

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

5200 SCRA SB 155

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relocation of electric facilities at a municipality's request when those costs are not paid by the municipality. The Commission issued a notice of utility tariff filing, and three individuals and the City responded as interested parties with letters opposing the tariff. In "adamantly oppos[ing]" the tariff filing, the City argued that under common law, a utility has the duty to relocate its facilities at its own expense when public convenience or necessity so requires.

The Commission suspended the operation of the proposed tariff and scheduled a public hearing in view of the City's strong opposition to the filing. The Commission also "concluded that the City met the standards for intervention set forth in 3 AAC 48.110," and determined "that full-party intervenor status should be granted to the City." In its order suspending the tariff filing, scheduling a public hearing, and granting intervenor status to the City, the Commission stated that "[the utility] and the City should be prepared to answer [five] questions" relating to Homer Electric's proposed tariff revision.¹ The Commission also stated that if the City did not

1. The Commission directed the City to be prepared to answer the following questions:

- (1) What is the nature of the facilities relocation costs which are the subject of [this order]?

(Footnote Continued)

wish to be granted full-party intervenor status; it should notify the Commission.

In a letter to the Commission, the City formally declined the Commission's offer of full-party intervenor status.

The letter stated:

While the City of Kenai declines the Commission's grant of full party intervenor status in this proceeding, it does not wish to convey an impression of disinterest or lack of importance in this matter by the City of Kenai.

The City's initial response . . . consisting of six pages plus attachments set forth at length not only the City's policy position in this matter, but provided citation of statute and case law authorities in support of its position.

(Footnote Continued)

(2) If facilities are relocated at the request of municipalities and the municipalities do not directly pay the costs of the relocations, how should the utility allocate those costs to its ratepayers?

(3) Does the answer to the preceding question vary according to circumstances associated with individual relocations? If so, how should these variations be reflected in a tariff format?

(4) How should the proposed [Municipal Facilities Relocation Cost Adjustment] affect previously uncollected municipal facilities relocation costs?

(5) Are municipalities the only entities to which the proposed surcharge should apply?

The City further observed that the Commission had already apparently decided that a municipality had the discretion to require a utility to pay for relocation expense. The City quoted from the Commission's letter to Homer Electric, in which the Commission declined to decide the contract dispute:

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.

Thus, in light of the earlier statement by the Commission to the utility, the City asserted that "[i]t would seem that the City's participation as a party in this matter may well be an unnecessary step for the Commission to formally order what has previously been decided."

On November 17, 1983, the Commission conducted a public hearing but the City did not appear or otherwise participate. The Commission issued its decision on January 11, 1985. The decision specifically considered the City's earlier arguments contained in the City's letter opposing the tariff revision.

Although the Commission recognized that the parties sought only an order from the Commission accepting or rejecting the proposed surcharge, the Commission found it necessary to preliminarily determine "the validity under AS 42.05 of the common law rule authorizing municipalities to compel without

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reimbursement relocation of utility facilities located within municipal rights-of-way." The Commission held that the practice of municipalities directing unreimbursed relocations of utility facilities was unreasonable, thereby making the City liable for the relocation costs incurred by Homer Electric. The Commission also denied Homer Electric's request for a surcharge.

The City appealed the Commission's decision to the superior court explicitly relying on AS 42.05.551,² AS 44.62.560,³ and Alaska Rule of Appellate Procedure 602.⁴ The Commission moved to dismiss the City's appeal on the grounds that the City was not a party to the administrative proceedings and therefore had no right to appeal. Homer Electric joined in the motion to dismiss, and Matanuska Telephone submitted a statement of position supporting the Commission and Homer Electric.

2. AS 42.05.551, Review and enforcement, provides in part:

(a) All final orders of the commission [APUC] are subject to judicial review in accordance with AS 44.62.560 - 44.62.570 of the Administrative Procedure Act.

3. AS 44.62.560, Judicial review, provides in part:

(a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters.

(Footnote Continued)

The City "opposed" the motion to dismiss, and requested in the alternative declaratory relief pursuant to the Declaratory Judgment Act, AS 22.10.020(g),⁵ and Ketchikan Retail Liquor Dealers Association v. State, Alcoholic Beverage Control Board, 602 P.2d 434, 440 n.21 (Alaska 1979).

The superior court entered an order dismissing the case on the grounds that the City had no right of appeal because it was not a party. The City's motion for reconsideration was also denied. This appeal followed.

II. KENAI'S STANDING TO APPEAL

Whether a party has standing to seek judicial review of an agency's decision following an evidentiary hearing, either by appeal or in a declaratory judgment action, is a question of law, reviewable de novo.

(Footnote Continued)

4. Alaska Rule of Appellate Procedure 602 provides for time and notice of appeals, and for bonds on appeal.

5. The parties refer to Alaska's Declaratory Judgment Act as AS 22.10.020(b). In 1984, subsection .020(b) was redesignated as subsection .020(g). See AS 22.10.020 (Supp. 1986). AS 22.10.020(g) provides in part:

In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought.

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The judicial review provisions of the Administrative Procedure Act, AS 44.62.560(a),⁶ are made applicable to APUC proceedings by AS 42.05.551.⁷ AS 44.62.560(a) does not specify who is qualified to obtain judicial review of administrative adjudications. Since the statute is silent on this point, the answer must be supplied by reference to other sources of law. This has already been accomplished in part in Ketchikan Retail Liquor Dealers Association v. State, Alcoholic Beverage Control Board, 602 P.2d 434 (Alaska 1979). In Ketchikan, we held that parties to an administrative hearing could appeal under AS 44.62.560(a), while expressly leaving open the question as to "whether a non-party may also have a right to appeal" 602 P.2d at 439 n.19. We referred to the statutory definition of party as "the agency, the respondent, and a person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear in the proceeding." AS 44.62.640(b)(4) (emphasis in text of quoted opinion, 602 P.2d at 440). It is evident that we construed the word "appeal" to have the same general meaning as "participate" because we went on to quote with approval the following language from Application of Bank of Rhame, 231 N.W.2d 801, 808 (N.D. 1975):

-
- 6. AS 44.62.560(a) is set out in note 3, supra.
 - 7. AS 42.05.551 is set out in note 2, supra.

[A]ny person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a "party" to any proceedings for the purposes of taking an appeal from the decision.

602 P.2d at 440.

The City of Kenai meets the test set out in Bank of Rhame, namely it (1) was directly interested in the proceedings, (2) was factually aggrieved by the decision, and (3) participated in the proceedings.

The City's participation is established by its opposition to the tariff filing of Homer Electric. This opposition fills more than fifty pages of the administrative record and contains citations to legal authorities and extensive arguments. Because of the City's opposition, the tariff was suspended and a public hearing was scheduled. Although the City declined formal party intervenor status and did not present witnesses or additional arguments at the hearing, it was understood, as stated by the Commission's presiding officer, to have "nonetheless stressed its opposition . . . and incorporated earlier written comments," which were in fact considered by the Commission. The issues presented by Kenai in its opposition constituted the focus of the public hearing and of the Commission's order that followed. This is sufficient participation to achieve "party"

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status for the purpose of standing to appeal from an administrative adjudication.⁸

We hold that the City of Kenai has standing to appeal the Commission's decision. We therefore vacate the superior court's dismissal of the City's appeal and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

ORDER

Pursuant to Appellate Rules 508(a) and (f) (1), attorney fees of \$750.00 are awarded to Appellant and the Appellant shall serve and file with this court an itemized and verified cost bill by 5-18-87. Entered by direction of Justice Hatchers.
 Dated: 5-6-87 Deputy: C. H. ...

8. See also Mahuiki v. Planning Comm'n, 654 P.2d 874, 880 (Ha. 1982) (standing upheld where a person whose legitimate interest is injured by agency action participates as an adversary - appellants had submitted letters against proposed agency action which were received as part of record); Alfred I. duPont School Dist. v. Delaware Alcoholic Beverage Control Commission, 343 A.2d 600, 604 (Del. 1975) (under Delaware statute, when one becomes a party to the record, either by protest received into evidence or formal appearance in person or by representative, that person becomes formal "party to hearing"); compare Model State Administrative Procedure Act § 5-106, 14 U.L.A. (Supp. 1986) (a person to whom agency action is specifically directed, a person who was a party to agency proceeding, or a person otherwise aggrieved or adversely affected has standing to obtain judicial review of agency action).

1 IN THE SENATE

BY JOSEPHSON

2

SENATE BILL NO. 155

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to the change, relocation, or re-
7 removal of utility facilities incident to the construc-
8 tion of road or other projects by a municipality."

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

10 * Section 1. AS 29.10.200 is amended by adding a new paragraph to read:

11 (49) AS 29.35.075 (relocation of utility facilities).

12 * Sec. 2. AS 29.35 is amended by adding a new section to read:

13 Sec. 29.35.075. RELOCATION OF UTILITY FACILITIES. (a) If,
14 incident to the construction of a road or other project, a municipali-
15 ty determines and orders that a facility of a utility subject to
16 regulation under AS 42.05 that is located across, along, over, under,
17 or within a right-of-way under its jurisdiction must be changed,
18 relocated, or removed, the utility owning or maintaining the facility
19 shall change, relocate, or remove it in accordance with the order.
20 ~~The utility shall provide in advance of the cost of the work payment.~~
The order shall provide a reasonable time period for compliance. [^] If
21 the utility facility is not changed, ^{**}relocated, or removed under the
22 order, the facility becomes an unauthorized encroachment and may be
23 disposed of ^{or relocated} by the municipality.

24 (b) The cost of change, relocation, or removal of a facility of
25 a utility subject to regulation under AS 42.05 necessitated by municipi-
26 pal road or other project construction shall be allocated as provided
27 in the permit, franchise, or other agreement with the municipality.
28 If no specific allocation has been agreed to, the cost shall be borne
29 by the municipality only if the facility has been placed in the

1 municipal right-of-way

2 (1) under a valid easement or permit that specifies the

3 location of the facility and the facility is within two horizontal feet and

4 ^{one vertical} foot of that location; or ^{on portion of a municipality that does not have}

5 ^{often} the effective date of this bill and in

6 (2) before the municipality had a system for granting

7 easements or permits for utility facilities.

8 (c) In (b) of this section, "cost of change, relocation, or

9 removal" means the entire cost incurred by a utility properly attri-

10 buted to the change, relocation, or removal of a facility, less costs

11 for improvements or upgrading not required by the change, relocation,

12 or removal; if a facility is to be relocated and replaced with new

13 equipment, there shall also be subtracted from the entire cost any

14 salvage value derived from the old facility.

15 (d) This section applies to home rule and general law munici-

palities.

and the facility was located in compliance
with applicable ~~with~~ codes, regulations and statutes
at the time of its ~~use~~

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
3KN-85-00169 CI

CITY OF KENAI
v.
STATE OF ALASKA,
ALASKA PUBLIC UTILITIES COMMISSION

APPEAL OF ADMINISTRATIVE ORDER
OF THE ALASKA PUBLIC UTILITIES COMMISSION

AMENDED BRIEF OF APPELLANT

Timothy J. Rogers
City Attorney
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210 Fidalgo Street
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★ Fairbanks North Star Borough

809 Pioneer Road

P.O. Box 1267

Fairbanks, Alaska 99707

907/452-4761

March 30, 1987

APR 3 1987

McKie Campbell
c/o Senator Arliss Sturgulewski
Pouch V
Juneau, AK 99811

Dear Mr. Campbell:

SUBJECT: SUGGESTED MODIFICATIONS TO LANGUAGE OF SB 155

Along the lines of our brief conversations in Juneau on Friday, March 27, I recommend the following language be considered as a substitute bill for SB 155, "An act relating to the change, relocation or removal of utility facilities incident to the construction of road or other projects by a municipality."

1. Add to page 1, line 20, after the word "compliance":

"The utility shall prepare an estimate of the work required by the order for review and approval by the municipality before beginning work."

2. Add to page 1, line 27, after the word "municipality":

"The cost shall not exceed the approved estimate unless agreed to by the municipality."

3. Remove the word "municipal" from page 2, line 1.

4. Add to page 2, line 3, after the word "horizontal":

"feet and one vertical"

5. Add to page 2, line 6, after the word "permits":

"in that right-of-way"

6. Add to page 2, line 6, after the word "facilities.":

"and the facility is located such that it met all applicable codes, regulations, and statutes at the time of its installation."

Mr. McKie Campbell

March 30, 1987

Page 2

I will immediately follow up these suggested wording changes in SB155 with a letter describing some of my concerns and the impetus for making these changes. Thank you for your attention to our suggestions in this matter.

Sincerely,

Clark R. Milne

Clark R. Milne
Manager
Division of Civil Engineering

cc: Pat Walsh, Special Assistant to the Mayor, FNSB

cm8-141

★ Fairbanks North Star Borough

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M E M O R A N D U M

TO: Dick Jackson, Administrator Director

THROUGH: Neil Kersten, Public Works Director *✓*

FROM: Clark Milne, Manager, Civil Engineering Division *Clark Milne*

DATE: March 30, 1987

SUBJECT: NEED FOR MODIFICATIONS TO SB155, "RELOCATION OF UTILITIES
IN RIGHT-OF-WAYS"

To validate my letter which suggested changes to SB155 concerning municipalities (such as the FNSB) being responsible for paying utilities to remove or relocate existing utility facilities within right-of-ways, I would like to submit to you the comments below.

My first and foremost concern is that our FNSB utility permit system is quite young, having only been instituted on July 1, 1985. Thus, the majority of all utilities installed in road rights-of-way in the FNSB have been put in before our utility permit system was in effect, and the language of Section 29.35.075.(b)2 will probably be in effect the majority of the time. Thus, we will consistently be responsible for the costs of moving utility facilities in our rights-of-way. I believe this is inappropriate and not in the public's best interests, at least so far as the unrestricted wording of (b)2 imposes these costs on us.

Our experience in the Civil Engineering Division has been that the majority of the time when we require the removal or relocation of a utility facility from our right-of-way, it is due to a past failure of the utility to install the service line or facility properly in the first place. This includes both aerial crossings that are too low, buried lines that are too shallow, and utility poles that intrude too closely to the existing road shoulders so that necessary road widening (within the right-of-way) requires the relocation of an existing pole. To require us to pay for these oversights, under-designs, and inappropriate installations by the utility firms seems unconscionable. Thus, my suggested revision in the SB155 language (as noted in my letters to Linda Anderson and McKie Campbell, see attached), item no. 4, which would require that the utility firm have installed the affected facility properly, i.e. to the standards of the applicable code or regulation, in the first place.

The most common and expensive instances of this type of facility that must be moved are aerial crossings above the roadway which are currently at less than the minimum 18 foot required by national electrical code. It is our practice, and is supported by the common law, that the utility firm is wholly responsible for the costs of raising these substandard lines crossing our right-of-way to an appropriate, code/standard elevation above the road surface.

Memo to Dick Jackson
March 30, 1987
Page 2

Similarly, we have had significant problems and expenses due to the relocation of telephone or power lines below the road surface. We have found that all too often a utility placed a line too shallowly in the right-of-way and a new road project thus uncovers and interferes with it. Again, national electric code requires that any power or telephone line must be buried at least 30" under the ground surface. If only this were the common condition of buried utility lines in the FNSB our troubles would be nearly over! Unfortunately, there are many instances in our road projects where buried utility lines are very often found to be at anywhere from 4" to 24" below the ground surface--thus, the road interference with minor improvements to the roadway.

In both of the cases noted above, SB155 would automatically give the utility firm a "reprieve" from having to pay for their illegal and substandard utility placement. Without actually calculating the exact expenses generated by utility relocation for FNSB projects in the last few years, I believe that as a rough estimate approximately 10% of our capital improvement monies for road improvement projects would go to utility relocation were SB155 to be passed in the form submitted by Senator Josephson.

Other concerns I have tried to deal with in my revised language for SB155 are evidenced in the other items noted in my letters of March 30. The first item deals with my concern that utility firms should work with the municipalities before beginning work on utility removal or relocation to assure that their field activities are cost-effective and solely done in an effort to replace or relocate the facility which is interfering with the legitimate uses of the road right-of-way. I fear circumstances where the utility could indiscriminately overcharge the municipality for unnecessary expenses, as well as situations where the replacement facility is a superior and improved product to that which is being replaced. Neither of these two concerns is addressed in SB155 as originally submitted.

Item no. 2 would tend to assure that the costs as discussed and approved by the utility and municipality before beginning work are indeed those reached during construction. I foresee reasonable incidences where the initial cost estimate is exceeded, but believe that the municipalities can negotiate with the utilities in a timely manner to increase those agreed upon estimates for valid, discernable reasons.

Item no. 3 was requested because I do not know what a "municipal right-of-way" is. In the Borough we only have public rights-of-way, some of which are included within service areas and thus subject to municipal maintenance efforts.

Memo to Dick Jackson
March 30, 1987
Page 3

Item no. 4 addresses my concern that an often crucial dimension in the location of utility facilities is the exact depth or elevation of the line or pipe. I understand that many utility firms have extremely poor as-built records of the location of their facilities, but I believe this should be the utility's concern, problem and expense, not ours.

Item no. 5 deals with my concern that the existing FNSB utility permit system applies only to those rights-of-way within recognized road service areas. The revised language would read "before the municipality had a system for granting easements or permits in that right-of-way for utility facilities," which would eliminate the problem of us having to pay for facility relocations in rights-of-way not covered by a utility permit system such as ours because the permit system was restricted to rights-of-way within service areas. Thus, if a service area annexed new roads after the utility firm installed a facility (after July 1, 1985), and we later interfered with that facility with our transportation use of that road right-of-way, we would not be held responsible for the lack of our utility permit system, but rather the utility firm would be responsible for having to follow good practice and the "applicable codes, regulations and statutes" affecting that utility facility.

Finishing up with item no. 6 from my letter, I understand that it may be troublesome to do the research necessary to confirm what "codes, regulations and statutes" apply to the various situations we find in needing utility relocations in our rights-of-way, but it seemed to me to be the most just and fair dividing line when faced with paying for a utility relocation or not. I agree with the concept that if a utility firm acted within the applicable codes and standards of their industry and all applicable regulations and statutes within the State of Alaska, our dramatic modification of the use of a road right-of-way should include and require our payment for the relocation or removal of the affected utility facilities. It is interesting to note that I believe that I understand the utility's point of view of some of these costs and concerns. But I do not believe that they should be able to "end run" the existing common law and the common sense of justice inherent in having to pay for their own mistakes of the past.

For additional specifics or other questions, please feel free to contact me at ext. 351.

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4A Nichols, <u>Eminent Domain</u> , §15.22.	FN36
2A Nichols, <u>Eminent Domain</u> , §6.31	47

CONSTITUTIONAL AND STATUTORY REFERENCES

Alaska Constitution, Article I, Section 18. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

AS 01.10.010. 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.

AS 09.55.290. Jurisdiction. Eminent domain proceedings may be commenced in the superior court.

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

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

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

(d) If requested by a municipality, the department shall implement this chapter by requiring to the maximum extent possible location underground of electric power transmission lines within the municipality.

AS 22.10.020. Jurisdiction of the superior court. (a) The superior court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters, including probate and guardianship of minors and incompetents.

(b) The jurisdiction of the superior court extends over the whole of the state.

(c) The superior court and its judges may issue injunctions, writs of review, mandamus, prohibition, habeas corpus and all other writs necessary or proper to the complete exercise of its jurisdiction. A writ of habeas corpus may be made returnable before any judge of the superior court.

(d) The superior court has jurisdiction in all matters appealed to it from a subordinate court, or administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

(e) An appeal to the superior court is a matter of right, but an appeal from a subordinate court may not be taken by the defendant in a criminal case after a plea of guilty, except on the ground that the sentence was excessive. The state has no right to appeal in criminal cases, except to test the sufficiency of an indictment or information or to appeal a sentence on the ground it is too lenient.

(f) An appeal to the superior court may be taken on the ground that a sentence of imprisonment of 90 days or more was excessive and the superior court in the exercise of this jurisdiction has the power to reduce the sentence. When a sentence is appealed by the state on the ground it is too lenient, the court may not increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

(g) In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

(h) The superior court, in an action for divorce, separation, or child support, affecting inalienable stock in a corporation organized under 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act), may order the stock transferred to the spouse, a child, or a guardian or custodian for a child, but may not order it sold on the open market or transferred to other persons.

(i) The superior court is the court of original jurisdiction over all causes of action arising under the provisions of AS 18.80. A person who is injured or aggrieved by an act, practice or policy which is prohibited under AS 18.80 may apply to the superior court for relief. The person aggrieved or

injured may maintain an action on behalf of that person or on behalf of a class consisting of all persons who are aggrieved or injured by the act, practice or policy giving rise to the action. In an action brought under this subsection, the court may grant relief as to any act, practice or policy of the defendant which is prohibited by AS 18.80, regardless of whether each act, practice or policy, with respect to which relief is granted, directly affects the plaintiff, so long as a class or members of a class of which the plaintiff is a member are or may be aggrieved or injured by the act, practice or policy. The court may enjoin any act, practice or policy which is illegal under AS 18.80 and may order any other relief, including the payment of money, that is appropriate.

AS 29.48.030 Municipal facilities and services. (a) A municipality may exercise the powers necessary to provide the following public facilities and services:

- (1) streets and sidewalks;
 - (2) sewers and sewage treatment facilities;
 - (3) harbors, wharves, and other marine facilities;
 - (4) watercourse and flood control facilities;
 - (5) health services and hospital facilities;
 - (6) cemeteries;
 - (7) police protection and jail facilities;
 - (8) cold storage plants;
 - (9) telephone systems;
 - (10) light, power and heat;
 - (11) water;
 - (12) transportation systems;
 - (13) community centers;
 - (14) libraries, visual or performing arts centers, or museums;
 - (15) recreation facilities;
 - (16) airport and aviation facilities;
 - (17) garbage and solid-waste collection and disposal service and facilities subject to AS 29.48.033;
 - (18) fire protection service and facilities, not in conflict with AS 18.70.075, but not limited to AS 18.70.075;
 - (19) parking and parking facilities;
 - (20) housing and urban renewal, rehabilitation and development;
 - (21) preservation, maintenance and protection of historic sites, buildings and monuments;
 - (22) consumer protection;
 - (23) emergency medical services and facilities.
- (b) First and second class boroughs may exercise the powers conferred by (a) of this section or AS 29.48.033(a) only after they have been assumed in the manner required under AS 29.33.250 - 29.33.290 for areawide exercise or in the manner required under AS 29.38 for exercise in the borough area outside cities, or are

conferred by AS 29.48.020 for exercise in the borough area outside cities. However, as to powers conferred under (a)(12) of this section, exercise of the powers areawide or in the borough area outside cities is at the option of the borough and is not subject to those restrictions on acquisition of additional borough powers. With respect only to boroughs which on September 10, 1972 are not exercising powers conferred under (a)(12) of this section on an areawide basis, objection which a city may raise to areawide exercise of the powers by a borough shall be reviewed by the Alaska Transportation Commission. The commission shall decide whether exercise of the powers exclusively by the borough areawide is to be approved as in the public interest under the particular facts and circumstances at issue.

AS 29.48.035. Regulatory powers. (a) A municipality may regulate the operation and use of its public rights-of-way, public facilities and services. It may also regulate the following:

- (1) vehicle, pedestrian, and other traffic, and licensing and operation of motor vehicles, including snow vehicles and off-highway vehicles, and operators not inconsistent with AS 28.01.010;
- (2) licensing of drivers of taxicabs, for-hire automobiles, motor buses, or other vehicles for the transportation of passengers or baggage not inconsistent with AS 28.01.010;
- (3) vehicle parking not inconsistent with AS 28.01.010;
- (4) transportation fares;
- (5) licensing, impounding and disposition of animals;
- (6) selling of food;
- (8) abandoned property;
- (9) dangerous and disorderly conduct;
- (10) alcoholic beverages as provided by AS 04.21.010;
- (11) recreational devices as provided by AS 05.20.100;
- (12) control of insects and rodents;
- (13) offering for sale, exposure for sale, sale, use, or explosion of fireworks;
- (14) building, housing and related codes, which may be provided by cities within cities or, in the manner required in (b) or (c) of this section, by first or second class boroughs in the borough area outside cities or areawide, subject to the following:
 - (A) exceptions to requirements of the codes may be made in the codes among other reasons, in order to provide for the preservation, maintenance and protection of historic sites, buildings and monuments;
 - (b) codes may not be used to prohibit or restrict the development or use of solar or wind energy unless the assembly or council finds that the development or use of solar or wind energy would endanger the health or safety of the public;

(15) condemnation and abatement of public nuisances and hazards;

(16) garbage and solid-waste collection and disposal;

(17) water pollution control;

(18) air pollution control as provided in AS 46.03.140 -46.03.230;

(19) other powers and functions affecting the general health, safety, well-being and welfare of its inhabitants;

(20) licensing of day care facilities.

(b) First and second class boroughs may exercise the powers conferred by (a) of this section only after they have been assumed in the manner required under AS 29.33.250 - 29.33.290 for areawide exercise or in the manner required under AS 29.38 for exercise in the borough area outside cities or are conferred by AS 29.48.020 for exercise in the borough area outside cities. However, as to powers conferred under (a)(5), (17), (18) and (20) of this section, exercise of the powers areawide or, as to (a) (5), (17) and (20), in the borough area outside cities is at the option of the borough and is not subject to those restrictions on acquisition of additional borough powers. Upon adoption of a borough ordinance to provide for areawide exercise of the powers specified, no home rule or general law city within the borough may exercise the powers, unless the borough ordinance provides otherwise or the borough by subsequent ordinance ceases to exercise the power.

(c) The provisions of (b) of this section notwithstanding, boroughs which on September 10, 1972 are exercising building, housing or related code powers, except as those code powers relate to flood control, on an areawide basis or in the borough area outside cities shall, subject to acquisition of the powers on an areawide basis by transfer or election as provided in (b) of this section, exercise the powers in the borough area outside cities and, upon agreement of the city and borough, within any city, home rule or otherwise, in which the powers are being exercised on September 10, 1972; if the city does not agree to continue borough exercise of the powers within the city, the city shall exercise the powers within the city.

AS 42.05.141. General powers and duties of the commission. (a) The Alaska Public Utilities Commission may

(1) regulate every public utility engaged or proposing to engage in such a business inside the state, except to the extent exempted by AS 42.05.711, and the powers of the commission shall be liberally construed to accomplish its stated purposes;

(2) investigate, upon complaint or upon its own motion, the rates, classifications, rules, regulations, practices, services and facilities of a public utility and hold hearings on them;

(3) make or require just, fair and reasonable rates, classifications, regulations, practices, services and facilities for a public utility;

(4) prescribe the system of accounts and regulate the service and safety of operations of a public utility;

(5) require a public utility to file reports and other information and data;

(6) appear personally or by counsel and represent the interests and welfare of the state in all matters and proceedings involving a public utility pending before an officer, department, board, commission or court of the state or of another state or the United States and to intervene in, protest, resist, or advocate the granting, denial or modification of any petition, application, complaint or other proceeding;

(7) examine witnesses and offer evidence in any proceeding affecting the state and initiate or participate in judicial proceedings to the extent necessary to protect and promote the interests of the state.

(b) The commission shall perform the duties assigned to it under AS 44.83.162.

(c) In the establishment of electric service rates under this chapter the commission shall promote the conservation of resources used in the generation of electric energy.

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

AS 42.05.551. Review and enforcement. (a) All final orders of the commission are subject to judicial review in accordance with AS 44.62.560 - 44.62.570, of the Administrative Procedure Act.

(b) If an appeal is not taken from a final order of the commission, the commission may apply to the superior court for enforcement of this chapter, the regulations adopted under it and the orders of the commission. The court shall enforce the order by injunction or other process.

AS 42.05.641. 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.

AS 44.62.560. Judicial review. (a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. Except as otherwise provided in this section, the notice of appeal shall be filed within 30 days after the last day on which reconsideration can be ordered, and served on each party to the proceeding. The right to appeal is not affected by the failure to seek reconsideration before the agency.

(b) The complete record of the proceedings, or the parts of it which the appellant designates, shall be prepared by the agency. A copy shall be delivered to all parties participating in the appeal. The original shall be filed in the superior court within 30 days after the appellant pays the estimated cost of preparing the complete or designated record or files a corporate surety bond equal to the estimated cost.

(c) The complete record includes (1) the pleadings, (2) all notices and orders issued by the agency, (3) the proposed decision by a hearing officer, (4) the final decision, (5) a transcript of all testimony and proceedings, (6) the exhibits admitted or rejected, (7) the written evidence, and (8) all other documents in the case.

(d) Upon order of the superior court, appeals may be taken on the original record or parts of it. The record may be typewritten or duplicated by any standard process. Analogous rules of court governing appeals in civil matters shall be followed where this chapter is silent, and when not in conflict with this chapter.

(e) The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action.

JURISDICTIONAL STATEMENT

The administrative order being appealed, Order No. 7, U-83-74, was entered on the eleventh day of January, 1985 by the Alaska Public Utilities Commission. The Superior Court has jurisdiction to review such decisions pursuant to AS 44.62.560, which is made applicable to APUC Orders by AS 42.05.551. The City of Kenai received Order No. 7 January 23, 1985 and filed a Notice of Appeal February 14, 1985.¹

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STATEMENT OF ISSUES

In an excruciatingly verbose Order, somewhat reminiscent of the Tower of Babel², the Alaska Public Utilities Commission (APUC) has invalidated "[t]he practice of municipalities directing unreimbursed relocations of utility facilities laid in municipal rights-of-way." Record page 319. Utilities are directed to relocate their facilities when public construction necessitates it. The common law requires utilities to bear this expense, but the APUC has declared, in addition to other things not before it, that a refusal by municipalities to pay the utility relocation expenses is unreasonable within the contemplation of AS 42.05.251. The APUC Order effectively abrogates the common law rule on liability for relocation expenses.

The validity of the APUC action, and all points of appeal, are dependent upon the resolution of three central issues: The jurisdiction of the APUC; the validity of the common law rule in Alaska; and the scope of the APUC's authority under AS 42.05.251. In accord with the Statement of Points on Appeal filed by Appellant, this Brief will therefore address the following issues: 1.) APUC jurisdiction; 2.) Validity of the common law rule under Alaska case law and statute; 3.) APUC duties under

² "Come, let us go down, and there confound their language, that they may not understand one another's speech." Genesis 11:7.

AS 42.05.251 and conflict with the common law; 4.) APUC authority under AS 42.05.251; 5.) Whether and how Art. I, Sec. 18 of the Alaskan Constitution is applicable; 6.) Municipal proprietary interest in public rights-of-way; and 7.) The correct characterization of relocation expenses.

STATEMENT OF THE CASE

Homer Electric Association (HEA), by contract with the City of Kenai (City), assumed control of certain municipal utility facilities within the City. Subsequent street construction required relocation of utility facilities and the City refused to reimburse HEA for that expense. HEA sought declaratory relief before the APUC to resolve this dispute according to the contract terms. The APUC declined to hear the contract dispute on jurisdictional grounds, but encouraged HEA to file for a special tariff before the APUC to recover the expense either through a surcharge pursuant to AS 42.05.251 or through general rates. Record Supplement.

HEA then filed a tariff revision (TA 35-32) which provided for a surcharge to recover all costs associated with the relocation of electric facilities at a municipality's request when those costs are not paid by the municipality. Record page 1. The City responded as an interested party expressing opposition to a surcharge of City residents only, citing the common law rule that those costs be borne by utilities. Record

page 31. The APUC suspended the tariff revision and called a public hearing on the proposal, U-83-74 Order No. 1, requesting the City to intervene. Record page 87. The Order identified five questions to be considered which related to the method of allocating relocation expenses to consumers.

The City declined to accept intervenor status, but reiterated its position. Record page 94. On November 17, 1983, a public hearing was held on U-83-74 (consolidated with U-83-79). Record page 139. A decision, Order No. 7, U-83-74, issued on January 11, 1985. Record page 270. It is this Order that Appellant addresses. The Order went beyond a determination of how or if the relocation expenses should be recovered by the utility to adopt a rule that has several effects: It abolishes the common law rule as to relocation expenses in Alaska; it denies municipalities any interest in their rights-of-way that would support use fees charged to utilities; it invalidates existing and future franchise agreements between municipalities and utilities that provide for use fees; it requires all municipalities to compensate utilities for relocation expenses any time a municipality is engaged in a "proprietary activity," defined by the APUC to include most public improvements within rights-of-way owned by the public; and it makes no distinction between economically regulated utilities and the cable television industry which is economically unregulated.

The APUC Lacks Jurisdiction To Adjudicate
Disputes Over Relocation Expenses Between A
Utility And A Municipality Incident To Construction
Activity Within A Right-Of-Way Owned
By The Municipality

As stated in Order No. 7, this is the first occasion that the Commission "...has considered the scope of its regulatory powers under AS 42.05.251 over municipal activities affecting utilities."³ Record page 270. This occasion was presented through a request by a utility to surcharge Kenai ratepayers to cover relocation expenses which the City of Kenai refused to pay pursuant to the common law rule.⁴ The APUC went far beyond determining which method of recovering this utility expense from

³ AS 42.05.251. Use of streets in cities and boroughs. Public utilities have the right to a permit to use public streets, alleys and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires. A dispute as to whether fees, terms, or 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.

⁴ "Under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities." Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. of Virginia, U.S. , 78 L.Ed. 2d 29, 34, 104 S.Ct. , (1983).

ratepayers would be the appropriate method, or whether the utility's claim for the amount requested was justified. The APUC has determined, erroneously, that its jurisdiction includes the authority to decide whether a common law rule governing the legal relationship between a utility and a municipality and their respective interests in the use of a public right-of-way owned by the municipality has been impliedly abrogated by Alaska statutory and case law, or should be expressly abrogated by the APUC's own regulations.

Appellant's jurisdictional argument is divided into three basis: First, case law has limited APUC jurisdiction to exclude the power to adjudicate property rights and common law responsibilities in municipal rights-of-way applicable to a municipality and a utility; second, the statute in question only requires the APUC to determine reasonableness of fees, terms or conditions a municipality places on the utility's permit to use a municipal right-of-way, not to rule on the effect or validity of the common law rule or whether a taking of property has occurred; and third, AS 42.05.251 does not give the APUC broad equitable powers to independently appraise the reasonableness of all municipal actions affecting regulated utilities.

A. Alaska Case Law Has Limited APUC Jurisdiction To Exclude The Power Exercised.

The issue of whether the APUC has authority to adjudicate disputes over construction activity due to improvements within a municipal right-of-way has already been addressed by the Alaska

Supreme Court. This decision, which held that the APUC has no such authority, is Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972), overruled on other grounds, 595 P.2d 629. In that case the City-owned utility needed to use a right-of-way owned by the Borough to service a subdivision within the City. The Borough refused to grant the City a permit to use the right-of-way, but the City installed its facilities despite the refusal. The Borough sought an injunction in Superior Court. The parties later agreed to an installation plan, thereby settling the immediate problem; but since the dispute over control of construction within the rights-of-way was a continuing one, they submitted the following question to the Superior Court: Whether the Borough had the authority to regulate the use of its rights-of-way, including construction in those rights-of-way. 504 P.2d at 1029.

The Superior Court referred the matter to the APUC, citing primary jurisdiction in the APUC as its reason, and the Borough appealed, claiming that the APUC lacked jurisdiction to adjudicate that issue. The Supreme Court noted that the "...resolution of this issue ... depends upon the nature and scope of the PUC's jurisdiction." 504 P.2d at 1032. The Court identified AS 42.05.141 as the enabling act defining the general powers and duties of the APUC. In holding that the APUC lacked jurisdiction to determine the matter, the Court stated:

The essence of the administrative power conferred upon the PUC is regulatory; the Commission is empowered to set rates, promulgate regulations, collect information, process complaints against utilities and the like. The statutory framework, however, does not grant unlimited adjudicatory

authority to the PUC. The agency is not empowered to decide disputes between municipalities over the control of construction activities within rights-of-way belonging to one of the litigants....By stipulation, the dispute concerns the Borough's authority to control work and other activities which take place within the Borough's rights-of-way. In short, the Alaska Public Utilities Commission Act simply does not contemplate the establishment of an administrative body with the authority to adjudicate such disputes. 504 P.2d at 1033, 1034.

There are only two differences between the present case and Greater Anchorage: Here the utility is not owned by a city, and here the dispute over construction concerns liability for relocation costs rather than municipal authority to prohibit the construction.

The similarities between Greater Anchorage and the present dispute, however, easily place the present dispute within the holding of that case: the dispute concerns construction activity within a public right-of-way. (504 P.2d at 1034); the municipal owner of the right-of-way is refusing to accede to certain construction demands of the utility; the dispute centers on the municipality's police power to regulate construction within and the use of its own right-of-way; and the APUC is adjudicating a dispute over construction regulation and liability under the common law rather than administratively regulating utility operations and rates. The Supreme Court expressly held that the APUC lacked such adjudicatory jurisdiction in Greater Anchorage, and that holding controls here. 504 P.2d at 1035.

While Greater Anchorage does not specifically address APUC jurisdiction over relocation expense disputes, that issue is addressed in a case very similar to the decision on appeal,

General Telephone Company of the Northwest Inc. v. City of Bothell, 693 P.2d 215 (Wash. App. 1985). As in Alaska, utilities are guaranteed a right to use municipal rights-of-way by state law in Washington. The City of Bothell directed the utility to relocate its facilities at its own expense for public safety reasons. This was in accord with the franchise agreement between Bothell and the utility. The utility relocated its facilities, but sought a tariff to recover this expense from City residents. The Washington Utilities and Transportation Commission granted the tariff, pre-empting municipal authority to regulate its rights-of-way through a franchise agreement.

The trial court upheld the tariff, but the appellate court reversed. The reasoning of the decision, that the utility commission is a regulatory agency lacking such adjudicatory jurisdiction, sounds very much like Greater Anchorage:

[I]n our view the Washington Utilities and Transportation Commission (WUTC) has no authority to allow General to enact a tariff which changes the conditions of General's franchise and forces the city to pay the cost of undergrounding the company's facilities.

The legislature conferred upon the WUTC the power to regulate the rates, services, facilities, and practices of telephone companies. ...The legislature also gave cities the power to grant franchises to telephone companies. ...Bothell's franchise to General is a form of contract between the city and the telephone company. ...It may only be abrogated by the WUTC if it affects rates or services to the general public; if the franchise concerns proprietary rights of the City granting the franchise, the WUTC has no power. 693 P.2d 218.

The City of Bothell was relying upon a franchise agreement when it directed the utility to relocate at its own expense. In the present case, the City of Kenai relied upon the common law. In both cases, the utility commission in question exceeded its regulatory jurisdiction to adjudicate relocation disputes.

A similar result has been reached by Pennsylvania courts. The Pennsylvania Public Utilities Commission has general regulatory authority "...to determine the reasonableness of utility rates and rate structures; and the adequacy, efficiency, and safety of utility service." Equitable Gas Company v. Pennsylvania Public Utility Commission, et al, 442 A.2d 419, 422 (Pa. 1982).

The general authority of the Pennsylvania Public Utilities Commission is therefore the same as that of the APUC as outlined by Greater Anchorage. But this regulatory jurisdiction does not extend to adjudication of relocation disputes between a utility and a municipality. "This argument has been rejected in the context of cases governed by the common law rule; that is, cases where a utility is merely required to move its facilities from one to another portion of a public highway right-of-way." Equitable Gas, 442 A.2d at 422; Borough of Highspire et al v. Pennsylvania Power and Light et al, CCH, Utilities Law Reports, §23,733 (Pa. 1982).

The APUC is a regulatory agency with limited authority over rates and general operations of utilities in relation to consumers. It is not an adjudicative body empowered to rule on relocation cost disputes arising under the law or through contract.

B. Jurisdiction To Adjudicate The Present Issue Is Unnecessary For The APUC To Perform Its Duties Imposed By AS 42.05.251.

Greater Anchorage does not address AS 42.05.251, though the statute was in effect at the time of that decision. Order No. 7 relies on AS 42.05.251 as authority for the APUC's action. The reasoning is that the common law rule is a fee, term or condition regulating the use of a municipal right-of-way and the APUC has jurisdiction to determine the reasonableness of any such fee, term or condition affecting the utility's right to use the public right-of-way granted by the statute. Record page 281.

There can be no doubt that municipalities retain some regulatory authority, as yet undefined, over the use of its rights-of-way by utilities that is beyond APUC authority to review for reasonableness under AS 42.05.251. B-C Cable v. City and Borough of Juneau, 613 P.2d 616 (Alaska 1980). Appellant contends that construction expense liability under the common law rule is within the municipal regulatory authority that is beyond APUC review under the statute.

The issue addressed in B-C Cable concerned the validity of a franchise agreement entered into between a utility and a municipality prior to the adoption of the Alaska Public Utilities

Act (APUCA). The agreement in part required the utility to pay a three percent franchise tax to the municipality.⁵ After adoption of the Act, the utility refused to comply with the agreement, contending that the APUCA pre-empted municipal regulation and voided existing franchise agreements. Summary judgment was granted to the municipality and the utility appealed. On appeal, the utility maintained "...that the APUC Act is complete and comprehensive in its regulation of public utilities and leaves nothing for a city to regulate except its public streets," citing AS 42.05.251 and AS 42.05.641 as the pre-emptive legislation. 613 P.2d at 618.

The Supreme Court disagreed: "While the AF Act pre-empts a large portion of the regulatory authority of municipalities over utility companies, it does not pre-empt all such authority." Id. The court identified the authority of the APUC as including review for the reasonableness of the franchise fee, but not for the right of a municipality to assess a fee in the first place. 613 P.2d at 619. Thus there is some regulatory authority that a municipality has over its own rights-of-way even under AS 42.05.251. Though B-C Cable does not define the scope of authority reserved to municipalities, at a minimum that authority is the authority to govern construction activity within its own rights-of-way consistent with Greater Anchorage.

⁵ The court construed all franchise agreements, whether arising from an ordinance or a franchise permit, as being in the nature of a contract. This position is in accord with the weight of authority. B-C Cable, 613 P.2d at 619 and cases cited.

The effect of AS 42.05.251 is quite simply to give utilities a right to a permit to use the municipal rights-of-way upon payment of a fee, subject to reasonable terms and conditions on that use imposed by the city. The limited authority given to the APUC is to determine the reasonableness of the fee, term, or condition and to allow a surcharge to recover the fee. It is unnecessary for the APUC to adjudicate the validity of the common law rule on relocation expenses to perform its duties under AS 42.05.251.

As an administrative commission, the APUC has no inherent authority. Rutter v. State, 668 P.2d 1343, 1349 (Alaska 1983). The only authority the APUC has is that which is expressly allowed or which is impliedly necessary to perform its duties. State, Dept. of Labor, etc. v. U. of Alaska, 664 P.2d 575 (Alaska 1983). AS 42.05.251 simply refers to how much a municipality may assess as a fee, and to the reasonableness of permit terms and conditions relating to such things as supervision, construction standards, or placement of the utility facilities within the right-of-way. Since it is unnecessary for the APUC to adjudicate disputes over construction liabilities in municipal rights-of-way under the common law to perform its duties under AS 42.05.251, the APUC has exceeded its statutory jurisdiction in doing so. Id; Borough of Highspire, CCH Utilities Law Reports, §23,733.02 (1982).

It is likewise unnecessary for the APUC to adjudicate taking issues under Art. I, Sec. 18, of the Alaska Constitution to perform its duties under AS 42.05.251. Order No. 7 analyzes the application of the common law as resulting in a taking under the Alaska Constitution. Record page 306. Any utility claim that its property was damaged or taken would clearly have to be heard in Superior Court, not before the APUC. The Superior Court alone has such jurisdiction. AS 22.10.020; AS 09.55.290.

C. The APUC Has Exceeded Its Jurisdiction Under AS 42.05.251 To Act In Equity.

Aside from reviewing the case law, statutory requirements or constitutionality of the common law rule, the APUC relied on an alternative basis for its adjudicatory authority to rule on the reasonableness of the common law rule. That alternative basis is a purported equitable authority granted under AS 42.05.251 to review any municipal action affecting utilities for reasonableness. Record pages 300-302. The APUC determined that the common law "...is unreasonable as placing an inequitable or unduly discriminatory burden on a utility's ratepayers to finance public improvements." Order No. 7, p.32. This finding was not a constitutional decision, but rather was based "... 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." Record page 302.

Appellant contends that AS 42.05.251 confers no equitable authority whatsoever on the APUC to review the reasonableness of any municipal action affecting regulated utilities beyond the discretion to review the reasonableness of the amount of permit fees charged by a municipality, or the reasonableness of terms, conditions or exceptions that a municipality imposes on a utility in the actual physical placement of its facilities within the public right-of-way through a permit. "Administrative agencies are creatures of statute, deriving from the legislature the authority for the exercise of any power they claim." Rutter v. State, 668 P.2 at 1343, 1349 (Alaska 1983). The power conferred on the APUC is expressly defined under AS 42.05.251 and needs no expansion by implication. State, Dept. of Labor, Etc., v. U. of Alaska, 664 P.2d 575, 579 (Alaska 1983). The APUC lacks the sweeping discretionary jurisdiction it claims under AS 42.05.251.

II

Validity Of The Common Law Rule As To Relocation Expenses In Alaska

As pointed out in the Order, the issue of the validity of the common law rule is one of first impression in Alaska, though there is ample case law from other jurisdictions. The case law is uniform in opinion. The issue of the validity of the common law is a question of law. The appropriate standard of review is

therefore the substitution of judgment standard. Earth Resources Co. v. State Department of Revenue, 665 P.2d 960, 965 (Alaska 1983).

The rule is stated in Michigan Bell Telephone Co. v. City of Detroit, 308 N.W. 2d 608, (Mich. App. 1981):

At common law, and in most recent cases to consider this issue, the right of the public utility to use public streets is subject to the right of the local government to require the utility to relocate its lines and facilities at its own expense when made necessary by considerations of public health and welfare (citations omitted).

See also McQuillin's §§34.74, 34.74a. The basis of this rule is generally recognized as being the police power. El Paso Natural Gas Co. v. State of Arizona, 662 P.2d 157, 158 (Ariz. 1983); New York Telephone Co. v. City of New York, 466 N.Y.S. 2d 56, 58 (N.Y. 1983); McQuillin's §§30.39, 34.74. The interest that a utility acquires in the right to use a municipal right-of-way remains subordinate to the municipality's exercise of the police power for the public health and safety. Urban Renewal Agency of the City of Beaverton v. Pacific Northwest Bell Telephone Co., 542 P.2d 908, 911-912 (Or. App. 1975); McQuillin's §34.74. The fact that a utility operates under a franchise granted by either the municipality or the state does not relieve the utility from application of this rule. Michigan Bell Telephone Co., 308 N.W. 2d at 610; Gen. Tel. Co. of Northwest, 693 P.2d at 217.

The common law rule can be modified in two ways: express legislative action, or contract agreement pursuant to appropriate municipal authority to do so. Pennsylvania Gas & Water Co. v. Nenna & Frain Inc., 467 A.2d 330, 334 (Pa. 1983); McQuillin's

§34.74a. Only the legislative action method is involved here. The City of Kenai has consistently taken the position that the utilities, with the help and guidance of the APUC, are attempting to do through an administrative order that which they could not accomplish through the state legislature: abolish the common law. Record Supplement. The acrobatic semantics that the reader is dragged through when reading the Order attempts to circumvent the fact that the legislature has refused to abolish the common law rule.

The APUC Order reasons that the legisla'ure and judiciary in Alaska may have impliedly rejected the common law rule. Record pages 302-305.⁶ There is, however, no case law authority found by Appellant that recognizes an implied modification of the common law rule. Rather, any legislative action that precludes the municipality from exercising its police power pursuant to the common law rule must be express:

The reasonable construction ... is to assume that the people are not to be burdened with any heavier expense than necessity requires, and that to relieve the public service corporations having franchises in the streets of their common-law liabilities and to pass them over to the taxpayer can only be accomplished by the express direction of the Legislature. Southern California Gas Co. v. City of Los Angeles, 329 P.2d 289, 293 (Ca. 1958) cert. den. 359 U.S. 907, 79 S. Ct. 583, 3 L.Ed. 2d 572 (1959), quoting Transit Commission v. Long Island R. Co., 171 N.E. 565, 568 (N.Y.), and citing New York City Tunnel Authority v. Consolidated Edison Co., 68 N.E. 2d 445, 448-449 (N.Y. 1946).

⁶ After musing over the B-C Cable decision and the implied rejection of franchise authority, the APUC determined that "...premature prophylactic abrogation of franchising authority could have unintended consequences." Record page 305. Appellant agrees with the APUC that premature prophylactic abrogation is a problem.

See also McQuillin's, §§ 34.74, 34.74a; East Bay Municipal Utility District v. Richmond Redevelopment Agency et al, 142 Cal. Rptr. 584, 589 (1974); Connecticut Railway and Lighting Co. et.al. v. New Britain Redevelopment Commission, 287 A.2d 362, 366 (Conn. 1971): "There can be no doubt that in the absence of express statutory authority a utility is not entitled to reimbursement for its expense in relocating its facilities located in public highways."

Cases which have recognized a legislative modification of the common law rule have limited the modification strictly to those situations expressly provided for in the statute. These cases typically involve urban renewal or federal highway construction statutes that expressly require a municipality or state to pay all or some portion of a utility's relocation expenses. See, for example AS 19.25.020; City of Columbus v. Indiana Bell Telephone Co., 281 N.E. 2d 510, 513 (Ind. 1970):

Nothing in this opinion should be construed as an attempt to alter the common law right of the city to subordinate the utility's interest to an exercise of the police power in any other setting than urban renewal. It is because of the expressed legislative intention and the nature of urban renewal that this exception has been established. Quoting City of Center Line v. Michigan Bell Telephone, 182 N.W. 2d at 772 (Mich. 1970).⁷

Where the statutes and contracts are silent as to the relocation expenses state judicial decisions have refused to find any implied responsibility on the part of the municipality to pay

⁷ Other case examples of this principle are Opinion of the Justices, 132 A.2d 613 (N.H. 1957); Missouri Pacific Railroad Co. v. City of Topeka, 518 P.2d 72 (Kan. 1974); South Central Bell Telephone Co. v. City of Chattanooga, 578 S.W.2d 950 (Tenn. 1978).

these expenses incurred by the utility. So. Cal. Gas. Co. v. City of L.A.; Transit Com. v. Long Island R. Co.; Conn. Railway and Lighting Co. et.al. v. New Britain Redevelopment Comm., supra. Any doubtful provision as to the relocation expenses should be construed in favor of the public. Urban Renewal Ag. of the City of Eugene v. Pacific Northwest Bell Telephone Co., 542 P.2d 908, 912 (Or. App. 1975).

The United States Supreme Court, in an 8-0 decision, has recently applied this rule of construction to federal statutes that identify "businesses" and "displaced persons" entitled to certain relocation expenses. The Court refused to allow utility relocation expenses to be impliedly included within those relocation expenses reimbursed under the statute. Rather, the court held that the common law rule was not abrogated because the legislative intent to do so was not expressed. Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Telephone Co. of Virginia, U.S. , 78 L.Ed. 2d 29, 34, 104 S.Ct. (1983).

The common law rule of the exercise of a municipality's police power in this situation is thus well established and quite clear. The city may direct a utility to relocate its facilities within municipal rights-of-way at the utility's own expense when relocation is necessary for the construction of improvements for the public health and safety. Any action of the APUC invalidating this rule of law must be based upon express statutory directive. The statute relied on by the APUC to invalidate the common law

rule is AS 42.05.251. This statute contains no express language modifying or invalidating the common law rule. Appellant's claim of error, then, is that the common law has not been expressly invalidated by the legislature through statute, which is the sole manner in which this police power may be restricted (no implied modification), and the APUC erred in finding any such modification has occurred.

III

APUC Responsibilities Under As 42.05.251 Do Not Conflict With the Common Law Rule

AS 42.05.251 grants utilities the right to a permit and grants municipalities the right to a fee.^{3,8} It authorizes the APUC to determine the reasonableness of any fee, term, condition or exception a municipality includes in the permit. The fee, term, condition or exception language in the statute is not inclusive of all rules or laws that pertain to the legal relationship between a municipality and a utility in the use of a right-of-way. B-C Cable v. City and Borough of Juneau, 613 P.2d 616 (Alaska 1980). That language refers only to the permit terms

⁸ No fee was charged HEA by the City for the use of the right-of-way, and no permit was issued. The City and HEA have a contract for the takeover of certain utility facilities which is currently in litigation as to relocation expense liability. At the APUC's urging, HEA has moved to amend its complaint in that case to state a cause of action for recovery on the basis of the APUC Order. Record page 317.

that a municipality imposes on the utility. Proper construction of this statute demonstrates that there is no conflict between the common law rule and AS 42.05.251 at all.

Review of the construction given to a statute by an administrative commission requires application of the independent judgment standard by which the court makes its own determination of the meaning of the statute. Wentland v. Employment Sec. Div., 671 P.2d 1285 (Alaska 1983); National Bank of Alaska v. State Department of Revenue, 642 P.2d 811 (Alaska 1982). The construction given this statute by the APUC is that it authorizes the commission to review any municipal action affecting a regulated utility for reasonableness. Record page 302. Here a reliance on the common law is deemed a "municipal action" or "practice" affecting a utility. Aside from the fact that reliance on the law is not an unreasonable action or practice of a municipality, there is no conflict between the common law rule and AS 42.05.251. The common law rule, therefore, cannot be unreasonable under the statute.

The common law rule on relocation expenses does not curtail or restrict a utility's right to the use of a municipal right-of-way which is granted by the statute. It simply subordinates the utility's right of use to the police power of the municipality. Vermont Gas Systems Inc. v. City of Burlington, 286 A.2d 275, 277 (Vt. 1971); So. Cal. Gas Co. v. City of L.A., 329 P.2d 289, 291 (Ca. 1958). A rule of common law regulating activity between a utility and a municipality not

in conflict with statute remains in force. AS 01.10.010. This construction has been applied in Alaska in regard to franchise provisions and APUC regulatory activity, and the same construction should be given in this situation:

While the APUC Act pre-empts a large portion of the regulatory activity of municipalities over utility companies, it does not pre-empt all such authority. ...As we read AS 42.05.251 and AS 42.05.641, provisions of a municipal franchise not in actual conflict with APUC regulatory activity remain in force. B-C Cable Co. Inc. v. City and Borough of Juneau, 613 P.2d 616, 618 (Alaska 1980).

The rule enunciated in B-C Cable as to conflict between APUC regulatory authority under AS 42.05.251 and franchise provisions applies as well to APUC authority and municipal police power under the common law. There is no conflict here between the APUC's regulatory duties under AS 42.05.251 and the common law rule. The common law rule therefore remains in effect.

IV

The APUC Has No Statutory Authority To Invalidate The Common Law Rule As To Relocation Expenses

The APUC, as an alternative to finding a legislative or judicial modification of the common law, relies upon the authority delegated under AS 42.05.251 to expressly invalidate the common law rule on its own. See footnote No. 1 at pages 273, 274 of the Record. Appellant contends that no such delegation has occurred.

The APUC is a creature of statute and its power is limited to that conferred. Rutter v. State, 668 P.2d 1343 (Alaska 1983). The APUC has no inherent authority. It may enact regulations only where such regulations are necessary to performing its assigned duties. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). The APUC has relied upon the scope of authority granted under AS 42.05.251 as including within its rulemaking power the authority to adopt a rule that modifies the common law rule as to relocation expenses. The APUC has determined that the common law rule is under most, but not all, circumstances an unreasonable fee, term or condition under AS 42.05.251. Record pages 309-311, 319.

The authority conferred on the APUC under AS 42.05.251 is to review the reasonableness of fees, terms or conditions included by a municipality in a permit to use its right-of-way.³ The issue of the scope of APUC authority under this statute, then, is whether the common law rule is a fee, term or condition of a permit subject to APUC review, even where there is no permit issued by the City to the utility. This is a question of statutory construction and the appropriate standard of review is the independent judgment standard. Wentland v. Employment Sec. Div., 671 P.2d 1285, 1286 (Alaska 1983); Nat. Bank of Alaska v. State Dept. of Rev., 642 P.2d 811, 815 (Alaska 1982).

A. AS 42.05.251 Only Allows APUC Review Of Permits.

Appellant initially contends that proper construction of AS 42.05.251 only allows the APUC to review actual permits granted by municipalities. The statute prevents a municipality from denying a utility the use of a right-of-way. It does this by entitling all utilities to a use permit. But in many instances no permit is granted when a utility places its facilities in public rights-of-way. The municipality simply does not object to the use of them. In those cases, there would be nothing whatsoever for the APUC to review; yet the common law would still apply. No permit was required by the City of Kenai in the present case, and consequently, there is nothing to review under AS 42.05.251.

The APUC gets around this problem through illogical gymnastics. The "permit fees" identified in the statute are reasoned to be "interchangeable concepts" with other items, such as relocation expenses. See Record Supplement, Record, Footnote 4, page 276, 285. The result is that the APUC can review for reasonableness anything that it considers to be an interchangeable concept with permit fees, terms, or conditions.

Words sometimes, however, have plain meanings to which even lawyers must succumb. "Permit" is one of them. There is no permit here to review. Proper construction of the statute precludes APUC review of "interchangeable concepts." If the

legislature chooses to empower the APUC to review "interchangeable concepts" it may do so through another statute that is, hopefully, as clear and succinct as AS 42.05.251.⁹

B. The Common Law Rule Is Not A Fee Under AS 42.050.251

The Order contains a lengthy analysis at pages 280-311 that Appellant understands to go as follows: HEA applied for a surcharge. A surcharge must be due to a reasonable permit fee. If the fee is unreasonable, the APUC will modify or prohibit it. Relocation costs are interchangeable with permit or franchise fees. There is a split of authority as to whether such fees should be recovered as an operating expense or through a surcharge. The APUC concludes that under some circumstances, the common law rule is reasonable, such as when relocation is needed for repairing storm damage. These relocation costs "...typically will be capitalized and recovered in generally applicable rates." Record page 311.

⁹ Appellant notes that the interchangeable concept argument advanced by HEA was that permit fees and relocation expenses are interchangeable concepts because one can be negotiated out or down for the other. Record pages 149-150. Or, as the Order phrases it, payment of relocation expenses is the "quid pro quo" for right-of-way use. Record page 285. But HEA pays no permit fee to any city. Record page 163. If relocation expenses can be negotiated for payment of a permit fee, the logical extension of this argument would be that utilities pay all relocation expenses if the city will refrain from charging any permit fees. Since HEA pays no permit fees, it should be content to pay relocation expenses under its own theory.

In most other cases, however, the relocation cost is an unreasonable fee and may not be forced on the utility. Thus this cost would never be recaptured through surcharge, because the municipality has to pay it. Relocation costs would, therefore, never be recaptured pursuant to AS 42.05.251 under any circumstances since "...there is no justification for utilities to have municipal surcharge tariffs to authorize recapture of unreimbursed relocation expenses." Record page 311.

All of the above APUC reasoning misses, or avoids, the point that no fee is being paid to a municipality when relocation is necessary. Franchise fees and relocation expenses are not interchangeable concepts. Relocation expenses are not paid to municipalities at all. These expenses are never an obligation of the municipality until the legislature expressly makes them so. Utility payment of them does not satisfy some obligation of the municipality. They are not use fees.¹⁰ They are not easement acquisition payments. They are not fair market value condemnation compensation paid to a property owner. Regardless of the appropriate mechanism through which a utility should recover its relocation expenses from its ratepayers, the relocation expenses are, quite simply, a business expense, not a "fee" imposed on a

¹⁰ The Order prohibits municipalities from collecting a rental-type use fee from a utility, which could conceivably off-set the relocation expenses being imposed on municipalities, because municipalities no longer have proprietary interests in their rights-of-way. This point is addressed later in the Brief.

utility by a municipality under AS 42.05.251 for the use of its right-of-way. Connecticut Ry. & L. Co. v. New Britain Redev. Com'n., 287 A.2d 362 (Conn. 1971).

C. The Common Law Rule Is Not A Term Or Condition Under AS 42.05.251.

The "terms" or "conditions" under AS 42.05.251 refer to restrictions or regulations of the right-of-way use that a city or borough imposes on a utility. They refer to how a utility can use the right of way. See B-C Cable. The Order construes AS 42.05.251 as allowing a surcharge for expenses incurred by a utility due to any term or condition of use of the right-of-way imposed by a city. If adherence to the common law rule is a term or condition required by a municipality, then the utility could recover the relocation expense through a surcharge. Record page 281.

Appellant's initial argument on this point is that the common law is not imposed on utilities by municipalities. It is imposed on all parties to this appeal, including the APUC, by state statute, AS 01.10.010.¹¹ The common law is, to the extent not specifically abrogated by the legislature, the law of the

¹¹ AS 01.10.010. 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.

state. Simply because a municipality relies on state law does not transform the state law into a local rule or regulation, or into a "municipal practice" as the APUC phrased it.

The terms and conditions of AS 42.05.251 must refer to local regulation. If the APUC is correct and adherence to state law is properly classified as a term or condition, then any state law that a municipality relies on in its relationship with a utility becomes subject to APUC review for reasonableness. The absurd result is that the APUC has displaced the state legislature in authority. State law becomes subject to APUC review for reasonableness.

Adherence to the law is not considered an unreasonable term or condition by the APUC in all instances, however. According to the APUC reasoning, if the municipality chooses to improve a street, or drainage, or install sewers or water lines and fire hydrants, or to engage in any other "proprietary activity," then the common law rule becomes an unreasonable term or condition. The APUC defines "proprietary activity" to be primarily all activities reflected in a municipal capital budget. Record pages 310-311.

Under the Order, then, the municipality's police power is subordinated to the utility's interest in municipal right-of-way use any time the municipality engages in a capital budget improvement. Either the taxpayers, or the property owners being

assessed for the improvement, would first have to cover the cost of relocating the utility facilities before improvements could be made by a municipality in its "proprietary capacity."

The proprietary/governmental function analysis used by the APUC is a confusing and contradictory area of the law. Cases can typically be found on either side of the fence characterizing the same municipal function as being either proprietary or governmental.

The use of this analysis should be avoided whenever possible. The United States Supreme Court has recently retreated from the use of this analysis in commerce cases by overruling its prior decision in National League of Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976). That case was overruled by Garcia v. San Antonio Metropolitan Transit Authority, Nos. 82-1913, 82-1951, Feb. 15, 1985.

Garcia characterized the proprietary/governmental analysis as being completely unworkable in an extensive criticism of the history and use of this legal theory. The APUC Order is a classic example of the morass that can result from application of this analysis. The APUC has somehow concluded through application of this analysis that municipalities no longer have a proprietary interest in their own rights-of-way.¹²

After this conclusion the APUC reasons that, since municipalities no longer have any proprietary interest, they cannot charge utilities a user fee. Since user fees and

¹² The issue of whether municipalities still have a proprietary interest in rights-of-way is addressed later in this Brief.

relocation expenses are interchangeable concepts, municipalities cannot force utilities to relocate without reimbursing the expense. An attempt to require a utility to follow the common law would therefore be an imposition of an unreasonable term or condition under AS 42.05.251. Record pages 297, 300. All existing and future franchise agreements calling for a user fee are also declared void. Record page 312.

The obvious objectives of the APUC in using the proprietary/governmental analysis are to eliminate any ability of a municipality to charge franchise fees and to force municipalities to pay relocation expenses. It was a calculated step taken by the APUC to deprive municipalities of franchising authority without going through the Legislature. This Court should overrule the use of the proprietary/governmental analysis in determining whether the common law is a term or condition under AS 42.05.251. At the least, the court should not utilize the APUC proprietary/governmental characterization.

Appellant notes that the use of the proprietary/governmental analysis is unnecessary to determine the issue at hand. After a criticism of this legal tool, the California Court of Appeal avoided its use in a relocation expense dispute. The Court quoted New York Telephone Co. v. City of Binghamton, 219 N.E.2d 184, 186 (N.Y. 1966) when it stated:

The distinction between "governmental function" and "proprietary function" is a sort of abstraction difficult to make meaningful in a day when municipalities continually find new ways to exercise police power in their efforts to cope with the pressing needs of their citizens. (cite omitted) A utility's right to compensation should depend, not on whether municipal activity is "governmental" or

"proprietary," but on whether compensation has been required by the legislature, or whether there has been a constitutionally compensable taking or damaging of a valuable property right." Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Glendale, et al, 142 Cal.Rptr. 584, 591 (Ca App 1977) hearing denied (1978).

This legal theory has, however, been used in other jurisdictions to determine when municipal construction necessitating utility relocation is outside the public health and safety interests that come within the common law rule. If the government requires relocation for a purpose other than public health and safety it must pay the relocation costs. See City of Pontiac v. Consumers Power Company, 300 N.W.2d 594, 496 (Mich. App. 1980) appeal denied (1981); Rochester Telephone Corp. v. Village of Fairport et.al., 446 N.Y.S.2d 823 (N.Y. 1982). (But see dissenting opinion.) In any event, the activities identified by the APUC as being proprietary are actually recognized as being governmental in nature. "Among the powers generally held to be governmental rather than private are the construction and maintenance of streets; conservation of public health; extinguishment of fires and making arrangements therefor; and power to legislate as to public utilities." McQuillin's, §10.05. See also City of Anaheim v. Metropolitan Water District of Southern California, CCH Utilities Law Reports, §23, 719.03 (Cal. App. 1982); Pacific Telephone and Telegraph Co. v. Redevelopment Agency of the City of Glendale, 142 Cal. Rptr. 584, 592. Even if the proprietary/governmental function analysis is used, then, the

APUC has erred in application of it to determine all capital improvement items are proprietary functions not subject to the common law rule.

The municipality has no inherent authority over public roads. McQuillin's §§30.39, 30.39a; AS 29.48.030(a), AS 29.48.035(a); New York Telephone Co. v. City of New York, 466 N.Y.S.2d 56, 58 (N.Y. 1983). The municipality acts in its governmental capacity when it improves roadways for the public health and safety. It has no inherent authority to either impose on a utility, or to release a utility from the common law requirements. City of Wichita v. Kansas Gas and Electric Co., 464 P.2d 196, 204 (Kan. 1970).

Thus, the common law rule is not a term or condition imposed by the municipality, such as a restriction on construction material, or location, which is selected to regulate how a right-of-way may be used. The APUC has erred in construing AS 42.05.251 as including the common law rule within "terms and conditions" subject to review under that statute.

The APUC Has Erred In Determining That A Utility's
Interest In The Use Of Municipal Rights-Of-Way
Is Protected By Art. I, Sec. 18 Of The Alaska
Constitution, Or That A Taking Has Occurred

The APUC has interpreted Art. I, Section 18 of the Alaska Constitution¹³ as including the interest that a utility has in the use of municipal rights-of-way pursuant to AS 42.05.251 within the category of property interests protected by the takings clause. Additionally, the APUC has determined that a taking occurs when a utility, in accordance with the common law, is required to relocate its facilities within municipal rights-of-way due to public improvement construction. Record pages 306-309. Both of these determinations are erroneous. Both are questions of law that require the substitution of judgment standard of review. Earth Resources Co. v. State, Dept. of Rev., 665 P.2d 960, 965 (Alaska 1983).

The reasoning of the APUC is that AS 42.05.251 has given the utility an interest that is sufficient to be protected by the Alaska takings clause, which is broader than traditionally allowed,¹⁴ and thus "...the common law rule allowing a

¹³ Art. I, Section 18. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

¹⁴ Under the federal constitution, relocation expenses are *damnum absque injuria* and are not a taking or damages that require compensation. Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Telephone Co. of Virginia, U.S. , 78 L.Ed.2d 29, 34, 104 S.Ct. (1983); New Orleans Gas Co. v. Drainage Comm., 197 U.S. 453, 462, 49 L.Ed. 831, 25 S.Ct. 471 (1905); 4A Nichols, Eminent Domain §15.22.

municipality to mandate unreimbursed utility relocations ... appears to be inconsistent with the Constitution of the State of Alaska." Record page 309. This line of reasoning in the Order relies heavily on the traditional case law distinction between the proprietary and governmental activity of municipal governments. The APUC characterizes the activity of a municipality in construction and improvements of its rights-of-way as a proprietary interest. This interest, however, is governmental, not proprietary and, as stated before, is inherent in the state and delegated to municipalities. See McQuillin's §§30.39, 30.39a.

Aside from the nature of the governmental activity involved, the APUC relies on State v. Hammer, 550 P.2d 820 (Alaska 1980) as authority for its determination that the relocation expenses are not merely *damnum absque injuria* but compensable interests. Hammer involved an exercise by the state of its eminent domain power in condemning land for a highway. The land had a business operating on it that was forced to shut down all operations and relocate. The relocation took many months during which time the business owner made no profits. The issue on appeal was whether these lost profits were compensable under the Alaska Constitution. The court held that they were.

Hammer is inapplicable here. In that case the business itself was a property interest that was directly damaged by the condemnation of real property. Here the utility has no property

that is being taken by the municipality. The municipality owns the property already. The relocation "damages" occur due to the subordinate position of the utility's interest in the use of the municipality's property to the police power of the municipality rather than from the municipality's taking something from the utility. The utility's interest has consistently been denied taking protection in this situation in other jurisdictions where the utility is required to relocate as opposed to being denied further use of the right-of-way altogether. Vermont Gas Systems Inc. v. City of Burlington, 286 A.2d 275 (Vt. 1971); Urban Renewal Agency of the City of Eugene v. Pacific Northwest Bell Telephone Co., 542 P.2d 908 (Or. App. 1975); Michigan Bell Telephone Co. v. City of Detroit, 308 N.W.2d 608 (Mich. 1981).¹⁵

Thus, while the utility will incur expenses due to the relocation, and could therefore be said to suffer some damage to its property (facilities) due to the construction of public improvements, the "damage" suffered is actually an operating cost that a utility must anticipate when utilizing the right-of-way of another entity rather than purchasing its own easement. The interest of the utility granted pursuant to AS 42.05.251 is in the nature of a license that a municipality cannot refuse, rather

¹⁵ Appellant has located one jurisdiction where the relocation expenses were compensable under the state constitution taking clause: Arkansas State Highway Com. v. Arkansas Power & Light Co., 330 S.W.2d 77 (Ark. 1960). But see the dissent, 330 at 81, which recognized that cases to the contrary "are numerous and unanimous. Arkansas may be alone against the weight of authority. See 4A Nichols, Eminent Domain, §15.22. Unlike the situation in Alaska, the Arkansas utilities paid substantial user fees, a factor considered by the Arkansas Court.

that is being taken by the municipality. The municipality owns the property already. The relocation "damages" occur due to the subordinate position of the utility's interest in the use of the municipality's property to the police power of the municipality rather than from the municipality's taking something from the utility. The utility's interest has consistently been denied taking protection in this situation in other jurisdictions where the utility is required to relocate as opposed to being denied further use of the right-of-way altogether. Vermont Gas Systems Inc. v. City of Burlington, 286 A.2d 275 (Vt. 1971); Urban Renewal Agency of the City of Eugene v. Pacific Northwest Bell Telephone Co., 542 P.2d 908 (Or. App. 1975); Michigan Bell Telephone Co. v. City of Detroit, 308 N.W.2d 608 (Mich. 1981).¹⁵

Thus, while the utility will incur expenses due to the relocation, and could therefore be said to suffer some damage to its property (facilities) due to the construction of public improvements, the "damage" suffered is actually an operating cost that a utility must anticipate when utilizing the right-of-way of another entity rather than purchasing its own easement. The interest of the utility granted pursuant to AS 42.05.251 is in the nature of a license that a municipality cannot refuse, rather

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than a vested property right. Rochester Telephone Corp. v. Village of Fairport et.al., 446 N.Y.S.2d 823, (N.Y. 1982); Borough of Highspire et.al. v. Pennsylvania Power and Light, CCH Utilities Law Reporter §23, 733 (Pa. 1982). It can be withdrawn by the state at any time. As such, the utility's use remains subordinate to the needs of the public.¹⁶ The Appellant's claim of error, then, is that the APUC has incorrectly determined that the interest that a utility has under AS 42.05.251 in using a municipal right-of-way is "property" under Art. I Section 18 of the Alaska Constitution.

In the event that the court should find such an interest to be property for taking purposes, Appellant contends that no taking has occurred. The general rule in Alaska is:

...a taking does not occur until: 1.) legal title vests in the State, 2.) the State enters into actual possession, or 3.) the State takes constructive possession either by causing damage to property or by depriving the owner of full beneficial use of his land. Stewart & Grindle, Inc. v. State, 524 P.2d 1242, 1246 (Alaska 1974).

In the present situation, the utility's property interest, if there is one, is a permit, or license, to use municipal rights-of-way. The fact that a utility may be required to relocate facilities due to the superior interest of the municipality acting for the public health, safety or welfare does

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"Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or public ways are at utility expense, a common law liability unless abrogated by the clear import of the language used in a particular statute." 4A Nichols, Eminent Domain, §15.22.

not deprive a utility of its "property." The utility still has exactly what it had before the governmental action: a permit to use the right-of-way. City of Wichita v. Kansas Gas & Electric Co., 464 P.2d 196,205 (Kan. 1970). The utility has not been "deprived of the economic advantages of legal ownership." Grant v. State, 560 P.2d 36, 39 (Alaska 1977). Rather, the utility has simply incurred a foreseeable expense associated with the ownership of this type of "property" that is normally incurred in the course of its operations.

The only conceivable manner in which this interest could be damaged is if the permit to use the right-of-way was somehow denied altogether by the municipality, but this possibility is precluded by the statute. Appellant's claim of error, then, is that even if the utility's interest in using the municipal rights-of-way is "property" under Art. I Section 18 of the Alaska Constitution, it has not been taken or damaged due to the application of the common law rule on relocation expenses.

VI

The APUC Has Erred In Determining That Municipalities Have No Proprietary Interest In Municipal Rights-Of-Way

The APUC has interpreted Alaska statute and case law as voiding any proprietary interest that municipalities have in their rights-of-way. Record pages 294-300. Alternatively, the

APUC has determined that any permit fee for the use of the right-of-way must be based on, and directly correlated to, any actual relocation expenses incurred by utilities, with the burden of proof on the municipality before the APUC, prior to recovery of any fee. Record pages 290-294. Any existing contract agreements between municipalities and utilities that may be inconsistent with the APUC order by allowing for such a fee are declared void. Record pages 312-313. All three of these points are based on the existence of the municipality's proprietary interest in the right-of-way. All three determinations are erroneous.

A. Alaska Statute And Case Law Have Not Voided The Municipal Proprietary Interest In Rights-Of-Way.

Order No. 7 cites Chugach Electrical Association v. City of Anchorage, 475 P.2d 115 (Alaska 1970) and AS 42.05.251 as authority for its conclusion that "... 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." Record page 296. Chugach, according to the APUC, prohibits a municipality from charging a fee, exacted from a utility as a condition of entry to its right-of-way. The interpretation of the Chugach decision in relation to statute is a question of law requiring application of the substitution of judgment standard of review. ERCA v. Dept. of Rev., 665 P.2d 960 (Alaska 1983).

Prior to the Chugach decision, the Legislature enacted AS 42.05.251 which expressly entitles utilities to a permit for the use of municipal rights-of-way. According to the APUC reasoning, with the passage of AS 42.05.251, "the municipality, by logical implication, was denied authority to grant or withhold such [use] rights and, with it, the authority to negotiate on a value basis with the utility." Record page 297. The APUC then concludes, through implication, that the sole purpose of the "fee" under AS 42.05.251 is to compensate the municipality for any costs incurred in policing right-of-way usage under the regulatory authority reserved to municipalities by the Chugach decision. Id.

Neither the Chugach decision nor AS 42.05.251 prohibit a municipality from charging utilities a reasonable fee for the use of its rights-of-way. Chugach involved a utility authorized by the Public Service Commission (PSC) to operate within the city limits of Anchorage. The utility was requested to provide service to a consumer within the city, but the city took steps to prohibit the utility from doing so without first receiving a permit from the city. The city then refused to issue the permit since the utility did not demonstrate a need for the increased service as required under the city ordinance criteria, and sought an injunction against the utility's operation.

The trial court granted the injunction, finding the utility's facilities to be an encroachment absent a permit from the city. On appeal, the utility reiterated its argument that the legislature had pre-empted the field of utility regulation

and the city lacked authority to prohibit its use of the right-of-way. 475 P.2d at 118. The Supreme Court declined to address this issue, however, since the legislature had in the interim enacted AS 42.05.251, which expressly granted utilities the right to a permit to use the municipal right-of-way. Id.

The issue that was determined in Chugach was whether a municipal ordinance requiring a permit to provide service or the statutory authority of the PSC (now APUC) to grant permission to service an area would control in a direct conflict between the two. It was a decision on home rule. Any further authority of that case was subsequently restricted by the Supreme Court: "... this court's opinion in Chugach must be confined to the specific facts and particular legal issues in that case, and any broader implications must be disavowed." Greater Anchorage Area Bor. v. City of Anchorage, 504 P.2d 1027, 1035 (Alaska 1972) overruled on other grounds 595 P.2d 629.

The Chugach decision, therefore, does not address the issue of whether a municipality has proprietary interests enabling it to charge a fee for utility use of its public rights-of-way. In fact, read in conjunction with Greater Anchorage Area Borough and B-C Cable, Chugach actually retains municipal authority over and proprietary rights in public rights-of-way that have not been expressly proscribed by the legislature and are not in conflict with APUC enabling acts.

A further question is raised by the Order. If municipalities have no proprietary interest that justifies a user fee, does that mean that municipalities in Alaska will be precluded by the APUC from collecting franchise fees they are entitled to under federal law from economically unregulated utilities? As an example, federal legislation permits a five percent franchise fee assessed on cable television companies by municipalities. If the APUC is correct and municipalities no longer have any proprietary interest in public rights-of-way, municipalities have no franchise authority justifying a franchise fee on cable television even though federal law prescribes one. This result is inconsistent with Alaska case law and statute. The APUC has erred in finding void or in voiding municipal proprietary interests in rights-of-way.

B. A Permit Fee Is Not Required To Be Based On Or Correlated To Actual Relocation Expenses Incurred.

As a policy the APUC attempts to allocate utility costs and expenses on a cost causer/cost payer basis. A test that is applied by the APUC to determine allocation of expenses is the benefit/burden test. The Order analyzes the reasonableness of any fee under AS 42.05.251 by applying this test and by analyzing the municipal action in equity for discrimination. Record page 290. (Discrimination is addressed later in the brief.) Since HEA sought a surcharge, the APUC assumed as a premise that the relocation expense is a fee recoverable through a surcharge.

As Appellant understands the APUC reasoning, the surcharge under this test is only allowable if the expense has "... 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." Record page 291. Since the relocation expense is "caused" by the municipal construction, so the APUC reasoning goes, there is no benefit to the ratepayer or burden that the utility bears in its ordinary activity of providing utility service to the ratepayer. Since the ratepayer does not benefit, he should not have to pay for the relocation. Since relocation expenses are not a burden of ordinary operations, the utility should not have to pay for it either. The surcharge is therefore, unreasonable under the benefit/burden test, and the municipality pays the expense.

Later on in the Order the APUC explains that, since municipalities have no proprietary interest and can no longer charge "rent," any fee collected from the utility by the municipality would have to bear a direct correlation to relocation expenses actually incurred by the utility; but since (if Appellant follows the Order's reasoning) any such "compensation" to the municipality would have to be based on fair market rental value of the right-of-way, the fee for any given year could never exceed the fair market rental value for that year even if relocation expenses incurred that year far exceeded such value. Record pages 299-300.

Through all of the benefit/burden fee analysis the APUC is misapplying its own standards. The benefit/burden test is being used to determine whether a city or a utility has liability under the law to pay certain expenses rather than to determine how acknowledged expenses of a utility are to be recovered by the utility. The two issues are distinct. One is a legal issue and the other a policy issue. A policy test for the latter cannot be used to determine the former.

The Order characterizes the relocation expense as something that has come about through no fault of the utility. Record page 291. The expense is caused "... primarily, if not exclusively..." by municipal discretion irrespective of utility activity. Record page 294. This line of reasoning in the Order only confounds, or avoids, the nature of the relationship between the utility and the municipality. Appellant's argument on this issue echoes earlier arguments.

First, relocation expense liability pursuant to the common law rule is not a fee, term, or condition under AS 42.05.251 that is subject to a benefit/burden analysis. Second, the utility's use of the right-of-way is subordinate to the municipality's right to make improvements for the public health and safety. Third, a utility that utilizes rights-of-way of a municipality rather than purchasing its own easement must anticipate, as a normal operating cost, relocating its facilities within the right-of-way when the owner requires it.

Thus the relocation expenses are not "caused" by the municipality. A utility must expect them to occur under the circumstances. This is particularly true when the utility has placed facilities in the middle of an unimproved right-of-way without regard for future development. See Record pages 210-213. If they are "caused" by anything, relocation expenses are "caused" by the utility's failure to acquire its own private easement, or by short-sighted location decisions.

The error made here, in requiring a correlation between any fee and actual relocation expenses, is that the APUC has confused the issue of appropriate fee recovery mechanisms, a ratemaking policy matter, with the issue of liability for the relocation expenses, a question of law. The result, requiring permit fees to be correlated to actual relocation costs rather than a reasonable rental rate, is therefore erroneous as well.

C. Existing Franchise Agreements That Provide For A Utility To Pay A Nonregulatory Or Ownership Permit And Franchise Fee Cannot Be Declared Void By The APUC.

The APUC Order applies the decision to all existing franchise agreements and permits between utilities and municipalities that require the utility to pay the municipality for the use of the right-of-way. Record page 312. (As opposed to a regulatory fee, which is still allowable.) These existing agreements are declared void, and future agreements to that effect are prohibited. The APUC relies on B-C Cable Co. v. City & Borough of

Juneau, 613 P.2d 616 (Alaska 1980) as authority that existing franchise agreements are subject to APUC regulation. The reliance on B-C Cable, however, is misplaced.

In B-C Cable a utility had a franchise agreement with the municipality that required the utility to pay a three percent franchise tax. After the franchise agreement was entered into, the APUC Act was adopted by the legislature. The utility discontinued payment of the tax, claiming all franchise agreements were rendered invalid by the legislature.¹⁷ The municipality sued to collect its three percent fees and prevailed at trial.

On appeal, the Alaska Supreme Court reviewed the scope of the APUC Act, and particularly AS 42.05.251 and AS 42.05.641. The utility contended that these statutes removed all regulatory authority over utilities from municipalities and placed that authority with the APUC, thereby voiding all existing municipal franchise agreements. 613 at 618. (emphasis added) The court disagreed. The court identified the franchise fee in question as having two purposes: "That fee was originally designed to compensate the city for the use of municipal streets and for the cost of municipal supervision and regulation." Footnote 4, 613 at 618. The court's ruling was that the APUC Act did not "...either expressly or by clear implication nullify the rights and liabilities of the parties under the franchise

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Order No. 7 is having the same affect. The City of Kenai has received notice from a gas utility that it may not honor our franchise tax due to the possible effect of Order No. 7.

agreements....," and therefore the state's general saving clause, AS 01.10.010, kept the franchise agreements in force. 613 at 619.

The authority of the APUC identified and defined in B-C Cable was authority to review the reasonableness of the amount of the use fee, not to abolish it or declare such fees void and unreasonable under AS 42.05.251 as contended in the Order No. 7. The B-C Cable decision is in keeping with the Greater Anchorage Area Borough decision that explains the limited adjudicatory authority of the APUC. Municipalities are expressly allowed to charge a fee under AS 42.05.251, and that fee may be for the use of rights-of-way. The APUC has exceeded its authority outlined in these cases by declaring void all existing or future franchise agreements which provide for a user fee paid by a utility to a municipality for the use of a right-of-way.

VII

Relocation Expenses Are Business Expenses, Not Public Improvement Construction Costs

The Order asserts that unreimbursed relocation expenses are a cost of constructing public improvements. The APUC Order concludes that burdening the utility with relocation expenses is unreasonable and discriminatory because it saddles ratepayers with a disproportionate share of the cost of the public improvements. Record pages 300-302.

The construction of public improvements results in costs to private interests that are directly related to the public improvement construction, but are nonetheless within the class of *damnum absque injuria* and are not considered a cost of the public construction for the purpose of compensation. See 2A Nichols, Eminent Domain §6.31; McQuillin's §32.38. The expense of relocating facilities is an expense the utility must anticipate when public construction occurs.

Even where a utility has a vested right to use municipal rights-of-way, the local government, absent state legislation to the contrary, is not divested of the power to improve the right-of-way for the general welfare of the community and require the utility to relocate its facilities at its own expense. Michigan Bell Telephone Co. v. City of Detroit, 308 N.W.2d 608 (Mich. App. 1981). The interest of the utility under a right of use such as is granted under AS 42.05.251 is ancillary to the primary interest of the public in its right-of-way, and is subordinate to the interest of the public. Vermont Gas Systems, Inc. v. City of Burlington, 286 A.2d 275 (Vt. 1971). The relocation costs borne by the utility are in the nature of a business loss. Connecticut Ry & C. Co. v. New Britain Redev. Com'n., 287 A.2d 362 (Conn. 1971). As such, these costs are properly recovered by a utility from all ratepayers through general rates. AS 42.05.251 does not provide for a surcharge to cover a business loss; only for a permit fee. Since the

relocation costs are anticipated business expenses, they are not costs of public construction discriminatorily imposed on the utilities or their ratepayers.

CONCLUSION

The APUC Order should be invalidated as to part 3, Record page 319, because the APUC lacks jurisdiction to adjudicate the issues surrounding the validity of the common law rule. If the Court concludes that the APUC has such jurisdiction, the Order should be invalidated because the common law rule can only be modified by the express directive of the Legislature or Courts and no such modification has taken place. If the Court concludes that the common law rule can be modified through implication, the Order should be invalidated because the common law rule has not been impliedly modified in Alaska.

If the Court concludes that the common law rule has not been modified by judicial decision or the legislature, the Order should be invalidated because the APUC lacks authority to expressly modify the common law rule on its own. The APUC has exceeded its authority under AS 42.05.251, and in addition to invalidating the Order, Appellant requests that this Court give

proper construction to that statute and to the issues of law raised by Appellant.

DATED: This _____ day of _____, 1985.

CITY OF KENAI

By: 

Tim Rogers
City Attorney

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

DATE: February 12, 1987
TO: Chip Dennerlein, Director of Intergovernmental Affairs
FROM: J. David Norton, Municipal Engineer, DPW *WBF for*
SUBJECT: UTILITY RELOCATION COSTS AMENDING SECTION 7
AS.29.35.010

Following are the comments of Public Works Engineering Division on the proposed amendments to Section 7 AS.29.35.010 Utility Relocations Costs.

1. The conditions of paragraph (a) indicate that, since Anchorage Municipal Ordinances currently provide for permitting procedures and responsibility for utility relocation costs, the proposed statute would have minimal effect on the manner in which such responsibility is now assigned.
2. "The cost of relocating or removing the utility shall be borne by the improvement project if the utility was placed within a two-foot horizontal location specified by permit issued by the Municipality." If this provision is to be interpreted as allowing a total of four feet of horizontal leeway, then it should be changed to read, "...one foot horizontal tolerance either side of the assigned utility installation centerline...."
3. Consideration should be given to the concept of Expired Service Life, a system used by Alaska DOT/PF which provides that the utility participates in a portion of the cost of relocating facilities one mile or greater in length when relocation will give the utility the effect of extended life.
4. It is our feeling that when a project is in a grandfathered area and involves relocating a utility having a reasonable amount of expected remaining life, that the project budget should cover the relocation costs with credits applied for design and betterment of the facility.
5. In regards to new placement of utilities, we feel that Section 29.35.061 (a) of this proposed amendment allows us the latitude we have needed in the past to require the utilities to bear the cost of any necessary construction.

JDN/PH/clg
1/jdn/350

cc: R. R. Mann
Susan Metcalf
John Olnes
Gene Green

Alaska Telephone Association

201 E. 56th Avenue / Suite 230
Anchorage, Alaska 99518
(907) 563-4000

Bernadette B. Murray
President

Ted Lehne
Executive Director

March 27, 1987

COMMENTS ON SB 155/HB 155

The Alaska Telephone Association Board of Directors on March 11, 1987, voted unanimously to support this legislation. It did so because we believe the bill sets a fair requirement on municipalities and also gives them an incentive to consider the full cost of a construction project before deciding to go ahead with it.

Fairness

The provisions of this legislation come into effect when a municipality decides to take an action that requires the relocation of the facilities of a utility within a municipal right of way. Typically, this means the locality decides to widen a road, relocate a road, or abandon a right of way to construct a municipal building, or for some other municipal purpose. Usually the utility had no plans to move its facilities. In the case of our members, these facilities are usually a pole line, buried line, or cable vault. When the municipality decides that the utility line must be moved, it creates a cost for the utility that the utility would not incur at that time otherwise. Fairness requires that the cost causer pay the cost it creates. This legislation requires that.

This legislation is also sensitive to concerns that a utility may have its facilities upgraded at municipal expense, by providing for certain offsets. It also exempts payment for utility facilities that are not located within a reasonable distance of where plans say they should be. And it allows a municipality to order a facility moved, and to take action to dispose of it if the utility ordered to move it fails to do so in a reasonable time.

Our members are not enthusiastic about these provisions, but accept them as

limitations to add a "comfort zone" for municipalities.

One other point on fairness. The State Department of Transportation and Public Facilities currently pays utilities, including municipalities, for relocation of their facilities required by state construction projects.

Full Cost

Our second reason to support this legislation is that it provides an incentive for a municipality to consider the full costs of its actions. By requiring a municipality to pay for the utility relocation costs of its actions, it forces the municipality to consider that cost. In some cases, that cost is a very important cost component of the project.

If Legislation Not Adopted

What happens if this legislation is not adopted? Unless a municipality volunteers to pay, a utility must pay to relocate its facilities when a municipality has a construction project in the works that will require it. That cost is passed on to the rate payer as an allowable expense. If the utility's rate payers were also all residents of the municipality, then it could be argued that the money is simply coming out of a different pocket of the same person. But the utility's rate payers and the municipality's residents are almost never the same group. And the financial considerations are almost never the same. The municipality will probably pay for the project with bonding or a grant. To the extent the project is paid for by taxes, either fully at the time or over time through bonding, the resident does not pay the full cost since the resident's taxes are deductible on the federal tax return. In short, if the utility relocation costs are paid for by the municipality, the resident is very unlikely to pay the full cost. On the other hand, if the utility must pay, the full cost is added to the expenses of the utility and the customers must pay not only the relocation costs, but a rate of return

on the investment if appropriate, and any interest costs of borrowing. In short, the cost to residents of the state if the municipality pays for utility relocation costs is, in almost every case, likely to be less, and in most cases much less, than if the utility pays.

Finally, a word about the telephone industry in Alaska. This bill is not a case of Alaskans subsidizing the utility relocation costs of large national firms. Of the 20 local exchange companies in Alaska that are members of ATA, three are municipally owned, seven are Alaskan cooperatives, six are private Alaskan small businesses, one is a small business located in the State of Washington, two are subsidiaries of PTI, a large concern located in the State of Washington, and only one is a subsidiary of a large national holding company.

Summary

In summary, the Alaska Telephone Association supports the adoption of SB 155/HB 155 this legislation session, because it believes it is in the best interest of Alaskans, and because fairness requires it.

Alaska MUNICIPAL League

TELEPHONE
(907) 586-1325

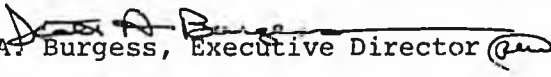
105 MUNICIPAL WAY, SUITE 301
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April 2, 1987

APR 2 1987

MEMORANDUM

TO: Senator Arliss Sturgulewski, Chair
Members of the Senate Community and Regional Affairs Committee

FROM: Scott A. Burgess, Executive Director 

SUBJECT: SB 155 - Relocation of Utility Facilities

The Alaska Municipal League is opposed to SB 155 and shifting the cost of relocating utility facilities in connection with municipal construction in rights-of-way from the utility company to the municipality. The AML has opposed this effort every year similar legislation has been introduced into the Legislature; most recently, SB 67 in the 13th Legislature. The legislation, if passed, would deviate from common and case law.

The AML's 1987 Policy Statement was most recently revised and adopted by the membership, representing 124 municipalities, at their annual meeting in Juneau last November. On page 17 of the Policy Statement, it states the following:

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

As 12 McQuillan, Municipal Corporations, Section 34.74 on page 183 states:

The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity. Accordingly, it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of a franchise, where public convenience or security require it, even at the grantee's own expense, and even in the face of a protest by a consumer. It makes no difference whether the surface or subsurface of streets is involved.

The common law rule referenced above can be modified by legislative action or contract agreement between the municipality and the utility company. The League urges the Legislature not to change common law and practice, and, instead, leave the matters addressed in this bill to local officials to work out with local utilities in the best interest of the local public.