association
237 East Fireweed Lane
Anchorage, Alaska 99503

Dear Dave,

I wanted to let you know the outcome of the advisory vote last night at our annual meeting. We did not have time to formally notice the question so we made it advisory and asked each member to write the percentage who should vote in favor of a sellout before the Cooperative could be sold. We suggested either the current requirement of one half of the members and the proposed 2/3 of the members. I have tabulated the results below:

| | |
|---|---|
| one half of members | 3 |
| two thirds of members | 56 |
| three quarters of members | 1 |
| no indication | 17 |
| total votes cast | 77 |

The large number of "No Indication" ballots were cast by people who were not in the room when we discussed the issue or who voted before the announcement.

Obviously, the members of Cordova Electric Cooperative are worried about a takeover attempt and want to protect their cooperative.

Sincerely,

Doug

W. D. Bechtel
General Manager

ERA® REALTY CENTER

October 12, 1987

RECEIVED
OCT 15 1987

Ak. Village Elect. Co-op
4831 Eagle St.
Anchorage, AK 99503

ATTN: Vincent T. Beans

Dear Mr. Beans:

Our firm has been requested by a major U.S. Corporation to search for power facilities or companies throughout Alaska that would perhaps consider selling.

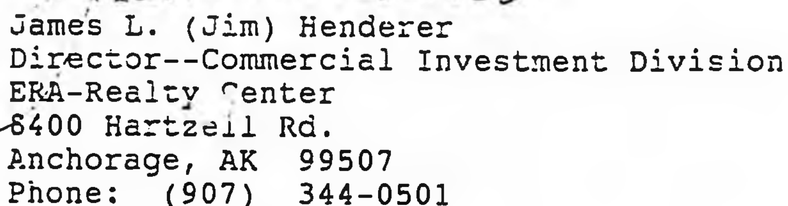
This major firm is presently involved in power and telecommunications throughout the contiguous United States, South Pacific, Hawaii and Alaska. They have unlimited financial resources in addition to a very wide range of technical personnel.

They have indicated an interest in acquiring generation and power facilities ranging from the smallest timber, mining and fishing villages, to those of the major service areas in the state. They have already purchased some utilities within this state and are looking for more.

This letter will be followed by a personal phone call to you within the next several weeks. Should your organization have an interest in selling your facility or entering into an on-site management agreement wherein the day to day operating responsibilities would be assumed by one of the operating divisions of this major corporation, please call me at the number shown below. I shall assist you in your negotiations with them.

If you need further in-depth information, please feel free to contact me.

Sincerely,



James L. (Jim) Henderer
Director--Commercial Investment Division
ERA-Realty Center
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561-0540

# KODIAK ELECTRIC ASSOCIATION, INC.

KODIAK, ALASKA

RESOLUTION

## 1988 ANNUAL MEMBERSHIP MEETING
## MEMBERSHIP RESOLUTION

WHEREAS, the Electric and Telephone Cooperative Act (AS10.25), originally enacted in 1959, is now outdated and has been amended in ways which produced internal inconsistencies; and

WHEREAS, the Alaska Rural Electric Cooperative Association (ARECA) has conducted a thorough study of the changes in this statute necessary for the efficient operations of the cooperative utilities and the effective control of those utilities by their member-consumers; and

WHEREAS, Kodiak Electric Association, Inc. (KEA) participated in the ARECA study of AS 10.25 and would benefit from the resulting proposed legislation; and

WHEREAS, HB 394 is the proposed legislation resulting from the ARECA effort;

THEREFORE, BE IT RESOLVED:

1. The membership of KEA supports the changes to AS 10.25 proposed by HB 394; and

2. The membership of KEA believes the requirement contained in HB 394 for a two-thirds vote of the members to agree to a takeover of this cooperative is an important protection for the members.

CERTIFICATION

I, [illegible] do hereby certify that I am [illegible] Secretary of Kodiak Electric Association, Inc., an electrical non-profit cooperative membership corporation organized and existing under the laws of the State of Alaska; that the foregoing is a complete and correct copy adopted at a meeting of the Board of Directors of this corporation, duly and properly called and held on the 4th day of April, 19 88, that a quorum was present at the meeting; that the resolution is set forth in the minutes of the meeting and has not been rescinded or modified.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of this corporation this 4th day of April 19 88

(SEAL) Secretary [signature]

*Amendments to Electric and Telephone*
*Cooperative Act (AS 10.25)*

*Comments from Alaska Rural Electric*
*Cooperative Association (ARECA)*

*Introduction*

*The Electric and Telephone Cooperative Act was originally enacted in 1959 as a variation of the model state legislation recommended by the Rural Electrification Administration (REA), a unit within the U.S. Department of Agriculture. The REA serves as the principal banker for most electric and telephone cooperatives, and this relationship accounts for their strong and continuing interest in our state enabling legislation.*

*The environment within which the coops operate has changed immensely during the last 29 years, and the old model act no longer covers everything that is needed in Alaska law. There have been a number of amendments to AS 10.25 through the years, and some internal inconsistencies within the Act have resulted from some of those amendments.*

*ARECA had a committee from across the state study AS 10.25 for about a year to develop the changes which are needed to clear up ambiguities, to permit cooperatives to operate efficiently, and to assure proper control of the cooperatives by the members. The draft prepared by that committee and unanamously approved by the members of the association provided the starting place from which SB 369 and HB 394 were prepared.*

*Mail Voting*

*One kind of change which appears in numerous locations throughout these bills is to clear up the conflicting language on how membership votes may be conducted. The legislature decided long ago that coops should have the option of conducting elections and other membership votes by mail. However, a number of sections still refer to such decisions being made "at the meeting." These bills would make it clear that, if the bylaws so provide, all membership votes can be conducted by mail.*

*Takeovers/Sellouts*

*A second change which required amendments in several sections is to make certain that any proposed sale of a cooperative is considered by an informed membership and that a decision to sell must be agreed to by a substantial proportion of the members of the cooperative (Sec. 5, 18, 19, 20). The sale or dissolution of a cooperative is final and irreversible. Such a momentous decision should not be made lightly or by a simple majority. If a pro-sale majority one day becomes a minority on some other day, there is no way to unscramble the egg. To protect the interests of the cooperative members against transitory swings in public opinion, a large majority should be required to agree to the death of the cooperative. In these bills, a two-thirds majority is proposed.*

*Powers of Cooperatives*

*The authority to make contributions for various public purposes (Sec. 1) is adopted verbatim from the law governing all other types of cooperatives in this state (AS 10.15.010 (12)). A typical instance in which this authority is needed is when some local civic or charitable group plans an event for which it needs a temporary service. In many such cases, the cooperative would like to support the local effort by making an in-kind contribution of the tempoary service drop rather than having to charge according to its line extension policy. Another example is to permit the electric coops to participate in the National Electric Power Research Institute.*

*Electric cooperatives would also be authorized to operate waste heat distribution systems (Sec. 2). Since 1980, the legislature has encouraged the use of waste heat, but the cooperatives have no clear authority to engage in that business. The authority to operate an existing system (other than waste heat) is intended to permit Golden Valley Electric Association to operate the Fairbanks district heating system now owned by the city if the city should decide to divest itself of that system.*

*Members*

*The provision to permit cooperatives to require membership as a condition of service (Sec. 4) is necessary to protect the coops from the possibility of losing their tax exempt status. The Internal Revenue Service (IRS) requires cooperatives to get not less than 85 percent of their revenues from providing service to members.*

*The provision prohibiting cooperatives from terminating or suspending memberships (Sec. 4) unless their bylaws establish the procedure, is also necessary to keep the coops out of trouble with the IRS. Terminating or suspending a membership without due process can cause the loss of a tax exemption. This provision was adapted from California Corporate Code 12410, Article 4.*

*Notice of Meetings*

*The increase in notice requirements for special meetings of the members (Sec. 5) is necessary to give adequate time for the informational processes established in Section 20 to be used when a special meeting is called to sell a cooperative.*

*Record Date*

*Establishing a record date for the right to participate in membership meetings (Sec. 7) helps to eliminate disputes as to the legality of actions taken by the members on hotly contested issues at annual or special meetings or other cooperative elections. This new section was adapted from the Alaska Business Corporation Act (AS 10.05.144).*

*Board Compensation*

*The principal change in Section 8 is to clarify the law on the payment of per diem to directors. The intent is to make it clear that directors can be compensated for the days on which the director is attending meetings in the performance of duties, not just*

*attendance at formal meetings of the board. However, the language needs to be amended to make it clear that it is a day rather than a meeting which authorizes the payment of per diem. (If a director were to go to three meetings on one day, the director should receive one per diem payment, not three.) To accomplish this, on page 6, line 12, the words "and at a" should be replaced with "or other."*

*Liability, Indemnification, and Insurance*

*The new language contained in Section 9 is necessary to protect directors and officers from individual liability for actions properly taken in the course of their duties. Subsection (a) limits the liability; (b) authorizes the cooperative to indemnify the directors; and (c) authorizes the cooperative to buy directors' and officers' liability insurance as a way to provide the indemnification. Similar limitations on personal liability are provided for directors and officers of business corporations (AS 10.05.010 (g)) and for many non profit corporations, public hospitals, public schools, and municipalities (AS 9.17.050).*

*Board Meetings*

*Board meetings could be conducted by teleconference (Sec. 12). A similar provision is made for boards of business corporations (AS 10.05.199 (a)).*

*Several specific items are listed which would permit a board of directors to meet in executive session (Sec. 13). Each of these specifics was thought to be encompassed in the general reasons for executive sessions listed as 1 - 3 when this statute was enacted in 1982. Recent court decisions have cast some doubt on that assupmtion, so listing these specific items is necessary.*

*The penalty for violations of the meetings statute needs to be rewritten as is done in Section 14 to permit the court to determine the appropriate equitable relief. Under the present law the only penalty authorized is to void any action taken at a meeting not in compliance with this section of the law. Recent court decisions seem to indicate that there is no way to correct actions taken incorrectly once they have been voided. This could cripple a cooperative if action on a major item like a power supply contract were voided.*

*Examination of Records*

*Information on subjects which can properly be discussed in executive session should also be protected in written form (Sec. 15). For example, it does no good to go into executive session to discuss an individual consumer's payment history if the records of that payment history are themselves available for inspection.*

*Limitations on Sale of Property*

*In addition to requiring a two-thirds vote to sell a cooperative as discussed earlier, Section 19 clarifies the law on exactly which sales of coop property must be referred to a vote of the members.*

*Section 20 establishes a procedure for having the cooperative's property appraised, informing the members, and inviting competing proposals. The purpose of this section is to protect the members by making sure they know what the coop's property is worth before they vote on an offer to buy it.*

*We do propose that this section be amended on page 12, line 11 by changing the phrase "have this property appraised" to "have all the real and personal property proposed for sale appraised". The reason for this change is to inform the members about the value of personal property such as long-term power supply contracts which would not show up on the books of the cooperative.*

*Sale of Glacier Highway Electric Association to Alaska Electric Light and Power*

*The possible merger of the two utilities in the Juneau area has been under negotiation, off and on, for about 20 years. We do not want to change the rules regarding that possible transaction when it is so near completion. A new section on "transitional provisions" should be added which provides that any sale of cooperative property approved by the members under AS 10.25.400 before the effective date of this Act will be valid even if the transaction is not completed by the effective date.*

*Another new section needs to be added to repeal AS 10.25.245. This section was enacted in 1980 at the request of GHEA, and it was intended to make a merger with AEL&P easier. The negotiations have proved this approach not to be practical, and it is not used in the proposed sale of GHEA to AEL&P. This section serves no purpose, and we ask that it be repealed.*

A R E C A

# REVISIONS TO THE ELECTRIC AND TELEPHONE COOPERATIVE ACT

DISCUSSION DRAFT

January 1988

REFERENCE


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CHAPTER 25. ELECTRIC AND TELEPHONE COOPERATIVE ACT.

Article 1. Substantive Provisions.

Sec. 10.25.010. Powers of electric or telephone cooperative. An electric or telephone cooperative may

(1) sue and be sued in its corporate name;
(2) have perpetual existence;
(3) adopt a corporate seal and alter it;
(4) construct, buy, lease, or otherwise acquire, and equip, maintain, and operate, and sell, assign, convey, lease, mortgage, pledge, or otherwise dispose of or encumber lands, buildings, structures, electric or telephone lines or systems, fuel transportation and production facilities; dams, plants and equipment, and any other real or personal property, tangible or intangible, which is necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;
(5) buy, lease, or otherwise acquire, and use, and exercise and sell, assign, convey, mortgage, pledge or otherwise dispose of or encumber franchises, rights, privileges, licenses and easements;
(6) borrow money and otherwise contract indebtedness, and issue evidences of indebtedness, and secure the payment of the indebtedness by mortgage, pledge, or deed of trust of, or any other encumbrance upon its real or personal property, assets, franchises, or revenues;
(7) construct, maintain, and operate electric transmission and distribution lines, or telephone lines along, upon, under and across publicly owned lands and public thoroughfares, including, without limitation, all roads, highways, streets, alleys, bridges and causeways;
(8) exercise the power of eminent domain;
1 (9) become a member of other cooperatives or corporations or own stock in them[;] or enter into joint ventures with other persons, cooperatives, corporations; the state or a political subdivision thereof;
(10) conduct its business and exercise its powers inside or outside the state;
(11) adopt, amend and repeal bylaws;
(12) make all contracts necessary, convenient or appropriate for the full exercise of its powers;
2 (13) donate for the public welfare or for charitable, scientific or educational purposes;
(14) do and perform any other act and thing, and have and exercise any other power which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized. (§ 4(1) ch 93 SLA 1959)

Sec. 10.25.020. Powers of electric cooperative. An electric cooperative may

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(1) either jointly or individually, generate, manufacture, plan for, purchase, acquire, accumulate and transmit electric energy and heat, and distribute, sell, supply and dispose of electric energy and heat to its members, to governmental agencies and political subdivisions, and to other persons not exceeding 10 per cent of the number of its members; however, a cooperative which acquires existing electric facilities may continue service to persons, not in excess of 40 per cent of the number of its members, who are already receiving service from these facilities without requiring them to become members, and these persons may become members upon the terms as may be prescribed in the bylaws;

(2) assist persons to whom electric energy is or will be supplied by the cooperative in wiring their premises and in acquiring and installing electrical and plumbing appliances, equipment, fixtures and apparatus by financing them, and in connection with these services wire or have wired the premises, and buy, acquire, lease, sell, distribute, install and repair electric and plumbing appliances, equipment, fixtures and apparatus;

(3) assist persons to whom electric energy is or will be supplied by the cooperative in constructing, equipping, maintaining and operating electric cold storage or processing plants by financing them or otherwise[.]; and

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(4) participate in economic development activities in the service area of the cooperative. (§ 4(2) ch 93 SLA 1959)

Sec. 10.25.030. Powers of telephone cooperative. A telephone cooperative may

(1) furnish, improve and expand telephone service and related telecommunications service to its members, and to other users not in excess of 10 percent of the number of its members; however, telephone service may be made available by a cooperative through interconnection of facilities to any number of subscribers of other telephone systems, and through pay stations to any number of users, and a cooperative which acquires existing telephone facilities may continue service to persons, not exceeding 40 percent of the number of its members, who are already receiving service from the facilities without requiring them to become members, and these persons may become members upon terms as may be prescribed in the bylaws;

(2) connect and interconnect its telephone lines, facilities or systems with other telephone lines, facilities or systems;

(3) make its facilities available to persons furnishing telephone service inside or outside the state. (§ 4(3) ch 93 SLA 1959; am § 1 ch 136 SLA 1982)

Sec. 10.25.040. Name. The name of a cooperative shall include the words "electric" or "telephone," as appropriate to its purpose, and "cooperative," and the abbreviation "inc." The name of a cooperative shall be distinct from the name of other cooperatives or corporations organized under the laws of or authorized to do business in this state. This section does not apply to a corporation which becomes subject to this chapter by compliance with §§ 290 and 300 or 600 of this chapter and which elects to retain a corporate name which does not comply with this section. (§ 5 ch 93 SLA 1959)

Sec. 10.25.050. Incorporators. Five or more persons, including cooperatives, may organize a cooperative. (§ 6 ch 93 SLA 1959)

Sec. 10.25.060. Articles of incorporation. (a) The articles of incorporation of a cooperative shall recite that they are executed under this chapter and shall state

(1) the name of the cooperative;

(2) the address of its principal office;

(3) the names and the addresses of the incorporators;

(4) the names and addresses of its directors;

(b) The articles may contain any provisions not inconsistent with this chapter which are considered necessary or advisable for the conduct of its business. The articles shall be signed by each incorporator and acknowledged by at least two of the incorporators, or on their behalf, if they are cooperatives. It is not necessary to recite in the articles the purpose for which the cooperative is organized or any of its corporate powers. (§ 7 ch 93 SLA 1959)

Sec. 10.25.070. Bylaws. The board of directors shall adopt the first bylaws of a cooperative to be adopted following an incorporation, conversion, merger or consolidation. Thereafter the district delegates in cooperatives having three or more districts that are not connected by a road system to another district of the cooperative may adopt, amend, or repeal the bylaws by the affirmative vote of a majority of the district delegates voting on the adoption, amendment, or repeal at a meeting of the district delegates. In all other cooperatives the members shall adopt, amend, or repeal the bylaws by the affirmative vote of a majority of the members voting on the adoption,
5 amendment, or repeal. [either at a meeting of the members or by mail ballot without a meeting.] The bylaws shall set out the rights and duties of members, district delegates, and directors and may contain other provisions for the regulation and management of the affairs of the cooperative consistent with this chapter or with the articles of incorporation of the cooperative. (§ 8 ch 93 SLA 1959; am § 1 ch 136 SLA 1968; am § 1 ch 120 SLA 1986)

Sec. 10.25.080. Members. Each incorporator of a cooperative shall be a member of the cooperative or of another cooperative that is a member of it. No person may become a member unless that person agrees to use electric energy, or telephone service, or other services furnished by the cooperative when they are made available through its facilities. The bylaws may require membership as a condition of obtaining service from the cooperative. Membership in a cooperative is not transferrable, except as provided in the bylaws. The bylaws may prescribe additional qualifications and limitations on membership. The bylaws may provide for the termination or suspension of membership, provided that no membership may be terminated unless the procedures for termination are contained in the bylaws. (§ 9 ch 93 SLA 1959; am § 1 ch 66 SLA 1982)

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Sec. 10.25.090. Meetings of members. (a) An annual meeting of the members of a cooperative shall be held at the time and place provided in the bylaws. An annual meeting of the members of a cooperative which has been divided into districts as provided for in § 190 of this chapter may consist of separate annual meetings of the members of each district.

(b) Special meetings of the members or district delegates may be called by a majority of the board of directors or by not less than 10 per cent of all members or 10 per cent of all district delegates. A special meeting of the members of a cooperative which has been divided into districts as provided for in § 190 of this chapter may consist of separate special meetings of the members of each district.

(c) An annual meeting of district delegates of a cooperative shall be held at the time and place provided in the bylaws. (§ 10(1) (2) ch 93 SLA 1959; am § 2 ch 136 SLA 1968)

Sec. 10.25.100. Notice of meetings. Except as otherwise provided in this chapter, written notice stating the time and place of [each] the annual meeting of the members or district delegates [and, in the case of a special meeting, the purpose or purposes for which the meeting is called,] shall be given to each member or district delegate, either personally or by mail, not less than 20 days nor more than 40 days before the date of the meeting. Notice of a special meeting of the members, together with notice of the purpose or purposes for which the meeting is called, shall be given to each member or district delegate, either personally or by mail, not less than 90 days nor more than 120 days before the date of the meeting. If mailed, notice is considered given when it is deposited in the United States mail with postage prepaid addressed to the member or district delegate at his address as it appears on the records of the cooperative. (§ 10(3) ch 93 SLA 1959; am § 3 ch 136 SLA 1968)

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Sec. 10.25.110. Quorum requirements. (a) Unless the bylaws prescribe the presence of a greater percentage or number of the members for a quorum, a quorum for the transaction of business at all meetings of the members of a cooperative or the members of a district of a cooperative having not more than 1,000 members is five per cent of all members, present in person, and a quorum for the transaction of business of the members of a cooperative or the members of a district of a cooperative having more than 1,000 members is 50 members, present in person. If less than a quorum is present at a meeting, a majority of those present in person may adjourn the meeting from time to time without further notice.

(b) Unless the bylaws prescribe the presence of a greater percentage of the district delegates for a quorum, a quorum for the transaction of business at all meetings of the district delegates of a cooperative is 25 per cent of all district delegates. (§ 10(4) ch 93 SLA 1959; am § 4 ch 136 SLA 1968)

Sec. 10.25.120. Voting. Each member is entitled to one vote on each matter submitted to a vote [(1) at a meeting of the members or (2) by mail ballot permitted by AS 10.25.070]. Each member of a district is entitled to one vote on each matter submitted to a vote at a district meeting. A member is not entitled to vote by proxy. Voting [at a meeting shall be in person, but], if the bylaws so provide, may [also] be by mail. (§ 10(5) ch 93 SLA 1959; am § 2 ch 136 SLA 1982; am § 2 ch 120 SLA 1986)

Sec. 10.25.125. Record date. To determine the members entitled to notice of a meeting of the members, or to vote on a matter which is to be submitted to a vote of the members, or in order to make a determination of members for any other proper purpose, the board of directors may fix in advance a date as the record date for the determination of members. If no record date is fixed for the determination of members entitled to notice of a meeting of members or to vote on a matter which is to be submitted to a vote of the members, the date on which notice of the meeting is first mailed or notice of mail voting is first mailed, is the record date for the determination of members. When a determination of members entitled to vote at a meeting of members is made, the determination applies to an adjournment of the meeting.

Sec. 10.25.130. Waiver of notice. A person entitled to notice of a meeting may waive notice in writing either before or after the meeting. Attendance at a meeting is a waiver of notice of the meeting, unless the person attends solely to object to the transaction of business because the meeting has not been legally called or convened. (§ 11 ch 93 SLA 1959)

Sec. 10.25.140. Board of directors. The business of a cooperative shall be managed by a board of not less than five directors, each of whom shall be a member of the cooperative or of another cooperative which is a member of it. The bylaws shall prescribe the number of directors, their qualifications other than those prescribed in this chapter, and the manner of holding meetings of the board of directors and of electing successors to directors who resign, die, or are otherwise incapable of acting.

10 The bylaws may provide for the removal for cause of directors from office and for the election of their successors. Directors shall not receive salaries for the services as directors and, except in emergencies, shall not receive salaries for their services in any other capacity without the approval of the members.

11 The bylaws may, however, prescribe a fixed fee for each day of attendance at meetings while officially representing the cooperative [for attendance at each meeting of the board of directors] and may provide for insurance and reimbursement of actual expenses incurred while performing their duties as directors [of attendance]. (§ 12(1) ch 93 SLA 1959)

12(a)

Sec. 10.25.145. Liability and indemnification of officers, directors, employees and agents: Insurance. (a) A director, officer, employee or agent of the cooperative is not individually liable for any action, inaction or omission except for any action, inaction or omission which the director, officer, employee or agent did not reasonably believe to be in or not opposed to the best interests of the cooperative.

12(b)

(b) Unless prohibited by the articles of incorporation or bylaws, the cooperative shall indemnify a director, officer, employee or agent of the cooperative, or a person who is or was serving at the request of the cooperative as a director, officer, employee or agent of another cooperative corporation, joint venture, trust or other enterprise, who is a party or is threatened to be made a party to a threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative, against expenses (including attorney fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with the defense, settlement, action or proceeding, except for any action, inaction or omission which the director, officer, employee or agent did not reasonably believe to be in or not opposed to the best interests of the cooperative, and, with respect to a criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful.

12(c)

(c) A cooperative may purchase and maintain insurance on behalf of a director, officer, employee or agent of the cooperative, or who is or was serving at the request of the cooperative as a director, officer, employee or agent of another cooperative corporation, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in such a

12(c) cont'd capacity, or arising out of his status as such, whether or not the cooperative would have the power to indemnify him against the liability under the provisions of this section.

Sec. 10.25.150. Term of office of directors. The directors of a cooperative named in articles of incorporation, consolidation, merger or conversion hold office until the next annual meeting of the members and until their successors are
5 elected and qualify. [At each annual meeting, or in case of failure to hold the annual meeting as specified in the bylaws, at a special meeting called for that purpose, the members shall elect directors to hold office until the next annual meeting of the members, except as otherwise provided in this chapter.] Each director holds office for the term for which he is elected and until his successor is elected and qualifies. (§ 12(2) ch 93 SLA 1959)

Sec. 10.25.160. Staggered terms of office for directors. Instead of electing all directors annually, the bylaws may provide that directors shall be elected for terms not to exceed three years, or until their successors are elected and qualify, and that the terms of directors shall be staggered so that one-third of the directors, or a number as close to one-third as
5 possible, shall be elected each year [at each annual meeting]. (§ 12(3) ch 93 SLA 1959)

Sec. 10.25.170. Quorum of board. A majority of the board of directors constitutes a quorum. (§ 12(4) ch 93 SLA 1959)

Sec. 10.25.175. Board meetings open; exceptions. (a) A meeting of the board of directors may be attended by members of the cooperative. Except when voice votes are authorized, a vote shall be conducted in such a manner that the members may know the
14(c) vote of each person entitled to vote. For purposes of this section, a meeting is defined as a meeting at which there occurs the deliberations of at least the number of individual directors required to take action on behalf of the cooperative.
13 The board of directors may conduct a meeting by communicating simultaneously with each other by means of conference telephones or similar communications equipment.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a regular or special meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the board. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No formal action may be taken during the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters the immediate knowledge of which would clearly have an adverse effect on the finances of the cooperative;

(2) subjects that tend to prejudice the reputation and character of a person; however, the person may request a public discussion;

(3) matters discussed with an attorney for the cooperative, the immediate knowledge of which could have an adverse effect on the legal position of the cooperative[.];

(4) labor negotiations;

(5) personnel matters;

14(a) (6) matters specifically exempted from disclosure by statute, the articles of incorporation or bylaws;

(7) bids, trade secrets or other confidential commercial information;

(8) information concerning a member's payment history, creditworthiness or outstanding accounts with the cooperative;

(9) discussion of litigation by or against the cooperative.

(d) Notice shall be given for all regular or special meetings of the board of directors as provided in the bylaws of the cooperative.

14(b) [(e) Action taken contrary to this section is void.]

(e) Any member affected by action taken contrary to this section may commence a suit in the superior court, and the court may order such equitable relief as it deems appropriate in the circumstances. Action taken contrary to this section shall not be voided if other equitable relief is available. (§ 3 ch 136 SLA 1982)

Sec. 10.25.180. General powers of board. The board of directors may exercise all of the powers of a cooperative not conferred upon the members by this chapter, its articles of incorporation or its bylaws. (§ 12(5) ch 93 SLA 1959)

Sec. 10.25.190. Districts. The bylaws may provide for the division of the territory served or to be served by a cooperative into two or more districts for any purpose, including, without limitation, the nomination and election of directors and the election and functioning of district delegates. These delegates, who shall be members, may nominate and elect directors. The bylaws shall prescribe the boundaries of the districts, or the manner of establishing the boundaries, and the manner of changing the boundaries, and the manner in which the districts function. No member at any district meeting and no district delegate at any meeting may vote by proxy or by mail. However, the election of directors shall be by mail unless the bylaws provide otherwise. (§ 13 ch 93 SLA 1959; am § 4 ch 136 SLA 1982)

Sec. 10.25.200. Officers. The officers of a cooperative are a president, a vice president, a secretary and a treasurer. The officers shall be elected annually by the board of directors from among its members. When a person holding an office ceases to be a director, he ceases to hold office. The offices of secretary and of treasurer may be held by the same person. The board of directors may elect or appoint such other officers, agents, or employees as it considers necessary or advisable and shall prescribe their powers and duties. An officer may be removed from office and his successor elected in the manner prescribed in the bylaws. (§ 14 ch 93 SLA 1959)

Sec. 10.25.210. Amendment of articles of incorporation. A cooperative may amend its articles of incorporation as follows, except that it may change the location of its principal office in the manner set out in § 230 of this chapter.

(1) The proposed amendment shall be presented to a meeting of the members or district delegates and the notice of the meeting shall set out or have attached to it the proposed amendment.

(2) If the proposed amendment, with any changes, is approved by the affirmative vote of not less than two-thirds of those members or district delegates voting on it, the president or vice president shall execute and acknowledge articles of amendment on behalf of the cooperative and the secretary shall affix and attest to the seal of the cooperative. (§ 15 ch 93 SLA 1959; am § 5 ch 136 SLA 1968)

Sec. 10.25.220. Contents of articles of amendment. (a) The articles of amendment shall recite that they are executed under this chapter and shall state

(1) the name of the cooperative:

(2) the address of its principal office;

(3) the amendment to its articles of incorporation.

(b) The president or vice president executing the articles of amendment shall make and annex to them an affidavit stating that the provisions of this section regarding the amendment were complied with. (§ 15 ch 93 SLA 1959)

Sec. 10.25.230. Change of location of principal office. A cooperative may, upon authorization of its board of directors or its members, change the location of its principal office by filing a certificate reciting the change of principal office, executed and acknowledged by its president or vice president under its seal, attested by its secretary, in the office of the commissioner. (§ 16 ch 93 SLA 1959)

Sec. 10.25.235. Member's right to examine books and records. A member of a cooperative may, at a reasonable time and for a proper purpose, examine and make copies of the books and records of the cooperative at the principal office of the cooperative. The cooperative may charge a member an amount equal to the actual cost of duplicating documents requested under this section. 14(d) The cooperative may withhold books and records concerning subjects which may be discussed in executive session as specified in AS 10.25.175(c). (§ 3 ch 136 SLA 1982)

Article 2. Merger and Consolidation.

Sec. 10.25.240. Merger. One or more cooperatives, each hereinafter designated "merging cooperative," may merge into another cooperative, hereinafter designated "surviving cooperative," by complying with the following requirements.

(1) The proposition for the merger of the merging cooperatives into the surviving cooperative and proposed articles of 15 merger shall be submitted to [a meeting of] the members of each merging cooperative and of the surviving cooperative. The notice 15 [of the meeting] shall have attached to it a copy of the proposed articles of merger.

(2) If the proposed merger and the proposed articles of merger, with any amendments, are approved by the affirmative vote of not less than two-thirds of those members of each cooperative 15 voting on them [at the meeting], articles of merger in the form approved shall be executed and acknowledged on behalf of each cooperative by its president or vice president and its seal shall be affixed by its secretary. (§ 18(1) (2) ch 93 SLA 1959)

Sec. 10.25.245. Merger of cooperative and corporation organized under AS 10.05.003 - 10.05.828. (a) A cooperative organized under the provisions of AS 10.25.010 - 10.25.650 may merge into a corporation organized under AS 10.05.003 - AS 10.05.828 that is engaged in business as and is certificated 16 [as an electric or telephone utility] to provide the same type of public utility service as the cooperative and whose certificated area is contiguous with that of the cooperative.

(b) The cooperative shall comply with the provisions of AS 10.25.240 - 10.25.280 insofar as they set out the procedures for the merger of cooperatives.

(c) The manner in which the members of the cooperative may be compensated for any net remaining assets transferred to the corporation organized under AS 10.05.003 - 10.05.828 after the payment of the debts and liabilities of the cooperative shall be stated in the articles of merger. (§ 2 ch 10 SLA 1980)

Sec. 10.25.250. Contents of articles of merger. (a) The articles of merger shall recite that they are executed under this chapter and shall state

(1) the name of each merging cooperative and the address of its principal office;

(2) the name of the surviving cooperative and the address of its principal office;

(3) a statement that each merging cooperative and the surviving cooperative agree to the merger;

(4) the names and addresses of the directors of the surviving cooperative;

(5) the terms and conditions of the merger and the manner of carrying it into effect, including the manner in which members of the merging cooperatives may or shall become members of the surviving cooperative.

(b) The articles of merger may contain provisions not inconsistent with this chapter which are considered necessary or advisable for the conduct of the business of the surviving cooperative.

(c) The president or vice president of each cooperative shall make and annex to the articles an affidavit stating that the provisions of this section regarding the articles were complied with by the cooperative. (§ 18(2) ch 93 SLA 1959)

Sec. 10.25.260. Consolidation. Two or more cooperatives, including electric and telephone cooperatives organized under this Act, hereinafter designated "consolidating cooperative" may consolidate into a new cooperative, hereinafter designated the "new cooperative," by complying with the following requirements.

(1) The proposition for the consolidation into the new cooperative and proposed articles of consolidation shall be submitted to [a meeting of] the members of each consolidating cooperative. The notice [of the meeting] shall have attached to it a copy of the proposed articles of consolidation.

(2) If the proposed consolidation and the proposed articles of consolidation, with any amendments, are approved by the affirmative vote of not less than two-thirds of those members of each consolidating cooperative voting on them, articles of consolidation in the form approved shall be executed and acknowledged on behalf of each consolidating cooperative by its president or vice president and its seal shall be affixed and attested by its secretary. (§ 17(1) (2) ch 93 SLA 1959)

Sec. 10.25.270. Contents of articles of consolidation. (a) The articles of consolidation shall recite that they are executed pursuant to this chapter and shall state

(1) the name of each consolidating cooperative and the address of its principal office;

(2) the name of the new cooperative and the address of its principal office;

(3) a statement that each consolidating cooperative agrees to the consolidation;

(4) the names and addresses of the directors of the new cooperative;

(5) the terms and conditions of the consolidation and the manner of carrying it into effect, including the manner in which members of the consolidating cooperatives may or shall become members of the new cooperative.

(b) The articles of consolidation may contain provisions not inconsistent with this chapter which are considered necessary or advisable for the conduct of the business of the new cooperative.

(c) The president or vice president of each consolidating cooperative executing the articles of consolidation shall make and annex to the articles an affidavit stating that the provisions of this section regarding the articles were complied with by the cooperative. (§ 17(2) ch 93 SLA 1959)

Sec. 10.25.280. Effect of consolidation or merger. (a) In the case of a consolidation the existence of the consolidating cooperatives ceases and the articles of consolidation are the articles of incorporation of the new cooperative. In the case of a merger the separate existence of the merging cooperatives ceases and the articles of incorporation of the surviving cooperative are amended to the extent that changes are provided for in the articles of merger.

(b) The rights, privileges, immunities and franchises, and all real and personal property including, without limitation, applications for membership, all debts due on whatever account and all other choses in action, of the consolidating or merging cooperatives are transferred to and vested in the new consolidated or surviving cooperative without further act or deed.

(c) The new consolidated or surviving cooperative is responsible and liable for the liabilities and obligations of each of the consolidating or merging cooperatives and a claim existing or action or proceeding pending by or against the consolidating or merging cooperatives may be prosecuted as if the consolidation or merger had not taken place, but the new consolidated or surviving cooperative may be substituted in its place.

(d) Neither the rights of creditors nor liens upon the property of the cooperatives is impaired by the consolidation or merger. (§ 19 ch 93 SLA 1959)

Sec. 10.25.290. Conversion of existing corporation. A corporation organized under the laws of the state and supplying or having the corporate power to supply electric energy, or to furnish telephone service, may be converted into a cooperative by complying with the following requirements and thereupon becomes subject to this chapter as if originally organized under this chapter.

(1) The proposition for the conversion of the corporation into a cooperative and proposed articles of conversion shall be submitted to a meeting of the members or stockholders of the corporation, or in case of a corporation having no members or stockholders, to a meeting of the incorporators of the corporation. The notice of the meeting shall have attached to it a copy of the proposed articles of conversion.

(2) If the proposition for the conversion of the corporation into a cooperative and the proposed articles of conversion, with any amendments, are approved by the affirmative vote of not less than two-thirds of those members of the corporation voting on them or, if the corporation is a stock corporation, by the affirmative vote of the holders of not less than two-thirds of those shares of the capital stock of the corporation represented at the meeting and voting on them, or, in the case of a corporation having no members and no shares of its capital stock outstanding, by the affirmative vote of not less than two-thirds of its incorporators, articles of conversion in the form approved shall be executed and acknowledged on behalf of the corporation by its president or vice president and its seal shall be affixed and attested by its secretary. (§ 20(1) (2) ch 93 SLA 1959)

Sec. 10.25.300. Contents of articles of conversion. (a) The articles of conversion shall recite that they are executed under this chapter and shall state

(1) the name of the corporation and the address of its principal office prior to its conversion into a cooperative;

(2) the statute or statutes under which it was organized;

(3) a statement that the corporation elects to become a cooperative, nonprofit, membership corporation subject to this chapter;

(4) its name as a cooperative;

(5) the address of the principal office of the cooperative;

(6) the names and addresses of the directors of the cooperative;

(7) the manner in which members, stockholders or incorporators of the corporation are to become members of the cooperative.

(b) The articles of conversion may contain provisions not inconsistent with this chapter considered necessary or advisable for the conduct of the business of the cooperative.

(c) The president or vice president executing the articles of conversion shall make and annex to it an affidavit stating that the provisions of this section were complied with regarding the articles. The articles of conversion are the articles of incorporation of the cooperative. (§ 20(2) ch 93 SLA 1959)

### Article 3. Dissolution.

Sec. 10.25.310. Dissolution of cooperative which has not commenced business. A cooperative which has not commenced business may be dissolved by delivering articles of dissolution to the commissioner. A majority of the incorporators shall execute and acknowledge articles of dissolution on behalf of the cooperative. The articles shall state

(1) the name of the cooperative;

(2) the address of its principal office;

(3) that the cooperative has not commenced business;

(4) that sums received by the cooperative, less that part disbursed for expenses of the cooperative, have been returned or paid to those entitled to them;

(5) that no debt of the cooperative is unpaid;

(6) that a majority of the incorporators elect to dissolve the cooperative. (§ 21(1) ch 93 SLA 1959)

Sec. 10.25.320. Dissolution of cooperative which has commenced business. A cooperative which has commenced business may be dissolved in the following manner.

(1) The proposition to dissolve shall be submitted to the members of the cooperative at an annual or special meeting. The notice shall set forth the proposition.

(2) At the meeting, the members shall approve, by the affirmative vote of not less than [a majority] <u>two-thirds</u> of all members of the cooperative, the proposition to dissolve the cooperative.

(3) Upon approval, a certificate of election to dissolve, hereafter designated the "certificate," executed and acknowledged on behalf of the cooperative by its president or vice president under its seal, attested by its secretary, shall be submitted to the commissioner for filing together with an affidavit by the officer executing the certificate stating that the statements in the certificate are true. The certificate shall state the name of the cooperative, the address of its principal office, and that the members of the cooperative have voted to dissolve the cooperative. (§ 21(2) ch 93 SLA 1959)

Sec. 10.25.330. Effect of certificate of dissolution. (a) Upon the filing of the certificate and affidavit by the commissioner, the cooperative shall cease to carry on its business except to the extent necessary for the winding up of business. However, its corporate existence continues until articles of dissolution have been filed by the commissioner.

(b) A cooperative that does not file its articles of dissolution within two years after the date of filing the certificate mentioned in (a) of this section, shall be involuntarily dissolved by the commissioner. (§ 21(2) ch 93 SLA 1959; am § 51 ch 170 SLA 1976)

Sec. 10.25.340. Notice to creditors. The board of directors shall immediately have a notice of the dissolution proceedings mailed to each known creditor of and claimant against the cooperative and publish it once a week for two successive weeks in a newspaper of general circulation in the city or borough in which the principal office of the cooperative is located. (§ 21(2) ch 93 SLA 1959)

Sec. 10.25.350. Termination of cooperative affairs. The board of directors shall wind up and settle the affairs of the cooperative, collect sums owing to it, liquidate its property and assets, pay and discharge its debts, obligations and liabilities, other than those to patrons arising by reason of their patronage, and do all other things required to wind up its business. After paying or discharging or adequately providing for the payment or discharge of all its debts, obligations and liabilities, other than those to patrons arising by reason of their patronage, the directors shall distribute remaining sums, first, to patrons for the pro rata return of all amounts standing to their credit by reason of their patronage, and second, to members for the pro rata payment of membership fees. Sums then remaining shall be distributed among its members and former members in proportion to their patronage, except to the extent participation in the distribution has been legally waived. The board of directors shall thereupon authorize the execution of articles of dissolution. The president or vice president shall execute and acknowledge articles of dissolution on behalf of the cooperative and the secretary shall affix and attest to the seal. (§ 21(2) ch 93 SLA 1959)

Sec. 10.25.360. Contents of articles of dissolution. (a) The articles of dissolution shall recite that they are executed under this chapter and shall state

(1) the name of the cooperative;

(2) the address of its principal office;

(3) the date on which the certificate of election to dissolve was filed by the commissioner;

(4) that there are no actions or suits against the cooperative;

(5) that all debts, obligations and liabilities of the cooperative have been paid and discharged or that adequate provision has been made for them;

(6) that the provisions of §§ 320 - 360 of this chapter have been complied with.

(b) The president or vice president executing the articles of dissolution shall make and annex to the articles an affidavit stating that the statements contained in the articles are true. (§ 21 (2) ch 93 SLA 1959)

## Article 4. Miscellaneous Provisions.

Sec. 10.25.370. Filing of articles. Articles of incorporation, amendment, consolidation, merger, conversion, or dissolution, when executed and acknowledged and accompanied by the affidavits required by this chapter, shall be presented to the commissioner for filing. If the commissioner finds that the articles presented conform to the requirements of this chapter, he shall, upon the payment of the fees provided in this chapter, file the articles in the records of his office. Upon filing, the incorporation, amendment, consolidation, merger, conversion, or dissolution provided for is in effect. This section also applies to certificates of election to dissolve and affidavits executed under §§ 320 - 360 of this chapter. (§ 22 ch 93 SLA 1959)

Sec. 10.25.375. Cancellation of certificates issued and filings accepted. The commissioner may, within one year after a filing, and after written notice to the cooperative or individual making a filing, cancel a certificate issued or filing accepted under AS 10.25.010 - 10.25.650, on any ground existing at the time notice of cancellation is made for which the commissioner could have originally refused to issue the certificate or accept the filing. The notice of cancellation shall state the reason for the proposed cancellation. A cooperative or individual may request a hearing within 90 days after receipt of the notice. The notice of cancellation becomes final if the cooperative or individual does not request a hearing within 90 days after receipt of notice. Notice of cancellation must be sent by certified mail with return receipt requested. If the return receipt is not received by the department within a reasonable time and the department has made diligent inquiry as to the current address of the corporation, notice may be made by publication in a newspaper of general circulation in the vicinity of the registered office of the cooperative or the address of the individual who made the filing, and the cancellation becomes final 60 days after publication of the notice. (§ 68 ch 123 SLA 1980)

Sec. 10.25.380. Nonprofit operation. A cooperative shall be operated on a nonprofit basis for the mutual benefit of its members and patrons. The bylaws of a cooperative or its contracts with members and patrons shall contain such provisions relating

to the disposition of revenues and receipts as may be necessary and appropriate to establish and maintain its nonprofit and cooperative character. (§ 23 ch 93 SLA 1959)

Sec. 10.25.390. Disposition of property to secure indebtedness. The board of directors of a cooperative may, without authorization by the members of the cooperative, authorize the execution and delivery of mortgages or deeds of trust of, or the pledging or encumbering of, the property, assets, rights, privileges, licenses, franchises and permits of the cooperative, whether acquired or to be acquired, and wherever situated, as well as the revenues therefrom, upon the terms and conditions the board of directors determines, to secure an indebtedness of the cooperative. (§ 24(1) ch 93 SLA 1959; am § 1 ch 118 SLA 1970)

Sec. 10.25.400. Limitations on disposition of all the property. (a) A cooperative may not otherwise sell, lease or
17 dispose of [all or a substantial portion of its property] more than fifteen percent (15%) of the cooperative's total assets, less depreciation, as reflected on the cooperative's books at the time of the trans-action unless the transaction is authorized by
18(a) the affirmative vote of not less than [a majority] two-thirds of all the members of the cooperative. However, notwithstanding a provision of AS 10.25.010 - 10.25.650 or any other provision of law, the board of directors may, upon the authorization of a majority of those members of the cooperative [present at a meeting of the members,] voting thereupon in an election in which at least ten percent (10%) of the eligible members return ballots, sell, lease or otherwise dispose of all or a substantial portion of its property to another cooperative [or to the holder of its property to another cooperative or to the holder of an evidence of indebtedness issued to the United States of America
18(b) or an agency or instrumentality of it] or to the state of Alaska. (§ 24(2) ch 93 SLA 1959; am § 2 ch 118 SLA 1970)

17 (b) Before a vote on authorization of disposition or sale of more than fifteen percent (15%) of the cooperative's property, the board of directors shall:

(1) have the property appraised by three appraisers chosen by the board and not associated with the cooperative or a
18(c) proposed buyer of cooperative property, provided that the proposed buyer shall have advanced the cost of such appraisals to the cooperative;

(2) notify all cooperative members, at least 90 days in advance, of a vote on disposition of cooperative property. The notice must contain detailed proposals for disposition of such property;

(3) at least 90 days before the vote, notify all other cooperatives situated and operating in the state that the property is available for disposition and include with the notice one copy of each appraisal of the cooperative property; and

(4) at least 30 days before the vote, mail to all members any alternative proposal made by another cooperative or any alternative proposal made by cooperative members if it has been submitted to the board and signed by 50 or more members, together with any recommendation that the board has made, and place all such proposals on the ballot.

(c) This section does not apply to the transfer of cooperative property pursuant to AS 10.25.240 - .300.

Sec. 10.25.410. Nonliability of members for debts of cooperative. No member is liable or responsible for any debts of the cooperative and the property of the members is not subject to execution therefor. (§ 25 ch 93 SLA 1959)

Sec. 10.25.420. Effect of recordation of mortgages. A mortgage, deed of trust, or other instrument executed by a cooperative, which affects real and personal property and which is recorded in the real property records in the city, borough or other recording districts in which the property is located or is to be located has the same effect as if recorded, filed or indexed as provided by law in the proper office in the city, borough or other recording district as a mortgage of personal property. All after-acquired property of the cooperative described or referred to as being mortgaged or pledged in a mortgage, deed of trust or other instrument is subject to the lien thereof immediately upon the acquisition of such property by the cooperative, whether or not the property was in existence at the time of the execution of the mortgage, deed of trust or other instrument. Recordation of such mortgage, deed of trust or other instrument constitutes notice and has the same effect with respect to after-acquired property as it has under the laws relating to recordation of property owned by the cooperative at the time of the execution of the mortgage, deed of trust or other instrument and described in it or referred to as being mortgaged or pledged thereby. The lien of such mortgage, deed of trust or other instrument upon personal property after its recordation continues for the period of time specified in the instrument without refiling or the filing of a renewal certificate, affidavit or other supplemental information required by the laws relating to the renewal, maintenance or extension of liens upon personal property. (§ 26 ch 93 SLA 1959)

Sec. 10.25.430. Validity of mortgage under Rural Electrification Act of 1936. A mortgage made by a cooperative organized under this chapter to the United States of America, or any agency or instrumentality of it, to secure indebtedness incurred under the Rural Electrification Act of 1936, as amended, is not void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith for value because the mortgage is not accompanied by an affidavit of the parties to

it, or an affidavit of the agent or attorney in fact of a party to it, that the mortgage is made in good faith to secure the amount named, and without a design to hinder, delay or defraud creditors. A mortgage made by a cooperative organized under this chapter to the United States of America, or any agency or instrumentality of it to secure indebtedness incurred under the Rural Electrification Act of 1936, as amended, need not set forth the date upon which the indebtedness secured by it becomes due. (§ 26 ch 93 SLA 1959)

Sec. 10.25.440. Construction standards. Construction of electric lines and facilities, or telephone lines and facilities, by a cooperative shall, as a minimum requirement, comply with the standards of the National Electrical Safety Code in effect at the time of construction. (§ 27 ch 93 SLA 1959)

Sec. 10.25.450. Directors, officers or members as notaries. No person authorized to take acknowledgments under the laws of this state is disqualified from taking acknowledgments of instruments to which a cooperative is a party because he is an officer, director or member of the cooperative. (§ 28 ch 93 SLA 1959)

Sec. 10.25.460. Registered office and registered agent. Each cooperative shall have and continuously maintain in the state

(1) a registered office which may be, but need not be, the same as the location of the principal office;

(2) a registered agent who is an individual resident in the state and whose business office is identical with the registered office. (§ 29 ch 93 SLA 1959)

Sec. 10.25.470. Change of registered office or registered agent. A cooperative may change its registered office or change its registered agent, or both, upon filing in the office of the commissioner a statement setting forth

(1) the name of the cooperative;

(2) the address of its registered office;

(3) if the address of its registered office is changed, the address of the new registered office;

(4) the name of the registered agent;

(5) if its registered agent is changed, the name of its new registered agent;

(6) that the address of its registered office and the address of the business office and its registered agent, as changed, will be identical;

(7) that such change was authorized by resolution adopted by its board of directors. (§ 30 ch 93 SLA 1959)

Sec. 10.25.480. Execution and filing of statement. The statement of change of office or agent shall be executed by the cooperative by its president or vice president, verified by him, and directed to the commissioner. If the commissioner finds that the statement conforms to this chapter, he shall file it in his office. Upon the filing, the change of address of the registered office, and the appointment of the registered agent, or both, as the case may be, is effective. (§ 30 ch 93 SLA 1959)

Sec. 10.25.490. Resignation of registered agent. A registered agent of a cooperative may resign by filing a written notice of resignation, executed in duplicate, with the commissioner. The commissioner shall immediately mail a copy of it to the cooperative at its registered office. The appointment of the agent terminates 30 days after receipt of the notice by the commissioner. (§ 30 ch 93 SLA 1959)

Sec. 10.25.500. Service of process on cooperative. (a) The registered agent of a cooperative is an agent of the cooperative upon whom process, notice or demand required or permitted by law to be served upon the cooperative may be served.

(b) When a cooperative fails to appoint or maintain a registered agent in the state, or when its registered agent cannot with reasonable diligence be found at the registered office, then the commissioner is an agent of the cooperative upon whom process, notice or demand may be served. (§ 31 ch 93 SLA 1959)

Sec. 10.25.510. Manner of service on commissioner. (a) Service on the commissioner is made by delivering to and leaving with him, or with a clerk having charge of the corporation department of his office, duplicate copies of the process, notice or demand. The commissioner shall immediately have one copy forwarded by registered mail, addressed to the cooperative at its registered office. Service on the commissioner is returnable in not less than 30 days.

(b) The commissioner shall keep a record of each process, notice and demand served upon him under this section, and shall record the time of service and his action with reference to it. (§ 31 ch 93 SLA 1959)

Sec. 10.25.520. Other means of service not affected. Nothing in §§ 500 and 510 of this chapter limits or affects the right to serve process, notice or demand required or permitted by law to be served on a cooperative in any other manner permitted by law. (§ 31 ch 93 SLA 1959)

Sec. 10.25.530. Fees. (a) The commissioner shall establish by regulation subject to AS 10.05.773, charge and collect filing fees for

(1) filing articles of incorporation;
(2) filing articles of amendment;
(3) filing articles of consolidation or merger;
(4) filing articles of conversion;
(5) filing certificate of election to dissolve;
(6) filing articles of dissolution;
(7) filing certificate of change of principal office and designation or change of registered office and registered agent; and
(8) acting as agent for service of process.

(b) The department may by regulation charge each cooperative subject to AS 10.25.010 - 10.25.650 a fixed fee in place of the various fees specified in AS 10.25.010 - 10.25.650, with the exception (a)(1) of this section, and for the routine administrative services rendered to the corporation by the department. An increase in the fixed fee charged under this subsection is subject to AS 10.05.773. (§ 32 ch 93 SLA 1959; am § 52 ch 170 SLA 1976; am § 69 ch 123 SLA 1980)

Sec. 10.25.540. Taxation of cooperatives. (a) Cooperatives under AS 10.25.010 - 10.25.650 shall apply for a business license and pay the initial license fee as provided by the Alaska Business License Act (AS 43.70.020 - 43.70.120), as amended.

(b) Before March 1 of each year,

(1) each telephone cooperative shall pay to the state, instead of state and local ad valorem, income and excise taxes which may be assessed or levied, a percentage of its gross revenue earned during the preceding calendar year;

(2) each electric cooperative shall pay to the state, instead of state and local ad valorem, income and excise taxes which may be assessed or levied, a tax on the number of kilowatt hours of electricity sold at retail by the cooperative during the preceding calendar year. (§ 33 ch 93 SLA 1959; am § 1 ch 66 SLA 1960; am § 1 ch 74 SLA 1980)

Sec. 10.25.550. Amount of telephone cooperative gross revenue tax. The telephone cooperative gross revenue tax shall be computed as follows:

(1) one percent of gross revenue for cooperatives which have furnished telephone service to consumers for less than five years as of December 31 of the preceding calendar year;

(2) two percent of gross revenue for cooperatives which have furnished telephone service to consumers for five years or longer as of December 31 of the preceding calendar year. (§ 33 ch 93 SLA 1959; am § 1 ch 66 SLA 1960; am § 2 ch 74 SLA 1980)

Sec. 10.25.555. Amount of electric cooperative tax. (a) The electric cooperative tax shall be computed as follows:

(1) one-fourth mill per kilowatt hour for cooperatives which have furnished electric energy and power to consumers for less than five years as of December 31 of the preceding calendar year;

(2) one-half mill per kilowatt hour for cooperatives which have furnished electric energy and power to consumers for five years or longer as of December 31 of the preceding calendar year.

(b) In this section, "mill" means one-tenth of one cent. (§ 3 ch 74 SLA 1980)

Sec. 10.25.560. Manner of computing telephone cooperative gross revenue. Gross revenue of a telephone cooperative includes all revenues earned from local and toll services. (§ 33 ch 93 SLA 1959; am § 4 ch 74 SLA 1980)

Sec. 10.25.570. Refund to local governments. The proceeds of the telephone cooperative gross revenue tax and the electric cooperative tax, less the amount expended by the state in their collection, shall be refunded to an organized borough or a city of any class incorporated under state law, in the proportion that the revenue was earned within the city or the borough area outside the city. However, taxes collected on gross revenue earned by a telephone cooperative or on the sale of electricity by an electric cooperative outside a city or organized borough shall be retained by the state and deposited into its general fund. (§ 33 ch 93 SLA 1959; am § 1 ch 241 SLA 1970; am § 5 ch 74 SLA 1980)

Sec. 10.25.580. Inventory and fixtures subject to taxation. The inventory and fixtures of a business operated by a cooperative incidental to the furnishing of central station electric service, including, without limitation, appliance stores or departments, is not exempt from ad valorem taxes. The inventory and accounts of these businesses shall be separately maintained and taxes shall be paid upon them as provided by law. (§ 33 ch 93 SLA 1959)

Sec. 10.25.590. Connection and interconnection of facilities. A telephone cooperative organized or doing business under this chapter, hereafter designated as applicant, may require a person furnishing telephone service to the public in the state, hereafter designated as company, to interconnect its lines, facilities or systems with, or otherwise make available the lines, facilities or systems to, the applicant's telephone lines, facilities or systems, in order to provide a continuous line of communication for the applicant's subscribers. If the company and the applicant are unable to agree upon the terms and

conditions of interconnection, including compensation, the superior court shall, upon petition of the parties, or either of them, establish the terms and conditions. The terms and conditions shall be reasonable and nondiscriminatory. (§ 34 ch 93 SLA 1959)

Sec. 10.25.600. Correction of defectively organized cooperatives. If a cooperative has filed defective articles of incorporation, or has failed to do all things necessary to perfect its corporate organization, it may file corrected articles of incorporation, or amend the original articles, and do and perform all acts and things necessary for the correction of the defects. The action so taken is valid and binding upon all persons concerned. The capacity of the cooperative to file corrected articles of incorporation or amendments to the original articles, or to do and perform all acts and things necessary, may not be questioned. (§ 37 ch 93 SLA 1959)

## Article 5. General Provisions.

Sec. 10.25.610. Purpose. Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of supplying electric energy or telephone service and promoting and extending the use of these services. (§ 2 ch 93 SLA 1959)

Sec. 10.25.620. Chapter extended to existing cooperatives.

Sec. 10.25.630. Construction of chapter. This chapter is complete in itself and is controlling. The provisions of any other law of the state relating to the organization of a corporation, except as provided in this chapter, do not apply to a cooperative organized under this chapter. The enumeration of an object, purpose, power, manner, method or thing does not exclude like or similar objects, purposes, powers, manners, methods or things. (§ 35 ch 93 SLA 1959)

Sec. 10.25.640. Definitions. As used in AS 10.25.010 - 10.25.650

(1) "commissioner" means the commissioner of commerce and economic development;

(2) "cooperative" means a corporation organized under AS 10.25.010 - 10.25.650 or which becomes subject to AS 10.25.010 - 10.25.650 in the manner provided in AS 10.25.010 - 10.25.650;

(3) "person" means a natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision, or an agency of the state or political subdivision, or a body politic;

(4) "telephone service" means communication service whereby voice communication through the use of electricity is the principal intended use, and includes all telephone lines, facilities or systems used in the rendition of this service.

(5) "related telecommunications service" means telecommunications service where there is the transmission and reception of messages, impressions, pictures, and signals by means of electricity, electromagnetic waves, and any other kind of energy, force variations, or impulses, whether conveyed by cable, wire, radiated through space, or transmitted through other media within a specified area or between designated points. (§ 3 ch 93 SLA 1959; am § 10 ch 64 SLA 1959; am § 2 ch 1 SLA 1961; am § 72 ch 218 SLA 1976; am § 5 ch 136 SLA 1982)

Sec. 10.25.650. Short title. This chapter may be cited as the Electric and Telephone Cooperative Act. (§ 1 ch 93 SLA 1959)

# ALASKA RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC.

237 E. FIREWEED LANE • SUITE 301
ANCHORAGE, ALASKA 99503 • (907) 276-3235


February 25, 1988

Mr. Jeff Bohman, Executive Director
Alaska Public Interest Research Group
P.O. Box 10-1093
Anchorage, AK 99510

Dear Jeff:

This is in response to your comments on HB 394 dated February 22, 1988.

First, we have never said that the purpose of this legislation is to deal with "mergers, dissolutions, consolidations, etc." You may have received that impression from a newspaper story. That was the focus of the news report, apparently because the reporter saw this as the one provision with the most potential for controversy. What we have said is the purpose of this bill is to amend the electric and telephone cooperative act "to clear up ambiguities, to permit cooperatives to operate efficiently, and to assure proper control of the cooperatives by the members."

We have no hidden agenda. If you could suggest an amendment which would narrow the scope of the title to prevent the addition of items to this bill which are not germane to AS 10.25, we would be delighted to endorse that amendment.

Section 1. The law is presently silent on whether cooperative utilities can make contributions for public purposes as would be authorized by this section. All cooperatives are frequently asked to make such contributions. Most cooperative boards have decided to make contributions. Some coop boards, on the advise of counsel, have decided that they do not have the authority to do so. Our principal purpose in proposing this kind of amendment is simply to get the law stated clearly as to what a cooperative can or cannot do in regard to contributions. The proposed standard is lifted verbatim from the law governing all other types of cooperatives in this state (AS 10.25.010 (12)).

Section 10. The proposed deletion of language in this section is purely for the purpose of eliminating surplus language which causes confusion. Most electric cooperatives - all of the larger ones -

now provide for voting by mail for election of directors. The old language in Section 10 being deleted implies that the election has to take place at a meeting.

If a cooperative does not have mail balloting and a quorum is not present at an annual meeting, the procedure is to adjourn the meeting to a later date rather than calling a special meeting. This procedure is provided for in AS 10.25.110 and is not proposed for amendment.

The amendment in Section 10 does not eliminate the right to recall directors. To make that right completely clear, the House Labor and Commerce subcommittee amended Section 8 (page 6, line 6) to provide that coop bylaws shall provide for the right of recall. We support that amendment.

Section 13. The subcommittee amended this section to remove the language on page 9, line 1 at our request. With that change, every item specifically listed as a subject which a cooperative board may discuss in executive session was believed to be included in the general provisions of AS 10.25.175 (c) when that section was enacted in 1980. Recent court decisions on similar provisions in AS 44.62.310 have cast doubt on that belief, so we ask that these items be listed specifically. When you look at this list of specific subjects, surely you cannot have any serious belief that they are not appropriate subjects for discussion in executive session. Any action taken on these subjects would still have to done in open session.

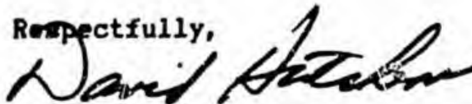
Electric and telephone cooperatives are corporations, not government entities, so it is necessary to deal with open meetings for cooperatives in AS 10.25 rather than applying AS 44.62.310 which covers public bodies. It would not be appropriate to apply that section to cooperatives by reference as you suggest because in a cooperative it is the "membership" not the "public" which should have a right to attend and be informed.

Section 14. You understand this section the same way we do. A court could void an action if it determined that to be the appropriate remedy, it is just that voidance would not be automatic.

Section 15. We understand this section to be narrow in its scope. Only those subjects which are appropriate for discussion in executive session can be withhled from inspection by a member.

If you have any further questions or comments regarding this legislation, we would be pleased to discuss them with you.

Respectfully,



David Hutchens

# NAKNEK ELECTRIC ASSOCIATION, INC.

POST OFFICE BOX 118 • NAKNEK, ALASKA 99633 • PHONE (907) 246-4261

MAR

February 26, 1988

John Sund, Representative
Alaska State Legislature
PO Box V (MS 3100)
Juneau, AK 99811

Dear Representative Sund:

As Representatives for Naknek Electric Association, Inc. (N.E.A.), we are jointly sending this correspondence to ask for your support concerning HB 394, which will be before you for consideration.

The proposed bill will modify the existing language of The Electric and Telephone Cooperative Act (AS 10.25) in an effort to meet the changes that have occurred in the utility industry since the Act was adopted in 1959.

Although we support all of the proposed amendments, two items of particular concern have prompted this writing.

Of foremost concern to N.E.A. and the other Cooperatives in Alaska are the proposed changes to Article 3 of the Statute. The most significant change here would be the increase in the vote required to sell a Cooperative from a simple majority to a two-thirds majority. We feel, that since the vote to sell or dissolve a Cooperative is the most important decision that the members can make, that this decision should be based on an overwhelming majority of the member/owners.

As you may be aware, N.E.A. along with many of the other Certificated Electric Utilities in Alaska, have been contacted for potential buy-out offers, (See attached copy of letter dated October 12, 1987 from ERA Realty). This prompts us to pursue the above referenced amendment. Those of us directly involved with the Cooperative Systems believe that local ownership and leadership is ~~still~~ the best way to operate a utility company.

N.E.A. is also very interested in the proposed amendment to Section 10.25.020, Powers of an Electric Cooperative.

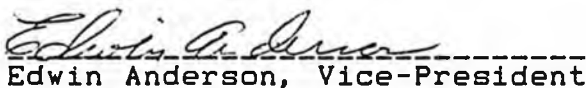
The section relating to authorizing waste heat distribution systems as a Cooperative function is most important to N.E.A. In the past, the legislature has encouraged the use of waste heating, but unfortunately the Cooperatives have had no clear authority to engage in that business. This modification would allow the Cooperatives this opportunity. N.E.A. has in place, an operating waste heating system that provides heating service to 83,837 square feet of residential and commercial buildings. We believe that this service provides a benefit to our consumers at a substantial savings of money and natural resources. For these reasons, we believe the Cooperatives should statutorily be permitted to engage in this business.

We thank you for your time, and any consideration that may be given to this important Legislation will be appreciated by our consumers.

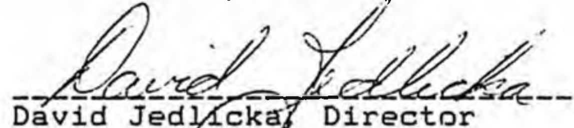
Sincerely,

Mike Swain, President

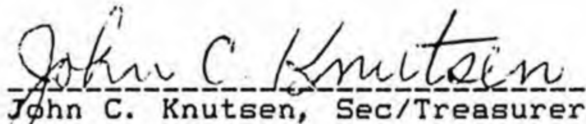
Dale Peters, Director



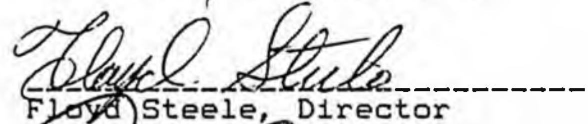
Edwin Anderson, Vice-President



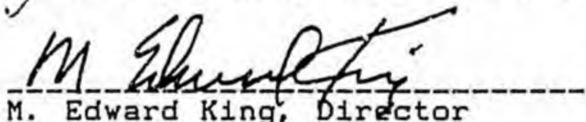
David Jedlicka, Director



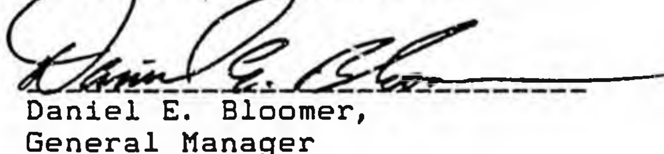
John C. Knutsen, Sec/Treasurer



Floyd Steele, Director



M. Edward King, Director



Daniel E. Bloomer,
General Manager

cc: David Hutchens, ARECA
Roger Kemppel, N.E.A. Attorney

## Electricity co-ops want hostile-takeover protection

The Associated Press

JUNEAU — The non-profit utility cooperatives that provide many Alaskans with electric power are seeking safeguards against hostile takeovers by profitable companies.

A bill supported by the Alaska Rural Electric Cooperative Association and introduced in both houses of the legislature would increase the vote needed to sell or disband a utility from half the members to two-thirds.

"We as a co-op organization are not trying to keep a co-op from selling if it's the opinion of the vast majority of the membership that they should sell," says Ken Johnson, information director for the association.

"If you have 2,500 members and 1,251 vote to sell and 1,249 vote not to, is that clear enough to go and sell? We think the margin should be substantially greater," Johnson said Thursday.

There's no immediate threat of utility takeovers in Alaska, Johnson said.

But there is increasing concern about them in the Lower 48, he said, and as Alaska co-ops improve their financial footing they might become attractive to utilities looking to expand. Growing companies in other states have, in essence, bought out some co-ops by offering members money for giving up their shares of a co-op's equity, he said.



# Non-profit utility co-ops seek protection from takeovers

By SUE CROSS
THE ASSOCIATED PRESS

The non-profit utility cooperatives that provide many Alaskans with electric power are seeking safeguards against hostile takeovers by profitable companies.

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But there is increasing concern about them in the Lower 48, he said, and as Alaska co-ops improve their financial footing they might become attractive to utilities looking to expand. Growing companies in other states have, in essence, bought out some co-ops by offering members money for giving up their shares of a co-op's equity, he said.

Alaska utilities are just beginning to consider the issue because they're becoming financially attractive for the first time after a long period of development, Johnson said.

During the 1970s and early 1980s, demand for electricity was booming with the population and utility co-ops were borrowing as fast as they could – often at high interest rates – to meet the need.

The large debts and high start-up costs left the co-ops with little equity that another corporation would want to acquire.

Since then the loans have been refinanced at lower interest, they're being paid off and Alaska utilities are building value, he said.

The association represents all but two of Alaska's 17 electric cooperatives, the Barrow and Middle Kuskokwim co-ops. About 70 percent of Alaska electric consumers are members of the co-ops, Johnson said.

The co-op bills (SB369 and HB394) also would affect telephone cooperatives.

Other than the proposed voting change, most of the measure's provisions would simply clarify co-ops' current practices by putting them in statute, Johnson said.

Utilities want it stated in law that they can donate money to charities or educational groups – as some do now – and that members can vote by mail as well as voting in person at co-op meetings.

Most of the larger co-ops already allow mail ballots because they don't have room to house a meeting of half their members and to increase the voting rate, Johnson said.

Other provisions of the bill would:

- Allow co-ops to run a waste heat distribution system;
- Require membership as a condition of getting service from a co-op;
- Increase the notice time for a public meeting from no more than 40 days to 120 days;
- Allow co-ops to insure their officers and directors against liability connected to their service;
- Clarify open-meetings requirements to allow executive sessions – which are closed – when discussing labor and personnel matters; litigation; a member's finances; bids, trade secrets or confidential commercial information.

HB
406

go0518hL
Ford
4/25/88

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 406 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to immunity for the decision to take or not to take an intoxicated or incapacitated person into protective custody; and providing for an effective date."

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

* Section 1. AS 47.37.170(g) is repealed and reenacted to read:

(g) A person may not bring a civil or criminal action against a peace officer or member of the emergency service patrol based on the decision of the peace officer or member of the emergency service patrol to take or not to take an intoxicated or incapacitated person into protective custody or to release a person from protective custody as provided in this section, unless the decision is made maliciously.

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

go0518hBa
Ford

# A M E N D M E N T

Offered in the HOUSE

By Sund

TO: CSHB 406(HESS)

Page 1, line 16, after "maliciously":

Insert "or with gross negligence"



4/25/88

Offered: 4/7/88
Referred: Judiciary and Finance

go0518hB

Ford

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

2 CS FOR HOUSE BILL NO. 406 (HESS)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to immunity for the decision to take
7 or not to take an intoxicated or incapacitated person
8 into protective custody; and providing for an effec-
9 tive date."

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

11 * Section 1. AS 47.37.170(g) is repealed and reenacted to read:

12 (g) A person may not bring a civil or criminal action based on
13 the decision of a peace officer or member of the emergency service
14 patrol to take or not to take an intoxicated or incapacitated person
15 into protective custody or to release a person from protective custody
16 as provided in this section, unless the decision is made maliciously.

17 * Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

Amdts:

(1) 'or gross negligence'

(2) May not bring a civil or criminal action against a peace officer - based on the decision

# Soldotna Police Department

P.O. Box 2499
Soldotna - Alaska 99669

APR 18 1988

Duane Udland
Chief of Police

Representative John Sund
Alaska State Legislature
Pouch V (MS 3100)
Juneau, AK 99811

Dear Representative Sund,

I am writing to you about two bills that are presently in House Judiciary, of which you are the Chairman. I would appreciate it if you would consider my thoughts on two bills.

House Bill 406. This bill has come to your committee with some amendments to it, that were made in House HESS. The amended version is acceptable to my City. We urge you to move this bill as quickly as possible. It is an important bill to every municipality in the State of Alaska, in that Cities need relief from the Busby decision. Time is short, and the bill is scheduled to go to another committee in the House, before it moves on to the Senate.

Senate Bill 37. This relates to the Fingerprinting of Juveniles. Hopefully, it will come to your committe from House HESS in the near future. It is my opinion, that SB 37, if enacted, would provide law enforcement a very important tool for investigating crimes. It is well documented that a large percentage of crime in Alaska is committed by Juveniles. By allowing the taking of fingerprints under the guidelines of SB 37, the ability of law enforcement to solve crime committed by juveniles would be greatly enhanced. We in law enforcement do not see SB 37 as an unreasonable intrusion of privacy, since the fingerprinting would be done only after juveniles of a certain age are arrested for felonies. We also do not feel that fingerprinting a juvenile is inconsistent with rehabilitation of youthful offenders.

Thank you for your time on these issues. If you or your staff have any questions that I may answer, please contact me.

Sincerely,

Duane S. Udland
Chief of Police

cc: Representative Navarre

P.O. Box 23, Craig, Alaska 99921 (907) 826-3275

April 14, 1988

APR 18 1988

Representative Jo. . Sund
State Capitol
Juneau, Ak 99801

Re: HB406

Dear John,

It is my understanding that HB 406 is in your committee. I am writing to ask that you schedule it for a hearing and move it out with a recommendation to pass it.

The bill will relieve the City from the duty to incarcarate each person observed in an intoxicated state, or at least, as I understand it, allow the officer some professional discretion in the decision. As our officers make bar checks, they encounter many intoxicated persons, most in the care of companions or friends. If our officers follow the present policy as outlined in the Busby case, they are negligent in their duties if they allow intoxicated or incapacitated people to leave the premises. We are presently expanding our jail, but as you know, the summer population of fishermen is no match for our police force or our facilities.

Officers should have the ability to escort drunks to their boats, to their homes, or to release them to their friends. At the time Busby was being litigated, the City of Craig was sued by a person who was arrested because he was intoxicated; it seems that we can't win, we are sued if we arrest drunks, and we are liable if we do not.

Alaskan municipalities and professional police officers need the protection of HB406. You and the House and Senate majority are the key, please help us by passing this bill this session!

Sincerely,

David Palmer
Executive Assistant to the Mayor

cc: Rep. Peter Goll
Sen. Dick Eliason

# CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

• Main Office (907) 224-3331
• Police (907) 224-3338
• Harbor (907) 224-3138
• Fire (907) 224-3445
• Telecopier (907) 224-3248

APR 21 1988

April 14, 1988

The Honorable John Sund, Chairman, Judiciary Committee
House of Representatives
P.O. Box V, Mail Stop 3100
Juneau, Alaska 99811

Dear Sir:

This is to request that you lend your support to the passage of House Bill No. 406, regarding protective custody. The recent amendment to the bill makes it a good bill that needs to be enacted quickly.

The burden that has been set upon law enforcement since the Busby decision has been detrimental to the safety of the public. Police Officers have been forced to detain incapacitated persons who did not need it, to protect themselves, wasting time that could have been better spent protecting the general public.

The "malicious" addendum to the bill will protect those incapacitated persons who really need to be placed into protective custody. Removing the financial burden from the municipalities will further push the State into establishing systems to help alleviate the problem we are having in our streets. Our agency has begun billing protective custody prisoners, and placing the money into a trust fund. We hope that this will place some of the burden on the drinking public, thereby making them think about saving money for a cab, or getting a ride home and not collapsing in the streets. More must be done.

This bill is a good step in the right direction. I would hope that you would use your good office to move this bill along.

Sincerely,

Louis A. Bencardino
Chief of Police
Seward Police Department

LAB/dra

(7)

# HOUSE COMMITTEE REPORT

Date referred: 1/27/88

FURTHER REFERRALS: Judiciary
Finance

DATE: April 6, 1988

The Health, Education and Social Services Committee has considered HB 406

"An Act relating to the responsibility for the treatment and care of intoxicated and incapacitated persons taken into protective custody; and providing for an effective date."

**RECOMMENDS:**

[X] replace with CS HB 406 (HESS)

[ ] attached amendment(s)

[ ] the same title

[X] a new title

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ________ Committee

**ADOPTS:** [ ] ________ letter of intent

**ATTACHES NEW FISCAL NOTE(s):**

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published ________

[X] same as previous zero fiscal note published 1/27/88

**SIGNING DO PASS:**

[signatures]

**SIGNING OTHER RECOMMENDATIONS:**

Chairman's signature

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 27, 1988

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the responsibility for the treatment and care of intoxicated and incapacitated persons taken into protective custody.

The bill is intended to address an existing crisis relating to the placement of intoxicated and incapacitated persons in state correctional facilities. As applied in the recent decision of the Alaska Supreme Court in Busby v. Municipality of Anchorage, 741 P.2d 230 (Alaska 1987), AS 47.37.-170(b) creates an actionable duty to take into protective custody persons who are incapacitated by alcohol. According to the court, failure to take an incapacitated person into protective custody creates a cause of action against a peace officer (or member of an emergency service patrol) who exercises the discretion not to do so, for any damages or injuries that occur as a result of the officer's (or member's) decision. The Busby decision has resulted in a tremendous increase in the number of persons being taken into protective custody under AS 47.37.170 by law enforcement agencies due to the agencies' fear of potential liability. Because of the lack of adequate alternative placements, most of these persons end up being detained in state correctional facilities.

Section 2 of this bill addresses this problem by making clear that, while the duty to provide for the safety of incapacitated persons exists, the decision to take a person into protective custody or to release a person in protective custody is a discretionary function under AS 09.50.250(1) (for state employees) and AS 09.65.070(d)(2) (for municipal employees), and no cause of action may be brought based upon such a decision. In other words, this bill would have the effect of countering the decision in Busby, and is supported by the municipalities in Alaska as well as the Department of Corrections, Department of Health and Social Services, Department of Law, and Department of Public Safety. In addi-

tion, by making clear not only that this is a discretionary function but that it is the sort of discretionary function that does not give rise to liability, this bill avoids the problem created by Neakok v. Division of Corrections, 721 P.2d 1121 (Alaska 1986). The decision in Neakok virtually eliminated any effect remaining in the legislature's phrase "discretionary function" in AS 09.50.250(1).

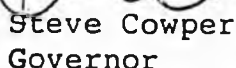
Section 1 of the bill addresses a related problem. AS 33.-30.071(a) presently requires municipalities to be responsible for the cost of care for incapacitated persons placed in municipal detention facilities, while the state is responsible when such persons are placed in state correctional facilities. Nearly all incapacitated persons are taken into protective custody by municipal peace officers or emergency service patrols, but municipalities in which a state correctional facility exists have little incentive to identify and use alternative placements for incapacitated persons since it costs them nothing to place those persons in a state correctional facility. The amendments in sec. 1 of the bill require the appropriate municipality to pay the costs of protective custody in a state facility, regardless of who placed the incapacitated person in custody.

Municipalities in which a state correctional facility does not exist are fully responsible for the care and placement of incapacitated persons under AS 33.30.071(a), and thus have substantial incentive to identify and use placements less costly than prison cells.

The problem of crowding in Alaska's prison system is well known, and is exacerbated by the large numbers of incapacitated persons who are admitted under AS 47.37.170. Section 1 of this bill would equalize the burden for the cost of care of incapacitated persons between all Alaskan communities, and help address the serious crowding problem in state correctional facilities. It will also provide incentive for municipalities to identify and use placements for incapacitated persons that are less costly than prison beds and more treatment oriented, as intended by Alaska's Uniform Alcoholism and Intoxication Treatment Act (AS 47.37).

Finally, due to the crisis that this bill is intended to address, the bill contains an immediate effective date.

Sincerely,



Steve Cowper
Governor

# KENAI POLICE DEPT.

107 SOUTH WILLOW ST., KENAI, ALASKA 99611

TELEPHONE 283-7879

February 12, 1988

Honorable Michael Navarre
House of Representatives
Box V
Juneau, Alaska 99811

RE: House Bill 406
Protective Custody

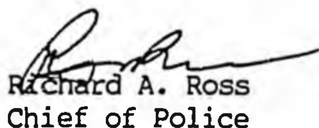
Dear Representative Navarre, Mike

Section 1 of this bill that amends AS 33.30.071(a) is unacceptable. It would require municipalities to now absorb the cost of protective custody detentions made within their jurisdiction. Those detentions made in the Borough would still be at State expense. The municipal taxpayer is being asked to absorb a cost for a service that is provided without taxpayers cost outside the municipality. As protective custody under Title 47 is not a violation or criminal offense there is no means by which the municipality can recoup the expense incurred. In the City of Kenai almost all protective custody detentions involve transients or other non-city residents where no other disposition is available.

Section 2 of this bill is much needed in order to protect the State and municipality from excessive liability exposure over an area of limited control. Changing the protective custody from a ministerial to a discretionary function as provided by this bill will accomplish that.

Your time and consideration of this input is appreciated.

Respectfully,



Richard A. Ross
Chief of Police

RAR/tc

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 406
PUBLISH DATE: 1/27/88

# FISCAL NOTE

REQUEST:

Revision Date:

Title: "An Act relating to the treatment and care of intoxicated and incapacitated persons."

Sponsor:

Requestor:

Agency Affected: Dept. Corrections

BRU:

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| 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 | | | | | | |
| TOTAL | 0 | 0 | 0 | 0 | 0 | 0 |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

This legislation will have no fiscal impact on the Department of Corrections. There will be increased costs for the Department of Public Safety. Projected program receipts from municipalities, based on current bookings, are $550,000.00.

Susan E. Knighton

Prepared by: Susan Knighton, Director
Phone: 465-3376
Division: Administrative Services
Date: 1-19-88

Approved by Commissioner: Susan Humphrey-Barnett
Date: 1-19-88
Agency: Department of Corrections

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: HB 406
Publish Date: 1/27/88

# FISCAL NOTE

REQUEST
Revision Date:
Title: Relating to the responsibility for treatment and care of intoxicated...
Sponsor: Rules Committee
Requestor: Governor's Office

Agency Affected: Public Safety
BRU: DPS Administration
Components: Contract Jails

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | -0- | -0- | -0- | -0- | -0- | -0- |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|---|---|---|---|---|---|---|
| GENERAL FUNDS | -0- | -0- | -0- | -0- | -0- | -0- |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | -0- | -0- | -0- | -0- | -0- | -0- |

POSITIONS:

| | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|---|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

See Fiscal Note continuation page for analysis.

Prepared by: Gayle Horetski, Deputy Commissioner
Phone: 465-4322
Division: Commissioner's Office
Date:

Approved by Commissioner: [signature]
Date: 1-21-88
Agency: Public Safety

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

FISCAL NOTE ANALYSIS

"An act relating to the responsibility for treatment and care of intoxicated and incapacitated persons taken into protective custody; and providing for an effective date."

Under this bill, the municipality in which an intoxicated person was taken into protective custody under AS 47.37.170 is responsible for the cost of care of that person while he or she is incapacitated. This would have no effect on the Department of Public Safety, as we do not pay the costs of care for these persons now, nor would we under this bill.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

**DEPARTMENT OF LAW**

*OFFICE OF THE ATTORNEY GENERAL*

*P.O. BOX K—STATE CAPITOL*
*JUNEAU, ALASKA 99811-0300*
*PHONE: (907) 465-3600*

February 3, 1988

Honorable Niilo Koponen
Honorable Johnny Ellis
Co-Chairs
House Health, Education, and
Social Services Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 406, treatment and care of intoxicated and incapacitated persons
Our file no. 773-88-0051

Dear Representatives Koponen and Ellis;

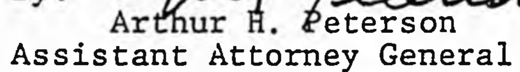
I let an error in this bill slip by. On page 1, line 27, the word "readopted" should, of course, read "reenacted." Assuming that the bill will be reported out of your committee, I would appreciate your making this correction in a committee substitute. (The "readopt" language comes from regulations work, whereas the "reenact" is appropriate for legislation.)

We have been advised by Revisor of Statutes David Dierdorff that, with the computerization of bill processing, the effect of this error is to have the section "read" by the SIRS program in BASIS as simply "repealing" the provision. SIRS is programmed to read "repealed and reenacted" as equivalent to "amending," but if the words "and reenacted" do not appear after "repealed," it assumes that the section cited in the lead-in is repealed. David also advises that it is not possible to manually override the entry and correct it until a new document, such as a committee substitute, is actually entered into the system.

Sorry to have let this slip by. Thanks for taking care of it.

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: 
Arthur H. Peterson
Assistant Attorney General

GBS:AHP:cb

cc: Bob Evans
Legislative Liaison
Office of the Governor

imposes upon a municipality an actionable duty to take persons incapacitated by alcohol in a public place into protective custody. We determine that it does and thus reverse the judgment of the trial court and remand for further proceedings.

## I

On May 1, 1980, Thomas Busby was walking about two feet into the traffic lane on East Fifth Avenue in Anchorage.[3] Officer Foster was on patrol and spotted Busby, stopped him, moved him off to the side of the road, talked with him and determined that Busby was intoxicated. Officer Foster then ran a warrant check on Busby but did not place him into protective custody. Apparently finding no outstanding warrants, Officer Foster then reentered her vehicle and proceeded on her way. Shortly after Officer Foster left, Busby was struck by a car and suffered injuries as a result.

In his suit against the Municipality, Busby alleged that the Municipality was negligent and/or reckless in failing to take him into protective custody and that the Municipality's omission was the direct and proximate cause of his injuries. After hearing was held on Busby's and the Municipality's cross-motions for summary judgment, the trial court determined that the Municipality owed Busby no affirmative duty to take him into protective custody and that, therefore, the Municipality could not have been negligent in failing to do so. Accordingly, the trial court granted summary judgment in favor of the Municipality. This appeal followed.

## II

[1] In the recent case of *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985), we unequivocally reaffirmed our rejection of the so-called "public duty doctrine" as an unnecessary and unjustified expansion of the state's statutorily limited immunity. *Id.* at 1311–12; *see also Adams v. State*, 555 P.2d 235, 241–43 (Alaska 1976). In place of that doctrine, we indicated that the liability of a municipality for the negligent acts and omissions of its representatives will be governed by traditional tort principles. As we stated in *McLean*:

> In practice, the public duty doctrine is an injunction against imposing liability on a government without first deciding what the government's duty is. While the public duty doctrine does protect the state from becoming the insurer of all private activity and from undue interference with its ability to govern, we believe that these concerns are better addressed by the tort concept of duty, which limits the class of people which may seek to hold the state responsible for negligent action, and by AS 09.50.250.

702 P.2d at 1313 (citation and footnote omitted). Thus, our determination here must be made with recourse to the principles embodied by the tort concept of duty.

[2, 3] As we have noted, "'[d]uty' is not sacrosanct in itself but [is] only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.* (quoting W. Prosser, *Handbook of the Law of Torts* § 53, at 325 (4th ed. 1971)). Thus stated, the process of finding that a defendant owes a duty to a

ferred to another health facility, and has no funds, may be taken to the person's home, if any. If the person has no home, the approved public treatment facility shall assist the person in obtaining shelter.

....

(g) Peace officers or members of the emergency service patrol who comply with this section are acting in the course of their official duty and are not criminally or civilly liable for it.

....

(j) For purposes of (b) of this section, "incapacitated by alcohol" means a person who, as the result of consumption of alcohol, is rendered unconscious or has judgment or physical mobility so impaired that the person cannot readily recognize or escape conditions of apparent or imminent danger to personal health or safety. The definition in AS 47.37.-270(8) applies to other portions of this chapter.

3. Because this appeal comes to us on summary judgment, our obligation is to draw all inferences of fact in favor of appellant Busby and against appellee Municipality. *See, e.g., Alaska Rent-a-Car v. Ford Motor Co.*, 526 P.2d 1136, 1139 (Alaska 1974).

plaintiff is one which involves a fine balancing of conflicting policies; it is in essence an attempt to determine whether it would be fair and equitable to require an individual to act, or to refrain from acting, in a specified manner so as to avoid undue risk of harm to third persons. *See generally* W. Keeton, D. Dobbs, R. Keeton, and G. Owen, *The Law of Torts* § 53, at 356–58 (5th ed. 1984) (hereinafter *Prosser*). Recognizing the difficulty of this task, we have delineated a number of factors which should be considered to provide greater predictability in the decision-making process. These factors include the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the extent of the burden to the defendant and consequences to the community in imposing a duty to exercise care with resulting liability for breach; and the availability, cost, and prevalence of insurance for the risk involved. *McLean*, 702 P.2d at 1314 (quoting *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981)).

[4] These independent considerations, however, may sometimes be superseded by the legislature. For example, where the legislature has considered and resolved conflicting policies by clearly enunciating a duty in a statute, the relevant statute should be considered and, in a proper case, adopted as the appropriate standard of care. *See Metcalf v. Wilbur, Inc.*, 645 P.2d 163, 167–68 (Alaska 1982); *Bachner v. Rich*, 554 P.2d 430, 440–42 (Alaska 1976); *Breitkreutz v. Baker*, 514 P.2d 17, 20–21 (Alaska 1973); *Ferrell v. Baxter*, 484 P.2d 250, 263–65 (Alaska 1971); *see generally Prosser, supra* p. 6, § 36, at 220–29; Restatement (Second) of Torts § 285 (1965) (hereinafter Restatement). A statute enunciates the appropriate duty when it is found that (1) the plaintiff is within the class protected by the statute, (2) the harm/injury which occurred was of the type which the statute was intended to protect against, (3) the statute prescribes specific conduct rather than merely a general or abstract duty of care, (4) the defendant was a party charged with observing the statute, (5) the defendant can be fairly charged with being aware of the applicability of the statute, and (6) the statute is not so outdated or arbitrary as to make inequitable the statute's adoption as the standard of care. *E.g., State Mechanical v. Liquid Air*, 665 P.2d 15, 18–19 (Alaska 1983); *Grothe v. Olafson*, 659 P.2d 602, 607 (Alaska 1983); *see also* Restatement § 286.[4]

[5, 6] Busby argues that AS 47.37.-170(b) articulates the appropriate duty in this case. We agree. As the statute explicitly states, and as the trial court itself noted, AS 47.37.170(b)[5] is intended to benefit and protect the health and well being of persons who are incapacitated by alcohol and imposes a mandatory duty upon law enforcement personnel to place such persons into protective custody. *Cf. Peter v. State*, 531 P.2d 1263, 1268 (Alaska 1975) (quoting House Concurrent Resolution No. 36 (1969) on treatment of problem drinkers and alcoholics); AS 47.37.010.[6] In addition, accepting as true Busby's assertions[7] that

4. Section 286 of the Restatement (Second) of Torts (1965) provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

5. *See supra* note 2.

6. AS 47.37.010 provides:

> It is the policy of the state that alcoholics and intoxicated persons should not be criminally prosecuted for their consumption of alcoholic beverages and that they should be afforded a continuum of treatment so they may lead normal lives as productive members of society.

7. *See supra* note 3.

he was a person incapacitated by alcohol in a public place, he was clearly a member of the protected class and his accident was of the type against which the statute was designed to protect. Finally, it cannot be doubted that the statute prescribes specific conduct rather than merely states some general or abstract duty of care; Officer Foster was within that class of persons charged with observing the statute; as a municipal police officer, she can fairly be charged with awareness that the statute applied; and the statute can hardly be considered so outdated or arbitrary as to make inequitable its application as the appropriate standard of care.

[7] The Municipality cites a number of cases which, it argues, mandate a different conclusion. Only two, however, require discussion. In *Stout v. City of Porterville,* 148 Cal.App.3d 937, 196 Cal.Rptr. 301 (1983), a California court refused to find that California Penal Code § 647(ff) set out an appropriate legislative standard of care in circumstances similar to those at issue here. *Id.* 196 Cal.Rptr. at 306–08. The statute in *Stout,* however, provided that an intoxicated person could only be taken to a voluntarily maintained public treatment facility. *Id.* The California court was therefore concerned that imposing a mandatory duty would cause counties participating in the voluntary treatment program to withdraw their support and thus cause the treatment program to collapse. *Id.* We have no similar concern in the present action.[8] In addition, Penal Code § 647, unlike AS 47.37.170(b), was not intended to minimize the dangers faced by the inebriate, but simply to end the "revolving door" policy of jail and street, street and jail. *Id.* We thus decline to adopt *Stout*'s analysis.

*Marshall v. Ellison,* 132 Ill.App.3d 732, 87 Ill.Dec. 704, 477 N.E.2d 830 (1985), also involves an analogous factual situation and statute.[9] Nevertheless, this case is also unpersuasive for at least two reasons. First, the court in *Marshall* apparently refused to find that the relevant statute imposed upon the state any mandatory duty on the basis of the state's sovereign immunity. *Id.* at 835. Relying upon *Rodriguez v. City of Cape Coral,* 451 So.2d 513 (Fla. App.1984), *affirmed,* 468 So.2d 963 (Fla. 1985), the *Marshall* court stated:

> Like the Florida statute [in *Rodriguez*], section 15(b) requires an officer to exercise his professional judgment in determining whether an individual appears to be incapacitated. We do not believe the public interest would be served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess a policeman's decision.

87 Ill.Dec. at 709, 477 N.E.2d at 835. Second, we find the *Marshall* court's statutory analysis questionable. Despite the unambiguous mandatory language in the Illinois statute and without citation to legislative history or any other authority, the court simply concluded that the legislature did not intend to create a cause of action under the statute for failure to take a person into protective custody. *Id.* Whatever the merits of the *Marshall* court's conclusion with respect to interpretation of the Illinois statute, we decline to apply its reasoning here.

We conclude then that AS 47.37.170(b) articulates an appropriate standard of care and thus hold that the Municipality has an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to an appropriate treatment facility.[10]

### III

Busby's cross-motion and appeal seeking summary judgment in his favor are without merit. For the reasons discussed above, we REVERSE the judgment of the

8. *See* AS 47.37.170(b), (c), *supra* note 2.

9. *See* Ill.Ann.Stat. ch. 111½, ¶ 6315(b) (Smith-Hurd Supp.1986).

10. Our decision today is expressly limited to a discussion of duty. Because the trial court's judgment was based solely upon this issue, we need not, and do not, consider any question regarding alleged breach and express no opinion as to the factual merits of Busby's claim. Similarly, we express no opinion regarding any claims of municipal immunity under AS 09.65.070.

trial court and REMAND for further proceedings consistent with this opinion.

STATE of Alaska, Appellant,

v.

NORTHWESTERN CONSTRUCTION, INC., Appellee.

No. S-1141.

Supreme Court of Alaska.

Aug. 7, 1987.

Contractor which was required to do more work than indicated in its contract with State brought action to recover damages. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., entered judgment in favor of contractor, and State appealed amount of damages. The Supreme Court, Compton, J., held that: (1) use of blue book rental rates for construction equipment to calculate damages was proper; (2) State's claim that blue book overtime equipment hours should have been reduced by 50 percent could not be considered for first time on appeal; (3) addition of 15 percent profit to blue book rates was not double recovery; (4) addition of ten percent to costs for overhead was reasonable; and (5) contractor should have allocated part of its grader time to less expensive grader in calculating damages.

Affirmed in part, reversed in part, and remanded.

Matthews, J., dissented and filed an opinion in which Rabinowitz, C.J., joined.

1. Damages ⚷189

Plaintiff in contract action need only prove its damages to "reasonable certainty."

2. Appeal and Error ⚷1008.1(5)

On appeal, Supreme Court will intervene only when convinced that trial court's findings of fact are clearly erroneous. Rules Civ.Proc., Rule 52(a).

3. States ⚷104

Use of construction equipment rental blue book rates to calculate damages was not clearly erroneous where state contract provided that payment for extra work would be calculated using blue book and blue book rates were commonly relied upon in state.

4. Appeal and Error ⚷169, 176

Issue raised for first time on appeal may be considered if issue is not dependent on any new or controverted facts, is closely related to appellant's trial court arguments, and could have been gleaned from pleadings, or if issue constitutes "plain error."

5. States ⚷214

State's argument that contractor's construction equipment rental blue book rate damages for extra work performed should have been reduced by 50 percent was dependent on new or controverted facts, was not closely related to State's trial court arguments, and could not have been gleaned from pleadings, and State was not entitled to argue that issue, which was raised for first time on appeal.

6. Appeal and Error ⚷169

Under "plain error" doctrine, issue not raised at trial may nonetheless be considered by Supreme Court if it appears that obvious mistake has been made which creates high likelihood that injustice has resulted.

See publication Words and Phrases for other judicial constructions and definitions.

7. States ⚷214

State was not allowed to raise for first time on appeal, under plain error doctrine, issue of whether contractor's damages, caused by extra work required and calculated using construction equipment rental rate blue book, should have been reduced by 50 percent, as there was no evidence that any state representative used 50 per-

relies on *Nugent v. Iowa Department of Transportation*, 390 N.W.2d 125 (Iowa 1986), in which the court held:

> [D]ifferent concerns are addressed in civil administrative proceedings. Thus, the criminal cases cited by plaintiff are not controlling in this situation.

*Id.* at 128.

We also have recognized the substantive differences between the criminal DWI prosecutions and license revocation proceedings, but nonetheless determined in *Champion* that any differences did not warrant lower procedural safeguards in the civil revocation proceeding. *Champion*, 721 P.2d at 133.

[3] The state also argues that the legislature presumably was aware of the margin of error in the test but nonetheless created a presumption of intoxication based on a particular test result. There are flaws in this argument. First, the legislature did not approve the Intoximeter 3000 test, it authorized the Alaska Department of Health and Social Services "to approve satisfactory techniques, methods and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis." AS 28.35.033(d). Second, *Champion* mandates that the defendant in a license revocation proceeding has the constitutionally guaranteed right to challenge the accuracy of the breath test independently. We have thus concluded that due process will not allow the results of a chemical test authorized under AS 28.35.031(a) to be conclusively presumed accurate.[5]

Our decision in *Champion* is controlling and mandates consideration of the inherent margin of error in any blood alcohol testing procedure which is to serve as the basis for driver's license revocation. Since both the department's own control sample test and the Intoximeter 3000's specifications showed a sufficient discrepancy to bring Barcott's test results below the legal limit, the license revocation pursuant to AS 28.15.166(g) cannot stand. The decision of the hearing officer is REVERSED and the case is REMANDED to the department for further proceedings consistent with this opinion.

Thomas BUSBY, Appellant,

v.

MUNICIPALITY OF ANCHORAGE, Municipality of Anchorage Police Department, and Officer Mary Lou Foster, jointly and severally, Appellees.

No. S-1580.

Supreme Court of Alaska.

Aug. 21, 1987.

Citizen brought suit against municipality for negligence in failing to take citizen into protective custody when he was intoxicated, and the Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., granted summary judgment for municipality. The citizen appealed. The Supreme Court, Burke, J., held that statute requiring persons incapacitated by alcohol to be taken into protective custody was intended to benefit and protect the health of such persons and imposed mandatory duty on law enforcement to place persons in protective custody.

Reversed and remanded.

**1. Municipal Corporations ⇐745**

Liability of municipality for negligent acts and omissions of its representatives

5. *Hrncir v. Commissioner*, 370 N.W.2d 444 (Minn.App.1985), relied on by the state, is likewise distinguishable. In *Hrncir*, the court refused to require consideration of test margin of error because "[t]he statute refers to test results showing a blood alcohol concentration of .10 or more, not .10 plus or minus a margin of error." *Id.* at 445. *See also Holstein v. Commissioner*, 392 N.W.2d 577, 580–81 (Minn.App.1986) (following *Hrncir*). Minnesota has no *Champion* rule equivalent.

will be governed by traditional tort principles, and not public duty doctrine.

2. Torts ⇐3

Process of finding that defendant owes duty to plaintiff in tort involves fine balancing of conflicting policies, and is, in essence, attempt to determine whether it would be fair and equitable to require individual to act, or refrain from acting, in specified manner as to avoid undue risk of harm to third person.

3. Negligence ⇐2

Factors to be considered in determining if defendant owes duty to plaintiff include foreseeability of harm, degree of certainty of injury, closeness of connection between defendant's conduct and injury suffered, moral blame attached to defendant's conduct, policy preventing future harm and cost and prevalence of insurance for risk involved.

4. Torts ⇐3

Statute enunciates appropriate duty for tort liability purposes when it is found that plaintiff is within class protected by statute, harm which occurred was of type which statute was intended to protect against, statute proscribes specific conduct rather than abstract duty, defendant was party charged with observing statute, defendant can be fairly charged with being aware of applicability of statute, and statute is not outdated or arbitrary.

5. Chemical Dependents ⇐1

Statute intended to benefit and protect health and well being of persons incapacitated by alcohol imposes mandatory duty upon law enforcement personnel to place such persons into protective custody. AS 47.37.170.

6. Chemical Dependents ⇐1

Municipal Corporations ⇐747(3)

Person incapacitated by alcohol who was walking two feet into traffic was within protection of statute designed to protect persons incapacitated by alcohol and in a public place, and municipal police officer was charged with observing statute and was required to take person into protective custody, and thus statute defined duty toward such person, violation of which could support tort liability when person was later struck by car. AS 47.37.170.

7. Chemical Dependents ⇐1

Statute requiring person who appears to be incapacitated by alcohol in a public place to be taken into protective custody by peace officer articulates appropriate standard of care and municipality, under statute, has affirmative duty to take persons incapacitated in public place into protective custody and transport them to appropriate treatment facility. AS 47.37.170(b).

---

Michael W. Flanigan, William Soule, Clark, Walther & Flanigan, Anchorage, for appellant.

James M. Bendell, James M. Bendell & Associates, Anchorage, for appellees.

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

## OPINION

BURKE, Justice.

This is an appeal from a summary judgment in favor of the Municipality of Anchorage (Municipality)[1] in which we are asked to determine whether AS 47.37.170[2]

1. Because it does not appear that Officer Foster has been sued in her individual capacity but only as a municipal police officer, the discussion which follows applies equally to all named appellees.

2. AS 47.37.170 provides in part:

(b) A person who appears to be incapacitated by alcohol in a public place shall be taken into protective custody by a peace officer or a member of the emergency service patrol and immediately brought to an approved public treatment facility, an approved private treatment facility, or another appropriate health facility or service for emergency medical treatment. If no treatment facility or emergency medical service is available, a person who appears to be incapacitated by alcohol in a public place shall be taken to a state or municipal detention facility in the area, if that appears necessary for the protection of the person's health or safety.

....

(e) A person who is not admitted to an approved public treatment facility, is not re-

CITY OF DILLINGHAM

Dillingham, Alaska

RESOLUTION NO. 88-19

A RESOLUTION OF THE COUNCIL OF THE CITY OF DILLINGHAM, ALASKA, SUPPORTING THE COMMITTEE SUBSTITUTE OF HOUSE BILL 406, DATED APRIL 5TH, 1988, AN ACT RELATING TO INTOXICATED OR INCAPACITATED PERSONS IN PROTECTIVE CUSTODY.

WHEREAS, the City Council of Dillingham is aware of the problems of alcoholism not only statewide but to it's own community and region, and

WHEREAS, the City Council of Dillingham has promoted a policy of diligent care for those people incapacitated by alcohol and subject to detention by police, and

WHEREAS, the City Council of Dillingham feels that the adverse reaction to the Busby vs. Anchorage case involving community liability in protective custody cases under Alaska Statute Title 47 is not in the best interest of the City of Dillingham, the Bristol Bay region nor the State of Alaska, now

THEREFORE, BE IT RESOLVED by the Dillingham City Council that they support the House Committee on Health, Education and Social Services substitute to House Bill 406, changing Section (g) of AS 47.37.170, to reduce the liability of communities in their dealings with alcohol incapacitated persons detained or released from protective custody.

APPROVED AND ADOPTED this 8th day of April, 1988.

SEAL:

Neil C. Armstrong

LEON C. BRASWELL, Mayor

ATTEST:

Vivian M Braswell

Vivian M. Braswell, City Clerk

Dillingham is not unlike many rural Alaskan communities in that it has it's share of alcohol abuse. A large portion of the visible abuse is that of the public inebriate. The Dillingham police have over the past 5 years has placed emphasis on the procetion of the public inebriate through protective custody detention. This has been accomplished through a cooperative program with the Bristol Bay Area Hospital.

The resources necessary for this have been borne soley by the community and region, without aid from the State office of Alcoholism and drug abuse.

The committee substitute for HB 406 is a reasonable addition to our current statute and provides some degree of protection to communities as a result of the ruling by the Alaska Supreme court in the BUSBY case.

If the law were to remain as it is in light of this recent ruling, we would be fostering an attitude within our police to turn their heads rather than extend a helping hand to these victims of alcoholism.

The enabling of alcoholics to shirk their responsibility by placing the liability on local communities will do more to detract from the efforts to treat the problem than help it. We need to once again renew our efforts in a positive way in dealing with this problem and to give our support to those who are out there on the streets dealing with this problem on a daily basis.

Our police throughout the state have hundreds of contacts daily with people in varying stages of intoxication, without this substitute the ability to effectively deal with them is greatly hampered.

As the statute now stands police will be in a position to abuse

HB 406

# Alcohol Abuse and the Police In Rural Alaska

## The North Slope Borough and City of Barrow Experience

Kim L. Moeller

Second Edition
January 1979

North Slope Borough
Department of Public Safety

## FOREWORD

This monograph will consider not only the results of a specific program of alcohol abuse intervention such as demographic age distribution, male/female incidents, and how the intervention affects the incidence of crime and types affected, but also how the process is set up, how it functions, what the risks are, the legal basis for such a program, costs, operational evaluations, and how it was implemented. This can be made concrete by showing how it was accomplished by the North Slope Borough Department of Public Safety. It does not represent universal answers; however, it can illustrate a type of solution to a particular problem: alcohol abuse and its effects on crime and public safety. The last section contains suggestions on how it can be designed, initiated, and locally evaluated. Modifications to the whole program or parts of it may also be useful to administrators of rural police departments and can act as a guide to a new systems approach to the problems of alcohol abuse in rural Alaska.

This program could not have been completed without the valuable assistance and support of a number of key individuals. In Barrow, the continual support and recommendations of the Task Force on Alcoholism in early December of 1976, more especially the aid and encouragement of the Magistrate, Mrs. Sadie Neakok, and the Assistant Magistrate, Mrs. Charlotte Brower. Magistrate Brower assisted with the data on death records as well as influenced the continuation of the program when others faltered. Data collection was critical to evaluating the program, and its consistent and careful preparation was accomplished monthly by Records and Identification Clerk, Becky Farmer. Assistance in editing is also acknowledged through the time consuming efforts of Dawn Wilson.

Similar acknowledgements are due Mayor Eben Hopson, who sustained the program and supported other critical efforts of this department and the recommendations of the Task Force on Alcoholism. In the ordinary line of command in any police or public safety agency, there are critical personnel who will make a policy or program designed by administrative directive either work or fail to work. Officer in Charge of the Barrow Division, Lt. James Christensen, was the officer who both pushed and administered the program throughout 1977.

# PREFACE

Since the Department of Public Safety was established by Borough Code in July of 1976, a large part of its time has been devoted to changing the images of the police, to the role of police in rural Alaska, and to developing new programs and solutions to old and long-identified problems. The department has concentrated on developing its own resources and new solutions while the State has decreased its resource people and levels of service to outlying areas of the bush. This concentration on local resource development has led to whole new approaches to old problems.

In late 1975 the State of Alaska, Criminal Justice Planning Agency began looking into common reports that alcohol abuse and crime were indelibly linked to one another; however, no subsequent records or data specifically identified what that relationship was. All law enforcement agencies in the state, and more particularly the rural areas, were asked and encouraged to keep data on alcohol abuse and its effects on rates and types of crimes. The formal procedure for this program was established by Public Safety late in 1976 when Barrow, after being dry for a full year, had voted to sell liquor at a community-owned liquor store. The process was a reaction to events of 1975 when the city had an abnormally high incidence of abnormal deaths related to alcohol, an abnormal number of suicides, and an incidence of crime that was not characteristic of past years.

This monograph and others will be published to illustrate the experience of Public Safety in Barrow and the North Slope and hopefully to delineate new programs and methods tried and tested. These ideas afford other rural areas of Alaska the opportunity to change and/or increase efforts at reducing crime.

Kim L. Moeller
Director

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I

## WHY HAVE A DETENTION PROGRAM?

In late 1975, G.U., a 55-year-old alcoholic, who had been treated several times within a month for alcohol overdoses and drinking Lysol, was found by his grandmother locked in her home after she had come home from the Post Office. Barrow Police responded to her call and found that G.U. had committed suicide after nonchalantly saying goodbye to his grandmother as she left to check the mail. He was a likeable and affable person in the community until delerium tremens drove him to suicide.

A short time later, E.T., a 25-year-old female, could not be awakened by a friend at whose home she had been drinking the night before. Again, Barrow Police responded and found E.T. on the floor next to her bed, apparently dead without any trauma. Autopsy later showed that she had drunk so much and so fast the night before that she died from a massive overdose of alcohol. (Her blood alcohol content was .39%). She had never been an alcoholic.

Within weeks of the above reports, E.K., a male, was reported to have frozen to death a short distance from Barrow after drinking all the previous day. It was later determined that E.K. had purposely committed suicide by freezing as a result of severe alcoholic depression.

At the end of 1976, a dry year for Barrow, R.S., a three-month-old boy was reported not breathing by a highly intoxicated mother. Investigation of R.S.'s death showed that the mother had passed out from the effects of alcohol, fallen on her baby and smothered him to death. For many in the community of Barrow this incident represented the last straw of complacent acceptance.

Each anecdote illustrates only a small aspect of the problem of alcohol abuse as seen from year to year. The connections between each began to reach several important people concerned with public safety in Barrow. The result was a Task Force on Alcoholism which met on December 7, 1976. The task force began the job of identifying those common factors that led to these deaths.

Several years ago the Barrow Volunteer Fire Department began to see an emerging pattern of fire deaths. From three to eight people per year were dying in home fires. Causes were examined, and it was found that most home fires were caused by an intoxicated person smoking and passing out from the effects of alcohol. They also discovered that no home fire resulting in deaths of occupants was caused by purely mechanical faults which prohibited occupants from escaping early enough to save their lives.

In combination with the above findings, the police found through experience that most crimes were committed by persons at various levels of intoxication. It was rare indeed to have any type of serious crime committed by someone who was stone cold sober. In fact all serious personal crimes had been committed by people who either were drunk or had

freeze to death. The urban police cheered and sighed with relief while rural police had to find another answer.

Legislation was almost immediately responsive with Alaska Statute AS 47.37 and an amendment that allowed for the public inebriate to be taken into protective custody and, as a last resort, held involuntarily for up to twelve hours in a "state or municipal detention facility", i.e. jail. The only major difference from prior law was the complete decriminalization of public intoxication. Hence, public drunks were not "arrested" and formally charged, with attendant booking, etc. They were detained for their own protection. A great distinction has now been made between "arrest" and "detention".

> The 1976 amendment stated: If no treatment facility or emergency medical service is available, a person who appears to be incapacitated by alcohol in a public place shall be taken to a state or municipal detention facility in the area, if that appears necessary for the protection of the person's health or safety.

## The Basis for Initiating a Detention Program

The detention program, by its title and statutory requirements, represents a new term for police custody that must be categorically separated from "arrest". The new term is "detention". With the legal problem not only solved but showing in its content a method by which a program could legally be initiated, the answer appeared and was clearly defined. The burdens of paperwork (case reports), mugging and booking, and other associated ills of the old system of DOPH and DIP were eliminated. The principle was then reasonably sound, and the method was opened through legislation--particularly in the rural areas of Alaska.

With community support and work by the task force, the North Slope Borough initiated a program in January of 1977. The department wanted to push its program, gain community support, and obtain a specific data base from which to evaluate the results. The following premises were used as a basis for the detention program:

1. If alcohol abuse is intercepted during its initial course, there should be a reduction in the commission of crimes by intoxicated persons.
2. Interception, although not necessarily decreasing suicide attempts, should effect a reduction in successful suicides.
3. With interception, there should be a reduction in residential fires and resultant fatalities.

The program is described in detail in the next chapter.

## Why Treatment Was Not Considered in the Program

It has been generally agreed that alcoholism is a disease that cannot be completely cured by any method known to science except complete abstention. Even abstention must be supervised and rigidly enforced.

# CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

02–576(2/77)

I

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In combination with the above findings, the police found through experience that most crimes were committed by persons at various levels of intoxication. It was rare indeed to have any type of serious crime committed by someone who was stone cold sober. In fact all serious personal crimes had been committed by people who either were drunk or had

been drinking shortly before. Resolution of these crimes was easy, but the problem increased year after year. It was time to document the facts relating to crime and alcohol.

A Composite Contemporary View of the Alcohol Abuse Problem

Today, the analysis of facts, collection of statistics, and reviews of every unnatural death and major crime have produced a conclusion which others have hinted at or stated without documentary support. The scene was set for some solutions when unnatural deaths began to reach the level of natural deaths--a potentially socially repulsive situation. The composite was produced by combining fire deaths, suicides, and crime data into a cause and effect relationship. The cause--alcohol abuse. The effect--fire deaths, suicides, and crime. A very pragmatic approach led to a very simple principle.

The department determined that a significant reduction in all three above areas might be accomplished if intervention between alcohol abuse and its ultimate effects could be accomplished. Intervention is the key principle. The work of the task force did not center around treatment of alcoholism nor rehabilitation. It was almost unanimously agreed that any effort to reduce problems identified by those means could and probably would bog down both the program and personnel resources. The resources were not present nor likely to be funded by any state or local agency. The solution must be simple, cost effective, and not require new resources. The police were the only available agency which had the existing resources. Only the police had 24-hour community coverage, facilities that could conceivably be used, and funding that was not dependent upon any outside agency or shaky cycle. However, a major problem had occurred just previous to initiating such a program.

Police and the Legal Problem

In 1974 a case involving statutory laws of arrest in incidents of Drunk on a Public Highway (DOPH) and Drunk in Public (DIP) came to the attention of the Alaska Supreme Court. The decision illustrated a case in which an individual had been arrested for Drunk in Public, was searched before being placed in detention, and subsequently charged with a felony crime as a result of stolen property being found on his person. The result of that court review struck down both DOPH and DIP as infringements upon the right of the individual and treating an intoxicated person as someone who had committed a crime by being drunk. The landmark case originated on the streets of Barrow.

Police departments throughout the State cheered the decision because it took the huge burden of managing drunk tanks, with its personnel and costly paperwork, off them and placed it elsewhere. It was placed in the medical community, as a medical rather than a police problem.

While urban police cheered, rural police were puzzled. What were they going to do about intoxicated persons, especially those incapacitated, when no sophisticated medical facilities (nor willing medical personnel) were available? People in the Arctic, incapacitated ten steps from their front door, let alone out on the streets, would quickly

freeze to death. The urban police cheered and sighed with relief while rural police had to find another answer.

Legislation was almost immediately responsive with Alaska Statute AS 47.37 and an amendment that allowed for the public inebriate to be taken into protective custody and, as a last resort, held involuntarily for up to twelve hours in a "state or municipal detention facility", i.e. jail. The only major difference from prior law was the complete decriminalization of public intoxication. Hence, public drunks were not "arrested" and formally charged, with attendant booking, etc. They were detained for their own protection. A great distinction has now been made between "arrest" and "detention".

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The Basis for Initiating a Detention Program

The detention program, by its title and statutory requirements, represents a new term for police custody that must be categorically separated from "arrest". The new term is "detention". With the legal problem not only solved but showing in its content a method by which a program could legally be initiated, the answer appeared and was clearly defined. The burdens of paperwork (case reports), mugging and booking, and other associated ills of the old system of DOPH and DIP were eliminated. The principle was then reasonably sound, and the method was opened through legislation--particularly in the rural areas of Alaska.

With community support and work by the task force, the North Slope Borough initiated a program in January of 1977. The department wanted to push its program, gain community support, and obtain a specific data base from which to evaluate the results. The following premises were used as a basis for the detention program:

1. If alcohol abuse is intercepted during its initial course, there should be a reduction in the commission of crimes by intoxicated persons.
2. Interception, although not necessarily decreasing suicide attempts, should effect a reduction in successful suicides.
3. With interception, there should be a reduction in residential fires and resultant fatalities.

The program is described in detail in the next chapter.

Why Treatment Was Not Considered in the Program

It has been generally agreed that alcoholism is a disease that cannot be completely cured by any method known to science except complete abstention. Even abstention must be supervised and rigidly enforced.

In addition to the a above-stated problem, composite evaluation of past incidents showed that almost all crimes, suicides and fire deaths were caused by alcohol abuse and not alcoholism. The alcoholic was not part of the overall problem to be addressed. The alcohol abuser made up 95% of the public problem.

Very few, if any, police departments wish to get involved in the medical, psychological, and physiological aspects of alcoholism treatment. It simply takes too much secondary effort by an agency that has a more primary responsibility to the public--that of dealing with crime. Hence, the program began with no intention of dealing with treatment nor becoming involved in rehabilitation. If there was an existing agency to deal with treatment, certainly referrals would be made. If not, treatment and rehabilitation were not even considered. The primary principle of the program was intervention.

## The Dittman Survey and Alcohol/Crime Perceptions

The Dittman survey had some interesting findings which are highly applicable to a drunk-detention program in rural areas of Alaska. Some of the findings support both the concept of the program and also the connections between alcohol abuse and crime. In the report,

> "The most striking regional difference was found in the area of alcohol use as the basic cause of crime. Respondents in the Northwest, but not in other areas, saw it as a cause of both crimes against people (22% of respondents) and against property (13% respondents). At the other extreme not one respondent in Anchorage saw alcohol alone as the basic cause of crime".

The reports statement that "Alcohol is seen as a basic factor only in rural Alaska..." not only reflects the perceptions of rural Alaskans, but also is representative of facts not yet measured properly by agencies and police departments in those areas. With a consistent effort at data collection there will be a core of facts which will support the people's perceptions and also show the need for a drunk-detention program until such time as State programs/agencies initiate facilities for Sleep-Off Centers and Detoxification programs through Public Health Service Hospitals serving rural areas.

Another section of interest in the Dittman report concerns police issues. Again, a shift in attitude between urban and rural areas is indicated from the public survey. Response to the survey's question regarding where the emphasis of police activities should be placed showed that "In rural....Alaska, a majority of the public favored emphasizing innovative preventive activities over traditional patrol and arrest activities". The rural prevalence of traditional life styles would also indicate that police procedures which are standard for urban areas are not necessarily useful nor preferred over altered methods of patrol and prevention.

## II

## THE DETENTION PROGRAM:

## AN OVERVIEW

For our purposes, a Detention Program is an administrative policy initiated by the community and police-agency head to control the problems related to alcohol abuse. All of the elements can be found in any police agency of almost any size. It is specifically designed for those rural areas of Alaska which have neither medical delivery systems directed to alcoholism or alcohol abuse nor the attendant facilities.

The police administrator, either through research in existing records or through personal knowledge, must identify characteristics found in unnatural deaths, suicides, and crime. Certainly if the result of research were the finding that less than a fourth of the problems or causes were related to alcohol abuse, then such a major effort as the detention program of the North Slope Borough's Department of Public Safety might not be all that viable. Yet, clearly, if one-half or more can be attributed to alcohol abuse, then a detention program should be given major attention and concern. A considerable number of conditions must be examined before such a program is initiated. For example:

1. Does a rural police department have time to accomplish the program?
2. Does the rural police department have relatively decent facilities for the program?
3. Is alcohol abuse identified by others in the community as a major problem, or is it so minor as to be the last of their concerns?
4. Is there overall commitment of the department to make it work?
5. After examining the risks involved, does there still remain a commitment to a detention program?
6. How can attendant medical problems or even life-threatening alcoholic trauma be provided for if it becomes necessary?

There are, of course, many more detailed questions about the functional aspects of such a detention program that also have to be answered. A careful and considerate approach must be maintained for the sake of the department and the community.

### The North Slope Borough Department of Public Safety

Created in July of 1976, the department had been given the responsibility of delivering public safety service throughout the 88,000-square-mile, seven-village North Slope. The primary concern is delivery of law enforcement, fire protection, and emergency medical services to villages, including Barrow.

The present personnel level for Barrow and the Village Division is nineteen sworn personnel and seven support civilian personnel. The facility for detentions was built in late 1975 as a modification to an old fire station originally built in 1954. The facilities are certainly not modern and are probably representative of most rural areas in Alaska. The extent of available facilities for the detention program is four detention cells, a bathroom separating one cell from the others, and video monitoring equipment.

Present operational levels in Barrow provide for two primary one-man vehicles on patrol. Extensive medical kits are found in each of the primary patrol vehicles. Each Public Safety Officer is required by department policy to obtain Registered Emergency Medical Technician status. The same applies for communications personnel.

## The Old Method of Daily Operations

Evaluating operations in terms of actual patrol experience and daily levels of service demands showed that service requests consumed the smallest amount of time. The majority of time was actually used in "driving around" and doing security checks. Several years of review showed that there was no deterrent to crime, including burglaries, by this use of patrol. The department had settled into a response-and-reaction method of operations. Virtually all work was accomplished solely upon reaction to service requests and citizen complaints. It was not unusual to find two officers responding to a single complaint for an eight-hour work shift. The entire operations of the department were reaction oriented.

In dealing with intoxicated persons, most often the officers on duty would stop, pick up the intoxicated or incapacitated person take him or her home. Twenty minutes later a family member would call and complain that A) they want him out; B) he is fighting; or C) he is beating his wife or kids. The patrol would respond, say "stop that", and leave. A recurrent cycle of behavior would be established by taking the intoxicated person home or to a friend's house. It was not unusual to have the person taken home and then found dead from fire or suicide a few hours later.

Another method used in dealing with intoxicated persons was to charge them with Disorderly Conduct, the most abused statutory law on the books. It required the drunk's taking a lazy swing at an officer or cussing one out to justify arrest, booking, and court prosecution. Both methods were exercises in futility. A more positive approach was needed.

## The Detention Program Initiated

Two weeks of advance work initiated the program. The first week was spent in giving both written and oral directions to all Public Safety Officers. Staff meetings were formalized to deal with questions about how the program was to be accomplished. Meetings with health personnel and community health providers identified anticipated medical problems. The second week was spent in public explanation of the policy and program through the radio and television. The task force assisted with this phase of the program so that virtually every resident of Barrow would be aware of the program and how it would work in advance of its actual initiation on the streets, in the homes, and in public places.

The Barrow Experience

The first three months (January, February, March) presented a problem with the program that was not anticipated at first. It was found that few of the duty officers were excited about or interested in this program. Little progress was made and only a very slow increase was shown in detentions. With supervisory guidance, departmental meetings, and further convincing, the program began to take off in the proper direction. There was a great deal of confusion about the difference between "arrest" and detention. That confusion led Public Safety Officers to conflicts over the role that they were to take and their personal relationships to the treatment of those detained for public intoxication. It was found that officers were taking intoxicated members of families from their own homes and detaining them, under the assumption that they had the authority to do so. Booking forms were mislabeled as "arrests" rather than "detention only". Fingerprints and mug photos were being taken. A major confusion over the purpose and intent of the detention program existed.

A major complaint of experienced police officers was their reluctance to deal personally with people solely because they were intoxicated. They found it reprehensible and unprofessional to accomplish such mundane tasks as dealing with a person who was slobbering drunk. It did not tax their resources, but it certainly taxed their personal attitudes about the worth of someone very drunk. Another complaint about officers dealing with the program was their intransigence in identifying their role as police who dealt with crime and not the social ills of a community. They simply could not identify the cause-and-effect relationship of alcohol abuse to levels of crime.

However, with training sessions on the causes and processes of alcohol abuse, there came about a complete change in attitude and approach to the overall problem. The program began to work as detentions began to climb month by month. With this type of change, another interesting problem, not anticipated by supervisors and administrators arose.

After six months of experience and monthly charting of detentions, it was found that no one had anticipated answering the question: Where would it stop or level off? The surprising answer at the end of the year is that it never did level off or stop at any particular point. The result was the continuing overloading of facilities and extremely crowded conditions at the jail. On one occasion seventeen persons were detained in a six-hour period in a facility designed for a maximum single occupancy of four. The facility is simply not large enough to handle actual need. In any event, it was decided to continue the program in spite of the overloading, as its effectiveness at reducing crime, suicides, and unnatural deaths was becoming self-evident. At this point even community support grew for its continuance, with frequent calls from the general public asking that persons they had seen intoxicated on the streets be picked up and detained.

The highest level of detentions for intoxication was reached during the last month of the "wet" year, at one-hundred fifteen (115) persons detained for the month of December. It was also discovered that the most consistent average time required for an intoxicated person to sober up completely was between five and seven hours. Of those hours, the first was generally an excitement stage, and the remainder were occupied by sleeping. After the

mandatory eight hours from time of detention was reached, those still sleeping were allowed to sleep until they awoke and then were immediately released. Those awake at eight hours were immediately released.

Recidivism was obviously very high; however, it was soon discovered that those who had completed the process rarely, if ever, committed any crime or attempts at suicide within 72 hours of being released. In addition, it was also discovered that most of the crime that continued during the program was committed by individuals intoxicated but missed by the efforts of the program. Crimes occurring on the streets became nonexistent; most were committed in the offender's own home.

Actual Costs Evaluated for Continuing Impact

Initially, the only cost associated with start-up of the program was installation of a TV-monitor system. This system was installed with two separate goals in mind. First, direct observation by communications personnel to assist in identifying medical problems and abnormal activity (attempts at suicide, DT's, etc.). The second purpose was to reduce any cost impact by eliminating the necessity for hiring guards and providing around-the-clock observation (which would greatly increase actual dollars expended in the program). This simple, one-time cost alleviated a particular threat to the well-being of detainees--suicide attempts in the cells. As a matter of procedure, all property was removed and inventoried in the same manner as for criminal arrestees. Belts and shoes, as well as parkas and coats, were also removed. There were fifteen (15) actual suicide attempts within the cells. Fourteen were immediately prevented by duty personnel. One actually succeeded. (See Section IV: Problems, Costs and Evaluation).

The Results of the Drunk Detention Program in 1977

At the end of the first year, evaluation produced some unusual results. Some were planned as objectives while others were surprise results. The first surprise was the net total of detainees (664) which indicated a huge number of persons processed through the program. Certainly the total number was not indicative of the actual number of individuals detained in the program. Returnees were very common and probably comprise about one-half of the total. Hence, the actual number of individuals may well be closer to 330 ± 5 to 10. This figure represents well over twelve percent of the total population of the City of Barrow.

Another result was the discovery that the ceiling, or maximum level of detentions per month, was never actually reached during any time of the program. Appendix A shows that the single highest month of detentions was the last month of the year, December. The only interruption in steady monthly increases was September and October which reflected a diversion from the effort to the management of an unusual incidence of very serious crimes during those two months. Aside from that single influence, the chart demonstrates a steady upward trend--allowing only speculation on what the peak actually could have been. Also, there could possibly be an artificial limit in terms of man hours applied to the program.

Some of the major effects of the program were:

1. No deaths occurred by freezing.
2. Two suicides occurred as compared to an annual average of five to seven.