ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
5199 SCRA SB 133 - SB 155

STEVE COWPER, GOVERNOR

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

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March 4, 1987

POSITION PAPER

RE: SB 133--"An Act Relating to General Grant Land Entitlements.

SPONSOR: Senators Hensley, Halford and Faiks

Program Effects of Bill

The bill accomplishes five purposes. It permits the Northwest Arctic Borough to select about 230,000 acres of land; it re-vests the North Slope Borough's 89,850 acre entitlement; it extends the period for city selection of state entitlement lands to January 1, 1988; it re-classifies land into categories suitable for municipal selection; and it establishes a consultation process between the Department of Natural Resources (DNR), and municipalities regarding land classification and selection.

Comments

The Department endorses the bill as presently drafted. However, we support an amendment to the language in Section 1. Currently the bill closes the date for city entitlements on January 1, 1988. The Department would prefer to see language permitting city selections up until two years after the state's final selections from the federal government. The logic for extending the selection date is to give every city which may contain state land within its boundaries in the future but does not now, the same opportunity to receive title to land as that enjoyed by existing cities with state selections. We think this is the most equitable approach since it places cities on an equal footing over time.

The Department supported a position last year to include land classified for forestry and wildlife habitat in the entitlement base. That provision is not in this bill, nor does the Department intend to recommend that it be included, out of our desire to see that this important bill is passed with the recommended amendment in section #1.

We feel the bill, with the suggested amendment, will promote equity among the state's municipalities; will guarantee an adequate land base in areas of the state which may wish to form regional governments; and will serve long-term economic development needs by placing land in local government and private ownership. Finally, in an era in which local governments must become more resourceful as they encounter fiscal restraints, a local land base for generating revenues and economic opportunities is that much more.

David G. Hoffman, Commissioner

ALASKA MUNICIPAL LEAGUE
POLICY STATEMENT 1987

PART IV
LAND USE

A. LOCAL OPTIONS

1. Planning and Zoning: The League feels strongly that laws pertaining to the powers of local planning and zoning must allow for the greatest flexibility at the local level.

2. Land Use: The League supports the requirement that the State comply with all local land use and subdivision regulations.

B. LAND SELECTION

1. Easements: The League urges modification of State Statutes which encourage the practice of blanketing all waterways within municipal selections with reservations for public easements and encumbering patents with undefined easements. The League, however, supports the policy of preserving needed specific rights-of-way and easements which provide for present and future public access with the concurrence of affected municipalities.

2. Conveyance and Land Use

(a) The League urges the immediate conveyance of Native and State lands presently identified and jointly agreed upon for selection.

(b) The League urges the State to move expeditiously to complete in-lieu, cash entitlements, and to convey lands to municipalities with the least amount of encumbrance and restrictions, and to take whatever actions are necessary to correct existing inequities and overcome all remaining obstacles, to fulfill land entitlements, for all municipalities to receive their entitled share.

(c) The League urges the funding of a cooperative intergovernmental land use planning commission to expedite conveyance of lands not yet jointly agreed upon by considering municipal, state, and federal interests in lands affected by the land selection process.

(d) The League urges state funding for the surveying of municipally-selected State land.

(e) The League urges the modification of regulations for greater flexibility in the use of grant funds by municipalities for the disposal of municipal grant land entitlements.

(f) The League urges that an entitlement program be established for those municipalities not previously allowed to participate in the conveyance and entitlement process.

SB

147

I would like to testify against H.B. 153 and S.B. 147.
I am a Life-long Resident of Alaska, a member of the Nationality known as "Indians" by the U.S., and as a member of the Indigenous Populations in the world today.

It's really a great feeling to be able to identify with the Indigenous Populations in the World Commmunity both Nationally and Internationally.

I realize that I must be careful.
Let me tell you one of the reasons why.
The other night on the program "60 minutes"
a student from the United States talked about how it felt
to go to Moscow University. This is what she said.
"We had to remember that when you talk to Totalitarian, Oppressive Governments you must CHOOSE your words carefully."

Bearing this in mind, I believe that ALL Native People in Alaska MUST stay AWAY from the word "Sovereignty".

I must say this because Anti-Native Factions in this "Great Land" have used the Media to paint a dark, mysterious, ugly picture of people who favor isolationism, separatism, egotism, primitivism, and all the worst things that can be recalled in the human mind whenever the word " sovereignty" is used.

I have to say this openly, and honestly because these are some of my fears in the world today.

NO, the State of Alaska might not be a Totalitarian Government.
NO, the State of Alaska might not be an Oppressive Government.
Someday, History will make it's own Judgement.
It's TRUE, someday ALL OF US will face God alone
with no one to support us and no alibi's for us.

That is precisely why I must testify that H.B. 153 and S.B. 147 must be STOPPED!
If these bills go far enough, they must be vetoed by Gov. Cowper. Why???

If these Arti-Facts Bills are not stopped.
Then, we have a Govt. of Laws and not a Govt. of PEOPLE.
Because, there are PEOPLE trying to stop these Bills.
There is a difference between a Govt. of Laws and a Govt. of PEOPLE!

If these Bills are not stopped.
Then, we have a Govt. of very selective Policies and NOT of Equity.

The so-called "problem" of Arti-facts is a case of Jurisdiction
which the State of Alaska has already declared in so many words that---
it "Disclaims all rights to Native Land or OTHER Property FOREVER
in Sec. 4 of the Statehood Act.

If I ask people to recall these facts, I am asking openly and honestly
and not maliciousley.
I was taught Traditionally to respect ALL members of Mankind as Human Beings
whether or not I am respected as a human being, we will see--won't we/???

Historically, 21 I.R.A. Councils worked WITH City Councils to build up Good Communities in ALASKA.
In order to do this, they were Equitable.
This fact can be found in the Federal Field Commission Report of 1969.
Does this sound like separatism, isolationism, primitivism, egoism, and a dark ugly force called-I.R.A.Councils?? Yet, this is the picture that is painted against them. I would have to say that mistakes have been made by Councils in their struggle to survive but there is no Nationality on EARTH that is perfect in every aspect.

AMERICA has been called---Anthro-Centric.
This, is what shaped U.S. Policy as it moved from East to West and then, NORTH.
It is DEBATABLE, if some States have been more ANTHRO_CENTRIC than the U.S. Govt. as-a-whole.To elaborate a little more on terms that can be understood by most people, I would have to say the following.

"IF an Anthropologist were to testify at the same hearing that I'm testifying at----- the words of an Anthropologist would be CONSIDERED like the Word of God as compared to my testimony---which would not be taken very seriously because___somehow, in some way I'm NOT Civilized yet and I don't have the same Credentials as an Anthropologist. AFTER ALL, I'm only a Descendant of the Original Inhabitants of this Land!!
For this reason, I challenge ALL Anthropologists, Historians, Archeologists, even if---it would do any good to call in the very BEST---- they will ALL come to -- ONE CONCLUSION. That Conclusion is, that we as Original Inhabitants have "Prior Existing Rights" and I will go a little farther and state that we have---"Prior Existing Claim" to any and ALL Arti-facts in the land, under the land and anywhere these Arti-facts are found.

There is an Alternative that I do favor.
There should be--- a FEDERAL COPYRIGHT LAW for ALL Tribal Arti-facts and Property other than land. This will be determined by all Alaska Native Tribes consenting.
The PROCESS of DETERMINATION will be determined by each Tribe.

Alaska---has been called "the Last Frontier." A Writer stated that, "this is our LAST CHANGE to do things RIGHT."

Let us all HOPE that in the writer had a real hope and not a vain one.
[redacted]

If the right of the people not to be infringed upon by Govt.s can truly be kept, if we can build better communities by working together, then our future is bright indeed.

If Native People's rights are ignored, ram-rodded, rail-roaded, or otherwise Destroyed, then the Future is very DARK indeed and History will hold it's final Court and yet another DISHONOR will be recorded.
Let's ALL hope that this--DOESN"T HAPPEN!!

I MUST REPEAT---H.B. 153 and S.B. 147 must be STOPPED.
If they go far enough, they must be VETOED by Governor Cowper!!

Al Judson
Juneau, Alaska
99801

SENATOR FRED F. ZHAROFF
ALASKA STATE LEGISLATURE

P.O. BOX 405, KODIAK, ALASKA 99615 (907) 486-5259
DURING SESSION:
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DISTRICT N

MEMBER: Senate Finance Committee, Resources Committee, and Community & Regional Affairs Committee

March 30, 1987

TO: Senator Arliss Sturgulewski, Chair
Senate Community and Regional Affairs

FROM: Senator Fred Zharoff

RE: SB 147 and Attached information on artifacts.

The attached is for your information. Please consider the suggestions in Lloyd Miller's memorandum.

Thank you.

KODIAK AREA NATIVE ASSOCIATION

402 Center Ave. - Kodiak, Alaska 99615 - Phone (907) 486-5725

March 25, 1987

The Honorable Fred Zharoff
Alaska State Legislature
P O Box V
Juneau, AK 99811

Dear Senator Fred:

Please find enclosed a memorandum from KANA's attorney, Lloyd Miller, discussing H.R. 153 and S. 147. We would ask you to consider the suggestions made in the memo. Such legislation will be very pertinent in the Kodiak area considering the archaeological activity that is taking place here. Protection of artifacts is always a concern and legislation that helps in that regard would be most welcome. However, village tribal laws and the authority of village tribal councils should not be ignored when developing such a law.

Thank you for considering this request. We all look forward to your return home after a successful legislative session.

Sincerely,

KODIAK AREA NATIVE ASSOCIATION

Gordon

Gordon L. Pullar
President

GLP:gc
Enclosure
cc: KANA Cultural Committee

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*ALASKA AND DISTRICT OF COLUMBIA BARS
**WISCONSIN BAR
ALL OTHERS DISTRICT OF COLUMBIA BAR

March 18, 1987

MEMORANDUM NO. 13A-87

TO: Alaska General Counsel Clients

FROM: Lloyd B. Miller
Sonosky, Chambers, Sachse & Miller

RE: Proposed state legislation concerning preservation of cultural and historic property (H.R. 153 and S. 147)
(Our File No. 1404.21)

Identical bills were recently introduced in both the House and the Senate to increase the protections available under state law for preserving Alaska Native cultural and historic property. The House State Affairs Committee reported out a substitute bill which makes only one change from the original House bill. (Copies of Senate bill and the substitute House bill are attached.) The bills would allow the establishment of trusts by Alaska Native custom and tradition for the protection of ceremonial, cultural, and religious property on behalf of traditional Native groups. This would be a change from existing state law, which under the Statute of Frauds requires that such trusts be established by a written document. (Alaska Stat. 09.25.010.)

Other changes the bills would make in current state law include: (1) allowing a court to recognize the grant or assignment of a cultural trust by established Alaska Native custom or tradition, (2) requiring a permit before cultural artifacts on state lands may be excavated, (3) requiring the permission of the owner of the land on which an artifact is located before excavation may occur (unless the excavator is the artifact owner), (4) making unlawful the destruction of burial sites, (5) adopting federal law standards to regulate the sale of artifacts, (6) allowing certain officials to seize artifacts taken in violation of the Act, and to deposit the artifacts in a public depository, (7) creating criminal penalties for the violation of the provisions of the Act, (8) creating a civil penalty which could amount to three times the monetary gain

realized from the violation of the Act, and (9) including ceremonial objects and cultural resources under the Alaska Historic Preservation Act (Alaska Stat. 41.35.010 et seq.).

If enacted, the bills would add substantially to the protections currently available under state or federal law. A recent federal court decision involving Chilkat Indian artifacts demonstrates that such amendments are needed if Native artifacts are to be adequately protected. We suggest that the language of the bills be amended to expressly protect trusts created under tribal laws adopted by traditional or IRA councils. As currently drafted, the bills only refer to trusts established on behalf of "a clan, house, band, or other traditional group of Alaska Natives as owners in common."

One disturbing aspect of the bills is the apparent assumption that the state or a private property owner enjoys full ownership of cultural resources located on state or private land. Such an assumption is troublesome, and ignores the obvious Native interest in such cultural resources regardless of the identity of the land owner. To at least partially address such interests, the Native American Rights Fund has suggested that the Commissioner be required to identify and cooperate with the desires of the appropriate tribe before a permit for excavation of the cultural resources may be issued under Section (3)(a). Further, NARF suggests that the bills should authorize the designated official to deposit objects seized under the Act with the interested Native tribe or other Native entity. Finally, NARF suggests that the bills mandate consultation with the affected tribe or other Native body concerning disposition of the cultural resource. We agree that NARF's suggestions would substantially improve and strengthen the bills.

The Committee substitute to H.R. 153 has been sent to the House Judiciary Committee. The Senate Committee on Community and Regional Affairs will hold hearings on S. 147 within three weeks. Please let us know if you would like us to prepare any testimony or written comments on your behalf concerning the bills.

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE & MILLER

By: Lloyd B. Miller
Jill A. De La Hunt

LBM:JAD:jg
Enclosure

SB 147 —

Protection of Cultural / Historic Property

attached to bill a fraud.

Maybe people —

Common people haven't wanted bill.

Senator Duncan may have consulted w/native leaders. L.L.G. act etc —

Leaders can't do what they want.

Al Judson

Alaska State Legislature

Senate

MAR 9 1987

Official Business

P.O. BOX V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

DATE: March 9, 1987

TO: Senator Arliss Sturgulewski
Chairman
Senate Community & Regional Affairs Committee

FROM: Senator Jim Duncan

RE: SB 147, Protection of Cultural/Historic Property

I respectfully request that a hearing for Senate Bill No. 147 be scheduled at the earliest convenience.

This legislation is aimed at strengthening the existing law. First, the bill involves the protection of a wide range of historic, cultural, artistic, and scientific artifacts of, sometimes, unique importance to Alaska.

Second, the bill would, also, permit the courts to recognize that traditional native customs can be valid sources of trust obligations, despite the fact that, in many cases, no written records are available. Under the current law, any trust, regarding property, must be in writing before state courts can recognize it. This is the case of some current court litigation.

Please find the enclosed explanation of the bill for your information.

Thank you for your consideration for SB 147.

EXPLANATION OF PROPOSED BILL

It has become increasingly apparent that many of Alaska's historic and cultural treasures are being lost, through neglect, sale to collectors from elsewhere, or theft. A task force has been working to develop legislation to halt this slow loss. The group is formulating a comprehensive bill that would offer protections to a wide range of historic, cultural, artistic, and scientific objects of unique importance to Alaska, ranging from prehistoric fossil remains to ceremonial objects from Native cultures to historic aircraft. This kind of effort will be unique - no other state has done it - and involves proposals that are legally and factually complex. Many of the broader ideas need further development before they can be offered in the form of a bill. But in the meantime some proposals for improvements in existing law are straightforward and can be offered now, without waiting for the comprehensive package of proposals. This bill should therefore be seen as a first step in a larger effort to protect Alaska's heritage.

Sections 1 and 2 of the bill are amendments to current statutes having to do with enforcement of trusts. Under current law, any trust regarding property must be in writing before state courts can recognize and enforce it (See AS 09.25.010 and AS 34.40.070). That rule leaves an important gap regarding trusts or similar arrangments which are traditional in certain Alaskan Native cultures but which have not been reduced to writing. For example, in the Tlingit culture certain ceremonial objects are owned by an entire clan or house group, with one person acting as caretaker of the object on behalf of the group. Conflicts have arisen on numerous occasions over whether a caretaker has the right to sell an object without the entire group's concurrence. Members of the group who object to a sale or to inappropriate treatment of the object by the caretaker may be left without an adequate remedy if they cannot go to the courts to enforce the terms of the unwritten cultural rules. This bill would permit the courts to recognize that traditional Native customs can be valid sources of trust obligations, despite the fact that they arise in a culture that did not historically use written instruments.

Sections 1 and 2 would still require a person seeking to enforce a trust to prove its existence and terms, and they are limited to traditional and customary trusts for protecting and preserving ceremonial, cultural, or religious property on behalf of a traditional group of Alaskan Natives. It would not create a presumption that particular objects are communally owned or the subject of a trust, nor would it permit the courts to dictate the contents of the trust. As with current law, the terms of a trust would be those set out by its creators. The bill would not by itself resolve disputes over whether objects are owned individually or by a group, but it would empower the courts to decide

such cases if the participants chose to bring them to court. And whether the object was determined to be individually owned or communally owned, nothing in the bill would prevent the true owner from selling it.

Sections 3, 4, and 5 are amendments to the Alaska Historic Preservation act, AS 41.35.010-.240. Some of the changes are merely clarifying, e.g., the change at AS 41.35.200(a) to make clear that resources "of the state" means "belonging to the state," not merely located within the state. The list of protected resources has been broadened to include cultural resources, since it is not clear in the present statute that cultural artifacts are included with other historic or archaeological resources. Likewise, references to gravesites have been changed to burial sites to make clear that all sites where human remains are found are protected, not just those where persons were intentionally interred; hence sites of accidental death, such as the ancient homesite remains recently found near Barrow, would be protected from looting.

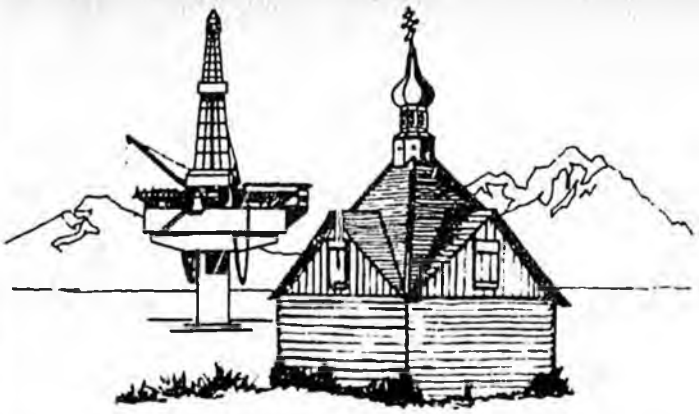
In section 3, at AS 41.35.200(b), the protections against looting or theft of important artifacts has been extended to removals from private property; the present statute limits protection to state property. This expansion is intended to deal with the problem of unlawful excavations from Native corporation and other private lands.

Section 4 revises the penalty provision at AS 41.35.210 to classify violations as class A misdemeanors, and by adding civil penalty provisions. A person violating the chapter would be liable for a civil penalty of up to three times the pecuniary gain from the offense. This feature is designed to create further economic disincentives to the person who regularly appropriates archaeological, historic, or cultural resources for the purpose of resale.

These proposed revisions are a start on the larger effort still needed for a comprehensive protection plan for Alaska's heritage. The larger effort will continue, but the changes suggested here can be implemented now as a good and needed start.

SB

155



CITY OF KENAI

"Oil Capital of Alaska"

210 FIDALGO KENAI, ALASKA 99611
TELEPHONE 283-7535

April 20, 1987

The Honorable Arliss Sturgulewski
Senator, State of Alaska
P.O. Box V
(Interdepartmental Mail Stop: 3100)
Juneau, AK 99811

Dear Senator Sturgulewski:

The powerful and un-elected utilities lobby is still leveraging and pressuring legislators (the people's representatives) to add another indirect tax on the people of the State of Alaska at a time when all taxpayers in Alaska are going to be hit with large tax increases.

House Bill 155 and its Senate companion bill are designed to transfer the cost of relocating utilities to local taxpayers when a municipality is attempting to improve or upgrade the road system for its citizens.

These bills are totally unfair when one realizes the taxpayers had to pay for these right-of-ways or easements and the utilities use them free of charge. It makes little or no difference to the municipality if the utility is municipally owned. However, if the utility is privately owned (under this bill) the taxpayers are subsidizing private enterprize or adding to their profitability.

There are dozens of municipalities in Alaska that do not own electric, gas, telephone or cable TV companies and therefore should not be burdened with utility companies' costs of doing business which adds to their profitability with tax dollars.

To make a long story short, please find enclosed a clipping from the "Clarion," dated April 16, 1987, that describes the special interest legislation on behalf of utilities.

Knowing full well that you are a representative of the people, we are sure this special interest legislation will find its deserved fate -- the waste basket.

Sincerely,

CITY OF KENAI

Wm. J. Brighton
City Manager

WJB/clf
Enclosure
cc: Scott Burgess, AML
The Peninsula Clarion

City Council to carve up street fund

Clarion
4/16/87

By BERT GRUBB 4/16/87
Staff Writer

The Soldotna City Council tackled the knotty problem of unexpectedly high utility relocation costs in Wednesday night's public hearing on $390,000 worth of proposed street improvements.

At its regular meeting, the City Council was to decide how to carve up the money among eight projects within the city limits.

Seventy-five percent of the improvement costs will be paid by general obiligation bonds issued in 1985 and covered by sales tax revenue. Property owners are expected to pay the remaining 25 percent through special assessments.

City Manager Rich Underkofler told a room filled with about 30 people the bad news that Homer Electric Association wanted around $60,000 to move electrical utilities out of the middle of Stacy Drive to allow paving. Enstar gas company wants $23,000, the telephone company wants $16,000 and the cable TV company wants $4,000 for relocation costs.

Underkofler said budget estimates prepared for the expenditure of just $30,000 for right-of-way work on all eight streets

See SOLDOTNA, page 9

...Soldotna streets mulled

Continued from page 1

selected for improvements in 1987.

Stacy Drive resident Mike Tauriainen said as an engineer he has seen utility companies hold the city hostage for relocation work on a number of projects. He said the companies can drag their feet and if the city has to finish by a deadline it may wind up paying rather than negotiating.

Underkofler proposed that Stacy Drive be made an alternate project pending successful negotiations with utility companies and property owners for the payment of relocation expenses. He said it was unfair for the city to have to pay for the relocation and property owners feared the cost would be too high for them.

Tauriainen urged the City Council to press for a legal resolution of who is responsible for the cost rather than changing the status of Stacy Drive.

Road improvements complicated by cost of moving utilities

By POLLY CRAWFORD
Associate Editor

When Kenai City Attorney Tim Rogers catches a plane for Juneau to testify on House Bill and Senate Bill 155, not only is he taking on the entire utility lobby, he is fighting against legislation which could ultimately cost the city of Kenai and other municipalities millions of dollars through the years.

At first glance, the subject matter of the bill could either put a person to sleep or get his mind tangled in a web of explanations from legislative aides who themselves don't totally understand the bill so pass it off as "too complicated to explain."

A nutshell explanation simplifies the legislation: if utilities in a public easement need to be moved because of a municipality-sponsored improvement project, the municipality pays for the relocation of those utilities.

At face value, that may sound fair enough. Somebody is going to have to pay for those relocation costs — either the resident as a utility consumer or the resident as a municipal tax payer, so what's the difference? But a deeper dig reveals the ramifications of the legislation.

According to Kenai City Manager Bill Brighton, the whole crux of the issue is the fact that the utilities — not only publicly owned electrical cooperatives, but also for-profit utilities such as cable television — are allowed to use public easements for free. Not only are they allowed, according to Brighton, the municipalities are required to allow them.

In some cases, those public easements were purchased by the city from the landowners. Because the city is providing the real estate for the utilities to use for free, Brighton said that the cost of relocating those utilities when a road is being upgraded should be counted by the utilities as a cost of doing business.

A similar example would be a private landowner who put some kind of improvement, such as a fence or parking lot, in the public easement in front of his property. When an improvement project is being done on the road, the landowner is asked to remove his improvements at his own expense.

But the utilities, and the Alaska Public Utilities Commission, don't see it that way. The issue boiled down to a fight between the city of Kenai and the Homer Electric Association in which HEA claims the city owes it $500,000 for the cost of relocating its facilities because of city road improvement projects.

At first, Homer Electric went to the APUC to ask for a surcharge to be placed only on the residents of Kenai to pay for the relocation costs. The city fought the surcharge, stating it would be the same as a tax, and that as a cost of doing business, the cost should come from all the ratepayers.

Instead of ruling only on the surcharge, the APUC ruled on the entire issue of the cost of

See UTILITY, back page

Down Under

Sky Carver is back from a trip to Australia sponsored by the Rotary Club. See *People*, page 8.

Index today:

Long distance

A peninsula man will compete in today's Boston Marathon. See *Sports*, page 14.

...Utility tangle may increase cost of road improvements

Continued from page 1

relocating utilities, rejecting the city's use of a common-law principle to back its right to request the utilities to pay, and placing the entire cost of relocating on the city's back, as long as the utilities were properly placed to begin with. According to Ray Wipperman, spokesman for the APUC, the commission didn't feel it was fair that rate payers for an entire utility pay for improvements benefitting only the residents of one municipality.

The city has appealed that ruling to the Alaska Supreme Court, stating that the APUC had no jurisdiction to rule on the common-law principle. The city is currently awaiting a decision.

The common-law principle which states that utilities will bear the cost of relocation was not pulled from a hat. Currently, Alaska is one of the only states in which the initiator of an improvement project, whether it be state or municipality sponsored, (except for the city of Kenai) routinely pays the relocation costs.

According to Marte Lyons, utility engineer with the state Department of Transportation, before 1977, there was no question on the issue — the utilities picked up the costs. That's the way it's done throughout the Lower 48, based on the common-law rule.

The Alaska Legislature feared that cost could effectively bankrupt small Bush utilities, so passed a statute requiring that on state projects, many of which were 95 percent federally funded, the relocation costs would be considered part of the project cost. Lyons said the Federal Highway Administration opposed the law, stating it would be a waste of federal dollars.

With one victory under their belts, the utilities began the fight to make municipalities pay relocation costs. Kenai has been fighting the principle for five years, and, according to Rogers, one by one, the other municipalities have dropped out of the battle, sometimes finding it easier to pay the costs than fight the utilities.

According to Tabby Lyon, administrative aide to State Rep. Bette Cato, D-Valdez, sponsor of HB 155, utility lobbyists brought the matter to Cato as an issue which needed attention. Who actually wrote the bill — which unequivocally places the relocation costs on the municipalities — was not revealed. Tam Cook, an attorney with legislative legal services said she helped draft it, but said she couldn't divulge who worked on it with her. The sponsor in the Senate is State Sen. Joe Josephson, D-Anchorage.

Utility lines run down the middle of Stacy Drive in Soldotna.

Lyon said the bill is needed to make the way in which the costs are handled uniform throughout the state. She said if relocation were part of the project costs, city officials may vote against projects because their true costs would be too high. She also said that when utilities pay for relocations, they can add 8 percent to the costs and recover the entire amount from rate payers, while only the cost of relocation itself would be charged if the municipalities collected it from taxpayers.

While Rogers maintains total opposition to any bill, stating any conflicts should be resolved before the APUC on a case-by-case basis, he has written a substitute bill which would have the municipalities only paying for future relocation costs of utilities put in after the effective date of the legislation. Then, he said, the cities could keep a closer eye on just where the utilities are located instead of giving blanket permits.

A case in point is currently occurring in Soldotna, according to City Manager Richard Underkofler. The city, plus the neighborhood paying a 25 percent assessment, would like to pave Stacy Drive, four or five blocks long. The subdivision was originally platted and developed by Tom Blazy, who put in a 50-foot-wide street with 20-foot utility easements on either side of the road. But the easements would have had to have been cleared, so the utilities put their lines down the middle of the street. Even the cable TV line, installed three years ago, goes down the middle of the street.

Now, they have to be moved, but the utilities are refusing to pay the costs: $60,000 for Homer Electric lines, $23,350 for Enstar lines, $15,000 for telephone lines, and $4,000 for Sonic Cable.

"As far as we're concerned, the utilities are trespassing on our street," Underkofler said. "This problem is going to stop construction." He added that municipalities are at the mercy of the utilities concerning the cost of relocation, because only utility people can move the lines. It is charged against the municipality on a cost-plus basis, based on the time it takes, which ends up being twice as expensive as a private contractor, he said. "It's like giving them a blank check," he said. "The city has the right to audit, but how can the city say it should have cost four hours instead of 12."

HB 155 is currently in the House Finance Subcommittee, chaired by State Rep. C.E. Swackhammer, D-Soldotna. Another member of the subcommittee is State Rep. Mike Davis, D-Fairbanks, who is working to try to get the municipality side represented in the bill. According to his aide, Marilyn Heiman, the utility lobbyists have been working hard to get the bill passed.

Swackhammer said he currently holds no opinion on the bill, but has vowed to pass it out of the subcommittee to the full committee. He said he doesn't believe in the practice of holding bills hostage in committee.

He said he can see both viewpoints in the issue — the fact that the utilities are using public easements, but, on the other hand, "Why should a utility pay for the relocation of utilities only happening in the city of Kenai? If the cost of relocation is spread out to all users. why should a person in Homer pay for it?"

Swackhammer said that judging from testimony heard at a recent hearing, the municipalities and utilities are even further apart that they were before. He said that he wants to judge the bill by a standard of fairness, and try to get the two sides to compromise. If no compromise is forthcoming, though, he said his committee will vote the amendments up or down and hand the issue to the full committee.

34. Sporting Goods

35. Garden

36. Machinery

37. Wanted

38. Real Estate

BEAUTIFUL LAKESHORE
Property, fully timbered, gravel base. Lots have highway and lake frontage. ½ of Borough accessed value. $12,900 per acre with terms.
776-8662

ABSOLUTELY
3 bedroom, FmHA, Central Heights, wooded ravine, heated garage, refrig. More!
130t6/29009 283-4184

ATTENTION
Builders, home sellers, realtors: private party needs 3 to 4 bedroom home in Soldotna. Has 40 acres in Homer to trade toward your equity. Box 907, Soldotna. 262-5216 evenings.
S144t10/29189

Below borough appraisal. Cook inlet bluff lot. 6 3/4 acre cabin, Greycliffs.
S141t6/29110 283-5601

BELOW ASSESSED VALUE
$73,500 for 3 bedroom house. Possible lease purchase. Soldotna.
S142t6/29134 262-7351

DONNIS THOMPSON REALTY
118tf/16071 776-8721

FABULOUS VIEW HOMER
3 bedroom, 2,800 sq. ft. home on 3.7 acres, East Hill Road. Detached garage, large lawn, beautiful trees.
136t25/28933 235-6788

FOR SALE BY OWNER
$125,000. Deluxe custom home in Soldotna. For appointment.
S139t6/29029 262-7778

K-BEACH
Beautiful, 3-4 bedroom, 2 bath, double garage, custom home. Assumable.
141t24/29041 283-3933

K-BEACH
2,800 sq ft possible duplex and/ or business? $137,000.
S143t6/29167 262-9610

INVESTMENT HOME

38. Real Estate

INVEST FOR THE FUTURE
2.5 Beautfully wooded secluded acres in the Wik Lake area North Kenai. $200 down, $150 per month. 283-9423, 283-9433.
124tf/28536

KENAI
3 bedroom, 1 bath, oversized lot, fenced back yard, 8x12 wooden building. $75,000.
142t25/28910 283-3693

KENAI ASSUMABLE
Non qualifing loan in Woodland Subdivision 2400 s.f. custom tri-level home includes 4 bedroom, 3 bath, family room, 2 car heated garage. Set in wooded landscape with fenced yard. By owner. $115,000.
137t10/28942 283-3689

Kenai, immaculate 3 bedroom. home, .94 acre. Sell for what we owe.
143t6/29142 283-7269

KENAI RIVER FRONT
1 plus acre, in town, 4 bedroom, 3 bath, gorgeous.
S143t6/29166 262-9610

KENAI
3 plus bedrooms, 2 bath, double garage, 1.04 acres, excellent neighborhood plus much more. $155,000. 283-4502 after 7:00 283-4457.
144t10/29183

Mobile home rental, city lot. Same renter 3 years. Cash or terms.
140t12/29042 283-7659

RENT REDUCED AGAIN
~~$395~~ $350 On these townhouse style 2 bedroom units. With fireplace and a full basement for storage. Good Kenai location. Call Earnae at Totem Realty 262-4402

Nice building 2 acre, Soldotna South Sub. 6 miles south of town. $234 month payments on terms, $15,000 cash.
144t10/29169 283-4218

Nice 2,400 sq. ft. home on 2 1/2 acres in Kasilof. $5,000 down and assume loan.
S122t25/28489 262-1390

NINILCHIK
Unfinished chalet with gorgeous view of the inlet. Priced for quick sale. Just reduced $10,000 to $34,000. Cabin Realty.
S143t10/29159 567-3493

NINILCHIK
2 acre commercial lot next to

38. Real Estate

Greycliff acreage with cabin. Make cash offer.
S114tf/28186 262-1002

NON-QUALIFYING
Assumable. 1872 sq. ft. 4 bedroom 2 bath home. $111,000.
139t15/29000 283-7959

NORTH KEANI
3 bedroom, 2 bath, 1800 sq. ft., 1 acre, cathedral ceiling, country accents, covered deck, landsaped yard. $112,000 (Neg.). 776-5113, 776-5365.
139t10/29034

ON MACKEY LAKE
Custom ranch, 3 bedroom, 2 bath, oversized garage, jacuzzi. Must see. Negotiable.
S135t25/28895 262-6233

HOME FOR SALE BY OWNER
1,600 square feet, attached garage, gas heat, W/D, F/P, walk to Sterling school, on highway, one acre. $86,000 OBO
235-5631

OUT OF STATE OWNER
Must sell. 3 bedrooms, 2 bath, fireplace, sauna, double garage, fenced yard. Close to schools and shopping. Reduced from $125,000 to $113,000. 262-5214 or collect (405)255-1155.
S127t25/28677

OUTSTANDING BUY
Large windows, excellent location near schools. Gas heat and appliances, city water and sewage and lots more. Make this neat as a pin 3 bedroom, 1 3/4 bath home an excellent choice! 283-4649, 262-3204
139t10/29038

PRE-FORECLOSURE SALE
Take over payments. 3 bedroom, 1 bath, Soldotna cul-de-sac.
133t24/28814 283-7640

RIDGEWAY
Large 4 bedroom, 2 bath, rec room, sauna, jacuzzi, fireplace, double garage, landscaped. 262-4710 eves.
136t15/28903

SATHER CONSTRUCTION
New homes starting at $65,000. We take trades for down on FHA. VA zero down.

38. Real Estate

totem REALTY INC.
SPECIAL FINANCING
Fannie Mae acquired homes, several locations.
Totem Realty 262-4402 or Cliff 262-7218

SOMETHING NEW
On the Peninsula - Fuqusa modular and trailer homes. 1-4 bedrooms, two baths. Buy for approximately half the price it would cost to build. Come and see. Call McKenzie Homes.
144tf/4290 262-6149

SPECIAL 2 WEEKS ONLY
Large four bedroom, double garage. $18,000 Below appraisal. 2,800 sq ft living space on 2½ acres. Asking $97,000.
135t1/28884 776-5187

Three bedroom house, 1½ bath, fenced yard, heated garage, very clean.
140t6/29058 283-4238

TRI-PLEX
Zoned commercial. Downtown Soldotna.
S48tf/26756 262-1002

WOODLAND KENAI
4 bedroom, 2 bath, 2 fireplace, double garage, large lot.
136t25/28902 283-5322

$12,000 below appraisal. 5 bedroom house. Gas. 7½ acres. View. Robinson Loop.
S140t6/29076 262-5020

3 bedroom, 2 bath, woodstove on 1 acre with lake access. Assumable loan at $815 a month. 262-5205 after 6pm.
133t25/28838

4 BDRM HOME/ $79,900
Clam Gulch. Nice unfinished home on 5 acres. Owner financing. Low down. Alaskan Real Estate, Inc.
S140t5/29060 274-2634

4 bedroom, 2 bath, 1 1/8 acre, woodstove, gas heat, 8¼% assumable loan, off Murwood Dr. $98,000.
122t25/28465 283-9568

80 ACRE PARCEL
½ mile Tiermore Lake frontage, ½ mile highway frontage on Holt-Lamplight Road. Ready to subdivide. Road work complete. $2995 per acre.
776-8662

4-PLEX PARTNER
No down, new unit, you finance,

38. Real Estate

4 bedroom, 3 bath, den, 2,500 sq. ft. One acre. VIP Subdivision.
S131t25/28784 283-4322

4 BEDROOM BARGAIN
Clam Gulch. Beautiful family home on 6 acres. $105,000. Alaskan Real Estate, Inc.
S140t5/29061 274-2634

4 bedroom, 2 bath, 1 acre. Washer, dryer, refrigerator, microwave. $85,000. 262-5923 after 5:00.
S144t5/29194

2 PARCELS SUBDIVIDED
11 acres and 33 acres. ½ mile from new High School. Fully timbered with gravel base. Road work complete. $1995 per acre with terms.
After 6 pm 776-8375

$68,500
Cute cedar home, excellent location in Kenai, quiet cul-de-sac. 283-7437, 283-9663 evenings.
133t12/28808

9½% ASSUMABLE LOAN
On new home over looking Longmere Lake. $85,000.
131tf/28763 283-9113

39. Lots & Acreage

ACRE PLUS
Natural gas, wooded. K-Beach area. No covenants. $16,000 terms.
S140t6/29077 262-3261

COMMERCIAL LOT
144' frontage, Soldotna city limit, gas, electric, phone. $19,500.
S142t6/29135 262-5208

Investment opportunity! 10 acres off Island Lake Road. Call for more information.
141t12/29092 776-8195

KASILOF RIVERFRONT
1.3 acre wooded lot one mile off highway. 200 plus feet of frontage. Electricity to lot. $42,750.
140t5/29007 346-3275

39. Lots & Acreage

KENAI RIVER LOT
Reduced for fast sale. Call 283-9234 or 283-4950.
113t25/28737

LAKE FRONT LOTS
On Mackey Lake. Southern exposure, paved streets. Owner finance.
S135t6/28898 262-4185

LOT ON GASWELL
With well. $14,500 easy down possible trade. 262-4497, 262-5972.
S82tf/27439

MOORING ESTATES
Lot 13 block 2 $32,950 cash, $36,980 terms. 612-843-2087 evenings.
136t25/28907

Nicely wooded 1 acre lot, ceep Creek Park. Only $200 month payments.
144t5/29182 262-4218

NO DOWN
1.3 acre lots. Half of borough appraisal. Sterling area.
143t25/29158 262-4108

STERLING VIEW LOT
3.75 acre lot with road and electric to property. $23,000 financing available.
126t25/28594 776-8920

STERLING
10 acre parcels. Also house lots, $5,000 cash. Gas, electric. Owner.
S142t6/29049 262-7099

1 acre lot on K-Beach ;five miles from Kenai. Below borough assessment.
139t6/29004 283-9468

2 acres near Anchor Point. Large trees, nice lot. $9,950 cash or terms or trade. 612-843-2087 evenings.
136t25/28908

20 ACRES
Subdivided, 4 parcels. Reasonable, low down. Trees, creek. Partial sales.
S144t6/29196 262-2587

40. Commercial Property

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LAND AND WATER MANAGEMENT
SOUTHCENTRAL REGION
3601 "C" Street, P. O. Box 7005
Anchorage, Alaska 99510-7005

PUBLIC NOTICE UNDER AS 38.05.945

STATE OF ALASKA

THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners:	Carolyn S. Guess, Chairman Marvin R. Weatherly Susan M. Knowles Diana E. Snowden Louis E. Agi
In the Matter of the Filing of a Tariff Revision, Designated as TA35-32, by HOMER ELECTRIC ASSOCIATION, INC., for a Municipal Facilities Relocation Cost Adjustment	U-83-74 ORDER NO. 7
In the Matter of the Formal Complaint by MATANUSKA TELEPHONE ASSOCIATION, INC., Against THE CITY OF WASILLA Regarding Certain Utility Right-of-Way Powers	U-83-79 ORDER NO. 4

ORDER INVALIDATING MUNICIPAL PRACTICE OF DIRECTING UTILITY RELOCATIONS WITHOUT COMPENSATION

AGI, Commissioner:

I. Introduction and Background

Presently before the Commission is the issue of the validity under AS 42.05 of the common law rule authorizing municipalities to compel without reimbursement relocation of utility facilities located within municipal rights-of-way. This is the Commission's, and apparently also Alaska's, first direct consideration of the common law rule. It also appears to mark the first occasion in which the Commission has considered the scope of its regulatory powers under AS 42.05.251 over municipal activities affecting utilities. Because important matters of first impression are involved, it is appropriate that this Order comprehensively examine the relevant factors.

This Docket was initiated by the request of HOMER ELECTRIC ASSOCIATION, INC. (HEA), for approval of a Municipal Facilities Relocation Cost Adjustment (MFRCA) surcharge that would recover unreimbursed relocation expenses incurred in compliance

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with a municipal directive only from ratepayers within the municipality. As the City of Kenai (Kenai) is apparently the only municipality actually occasioning such expenses, HEA requested that its MFRCA surcharge be applicable to Kenai subscribers. Kenai protested the proposed surcharge.

The Commission subsequently consolidated proceedings on HEA's proposed MFCRA with one aspect of a formal complaint by MATANUSKA TELEPHONE ASSOCIATION, INC. (MTA), against the City of Wasilla (Wasilla). Specifically, MTA requested a declaratory ruling that, if it were required by Wasilla, as a result of a municipal right-of-way ordinance challenged by MTA's complaint, to incur unreimbursed relocation expenses (as well as other recurring and one-time charges), then MTA would be authorized to impose a Municipal Facilities Cost Adjustment (MFCA) surcharge to recover those expenses from Wasilla ratepayers only. Wasilla opposed the request for an MFCA.

Both HEA and MEA in the first instance premised their request for authorized surcharges on AS 42.05.251, which provides:

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

As proposed by HEA, its MFRCA tariff would operate as a monthly per capita surcharge on HEA customers within a municipality that would clear any prior balance of unreimbursed relocation expenses directed by that municipality. The surcharge would not be imposed if the resulting charge would be less than $.10 per capita for the month; nor would it be imposed to the extent it exceeded $10 per capita for the month. Uncharged expenses would be carried forward

to subsequent months, subject to the same minimum/maximum constraints.

The contemplated MFCA tariff of MTA would require an initial estimate of the subject expenses to be incurred by MTA over the following 12 months, which estimate would then be averaged per month and spread on a per capita basis over the affected customers for their monthly surcharge. At the end of the 12-month period, any actual excess or deficiency in incurred expenses would be determined and credited or debited, as appropriate, to the estimate then being made for the ensuing twelve months.

The consolidated hearing was held on November 17, 1983, with counsel and principals for HEA, MTA, and Wasilla present. Kenai was invited to participate but declined to appear or accept full-party intervenor status in a letter from Kenai to the Commission dated September 14, 1983. In that letter, Kenai nonetheless stressed its opposition to HEA's MFRCA clause and incorporated earlier written comments dated August 17, 1983. The written comments of Kenai have been considered, together with the written and oral presentations of the parties.

II. Contentions of the Parties and Kenai

(a) Kenai

The arguments of Kenai against the proposed surcharge are premised on acceptance of the common law rule authorizing unreimbursed relocations, and Kenai cites McQuillin, Municipal Corporations, Secs. 34.72 and 34.74(a) for the statements of this rule. Those sections provide:

> Section 34.72. The grantee of a franchise to use the streets takes it subject to the right of the municipality to make public improvements whenever and wherever the public interest demands, and if the improvement causes injury to the company, as by requiring it to relay or change the location of its pipes, tracks, or poles, or otherwise, the grantee of the franchise cannot recover damages from a municipality therefor.
>
> Section 34.74(a). The fundamental common law right applicable to franchise in streets is that the utility

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> company must relocate its facilities in public streets when changes are required by public necessity. Accordingly, it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of the franchise, where public convenience or security require it, even at the grantee's own expense.
>
> This common law rule may be changed by contract between the utility and a municipality so that relocation expenses are borne by the municipality, or may be changed by statute so that relocation expenses in certain cases are borne by the state.

From this premise, Kenai advances several discrete arguments. First, Kenai maintains that assessing the utility's customers within the municipality for the expense of a directed relocation is no different in legal contemplation than requiring the municipality to pay that expense. Therefore, Kenai concludes that authorization of a surcharge provision would be tantamount to rejection of the common law principle.

Kenai appears also to advance a separate argument that relocation expenses should not be considered in the same category as permit or franchise fees under AS 42.05.251. In this argument, Kenai contends that absent express authorization from the Alaska Legislature, a municipality is without power to surrender its immunity from having to pay utility expenses for accommodating a municipal relocation request. This proposition seems premised on the contention that the municipality's common law right to direct unreimbursed relocations results from the police power of the municipality, which it may not contract away.[1]

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[1] In support of this contention, Kenai quotes 29 AM.JUR.2d Highways, Streets, and Bridges, Sec. 232, which states as follows:

> Rights in streets or highways granted to individuals or corporations are at all times held in subordination to the superior rights of the public. The grantee takes them subject to the paramount right of the public authorities to grade and improve the way and to make such requirements and regulations as are necessary and reasonable in order to make it suitable and convenient for the

Kenai next argues that HEA has approached the Alaska Legislature to extend AS 19.25.050 (which requires the State to pay utility relocation expenses incident to State highway work), to municipally directed relocation work and thereby abrogate the common law principle. The effort was unsuccessful, and Kenai argues that either the Legislature failed to terminate the city's police power or the Legislature has confirmed the common law rule

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([1]continued)

> use of the traveling public, and the grantee may be required to abandon the use granted, or to remove or change the location of structures erected under the grant, when demanded by the public necessity, convenience or welfare. This power of the public authority cannot be limited by contract. (Emphasis supplied.)

As a short answer, it may be observed that if a proper exercise of Commission discretion under AS 42.05.251 should result in authorizing this surcharge or invalidating unreimbursed relocations, this should constitute the requisite legislative action postulated as necessary by Kenai. More importantly, McQuillin in the previously quoted section acknowledged the general rule in this situation as being that a municipality may indeed assume by contract liability for relocation expenses. Seemingly involved here is recognition that two types of valid municipal activity can occasion request for utility relocation or removal; one, under the proprietary powers of the municipality, would be utility relocation incident to a municipal project requiring some sort of redesign or relocation of the roadway; the other, under the police powers of the municipality, would be utility relocations or even ouster incident to a need to maintain the roadway in a serviceable condition to the benefit of all users. The former, apparently constituting the typical situation in which the common law rule generates litigation, is subject to contractual surrender while the latter, when it occurs, would not be so subject. Indeed, it seems the argument encountered frequently is that legislative abridgment of the common law rule would constitute some sort of constitutionally prohibited impairment of vested or contractual obligations by a utility to a municipality to accept liability for relocation expenses. See, State Road Commission of Utah v. Utah Power & Light Company, 353 P.2d 171 (Utah 1960). Again, the short and sufficient answers are that the AM.JUR. treatise does not state the complete general rule, and that, in any event, proper action under AS 42.05.251 constitutes the allegedly requisite legislative action. Accordingly, the Commission will not address further this argument as a bar to the surcharge or other Commission action under AS 42.05.251, although the distinction between relocations directed pursuant to the police power rather than proprietary powers will be returned to in a somewhat different context later in the discussion.

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or the Commission as a matter of discretion should leave the issues to the Legislature.[2]

Kenai also observes that HEA has never paid an annual fee for use of municipal streets. By contrast, the gas utility serving the city, Kenai Utility Service Corporation (KUSCO), pays a 2 percent annual gross receipts tax. Kenai suggests that HEA, in the absence of such payment, should not have the security of possession associated with an easement nor otherwise enjoy a cognizable hardship claim.[3]

Following the Commission's dismissal of an earlier petition by HEA for a declaratory ruling that Kenai had breached a contract with HEA allegedly requiring the city to pay most of the unreimbursed relocation expenses currently accrued, HEA filed a complaint in the Superior Court seeking recovery of the relocation expenses. Kenai suggests that the Commission should stay proceedings on the tariff revision proposed herein until a decision is rendered in the court case. In this connection, Kenai also chides the Commission for probably having precipitated HEA's current

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[2]The Commission does not agree with the contention of Kenai that its documentation of a failure of the Legislature to enact a specific piece of legislation requiring municipal reimbursement of relocation expenses is tantamount to a legislative intent to place the common law principle beyond the purview of the Commission under AS 42.05.251. Indeed, given the uniquely broad responsibility conferred by the Legislature upon the Commission in AS 42.05.251 to regulate the interface between municipalities and public utilities, the generally ambiguous significance of legislative inaction is seemingly more consistent in this instance with a belief by the Legislature that utilities already had access to sufficient remedies before this Commission or the judiciary if the complex considerations attendant to the common law principle established its unsuitability for Alaska.

[3]However, KUSCO has submitted a proposed MFRCA surcharge of its own, as the Kenai ordinance exacting the two percent payment also specifically requires that the utility bear the costs of relocations directed by the municipality. Commission Docket U-84-2. In any event, HEA pays a gross receipts tax to the State which is then refunded to Kenai.

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tariff filing in that earlier dismissal by simultaneously suggesting the possible propriety of a municipal surcharge.[4]

Finally, the city contends that authorization of the surcharge would result in an unreasonable preference or undue discrimination against consumers located within municipalities and in favor of those located outside municipal boundaries, allegedly in violation of AS 42.05.391 which prohibits undue discrimination in a utility's rate structure.

(b) HEA

HEA in its initial filing for approval of the MFRCA surcharge notes that unreimbursed relocation expenses are proper items for a surcharge because of their relationship to permit fees which the Legislature authorized as proper items for such a surcharge in AS 42.05.251. HEA further contends that such treatment

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[4]After concluding that declaration of the rights of the parties under the agreement appeared more properly a matter for judicial determination, the Commission observed in the June 3, 1984, letter:

> However, it appears your client should consider filing a special tariff to authorize collection of the unreimbursed costs of any municipally-directed relocation as a surcharge on the bills of customers residing within the political boundaries of the City of Kenai. Assuming, arguendo, that the City is correct in its contention that there is no common law obligation to reimburse a utility for municipally-directed relocations, their cost would seem to be a proper expense of utility operations which are recoverable in rates. Because this is not a system-wide cost (and underlying benefit), it would seem unfair to pass the cost on to all subscribers. This conclusion seems particularly warranted as a municipality may negotiate away its immunity from having to pay relocation costs. Frequently, such immunity is surrendered, or liability for relocation costs assumed, in a franchise or permit agreement which would provide for payment of a fee by the utility. The requirement to pay either a fee or relocation expense at the discretion of the municipality would seem to make a fee and relocation expense interchangeable concepts, so that the authority of a utility in AS 42.05.251 to recover fees from the customers in the municipality receiving the fees would seem to necessarily sanction the recovery of relocation expenses in the same manner.

for unreimbursed relocation expenses is consistent with the general cost-causer/cost-payer philosophy of ratemaking, in that such expenses are incurred only in servicing those customers within the municipalities responsible for the unreimbursed expenses. Arguably, therefore, such tariff provisions are proper (even apart from AS 42.05.251) under AS 42.05.391 and its prohibition against utility rates that embody undue discrimination or preferences.

In response to specific points of Kenai, HEA argues, first, that the pending court case involving construction of a contract between Kenai and HEA is entirely separate from the issue of how or which ratepayers are billed for relocation expenses incurred by the utility. Consequently, according to HEA, there would be no justification for delaying the present Commission proceeding pending outcome of the court case.

HEA next responds that any contention of Kenai based on the common law rule of unreimbursed relocations is unavailing, since the common law principle presupposes the existence of a municipal franchise, citing McQuillin, supra, Sec. 34.74(a). HEA claims that AS 42.05 (and particularly the provision in AS 42.05.251 granting utilities under State law the right to use municipal rights-of-way) constitutes a legislative recision of municipal franchising authority in Alaska and associated common law rules purporting to control relationships between municipalities and utilities.

HEA then relies on AS 01.10.010 to conclude that the common law rule of unreimbursed relocations should not operate to preclude Commission approval of HEA's proposed MFRCA surcharge. AS 01.10.010 provides:

> Applicability of Common Law. So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the Legislature of the State of Alaska is the rule of decision in this State.

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The only remaining question, according to HEA, is whether or not the Commission is empowered to and should authorize the surcharge. Essentially repeating its earlier reliance on the cost-causer/cost-payer philosophy, HEA concludes that an MFRCA surcharge is entirely consistent with legislative and Commission declarations mandating fair and equitable rates and rate structures within Alaska.

(c) MTA

MTA believes a surcharge is appropriate under the cost-causer/cost-payer philosophy, as municipal residents are actually the principal users and beneficiaries from utility payments of fees and relocation expenses incurred in connection with municipal road improvements and maintenance. Thus, according to MTA, the municipal subscriber very justly should be the recipient of a special surcharge to recover such payment under general ratemaking practices.

MTA also argues that a surcharge is appropriate under a franchise theory applicable at least in its situation. In B-C Cable v. City and Borough of Juneau, 613 P.2d 616 (Alaska 1980), the Alaska Supreme Court held that AS 42.05.251 and AS 29.48.-050(1) did not abrogate existing franchise agreements between utilities and municipalities. The Court also noted that it is generally held that utility permits granting the right to use public streets are franchises. 613 P.2d at 619, n. 5.

According to MTA, agreements with Wasilla in 1976 and 1982 permitted the placement of utility facilities in public rights-of-way and expressly provided for Wasilla to pay the cost of any subsequent municipally directed relocations. The latter ordinance was in effect until August 22, 1983, when Wasilla enacted the ordinance which is the subject of the present complaint and does not provide for as wide an assumption of relocation responsibilities by Wasilla as did the earlier ordinances.

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It is MTA's contention that B-C Cable precludes Wasilla from directing relocation of pre-1983 facilities without also paying MTA for the costs of those relocations in accordance with the earlier contracts. Moreover, if the Commission will not modify the current ordinance or otherwise take action to enforce that liability upon Wasilla directly, it is entirely proper to have such unreimbursed relocation costs included in the requested special surcharge against Wasilla. Consequently, MTA argues that the surcharge is justified on the basis that municipal subscribers may serve as a proper surrogate for liabilties of the Wasilla municipal entity.

Finally, MTA advances an argument that suggests unreimbursed relocation expenses are in violation of the Alaska Constitution. Article I, Sec. 18, of the Alaska Constitution provides:

> Private property shall not be taken or damaged for public use without just compensation. (Emphasis supplied.)

Relying on State v. Hammer, 550 P.2d 820 (Alaska 1980), MTA argues essentially that (1) the emphasized portion of the Alaska Constitution creates a greater range of compensable interests than the Fifth Amendment to the United States Constitution, and (2) the common law rule allowing a municipality to mandate unreimbursed utility relocations violates the subject provision of the Alaska Constitution. Again, MTA completes its argument by suggesting that utility subscribers located within the municipal boundaries of Wasilla are fair surrogates for the Wasilla corporate entity. The argument concludes with the duly respectful suggestion that the Commission paraphrase and apply to itself the following language from State v. Hammer: "This court would poorly serve the law if it were to so blind itself to the realities of condemnation." 550 P.2d at 824.

(d) Wasilla

Wasilla responds to MTA's arguments by contending that customers outside municipal limits as well as those inside benefit from or are served by communications plant located within municipal boundaries. Moreover, certain relocation costs and damages will be incurred by MTA under the subject ordinance because of MTA's own faulty installations. Therefore, Wasilla suggests it is improper to consider only the subscriber located within the municipal boundaries as the cost-causer of a municipal assessment.

Second, Wasilla contends MTA consented to abrogation of the earlier agreement and thus cannot now rely on its provisions, which, in any event, addressed only relocation matters and not the full spectrum of costs which MTA may potentially incur under the new ordinance.

Finally, Wasilla disputes the characterization of relocation costs as "damages" under the Alaska Constitution, contending that such costs are visited by Wasilla on MTA in the city's capacity as administrators of public rights-of-way for the benefit of all users including other sub-surface users. According to this argument of Wasilla, relocation costs are "...a necessary and inevitable risk associated with the benefit MTA enjoys in making use of the city's property. There is nothing unconstitutional about paying for such costs."

III. Discussion

(a) Preliminary

This proceeding has addressed the validity of the common law rule authorizing unreimbursed relocations. The parties have discussed whether the rule is reasonable and whether it is consistent with the Constitution and statutory law of Alaska. The parties have requested from this Commission only a rejection or acceptance of the requested surcharges under AS 42.05.251, with

the municipalities arguing for rejection if the rule is valid and the utilities arguing for acceptance if the common law rule is invalid.[5]

However, as the Commission construes AS 42.05.251, the imposition of a surcharge requires a preliminary finding that the expense imposed by a municipality and to be recovered through the surcharge is the consequence of a reasonable fee, term, or condition. If the fee, term, or condition causing the expenses is not reasonable under AS 42.05.251, then the proper response is to prohibit or appropriately modify the subject municipal action.

AS 42.05.251 contemplates protection of the ratepayers within a municipality as well as those outside against the consequences of unreasonable municipal action. Where, as here, a practice is challenged as unreasonable, the Commission must first find the practice reasonable before considering whether a surcharge is appropriate for dealing with the financial consequences of the action to the utility. Moreover, this seemingly reasonable if not obligatory interrelationship under AS 42.05.251 between the reasonableness of municipally occasioned expenses and surcharge mechanisms is supported by factual and policy considerations concerning the undesirable and inequitable features of such mechanisms in general and for recovery of unreimbursed relocation expenses in particular.

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[5] To a certain extent, the Commission has contributed to the parties' restricted approach in its previously noted suggestion that HEA consider filing for a surcharge mechanism if it is obligated to accept unreimbursed relocation expenses. However, because the Letter Order premised its suggestion that a surcharge mechanism was worth further consideration on the express assumption for argument's sake that the common law rule was correct, it should reasonably have been understood from the letter that the Commission was not intending any judgment on the common law rule or precluding investigation of remedies other than a surcharge if the rule were challenged as it has been in this proceeding.

(b) Surcharge Mechanisms in General

The generally applicable rates and rate structure of a utility attempt to match revenues and costs both for the utility as a whole and for functional classes of service. Typically, the rates and rate structure are based on audited historical data and appropriate *pro forma* adjustments. Structured opportunities are also provided for affected consumers to participate in the process.

The beneficial results of this exacting process are several. Ratepayers are provided with reasonable rates for types and amounts of service used. This means, among other things, that current expenses of utility operations are appropriately allocated to and paid for by the various classes of current ratepayers, and common capital expenses are appropriately shared between proper classes of current ratepayers and future ratepayers who will also benefit from those expenditures.

Moreover, the rates that emerge from this process are relatively stable, which is an often overlooked but frequently important consideration for the vast majority of consumers who operate within fixed incomes and for whom the cumulative total of monthly utility payments constitutes a substantial budget expense. Also not to be minimized is that under the standard ratemaking approach utilities have a considerable incentive to minimize costs, either to maintain profits or offset other rising costs under existing rates and, thereby, to avoid the necessity of seeking rate relief in formal rate proceedings with their unlimited scope of review and uncertain results.

Surcharges, on the contrary, are erratic whenever they are intended to recover on a monthly basis variable current expenses.[6] Even HEA's suggested monthly lid of $10 per capita does

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[6] KUSCO, it should be noted, contends in support of its

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not remove the potential of sizable swings in uncontrollable and unbudgeted utility billings. Moreover, if there are substantial amounts that are held back monthly because of the $10 lid (and if it is proper to consider relocation expenses as current and not capital expenses), then to that extent there is a mismatch in periods for incurring and paying expenses.

The MTA proposal for annual estimates and prospective adjustments for incurred differentials does have the virtue of eliminating month-to-month swings. However, it does add the disadvantage of requiring the municipal ratepayer each month to pay an amount that is composed entirely of an estimated amount adjusted for a true-up in another year's estimate; in other words, a charge not reflecting current reality.

As suggested, there is also the issue of whether relocation expenses, even under a surcharge, should be recovered on any sort of current basis. Admittedly, it is to the utility's advantage to recover its expenses on as current a basis as possible. However, relocation expenses represent labor and materials associated with plant that will thereafter enjoy a full service life. Even under a surcharge mechanism, the current municipal ratepayer should be entitled to a temporal allocation of such cost. With respect to a properly allocated amount to the current municipal ratepayer, there should also be a further allocation within classes of municipal users as is done with other common current expenses.

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[6](continued)

proposed MFRCA in Docket U-84-2, that "...these [relocation] costs cannot be predicted with any degree of accuracy...." KUSCO TA Letter No. 15. HEA alleges that as of its filing, presumably not including the past construction season, it has $200,000 in unreimbursed relocation expenses that it proposes to recover from Kenai subscribers under its requested surcharge.

Additionally, neither HEA nor MTA appears to propose a viable method for noticing and allowing the public and Commission to investigate the accuracy and prudence of a relocation expenditure. Moreover, as a surcharge item, the situation would be lacking the typical dynamic for the utility to minimize costs of a relocation. Indeed, there could be a disincentive to the utility's exploring larger reconfigurations in the event of a mandated reimbursement in order to avoid complications in determining proper allocations to the surcharge account. This is not to suggest that the utility's normal prudence or the Commission's own review efforts would be ineffective checks, or that some sort of notice provision could not be interwoven into an MFRCA surcharge. However, the added value of a utility's traditional incentive to minimize cost is not a factor that should be lightly removed.

In this connection, it should be observed that the Commission is not considering surcharges that permit flow-throughs of changes in wholesale power costs or fuel costs, which are concededly current expenses, easily verifiable, comparatively unavoidable or unmodifiable, and rateable by usage rather than customer. None of these considerations are present in the proposed surcharges for unreimbursed relocations, so that allowance of pass-through mechanisms is not nearly as justifiable. Moreover, it should not be forgotten that surcharges even in fuel and wholesale power situations are not well received of late (if ever), principally because their presence reduces incentives to minimize or offset cost increases.

Beyond these negative aspects of surcharges in general and recovery of unreimbursed relocation expenses in particular, there are further considerations underlying the equity of recovering such expenses from the municipal ratepayer alone under any

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methodolgy. In other words, it is not entirely clear that assessment of the municipal ratepayer for such expenses is justified even under cost-causer/cost-payer or similar principles.

Assuming the propriety of municipal mandating of unreimbursed relocations, all that has occurred is that the utility has been subjected to an expense of utilization of another's right-of-way. Such an expense can reasonably be viewed as the quid pro quo for lack of an initial or ongoing fee paid by the utility to place its facilities in the right-of-way or even, until shown to the contrary, the "balance" of compensation due for a less than sufficient initial or ongoing fee that would assure security of facility placement.

Viewed in such a light, the expense of unreimbursed relocations within a municipality does not appear as a practical and perhaps also conceptual matter any different from the expenses of easement acquisition or compliance, or even unusual construction or maintenance circumstances, that the utility will incur normally in providing service anywhere in its service area, even outside municipal boundaries. Typically, however, the utility does not segregate those expenses where incurred outside the service area (unless part of an applicable line extension policy) and thereby insulate the municipal subscriber from responsibility for them. Therefore, a good argument exists that any cost burdens associated with utilization of municipal rights-of-way should not be paid for by municipal residents only.

Admittedly, a utility can protect itself in dealing with private individuals against excessive easement or unusual construction expenses through invocation of eminent domain powers or appropriate line extension policies, while unreimbursed relocations seemingly cannot be so limited. However, this is not a

satisfactory rejoinder as the fair value of easements not included in a line extension charge or the prudent expenses of easement compliance and unusual construction or maintenance circumstances are nonetheless shared by the municipal ratepayer. By the same token, if liability for unreimbursed relocations is considered as merely the reasonable value of the right to lay facilities in municipal rights-of-way, it should be shared by all consumers. Moreover, it would not be beyond possibility for the Commission's aid to be invoked under AS 42.05.251 to resolve disputes as to whether relocation expenses exceed a reasonable value for use of municipal rights-of-way that year. Anticipating later discussion herein, such a determination would be on a basis comparable to an eminent domain valuation because the issue in that instance would be in the nature of a determination of the fair market rental value of municipal properties.

None of the foregoing is to suggest that a utility could not or should not in an appropriate case file for separate rates for subscribers within and outside of municipal boundaries. However, functional service classes rarely follow municipal boundaries, and this Commission generally exhibits a preference for "postage stamp" or common rates within a single service area. However, in the absence of a full cost-of-service study based on municipal/nonmunicipal divisions, it is difficult to see the equity in singling out the item of unreimbursed relocation expenses for selective recovery on a theory that not to do so would result in an undue discrimination against or subsidy by the nonmunicipal ratepayer in favor of the municipal ratepayer. Stated alternatively, it is difficult to conclude that the municipal ratepayer is such a cost-causer in this situation as to fairly

warrant imposition of sole responsibility for payment of relocation expenses.[7]

This lack of decided equity in favor of restricted surcharge versus general rate recovery for unreimbursed relocation expenses is also demonstrated in a rebuttal from other jurisdictions to a Commission premise in inviting the surcharge filings in its letter. In that invitation, one issue that was thought to require future attention was the interchangeability between relocation expenses and permit fees, which are expressly mentioned as a possible surcharge item in the statute. Assuming the identity were adequately established, it seemed doubtful at first glance that any meaningful obstacle would appear to surcharging such expenses. However, the statutory language even as to such fees is permissive, and the limited experience of other jurisdictions in handling such franchise and permit fees is not consistent.

In Washington, for instance, the court reversed an order of the Washington Department of Public Service requiring a telephone utility to impose municipal surcharges to recover franchise fees exacted by local municipalities. The court there stated:

> A franchise is "a special privilege conferred by the government on an individual or individuals and which does not belong to the citizens of the country general ly, of common right." 37 C.J.S., Franchise Par. 1, p. 142. Such a franchise as those with which we are here concerned is a contract between a municipal corporation

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[7]There is also a contention not explicitly denominated that the municipal subscriber, if not fully a cost-causer of unreimbursed relocation expenses, is at least a 'cost controller' and beneficiary with respect to such items. However, and without lengthy analysis, it is difficult to find that the degree of control over municipal actions with respect to imposition of unreimbursed relocation expenses obviously warrants surcharging municipal subscribers. Moreover, even allowing full weight to the control and benefit notions, this only raises a larger issue. If a ratepayer owns property beyond his service premises, is it reasonable that he be required to gratuitously surrender the value of an easement therein as a condition to enjoying the right to utility service? The Commission cannot dispel the sense that notions such as control and benefit in this context mask an effort at sanitizing the proposition that "two wrongs make a right."

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> and a person who has applied for leave to engage in certain business operations of a public nature within the limits of the municipality. Franchises granted to respondent include the right to place poles, wires and conduits within the public streets. Any person desiring such a franchise must apply therefor to the municipal corporation. If his application be favorably considered, a franchise is offered upon certain conditions. This offer the applicant may accept or refuse. If accepted, the franchise provisions become binding on all persons concerned, save as heretofore noted as to provisions fixing rates....
>
> It might well be that respondent would find it convenient to procure an easement over private property outside the municipal limits, for the purpose of placing its poles and wires. Money paid for such an easement would certainly be properly classed as an operating expense. It seems reasonable to consider that payment of a certain proportion of respondent's gross income collected from rate payers within the city limits be considered as compensation for use of streets, if no other provision has been made for the payment for the privilege. Such franchise payments, if considered as compensation for the use of the streets, would be properly classed as a general operating expense.

State ex rel. Pacific Telephone & Telegraph Co. v. Department of Public Service, 142 P.2d 498, 535-536 (Wash. 1943). In sum, the Washington court thought it not unreasonable to conclude that a very broad view of the matter can equate a franchise fee and easement fee as both being an exercise between a utility and property owner in reaching an appraisal of property value which, in turn, should receive consistent treatment in ratemaking. The court did, however, allow municipal taxes to be recovered only from subscribers within the municipality.

In Utah, on the other hand, the court registered bewilderment at the Washington approach and in a pair of cases confirmed the propriety of confining recovery of franchise fees to subscribers within the assessing municipality. Ogden City v. Public Service Commission, 260 P.2d 751 (Case I), 754 (Case II) (Utah 1953). The court there stated:

> The question remains: Can the Commission permit a utility to charge and bill subscribers of an area, for payment of imposts on the company levied by local governmental authority of that area?

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> In a distinguishable case, Ogden finds support for a negative answer, and another case agrees where franchises only are involved, but deserts her and supports the Commission, where other levies are imposed,--a distinction we logically cannot perceive, albeit there may be one. But competent and well-reasoned authority agrees with the Commission, and conforms more nearly to the views of this court, particularly where, as here, ever-changing and probably ever-increasing local imposts appear on the horizon which neither the legislature nor the company to date has controlled, and where, should we conclude otherwise, discrimination would fluctuate in direct proportion to the actions of a myriad of local governing bodies. (Case I.) (Footnotes omitted.)

260 P.2d at 753.

> The Company's president asserted that in the past, because of lower unit operational costs, densely populated areas (where local imposition generally prevailed) had benefited outlying areas having no impositions, since rates for like service were the same, statewide, irrespective of residence in or out of a local imposition area, which, in reverse, represented a discrimination against users in the areas where such impositions existed. The argument is suggested that the local imposts tend to lessen or neutralize the discimination against subscribers in non-imposition communities. But neutralizing one discrimination by increasing another is no answer. Public policy seeks the elimination of as many discriminations as possible in a field where total elimination thereof is difficult or impossible of achievement. If the discrimination adverted to exists in fact, it is for the Commission to help write its obituary, rather than to cancel its effectiveness by permitting the creation or persistence in being of another. (Case II.)

260 P.2d at 755.

Thus, even if the interchangeability of annual municipal charges and unreimbursed relocation expenses is accepted, there is not clear guidance from that proposition alone as to how such expenses should be recovered.

The foregoing review of the disadvantages to be experienced by ratepayers under surcharges in general and for recovery of unreimbursed relocation expenses in particular, coupled with the question of fairness in any event of singling out such expenses for recovery from municipal subscribers alone, is intended to establish only that the proposed surcharges are not the eminently equitable vehicles they appeared to be initially. Nonetheless, the Commission is not intending at this point to rule on

the circumstances under which a surcharge might be appropriate. There are inequities in visiting unreimbursed relocation expenses on the general ratepayer as well as the substantial policy consideration of not adopting an approach that encourages all municipalities to pass expenses to utilities that will increase utility rates to all. Nor are the full range of obstacles postulated here applicable to surcharges for items other than relocation expenses. Indeed, the Commission could be overstating at least some concerns in the foregoing analysis. However, this analysis does illustrate the concerns on behalf of the municipal subscriber with the proposed surcharges that moved the Commission to reexamine AS 42.05.-251 and ultimately conclude that an expense to be surcharged to municipal ratepayers must first be reasonable under the statute.

(c) Reasonableness of Unreimbursed Relocations

(i) Benefit/Burden Standard

The Commission must first consider the criteria for appraising reasonableness under AS 42.05.251. The primary guide that permeates all Commission decisionmaking under AS 42.05 is protection of the legitimate interests of utility ratepayers, and there is no reason for not employing the same guide in approaching an issue of reasonableness with respect to municipal actions.

For present purposes, these legitimate interests can be abstracted from AS 42.05 as, simply, ensuring that the ratepayer pays no more than reasonable operating expenses and the fair value of used and useful plant employed in the provision of safe and adequate utility service. In short, the ultimate concern in any event is that the ratepayer in utility rates pays no more than fair value for a benefit received or burden generated by the utility in the ordinary course of delivering reasonably adequate service.[8]

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[8]It should be noted that this benefit/burden test is only one

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Applying this test of reasonableness in the context of a municipal practice of directing unreimbursed relocations irrespective of any utility fault, the expenses of which must then be recouped from customers, the question is whether there is a rational or substantial connection between payment of such expenses by ratepayers and cognizable benefit received or burden occasioned by the utility in the ordinary course of providing utility service to the ratepayer. If so, then the practice is reasonable with perhaps only a secondary question of insuring that the expenses are calculated to be commensurate to the reasonably related benefit or harm. If not so related, then, as to those utilities' ratepayers which the Commission is charged to protect under AS 42.05, the Commission must declare municipal efforts to direct unreimbursed relocation expenses as unreasonable within the contemplation of AS 42.05.251.

In determining whether or not the common law rule satisfies the benefit/burden test, it is relevant to examine the historical justification for unreimbursed relocation charges. There appears to have been an evolution in judicial opinion on the subject. The court in Baltimore Gas and Electric Co. v. State Roads Commission, 134 A.2d 312 (Md. 1957), had before it a request by the utility for relocation expenses incident to the commission's construction of a tunnel. In ordering compensation under the theory that the statutory scheme creating and empowering the commission had abrogated the common law rule that a public utility must relocate facilities in public ways at its own expense if made

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([8]continued)

test of reasonableness under the statute. AS 42.05.251 also contemplates that a challenged municipal practice not discriminate among or against utilities, and this aspect will also be examined in the next section.

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necessary by improvements or extensions of the road system, the Court stated:

> The Commission and the Company agree that the controlling part of the statute is the paragraph of Sec. 120 reading: 'All private property damaged or destroyed in carrying out the powers granted by this sub-title shall be restored or repaired and placed in its original condition as nearly as practicable or adequate compensation made therefor * * *.'
>
> * * * *
>
> The Commission concedes that if private property, other than that of a utility, located in, on or under State owned land, is damaged but not taken in the course of the building of a bridge, motorway or tunnel, Sec. 120 requires the payment of compensation for the damages that otherwise would be incidental or consequential and so, damnum absque injuria. Its earnest argument is that there is a fundamental difference between statutes, on the one hand, that merely extend to owners of property damaged consequentially, and not directly, the right to compensation enjoyed by owners of property taken, and statutes, on the other 'which deny to the State the police power with respect to public utility facilities located on the public domain * * *.'
>
> * * * *
>
> There is no esoteric or sacred difference--if there is any significant difference--between the police power of the State to injure the rights of property of a utility without paying for the injury and the State's power to so injure the rights of property of every other owner. Cases that have imposed the common law burden on the utility sometimes have relied on an implied limitation or condition that the company will move its facilities at its own expense if the public interest requires moving but, as we see it, the bedrock basis for the police power to require the moving of utility facilities without paying compensation, is that the State does not take property within the meaning of the Constitution and, therefore, is not required to pay. Because it has not taken the property, the damage to the owner is consequential or incidental, just as is the damage to one abutting the newly built or improved road or bridge whose property is not taken but merely damaged. In both cases the common law rule has been that the loss to the owner was damnum absque injuria.

Id. at 314-315, 316, 318.

The court went on to cite both its own earlier decision and that of the New York Court in In re Gillen Place, 106 N.E.2d 897, 900 (N.Y. 1952), for the proposition that a utility laying

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facilities pursuant to franchise has an "incorporeal hereditament" or property interest in the nature of an easement which is a sufficient property interest for compensation under the statute in the event of damage.[9]

As also stated by the Maryland court, the common law rule has alternatively been justified as an "implied limitation or condition" on utilization of municipal streets. This appears to be a reference to the earlier observed view of McQuillin (see pp.

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[9]The Maryland Court had also discussed the New York approach, in which the common law rule is stated as denying reimbursement for relocations directed pursuant to the governmental powers of a municipality but allowing reimbursement if the relocations are required to accommodate either a proprietary activity of the municipality or another utility's use of the streets. The most significant aspect of the New York approach appears to be the judicial reluctance, absent the clearest legislative statement possible, to construe statutory language as sufficiently broad to abrogate the common law rule and protect a utility's interests in facilities laid in public rights-of-way. Maryland disagreed with such a restrictive interpretation and further suggested that New York might have abandoned this approach In re Gillen Place, in which compensation was allowed for utility relocaction incident to construction of a municipal bus garage and shop, on the theories that the activity was proprietary and, in any event, the utility's interests were compensable as eligible subsurface structures under the condemnation statute involved. The Maryland Court observed that Judge Fuld, who had authored a previous significant opinion in New York supporting a restrictive construction approach, had dissented vigorously. Contrary to the Maryland Court's prediction, New York did not continue its arguably tentative step toward liberalization of its approach in the subsequent decision of Consolidated Edison Company of New York v. Lindsay, 248 N.E.2d 150 (N.Y. 1969), in which Judge Fuld, writing for the majority, denied compensation, holding that In re Gillen Place must be strictly confined to its facts. The common law rule allows exceptions, essentially, only when the municipality 'goes into business for itself,' and legislative abrogation of the rule to the benefit of utilities must be very clear. Under the statutes involved in that case, a utility's subsurface rights were not intended to be compensable. The policy basis for the attitude seems to be that so long as the utility did not pay the city any money for street use, it should not be compensated for a relocation unless the relocation is required by another utility or the city incident to the generation of revenues. Consolidated Edison Company, 248 N.E.2d at 153.

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3-4 of this Order) which considers the common law rule as an implied condition of franchises unless expressly disclaimed. In this connection, it should also be observed that a franchise is defined as follows:

> In American law, a franchise is defined as a special privilege conferred by the government on individuals or corporations and which does not belong to the citizens of a country generally by common right, and it is immaterial whether the grant is made direct by the legislature or by a municipality to whom the power is delegated.

Id., Sec. 34.03 at 9. McQuillin is in essence stating that a municipality's right to mandate unreimbursed relocations is an aspect of its right to prohibit entry.

While the significance under Alaska law of both the franchise and condemnation approaches to unreimbursed relocations will be explored further at a later point, the above views of the source of the common law rule appear to reflect one immediately relevant point: Nowhere is the rule justified on a theory that its invocation is intended to compensate for a burden imposed by normal utility operations or a benefit received by the utility in its normal operations. Rather, the unreimbursed relocation expenses are incurred primarily, if not exclusively, because of a road or other civic project of a municipality whose occurrence, timing, extent, and nature are totally at the discretion of the municipality and irrespective of any particular utility activity within the affected right-of-way. Consequently, under the benefit/burden test of reasonableness, the expenses for unreimbursed relocations cannot be passed on to the utility's customers as a reasonable exchange for a benefit received or burden caused by a utility to the municipality in the ordinary course of the utility's normal operations.

Implicit in the foregoing is a further conclusion that unreimbursed relocations cannot be justified as a species or

alternative manifestation of a franchise, permit, or license fee exacted in exchange for the right to engage in a utility enterprise within municipal boundaries, or at least to use municipal rights-of-way in the conduct of that enterprise within municipal bcundaries. Whether denominated the franchise, permit, or license authority (and the terms frequently appear interchangeable), the municipal right to special monetary exactions from a utility seems to be premised on either the "regulatory" power of the municipality to reasonably regulate the entry and conduct of enterprises affecting the public interest and to be compensated for the activity, or the "ownership" power of a municipality to deny use of its rights-of-way to public utilities except on terms negotiated between the municipality and utility, including possible one-time and/or recurring payments.

The regulatory aspect of franchising would not seem adequate to serve as a justification for unreimbursed relocations. Such authority to the extent recognized should only justify fees commensurate with regulatory or other quantifiable cost burdens imposed by the utility on the municipality; but, as observed, unreimbursed relocations are not based on such utility-occasioned costs. However, fees associated with the ownership aspect of the franchise authority would seem to be limited only by the value to the utility in being allowed to operate within the municipality, so that the utility deals with the municipality much as it would with a private property owner in negotiating an easement. As neither ownership franchise fees nor unreimbursed relocations are based on utility-occasioned costs, ownership franchising could arguably constitute a wedge for the allowance of unreimbursed relocations or other conditions with financial impact that are not limited by regulatory or other quantifiable cost burdens imposed by the utility on the municipality.

However, it seems clear that judicial precedent and statute in Alaska preclude any compensation being paid by a utility for the value of engaging in a utility enterprise within municipal boundaries or even within its rights-of-way. In Chugach Electric Association v. City of Anchorage, 476 P.2d 115 (Alaska 1970), the Alaska Supreme Court had before it a municipal ordinance that purported to require a utility issued a certificate of public convenience and necessity by this Commission under AS 42.05 to also acquire a permit to serve customers within municipal boundaries, which permit in turn required a showing of inadequacy of existing services. The court ruled the ordinance could not stand, stating:

> This does not mean that the City of Anchorage is without jurisdiction to charge Chugach with the responsibility of meeting reasonable standards of construction, limiting its joint use of public ways so as not to unduly restrict their utility, obtaining and filing plans, and providing the city with other information to allow for the proper administration of municipal police powers. It is only that part of the municipal ordinance which is applied inconsistently with our state laws that must yield.... (citation omitted). It means, simply, that the city may not deny Chugach the right to provide the electrical service requested by Park Lanes.

Id. at 123.

The opinion clearly preempted any right of a municipality to deny operating authority within municipal boundaries on public interest grounds where the utility has received operating authority pursuant to AS 42.05.[10] Thus, to the extent even the regulatory aspect of the franchise authority might otherwise justify a fee being exacted as a condition of entry, there would

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[10] By reasonable extrapolation, this decision would seemingly also apply to other areas of potential public interest regulation by a municipality that the legislature entrusted to the Commission in AS 42.05., such as rate regulation. It should also be observed that the decision reflected a preemption of municipal authority in the subject area, not a two-tiered approach with the municipality functioning as a first forum and the Commission as a second or appeals-type forum.

seem to be no such authority in Alaska. Regulatory entry is controlled by state statute.

The opinion did acknowledge the survival under its rationale of certain municipal powers over right-of-way activities, which would allow regulatory control in matters not typically regulated by an agency such as the Commission. Moreover, after the Chugach case was submitted for decision, the Legislature enacted AS 42.05.251 which, as previously quoted but useful to restate here, provides in its first sentence as follows:

> Utilities have the right to a permit to use public streets, alleys, and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires.

The Legislature thus directly conferred on regulated utilities the right to use municipal rights-of-way. The municipality, by logical implication, was denied authority to grant or withhold such rights and, with it, the authority to negotiate on a value basis with the utility. The only authority municipalities possess over utility activities, whether under the terms franchise, permit, or license, is the authority to police right-of-way usage essentially as illustrated in Chugach and to impose fees commensurate with that activity, with even the reasonableness of both the activity and fee subject to review before this Commission under the remaining provisions of AS 42.05.251.[11]

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[11]The status of municipal authority over utilities as a result of the statutory scheme in Alaska seems to be that reflected in the following passages from McQuillin, supra.

> In the absence of constitutional limitations, the creation of a state public service commission may have the effect of abrogating all conflicting regulatory powers theretofore vested in municipalities, or even of taking from municipalities all control over public utilities, except the power to enforce municipal police and sanitary regulations and other regulations authorized under the police power, and the power to grant franchises upon the terms and in the manner prescribed by law. (Citations omitted). Id., Sec. 34.09.

For these reasons, the Commission concludes that the

([11]contined)

> All franchises or privileges known by that term proceed from the state in the exercise of its sovereign powers. The power to grant franchises resides in the state; and the city, in granting a franchise, acts as agent for the state. Sometimes the right to use the streets is conferred by a general statute or the charter of the company, or by a constitutional provision, and in such case the consent of the municipality is not required. (Citations omitted.) Id., Sec. 34.10.

> A municipality cannot absolutely refuse to allow the use of its streets by a public service company where the right to use the streets has been unconditionally granted by the legislature. So where the right to the use of the streets has been expressly granted to a public service company by the legislature, no municipal power to prohibit such use of the streets can be inferred from the clause in the grant that the use shall be subject to such regulations and restrictions as may be imposed, since the restrictions thereby intended must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use, or impose new conditions to the power to exercise the franchise.

> On the other hand, where it is provided that the consent of the municipality must be obtained before the streets can be used, a municipality has power to refuse to allow a public service company to use its streets, and its authority is not limited to a reasonable regulation of the method of using the streets. (Citations omitted.) Id., Sec. 34.19.

> If the consent of the municipality is necessary to the use of streets by a public service company, the municipality, on granting the right to use the streets, may impose conditions on the company which will be binding on it if it accepts the right to use the streets, or conditions precedent to be performed before the rights under the franchise can be claimed, provided, however, that such conditions are not forbidden by the constitution or statutes or inconsistent with conditions prescribed by the legislature; conditions that conflict with the public service act are of no force or effect....

> If a company is granted the right to use streets by the state, a municipality cannot impose conditions as to rates or the like, since such conditions are not proper police regulations and in such a case no other conditions can be imposed. And if a corporation is authorized by the legislature, by charter or otherwise, to use the streets of a municipality, it has been held that the muncipality cannot compel the company to sign a contract imposing stipulations as to the manner of using streets, although the municipality undoubtedly retains its power to regulate the use of the streets by the company, in the exercise of the police power. Likewise, conditions

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benefit/burden test of reasonableness under AS 42.05.251 does not include as an element of cognizable benefit to the ratepayer any payment to the municipality for the values of the right to engage in a utility enterprise within municipal boundaries or within municipal rights-of-way. Consequently, the practice of mandating unreimbursed relocations cannot be sustained on the premise it is a type of payment to the municipality for the value of utilizing municipal rights-of-way.

Moreover, the Commission must register here a further finding. Even if a value approach to permit or franchise fees is applicable in Alaska, the command in AS 42.05.251 that such fees be reasonable implies that the fee in question should be accompanied by an intent to approximate value or be amenable to a correlation to such value if challenged. Unreimbursed relocations, however, have no intended correlation to value. Nor are they amenable to any efforts at such correlation as, by nature, they are totally dependent on the general scope of municipal construction activity in a particular year or period of years. There is no way the utility or the ratepayer can rationally budget for the expense which could well be severe in any period.

([11] continued)

> in the grant of a franchise, on acceptance, cannot become a valid contract which will divest the municipality of its police power....
>
> If conditions may be imposed, the municipality may retain the right to revoke the license or privilege at pleasure, or for breach of condition or to purchase the grantee's property on the streets upon the termination of the franchise. And, the municipality may impose conditions of service; fix rates; limit the duration of the grant; require restoration of streets....
>
> ...And it has been held that the conditions must be performed by the company at its own expense, it being estopped from saying that the conditions are not reasonable. (Citations omitted.) Id., Sec. 34.36, at 95-96.

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The Commission does not believe the Legislature intended the allowance of reasonable terms or conditions of usage of municipal rights-of-way in AS 42.05.251 to include practices with such unpredictable consequences. Accordingly, and despite the fact that in a given year the Commission could conceivably scale down unreimbursed relocation expenses to no more than the reasonable rental value of the municipal rights-of-way for the year, the Commission must hold that the practice of mandating unreimbursed relocations is unreasonable even if municipalities may be compensated for the value of right-of-way usage.

The reasonable practice in the event value compensation is authorized is for the municipality to impose an annual fee expressly for that purpose and have available appropriate supporting methodology and data if the fee is subsequently challenged. This constitutes the only rational and responsible approach to value compensation.

(ii) Discrimination

The benefit/burden test set forth herein for measuring reasonableness under AS 42.05.251 should not be the exclusive measure employed by the Commission. By its nature, a reasonableness standard reflects a legislative intent that the body vested with such discretion should retain a residual capacity to recognize relevant equitable considerations that in a particular instance would be ignored or inadequately treated under an inflexible formula. For instance, a benefit/burden test would not be helpful in the face of a discriminatory policy by a municipality that subjected one utility to "reasonable" fees or conditions yet insulated others from the same impositions. Yet, it is difficult to avoid concluding that such discrimination should be a significant aspect of reasonableness under AS 42.05.251. Nor should a discrimination policy be subject to consideration only to the extent other utilities may be involved. If any interests are

similarly situated to a utility's with respect to a municipal endeavor, then the utility's interests should be entitled to similar consideration.[12]

Typically, the activity occasioning the relocation mandate is a civic project that, while proper and lawful for the municipality to undertake, carries with it an obligation to make compensation for property interests adversely affected by the undertaking. In other words, the activity occasioning the relocation is ordinarily undertaken pursuant to the proprietary and not the police powers of the municipality (which latter power arguably is not subject to the constraint of compensation to affected interest). Nonetheless, public utilities are denied the protection of such compensation.

The Commission is of the opinion that a utility laying facilities in municipal rights-of-way has by virtue of certification of this Commission and the rights granted in AS 42.05.251 sufficient interest to be treated similarly to other persons whose interests would be protected in the course of the municipal undertaking. Accordingly, the Commission concludes that a municipal practice of mandating unreimbursed utility relocations incident to a proprietary activity of the municipality is unreasonable as placing an inequitable or unduly discriminatory burden on a utility's ratepayers to finance public improvements. This finding is independent of the earlier finding that the common law rule is unreasonable under the burden/benefit test. And, despite being based on considerations that might support a judicical finding

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[12]It should be noted that the Commission is not considering the benefit/burden test as necessary but not sufficient to justify the reasonableness of a questioned municipal action. It is entirely plausible to suppose that a municipality can in circumstances unknowable at this time establish the reasonableness of a municipal action, notwithstanding that such action would fail the benefit/burden test.

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that the common law rule is inconsistent with the Alaska Constitution (to be discussed in the next section), this finding is not based on such possible unconstitutionality but on the application of the discretion conferred on the Commission in AS 42.05.251 to independently appraise the reasonableness of municipal actions affecting regulated utilities.

(iii) Additional Considerations: Status of Historical Justifications for Rule under Alaska Law

A. Franchise Theory (B-C Cable Co. v. City and Borough of Juneau)

The preceding section indicated that the common law rule was premised on the larger municipal power to deny entry under the ownership aspect of the franchise authority. But, as the Commission construed the Chugach decision and AS 42.05.251, that franchise power was denied to municipalities in Alaska and, with it, any dependent powers. It is possible that the Alaska Supreme Court has already confirmed this voiding of the franchise power.

In B-C Cable Company v. City and Borough of Juneau, supra, the Alaska Supreme Court considered a contention that the passage in 1970 of AS 42.05.251, AS 42.05.641, and AS 29.48.050(a) effected a legislative withdrawal or denial of the municipal franchise authority in Alaska as to regulated utilities.[13] The case involved the continued legality of a 3 percent franchise for permit fees specified in ordinances antedating the above statutory provisions.

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[13] Section 42.05.641 provides: Regulation by municipality. The commission's jurisdiction and authority extend to public utilities operating within a city or borough, whether home rule or otherwise. In the event of a conflict between a certificate, order, decision or regulation of the commission and a charter, permit, franchise, ordinance, rule or regulation of such a local governmental entity, the certificate, order, decision or regulation of the commission shall prevail.

Section 29.48.050(a) provides: Franchises and permits. (a) The assembly, acting for areas outside cities and the

The court held that pre-existing franchise agreements were valid unless superseded by specific order of the Commission pursuant to AS 42.05.251 and AS 42.05.641. This seems to have been based on the court equating franchises and permits, considering franchise ordinances as contracts, noting that AS 42.-05.641 contained a reference to valid "franchises," and holding that the Legislature should not be presumed to have intended the statutory provisions to operate retrospectively.

The utility had also advanced a further contention that even if the franchise or permit fees in that case were not invalidated, the 3 percent fee should be voided until the city established a reasonable permit fee for the use of its streets pursuant to AS 42.05.251. The court noted that this contention had as its premise that the 3 percent fee, "...was originally designed to compensate the city for use of municipal streets and for the costs of municipal supervision and regulation. Since the latter services have now been assumed by the APUC, appellant argues that the reasonableness of the fee is subject to doubt." Id. at note 4. It is not clear from the statement of the premise whether it was derived from the facts of the case, represented a generic contention of the utility, or reflected a conclusion of the court as to the legal purpose and scope of franchise or permit fees in Alaska. The court rejected the contention that it should void the 3 percent fee on the basis that the reasonableness of the fee is within the original jurisdiction of this Commission and the utility should first try its case on that point before this body.

([13]continued)

> council acting for the area within a city may grant franchises, including exclusive franchise privileges, for the construction, operation or maintenance of bus transportation systems and public utilities not regulated under AS 42.05 and may permit them the use of streets and other public places under regulations prescribed by ordinance.

The court's focus in the opinion on not giving retrospective effect absent clear legislative direction to the subject statutory provisions implies that they have prospective effect. As the issue in contention was whether or not the Legislature had repealed municipal franchising, the implication was that the court concluded a voiding of the franchise power had occurred. Similarly, the wording of the premise on which a contention of unreasonableness of the franchise fee might be sustained, coupled with the absence of any qualification on that premise which could have issued as a matter of guidance to the Commission without necessarily disturbing its original jurisdiction, supports the conclusion that permit fees after the enactment of AS 42.05.251 should be limited to offsetting regulatory burdens and costs to the municipality associated with right-of-way usage by a utility, and not include any compensation to the municipality for the value of the right-of-way.

This distinction between prospective and retrospective operation of the 1970 statutory provisions could be significant as HEA did not assume responsibility for Kenai until 1971 pursuant to an ordinance/sales agreement for the theretofore municipally owned electric utility system. Similarly, all the relevant events in the MTA situation occurred after 1970. Consequently, HEA's and MTA's rights and obligations presumably would be tested under the prospective application of the subject statutory provisions.

The difficulty with the B-C Cable decision, of course, is that it did not expressly affirm that a prospective voiding of the franchise power had occurred by virtue of the subject statutory provisions and, if so, to what extent or in which aspects. Nor did the opinion expressly confirm the regulatory burden test of reasonableness for permit fees and, presumably, other attempted limitations. The absence of such express declarations would seem to reflect an uncertainty by the court as to either the actual

intent of the legislature or the consequences of premature statement. Indeed, having observed that AS 42.05.641 expressly refers to franchises and also noting in its opinion that permits and franchises can be interchangeable concepts and terms, the court could have entertained concern as to whether the term "permit" in AS 42.05.251 reflected a legislative intent that certain aspects of "franchise" authority did persist in the new legislative scheme. If so, premature prophylactic abrogation of franchising authority could have unintended consequences.

Nonetheless, it appears to the Commission that it was the court's intent to void the ownership aspects of municipal franchising or permitting in Alaska with respect to regulated utilities, leaving intact only those regulatory aspects of permitting and franchising not preempted under the holding in Chugach Electric Association v. City of Anchorage, supra. If this is correct, then to the extent the practice of unreimbursed relocations is premised on or is viewed as an incident of the ownership and not regulatory aspect of franchising, the Alaska judiciary would appear by necessary implication to have already rejected the common law rule as inconsistent with the statutory law of Alaska.

Admittedly, however, the Commission is here speculating or perhaps predicting a holding of the judiciary. At the least, though, the decision in B-C Cable did sanction a Commission inquiry under AS 42.05.251 into the reasonableness of particular fees or terms for utilization of municipal rights-of-way, and did confirm that under AS 42.05.641 a determination of unreasonableness would invalidate the fee or practice. Such a particular inquiry was undertaken in the preceding sections and resulted in a Commission determination that the common law rule of unreimbursed relocations is unreasonable because (1) its necessary (but not sufficient) predicate to constitute a cognizable utility benefit

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is the existence of value compensation, but the Legislature abrogated that premise; and (2) based on the Commission's construction of AS 42.05.251, even if value compensation is still permissible, the practice has sufficient undesirable consequences to preclude its acceptance as a reasonable condition of right-of-way usage.

B. Insufficient Interest for Compensation (State v. Hammer)

It will also be recalled from Baltimore Gas and Electric Co. v. State Roads Commission, supra, that even if viewed as an incident of the franchising authority, this is not sufficient justification for the common law rule. The underlying reason utility interests in facilities laid pursuant to franchise are historically denied compensation in the typical instance of relocations incident to a municipal proprietary activity[14] is that such interests seem to have been classified as "incorporeal hereditaments" and, as such, considered damnum absque injuria or too insubstantial a property interest to merit protection under the traditional wording and construction of the United States' and most states' constitutional provisions requiring compensation for governmental takings. Thus, the court in Baltimore Gas and Electric Co. was required to find in the enabling legislation creating the condemning authority particular language that was construed as intending to enlarge the otherwise too narrow state constitutional provision on compensatory taking so as to render the utility's interest compensable and not subject to the common law rule.

The significance here of Baltimore Gas and Electric Co. is that the statutory language found in that case to be sufficient for compensation is similar to the language contained in Art. I, Sec. 18, of the Constitution of the State of Alaska, which provides:

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[14]It should be noted that Baltimore Gas and Electric Co. v. State Roads Commission, supra, at 317-318, contained a fairly lengthy rebuttal to the notion that there is an inherent division

> Private property shall not be taken or damaged for public use without just compensation.

Moreover, as correctly observed by MTA, the Alaska judiciary has construed this language as creating an Alaska compensation standard broader than traditionally allowed. In State v. Hammer, supra, the court had before it a contention that lost profits incurred by a lessee of condemned property until a new business site could be procured should be compensable. Acknowledging that the traditional view would deny such damages, the court stated:

> The traditional view had been that such damages, as part of the category of incidental damages, are not recognized in eminent domain proceedings, being damnum absque injuria, a loss which does not give rise to an action for damages. Compensation has been denied under three theories: that damage to personal property need not be compensated for; that the state has taken the land only, and not the business; and that the damages are too speculative to be awarded. The first theory is inapplicable in Alaska, since by statute and case law, personal property is included in the categories of property for which the condemnor must compensate the owner. We do not find either of the other theories sufficiently persuasive to cause us to deny compensation for the damages suffered here.

Id. at 823 (footnotes omitted). After observing that the U.S. Supreme Court in Mitchell v. United States, 267 U.S. 341 (1925), had embraced the second view that destruction of a business is merely an uncompensable incident to the taking of property, the court stated:

> Secondly, Mitchell v. United States, supra, was decided under the fifth amendment to the United States Constitution, which unlike the Alaska Constitution, does not expressly require compensation for damage to property. Finally, the reasoning of Mitchell is unacceptable

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([14]continued)

between police and proprietary activities of a municipality with respect to the obligation to make compensation. The court's view was that all municipal activities proceed from the police power, and it is only the wording of the relevant constitutional or statutory provision that dictates whether compensation shall be paid. It is not necessary in this discussion to depart from the conventional proprietary/police power division as the Commission is considering only instances in which the subject municipal project would carry an obligation to pay compensation in the event nonutility private property was taken during the course of the project.

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> because it fails to provide a realistic measure of what has been taken. The court simply ignored, for the purpose of compensation, the destruction of Mitchell's business, characterizing it as 'an unintended incident of the taking.' This court would poorly serve the law if it were to so blind itself to the realities of condemnation.

Id. at 824 (footnotes omitted). The court continued on to state it is illogical to consider loss of profits too speculative in a condemnation proceeding but sufficiently certain for use in other civil contexts, and observed:

> Our dissatisfaction with the reasoning used to deny compensation for damages such as loss of profits due to business interruption is shared by commentators, and by courts, which while feeling compelled by precedent to deny compensation, have commented on the harshness of the result. Other courts, faced with intolerably inequitable results, have simply rejected the traditional views. In Luber v. Milwaukee County, 47 Wis. 2d 271, 177 N.W.2d 380 (1970), the Wisconsin Supreme Court ...pointed out that over time the use of the fair market value measure of compensation alone had become inadequate:
>
> 'The importance of allowing recovery for incidental losses has increased significantly since condemnation powers were initially exercised in this country. During the early use of such power, land was usually undeveloped and takings seldom created incidental losses. Thus the former interpretation of the "just compensation" provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship. In modern society, however, condemnation proceedings are necessitated by numerous needs of society and are initiated by numerous authorized bodies. Due to the fact people are often congregated in given areas and that we have reached a state wherein re-development is necessary, commercial and industrial property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some of the cases exceed the fair market value of the actual physical property taken.'
>
> The court concluded that "the rule making consequential damages damnum absque injuria is, under modern constitutional interpretation, discarded."

Id. at 825-826 (footnotes omitted). The court concluded:

> Having reviewed the cases from other jurisdictions both denying and requiring compensation for incidental damages, we turn to an examination of the relevant Alaska law. Article I, Sec. 18 of the Alaska Constitution provides that "private property shall not be taken or damaged for public use without just compensation". Given this mandate, we are unable to deny temporary loss

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of profits damages to Kito. His business is 'property', and it has been directly damaged by the state in taking of his leasehold. His damages have been fixed by stipulation. To deny compensation for such damages would contravene the policy behind the constitutional provision, that the condemnee should not pay a higher price for a public improvement than do other members of the public. The constitution does not require Kito to make a special sacrifice for the Petersburg Highway.

We have indicated in other eminent domain cases that the just compensation provision of the Alaska Constitution requires full indemnification of the owner for property taken or damaged....As we stated in Steward & Grindle Inc. v. State, 524 P.2d 1242 (Alaska 1974):

'Without such a rule, the State forces a property owner to pay a greater portion of the costs of a public project than any other taxpayer must pay by afflicting him with the unavoidable expenses of condemnation. Placing such a burden on the property owner is no more...just than assessing a levy against him but no others.'

Id. at 826-827 (footnotes omitted).

The acknowledgment in Hammer that a restricted view of constitutionally compensable interests is not suitable in modern times with its heavy pace of governmental activity and condemnation is very much reminiscent of the policy considerations invoked by the court in Baltimore Gas and Electric Co. to read the statutory phrase "damages" as intended to require compensation for unreimbursed relocations. And, every bit as much as in the instance of an uncompensated owner of a destroyed business, to deny a utility compensation is to require a utility ratepayer, whether within or outside of a municipality, to make a "special sacrifice" or pay "a levy against him but no others." Accordingly, even if some aspects of ownership franchising have survived in the present statutory scheme, the common law rule allowing a municipality to mandate unreimbursed utility relocations nonetheless appears be inconsistent with the Constitution of the State of Alaska.

(iv) Clarification of Holding

The determination that the common law rule authorizing the municipal practice of mandating unreimbursed utility relocations is unreasonable as to regulated utilities is not meant to

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reject totally the rule. AS 42.05.251 and Chugach Electric Association v. Municipality of Anchorage, supra, do preserve, subject to Commission review, the police power of the municipality to regulate right-of-way usage. Thus, permitting (or even franchising) to insure compliance with reasonable safety and construction standards is authorized, and a utility may properly be required to relocate its facilities without compensation in the event of non-compliance. Indeed, even in the absence of an expressed procedure or specification of placement or construction standards, a utility is obligated to construct and maintain facilities in municipal rights-of-way utilizing a reasonable degree of prudence to insure not only the safety of the facilities but the maximum opportunity for others to use the right-of-way without conflict, and such obligations may also be enforced by the municipality without reimbursement. Also, a municipality does not warrant to a utility that rights-of-way would be preserved in any particular condition. Thus, if the municipality should require a utility to remove and replace its facilities incident to repairs necessary either to restore after emergency, or to otherwise reasonably maintain, serviceability of the right-of-way in the condition existing when the utility first laid its facilities, such removal and replacement may be directed without compensation. These are illustrative circumstances only, and other situations could well arise in which the municipality may require an unreimbursed relocation as an incident of right of way activity pursuant to its police powers. Southwestern Bell Telephone Company v. the City of Fayetteville, 609 S.W.2d 914, 918, (Ark. 1981).

However, the decision herein is intended to abrogate the common law rule where a municipality requests relocation incident to a proprietary activity and recognizable management direction is present. Proprietary activities are at this time defined for the purpose of AS 42.05.251 to be primarily all activities reflected

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in a municipal capital budget. It is also intended to apply to situations in which a municipality allows itself or a third party (whether or not a utility) to lay facilities or work in its rights-of-way when such work will necessitate relocation or other disturbance of a present utility's facilities. It is, of course, a reasonable condition of entry into a right-of-way for the municipality to require the entering entity to absorb such relocation expenses of other utilities, so the municipality can adequately protect itself in these circumstances. The foregoing should constitute the vast majority of instances in which the common law rule would be invoked, and utilities and municipalities should have little difficulty in agreeing on the nature of a particular project.

In the event of dispute, the Commission remains available pursuant to AS 42.05.251 to resolve whatever problems may arise. To avoid abuse of the exceptions allowed, it will be the burden of the municipality to establish in the event of dispute that the requested unreimbursed relocation is a reasonable exercise of its supervisory powers over right-of-way usage. It is expected that utilities, for their part, have or will make a normal practice of recording the circumstances of any relocation for which they do pay expenses so as to permit validation of the propriety of such payment and their proper disposition in rate-making proceedings. Considering that such situations where ratepayers will assume the burden will be comparatively few and basically reflect true construction or regulatory necessities, such payments typically will be capitalized and recovered in generally applicable rates. In other words, there is no justification for utilities to have municipal surcharge tariffs to authorize recapture of unreimbursed relocation expenses. In those rare occasions that, for reasons unforeseeable at this time, a

municipal surcharge might be appropriate, the Commission will consider such surcharges on a case-by-case basis.

This decision also reflects the Commission's opinion that nonregulatory or ownership permit and franchise fees are unreasonable. This determination is applicable to any current or future franchise or permit fees. Franchise or permit fees that are based on a utility's revenues would seem presumptively unrelated to the actual costs of supervising the utility's right-of-way activities or other burdens caused by normal utility operation. Accordingly, the Commission will disallow such payments in reviewing future requests for rate relief, unless such a fee has been sustained in the individual utility's instance prior to conclusion of the rate case. For those occasions in which the Commission might allow nonregulatory or ownership franchise and permit fees, the Commission will also consider on a case-by-case basis whether such fees should be recovered in generally applicable rates or in a special municipal surcharge. As should also be clear, the Commission's predisposition is to require regulatory permit or franchise fees to be recovered in general rates, as they do not at present generate apprehensions concerning escalation to the point of significant impact and they are otherwise based on operational considerations.

Another aspect of this decision should also be mentioned. While B-C Cable Company v. City and Borough of Juneau, supra, sustained the validity of at least those franchises antedating the 1970 statutory scheme on behalf of the municipality, it did allow for Commission review of the reasonableness of terms even in those franchises. There is no reason why, in connection with franchises or permits either antedating or postdating the statutory scheme, a municipality could not seek relief before this Commission from any terms and conditions in such agreements as may appear or in the course of time become injurious to the

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municipality's interest in regulating right-of-way activity.[15] Indeed, such relief might well be obligatory to pursue in certain situations in light of the foregoing comments concerning discriminatory practices, although it also appears some allowance for discriminatory practices might be appropriate if commensurate with a past benefit received from the utility.

VI. Application of Determination To Present Filings

As the Commission is acting pursuant to a partial vesting of the legislative discretion in rejecting of the common law rule, this determination would appear to be applicable to any dispute brought before the Commission by a utility opposing an unreimbursed relocation. In State Road Commission of Utah v. Utah Power & Light Co., 353 P.2d 171 (Utah 1960), the court sustained a legislative declaration to compensate utility relocations incident to federal highway projects over a contention that it would unconstitutionally abrogate implied terms of the utilities' franchises incorporating the common law rule. The court there stated:

> In this case it is admitted that the franchises were granted and accepted with knowledge that they were subject to the exercise of the police power of the state. Among the unwritten provisions, then as now, was that overarching one to comply with the law at all times. What that law would be from time to time, no one knew. What specific acts or other considerations would be required of the utilities was just as unpredictable. 'We know in part, and we prophesy in part.' When a change in use of the street necessitated adjustment with respect to use by the utilities and a demand for action on the part of the utilities was made, then and only then would an obligation arise and the requirements imposed by the obligation become known. If the law had changed or street uses now unknown were contemplated, the requirements would be affected accordingly. The utilities assumed that risk to their advantage or disadvantage. The theory that the common law rule as it existed when the franchises were granted became an integral part of the franchises as if expressly written therein, and could not be modified by subsequent legislation, is not supported by the authorities. All contracts and property rights are held subject to the fair exercise of the police power of the state.

Id. at 177 (footnotes omitted). The same opinion also quoted

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[15] See also McQuillin, supra, Sec. 34.36 (quoted at note 12.)

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the follcwing language in Justice Cardozo's opinion in Oswego & Syracuse Co. v. State, 124 N.E. 8 (N.Y. 1919):

> This case is governed, therefore, by our decision in that of the Lehigh Valley Railroad so far as the facts of the two cases are the same. The state finds a distinction between them in the terms of the claimant's permit. In the earlier case there was an implied reservation by the state of the right to destroy the bridge in the improvement of navigation **** In this case the reservation was expressed. We think the difference is unsubstantial. The power of the state is not changed by the form of reservation. Even though no permit had been granted, the duty of the railroad would be the same. The equity of its position is not destroyed by its promise to obey the law. In such matters we must go beneath the form of the transaction to its substance **** In form only the duty is contractual. Back of the form of contract there lies the substance of submission to coercive power of the state. We are not dealing with a fee bargain, which has been found afterwards to be a hard one. What the legislature's power of relief or dispensation may be in such circumstances, we need not now determine. We are dealing with a bargain dictated by the law. Between such a case and that of the Lehigh Valley Railroad we find no difference in principle. The state was about to execute a great public work. It was that in the doing of that work there would be destruction of private property. Much of the damage would be damnum absque injuria. Nonetheless it would be damage. The result would be inequality in the distribution of public burdens. Some would pay more dearly than others in proportion to benefits received. The question was for the legislature whether the equity of compensation was strong enough to merit recognition. We cannot hold it to be illusory.

353 P.2d at 174.

In South Central Bell v. City of Chattanooga, 578 S.W. 2d 950 (Tennessee 1958), the court held that, notwithstanding internal designation, a particular city project was not a normal city activity (or "merely a street job," Id. at 925) but a redevelopment project within the contemplation of the state statute requiring reimbursement for utility relocation incident to redevelopment projects. In the course of the opinion, the court summarily rejected a contention that the utilities were barred from seeking reimbursement because their franchise agreement expressly assumed the responsibility for relocation expenses:

> It is claimed that the plaintiffs by their franchise from the city agreed to pay all relocation expenses. The city argues that under the emphasized portion of the

> statute these franchises are binding contracts whereby the benefits of furnishing their respective services to the citizens of the city inured to the benefit of the utilities. This argument is foreclosed by the recent decision of the Middle section of this Court in Metropolitan Dev., Etc. v. South Cent. Bell. (Tenn. Ct. App. 1978) 562 S.W.2d 438.

Id. at 953.

From these opinions, it seems to be the better and more modern rule that as against at least a legislative rejection of the common law, a municipality may not claim a vested right in continuation of the rule. Nor may such a vested right be claimed on the basis of an express recital in the franchise or permit ordinance that the utility assumes the burden of relocation expenses. Accordingly, the Commission's determination should be effective in any future disputes brought before it.

With respect to MTA's request for a declaratory ruling that a municipal surcharge is available to recover unreimbursed relocation expenses, there is no difficulty with a "present" application of this opinion as the determination of liability for relocations directed or to be directed under the disputed ordinance is before the Commission in the parallel complaint docket. Actually, Wasilla accepts responsibility for the expense of relocations of facilities placed pursuant to the permit system and location standards contemplated under its new ordinance, so that it does not truly generate a dispute over the common law rule. The dispute is over facilities laid pursuant to the old agreements under which Wasilla also assumed responsibility but which had no permit system or location standards.

The issue is whether MTA, despite the earlier agreements assuming municipal responsibility for the expenses of relocation, but without any permit system or relocation standards, is nonetheless liable for the expenses of relocation of earlier laid facilities if they were positioned in Wasilla's rights-of-way in violation of the new standards. This issue would seem necessarily to

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Anchorage, Alaska 99501

require resolution in favor of MTA. However, as discussed earlier (see page 41 of this opinion), MTA nonetheless had an obligation to prudently lay its facilities even in the absence of express municipal standards. Included in this obligation is the requirement that MTA maintain accurate "as-builts" of its plant in municipal rights-of-way. Whether or not MTA has any relocation or other liability under the foregoing principles will be considered further in the complaint docket, together with the possible further issue of whether there should be a general ratepayer recovery. Accordingly, a surcharge will not be appropriate for such items.

The reasonableness of permit fees and other possible expenses under the new Wasilla ordinance will also be discussed in the decision on the complaint. However, it may be observed here, that Wasilla seeks only to recover what it contends are the reasonable costs for damage and regulatory supervision occasioned by MTA's presence in Wasilla's right-of-way; there are purportedly no value components to the charges sought to be levied. Accordingly, no surcharge will be allowed for such permit fees and expenses under the new ordinance as the Commission may allow.

With respect to the HEA situation, the Commission's determination to reject the common law rule does not solve all problems. Clearly, this ruling will apply to any future relocations directed by the city, so there is no need for a municipal surcharge for such future relocations. However, HEA claims to have held back from its revenue requirement for generally applicable rates some $200,000 in past unreimbursed relocations which it now seeks to recover as the opening balance in the requested surcharge. It is not as clear to the Commission if its ruling rejecting the common law rule could properly be applied to sanction recovery of those expenses from the city and, if not, whether and how those charges may now be recovered.

The question here is whether the specified instances generating the present $200,000 in unreimbursed relocation expenses are consummated transactions beyond the reach of this Commission to undo and, if so, whether the utility may by any method pass these expenses on to ratepayers without violating the rule against retroactive ratemaking. Such a decision that these are consummated transactions would be harsh as the utility has obviously been attempting in good faith to seek an appropriate treatment of the problem, first thought its complaint and then through the present filing. Indeed, it seems clear in hindsight that a good deal of the present difficulty could have been avoided if the initial complaint, notwithstanding its premise on an alleged contractual breach, had not been dismissed but instead expanded to embrace a direct inquiry into whether the common law rule was reasonable and lawful as either an implied or express condition of right-of-way usage.

However, the dismissed complaint before the Commission has in fact been filed in court and, according to the copy thereof attached to the city's pleading, contains a final prayer for such other and further relief as the court may deem appropriate. It appears that the matter of liability for such relocation expenditures as between HEA and the city is still at issue. Therefore, the most efficient procedure for resolving present uncertainties is for HEA to request leave to amend its judicial complaint to include an additional prayer for relief based on this Order.

It also seems reasonable to request the Attorney General's office to seek intervention on, initially, the request to amend the complaint and, if allowed, to respond thereafter on the merits of the case as may be appropriate. If the request to amend should be denied, that would presumptively resolve the question of the applicability of this Order to the subject relocations, as well as the retroactive ratemaking issue, leaving only

the question of whether the contractual claim will be granted.

With respect to such contractual claim if it becomes the remaining issue, HEA may settle or litigate the matter in any prudent manner. If a prudent resolution should result in HEA's having to absorb some or all of the expenses of the unreimbursed relocations, then the undepreciated balance of such expenditures should be transferred to the appropriate plant accounts and thereafter utilized in establishing the utility's total revenue requirement and generally applicable rates.

The Commission is rejecting the use of a surcharge for recovery of such potential exposure for the subject relocations. The exposure would constitute a nonrecurring expenditure, so that even the arguably strongest surcharge premise of discouraging similar future activity by Kenai and other municipalities would be largely inapplicable. Coupled with the other considerations previously advanced concerning the inequity of a surcharge mechanism, this persuades the Commission that the best mode of recovery for such potential exposure is through generally applicable rates. Of course, if the Commission's Order herein is reviewed and reversed as to sanction the common law rule in Alaska, the Commission would then have to determine whether or not a surcharge is the proper response for recapturing the expense.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The request of Matanuska Telephone Association, Inc., for a declaratory ruling approving a Municipal Facilities Cost Adjustment surcharge against ratepayers within the City of Wasilla is denied.

2. The request of Homer Electric Association, Inc., in TA35-32 for a Municipal Facilities Relocation Cost Adjustment

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420 "L" Street, Suite 100
Anchorage, Alaska 99501

surcharge to recover only from ratepayers within the municipalities directing unreimbursed relocations the costs of those relocations is denied.

3. The practice of municipalities directing unreimbursed relocations of utility facilities laid in municipal rights-of-way is declared unreasonable within the contemplation of AS 42.05.251, except for those situations discussed in the body of this Order.

DATED AND EFFECTIVE at Anchorage, Alaska, this 11th day of January, 1985.

BY DIRECTION OF THE COMMISSION
(Commissioner Diana E. Snowden, dissenting with separate statement, nunc pro tunc;
Commissioners Carolyn S. Guess, Chairman, and Marvin R. Weatherly, not participating)

(S E A L)

Alaska Public Utilities Commission
420 "L" Street, Suite 100
Anchorage, Alaska 99501

STATE OF ALASKA

THE ALASKA PUPLIC UTILITIES COMMISSION

Before Commissioners:	Carolyn S. Guess, Chairman Marvin R. Weatherly Susan M. Knowles Diana E. Snowden Louis E. Agi
In the Matter of the Filing of a Tariff Revision, Designated as TA35-32, by HOMER ELECTRIC ASSOCIATION, INC., for a Municipal Facilities Relocation Cost Adjustment	U-83-74
In the Matter of the Formal Complaint by MATANUSKA TELEPHONE ASSOCIATION, INC., Against THE CITY OF WASILLA Regarding Certain Utility Right-of-Way Powers	U-83-79

DISSENTING STATEMENT OF COMMISSIONER DIANA E. SNOWDEN
TO ORDER NOS. 7 AND 4

Commissioner Snowden, while sympathetic to the merits of repudiating the common law rule, dissents from the majority decision on the basis that such repudiation is properly the prerogative of the court and legislature and not within the discretion vested in the Commission under AS 42.05.251. It is Commissioner Snowden's further opinion that unreimbursed relocation expenses incurred by a utility through municipal application of the common law are most equitably recovered from only municipal ratepayers through an appropriate surcharge mechanism.

DATED at Anchorage, Alaska, this 11th day of January, 1985.

Diana E Snowden
by cg

Alaska Public Utilities Commission
420 "L" Street, Suite 100
Anchorage, Alaska 99501

300

CITY OF SKAGWAY

GATEWAY TO THE GOLD RUSH OF "98"

P. O. BOX 415 SKAGWAY, ALASKA 99840

907-983-2297

April 3, 1987

Senator Richard Eliason
State of Alaska
P. O. Box V
Juneau, Alaska 99811

Dear Senator Eliason;

It has come to our attention that in SB155 and HB155 the Legislature is considering payment of utility relocation costs by municipalities. The City of Skagway is opposed to this legislation.

In June, 1983, after long and heated argument with our local utility, the Alaska Power and Telephone Company, over, among other things, quality of service, possible condemnation and utility relocation costs, the City of Skagway and Alaska Power and Telephone Company reached an agreement whereby a twenty-year franchise permit was signed. A major point of contention in reaching this agreement was the cost of utility relocation as a consequence of public construction.

If these proposed bills pass the legislature, the City of Skagway would be left with an agreement that would no longer contain the major provision gained by the City. It does not seem fair to permit a private company the use of public rights of way to provide utility services for private gain and then to require the municipality to pay for the relocation of these facilities if public construction must occur in a public right of way.

At the least, passage of these bills should provide for existing permit agreements to remain in force, but such a provision would still not address the fundamental unfairness of this legislation and the burden it transfers from the private sector to the public sector.

Sincerely,

Thomas Healy
City Manager

OFFICE OF ADMINISTRATION
April 3, 1987

Alaska Municipal League
Legislative Bulletin
105 Municipal Way, Suite 301
Juneau, Alaska 99801

re: Legislative Bulletin # 1?-6
House Bill 155 and Senate Bill 155

The City of Valdez feels that a municipality should pay for utility relocation only if the utilities to be moved in the right-of-way are there by reason of a permit. If the utilities are not permitted or do not comply with current codes and industry standards, then the utilities should be relocated at the expense of the utility companies.

Thank you for the opportunity to comment on this.

Sincerely,

CITY OF VALDEZ, ALASKA

John Thorp, P.E.
Acting City Manager

JT/jt/lma

P.O. BOX 307 • VALDEZ, ALASKA 99686
TELEPHONE (907) 835-4313 • TELEX 25-381 • TELECOPIER (907) 835-2992

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 3/26/87 5-DAY NOTICE
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER: TRANSPORTATION

**FISCAL NOTE(S) ATTACHED X **
IN ACCORDANCE WITH AS 24.08.035
(see below)

3/3/87

DATE TURNED INTO OFFICE 4/10/87

Mr. President:

C&RA Committee considered SB 155

change, relocation, or removal of utility facilities incident to the construction of road or other projects by a municipality.

and recommended:

[X] replace with CS for SB 155 [X] same title
[ ] new title

[ ] attached amendment(s) and

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to

[ ] letter of intent adopted and attached

** Committee [ ] attached or [X] adopted fiscal note(s)
[X] zero [ ] fiscal impact

MEMBERS SIGNING DO PASS

Tim Kelly

OTHER RECOMMENDATIONS

Mike Dimond
Fred Brandt
Rick Halford

Cliff Stumpfenhi Do Pass
Chairman signature and recommendation

[ ] Committee Backup Attached

(1)

THE SUPREME COURT OF THE STATE OF ALASKA BALDWIN

CITY OF KENAI,

Appellant,

v.

STATE OF ALASKA, PUBLIC UTILITIES COMMISSION,

Appellee.

File No. S-1337

OPINION

[No. 3176 - May 8, 1987]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai
Peter A. Michalski, Judge.

Appearances: Timothy J. Rogers, City Attorney, Kenai, for Appellant. Mark L. Figura, Assistant Attorney General, Anchorage, Harold M. Brown, Attorney General, Juneau, for Appellee. Andrew E. Hoge, Hoge and Lekisch, Anchorage, for Intervenor Matanuska Telephone Association, Inc. Carol A. Baldwin, Kenai, for Intervenor Homer Electric Association, Inc.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

MATTHEWS, Justice.

This is an appeal by the City of Kenai from a decision of the superior court dismissing Kenai's appeal to that court from a decision of the Alaska Public Utilities Commission. The superior court found that Kenai was not a party to the

Commission's proceedings, and therefore had no right to appeal. Homer Electric Association and Matanuska Telephone Association were parties to the Commission's proceedings, and both have been granted intervenor status in this appeal. Because Kenai has a legally recognized interest which was adversely affected by the Commission's action, and because Kenai sufficiently participated in the Commission's proceedings, we hold that Kenai has standing to obtain judicial review of the agency's action by means of an appeal. We therefore vacate the dismissal and remand the case to the superior court.

I. FACTS AND PROCEEDINGS

In 1971, Homer Electric Association, by contract with the City of Kenai, assumed control of certain municipal utility facilities located within the City. Subsequent street construction required Homer Electric to relocate those utility facilities, but the City refused to reimburse it for the relocation expense. Homer Electric sought declaratory relief before the Commission to resolve the dispute according to the contract terms. The Commission declined to hear the contract dispute on jurisdictional grounds, but encouraged Homer Electric to file for a special tariff before the Commission to recover the expense either through a surcharge or through general rates.

Homer Electric filed for a tariff revision which provided for a surcharge to recover all costs associated with the