ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9219 HOUSE JUDICIARY

HB

473

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. CSHB 473 (JUD)

Revision Date (Note if correction) _____ Dept. Affected Public Safety

Title An Act relating to training or certifying fire fighters BRU Commissioner's Office

Component _____

Sponsor House State Affairs

Requester House Judiciary Component Serial No. _____

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	111.8	111.8	111.8	111.8	111.8	111.8
Travel	20.0	20.0	20.0	20.0	20.0	20.0
Contractual	29.2	29.2	29.2	29.2	29.2	29.2
Supplies	11.5	5.0	2.5	2.5	2.5	2.5
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**172.5**	**166.0**	**163.5**	**163.5**	**163.5**	**163.5**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	172.5	166.0	163.5	163.5	163.5	163.5
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	**172.5**	**166.0**	**163.5**	**163.5**	**163.5**	**163.5**

Estimate of any current year (FY98) cost: 0.0

POSITIONS

Full-time	2	2	2	2	2	2
Part-time						
Temporary						

ANALYSIS:

Prepared by Mark Barker Phone 269-5789

Division Fire Prevention Date 4/7/98

Approved by Ronald L. Otte, Commissioner Date 4/8/98

Agency Department of Public Safety

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(Rev 9/97) 98fnform.xls/OMB

AMENDMENT

OFFERED IN THE HOUSE **April 8, 1998**

TO: CS FOR HOUSE BILL NO. 473, Draft version "E"

Page 1 line 1,	**Delete**	**[FIGHTERS AND FIRE INTRUCTORS]**	
	Insert	**service professionals**	
Page 1 line 5,	**Delete**	**[FIGHTERS]**	
Page 2 line 31	**Insert**	**(2)**	**approve and/or establish minimum**
Page 3 line 3	**Insert**	**(3)**	**approve and/or establish minimum**
Page 3 line 21	**Delete**	**[FIGHTERS AND FIRE INTRUCTORS]**	
Page 3 line 23 through line 31		**[DELETE ALL]**	
Page 4 line 1 through line 31		**[DELETE ALL]**	
Page 5 line 1 through line 15		**[DELETE ALL]**	

Legislative Affairs Agency
Division of Administrative Services
Delta Junction Legislative Information Office
P.O. Box 1189
Delta Jct., AK 99737
Phone: (907) 895-4236 Fax: (907) 895-5017

To: House Judiciary

Fax: 465-4316 *Phone:*

Testimony on HB 473

Date Sent: 4/8/98 *No. of Pages Including Cover Sheet:* 3

Thank You,

Tammy Renee' Hall
Information Assistant

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary committee name committee on HB 473 bill/ subject, dated 8 Apr 98.

Volunteer fire departments in rural areas attempt to attain the standards set by the National Fire Protection Association. This however is extremely difficult if not impossible because of the number of hours of mandatory annual training time (over 200). Vast areas of the state are covered by volunteers, our coverage area within the district (Rural Deltana Fire Protection District) is 50 miles north/south by 35 miles east/west. We also respond to fires outside our distrcit which has no coverage. This bill, as worded, would effectively put an end to ~~fire~~ coverage by volunteer throughout the rural areas of Alaska. We did not know about this bill until notified By LIO on 7 Apr 98.

Signed: Kevin Kelly

Testifier.

Vice President Rural Deltana ~~Volunteer~~ Fire Protection District

Representing (Optional) Assistant Chief, Rural Deltana Volunteer Fire Dept

PO Box 40 Delta Junction AK 99737

Address

907-869-3301 w

Phone No. 907-895-4334

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary committee name committee on HB 473 bill/ subject, dated April 8, 1998.

Addendum: Our Fire Dept. did not know about this bill until 4-7-98, HB 473. The committee substitute was not available until the teleconference was almost over.

RE: HB473: I am a member of the Rural Deltana Volunteer Fire Department, and have been for 3 years. I am also an EMT-1, and have a law office, a private practice, in Delta. Our RDVFD has the primary responsibility for fire protection for the entire area outside the city limits of Delta Junction. This includes coverage of areas halfway down the Alaska Highway towards TOK (50 miles), 35 miles north on the Richardson (to Birch Lake) Hwy, and 65 miles south on the Richardson Hwy (to Paxson). We are composed of volunteers of a wide age range, most of whom are employed at full time jobs. We engage in a comprehensive training program specifically tailored to the needs of our rural fire fighting mission and operation requirements. We train extensively in the skills regularly need on the types of fire situations we typically encounter. Specifically, we find that water supply training, engineering training, automobile extrication training, and general firefighter traing is necessary. Additionally, we participate annually in training offered by our local DNR Forestry office, as we are usually called upon to protect structures when wildfires occur in the area. The current bill mandates traing to national standards (NFPA, etc), or otherwise prohibits our firefighters from serving our local area. This would effectively shut down our department. If we did not meet the NFPA or other national standards by July 1, 1999, and responded to a fire, we would all be guilty of committing a misdemeanor crime.

Signed: Audrey A. Brown Audrey A. Brown
Testifier

Rural Deltana Volunteer Fire Dept.
Representing (Optional)

P.O. Box 990, Delta Jct. AK 99737
Address

(907) 895-5297
Phone No.

for HB473 files

04-05-98

CENTRAL EMERGENCY SERVICES

Central Kenai Peninsula Fire & EMS Providers

231 SOUTH BINKLEY

SOLDOTNA, AK 99669-8084

907-262-4792 ● Fax 907-262-5770

"Prepared for the Worst, Providing the Best"

March 31, 1998

The Honorable Gail Phillips
Speaker of the House
Alaska State Capital
Room 208
Juneau AK 99801-1182

Dear Madam Speaker:

Thank you for your letter of March 25, 1998 in which you asked to continue discussion on two items - HB473 and stable funding for Fire Service Training. You asked for input on these two issues.

I have carefully reviewed HB473, version E, and found it to fully meet the intent of our efforts to gain professional standing by requiring firefighters to be trained. The concept of a Standards Council will ensure that the training requirements are acceptable to all communities without adding an additional unfunded mandate for training upon them. Please support HB473, version E, as the answer to the Alaska Fire Services concerns for training standards.

The Alaska Fire Chiefs Association has proposed a $1.00 per capita and program receipt concept as a stable funding source for Fire Service Training. I believe that this will work, but if the concept included provisions for accepting and using grants or other funding as a pass through that would not impact the budget in other areas this would be even better. There may be money available to provide training for Alaska Fire Service personnel that could be obtained and used. If the acceptance of these funds lowered the budget in other areas/programs than obviously the net result is counter-productive. Outright use of such funds to preclude using state monies would be in the best interests of all concerned.

We also discussed the hiring of additional "Initial Attack Forestry Firefighters" for Alaska-and the Kenai Peninsula in particular. I still think that this is one of the most import issues for the Kenai Peninsula. The low snow pack and large beetle kill could be a disaster situation for us, and any additional help will allow quicker response. A quick response with adequate personnel MAY avert a large event that will become uncontrollable. If possible, we should hire the additional initial attack personnel for the Kenai Peninsula as soon as possible this spring.

Finally, I just looked at SB334 - "An act relating to guidelines and standards for state training programs; and relating to the Alaska Human Resource Investment Council." This bill mentions firefighter training. Since HB473 meets our needs, I think that we could be removed from SB334, or it should be made a companion bill to HB473.

I appreciate your support and concern for fire safety. For your information, we will be sponsoring community defensible space classes early this spring. I hope that you will be able to make one of the meetings. Thank you again for your support and assistance.

Yours in public safety,

Len A. Malmquist, Chief

ALASKA STATE LEGISLATURE

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(907) 465-3779 - Phone
(907) 465-2833 - Fax

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Kenai, Alaska 99611
(907) 283-7223 - Phone
(907) 283-3075 - Fax

REPRESENTATIVE MARK D. HODGINS
House District 9

SPONSOR STATEMENT

HB-473 **"An Act Relating to training and certification of fire fighters and Fire instructors; and providing for an effective date."**

This legislation creates, in the Department of Public Safety, the Alaska Fire Standards Council. Provides for appointment of members, selection of officers, meetings schedule, compensation and expenses of the Council and shall adopt minimum standards for employment and curriculum requirements for fire fighters and fire instructors and their certification, and establishes and maintains fire fighter and fire instructor training programs.

Bill File
HB 473

HB 473, Fire Training and Certification

Sponsor: State Affairs Committee

HB 473 provides that fire fighters and fire instructors be required to meet minimum standards created by an Alaska Fire Fighters Standards Council, which will be established under the auspices of the Department of Public Safety.

The Council will establish qualifications for employment of persons as fire fighters and fire instructors, including standards relating to:

- **Age**, physical attributes and fitness, citizenship, **moral character**, and **experience**;
- Education and training; the Council will establish the training standards, which must be consistent with the training standards of the National Fire Protection Association **or other applicable national standards.**

Questions for HB 473:

- Which fire departments are registered with the state fire marshal?
- Do all fire instructors work for fire departments?
- Legal has added a delayed effective date of July 1, 1999, which [they] still feel is inadequate time for the creation of a Council and then its adoption of standards to be met for certification.
- Should age, moral character and experience be considered criteria for becoming employed as a fire fighter, if a person is in good physical condition to meet the **necessary** standards that a fire fighter would need?
- What are the training standards of the National Fire Protection Association and what **other** applicable national standards are to be considered – a list?

mm

TO: Kevin Jardell
FR: Melissa Myers
RE: HB 473
Date: March 25, 1998

HB 473, Fire Training and Certification
Referred to H(JUD)
Sponsor: State Affairs

Kev,

Do you have the bill packet for HB 473?
Has it been requested for a hearing?
What is Joe's feelings on this bill and do you think it will be heard in JUD?

Tom from Rep. Hodgin's office was inquiring.

Mel

Joe,

Michael, Fire Chief
479-6858/cell 322-4232
***Supports CS for HB 473**
This was very important for Rep. Hodgins

ALASKA STATE LEGISLATURE

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REPRESENTATIVE MARK D. HODGINS
House District 9

March 25, 1998

Representative Joe Green
Chairman
House Judiciary Committee

"VERSION E"

RE: Scheduling HB 473-"An Act relating to training and certification of fire fighters, fire instructors, and certain emergency responders; and providing for an effective date."

Dear Chairman Green:

HB 473 was introduced in the House State Affairs Committee on March 24, 1998. HB 473 was referred to the House Judiciary Committee; I respectfully request a hearing on it.

I am looking forward to testifying in your (H) Judiciary Committee on HB 473.

Thank you for your consideration of this request.

With kindest personal regards,

Sincerely,

Mark Hodgins

Mark Hodgins
Representative, District 9

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM March 25, 1998

SUBJECT: Fire Protection (CSHB 473( ), version "E")

TO: Representative Jeannette James
Attn: Barbara Cotting

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is the CS you have taken over from Representative Hodgins' office. It is based on the material they submitted, which was patterned somewhat on the Alaska Police Standards Council (AS 18.65.130 - 18.65.290).

I am not certain who would be required to obtain certification under this bill. AS 18.70.365, enacted by the bill, requires certification of fire fighters and fire instructors. However, the definitions of fire fighter and fire instructor in the bill are tied into a registration requirement relating to the fire department they work for. I do not know which fire departments are registered with the state fire marshal or even if all fire instructors work for fire departments.

I have added a delayed effective date of July 1, 1999, which would give people some time to comply with the new requirements. However, this date may be entirely too early, considering that the council will also need time to adopt the standards that must be met for certification. I recommend consideration of transitional provisions of some sort or an effective date later than 7/1/99.

I offer the enclosed for discussion purposes. Please let me know if I can be of further assistance.

TML:jdr:glc
98-187.jdr

Enclosure

0-LS*550\E
* Lauterbach
3/25/98

CS FOR HOUSE BILL NO. 473( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to training and certification of fire fighters and fire instructors; and providing for an effective date."

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

* **Section 1.** AS 18.70 is amended by adding new sections to read:

Article 3. Alaska Fire Fighters Standards Council.

Sec. 18.70.320. Policy. The administration of fire prevention and suppression services affects the health, safety, and welfare of the people of this state and requires education and training of a professional quality. It is a primary public interest that applicants meet minimum standards for employment as fire fighters and fire instructors and that fire fighting training be made available to fire fighters and fire instructors serving in a probationary capacity and fire fighters already in regular service. It is of secondary public interest to encourage the establishment of preliminary training programs for persons seeking to become fire fighters.

Sec. 18.70.325. Creation. (a) There is created in the Department of Public

Safety the Alaska Fire Fighters Standards Council.

(b) The council consists of the following persons:

(1) four chief administrative officers or fire chiefs of local government;

(2) the commissioner of public safety or a designee of the commissioner;

(3) two representatives of fire fighters, including at least one fire fighter administrative officer from the Alaska State Fire Fighters Association; a person appointed under this paragraph may not, while serving on the council, be a fire chief; and

(4) four members of the public at large with at least two members from communities of 2,500 population or less.

Sec. 18.70.330. Appointment. (a) The commissioner of public safety or a designee shall serve during each commissioner's continuance in office. Other members of the council shall be appointed by the governor for staggered terms of four years, except that a member may not serve beyond the time the member holds the office that established eligibility for appointment.

(b) Membership on the council does not disqualify a member from holding another public office or employment.

Sec. 18.70.335. Officers; meetings. (a) The council shall select its chair and vice-chair annually.

(b) The council shall meet at least twice a year. The chair shall set the time and place of the meeting, either on the chair's own motion or on written request by three members of the council.

Sec. 18.70.340. Compensation and expenses. The members of the council may not receive a salary for service on the council, but are entitled to per diem and travel expenses authorized by law for other boards and commissions under AS 39.20.180.

Sec. 18.70.350. Powers. The council may

(1) adopt regulations for the administration of AS 18.70.320 - 18.70.390;

(2) establish minimum standards for employment as a fire fighter or fire

instructor in a permanent or probationary position and may certify persons to be qualified as fire fighters and fire instructors;

(3) establish minimum fire fighter curriculum requirements for basic, specialized, and in-service courses and programs for schools operated by or for the state or a political subdivision of the state for the specific purpose of training fire fighters and fire instructors;

(4) consult and cooperate with municipalities, agencies of the state, other governmental agencies, universities, colleges, and other institutions concerning the development of fire fighter and fire instructor training schools and programs of the Department of Public Safety that relate to fire prevention and suppression;

(5) employ an administrator and other persons necessary to carry out its duties;

(6) investigate when there is reason to believe that a fire fighter or fire instructor does not meet the minimum standards for employment; in connection with an investigation under this paragraph, the council may subpoena persons, books, records, or documents related to the investigation and require answers in writing under oath to questions asked by the council or the administrator;

(7) charge and collect a fee of $50 for processing an application for certification of a fire fighter or fire instructor.

Sec. 18.70.355. Training programs. The council shall establish and maintain fire fighter and fire instructor training programs through agencies and institutions that the council considers appropriate.

Sec. 18.70.360. Standards for fire fighters and fire instructors. (a) The council shall establish qualifications for employment of persons as fire fighters and fire instructors including standards relating to

(1) age, physical attributes and fitness, citizenship, moral character, and experience; and

(2) education and training; the training standards established by the council must be consistent with the training standards of the National Fire Protection Association or other applicable national standards.

(b) The council shall

(1) prescribe the means of presenting evidence of fulfillment of the requirements set out in (a) of this section; and

(2) issue a certificate evidencing satisfaction of the requirements of (a) of this section to an applicant who

(A) satisfies the requirements of (a)(1) of this section; and

(B) meets the minimum education and training standards of (a)(2) of this section by satisfactorily completing a training program in this state for fire fighters and fire instructors that is approved by the council or a training program in another jurisdiction that, in the opinion of the council, contains the equivalent in content and quality to that required by the council for approved fire fighter and fire instructor education and training programs in this state.

(c) In the evaluation of applicants against the standards developed under (a)(1) of this section, the council shall use evaluation methods that do not discriminate against applicants of different ethnic origins.

Sec. 18.70.365. Certificate required. A person may not be appointed as a fire fighter or fire instructor unless the person is appropriately certified under AS 18.70.360.

Sec. 18.70.370. Denial or revocation of certificates. The council may

(1) deny a certificate to an applicant for a fire fighter or fire instructor certificate if the applicant does not meet the standards adopted by the council under AS 18.70.360;

(2) revoke the certificate of a fire fighter or fire instructor who, having been issued a certificate, fails to meet the standards adopted by the council under AS 18.70.360.

Sec. 18.70.375. Alaska fire fighters and fire instructors fund. The Alaska fire fighters and fire instructors fund is created in the general fund. The fund consists of appropriations made by the legislature to the fund. The council may use the money in the fund to carry out its powers and duties.

Sec. 18.70.390. Definitions. In AS 18.70.320 - 18.70.390,

(1) "council" means the Alaska Fire Fighters Standards Council

established under AS 18.70.325;

(2) "fire fighter" means a person who performs fire prevention or fire suppression services as an employee or volunteer with a fire department registered with the state fire marshal;

(3) "fire instructor" means a person who performs training and education services as an employee of or volunteer with a fire department registered with the state fire marshal.

* **Sec. 2.** INITIAL TERMS. Notwithstanding AS 18.70.330, enacted by sec. 1 of this Act, the initial terms of office for persons appointed to the Alaska Fire Fighters Standards Council shall be set by the governor so that

(1) two persons appointed under AS 18.70.325(b)(1), two persons appointed under AS 18.70.325(b)(4), and one person appointed under AS 18.70.325(b)(3) will serve two-year terms;

(2) the members not appointed under (1) of the section will serve four-year terms.

* **Sec. 3.** AS 18.70.365, enacted by sec. 1 of this Act, takes effect July 1, 1999.

* **Sec. 4.** Except as provided in sec. 3 of this Act, this Act takes effect immediately under AS 01.10.070(c).

Municipality of Anchorage

P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 267-4900
http://www.ci.anchorage.ak.us

Rick Mystrom, Mayor

FIRE DEPARTMENT
Administration
(4301 East 80th avenue)

April 15, 1998 FAX: **907-465-4316**

Chairman Joe Green
House of Representative
State Capitol, Rm 406
Juneau AK 99801

Dear Chairman Green:

This letter is to express my support of HB 473. This is a very positive and progressive step in the evolution of the firefighting community. You have witnessed, across the state. The positive effects of the Police Standards Council and the Emergency Medical Standards. It is imperative that the remaining branch of the emergency services triumvirate have the Alaska Fire Standards Council.

Thank you for your interest and assistance in this very necessary endeavor.

Sincerely,

Mike Nolan
Fire Chief

Alaska State Legislature
SENATE

Official Business

Labor & Commerce Committee

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

TO: **REPRESENTATIVE JOE GREEN**
CHAIRMAN, HOUSE JUDICIARY COMMITTEE

FROM: **SENATOR LOREN LEMAN**
CHAIRMAN, SENATE LABOR & COMMERCE COMMITTEE

DATE: **APRIL 30, 1998**

RE: **SCHEDULING SENATE BILL 254**

Please schedule Senate Bill 254 (Levy on Permanent Fund Dividend) for a hearing in the House Judiciary Committee. SB 254 was reported from the House Labor & Commerce Committee yesterday (April 29).

SB 254 was introduced January 23 by the Senate Labor and Commerce Committee. The legislation amends AS 43.23.065 to lower the exemption for PFD garnishment from 45 percent to 20 percent. SB 254 passed the Senate on March 19 by a vote of 14 to 1.

Attached is a sponsor statement and copy of the bill. If you have any questions please contact me or my staff aide Mike Pauley at 465-3841.

SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

MEMORANDUM

To: Representative Joe Green
Chair, House Judiciary Committee

From: Senator Dave Donley DD

Re: Hearing Request for Senate Bill 304 "An Act relating to offenses committed in a highway work zone"

Date: April 20, 1998

I respectfully request you schedule Senate Bill 304, relating to offenses committed in a highway work zone, for a committee hearing at your earliest convenience.

Senate Bill 304 would double the fines for moving traffic violations in construction zones in an effort to protect highway construction workers. If passed, Alaska would join 26 other states which have increased sanctions for motorists who recklessly endanger the safety of roadway workers.

If you have any questions or need additional information please call myself or James Armstrong of my staff at 465-3892.

DD/jja

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MEMBER: Senate Finance Committee • Legislative Budget & Audit Committee
• Senate Community & Regional Affairs Committee

REPRESENTATIVE FRED DYSON

Alaska State Legislature

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Eagle River, Alaska 99577
☎ (907) 694-6683
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☎ (907) 465-2199
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Toll free (800) 342-2199

- E-mail -
Representative_Fred_Dyson
@Legis.state.ak.us

- Internet -
http://www.akrepublicans.org

MEMORANDUM

To: Representative Joe Green, Chairman
House Judiciary Committee

From: Representative Fred Dyson

Date: April 16, 1998

Re: HB-442

I am respectfully requesting a hearing for HB-442 at your earliest convenience.

We would like the committee to hear teleconferenced testimony from potential witnesses including: Department of Corrections, Allvest Corporation, and operators of Community Residential Centers (CRC).

Please find attached:

- Sponsor Statement
- Sponsor's Substitute HB-442

Before the hearing, I will submit a fiscal note and additional supporting documents.

If you have any questions please contact Pat Harman in my office at x2195

ALASKA STATE LEGISLATURE

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(907) 465-3779 - Phone
(907) 465-2833 - Fax

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145 Main St. Loop Suite 221
Kenai, Alaska 99611
(907) 283-7223 - Phone
(907) 283-3075 - Fax

REPRESENTATIVE MARK D. HODGINS
House District 9

May 1, 1998

Representative Joe Green
Chairman
House Judiciary Committee

RE: Scheduling HB-340 - "An Act relating to Child Abuse and Neglect."

Dear Chairman Green,

HB-340 "An Act relating to Child Abuse, Neglect and child-in-need-of-aid proceedings," has been referred to your committee.

I, respectfully, request a hearing on HB-340 in the House Judiciary committee.

Thank you for your consideration of this request.

Sincerely,

Mark Hodgins,
Representative District 9

Alaska State Legislature
SENATE

Official Business

State Capitol
Juneau, AK 99801-1182

Senate Labor & Commerce Committee

Memo

TO: Representative Joe Green, Chairman
House Judiciary Committee

FROM: Senator Loren Leman, Chairman
Senate Labor & Commerce Committee, Sponsor

DATE April 29, 1998

RE: Hearing for SB 329: Investment Club License Exemption

Please schedule at your earliest convenience Senate Bill 329, which exempts investment clubs from the requirement to obtain a business license, and clarifies the definition of a business.

I have attached a copy of the bill and sponsor statement.

Thank you for your consideration.

HB

474

FISCAL NOTE

STATE OF ALASKA **BILL NO: HB 474**

1998 LEGISLATIVE SESSION

Revision Date: 4-7-98 Dept. Affected: Alaska Police Standards Council

Title: An Act... relating to Correctional Officers BRU: Alaska Police Standards Council

Component:

Sponsor: House Judiciary

Requestor: (H) Jud COMPONENT SERIAL NO.

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
PERSONAL SERVICES						
TRAVEL						
	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	-0-	-0-	-0-	-0-	-0-	-0-
1006 GF/MHTIA						
Other						
TOTAL						

Estimate of current year (FY 98) impact: $ -0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

The purpose of HB 474 is to provide the Alaska Police Standards Council regulatory authority for certification and training to Municipal Correctional Officers hired under contract by the Department of Corrections.
Estimates are to train a minimum of 15 officers per year at a cost of $ 1500.00 per officer for the 120 hour course.
The Alaska Police Training Fund allows for the establishment of training programs through the Alaska Police Standards Council, such as the Depatment of Corrections Municipal Correctional Offficer Academy.

Prepared By: Laddie Shaw Phone: 465-4378

Division: Alaska Police Standards Council Date: 4-7-98

Approved by Commissioner: Date: 4/7/98

Agency: Ronald L. Otte, Dept. of Public Safety

Alaska State Legislature

WHILE IN SESSION
CAPITOL BUILDING
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(907) 465-4931
1-800-870-4931
(907) 465-4316 FAX

INTERIM ADDRESS:
716 WEST 4TH AVENUE
ANCHORAGE, ALASKA 99501
(907) 258-0198
(907) 258-8171 FAX

Representative Joe Green
District 10

CHAIRMAN, JUDICIARY COMMITTEE
VICE CHAIRMAN, HEALTH, EDUCATION & SOCIAL SERVICES COMMITTEE
MEMBER, RESOURCES COMMITTEE

FINANCE SUBCOMMITTEES
DEPT. OF COMMERCE & ECONOMIC DEVELOPMENT
ALASKA COURT SYSTEM

SPONSOR STATEMENT

HOUSE BILL 474

"An act relating to the Police Standards Council"

The Alaska Police Training Fund, created by the legislature, was established January 1, 1996. The purpose of this fund is to "...provide a stable funding source for law enforcement and corrections officer training...." To this end, the legislature established a schedule of surcharges to be applied to various offenses and provided that the equivalent of the surcharges be deposited in the Police Training Fund. This fund allows for the establishment of training programs through the Alaska Police Standards Council, such as the Department of Corrections Municipal Corrections Officer Academy.

HB 474 amends the Alaska Police Standards Council minimum standards for Probation, Parole, and Corrections Officers to include Municipal Correction Officers. Its purpose is to provide the Alaska Police Standards Council regulatory authority for certification and training of Municipal Correctional Officers hired under contract by the Department of Corrections.

DRAFT DRAFT

PROPOSED
ALASKA POLICE STANDARDS COUNCIL
ARTICLE 2
MINIMUM STANDARD FOR PROBATION, PAROLE, [AND] CORRECTIONAL OFFICERS AND MUNICIPAL CORRECTIONAL OFFICERS

13 AAC 85.200. APPLICABILITY

(a) The requirements of 13 AAC 85.200 - 13 AAC 280, except for 13 AAC 85.215 and 13 AAC 85.235, apply to probation, parole, and correctional officers hired or rehired by [A CORRECTIONAL AGENCY] the Department of Corrections six months or more after the effective date of 13 AAC 85.215 and 13 AAC 85.235 and those previously hired officers who seek to become certified after the effective date of 13 AAC 85.215 and 13 AAC 85.235;

(b) The requirements of 13 AAC 85.200 - 13 AAC 85.280, except for 13 AAC 85.210 and 13 AAC 85.230 apply to municipal correctional officers hired or rehired by a municipality six months or more after the effective date of 13 AAC 85.215 and 13 AAC 85.235 and those previously hired officers who seek to become certified after the effective date of 13 AAC 5.215-13 AAC 85.235. This subsection only applies to those municipal correctional officers employed by a municipality that has adopted an ordinance under AS18.65.285 that requires a person employed at a municipal correctional facility to meet the requirements of AS 18.65.130-18.65.290.

(NEW) 13 AAC 85.215. BASIC EMPLOYMENT STANDARDS FOR MUNICIPAL CORRECTIONAL OFFICERS

(a) A municipality operating a correctional facility under contract with the State Department of Corrections may not hire a person as a municipal correctional officer unless the person meets the following minimum qualifications:

(1) is a citizen of the United States, or a resident alien who has demonstrated the intent to become a citizen of the United States;

(2) is 19 years of age or older;

(3) is of good moral character;

(4) is capable of reading, understanding and has demonstrated the ability to apply operational rules and policies;

(5) is, at the time of hire, certified by a licensed physician, certified physicians assistant, or nurse practitioner on a medical form supplied by the council to be physically sound and free from physical handicaps, including vision, hearing, and speech impairments that would, even with a reasonable accommodation, adversely affect performance as a municipal correctional officer.

(b) A municipality may not hire as a municipal correctional officer a person,

(1) who has been convicted of a felony by a civilian court of this state, the United States, or another state or territory, or by a military court;

(2) who has been convicted by a civilian court of this state, the United States, or another state or territory, or by a military court, during the three years immediately before hire as a municipal correctional officer, of a misdemeanor crime of dishonesty or moral turpitude, of a misdemeanor crime that resulted in serious physical injury to another person, or of two or more DWI offenses;

(3) who has been convicted by a civilian court of this state, the United States, or another state or territory, or by a military court, of the sale, possession for purposes of sale, manufacture, or transport of controlled substances;

(4) who has within three years before the date of hire, illegally used a controlled substance other than marijuana unless the person was under the age of 21 years at the time of using the controlled substance;

(5) who has been denied any certification by the council or has had a basic certificate revoked by the council regarding qualifications to be a municipal correctional officer, unless the denial or revocation has been rescinded by the council.

(c) A municipality must within 90 days after the date of hire, confirm that the person hired as a municipal correctional officer meets the standards of (a) and (b) of this section. Upon written request by the municipality, the council will in its discretion, grant an extension of the 90 day period if the council determines that the person will probably be able to meet the standards by the end of the extension period. If a municipality concludes at the end of an investigation that a person does not meet the required standards, the agency shall immediately discharge the person from employment as a municipal correctional officer. When determining whether a person meets the standards of (a) and (b) of this section, the municipality shall

(1) obtain proof of age, citizenship status, and applicable education;

(2) obtain fingerprints on two copies of FBI applicant card FD-258, and forward both cards to the automated fingerprint identification section of the Department of Public Safety;

(3) obtain a complete personal history of the person on a form supplied or approved by the council;

(4) conduct a thorough personal-history investigation of the person to determine character traits and habits indicative of moral character and fitness as a municipal correctional officer, which includes a criminal history, wants and warrants check, a check of

prior job references, and a check of personal references;

(5) obtain a complete medical history report of the person; the report must be provided to a licensed physician, or certified physicians assistant, or nurse practitioner for use in conducting a physical examination of the person;

(6) determine if the person has ever been denied any certification or if any certification has been revoked, by the council or by a similar agency in another jurisdiction, and if so, what the circumstances of the denial or revocation were, and whether the denial or revocation has been rescinded.

(d) All information, documents, and reports obtained by a municipality under (c) of this section must be placed in the permanent files of the municipality and must be available for examination, at any reasonable time, by representatives of the council. A copy of any criminal record discovered and of the following completed council forms must be sent to the council within 90 days after the date of each hire:

(1) medical examination form;

(2) health questionnaire;

(3) personal history statement.

(e) A municipality shall begin field training with a municipal correctional officer, using the Department of Corrections Municipal Correctional Officers Field Training Manual, immediately after the officer is hired. The field training manual must be completed and sent to the council within six months after the date the officer began work with the agency.

(f) The information in the council's files regarding an applicant or a municipal correctional officer is confidential, and available only for use by the council in carrying out requirements of AS 18.65.130 - 18.65.290 and the regulations adopted under AS 18.65.130 - 18.65.290. However, training records and the documents listed in (c) and (d) of this section relating to an applicant or a municipal correctional officer may be reviewed by the applicant or the officer. Information that indicates that a person might not qualify for certification as an officer, or that adversely reflects upon a person's ability to be a competent officer will, in the council's discretion, be furnished by the council to a correctional agency. An officer or applicant may not review information in the council's files which was supplied to the council with the understanding that the information or the source of the information would remain confidential, except that any information that serves as the basis for a decision to deny or revoke certification will be revealed to the officer or applicant.

(g) If the signature of the officer or applicant is required on a council form, the signature must be under oath or affirmation and must be accompanied by a statement by the officer or applicant that the information supplied is true, to the best of the person's knowledge.

13 AAC 85.220. PERMANENT EMPLOYMENT FOR PROBATION, PAROLE, [AND] CORRECTIONAL OFFICERS AND MUNICIPAL CORRECTIONAL OFFICERS.

(a) A correctional agency may not grant a person permanent status as a probation, parole, or correctional officer unless the person has a current basic certificate issued by the council under 13 AAC 85.230; or as a municipal correctional officer unless the person has a current basic certificate issued by the council under 13 AAC 85.235.

(b) A correctional agency may not employ a person as a probation, parole, or correctional officer, or municipal correctional officer for more than 14 consecutive months unless the person has a current basic certificate issued by the council under 13 AAC 85.230 or 18 AAC 85.235, or an extension is granted under (c) of this section.

(c) The council will, in its discretion, grant an extension for employment for longer than 14 consecutive months if the chief administrative officer of the correctional agency makes a written request for extension and certifies that the agency is temporarily understaffed. An extension will not exceed six months.

13 AAC 85.230. BASIC CERTIFICATE FOR PROBATION, PAROLE AND CORRECTIONAL OFFICERS (No Change Except for Title)

(NEW) 13 AAC 85.235. BASIC CERTIFICATE FOR MUNICIPAL CORRECTIONAL OFFICERS

(a) The council will issue a basic certificate to a municipal correctional officer meeting the standards set out in this section. No certificate will be issued unless documents required under 13 AAC 85.215 are submitted to the council.

(b) To be eligible for the award of a basic municipal correctional officer certificate, an applicant must

(1) successfully complete the Department of Corrections basic municipal correctional officer training program meeting the standards set out in 13 AAC 87.075 and field training required by 13 AAC 85.215;

(2) be a full time, paid municipal correctional officer employed by a correctional agency in Alaska;

(3) have worked 12 consecutive months as a municipal correctional officer on a probationary status with the participating municipality where the applicant is employed at the time of application for certification;

(4) meet the basic employment standards set out in 13 AAC 85.215; and

(5) attest and subscribe to the municipal correctional officer Code of Ethics.

(c) The municipal correctional officer Code of Ethics is:
As a municipal correctional officer, my fundamental duty is to respect the

dignity and individuality of all people, to provide professional and compassionate service, and to be unfailingly honest. I will respect the right of the public to be safeguarded from criminal activity, and will be diligent in recording and making available for review all case information that could contribute to sound decisions affecting the public safety, or an inmate. I will maintain the integrity of private information, and will neither seek personal data beyond that needed to perform my duties, nor reveal case information to anyone not having a proper professional use for the information. In making public statements, I will clearly distinguish between those that are my personal views and those that are made on behalf of the agency. I will not use my official position to secure privileges or advantages for myself, and will not accept any gift or favor that implies an obligation inconsistent with the objective exercise of my professional duties. I will not act in my official capacity in any matter in which I have a personal interest that could in the least degree impair my objectivity. I will not engage in undue familiarity with inmates. I will report any corrupt or unethical behavior of a fellow municipal correctional officer that could affect either an inmate or the integrity of the agency, but will not make statements critical of colleagues or other criminal justice agencies unless the underlying facts are verifiable. I will respect the importance of, and cooperate with, all elements of the criminal justice system, and will develop relationships with colleagues to promote mutual respect for the profession and improvement of the quality of service provided.

(d) Not withstanding (a) and (b) of this section, the council will, in its discretion, issue a basic municipal correctional officer certificate, to an applicant with a current basic correctional officer certificate in this or another state, or a certificate which has lapsed for a period of less than five years. The council will in its discretion, require supplemental training by the applicant, as a condition of issuing a certificate under this subsection.

(e) College credits or degrees awarded by an institution of higher learning will be recognized by the council only if the institution is accredited by the National Association of Post-Secondary Education.

13 AAC 85.240. WAIVER AND RECIPROCITY

(a) The council will, in its discretion, waive part or all of the training required under 13 AAC 85.230(b)(1) or (c)(1) or 13 AAC 85.235 (b)(1)if an applicant furnishes satisfactory evidence of successful completion of an equivalent training program.

(b) The council will, in its discretion, enter into reciprocity agreements for certification with states that regulate or supervise the quality of probation, parole or correctional officer training, or municipal correctional officer training and that require training standards for probation, parole, or correctional officers, or municipal correctional officers equivalent to the standards set by the council.

(c) Notwithstanding (a) of this section, the council will not grant a waiver if the applicant was previously issued a certificate that lapsed more than five years before the waiver was sought.

13 AAC 85.250. PERSONNEL REPORTS

(a) A correctional agency shall report to the council the name, address, and other pertinent information concerning each newly appointed probation, parole [OR], correctional officer or municipal correctional officer within 30 days after the probation, parole [OR], correctional officer, or municipal correctional officer is appointed.

(b) If a probation, parole [OR], correctional officer, or municipal correctional officer resigns or is terminated from the agency, the agency shall notify the council within 30 days after the resignation or termination and shall state the reason for the resignation or termination.

(c) Forms for the notification required in (a) and (b) of this section will be supplied by the council. The council will keep the information, and will, in its discretion, furnish it to an agency that has hired or is considering the hire of a person who resigned or was terminated from employment as a probation, parole, [OR] correctional officer, or municipal correctional officer.

13 AAC 85.260. DENIAL OF CERTIFICATE

(a) The council will, in its discretion, deny a basic certificate upon a finding that the applicant for the certificate

(1) falsified or omitted information required to be provided on the application for certification or on supporting documents; or

(2) has been discharged or resigned under threat of discharge, for cause other than dishonesty or misconduct, from employment as a probation, parole or, correctional officer, or municipal correctional officer in this state or any other state or territory.

(b) The council will deny a basic certificate upon a finding that the applicant for the certificate

(1) has, after hire as a probation, parole, [OR] correctional officer, or municipal correctional officer, been convicted of a felony or of a misdemeanor crime listed in 13 AAC 85.210(b)(2), or 13 AAC 85.215(b)(2) or (3), as applicable;

(2) has, after hire as a probation, parole,[OR] correctional officer, or municipal correctional officer

(A) used marijuana;

(B) illegally used or possessed any other controlled substance; or

(C) illegally purchased, sold, cultivated, transported, manufactured, or distributed a controlled substance;

(3) does not meet the standards in 13 AAC 85.210, or 13 AAC

85.215. as applicable; or

(4) has been discharged or resigned under threat of discharge, for cause relating to dishonesty or misconduct, from employment as a probation, parole, [OR] correctional officer, or municipal correctional officer in this state or any other state or territory.

(c) The executive director may act on an application for certification, consistent with standards and qualifications adopted by the council and consistent with AS 18.65.130 - 18.65.290. The executive director may deny an application if the applicant does not satisfy those requirements. An applicant aggrieved by the decision of the executive director may petition for review of that decision by the council. The council's review of that decision is controlled by the Administrative Procedures Act.

(d) If a person has been denied a basic certificate under this section, the person may petition the council for rescission of the denial after one year following the date of the denial. The petitioner must state in writing the reasons why the denial should be rescinded. A denial will, in the discretion of the council, be rescinded for the following reasons:

(1) Newly discovered evidence that by due diligence could not have been discovered before the effective date of the denial;

(2) the denial was based on a mistake of fact or law or on fraudulent evidence; or

(3) conditions or circumstances have changed so that the basis for the denial no longer exists.

(e) If a petition for rescission is based on one or more of the reasons set out in (d) of this section, a hearing on the petition for rescission will be held before a hearing officer or the council. Following the hearing, the council will decide whether to rescind the denial, and will state on the record at the hearing, or in writing, the reasons for the decision. If the denial is rescinded, the applicant is eligible for hire by a correctional agency, but must serve the full probationary period required under 13 AAC 85.230 or 13 AAC 85.235. as applicable, before reapplying for certification.

13 AAC 85.270. REVOCATION OF CERTIFICATE

(a) The council will, in its discretion, revoke a basic certificate upon a finding that the holder of the certificate

(1) falsified or omitted information required to be provided on an application for certification, or in supporting documents;

(2) has been discharged or resigned under threat of discharge, for cause other than for dishonesty or misconduct, from employment as a probation, parole, [OR] correctional officer, or municipal correctional officer in this state or any

other state or territory; or

(3) does not meet the standards in 13 AAC 85.210 (a) or (b) or 13 AAC 85.215 (a) or (b), as applicable.

(b) The council will revoke a basic certificate upon a finding that the holder of the certificate

(1) has, after hire a probation, parole, [OR] correctional officer, or municipal correctional officer, been convicted of a felony or of a misdemeanor crime listed in 13 AAC 85.210 (b)(2) or 13 AAC 85.215 (b)(2) or (b)(3), as applicable;

(2) has, after hire as a probation, parole, [OR] correctional officer, or municipal correctional officer,

(A) used marijuana;

(B) illegally used or possessed any other controlled substances; or

(C) illegally purchased, sold, cultivated, transported, manufactured, or distributed a controlled substances; or

(3) has been discharged or resigned under threat of discharge, for cause relating to dishonesty or misconduct, employment as a probation, parole, [OR] correctional officer, or municipal correctional officer in this state or any other state or territory.

(c) The executive director of the council may initiate proceedings under the Administrative Procedure Act for the revocation of a certificate issued by the council when the revocation complies with AS 18.65.130 - 18.65.290 and 13 AAC 85.200 - 13 AAC 85.280.

(d) If a basic certificate was revoked under this section, the former probation, parole, [OR] correctional officer, or municipal correctional officer may petition the council for rescission of the revocation after one year following the date of the revocation. The petitioner must state in writing the reasons why the revocation should be rescinded. A revocation will, in the discretion of the council, be rescinded for the following reasons:

(1) Newly discovered evidence that by due diligence could not have been discovered before the effective date of the revocation;

(2) the revocation was based on a mistake of fact or law or on fraudulent evidence; or

(3) conditions or circumstances have changed so that the basis for the revocation no longer exists.

(e) If a petition for rescission is based on one or more of the reasons set out in (d) of the section, a hearing on the petition for rescission will be held before a hearing officer or the council. Following the hearing, the

council will decide whether to rescind the revocation, and will state on the record at the hearing, or in writing, the reasons for the decision. If the revocation is rescinded, the petitioner is eligible for hire by a correctional agency, but must serve the full probationary period required under 13 AAC 85.230 or 13 AAC 85. 235. as applicable. before applying for reinstatement of a basic certificate.

13 AAC 85.280. LAPSE OF CERTIFICATE

(a) A basic certificate lapses if the holder is not employed as a probation, parole, [OR], correctional officer, or municipal correctional officer with a correctional agency for a period of 12 consecutive months.

(b) A person may request reinstatement of a lapsed certificate after serving an additional 12-month probationary period. The council will, in its discretion, require supplemental training as a condition of reinstatement. A certificate will not be reinstated if it has lapsed for more than five years.

(NEW) 13 AAC 85.900. DEFINITIONS

In this chapter,

(1) "controlled substance" means a controlled substance as defined in AS 11.71.900 ;

(2) "correctional agency" means the Department of Corrections or a municipality that has adopted an ordinance under AS 18.65.285 that requires a person employed at a municipal correctional facility to meet the requirements of AS 18.65.130 - 18.65.290;

(3) "correctional officer" means a person [(A)] appointed by the commissioner of corrections whose primary duty under AS 33.30 is to provide custody, care, security, control, and discipline of persons charged or convicted of offenses against the state or held under authority of state law; [OR(B) EMPLOYED IN A MUNICIPAL CORRECTIONAL FACILITY BY A MUNICIPALITY THAT IS A CORRECTIONAL AGENCY];

(4) "council" means the Alaska Police Standards Council;

(5) "felony" means a crime classified as a felony in Alaska at the time the crime was committed; a conviction in another jurisdiction by a civilian or military court is a felony conviction if the crime has elements similar to those of a felony under Alaska law at the time the offense was committed; a completed suspended imposition of sentence, expungement of record, or a pardon does not remove a felony conviction from a person's record;

(6) "for cause relating to dishonesty or misconduct" means acts or conduct that would cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and the United States or that are detrimental to the integrity of the department or agency where the officer works, including

(A) illegal conduct, including the illegal purchase, use, possession, transportation, distribution, cultivation, manufacture, or sale of any controlled substance, any imitation controlled substance, or alcohol in an area that has adopted a local option under AS 04.11.490-04.11.500;

(B) conduct involving moral turpitude, including dishonesty, fraud, deceit, or misrepresentation in an application, examination, or other document for securing employment, eligibility, or certification;

(7) "good moral character" means the absence of acts or conduct that would cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and the nation; for purposes of this standard, a determination of lack of"good moral character" is not restricted to acts that reflect moral turpitude, but may be based upon a consideration of all aspects of a person's character; the following are indicia of a lack of good moral character:

(A) illegal conduct;

(B) conduct involving moral turpitude, including dishonesty, fraud, deceit, or misrepresentation;

(C) intentional deception or fraud, or attempted deception or fraud in an application, examination, or other document for securing employment, eligibility, or certification;

(D) conduct that adversely reflects on a person's fitness to perform as a police, probation, parole, [OR] correctional officer, or municipal correctional officer; examples include intoxication while on duty, unauthorized absences from duty not involving extenuating circumstances, or a history of personal habits off the job which could affect the officer's performance on the job, such as excessive use of alcohol; undue familiarity with inmates,

probationers, or parolees is conduct that adversely reflects on a person's fitness to perform as a probation, parole, [OR] correctional officer, or municipal correctional officer;

(E) illegal purchase, use, possession, transportation, distribution, cultivation, manufacture, or sale of any controlled substance, any imitation controlled substance, or alcohol in an area that has adopted a local option under AS 04.11.490-04.11.500;

(8) "imitation controlled substance" means an imitation controlled substance as defined in AS 11.73.099 ;

(9) "misdemeanor" means a crime classified as a misdemeanor in Alaska at the time the crime was committed; a conviction in another jurisdiction by a civilian or military court is a misdemeanor conviction if the crime has elements similar to those of a misdemeanor under Alaska law at the time the offense was committed; a completed suspended imposition of sentence, expungement of record, or a pardon does not remove a misdemeanor conviction from a person's record unless the offense was committed by the person before the age of 21;

(10) "moral turpitude" means an act

(A) contrary to justice, honesty, principle, or good morals;

(B) that violates the private and social duties that a person owes to another or to society in general; or

(C) that is immoral in itself, regardless of illegality;

(11) "municipal correctional officer" means a person employed by a municipality in a municipal correctional facility on a full time basis

(A) where the facility is operated under a contract with the Department of Corrections, and the municipality has adopted an ordinance under AS 18.65.265 that requires a person employed at a municipal correctional facility to meet the requirements of AS 18.65.130--8.65.290;and

(B) whose primary duty is to provide custody, care, security and control of persons charged or convicted of offenses against the state or held under authority of state law; the term "municipal correctional officer" does not include emergency guard hires who are not required to be certified under this chapter;

[11] (12) "parole officer" means a person appointed by the

commissioner of corrections to perform the duties of supervising the parole of prisoners under AS 33.16 ;

[12] (13) "participating police department" includes the Alaska Department of Public Safety and a police department of any political subdivision of the state that has not excluded itself under the provision of AS 18.65.280 (b);

[13] (14) "police department" means a civil force of police officers organized by the state or a political subdivision of the state whose basic purpose and function is to maintain peace and order and to prevent and investigate criminal offenses;

[14] (15) "probation officer" means a person appointed by the commissioner of corrections to perform the duties of a probation officer under AS 33.05 ;

[15] (16) "probationary period" means employment as a police, probation, parole, [OR] correctional officer, or municipal correctional officer for a period of 12 consecutive months with a single police department or a single correctional agency; separation of less than 91 consecutive days will be considered unbroken;

[16] (17) "serious physical injury" means serious physical injury as defined in AS 11.81.900 ;

[17] (18) "undue familiarity" means developing, or attempting to develop, an intimate, personal, or financial relationship with an inmate, probationer, or parolee, or otherwise failing to maintain an appropriate professional relationship with an inmate, probationer, or parolee;

[18] (19) "DWI offense" means the offense of operating a motor vehicle, aircraft, or watercraft while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements, or of refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements;

[19] (20) "for cause relating to other than dishonesty or misconduct" means inefficiency, incompetency, dishonesty, misconduct, or some other reason that adversely affects the ability and fitness of the officer to perform job duties or that is detrimental to the reputation, integrity, or discipline of the department or agency where the officer works, including conduct that adversely reflects on a person's fitness to perform as a police, probation, parole, [OR] correctional officer, or municipal correctional officer; the term "for cause relating to other than dishonesty or misconduct" Includes intoxication while on duty, unauthorized absences from duty

not involving extenuating circumstances, a history of personal habits off the job that could affect the officer's performance on the job, such as excessive use of alcohol, and undue familiarity with inmates, probationers, or parolees.

PROPOSED
ALASKA POLICE STANDARDS COUNCIL
ARTICLE 3
CERTIFICATION OF PROBATION, PAROLE, CORRECTIONAL OFFICER AND MUNICIPAL CORRECTIONAL OFFICER TRAINING PROGRAM

(NEW) 13 AAC 87.075. CERTIFICATION OF BASIC MUNICIPAL CORRECTIONAL OFFICER TRAINING PROGRAM

(a) The Department of Corrections shall
- (1) establish a program of instruction to qualify students for municipal correctional officer certificates under 13 AAC 85.235;
- (2) apply for certification of the program of instruction by the council;
- (3) provide information to the council showing that the requirements for certifications of the program have been met; and
- (4) comply with requirements of this chapter.

(b) The council will approve the Department of Corrections' application for certification of a program of instruction as meeting the requirements of the training program provided for in 13 AAC 85.235, upon a showing that the program meets the following minimum standards;
- (1) the program of instruction meets the requirements of 13 AAC 87.080 and the courses, curriculum and instruction are adequate in content, quality, and length to provide students with the education and training necessary to become successful, knowledgeable, and effective municipal correctional officers;
- (2) the directors and administrators have adequate training and experience, and all full time instructors have been certified under 13 AAC 87.085;
- (3) a copy of the rules of operation, program outline and policies pertaining to absences, grading, conduct, and conditions for dismissal for unsatisfactory conduct, is provided to each student upon enrollment;
- (4) adequate records are kept to show attendance and grades, and satisfactory standards relating to attendance, progress, and conduct are enforced in accordance with the requirements of 13 AAC 87. 080;
- (5) written examinations are required for each student in those courses

for which written examinations are appropriate, and practical tests are required in those courses where practical tests are appropriate; and

(6) the Department of Corrections gives students, upon successful completion of the program, a certificate indicating the program of instruction was satisfactorily completed.

(c) Within 10 working days after the completion of each program the Department of Corrections shall provide the council with a roster of those students who attended at least 90 percent of the classes offered (in class hours), and the roster must show the full name, rank, employing agency, and examination scores for each student completing the program.

(d) The program of instruction for municipal correctional officers is subject to periodic inspection by the council or its representatives to assure compliance with this section.

(e) The council will in its discretion, certify additional training courses for municipal correctional officers, offered by the Department of Corrections, designed to provide for continuing education, and supervisory, mid-management, executive, specialized, and in service training.

(NEW) 13 AAC 87.080. MUNICIPAL CORRECTIONAL OFFICER TRAINING PROGRAM REQUIREMENTS

(a) The basic program of instruction for municipal correctional officers must include a minimum of 120 hours of instruction in security and search procedures, supervision of inmates, use of force and methods of self defense, report writing, rights and responsibilities of inmates, fire and emergency procedures, domestic violence, communication skills and interpersonal relations, special needs inmates, recognition of the signs and symptoms of mental illness and retardation, substance abuse, physical deficiencies and suicide prone behavior and suicide prevention, cross cultural awareness, legal issues and liability, cardiopulmonary resuscitation (CPR), and first aid instruction sufficient to qualify students for a standard Red Cross first aid certificate.

(b) To receive credit for the municipal correctional officer training program for purposes of certification under 13 AAC 85.235, a person must attend all sessions of the course, except for absences approved by the head of the program, and be awarded a certificate of graduation by the head of the program. A person may not be certified for successful completion of the municipal correctional officer program if the person;

(1) has excused absences exceeding 10 percent of the total hours of instruction;

(2) fails to achieve a passing grade of 70 percent or higher in each block of instruction; or

(3) fails to achieve a cumulative average of 70 percent or higher.

(NEW) 13 AAC 87.085. CERTIFICATION OF MUNICIPAL CORRECTIONAL INSTRUCTORS

(a) Except as provided in (d) of this section, an instructor in the municipal correctional officer training program must be certified by the council as qualified to provide instruction to municipal correctional candidates for certification under 13 AAC 85.235.

(b) The council will certify an instructor who meets the following minimum qualifications in the following areas of education, training, and experience:

(1) A person applying for certification to teach municipal correctional subjects must meet the following minimum criteria:

(A) a high school diploma or its equivalent;

(B) three years experience in corrections;

(C) 40 hours of verified training in each subject to be taught;

(D) at least 40 hours of instructor development training approved by the council, including training in the areas of communication, psychology of learning, techniques of instruction, use of instructional aids, preparation and use of lesson plans, preparing and administering tests, teaching resources, and motivation; and

(E) the recommendation of the director of the Department of Corrections training program established under 13 AAC 87.080

(2) A person applying for certification to teach general subjects, including management, administration, or human relations must have

(A) a baccalaureate degree;

(B) at least three years of experience in the subject to be taught;

(C) 40 hours of verified training in each subject to be taught; and

(D) the recommendation of the director of the Department of Corrections' training program established under 13 AAC 87.080.

(c) The council will, in its discretion, waive any part of the requirements of (b) of this section, if it finds that a person is qualified to be an instructor based upon education, training, or experience, despite the person's inability to meet the specific requirements of (b) of this section.

(d) An instructor used on a one-time basis for a specialized subject area of a training program may be classified as a guest lecturer. Requirements for application and certification as an instructor do not apply to a guest lecturer. A guest lecturer is defined as a person who, by reason of position

or experience, can make a worthwhile contribution to a training program. A guest lecturer must be experienced in a specialized area, and the instruction limited to that area of experience.

(e) The director of the Department of Corrections training program shall supervise all instructors to ensure instructional excellence is maintained.

(f) Instructor certification will, in the council's discretion, be revoked if an instructor is found by the council to be no longer qualified. Revocation of instructor certification will be considered by the council if

(1) the instructor is terminated, is asked to resign, or resigns instead of discharge for cause by the Department of Corrections;

(2) there is a recommendation to revoke certification by the Department of Corrections for failure of the instructor to provide adequate instruction; or

(3) the holder of the instructor certificate falsified or omitted required information on any application for certification or on supporting documents.

(g) A person who is currently certified or licensed by the State of Alaska or a nationally recognized certifying body need not be certified by the council to teach municipal correctional officer candidates in the subject for which the person is certified or licensed.

(h) The director of the Department of Corrections training program must furnish the council documentary verification of the certification or licensure of a person described in (g) of this section before council approval as an instructor will be considered.

(I) An instructor certificate becomes inactive if the holder of the certificate does not instruct at least one course certified by the council during an interval of three consecutive years.

(j) An inactive instructor certificate may be reactivated upon written request of the Department of Corrections following the applicant's instruction of at least one course, certified by the council, under direct supervision of a currently certified instructor.

Article 3 definitions (becomes Article 4)

0-LS1687\A
Luckhaupt
3/19/98

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to correctional officers."

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

*** Section 1.** AS 18.65.285 is amended to read:

Sec. 18.65.285. Municipal correctional employees. A municipality that employs persons in a municipal correctional facility **that does not, under contract with the state, house prisoners committed to the custody of the commissioner of corrections** may, by ordinance, require that those persons meet the requirements of AS 18.65.130 - 18.65.290 that are applicable to correctional officers.

*** Sec. 2.** AS 18.65.290(2) is amended to read:

(2) "correctional officer" means a person

(A) appointed by the commissioner of corrections whose primary duty under AS 33.30 is to provide custody, care, security, control, and discipline of persons charged or convicted of offenses against the state or held under authority of state law;

(B) employed on a full-time basis by a municipality and

whose primary duty is to provide custody, care, security, control, and discipline of persons charged or convicted of offenses or held under authority of law in a municipal correctional facility, and the municipality

(i) holds persons who are committed to the custody of the commissioner of corrections in the correctional facility under a contract with the department of corrections; or

(ii) has adopted an ordinance under AS 18.65.285 making AS 18.65.130 - 18.65.290 applicable;

HB

487

Alaska State Legislature

Representative Joe Green
District 19

CHAIRMAN, JUDICIARY COMMITTEE
VICE CHAIRMAN, HEALTH, EDUCATION & SOCIAL SERVICES COMMITTEE
MEMBER, RESOURCES COMMITTEE
FINANCE SUBCOMMITTEES
DEPT. OF COMMERCE & ECONOMIC DEVELOPMENT
ALASKA COURT SYSTEM

Sponsor Statement

HB 487 - Member approval of political and expansion activities

HB 487 establishes that an electric cooperative may only include the costs of political or expansion activities in its rates if it; 1) advises members that rate monies will be used for such activities, 2) tells them how much of the rate money would be used for such activities, 3) informs the member that the cooperative would not refuse service if the members declines to consent, and finally, 4) receives the consent of the member.

HB 487 empowers consumers by providing them the opportunity to approve rate charges for political and expansion activities. AS 42.05.381 (a) currently restricts rate monies collected by a utility from being used for political contributions or public relations, with some exceptions. However, political and expansion activities *are* being undertaken, which suggests the statute needs clarification.

While cooperative members have the right to vote for board members who may publicly support or oppose political or expansion activities, participation in these elections is notoriously low. However, each member does receive a billing statement, which could easily include a statement of intent for the rate monies collected, and a questionnaire asking if the member approved of their rate money being dedicated to political or expansion activities.

HB 487 takes no position on electric utility industry restructuring. It only says that if a utility wants to expand into another service area, it can only do so with monies approved by its members for that purpose.

Sec. 42.05.381. Rates to be just and reasonable. (a) All rates demanded or received by a public utility, or by any two or more public utilities jointly, for a service furnished or to be furnished shall be just and reasonable; however, a rate may not include an allowance for costs of political contributions, or public relations except for reasonable amounts spent for

(1) energy conservation efforts;

(2) public information designed to promote more efficient use of the utility's facilities or services or to protect the physical plant of the utility;

(3) informing shareholders and members of a cooperative of meetings of the utility and encouraging attendance; or

(4) emergency situations to the extent and under the circumstances authorized by the commission for good cause shown.

(b) In establishing the revenue requirements of a municipally owned and operated utility the municipality is entitled to include a reasonable rate of return.

(c) A utility, whether subject to regulation by the commission or exempt from regulation, may not charge a fee for connection to, disconnection from, or transfer of services in an amount in excess of the actual cost to the utility of performing the service plus a profit at a reasonable percentage of that cost not to exceed the percentage established by the commission by regulation.

(d) A utility shall provide for a reduced fee or surcharge for standby water for fire protection systems approved under AS 18.70.081 which use hydraulic sprinklers.

(e) The commission shall adopt regulations for electric cooperatives and for local exchange telephone utilities setting a range for adjustment of rates by a simplified rate filing procedure. A cooperative or telephone utility may apply for permission to adjust its rates over a period of time under the simplified rate filing procedure regulations. The commission shall grant the application if the cooperative or telephone utility satisfies the requirements of the regulations. The commission may review implementation of the simplified rate filing procedure at reasonable intervals and may revoke permission to use the procedure or require modification of the rates to correct an error. The commission shall adopt the regulations concerning adjustment of rates by local exchange telephone utilities on or before October 1, 1991.

(f) A local exchange telephone utility may adjust its rates in conformance with changes in jurisdictional cost allocation factors required by either the Federal Communications Commission or the Alaska Public Utilities Commission upon a showing to the Alaska Public Utilities Commission of

(1) the order requiring the change in allocation factors;

(2) the aggregate shift in revenue requirement, segregated by service classes or categories, caused by the change in allocation factors; and

(3) the rate adjustment required to conform to the required shift in local revenue requirement.

(g) The commission shall allow, as a necessary and reasonable expense, all payments made to the Department of Environmental Conservation under AS 46.14.240 — 46.14.250. The commission shall allow the public utility to recover these fees through a periodic fuel surcharge rate adjustment. (§ 6 ch 113 SLA 1970; am § 1 ch 86 SLA 1976; am § 5 ch 106 SLA 1977; am § 4 ch 45 SLA 1980; am § 3 ch 104 SLA 1986; am § 1 ch 87 SLA 1990; am §§ 1, 2 ch 81 SLA 1991; am § 11 ch 74 SLA 1993)

Effect of amendments. — The 19 ó amendment added subsection (e).

The 1990 amendment inserted "and for local exchange telephone utilities" in the first sentence and inserted "or telephone utility" after "cooperative" in the second and third sentences of subsection (e).

The 1991 amendment, effective June 27, 1991, added the last sentence in subsection (e) and added subsection (f).

The 1993 amendment, effective June 26, 1993, added subsection (g).

NOTES TO DECISIONS

Separation of intrastate and interstate properties, expenses and revenues is required for properly determining the adequacy of a utility's intrastate rates. United States v. RCA Alaska Communications, Inc., 597 P.2d 489 (Alaska 1979).

Lobbying expenses excluded from revenue requirement. — The commission acted reasonably and within its statutory authority in excluding lobbying expenses as part of a utility's revenue requirement. Homer Elec. Ass'n v. State, Pub. Utils. Comm'n, 756 P.2d 874 (Alaska 1988).

Applied in Alaska Pub. Util. Comm'n v. Greater Anchorage Area Borough, 534 P.2d 549 (Alaska 1975).

HOMER ELECTRIC ASSOCIATION, INC., Appellant,

v.

STATE of Alaska, ALASKA PUBLIC UTILITIES COMMISSION, Appellee.

No. S-1952.

Supreme Court of Alaska.

May 20, 1988.

In connection with nonprofit electric cooperative's rate increase request, Public Utilities Commission entered orders excluding lobbying expenses from cooperative's "revenue requirement" and allocating 100 percent of costs incurred in rate-making proceeding to cooperative, and cooperative appealed. The Superior Court, Third Judicial District, Kenai, Charles K. Cranston, J., affirmed Commission on all substantive issues, but remanded for determination of specific proportion of cooperative's dues actually used for lobbying purposes, and cooperative appealed. The Supreme Court, Burke, J., held that: (1) per se exclusion of lobbying expenses from cooperative's "revenue requirement" was not abuse of Commission's discretion; (2) fees Commission paid for services performed by Attorney General's office in connection with rate-making proceeding were not "costs" recoverable by Commission; and (3) remand was required for individualized findings as to propriety of allocating 100 percent of costs of proceeding to cooperative.

Affirmed in part, reversed in part, and remanded with instructions.

Matthews, C.J., filed opinion dissenting in part.

1. Electricity ⇐11.3(4)

Public Utilities Commission had discretion under general statutory authority to exclude electric cooperative's lobbying expenses from cooperative's "revenue requirement," upon determination that inclusion of such costs would be contrary to best interests of electric cooperative's ratepayers, even though lobbying expenses were not listed in mandatory exclusion provision. AS 42.05.141, 42.05.141(a)(3), 42.05.381(a).

2. Electricity ⇐11.3(5)

Public Utilities Commission's determination that it would not be just, fair or reasonable for electric cooperative to charge ratepayers for lobbying activities carried out on cooperative's behalf was subject to reasonable basis test upon review. AS 42.05.141, 42.05.141(a)(3), 42.05.381(a).

3. Electricity ⇐11.3(4)

Per se exclusion of lobbying expenses from electric cooperative's "revenue requirement" was not abuse of Public Utilities Commission's discretion in rate-making proceeding. AS 42.05.141, 42.05.141(a)(3), 42.05.381(a).

4. Electricity ⇐11.3(4)

"Costs" recoverable by Public Utilities Commission in rate-making proceeding did not include fees paid by Commission for services performed by Attorney General's office pursuant to explicit statutory mandate. AS 42.05.111, 42.05.111(b), 42.05.651, 42.05.651(a), 42.06.610, 42.06.610(a).

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

5. Electricity ⇐11.3(5, 7)

Determinations that electric cooperative could better pass along costs of rate-making proceeding to ratepayers and that cooperative had "caused" costs of proceeding by requesting rate increase did not justify Public Utilities Commission's allocation of 100 percent of costs of rate-making proceeding to electric cooperative; remand was required for individualized consideration of facts of particular case. AS 42.05.651(a), 42.06.140 et seq.

C.R. Baldwin, Kenai, for appellant.

Virginia A. Rusch, Asst. Atty. Gen., Anchorage, and Grace Berg Schaible, Atty. Gen., Juneau, for appellee.

Roger R. Kemppel, Donald C. Ellis, Kemppel, Huffman and Ginder, P.C., An-

merits and Homer Electric, joined by Alaska Rural as amicus curiae on the lobbying expense issue, appealed the matter to the superior court. Homer Electric argued on appeal that (1) the APUC erred in excluding lobbying expenses from Homer Electric's revenue requirement, (2) the APUC erred in including as costs those attorney's fees attributable to services performed by the Attorney General's office and, (3) the APUC abused its discretion in allocating to Homer Electric 100% of the costs incurred by the APUC in the rate making proceeding. The superior court affirmed the APUC on all substantive issues, but remanded the case for a determination of the specific proportion of Alaska Rural dues actually used for lobbying purposes. Homer Electric appeals the superior court's ruling.

II. EXCLUSION OF LOBBYING EXPENSES

[1] The APUC's decision to exclude lobbying expenses in the case at bar was based upon its conclusion that, "as a matter of law and public policy," lobbying expenses should be excluded from public utilities' revenue requirements.[4] We must decide whether such a policy decision was within the APUC's legitimate statutory authority and, if so, whether there was a reasonable basis for its application in the case at bar.

The APUC's general powers and duties are defined in AS 42.05.141. That statute provides in part:

> (a) The Alaska Public Utilities Commission may
>
> ....
>
> (3) *make or require just, fair and reasonable rates*, classifications, regulations, practices, services and facilities for a public utility[.]

(Emphasis added). In addition AS 42.05.381(a) provides in part:

> All rates demanded or received by a public utility, or by any two or more public utilities jointly, for a service furnished or to be furnished *shall be just and reasonable;* however, a rate may not include an allowance for costs of political contributions, or public relations....

(Emphasis added).

The APUC asserts that it has been given ample authority under these provisions to exclude any operating costs, including lobbying expenses, from a utility's revenue requirement when it concludes that inclusion of such costs is contrary to the best interests of the utility's ratepayers. Alaska Rural, appearing as amicus on behalf of Homer Electric,[5] argues that both the wording and legislative history of AS 42.05.381(a) preclude the APUC from excluding lobbying expenses from a utility's revenue requirement.

Alaska Rural's argument is primarily one of legislative intent. As originally enacted, AS 42.05.381(a) provided only that public utility rates be "just and reasonable," as determined by the APUC under its general rate making authority. Ch. 113, § 6, SLA 1970. The statute was amended in 1976, however, to specify certain expenditures which the APUC was *required* to omit from a utility's allowable costs. Ch. 86, § 1, SLA 1976. As originally proposed, the 1976 amendment would have specifically excluded lobbying costs, as well as costs in connection with advertising, political and charitable contributions, and public relations.[6] The bill was amended on the floor, however, to delete the prohibitions on lob-

4. The APUC's decision in this case was based upon its earlier decision on the same question in *In re Chugach Electric Ass'n*, APUC Order No. U-81-53(21)/U-83-57(9)/U-84-13(1) (1984).

5. Homer Electric adopts Alaska Rural's argument on this issue *in toto*.

6. The amendment, as originally proposed, read:

> All rates demanded or received by a public utility, or by any two or more public utilities jointly, for a service furnished or to be furnished shall be just and reasonable; *however, no rate may include an allowance for costs of advertising, political or charitable contributions, lobbying expenses, or public relations*....

H.C.S.S.B. 50, 10th Leg., 1st Sess. (May 14, 1977) (emphasis added). These exclusions were made subject to certain exceptions not relevant here. *Id.*

bying expenses, advertising and charitable contributions.[7]

Alaska Rural argues that the legislature's deletion of the term "lobbying expenses" from the list amounts to a legislative determination, not only that lobbying expenses need not be excluded, but also that they may not be excluded from a utility's revenue requirement. In support of its argument, Alaska Rural points to the statements of Representative Freeman, a sponsor of the amendment to remove "lobbying expenses" from the list, who argued during debate on the measure:

> Mr. Speaker ... I am basing my objection on personal experience.... [A]dvertising, ... lobbying expenses, [and] charitable contributions ... these are the sort of things that—especially the lobbying and advertising—are just part of doing business. For instance, if a utility sends a man down here to—in connection with a bill such as this, that's lobbying, and I just see no reason why you should ... a public utility especially has to come up with money to do business somewhere and this is just part of doing business. And I see nothing to be gained by putting these kinds of restrictions on a utility.

Record of the House Floor Debate on H.C. S.S.B. 50 (May 20, 1977). Alaska Rural concludes, based upon the foregoing, that the history of AS 42.05.381(a) evidences a clear legislative intent to *allow* lobbying expenditures as part of a utility's revenue requirement. We do not agree.

The mandatory exclusion provisions of AS 45.05.381(a) simply specify certain items which the APUC *must* exclude from a utility's revenue requirement. They say nothing whatsoever about what the APUC *may* exclude under its general authority to establish "just, fair and reasonable rates." AS 42.05.141(a)(3). The legislative history upon which Alaska Rural relies suggests at most that the legislature did not intend to eliminate the APUC's discretion to allow lobbying expenses if it saw fit to do so. Even Representative Freeman's comments, however, do not suggest an intent to prohibit the exclusion of such expenses where the APUC, in its discretion, determines that exclusion is appropriate.

[2] Having found no express or implied statutory prohibition on the APUC's ruling, we should reverse only if we find that the APUC had no reasonable basis for concluding that it was not "just, fair and reasonable" for public utilities to charge ratepayers for lobbying activities carried out on the utilities' behalf. *See Alaska Public Utilities Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 559 (Alaska 1975) (APUC rate making decisions generally subject to "reasonable basis" test); *Kelly v. Zamarello*, 486 P.2d 906, 917 (Alaska 1971) (reasonable basis test should be applied in cases "concerning administrative expertise as to either complex subject matter or fundamental policy formulations").

[3] In reaching its decision on the lobbying expense issue in this case, the APUC relied upon several of its earlier decisions excluding lobbying expenses. *See In re Chugach Electric Ass'n*, APUC Order No. U-81-53 (21)/U-83-57(9)/U-84-13(1) (1984); *In re Enstar Natural Gas*, APUC Order No. U-81-101 (1982); *In re RCA Alaska Communications*, APUC Order No. U-78-4(33) (1981). In those cases, the APUC noted that utility companies, in charging their customers for lobbying activities, are "presuming to determine without the prior knowledge or consent of [their] ratepayers what pending legislation is or is not beneficial to them." *In re Enstar Natural Gas*, U-81-101 at 3. It also noted that the practice of forcing ratepayers, by virtue of the utility's monopoly status, to subsidize political activities with which they may not agree, has been rejected by numerous other jurisdictions. *See In re RCA Alaska Communications*, U-78-4(33) at 95-96; *see also In re Public Service Co. of Colorado*, 13 P.U.R.4th 40, 58 (Colo.Pub.Util.Comm'n 1975); *In re Washington Water Power Co.*, 24 P.U.R.4th 39, 50 (Idaho Pub.Util.Comm'n 1978); *Washington Utilities and Transportation*

7. *See* H.C.S.S.B. 50, am H, 10th Leg., 1st Sess. (May 18, 1977).

Comm'n v. Pacific Northwest Bell Telephone, 26 P.U.R.4th 495, 514 (Wash.Util. & Trans.Comm'n 1978). *See generally In re Southwestern Bell Telephone*, 19 P.U.R.4th 1, 27–28 (Kansas State Corp. Comm'n 1977) (citing additional authorities). In accordance with these considerations, the APUC concluded that lobbying expenses were more appropriately borne by investors than by ratepayers, and that such activities should be financed out of profits rather than out of general operating costs.

We believe that the APUC's decision represents a logical solution to a difficult policy problem, and one which is consistent with the general regulatory trend in this arena.[8] We cannot say that it was without any reasonable basis. Nor can we say that it was unreasonable for the APUC to opt for a *per se* rule concerning the exclusion of lobbying expenses, rather than a case by case approach based upon the individual merits of each lobbying effort. The latter approach was explicitly abandoned by the APUC as unworkable because it required the Commission to make such "subjective and judgmental" decisions as:

> Is the Legislature (or Congress) acting wisely in changing existing laws? What types of proposed legislation should be defeated? Should a utility be reimbursed for meritorious but unsuccessful lobbying efforts? How should legislation beneficial to one utility's ratepayers but detrimental to others be treated?

In re Enstar Natural Gas, APUC Order No. U-81-101 at 3–4 (1982). We agree with the APUC that it would be untenable to force that body into a position of having to choose between "good" lobbying and "bad" lobbying for purposes of establishing a utility's proper revenue requirements. Thus, we hold that the APUC acted reasonably and within its statutory authority in excluding such expenses altogether.[9]

III. ATTORNEY GENERAL'S SERVICES AS AN ELEMENT OF COSTS

[4] Alaska Statute 42.05.651(a) grants the APUC the authority to allocate among the parties, including the Commission itself, the costs incurred by the APUC in connection with certain rate making proceedings. In this case, the APUC concluded that the fees which it was required to pay to the Attorney General's office for the use of an assistant attorney general were allocable costs within the meaning of AS 42.05.651(a).[10] Accordingly, it assessed $482.06 in attorney's fees against Homer Electric, as part of its cost allocation order. Homer Electric contests the allocation, arguing that the term "costs," as used in AS 42.05.651(a), does not include attorney's fees, and that, even if it did, it would not include fees paid to assistant attorneys general who are statutorily designated as legal counsel to the Commission. *See* AS 42.05.111.

The APUC concluded, and the superior court agreed, that our holding in *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Comm'n*, 711 P.2d 1170 (Alaska 1986), controls this issue. In *Amerada Hess*, we

8. In fact, at least one court has held that it may be unconstitutional to force ratepayers to subsidize political or religious activities with which they do not agree. *Cahill v. Public Service Comm'n*, 69 N.Y.2d 265, 513 N.Y.S.2d 656, 657, 506 N.E.2d 187, 188–89 (N.Y. 1986), *cert. denied*, — U.S. —, 108 S.Ct. 100, 98 L.Ed.2d 61 (1987) (plaintiff stated cause of action for violation of First Amendment rights based on Public Service Commission practice of including charitable contributions as part of a utility's authorized expenditures).

9. Neither the APUC nor Homer Electric has contested that portion of the superior court's decision which required remand for a determination of the specific percentage of Alaska Rural dues attributable to lobbying expenses. We agree with the trial court's conclusion that the arbitrary 50% figure was unsupported by the evidence, and we affirm the lower court's decision as to this limited remand.

10. The State Attorney General is designated by statute as staff counsel for the Commission. AS 42.05.111. However, the two assistant attorneys general assigned to the APUC are in fact paid for through "reimbursable services agreements," under which the Commission pays the Attorney General's office some $120,000 per year in exchange for its services. Of this figure, the Commission estimates that 46% (or $55,000) of the services provided by these assistant attorneys general is attributable to hearings and investigations for which the Commission may recover costs under AS 42.05.651.

held that the term "costs," as used in AS 42.06.610, includes fees paid to temporary private counsel retained on a contract basis by the APUC in connection with proceedings under the Pipeline Act. We stated:

> We ... reject the owners' contention that AS 42.06.610 does not authorize the allocation of attorney's fees. Pursuant to AS 42.06.610, the Commission is authorized to allocate the "costs" of the proceeding. The statute provides that "costs" include consultants' fees, but it nowhere excludes attorney's fees. When the legislature uses the term costs, it often intends to include attorney's fees. *See, e.g.*, AS 09.60.010. The inclusion of attorney's fees in the "costs" allocable in AS 42.06.610 is consistent both with the apparent intent of the legislature to allow the APUC to recoup its costs of regulation, and with AS 42.05.141(1) which provides that the powers of the APUC shall be liberally construed to accomplish its stated purposes. Thus, we hold that AS 42.06.610 authorizes the APUC to allocate the costs incurred in hiring temporary legal counsel for a particular proceeding.

Id. at 1182 (footnote omitted). The APUC points to the similarity in wording between AS 42.06.610 [11] and AS 42.05.651(a),[12] and argues that there is no reasoned basis upon which *Amerada Hess* can be distinguished from the case at bar. It concludes, therefore, that attorney's fees, including those attributable to the services of the Attorney General, are clearly allocable under the statute.

We agree with the APUC that the *Amerada Hess* rationale is applicable in the context of cost allocations under AS 42.05.651(a). Contrary to the APUC's assertion, however, that decision does not justify the cost allocation order entered here. *Amerada Hess* was expressly limited to cost allocations with regard to privately contracted "temporary legal counsel." 711 P.2d at 1181–82. That decision does not suggest that the APUC is entitled to be reimbursed for the cost of services rendered by the Attorney General's office pursuant to its statutory duty under AS 42.05.111,[13] nor do we think that such general overhead expenditures can be reasonably justified as an element of "costs" under AS 42.05.651(a).

Alaska Statute 42.05.651(a) provides that the APUC is entitled to allocate "costs ... includ[ing] the costs of any time devoted to investigation or hearing by *hired consultants* ... [and] any *out-of-pocket expenses* incurred by the commission in the particular proceeding." (emphasis added). Under traditional principles of *ejusdem generis*, we must limit the application of the general term "costs" to those expenses which are similar in nature to the more specific terms, "hired consultants" and "out-of-pocket expenses." *See* 2A N. Singer, Sutherland Statutory Construction § 47.17 (Sands 4th ed. 1984). Accordingly, while it may be appropriate to allow recovery of the state's expenses with regard to privately contracted outside counsel,[14] we do not

11. AS 42.06.610(a) provides:

> During a proceeding held under this chapter, the commission shall allocate the cost of the proceeding among the parties, including the commission, as is just under the circumstances. The costs allocated may include the costs of any time devoted to investigations or hearings by hired consultants, whether or not the consultants appear as witnesses or participants. The commission shall provide an opportunity for any person objecting to an allocation to be heard before the allocation becomes final.

12. *See supra* note 3.

13. AS 42.05.111 provides:

> (a) The attorney general is legal counsel for the commission. The attorney general shall advise the commission in legal matters arising in the discharge of its duties and represent the commission in actions to which it is a party. If, in the opinion of the commission, the public interest is not adequately represented by counsel in a proceeding, the attorney general, upon request of the commission, shall represent the public interest.
>
> (b) The commission may employ temporary legal counsel from time to time in proceedings before the commission in which the attorney general is representing the public interest or a party before the commission.

14. We note that the use of temporary legal counsel is expressly limited by the terms of AS 42.05.111(b) to those situations in which the Attorney General is representing the public interest or a party before the commission.

think it proper, under this statutory scheme, to permit recovery for routine services rendered by officers of the state pursuant to an explicit statutory mandate.

Under the broad reading suggested by the APUC, we can conceive of no state expense incurred in connection with APUC rate making proceedings which would fall outside the scope of the term "costs" under AS 42.05.651(a). In our view, the term "costs" was never intended to be so broadly construed. Thus, we hold that the APUC erred in allocating as part of its costs those fees attributable to services performed by the Attorney General's office in connection with this proceeding.

IV. 100% COST ALLOCATION TO HOMER ELECTRIC

[5] Alaska Statute 42.05.651(a) allows the APUC to allocate the costs of rate making proceedings "among the parties, including the commission, as is just under the circumstances." In determining whether an allocation is "just under the circumstances," the Commission may consider "the results, ability to pay, evidence of good faith, other relevant factors and mitigating circumstances." AS 42.05.651(a).

In the case at bar, Homer Electric and the APUC were the only parties. The APUC allocated 100% of the costs of the proceeding to Homer Electric. The primary justifications offered by the Commission in support of this result were (1) that Homer Electric had a greater ability to pay because Homer Electric could pass the costs on to its ratepayers, while the APUC "must function under budgetary limitations," and (2) that, in fairness, "the cost-causer should be the cost-payer," and Homer Electric created these costs by filing its tariff revisions. We agree with Homer Electric that such considerations, by themselves,[15] are insufficient to justify the allocation in this case.

In *Amerada Hess*, 711 P.2d at 1180, we upheld the cost allocation scheme established under the Pipeline Act against a constitutional challenge claiming that the statute violated due process by allowing the Commission to be a "judge in its own cause" as to liability for costs. We stated:

> We conclude that the dual role of the APUC as both administrator of its own budget and adjudicator of costs does not violate state due process if sufficient safeguards exist against APUC's discretion. In this case, the APUC's issuance of a reasoned decision explaining its cost allocation was sufficient safeguard against the APUC's abuse of discretion. *We can adequately check the APUC's exercise of discretion by reviewing a decision setting forth the agency's factual premises and substantive considerations.*

Id. (emphasis added). We believe that this is an appropriate case in which to act as a check on the APUC's discretion.

We do not question the APUC's general authority to determine the appropriate proportion of the costs to be borne by each party in a rate making proceeding. However, we are disturbed by the reasoning of the APUC in this case. The factors upon which the APUC order is based, *i.e.*, that Homer Electric can better pass along its costs and that Homer Electric "caused" the costs in this proceeding by requesting the rate increase, would appear to be present in virtually every case. Indeed, the APUC's arguments suggest that it may be the Commission's regular policy that utility companies bear all costs in rate making proceedings. Such a policy is contrary to the clear wording of AS 42.05.651(a), which allows the Commission to allocate costs among the parties "*including the commission.*" To allow the APUC to base its findings as to its own liability upon such superficial and recurring grounds would be tantamount to interpreting the statute to

15. The Commission also noted that "Homer Electric was spared the expense of a full evidentiary hearing." However, this consideration is essentially neutral in character; the Commission was equally "spared" such costs. Moreover, AS 42.05.651(a) provides that costs should be allocated among the parties as is "just," whether they are incurred in hearings or investigations. Thus, the fact that this matter did not go to a "full evidentiary hearing" is not controlling.

read that "the commission may allocate costs among the parties *excluding the commission*." We think this is inconsistent with the legislature's intent. Consequently, we reverse the APUC's cost allocation and remand for further findings as to the propriety of a 100% cost allocation in the case at bar.[16]

V. CONCLUSION

The APUC rate-setting order, insofar as it relates to the exclusion of lobbying expenses from Homer Electric's revenue requirement, is AFFIRMED. In accordance with the trial court's earlier order, however, we REMAND to the superior court with instructions to REMAND the matter to the APUC for a determination of the specific portion of Alaska Rural dues actually used for lobbying activities.

The APUC cost allocation order is REVERSED and the matter is REMANDED to the superior court with instructions to REMAND to the APUC with instructions that the APUC (1) exclude from its cost allocation any fees attributable to services performed by the Attorney General's office in connection with this proceeding, and (2) make further findings as to the propriety of a 100% cost allocation order in this case.

MATTHEWS, Chief Justice, dissenting in part.

I agree with the opinion, except as to part IV concerning the 100% cost allocation to Homer Electric.

APUC gave three reasons in support of this allocation:

1. ability to pay, finding that Homer Electric had the superior ability since it could pass the costs on to the consumer;

2. "that insofar as possible the cost causer should be the cost payer; i.e. HEA was the party whose tariff revision generated the audit and associated costs in this proceeding and should be required to bear the burden of paying those costs."; and

3. that "HEA was spared the expense of a full evidentiary hearing in this proceeding."

The expression of the third reason suggests that if the Commission had subjected the utility to a full evidentiary hearing and was thus responsible for needless additional work, the Commission would not have made the 100% allocation.

It seems to me that all of these reasons are appropriate for consideration and that the Commission has expressed grounds which suffice to satisfy the "just under the circumstances" statutory standard. I would therefore affirm the cost allocation.

16. We do not mean to suggest that the 100% cost allocation is necessarily unjustified. Our holding is simply that it is an abuse of discretion for the APUC to enter such an order without a more individualized consideration of the facts of the particular case.

Dan (Ike) PARKER and Parker Paving, Inc., Appellants/Cross-Appellees,

v.

NORTHERN MIXING COMPANY, C.J. Guthrie, Douglas Guthrie, and Guthrie Machinery Co., Appellees/Cross-Appellants.

Nos. S-1667, S-1737.

Supreme Court of Alaska.

May 27, 1988.

Members of de facto partnership owning asphalt plant sued each other over proper distribution of assets and losses. The Superior Court, Third Judicial District, Charles K. Cranston, J., made various findings, rendered an accounting, and issued judgment from which all parties appealed. The Supreme Court, Rabinowitz, C.J., held that: (1) trial court properly found that individual who advanced monies to de facto partnership was not member of partnership, but was creditor; (2) one partner was entitled to partnership contribution for val-

Re Certification of Garbage and Refuse Utilities

Alaska Public Utilities Commission
September 21, 1973

ORDER extending for another 60 days the temporary (60-day) certificates granted to 19 refuse collection carriers formerly under the jurisdiction of the Alaska Transportation Commission but now deemed public utilities. Also, another refuse collection carrier is added to the list receiving the temporary authority.

[ABSTRACT OF DECISION. THE FULL CASE TEXT IS OMITTED.]

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1. CERTIFICATES, § 134 — Amendment — Temporary certificates — Extensions of time — Factors.

[ALASKA] Due to confusion over formal investigation and certificate requirements, the commission extended for another 60 days the temporary certificates granted to 19 refuse collection carriers formerly under the jurisdiction of the Alaska Transportation Commission but now deemed public utilities; another carrier also was added to the group receiving the temporary certificates.

Re City of Anchorage dba Municipal Light and Power Department

Additional respondent: Chugach Electric Association, Inc.

U-71-16
Order No. 19

Alaska Public Utilities Commission
September 27, 1973

ORDER resolving service area boundary conflicts between a municipal electric utility and a nearby electric cooperative. At least temporarily, the municipal utility is awarded most areas within corporate limits as well as a noncontiguous area around the airport. The cooperative is granted the area beyond city limits, as well as limited areas within city limits for which it is the existing primary supplier. For those areas within city limits granted the cooperative, the commission notes that as the cooperative's facilities for serving that area are depreciated, the municipal utility will have the right to construct and operate replacement facilities.

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1. CONSOLIDATION, MERGER, AND SALE, § 28 — Exchange of properties and customers — Objections to approval — Financial encumbrances.

[ALASKA] Where a municipal electric utility and an electric cooperative had several overlapping service areas and duplicative facilities, the commission realized that a straight exchange of properties and customers would not solve the problem, since such an exchange could interfere with existing loan encumbrances or other financial obligations associated with certain facilities.
p. 34.

2. SERVICE, § 221 — Abandonment —

Duplicative facilities — Objections to approval — Costs.

[ALASKA] Where a municipal electric utility and an electric cooperative had several overlapping service areas and duplicative facilities, the commission realized that simply requiring one or the other to remove and prematurely retire certain plant would not solve the problem, and could in fact be extremely costly.
p. 34.

3. MONOPOLY AND COMPETITION, § 28 — Service areas — Division of territory — Municipal utility.

[ALASKA] Where a municipal electric utility and an electric cooperative had several overlapping service areas and duplicative facilities, the commission attempted to resolve the problem (at least temporarily) by awarding the municipal utility most areas within city limits as well as a noncontiguous area in which was located the city airport; the territory represented the areas in which the municipality was the primary supplier and included Anchorage, Elmendorf Air Force Base, Knik Arm, and Point Woronzof.
p. 34.

4. MONOPOLY AND COMPETITION, § 28 — Service areas — Division of territory — Cooperative.

[ALASKA] Where a municipal electric utility and an electric cooperative had several overlapping service areas and duplicative facilities, the commission attempted to resolve the problem (at least temporarily) by awarding the cooperative most areas outside city limits as well as certain areas within city limits in which the cooperative was the primary supplier, including Turnagain, Spenard, and much of Fort Richardson.
p. 35.

5. CERTIFICATES, § 96 — Rival applications — Factors — Priority in occupying field.

[ALASKA] Where an electric cooperative was granted temporary authority to serve the Point Campbell Military Reserve pending final adjudication of a territorial dispute with a municipal electric utility, it was told that it would receive preferential consideration in a subsequent permanent certification proceeding for the Point Campbell area.
p. 35.

6. SERVICE, § 251 — Abandonment — Duplicative facilities — Substitution of facilities.

[ALASKA] Although an electric cooperative was allowed (temporarily) to continue providing service in those limited areas of a municipally served city in which the cooperative already had facilities in place, the municipal utility was told that it would be allowed to construct and operate replacement facilities as the cooperative's facilities were depreciated and retired, or it could allow the cooperative to renew its facilities.
p. 36.

7. CONSOLIDATION, MERGER, AND SALE, § 18 — Exchange of properties and customers — Commission plan — Voluntary transfers.

[ALASKA] Although stating that it believed its plan to solve a territorial dispute was a reasonable means by which to eliminate duplicative plant and facilitate an orderly transfer of properties and customers, the commission noted that its plan did not preclude any voluntary transfer or exchange plans developed by the affected parties.
p. 37.

BY THE COMMISSION:

ORDER DELINEATING SERVICE AREAS AND PROVIDING FOR ELIMINATION OF UNDESIRABLE DUPLICATION OF FACILITIES

On December 21, 1970, the CITY OF ANCHORAGE d/b/a MUNICIPAL LIGHT AND POWER DEPARTMENT (ML&P) filed an application in Docket U-70-63 for a certificate of public convenience and necessity requesting authority to furnish electric public utility service throughout a service area situated within and immediately adjacent to the City of

Anchorage. At the time of filing of its application, ML&P was operating an extensive network of electric generation, transmission, and distribution facilities for which Commission authority was not required prior to January 1, 1971.

Coincident with this provision of electric service by ML&P, CHUGACH ELECTRIC ASSOCIATION, INC. (CEA) under authority granted by Certificate of Public Convenience and Necessity No. 8, was furnishing similar service in much of the service area requested by ML&P. In the Commission's opinion, the identical services being offered in many instances by the two utilities represented undesirable duplication.

AS 42.05.221(d) provides that in an area where the Commission determines that two or more public utilities are competing to furnish identical utility service, and that this competition is not in the public interest, the Commission shall take appropriate action to eliminate the competition and any undesirable duplication of facilities. Accordingly, on March 11, 1971, the Commission issued its Order No. 1 in this proceeding seeking the advice and assistance of ML&P and CEA in:

(1) delineating the service area boundaries of each utility in those areas of competition;

(2) eliminating existing duplication and paralleling to the fullest reasonable extent;

(3) precluding future duplication and paralleling;

(4) providing for the exchange of customers and facilities;

(5) providing for such other mutually equitable arrangements as would be in the public interest.

Additionally, the order called for CEA and ML&P to file with the Commission, and serve on each other, briefs outlining their respective views as to how the Commission should proceed to take appropriate action to eliminate existing, and preclude future, undesirable duplication of facilities and competition pursuant to AS 42.05.221(d). Each brief was to include a proposed order designed to specifically implement the recommendations and suggestions contained in the brief.

In response to Order No. 1 herein, both ML&P and CEA submitted proposed orders which would establish a negotiating committee and allow the utilities a period of six months to reach agreement on a voluntary basis. Also, CEA proposed a second order which would establish interim service areas based principally upon which utility was the predominant supplier. The concept of the second proposed CEA order was accepted by the Commission and promulgated by its Order No. 3 in this proceeding, issued June 11, 1971.

On June 29, 1971, ML&P filed a petition to vacate and declare void Order No. 3 on the basis that the order had been entered ex parte without benefit of notice or public hearing as provided by Order No. 1. In response to the petition of ML&P, the Commission ordered that oral argument relating to Order No. 3 and its attached exhibit (map) would be heard on July 8, 1971.

Subsequent to the July 8, 1971, hearing, a series of conferences were held involving representatives of ML&P, CEA, and the Commission Staff, wherein a map was developed and accepted by all conferees concerned, together with a recommendation to the Commission that that map be substituted for the one defining interim service areas issued as a part of Order No. 3. Throughout Order No. 3 and in the related map, the terms "predominantly ML&P service" and "predominantly CEA service" were utilized in conjunction with areas in which one utility was authorized to proceed with the construction or installation of electric facilities without the prior concurrence of the other utility or of the Commission. A consensus evolved during the course of the conferences that these terms were somewhat difficult to accurately define and that the interim service areas should refer simply to:

(1) Areas requiring waiver of objection from the other utility or approval of the Commission prior to construction of electric facilities;

(2) Areas in which one utility (as indicated by the map) could proceed with construction or installation of electric facilities without a prior waiver of objection from the other utility or approval of the Commission.

The Commission subsequently accepted

the findings and recommendation arising from the conferences and implemented the suggested changes and modifications to Order No. 3 by issuance of its Order No. 6 herein. By its Orders No. 8 and 10 the Commission established the forms and procedures by which "Waiver of Objection" and "Commission Approvals" would be processed and obtained. These forms and procedures remain currently in effect.

Both ML&P and CEA in response to Order No. 1 filed proposals for the establishment of a Negotiating Committee for the purpose of consummating a voluntary agreement for the elimination of existing and future duplication of electric facilities. Each utility had requested a minimum period of six months to formulate a final plan for resolution of the problem. Accordingly the Commission by its Order No. 9 on August 31, 1971, established the requested Negotiating Committee. In addition to members from each of the utilities (as proposed by the utilities) one Commission Staff member was added by the Commission to serve as Coordinating Chairman.

During the months of September, October, November, and December, 1971, a number of meetings and work sessions were held by the Committee and its various designated subcommittees. At the conclusion of this four month period of preparatory work, all parties supposedly were in agreement that adequate guidelines had been established and that sufficient legal, engineering, and other related data had been compiled to conduct meaningful, initial negotiations early in January of 1972. Accordingly, the period of January 4 through January 8, 1972, was set by all parties for that purpose.

The full Committee met at 9:00 A.M. on January 4, 1972, with all parties presumably prepared to proceed with earnest negotiations directed toward the ultimate and timely resolution of the long standing service area problem existing between ML&P and CEA. Unfortunately, shortly after negotiations opened it became obvious that there was a wide divergence of opinion between certain representatives of the parties as to which exact issues were to be discussed, and (if discussed) how they were to be approached. Considerable discussion regarding a possible immediate resolution of these differences ensued, and the final conclusion of the Committee was that negotiations should be recessed until 9:00 A.M., January 6, 1972, at which time both CEA and ML&P should be prepared to present firm opening proposals without further delay.

On January 6, 1972, (prior to the reconvening of negotiations) CEA verbally requested a further recess until approximately January 10, 1972, in order to file a motion regarding modification of the procedures established by Order No. 9 in this proceeding. The Negotiating Committee Chairman, with the verbal concurrence of the ML&P counsel, granted the extension. Subsequently, on January 10, 1972, CEA filed a motion requesting, in essence, that in lieu of further informal negotiations at that time, each utility should be required to submit its proposal directly to the Commission for formal consideration.

Following a series of oral arguments and prehearing conferences, it was the Commission's decision to accept the motion of CEA for curtailment of Negotiating Committee action with proposals by each party to be submitted directly to the Commission. By its Order No. 13 issued April 4, 1972, the Commission directed that CEA and ML&P file written proposals simultaneously not later than 4:30 P.M. on April 10, 1972, including but not limited to, specific recommendations for a solution to the service area dispute in question. Order No. 13 also set the matter for hearing on May 10, 1972, a date which was ultimately continued until September 19, 1972.

In its proposal CEA recommended that ML&P be awarded the following described service area:

"Commencing at the mouth (east bank) of Fish Creek (Knik Arm of Cook Inlet), thence southerly along its east bank to its intersection with the center line of the Alaska Railroad right-of-way; thence south along the center line of the Alaska Railroad right-of-way to the center line of West Northern Lights Boulevard; thence east along the center line of West Northern Lights Boulevard to the center line of the Minnesota By-Pass; thence north along the center line of the

Minnesota By-Pass to a point at which a projection of the northern boundary of Block Nine (9) of the Romig Park Subdivision would intersect the center line of the Minnesota By-Pass; thence easterly along the northern boundary of Block Nine (9) of the Romig Park Subdivision to the center line of Spenard Road; thence northeasterly along the center line of Spenard Road to its intersection with the south bank of Chester Creek; thence generally east along the south bank of Chester Creek to the center line of Lake Otis Parkway; thence south along the center line of Lake Otis Parkway to the center line of East Northern Lights Boulevard; thence east along the section line common to Sections Twenty-one (21) (all such sections being in Township 13 North, Range 3 West, Seward Meridian) to the Center line of Boniface Parkway to the center line of the Glenn Highway; thence west along the center line of the Glenn Highway to the center line of Pine Street; thence generally west and north along the boundary of the Military Reservation (Elmendorf Air Force Base) to Knik Arm."

CEA proposed to receive all area in the vicinity of Anchorage falling outside the above described boundaries.

Additionally, CEA contemplated that the parties would be exchanging areas of service with each other to achieve compactness and eliminate "patch work" areas and that such exchanges would be pursuant to an equalization of economic burden.

In its filing ML&P proposed that it should be awarded as its service area all area within the corporate limits of Anchorage, including all future annexations. ML&P also proposed to exchange all properties at depreciated book value in accordance with the arrangement generally known as the "Tennessee Plan."

In comparing the recommendation of CEA and ML&P it was obvious to the Commission that neither plan offered an equitable solution to the problem. Also it was equally obvious that the same general impasse continued to exist between the utilities.

Public hearings commenced on September 19, 1972, to afford both CEA and ML&P the opportunity to augment their written filings and to cross examine the other party on its proposal. Messieurs Robert E. Sharp, Herbert C. Purcell, Gregory L. Jones, Donald R. Aubuchon, Robert L. Marshall, Charles D. Wood, and Robert Morrison appeared on behalf of ML&P, while L. J. Schultz, James D. Bumgardner, Gunnar Flygenring, and George Hedla presented testimony supporting CEA's position.

Mr. Sharp, Anchorage City Manager, introduced the City's Annual Statement and discussed growth and planning activities relating to ML&P. Mr. Purcell, ML&P Assistant Chief Engineer, discussed the desirability of establishing the demarcation between service areas along natural boundaries wherever possible. He also emphasized the need for the utilities to have their individual service areas defined with the least practicable delay in order that they might proceed with orderly development planning. Mr. Jones, Assistant Planner for the Greater Anchorage Area Borough, introduced evidence relating to the anticipated growth and zoning patterns applicable to the immediate Anchorage area. Mr. Aubuchon, Economist for the City, discussed the economic impact that implementation of the ML&P proposal would have on that organization. He also expressed a concern that any service area delineation made by the Commission afford ML&P an opportunity for continuing horizontal growth. Mr. Marshall, a Consultant for R. W. Beck & Associates, appeared and expressed his opinion as to the feasibility of the City's proposal. Mr. Wood, City Controller, presented data relating to transmission and distribution costs. Mr. Morrison, Budget Officer for the City, concluded testimony in support of ML&P with an explanation of the method by which overall City administrative costs were allocated between ML&P and the various other City departments.

Mr. Schultz, General Manager of CEA, gave a detailed description of that utility's electric system and presented a series of exhibits relating to future subscribers trends and power requirements. Mr. Bumgardner, CEA Operations Manager, revealed CEA's long range transmission and distribution plan and discussed the details of the proposal for

delineating service areas. Mr. Flygenring, CEA Executive Assistant for Finance, gave testimony which described the various methods by which CEA obtained funds for capital expansions. Mr. Hedla, a certified public accountant, concluded testimony for CEA with presentation of its financial statements.

[1, 2] Initially, the Commission envisioned that the resolution of the service area problem would result in the beginning of an extensive and orderly transfer of properties and customers between the utilities. After a thorough investigation of the matter, however, the Commission now concludes that such action would be neither feasible nor reasonable. First, the distribution facilities of CEA and ML&P are subject to loan encumbrances or bond covenants which presumably will require advance approval of the loan or bond holders in order to permit retirement or disposal of any substantial item of property prior to its normal life expectancy. Furthermore, in those areas where direct duplication presently exists, the removal of one or the other of the paralleling facilities and the accompanying transfer of subscribers would be extremely costly and would provide no immediate benefit other than aesthetic. Rather than to force a premature plant retirement on either utility in those instances where both CEA and ML&P are furnishing identical service in a given area, it would appear to be more appropriate to restrict or limit one of the utilities' construction activities but permit it to serve its existing customers until present plant is fully depreciated or is sold voluntarily to the other utility.

The Commission at this time will assign firm fixed service areas to each of the utilities.

[3] Essentially ML&P will be granted an overall service area comprised of two individual non-contiguous sub-areas. One of these sub-areas will encompass the Anchorage International Airport and all of Point Woronzof west of that area in which CEA is the sole supplier and south to the township line between T12N and T13N, S.M. More specifically, this sub-area is an area bounded by a line beginning at point of intersection of the NW corner of the Point Campbell Military Reserve and the high water line of Knik Arm; thence east to the SE corner of Section 35, T13N, R4W, S.M. (All further references to Sections in this sub-area description refer to T13N, R4W, S.M.); thence north to NE corner of SE 1/4 of Section 35; thence west to the NW of corner of the SE 1/4 of Section 35; thence north to the NE corner of SW 1/4 of Section 26; thence west to the NW corner of the SW 1/4 of Section 26; thence north to the NE corner of SE 1/4 of the NE 1/4 of Section 27; thence west to the SE corner of the NE 1/4 of the NW 1/4 of Section 27; thence north to the point of intersection with the high water mark of Knik Arm; thence generally southwesterly along the high water line of Knik Arm to the point of beginning. Except for infrequent minor border area penetrations by CEA, ML&P is the sole present supplier in this sub-area.

The second sub-area to be awarded to ML&P is an area bounded generally by a line beginning at approximately the NW corner of Section 24, T13N, R4W, S.M. (Until otherwise indicated all further references to sections in this sub-area description refer to T13N, R4W, S.M.); thence generally south along the center line of the Alaska Railroad right-of-way to a point of intersection with the section line common to Section 23 and Section 26; thence east to the NW corner of Section 30, T13N, R3W, S.M. (All further references to sections in this sub-area description refer to T13N, R3W, S.M.); thence south to the SW corner of the NW 1/4 of Section 31; thence east to the SE corner of the NW 1/4 of Section 32; thence north to SW corner of the NE 1/4 of Section 29; thence east to SE corner of the NE 1/4 of Section 29; thence south to the SW corner of the NW 1/4 of the SW 1/4 of Section 28; thence east to SE corner of the NE 1/4 of the SE 1/4 of Section 28; thence south to the SW corner of Section 27; thence east to the SE corner of Section 27; thence north to the SW corner of the NW 1/4 of the NW 1/4 of Section 26; thence east to SE corner of the NE 1/4 of the NW 1/4 of Section 26; thence south to the SW corner of the NE 1/4 of Section 26; thence east to SE corner of the SW 1/4 of the NE 1/4 of Section 26; thence south to the SW corner of the NW 1/4 of the SE 1/4 of the SE 1/4 of Section 26; thence east to the SE corner of the NE 1/4 of the SE 1/4 of the SE 1/4 of Section 26; thence north to the NE

corner of the SE 1/4 of the SE 1/4 of Section 23; thence west to the NW corner of the SW 1/4 of the SE 1/4 of Section 23; thence north to the NE corner of the SW 1/4 of Section 23; thence west to the NW corner of the NE 1/4 of the SW 1/4 of Section 23; thence south to the NE corner of the SW 1/4 of SW 1/4 of Section 23; thence west to a point approximately 400 feet east of the NW corner of the SW 1/4 of the SW 1/4 of Section 23; thence due south to a point approximately 400 feet north of the section line common to Section 23 and Section 26; thence due west to a point on the quarter section line common to the SE 1/4 and SW 1/4 of Section 22; thence north to the SW corner of the NE 1/4 of Section 22; thence east to the SE corner of NE 1/4 of Section 22; thence north to a point of intersection with the south boundary line of the Elmendorf Air Force Base Military Reservation; thence generally westerly along the boundary of the Elmendorf Air Force Military Reservation to the point of intersection with the high water line on Knik Arm; thence southwesterly along the high water line of Knik Arm to the point of beginning. This second sub-area to be awarded to ML&P basically contains those geographic areas inside and outside the corporate limits of Anchorage in which ML&P is essentially the sole supplier; all areas within the corporate limits not being served by either CEA or ML&P; and all areas within the corporate limits in which CEA and ML&P presently operate paralleling or duplicating facilities.

[4] CEA, in part, will be awarded those portions of the Turnagain and Spenard areas (both inside and outside the corporate limits of Anchorage) in which it is essentially the sole supplier, consisting of the following areas in T13N R4W, S.M.: SE 1/4 of Section 22; all of Section 23 west of the center line of the Alaska Railroad right-of-way; all of Section 25; NW 1/4 and the E 1/2 of Section 26; N 1/2 of the NE 1/4 of Section 27; NE 1/4 of Section 35; and all of Section 36. Additionally, CEA will be awarded the following blocks in the general Boniface/Tudor/Northern Lights/Baxter Road area in T13N, R3W, S.M. in which it is the principal supplier (These areas are contiguous to the remainder of CEA's service area, but are abutted on two or more sides by areas to be awarded to ML&P.): S 1/2 of the NW 1/4, SW 1/4, W 1/2 of the SE 1/4, and the S 1/2 of the SE 1/4 of the SE 1/4, all in Section 26; SE 1/4 of Section 22 less approximately the south 400 feet; and the NW 1/4 of the SW 1/4, the N 1/2 of the SE 1/4 and the SW 1/4 of the SW 1/4, less approximately the east 920 feet and the south 400 feet, all in Section 23. Also, CEA will retain all of its existing certificated service area generally south and east of the following line except for certain portions encompassing military reservations: Beginning at the point of intersection of the north boundary of the Point Campbell Military Reserve and the high water line of Knik Arm; thence east to the SW corner of Section 31, T13N, R3W, S.M. (All further references to sections in this description refer to T13N, R3W, S.M.): thence north to the NW corner of the SW 1/4 of Section 31; thence east to the NE corner of the SW 1/4 of Section 32; thence north to the NW corner of the SE 1/4 of Section 29; thence east to the NE corner of the SE 1/4 of Section 29; thence south to the NW corner of the SW 1/4 of the SW 1/4 of Section 28; thence east to the NE corner of the SE 1/4 of the SE 1/4 of Section 28; thence south to the NW corner of Section 34; thence east to the SE corner of Section 26; thence north to the NE corner of the SE 1/4 of Section 23; thence west to the SW corner of the NW 1/4 of Section 23; thence north to a point of intersection with the boundary of the Elmendorf Air Force Base Military Reservation.

[5] CEA presently furnishes service within the boundaries of the Point Campbell Military Reserve and maintains lines paralleling or penetrating the north boundary of that portion of the Fort Richardson Military Reservation, generally referred to as the Campbell Airstrip Area. Also, the Commission is aware that the City of Anchorage desires to acquire certain lands within the Campbell Airstrip Area for future airport usage. Finally, the Commission anticipates that either part or all of the two reservation areas subsequently may be returned to public use. Accordingly, it is the Commission's opinion that the rights to serve these areas at such date(s) as they may be released to the public, should be determined at this time.

CEA will be granted temporary operating authority and preferential consideration for

future permanent certification to furnish electric utility service within all of the Point Campbell Military Reserve and the following sections within the Fort Richardson Military Reservation: NE 1/4 of Section 34; N 1/2 of Section 35; N 1/2 of Section 36 all located in T13N, R3W, S.M.; and the S 1/2 of Section 12, T12N, R3W, S.M. Entry, construction, or operation within any portion of these areas prior to dedication to public use, is subject to the advance approval of the United States of America. ML&P will be granted temporary operating authority and preferential consideration for future permanent certification to furnish electric utility service within the following sections of the Fort Richardson Military Reservation, subject to the same terms and conditions set forth above for CEA: NE 1/4 and S 1/2 of Section 34; S 1/2 of Section 35; and the S 1/2 of Section 36, all located in T13N, R3W, S.M.; and Section 1, Section 2, Section 3, N 1/2 of Section 12; N 1/2 of Section 11, N 1/2 of Section 10, all located in T12N, R3W, S.M.

[6] In establishing the above service area boundaries between CEA and ML&P, extensive consideration was given to the requirements that ML&P be afforded the necessary opportunity for horizontal growth and that the existing revenue base of CEA be preserved. To assure ML&P a reasonable future growth the Commission granted it (wherever feasible) all areas within the corporate limits of Anchorage not being served presently by either utility. Additionally, ML&P was granted (where possible) all areas within the present city limits of Anchorage in which CEA and ML&P have essentially paralleling or duplicating facilities. To preserve CEA's immediate financial integrity, CEA will be afforded the opportunity to retain and operate its existing electric distribution lines within these ML&P service areas for the normal life of the plant. AS CEA plant is retired, ML&P will be permitted to construct and operate the replacement facilities.

The Commission recognized in assigning ML&P almost all areas within the city in which duplication exists, that without compensating factors the gradual phase out of facilities and customers by CEA would progressively reduce that utility's revenues. Such effect, however, should be offset adequately by CEA's exclusive authorization to serve the rapidly expanding business and residential communities immediately outside ML&P's service boundaries.

In setting the geographic limits of ML&P's electric distribution operations, the Commission would have preferred that ML&P be granted a single composite service area. Unfortunately, because of CEA's exclusive ownership of electric distribution plant in the Turnagain and Spenard areas, coupled with the apparent difficulties associated with any attempted force sale or exchange of properties, the assignment of one composite service area was impossible.

ML&P in its filings, proposed that any final order in this proceeding provide for the future ML&P acquisition of CEA distribution facilities and customers in areas subsequently annexed by the City of Anchorage. Such action would negate one of the principal objectives of this proceeding and would preclude CEA from recovering offsetting loss of revenue in those areas within the city in which duplication of facilities now exists. Both CEA and ML&P have stated that the lack of firmly established territorial boundaries between the two utilities presents a serious obstacle to the logical long-range development of transmission and distribution system plans for the general Anchorage area. To impose continually "floating" boundaries upon CEA would perpetuate a major existing problem for that utility.

In deriving the general boundary lines described by this order, the Commission relied solely upon the facilities information and the distribution plant data entered into the record in this proceeding. In doing so the Commission realized, because of the complex intermingling of CEA and ML&P plant along certain segments of the dividing lines, that an actual field survey of all the common boundaries may lead to minor adjustments. Accordingly, the Commission will allow the parties either individually or through the Negotiating Committee established by Order No. 9 in this proceeding to perform or arrange for the necessary field work and to prepare and submit to the Commission any reconsideration of the service area descriptions within sixty (60) days of the date of this Order. The parties may wish to recommend minor

changes in the boundaries indicated by this Order which are considered necessary to make proper the division between existing facilities that may be located on or along the same street, road, alley, or right-of-way.

The Commission in this determination also recognized that a distribution facility cannot be utilized for the full extent of its normal life without a reasonable level of routine and emergency maintenance. Accordingly, during the course of the period in which one utility is allowed to continue to operate its existing facility within the authorized service area of the other utility, necessary maintenance activities must be permitted, provided such maintenance does not constitute an attempt to extend the life of the facility beyond that for which it was or should have been dedicated.

In its establishment of firm service boundaries around areas containing electric distribution facilities of both CEA and ML&P, the Commission was fully aware that instances relating to new customers and line extensions would arise from time to time when it would be more *reasonable* and economical to allow the non-certificated utility to construct or install additional plant within the authorized service area of the other utility rather than to have service provided by the certificated utility. Accordingly, in such cases until the duplication of all distribution properties has been eliminated, the Commission will retain, in full force and effect, the "Waiver of Objection" procedures promulgated by Orders No. 8 and 10 herein, subject to the following additional condition. Prior to the construction or installation of new electric distribution facilities (as defined by Orders No. 8 and 10) by one utility in the authorized service area of the other utility, the utility proposing the installation or construction shall furnish to the certificated utility a written option to acquire those new facilities at depreciated cost at such time as the existing distribution plant to which the new facilities are to be connected are retired.

The Commission also visualizes that occasions will arise in geographic areas of dual service, when the utility certificated to serve that area will not be in an immediate position to provide the replacement facilities for plant being retired by the other utility. In that event the utility scheduled to retire its plant under the provision of this order, will be permitted to renew those facilities, subject to the granting of an option to the certificated utility to purchase the replacement plant at depreciated cost upon reasonable notice of intent to do so.

The Commission in reaching its decision in this proceeding has given due consideration to the prevention of additional undesirable duplication, the orderly elimination of existing parallel facilities, the prevention of complicating effects with regard to the bond and loan holders, the prevention of costly premature retirement of useful plant, and the preclusion of adverse financial impact on the utilities and their customers. It is the Commission's opinion that the service area delineation directed and the terms and conditions prescribed by this order represent an equitable and reasonable solution to the unresolved service area dispute which has existed between CEA and ML&P for over a decade.

[7] Nothing in this order is intended to preclude the voluntary transfer of facilities and customers by the utilities. In fact, the Commission encourages that such action be taken as speedily as loan, bond, and other requirements will permit. The Commission does not, however, condone the premature retirement of useful plant at increased rates to the customers simply for the purpose of eliminating existing duplicating services. Accordingly, the Commission will continue to monitor the property disposition and transfer activities of CEA and ML&P even after issuance of this final order or any reconsideration thereof actively intervening if (and only if) necessary to protect the public interest.

The Commission realizes that from time to time each utility will be required to construct new or additional transmission and sub-station intertie lines through the service area of the other utility. Nothing in this order is intended to limit such activities, provided, that no new customers are connected to these facilities within the authorized service area of the other utility.

THE COMMISSION FURTHER FINDS AND CONCLUDES:

1. The public convenience and necessity

dictate that the matter of the common service area boundaries between CEA and ML&P be resolved at this time.

2. It is neither feasible to attempt nor possible to achieve the immediate elimination of existing duplication previously created by CEA and ML&P because of the existence of long term loan encumbrances and bond covenants relating to the properties.

3. ML&P and CEA should be permitted to continue to own and operate existing facilities, as appropriate, within the authorized service areas of the other utility for the remainder of the useful service life of the associated pole, wire, and cable lines.

4. CEA and ML&P should be permitted to acquire new customers and build new electric distribution facilities within the authorized service area of the other utility when dictated by *reasonableness* and economic factors, if a waiver from the other utility or approval of the Commission is obtained first and the utility to which the area is certificated is provided the written option to purchase these new facilities at depreciated cost at such time as the electric distribution plant to which these new facilities are to be connected are retired.

5. Elimination of paralleling facilities through the premature retirement of duplicating plant could only result in either increased rates for the customers or decreased margins for the utilities in the absence of any significant improvement in service.

6. ML&P and CEA should be permitted to renew fully depreciated facilities located within the authorized service area of the other utility, if the other utility is not in an immediate position to furnish the replacement plant, provided however, that approval of the Commission is obtained and a written option is issued to the permanently certificated utility to purchase the replacement plant at depreciated cost upon reasonable notice to do so.

7. Although the long term growth patterns desired by CEA and ML&P may be altered by the service area delineations, terms, and conditions set forth in this order, there will be no significant adverse financial or operational impact upon the existing operations of either utility or its customers.

8. The service area delineations, terms, and conditions set forth herein will result in the prevention of further undesirable competition between the utilities, the curtailment of unnecessary new paralleling of facilities, and the ultimate elimination of existing duplication of electric distribution plant on an orderly basis, while at the same time providing for the continued growth of each utility within its assigned service area.

ORDER

THE COMMISSION ORDERS:

1. The authorized electric public utility service areas of the City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc. are hereby amended to the extent necessary to reflect those service area assignments described on Pages 10 through 15 of this Order.

2. The City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc. are authorized to continue to own and operate existing electric distribution facilities, as appropriate, within the authorized service area of the other utility for the remainder of the useful service life of the associated pole, wire, and/or cable lines.

3. The City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc. are hereby permitted to acquire new customers and extend existing electric distribution facilities (as described by Orders No. 8 and 10 herein) within the authorized service area of the other utility, provided all the following criteria are met:

a. It would be more reasonable, based on economic and other factors that service be furnished by the utility which is not certificated;

b. Concurrence of the utility to which the area is permanently certificated or approval of the Commission is obtained first under the terms and conditions set forth in Orders No. 8 and 10 in this proceeding relating to "Waivers of Objection;"

c. The utility proposing to furnish the service issues to the utility holding permanent certification a written option to purchase the new facilities at depreciated cost at such time as

the electric distribution plant to which these facilities are to be connected are retired.

4. The City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc., subject to approval of the Commission and issuance of an option to the other utility to purchase replacement facilities at depreciated cost upon reasonable notice to do so, may renew fully depreciated distribution facilities located within the certificated area of the other utility if the other utility is not in an immediate position to furnish the necessary replacement plant.

5. Nothing in this order shall be construed to preclude the City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc. from constructing new or operating new and existing transmission and sub-station intertie lines within the authorized service area of the other utility, provided that service is not extended to new customers within that certificated area, except as may be authorized by additional authority granted under the terms and conditions set forth in Ordering Paragraph 3 above.

6. The City of Anchorage d/b/a Municipal Light and Power Department and Chugach Electric Association, Inc., either individually or through the official Negotiating Committee established by Order No. 9 in this proceeding, may submit for reconsideration within sixty (60) days of the date of this order recommendations for minor service area boundary adjustments which will improve the division between existing facilities along common streets, alleys, roads, or rights-of-way.

DATED AND EFFECTIVE at Anchorage, Alaska, this 27th day of September, 1973.

Re Telecommunications Services Along the New Anchorage-Fairbanks Highway

Respondents: Matanuska Telephone Association, Inc.; Glacier State Telephone Company; RCA Alaska Communications, Inc.

U-71-102
Order No. 6

Alaska Public Utilities Commission
October 2, 1973

ORDER terminating an investigation into the extent of telecommunications services along a new highway between Anchorage and Fairbanks, upon finding that a cooperative effort among various telephone carriers had produced adequate telecommunications facilities along that route.

[ABSTRACT OF DECISION. THE FULL CASE TEXT IS OMITTED.]

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1. TELEPHONES, § 2 — Construction and equipment — Highway facilities — Cooperative effort.

[ALASKA] The commission found that a cooperative effort between various telephone carriers for the construction of additional pay telephones and microwave facilities had produced a network of adequate telecommunications services along a new highway between Anchorage and Fairbanks.

SUBJECT OF ANNOTATION

Beginning on page 963

Advertising or promotional expenditures of public utility as part of operating expenses for ratemaking purposes

Application of HAWAIIAN ELECTRIC COMPANY, INC., for Approval of Rate Increases and Revised Rate Schedules

Supreme Court of Hawaii
May 7, 1975
535 P2d 1102, 83 ALR3d 951

SUMMARY OF DECISION

The Supreme Court of Hawaii, Menor, J., affirmed in part and reversed in part an order of the state public utilities commission granting to an electric company an increase in its rates to produce an 8.25 per cent rate of return on its rate base and allowing it $549,000 for promotional expenses. The court found that the commission did not abuse its discretion in denying intervention status and granting participation status to a user of the utility's services and to an organization that was a user of the utility's services as well as being a membership organization concerned with protecting the environment and that the utility subscriber and the organization had standing to obtain judicial review of the commission's decision and order granting the utility a rate increase. The court also held that there was substantial evidence to support the commission's decision and order, except for the allowance of promotional expenses. The court found that the commission's decision to permit the utility to include promotional expenditures by the electric company to attract new customers from a competing utility and expenses for programs designed to increase the use of electricity and purportedly to improve the company's load factor was an abuse of discretion.

HEADNOTES

Classified to ALR Digests

Public Utilities § 27(1) — public regulation and control — state public utilities commission

1. Intervention as a party in a proceeding before a state public utilities commission is not a matter of right but is a matter resting within the sound discretion of the commission subject to the essential qualification that this discretion is not to be arbitrarily and capriciously exercised.

Public Service Commissions § 20 — proceedings and remedies — parties

2. A state public utilities commission did not abuse its discretion in denying intervenor status but granting participation status in a rate hearing of a electric utility company to a user of the services of the utility company and to a membership organization concerned with protecting and preserving the environment.

Public Service Commissions § 20 — proceedings and remedies — parties

3. A user of the services of an electric utility company and members of an organization devoted to protecting the environment, who testified that they would be paying higher utility rates under a rate approved by the state public utilities commission, had been "aggrieved" by the action of the commission in approving the higher rate and thus had standing to obtain judicial review of the decision and order of the commission, where, in addition to being "aggrieved" by the commission's action, they had been involved as participants during the agency hearings on the proposed increase and where the commission's staff — the agency through which they had participated at the hearings — had failed to appeal the decision of the commission.

Public Utilities § 36 — rates and charges — fixing of rates by public utilities commission

4. Except for the allowance of promotional expenses, there was substantial evidence properly and thoroughly adduced to support the decision and order of a state public utilities commission granting an increase in the rates charged by an electric company to produce an 8.25 per cent rate of return on its rate base.

Public Utilities § 38 — rates and charges — fixing rates — promotional costs

5. The decision of the state public utilities commission to permit an electric utility company to include for rate making purposes expenditures in its budget designed to attract new customers and to take customers from a competing gas utility company, which decision was based on a previous grant of similar expenditures to the gas company, failed to take into consideration the interests of the rate payer and was thus an abuse of discretion.

[Annotated]

Public Utilities § 38 — rates and charges — fixing rates — promotional expenditures

6. An electric utility failed to carry its burden of showing the propriety of its request for promotional expenditures which were designed to increase the use of electricity and purportedly to improve the company's load factor and which consisted essentially of direct advertising and contributions to dealer and distributor advertising of certain electric appliances. The utility could not show the presumed profits attributable to the sales which these expenditures would partially stimulate by subsidizing the promotional activities of dealers whose commercial transactions formed no part of the utility's own business venture. The utility also failed to satisfactorily show how much of an improvement in its load factors these expenses could reasonably be said to have made.

[Annotated]

Public Service Commissions § 14 — jurisdiction and powers — rates and charges

7. In the face of dwindling oil supplies and spiraling costs, promotional practices by utility companies which are wasteful or

which only serve to fuel the energy crisis should be viewed by a regulatory agency with extreme caution.

Syllabus by the Court

1. Intervention as a party in proceedings before the Public Utility Commission is addressed to the sound discretion of the commission, subject only to the essential qualification that this discretion not be arbitrarily and capriciously exercised.

2. A ratepayer who is compelled to pay higher utility rates because of agency action is a "person aggrieved" under HRS § 91-14(a), Hawaii Administrative Procedure Act.

3. Appellants have standing to challenge the order of the PUC in this court, where they have been "aggrieved" by the order; were involved as "participants" during agency hearings; and the PUC staff (the agency through which they participated at the hearings) has failed to appeal.

4. By basing its decision to allow promotional expenditures for ratemaking purposes solely on its previous grant of similar expenditures to a competing utility, the PUC failed to give adequate consideration to the interests of the ratepayer and thus abused its discretion.

5. The burden is on the applicant to prove justification for a requested rate increase and the reasonableness of proposed expenditures.

BRIEFS OF COUNSEL

Edward C. Kemper, III, Honolulu (**Matoch, Kemper & Brown,** Honolulu, of counsel), for appellant:

The state commission had an affirmative duty to fully develop a sound record, and to effectuate a complete disclosure of the pertinent facts. Scenic Hudson Preservation Society v FPC, 354 F2d 608 (2nd Cir. 1965); National Broadcasting Co. v FCC, 132 F2d 545 (D.C. Cir. 1942); WAIT Radio v F.C.C., 418 F2d 1153 (D.C. Cir. 1969).

Public interest is most directly involved in proceedings with regard to a monopoly industry or service, where intervention by responsible public groups is more critically necessary. Office of Communication of the United Church of Christ v F.C.C., 359 F2d 994, 1004 (D.C. Cir. 1966).

Appellants' status before the state commission was ambiguous, informal, and unsustained by even the most rudimentary constituents of meaningful participation. National Broadcasting Company v F.C.C., 132 F2d 545 (D.C. Cir. 1942); Office of Communication of the United Church of Christ v F.C.C., 359 F2d 994, 1003 (D.C. Cir. 1966).

The state commission's decision to permit appellee electric company to include promotional expenditures in its budget for rate-making purposes was arbitrary, capricious, and beyond the weight of the probative evidence. Moreover, the decision was unreasonable as contrary to the best interest of the general public, the utilities, and their customers.

Any promotional expenditure intended to stimulate additional energy consumption is an expenditure carried to excess. For a public agency to gamble with the possibility of ecological catastrophe is surely thoughtless, unreasonable conduct.

Appellants were both de facto parties and aggrieved persons at the state commission hearings and therefore have standing to appeal to the state supreme court. East Diamond Head Ass'n v Zoning Bd. of Appeals, 52 Haw. 518, 524, 479 P2d 796 (1971); Office of Communication of the United Church of Christ v FCC, 359 F2d 994, 1005 (D.C. Cir. 1966); Scenic Hudson Preservation Society v FPC, 354 F2d 608, 616 (2d Cir. 1965); Citizens Committee for the Hudson Valley v Volpe, 425 F2d 97, 103 (2d Cir. 1970).

A person aggrieved must be specially, personally, and adversely affected. East Diamond Head Ass'n v Zoning Bd. of Appeals, 52 Haw. 518, 522, 479 P2d 796 (1971).

Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular envi-

ronmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. Sierra Club v Morton, 405 US 727, 734 (1972); United States v Students Challenging Regulatory Agency Procedures (SCRAP), 37 L.Ed.2d 254.

Appellee electric company's assertion that a sound record was developed is based on the assumption that all that was excluded was not a part of a sound record.

The state commission's decision allowing the appellee electric company to include any promotional expenses in the rate base was irrational.

Marshall M. Goodsill and **Gary S. Okabayashi**, Honolulu (**Goodsill, Anderson & Quinn**, Honolulu, of counsel), for appellee:

Notice of appeal shall specify the parties taking the appeal. Only a party and not any person may appeal a circuit court decision. East Diamond Head Ass'n v Zoning Bd. of Appeals, 52 Haw. 518, 479 P2d 796 (1971); City & County of Honolulu v Public Util. Comm'n, 53 Haw. 431, 495 P2d 1180, aff'd on rehearing, 53 Haw. 669, 500 P2d 745 (1972).

The Appellants have no standing to appeal because they are not aggrieved. The mere involvement of the appellants as participants in the administrative proceeding does not give them standing to appeal. Utility Users League v Federal Power Comm'n, 394 F2d 16 (7th Cir.), cert. denied, 393 US 953 (1968); Castleman v Civil Serv. Comm'n, 58 Ill. App. 2d 25, 206 NE2d 514 (1965); Southern Union Gas Co. v New Mexico Pub. Serv. Comm'n, 82 NM 405, 482 P2d 913 (1971); East Diamond Head Ass'n v Zoning Bd. of Appeals, 52 Haw. 518, 522, 479 P2d 796 (1971); City & County of Honolulu v Public Util. Comm'n, 53 Haw. 431, 495 P2d 1180, aff'd on rehearing, 53 Haw. 669, 500 P2d 745 (1972).

A ratepayer has no constitutional or vested right or property right in the rates of a public utility. Public Util. Comm'n v United States, 356 F2d 236 (9th Cir.), cert denied, 385 US 816 (1966); Lenihan v Tri-State Tel. & Tel. Co., 208 Minn. 172, 293 NW 601, cert. denied, 311 US 711 (1940); Ten Ten Lincoln Place v Consolidated Edison Co., 190 Misc. 174, 73 NYS2d 2 (1947); United Gas Pipe Line Co. v Louisiana Pub. Serv. Comm'n, 241 La. 687, 130 So. 2d 652 (1961).

Interest in the environment does not make appellant nonprofit corporation aggrieved. Sierra Club v Morton, 405 US 727 (1972); Ward v Ackroyd, 344 F Supp 1202, 1211 (Md. 1972).

The question of whether energy consumption should be moderated in order to conserve natural resources is a matter for the voters or the legislature to decide, not for the state commission. The electric company has an obligation to provide adequate electric power for all those who desire to use it, and the state commission has a duty to the public to see to it that this obligation is met.

Intervention usually rests in administrative discretion. City of San Antonio v Civil Aeronautics Bd., 374 F2d 326 (D.C. Cir. 1967); Scenic Hudson Preservation Conference v Federal Power Comm'n, 354 F2d 608, 617 (2d Cir. 1965), cert. denied, 384 US 941 (1966).

Participation as parties of persons only insubstantially as remotely interested or affected is not necessary for protection of either private right or public interest. Exclusion of such persons from participation as of right is necessary for efficient conduct of the state commission's functions and to keep the hearings within manageable bounds. National Broadcasting Co. v Federal Communications Comm'n, 132 F2d 545, 556 (D.C. Cir. 1942), aff'd, 319 US 239 (1943).

A decision of the state commission is the product of expert judgment which carries a presumption of validity. He who would upset a rate order of the state commission carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Re App'n of Hawaiian Elec. Co., 42 Haw. 233, 245 (1947); Federal Power Com'n v Hope Natural Gas Co., 320 US 591, 602 (1944); Permian Basin Area Rate Cases, 390 US 747, 800, 812 (1968).

Advertising and promotional activities

have long been recognized as proper activities of electric utilities. (West Ohio Gas Co. v Public Util Comm'n (No. 1), 294 US 63, 73 (1935); (New England Tel. & Tel Co. v Department of Pub. Util., Mass., 275 NE2d 493, 517 (1971).

Before **Richardson**, C. J., **Kobayashi, Ogata** and **Menor**, JJ., and **Kato**, Circuit Judge, in place of **Levinson**, recused.

OPINION OF THE COURT

Menor, Justice.

This is an appeal by Life of The Land, a nonprofit corporation whose objectives are the protection and preservation of the environment of the people of Hawaii, and Tony Hodges, an individual [hereinafter appellants] from Decision and Order No. 3008 of the Public Utilities Commission of the State of Hawaii [hereinafter PUC], dated August 17, 1972.

Hawaiian Electric Company, Inc. [hereinafter HECO], filed its initial application for a rate increase and revision of rate schedules on April 27, 1971. The rate increase requested was to produce a sales revenue increase of 9.7% or $7,898,000. HECO further requested a rate of return on its rate base of no less than 8.5%. The application was amended on June 25, 1971, to cure technical defects, and again on October 13, 1971, to request approval of an environmental control clause.

After due notice given by the PUC, public hearings on HECO's application were held in Honolulu, Kailua, and Waipahu, on November 9, 10, and 11, 1971, respectively. Extensive testimony on environmental matters was given by representatives of appellant Life of The Land at each of the hearings. Appellant Hodges gave testimony at the Kailua hearing.

On August 10, 1971, the appellants filed a petition to intervene in the PUC economic hearings, alleging, inter alia, that appellant Hodges was a Hawaii resident and a subscriber of HECO services, and that appellant Life of The Land was a user of HECO services, as well as being a membership organization concerned with protecting and preserving the environment of the people of Hawaii. The appellants conceded that their intervention would broaden the immediate issue and cause a delay in the proceedings but urged the commission to grant their petition because it was "imperative that the environmental aspects of electricity generation and consumption be presented to the public."

After a hearing on January 24, 1972, the PUC denied the appellants' petition for intervention, but granted them participation status and directed them to present any relevant material they might have through

the PUC staff, which was being represented by Deputy Attorney General Harry Kim.

Hearings on the merits of HECO's application began on January 24, 1972, and continued throughout certain periods of the months of January, March, April, and May, 1972. HECO offered the testimony of eight witnesses; the PUC staff offered the testimony of seven. HECO supplied the staff with all materials that were requested, and submitted a total of 89 exhibits, the staff submitting an additional 20.

The appellants were represented at practically all of the hearings; met with PUC staff members to discuss the case; submitted proposed cross-examination questions for HECO's witnesses to Mr. Kim, who used those he deemed pertinent to the inquiry at hand; and presented limited testimony on the environmental control clause. Further, the appellants were permitted to submit proposed findings of fact and conclusions of law.

The PUC rendered its decision on August 17, 1972. It granted HECO an increase in its rates to produce an 8.25% rate of return on its rate base. It also allowed HECO $549,000 for promotional expenses, contrary to the recommendations of both the appellants and the PUC staff. After the appellants' petition for a rehearing was denied by the PUC on December 7, 1972, they filed this present appeal. The PUC staff has not filed an appeal in this case.

I

The appellants sought party intervenor status pursuant to PUC Rule 12.02. Their petition was denied, and they were instead allowed a participatory role under PUC Rule 12.03, which permits involvement to the degree directed by the presiding officer.

[1, 2] Intervention as a party in a proceeding before the PUC is not a matter of right but is a matter resting within the sound discretion of the commission. HRS Section 269-13; cf. H.R.C.P. Rule 24. This is generally true in proceedings before administrative agencies. 1 F. Cooper, State Administrative Law, 325 (1965). See also City of San Antonio v. C.A.B., 126 U.S.App.D.C. 112, 374 F.2d 326 (1967); P.U.C. v. United States, 356 F.2d 236, 241 (9th Cir. 1966), cert. denied, 385 U.S. 816, 87 S.Ct. 35, 17 L.Ed.2d 54; Pittsburgh v. Pennsylvania P.U.C., 153 Pa.Super. 83, 33 A.2d 641 (1943). This rule, however, is always subject to the essential qualification that this discretion is not to be arbitrarily and capriciously exercised. In this case, we are satisfied that the commission did not abuse its discretion in denying the appellants' motion for intervention.

It is clear that had the appellants been accorded intervenor status, they would have had the right to appeal all interlocutory and final orders affecting them. Fishgold v. Sullivan Drydock & Repair Corp.,

328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946); Securities & Exch. Comm'n v. United States Realty & Improvement Co., 310 U.S. 434, 60 S.Ct. 1044, 84 L.Ed. 1293 (1940). But having been denied party intervenor status, although allowed participation in this case, are the appellants now properly before this court? In other words, have the appellants the requisite standing to obtain judicial review of the decision and order of the PUC granting HECO a rate increase?

The question of standing is essentially one that resolves itself into the elementary proposition that one who is injured by the act of another may legally challenge the propriety of the action. But the answer to the threshold question of "who is injured" for purposes of judicial review is not always so obvious.

The Hawaii Administrative Procedure Act as codified in Chapter 91 of the Hawaii Revised Statutes entitles "[a]ny person aggrieved" by the action of an administrative agency to judicial review. In East Diamond Head Association v. Zoning Board, 52 Haw. 518, 479 P.2d 796 (1971), this court considered the question of what constituted an aggrieved person under the Act for purposes of appeal. There, an unincorporated landowners' association sought to challenge a variance that had been granted by the Zoning Board of Appeals of the City and County of Honolulu. The variance would have allowed a parcel of land adjacent to property held by members of the association to be used as a location for movie production. Association spokesmen testified at a public hearing that the movie operations would interfere with their property enjoyment. Such operations, their evidence indicated, would cause a significant increase in the level of noise, traffic, and congestion, as well as promote inconvenience generally, and impair the aesthetic character of the surrounding neighborhood. We reversed the trial court's holding that the association lacked the standing required to secure review since they had failed to intervene in the board's proceedings. Adopting the construction that a "person aggrieved" is one whose personal or property right has been injuriously or adversely affected by an agency's action, we held, inter alia, that the action of the board in granting the zoning variance "immediately and directly affect[ed] each homeowner," and thus, that the association had established its status as a person aggrieved. See also Dalton v. City and County, 51 Haw. 400, 403, 462 P.2d 199, 202 (1969) (standing found where plaintiffs resided "in very close proximity" to property alleged to have been improperly rezoned.)

In addition to the requirement that an aggrieved party be specially, personally and adversely affected for standing to lie, this court has added a further gloss to the standing issue as regards administrative proceedings. In City and County v. P.U.C., 53 Haw. 431, 495 P.2d 1180 (1972) we held that the person aggrieved must have been *involved* in the contested case. It is not enough that a person has been

"aggrieved" by agency action. He must also have contested the issue before the agency. However, this adversary participation need not be confined to formal proceedings before the agency. In East Diamond Head Association we held that a public hearing, conducted pursuant to published notice, was a "contested case" within the meaning of HRS § 91-1.

The appellants are users of electrical energy, and two members of appellant Life of The Land, in opposing the rate increase, testified that they would be paying the higher utility rates. A ratepayer who is compelled to pay higher utility rates by agency action is a person specially, personally and adversely affected. The fact that he shares this additional burden with all other users does not disentitle him from challenging the results. Cf. United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).[1] But he must pursue his remedies through established and legitimate channels.

In proceedings before the PUC, the Director of Regulatory Agencies is mandated by law to represent and protect the interests of consumers throughout the State. HRS § 26-9 (Supp.1974). He is an indispensable party to the proceedings, and in that capacity he acts through the technical staff and other personnel of the commission, aided by a specially designated deputy attorney general. In re Hawaiian Telephone Co., 54 Haw. 663, 513 P.2d 1376 (1973).

[3] The PUC staff, however, failed to appeal the decision of the PUC with regard to the rate increase. The practical effect of denying the appellants standing here would be to silence the voice of all those who would speak in the public interest, a duty that normally resides with the PUC staff. We hold, therefore, that where the appellants have been "aggrieved" by the action of the PUC, and where they were involved as "participants" during the agency hearings, and where the PUC staff (the agency through which they participated at the hearings) has failed to appeal the decision of the PUC, the appellants may challenge the order of the PUC in this court. We shall thus consider their appeal.

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1. We note that the trend in American jurisprudence as evidenced by recent decisions of this court and courts across the land, has been to broaden the class of persons that have standing to challenge agency action. The United States Supreme Court has clearly indicated that standing cannot be confined only to those who allege economic harm, nor can it be denied to others simply because many persons share the same purported injury:

"Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." United States v. SCRAP, 412 U.S. at 686, 93 S.Ct. at 2415 (quoting Sierra Club v. Morton, 405 U.S. at 734, 92 S.Ct. 1361, 31 L.Ed.2d 636).

II

We turn now to the question of whether the decision of the PUC should be affirmed, reversed, modified, or remanded for further proceedings consistent with our opinion.[2]

[4] We are satisfied from an exhaustive review of the record that, except for the allowance of promotional expenses, there is substantial evidence properly and thoroughly adduced to support the commission's decision and order.

The appellants contend that the PUC's decision to permit HECO to include promotional expenditures in its budget for ratemaking purposes was arbitrary and unreasonable, and contrary to the best interests of the general public. The PUC staff found itself in complete agreement with the appellants on this issue, and thus recommended the allowance of sales expenses in the sum of $713,100 but opposed HECO's request for promotional expenditures. The commission, however, approved the total sum of $1,262,100, including $549,000 for promotional activities. HECO's original request was broken down as follows:

Programs due to competitive fuels:		
Home Builder Program	$148,500	
Apartment Builder Program	105,000	
Cooperative Advertising	102,500	$356,000
Other programs to increase kilowatt-hours per kilowatt usage:		
Domestic Appliance Program	$123,000	
Commercial Cooking Program	17,400	
Commercial Water Heating	17,300	
Commercial Air Conditioning	9,500	
Medallion Program	700	
Signs Program	1,800	
100-Amp. Program	1,800	
Lighting and Wiring Program	4,000	
Special (Sales Program)	13,200	
AEBA Program	5,000	$193,900
Total		$549,900

2. HRS § 91-14(g) provides as follows:

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or charac-

The programs due to competitive fuels are designed to attract new customers and, where possible, capture customers and usage from the Honolulu Gas Company [hereinafter GASCO], while defending against similar efforts on the part of GASCO, the electric company's sole competitor in this area. They consist mainly of allowances or payments to owners and developers who build all-electric homes and apartments and advertise them for sale as such.

There is decidedly a serious question as to the legality of these rebates or allowances,[3] but we do not deem it advisable to decide that particular issue, inasmuch as it was not briefed and argued before this court. Moreover, we need not reach that issue, for we are satisfied that in the context of our times, these promotional expenditures on the part of regulated public service companies are wasteful and unreasonable,[4] and their allowance by the commission was an abuse of its discretion.

The disturbing aspect of the PUC decision to allow expenditures for these programs is the rationale behind it. GASCO had been granted an allowance for similar promotional expenditures earlier. See Decision and Order No. 2621 (PUC of Hawaii, Aug. 31, 1970). GASCO, in making its request, had argued that the expenses were necessary to attract customers away from Hawaiian Electric. HECO, in its present application for a rate increase, pointed to the GASCO allowance as justification for its own request. It seems apparent from the record that the PUC's decision was based on this particular argument of HECO.

The PUC has consistently failed to meet squarely the issue of the reasonableness of competitive advertising expenditures. In late 1963, the PUC ordered the opening of Docket No. 1581 for the avowed purpose of inquiring into the promotional practices of the utilities, pursuant to the authority vested in it by Section 104-15 of the Revised

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terized by abuse of discretion or clearly unwarranted exercise of discretion.

3. In its Opinion No. 65-18, dated May 11, 1965, the Attorney General ruled these promotional practices to be proscribed rebates under Section 104-15 of the Revised Laws of Hawaii 1955, as amended (now HRS § 269-16 (Supp. 1974)). In a subsequent legal memorandum, dated November 5, 1969, the Attorney General advised the PUC that it, ultimately, must make its own determination of the reasonableness or unreasonableness of these promotional practices.

4. At the hearings before the PUC, HECO very candidly acknowledged that if these promotional activities were forbidden to both utilities, their respective shares of the market would remain the same. In his testimony before the PUC, Mr. Carl H. Williams stated:

"Q And if neither offered these programs, promotional allowances, each to stand on its own merit of gas or electricity, then where would you say would be your share of the market?

A My estimate is that it would be the same.

Q You would still gather that segment or that portion of the market which would normally want to use electricity and that portion of the market which wants gas would get gas without the promotional allowances?

A I think we would get similar proportion to what we're getting now, yes. . . ."

ANNOTATION

ADVERTISING OR PROMOTIONAL EXPENDITURES OF PUBLIC UTILITY AS PART OF OPERATING EXPENSES FOR RATEMAKING PURPOSES

by

Jane Massey Draper, B.C.L.

I. PRELIMINARY MATTERS

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TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

64 Am Jur 2d, Public Utilities § 173

20 Am Jur Pl & Pr Forms (Rev Ed), Public Utilities §§ 31–104

15 Am Jur Legal Forms 2d, Public Utilities §§ 215.41 et seq.

15 USCS, Natural Gas §§ 717c, 717d; 16 USCS, Electric Utilities §§ 824d, 824e

US L Ed Digest, Carriers § 228; Public Service Commissions § 27; Public Utilities § 26

ALR Digests, Carriers, §§ 708–711; Public Service Commission §§ 14, 15, 17; Public Utilities § 38; Telephones §§ 16–19

L Ed Index to Annos, Public Utilities

ALR Quick Index, Electricity and Electric Companies; Public Utilities; Reasonableness; Telecommunications

Federal Quick Index, Federal Power Commission; Public Utilities; Rates and Charges

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Pa: § 2[b]
RI: § 2[a]
Tex: §§ 4[b], 9[b]
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Vt: §§ 3, 4[b], 5
Va: § 7
Wash: § 2[a, b]
FPC: § 2[b]

I. Preliminary matters

§ 1. Introduction

[a] Scope

Ordinarily, the determination of what business expenses are to be incurred by a public utility in its operations is a matter left within the discretion of the utility's management. Whether certain types of expenditures can then be classified as "operating expenses" and passed along to the utility's ratepayers is a question with which utility regulatory agencies are frequently confronted. In many instances, either the utility or the ratepaying public disputes the agency's response to the question, and one of the areas of contention is whether, for ratemaking purposes, expenses incurred by a public utility for promotion or advertising can be included under "operating costs." This annotation collects and analyzes the cases in which the courts, in reviewing agency determinations, have discussed or determined the propriety, for ratemaking purposes, of including the utility's advertising[1] or promotional[2] expenditures as operating expenses or cost of service.[3]

1. For present purposes, the term "advertising" is used broadly and encompasses all forms of advertising by a public utility, including, for example, informational (see § 6, infra) and institutional (see § 7, infra) advertising, as well as advertising supporting rate increases (see § 8, infra).

2. For present purposes, the term "promotion" includes promotional advertising as well as other forms of promotion.

3. Although this annotation is con-

Relevant statutes are considered herein only insofar as they are reflected by reported cases within the scope of this annotation, and this annotation does not purport to reflect the current statutory law of any jurisdiction. The reader is cautioned to consult the most recent enactments of the particular jurisdiction in which he or she may be interested.

[b] Related matters

Validity of "fuel adjustment" or similar clauses authorizing electric utility to pass on increased cost of fuel to its customers. 83 ALR3d 933.

Charitable contributions by public utility as part of operating expense. 59 ALR3d 941.

What constitutes false, misleading, or deceptive advertising or promotional practices subject to action by Federal Trade Commission. 65 ALR2d 225.

Adequacy, as regards right to injunction, of other remedy for review of order fixing public utility rates. 8 ALR2d 839.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge. 1 ALR2d 160.

Validity, construction, and application of Johnson Act (28 USCS § 1342), prohibiting interference by Federal District Courts with state orders affecting rates chargeable by public utilities. 28 ALR Fed 422.

§ 2. Background, summary, and comment

[a] Generally

A public service or public utility commission is established to oversee business operations of the public utilities coming under its jurisdiction. One of the commission's primary jobs is to determine what rate a utility may fix for its services, to the end that the ratepayers will be charged only a fair and reasonable rate for the utility's product, and, on the other hand, that the utility's stockholders will receive a fair and reasonable return on their investment. One of the more troublesome areas confronting a commission is the determination of which utility operations really benefit the ratepayers and can thus be charged as legitimate business expenses[4] and figured in the rates to be charged for the utility's product or service, and which insure solely or in major part to the benefit of the stockholders. In the large catalog of operating expenses which are included in the computations for ratemaking purposes, advertising expenditures ordinarily come within the general rule that corporate management should be permitted to control the amount a utility spends,[5] provided always, of course, that the advertising engaged in is of benefit to the ratepayer,[6] and that the amount expended by the utility for advertising is within reason.[7]

Courts have dealt with advertising

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cerned with whether advertising or promotional expenditures are allowable, for ratemaking purposes, as part of a public utility's operating expenses or cost of service, cases dealing with whether certain advertising or promotional practices are legal are not within the scope of this annotation. For cases involving the question of what constitutes false, misleading or deceptive advertising or promotional practices subject to action by the Federal Trade Commission, see the annotation at 65 ALR2d 225.

4. For a general discussion of a public utility's current and operating expenses, see 64 Am Jur 2d, Public Utilities § 173.

5. § 3, infra.

6. § 4[a], infra.

7. § 4[b], infra.

expenditures not only as a general category of operating expenses,[8] but also in terms of the type of advertising involved. Thus, expenditures for purely informational advertising—including methods of conservation—have been held properly allowable as utility operating expenses,[9] as have institutional advertising expenditures,[10] but expenses incurred by a public utility for advertisements in a campaign to increase the rates to be charged by the utility, or to explain why the rate increase is needed, have not been allowed as operating costs for ratemaking purposes.[11]

Expenditures for promotional purposes—both advertising and other forms of promotion—have presented entirely different questions, depending on the type of promotion undertaken and, more recently, upon the necessity for concern about conservation of resources. Thus, in some instances, expenditures for promotional advertisements and practices have been allowed as legitimate operating expenses,[12] but in other cases, such outlays of utility moneys have been disallowed, or reduced in amount, as not constituting the type of expense for which the utility's customers should be required to pay.[13]

The task set before public utility commissions is one of regulation, and not one of management. Many of the requests for judicial review of commission decisions have been based on contentions that the commission has usurped the prerogative of management in deciding how the utility's business should be run. For example, State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, §§ 7, 9[a], infra, was an appeal from a commission's order prohibiting promotional and institutional advertising by utilities,[14] wherein the court ruled that such an actual prohibition was an invalid invasion of the discretion reserved to corporate management of the utilities.

It would seem that management is ordinarily permitted to determine the amounts to be expended by a utility for informational or educational programs or advertising and subsequently included as operating expenses for ratemaking purposes. In Re Iroquois Gas Corp. (1971, NY) 91 PUR3d 511, the commission even spoke of its requiring the gas companies to maintain such programs. In what appears to be a singular action, the commission in Re D. C. Transit System, Inc. (1970, Wash) 85 PUR3d 1, mandated an intensified informational advertising program to maintain and promote the company's ridership, and set forth the procedures, including the amount to be put in escrow for such a program, to be followed by the company in implementing the commission's decision.

Within the area of informational advertising is a relatively new field of conservational advertising, in which the energy utilities are being encour-

8. § 5, infra.

9. § 6, infra.

10. § 7, infra.

11. § 8, infra.

12. § 9[a], infra.

13. § 9[b], infra.

14. A state statute prohibiting such orders, to the effect that no state agency, board, or commission might limit or restrict the right of any public utility to engage in or promote area development or to advertise, was upheld as constitutional, and not antithetical to the "common welfare clauses" of the United States and state constitutions, in Ohio Public Interest Action Group, Inc. v Public Utilities Com. (1975) 43 Ohio St 2d 175, 72 Ohio Ops 2d 98, 331 NE2d 730.

aged to participate. For example, in Washington Utilities & Transp. Com. v Pacific Power & Light Co. (1974, Wash) 7 PUR4th 470, the commission stated that it was appropriate to order that no allowance would attach to expenditures designed to encourage increased use of electricity for any purpose and that allowance would be made only for expenditures directly related to the conservation of electric energy, or directing use thereof to off-peak periods. And in Re Michigan Consolidated Gas Co. (1973, Mich) 1 PUR4th 229, the commission approved the initiation by a gas company of a conservation program aimed at convincing its customers to insulate their homes, and determined that its costs, including those incurred in the employment of advertising in the media, direct mailings to customers, use of the company's outdoor signs and message boards carried by its vehicles, and the preparation and distribution of an informational booklet, could be reflected in the rates prescribed for the company in future rate cases. But it is to be noted that even in this area of advertising, which is stressed as being of great importance in our present circumstances, at least one commission still gave "reasonableness" priority, stating, in Re Portland General Electric Co. (1974, Or) 8 PUR4th 393, that an individual utility should spend a reasonable amount for conservation advertising, but the amount thereof must be considered in view of the fact that much conservation advertising is now being done by governmental agencies, on a state and federal level, and that the news media have provided much in the way of conservation information to the general public.

The issue of the allowance, for ratemaking purposes, of institutional advertising expenses as operating costs, was fully discussed in Re Consolidated Edison Co. (1961) 41 PUR3d 305, where the commission allowed institutional advertising expenses over the contention that such advertising was a process of selling the organization and ownership of the company to its environment, and that therefore the stockholders, not the ratepayers should bear the burden of this conceivably necessary and proper expense. The commission, noting that what was of concern were advertisements which were obviously designed to project a favorable image of the company to its customers, its existing stockholders, and potential investors, went on to explain that to the extent that such advertising fostered sound consumer relations or encouraged people to invest in the company, it seemed clear that the consumers, as well as the stockholders, were ultimately benefited through the lessening of the expense of doing business. The argument had been made that institutional advertising had previously been largely considered as an improper charge to operating expenses for ratemaking purposes, but the commission pointed out that the trend in modern regulatory decisions was to allow such charges as proper for ratemaking purposes. For example, the commission stated, the Committee on Accounts and Statistics of the National Association of Railroad and Utility Commissioners issued its Accounting Interpretation E-110, wherein it stated that nonpromotional advertising of the kind referred to as institutional advertising—the purpose of which is to foster good will—should be charged to Operating Expense Account 787.2—Advertising. In another instance, the commission continued, the Federal Power Commission revised its Uniform System of Accounts, effective January 1, 1961,

to provide that institutional advertising or good will advertising charges should be included in Miscellaneous General Expenses, and above-the-line account, wherein there is recorded cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere. Although a witness had observed that the Federal Power Commission had issued accounting regulations only and, therefore, it did not necessarily follow that the same treatment would be adopted for ratemaking purposes, the commission reasoned that it did not seem unreasonable to conclude that the commission would go to the trouble of amending its system of accounts to expressly include institutional advertising as an operating expense if it had any reservation about the propriety of including such expense for ratemaking purposes, since it was obvious that if any doubt existed, the commission would have directed that such expense be charged below the line. The commission determined that in view of the fact that management should be permitted to control advertising expenditures so long as they are within the limits of reason, and so long as these expenses do not exceed what is reasonably necessary and proper in the particular case—and there had been no contention that the expenses herein were unreasonable or unnecessary—there was no ground to distinguish such costs from other necessary and proper expenses.

An almost unanimous front is presented in the disallowance as operating costs of advertising expenses incurred in connection with attempts to gain support for rate increases. The statement by the court in Ft. Smith v Southwestern Bell Tel. Co., (1952) 220 Ark 70, 247 SW2d 474, § 9[a], infra, to the effect that a quasi-judicial board had been created by the state to act for the public and for the utilities, and its determinations were not to be influenced by appeals directed to other sources, and that the utility must use all its receipts as though they were a public trust, and receipts must not be dissipated in an effort to get further increases from the public, seems an accurate summary of judicial and quasi-judicial attitudes on utilities' advertising campaigns in relation to ratemaking cases.

Commissions have almost uniformly disallowed promotional expenses as operating costs for ratemaking purposes where the utility practicing such promotional methods has as much demand on its capacity for service as it can handle. See, for example, Public Utilities Com. v New England Tel. & Tel. Co. (1949, Me) 80 PURNS 397, in which the commission disallowed a portion of the amount claimed as advertising expenses by the company, rejecting the necessity of the company's stimulating, by advertisements published at ratepayers' expense, an already overtaxing demand for telephone service which had in large part produced the financial difficulty of which the company was complaining. And see also Re Narragansett Electric Co. (1972, RI) 93 PUR3d 417, in which the commission determined that a promotional program was entirely unnecessary in view of the fact that the company had difficulty in handling the peak load under the present situation.

The allowance of advertising or promotional expenses of public utilities as part of operating expenses for ratemaking purposes is a question which will probably confront commissions, and courts, for years to come on a case-by-case basis. Although it would be perhaps a bit simplistic to