

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9354 HOUSE LABOR & COMMERCE

Alaska State House of Representatives
Twentieth Legislature
Second Session

RCS# 1066
Item 12

04-27-98
12:15:00

CSHCR 34 (L&C) am
Second Reading
Final Passage

Yeas: 34 Austerman, Barnes, Berkowitz, Bunde,
Cowdery, Croft, Davies, Davis, Dyson,
Elton, Foster, Green, Grussendorf, Hodgins,
Hudson, Ivan, James, Joule, Kemplen,
Kohring, Kookesh, Kott, Kubina, Martin,
Masek, Nicholia, Ogan, Phillips, Porter,
Rokeberg, Ryan, Sanders, Therriault,
Williams

Nays: 0

Excused: 4 Brice, Hanley, Moses, Vezey

Absent: 2 Kelly, Mulder

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

**A Resolution of the Alaska Conference of Mayors and
the Alaska Municipal League Board of Directors**

RESOLUTION 98-04

**URGING THE GOVERNOR AND LEGISLATURE TO REACH AN
ACCEPTABLE COMPROMISE ON EDUCATION FUNDING THAT
INCREASES OR PRESERVES EDUCATIONAL OPPORTUNITIES FOR
ALL STUDENTS**

WHEREAS, the people of Alaska, specifically the students, need the **Governor and Legislature to achieve an acceptable plan for school funding; and**

WHEREAS, the AML/ACoM conducted a statewide education funding survey that received responses by municipal leaders representing over 80% of the population. **It gives clear guidance from the Alaskans who work with students and the public every day on the implementation and funding of education.** (This survey was distributed to all legislators and the administration); and

WHEREAS, over the past ten years, the state has not increased state per student funding to offset increased operating costs. While the state has increased funding for increased number of students and some special education programs, **the impact on local taxpayers has been an average doubling of local property taxes for schools; and**

WHEREAS, SB 36 actually proposes a significant decrease in per student (ADM) funding for some school districts; and

WHEREAS, this year, due to increases in Assessed Property Tax Values, the state mandated local taxpayer contribution to the state for education increased by \$9 million. Despite this windfall to the state paid by local taxpayers, local taxpayers will see no benefit from their \$9 million increased contribution unless the state increases the per student state allocation for schools; and

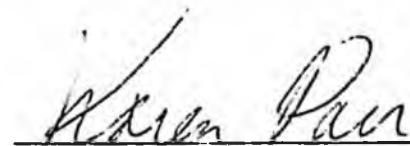
WHEREAS, the McDowell "Alaska School Operating Cost Study" recommends "a transition period to insure that no district receives less than its current allocation." SB 36 provides only a two-year transition in most districts and no transition for some; and

NOW, THEREFORE BE IT RESOLVED, any changes in the education funding formula should:

1. Add \$18 million of funding to recognize the lack of inflation adjustment for the last eight years, for an estimated total appropriation for education of \$678 million.

2. Include an analysis of educational adequacy for all districts, with no district receiving less than their FY 98 funding for the first two years. Any funding adjustments resulting from this analysis should be accomplished over a five-year transition period.
3. Implement an annual funding adjustment process to offset necessary increases in the cost of educating children.
4. Accept the 20% average distribution for categorical funding proposed in SB 36 (while continuing to fund intensive needs separately) but add a waiver process to the state Board of Education for additional district funding based on statewide standards and documentation of need.
5. Include provisions that establish measurable goals and standards to ensure education excellence.
6. Encourage the Legislature, which is mandated by the Alaska Constitution to act as the Assembly for the Unorganized Borough, to consider the question of equitable taxation for schools in the Unorganized areas of the state. Designated as a borough by the Constitution, the Unorganized Borough should generally not be treated differently than any other borough on the question of taxation for schools.
7. Add a factor which equalizes school funding based upon local assessed valuation per pupil.

PASSED and APPROVED on April 1, 1998, Juneau, Alaska.



Karen Parr, President
Alaska Municipal League



Mayor John Gonzales, President
Alaska Conference of Mayors

Alaska State House of Representatives
Twentieth Legislature
Second Session

RCS# 1066
Item 12

04-27-98
12:15:00

CSHCR 34(L&C) am
Second Reading
Final Passage

Yeas: 34 Austerman, Barnes, Berkowitz, Bunde,
Cowdery, Croft, Davies, Davis, Dyson,
Elton, Foster, Green, Grussendorf, Hodgins,
Hudson, Ivan, James, Joule, Kemplen,
Kohring, Kookesh, Kott, Kubina, Martin,
Masek, Nicholia, Ogan, Phillips, Porter,
Rokeberg, Ryan, Sanders, Therriault,
Williams

Nays: 0

Excused: 4 Brice, Hanley, Moses, Vezey

Absent: 2 Kelly, Mulder

✓
AMENDMENT # 1

OFFERED IN THE HOUSE

BY DAVIES

TO: CS HCR 34 (L&C)

Page 2, line 6, following presiding:

Delete: "officers may appoint"

Insert: "officer of each body shall apportion"



ALASKA VILLAGE ELECTRIC COOPERATIVE, INC.

April 7, 1998

The Honorable Norm Rokeberg
Chairman, House Labor and Commerce Committee
Alaska State Legislature
Juneau, Alaska

Subject: HCR-34, Electric Utility Restructuring

Representative Rokeberg,

We support HCR-34 which takes a deliberative approach to the many issues involved with restructuring of the electric utility industry in Alaska. It is imperative that the legislature carefully consider the implications and ramifications on all consumers by restructuring the electric utility industry. This letter is to follow-up and confirm my verbal testimony given yesterday.

In our villages central station electric service is made feasible only by all consumers in the village patronizing the village's electric utility. Such a tiny isolated utility market cannot sustain retail competition. An isolated village electric utility system simply cannot accommodate competitors who want to cherry pick the profitable large customers yet refuse to pay for the utility's stranded investment nor are they willing to assume the legal obligation to serve that a utility bears. Such competitors can easily destroy the feasibility of a village utility system if allowed.

For such reasons, the rural areas local telephone service was exempted from the deregulation of the telephone industry. When you examine the facts you will find, I am confident, that the rural exemption from deregulation argument is even more compelling for electric service than it was for telephone service. One of those compelling arguments is ensuring that all Alaskans have access to reliable and affordable electric service in a deregulated competitive market. In the telephone industry a universal service fund was created to subsidize high cost areas... such as our villages. A similar universal service fund for electric service should be considered as a part of the restructuring of Alaska's electric industry.

Sincerely,

Charles Y. Walls
President & CEO

cc: Eric Yould, ARECA

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE MEMBERS

REPRESENTATIVE NORMAN ROKEBERG, CHAIRMAN
REPRESENTATIVE JOHN COWDERY, VICE CHAIRMAN
REPRESENTATIVE BILL HUDSON
REPRESENTATIVE JOE RYAN
REPRESENTATIVE JERRY SANDERS
REPRESENTATIVE TOM BRICE
REPRESENTATIVE GENE KUBINA
COMMITTEE AIDE, SHIRLEY ARMSTRONG
COMMITTEE SECRETARY, CATHY WOOD
COMMITTEE HEARING ROOM 17 STATE CAPITOL



INTERIM:
716 WEST 4TH AVENUE, SUITE 640
ANCHORAGE, AK 99501
PHONE: (907) 258-8191
FAX: (907) 258-2916

SESSION:
STATE CAPITOL ROOM 24
JUNEAU, AK 99801-1182
PHONE: (907) 465-4954
FAX: (907) 465-2040

Labor and Commerce Committee

MEMORANDUM

TO: Representative John Cowdery
Representative Bill Hudson
Representative Joe Ryan
Representative Jerry Sanders
Representative Tom Brice
Representative Gene Kubina

FROM: Representative Norman Rokeberg, Chairman
House Labor & Commerce Committee

DATE: 7/16/98

SUBJECT: Additional Backup For Committee Bill Packet - HCR 34

Attached is information that has come to the House Labor and Commerce Committee since our committee hearing.

Attachments

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

April 9, 1998

SUBJECT: Joint Committee on Electric Utility Restructuring (CSHCR 34(L&C))

TO: Representative Norman Rokeberg, Chair
House Labor and Commerce Committee
Attn: Shirley Armstrong

FROM: Tamara Brandt Cook
Director

TBC

You have asked whether a joint committee may include members of the public. A joint committee is established under Uniform Rule 21 and may include only members who are legislators because a joint committee has the power to take actions that are legislative in nature and not purely advisory to the legislature. For example, under Uniform Rule 37 a joint committee may introduce a bill.

The legislature has established advisory committees that include members of the public. This type of committee is usually referred to as a task force or advisory committee. If the legislature establishes a committee with public members on it and elects to call it a joint committee, the committee would, nonetheless, not be a "joint committee" as that term is used in the Uniform Rules.

TBC:jdr
98-238.jdr

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HCR 34

Page 1, Line 17:

Add the following:

“WHEREAS, the legislature wishes to enhance its knowledge of the development of retail competition in the electric industry, and

WHEREAS, the legislature’s understanding and review of this issue will greatly be enhanced if the Alaska Public Utilities Commission quickly decides the matters currently pending before it which pertain to retail competition in the electric industry,”

Adopted
CSHCR 34
(L&C)

0-LS1639AB
Cook
4/6/98

CS FOR HOUSE CONCURRENT RESOLUTION NO. 34(L&C)

Boarded

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A RESOLUTION

1 Establishing a Joint Committee on Electric Utility Restructuring.

2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 WHEREAS electricity is among modern society's most basic requirements and
4 commodities; and

5 WHEREAS even other forms of infrastructure, such as water and waste water systems,
6 are largely dependent on electricity; and

7 WHEREAS the provision of adequate, reliable, and reasonably priced electrical energy
8 is essential to the daily functions, safety, and economic well-being of Alaskans, their local
9 communities, and the state; and

10 WHEREAS fundamental restructuring of the electric utility industry is now under
11 deliberation by the Congress and other states; and

12 WHEREAS electric utility restructuring is a highly complex issue, carrying with it
13 profound implications for all classes of electrical consumers; and

14 WHEREAS the implications and ramifications of such restructuring deserve detailed,
15 careful, and informed decision making by the Alaska State Legislature;

16 BE IT RESOLVED by the Alaska State Legislature that a Joint Committee on Electric
17 Utility Restructuring is established; and be it

1 **FURTHER RESOLVED** that the Speaker of the House of Representatives and the
 2 President of the Senate shall determine an equal number of members of the House of
 3 Representatives and of the Senate to serve on the joint committee, and that the Speaker of the
 4 House of Representatives shall appoint the representatives to the committee and that the
 5 President of the Senate shall appoint the senators to the committee, and be it

6 **FURTHER RESOLVED** that the joint committee, may meet during and after the
 7 Second Session of the Twentieth Alaska State Legislature and is terminated on the convening
 8 of the ~~First~~ ^{Second} Session of the Twenty-First Alaska State Legislature; and be it

9 **FURTHER RESOLVED** that the joint committee shall provide to the legislature
 10 written recommendations on whether and how to implement electric utility restructuring in
 11 Alaska

under what if any circumstances it is appropriate - Amendment No. 3
Bice Amendment - 3

Amendment No. 1 will draw

Chairman Robele No
 Cowley No
 Sander Yes
 Bice Yes
 Pynn Absent
 Hudson Absent
 Waterfalls -

Cowley
 Robele No
 Cowley No
 Sander No
 Bice Yes

*1.
Rule 19*

*Amend No 3
in accordance with
in accordance with
AREAC shall appoint an equal
of members*

*passed
fairly
Bice #1
Cowley
Object
Pynn
Robele
Agrees
w/ Cowley*

*Bice
Amendment No. 3
Robele
Object*

technologies; a Renewable Portfolio Standard, to require that at least 5.5 percent of electricity sales be generated from non-hydroelectric renewable sources, subject to a cost cap; trading authority for nitrogen oxide emissions to facilitate cost-effective, market driven pollution reductions; and consumer information requirements to ensure that consumers can choose to purchase power from cleaner sources. We estimate that the plan will reduce greenhouse gas emissions by an estimated 25 million to 40 million metric tons in 2010. The Administration will monitor emissions by coordinating data received from utilities by the various agencies and such data will be provided in annual reports to the President, and will work with the Congress to ensure that any unanticipated consequences are addressed quickly and in keeping with the Administration's climate change policies.

3. Stranded Cost Principle. We support the principle that utilities should be able to recover prudently incurred, legitimate, and verifiable retail stranded costs arising from the transition to competition if these costs cannot be mitigated. States would continue to determine stranded cost recovery under State law.

4. Consumer Information. Uniform and easy to understand labeling similar to the Food and Drug Administration's nutritional labeling system will ease customer choice and facilitate the sale of environmentally responsible green power. The Department of Energy would develop a system for requiring all electricity sellers to disclose the price and environmental attributes of their power supply.

5. Strengthen Electric System Reliability. Reliability and competition can -- and must -- go hand in hand. To ensure reliability in the new market we propose to build upon the industry's tradition of self-regulation by requiring key market participants to join an organization which would establish reliability standards and enforce those standards subject to the oversight of the Federal Energy Regulatory Commission.

6. Cost Savings for Consumers and the Government. The typical family of four is expected to save over \$220 per year from this plan: \$104 per year directly -- in lower electricity bills -- and another \$128 per year indirectly -- in lower costs for goods and services that use electricity. Federal, State and local governments will also save close to \$2 billion per year.

**KETCHIKAN PUBLIC UTILITIES**

2930 TONGASS AVENUE

KETCHIKAN, ALASKA 99901

TELEPHONE 907-225-1000
FAX 907-225-1000MUNICIPALLY OWNED
ELECTRIC TELEPHONE WATER

April 6, 1998

The Honorable Norm Rokeberg
Chairman, Labor & Commerce Committee
Alaska State Legislature
Juneau, AK 99901

Subject: HCR-34: Electric Utility Restructuring

Dear Representative Rokeberg:

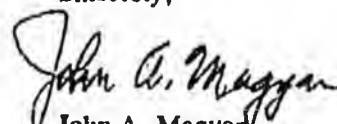
Ketchikan Public Utilities supports House Concurrent Resolution No. 34 establishing a joint committee on electric utility restructuring in Alaska.

The United States Congress is considering the establishment of mandatory electric utility restructuring that will apply to electric utilities in Alaska in the same manner that it will apply to utilities in the lower 48. We recognize that electric consumers in Alaska have the same needs for low cost electric energy as do consumers in the lower 48. And we recognize that the objective of restructuring is to provide such lower costs. However, the electric industry in Alaska is vastly different from the electric industry in the lower 48 and mandatory regulations that are good for consumers in the lower 48 may not be good for consumers in Alaska. As an example of that difference I point out that except for the rail belt area in Alaska there is little, if any, interconnection of utilities in Alaska. Where the lower 48 has a grid that connects nearly all utilities and their customers, Alaska has, essentially, no grid at all. Where electric distribution utilities in the lower 48 buy their electric energy at substations in their service areas and have no responsibility for generation and transmission, nearly all non-rail belt Alaskan utilities have complete responsibility for generation and transmission as well distribution.

Senator Murkowski, Chairman of the Senate Energy Committee which has jurisdiction over the national legislation on restructuring, has advised the Alaska utility industry to seek state legislation that will define the parameters of deregulation (restructuring) for the State of Alaska so that national legislation could take into account that very unique differences exist between the electric utility industry in Alaska and the electric utility industry in the lower 48. Unless the State of Alaska demonstrates that it intends to deal with restructuring, federal legislation will likely include Alaska in the broad sweeping changes that will be mandated in the lower 48. Neither the electric utility consumers nor the industry can afford to let that happen in Alaska.

For this reason, we support and ask your support for HCR No. 34.

Sincerely,


John A. Magyar
General Manager

Some Critical Issues That Must Be Addressed

- Structural “Deregulation” Model
- Benefits vs. Costs
- Stranded Costs
- Mitigation Of Market Power
- Identification Of Competitive And Monopoly Services
- Separation Of Regulated And Non-Regulated Functions

Potential Benefits of Retail Competition

- Choices
- Lower Rates
- Technology Deployment
- Economic Efficiency

Major Stranded Cost Issues

- Does It Exist?
- How Do You Define It?
- Should It Be Net Of Stranded Benefits?
- Who Pays?
- Length Of Recovery/Transition Period?
- Form Of Recovery?

Alaska State Legislature



Official Business
Fax: (907) 465-3472

State Capitol
Juneau, AK 99801-1182
(907) 465-3720
(907) 465-2689

Speaker of the House of Representatives

Memorandum

To: Representative Norman Rokeberg, Chairman
House Labor and Commerce Committee

Norm

From: Representative Gail Phillips
SPEAKER OF THE HOUSE

Gail

Subject: Electrical Utility Restructuring Committee

Date: March 20, 1998

Per our earlier conversations about establishing the Joint Committee on Electrical Utility Restructuring, please prepare the resolution for introduction the first week in April.

Thank you for your assistance with this issue.

Norm - Pls bring me a copy of the draft resolution before you send it in for final. We need to take out any reference to the Chairman from the resolution - just include the # of members from each body. Thanks - I will be appointing you as the House Co-Chair, but this should not be in the resolution language.

Gail

HOUSE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Introduced:

Referred:

A RESOLUTION

1 Establishing a Joint Committee on Electric Utility Restructuring.

2 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 WHEREAS electricity is among modern society's most basic requirements and
4 commodities; and

5 WHEREAS even other forms of infrastructure, such as water and waste water systems,
6 are largely dependent on electricity; and

7 WHEREAS the provision of adequate, reliable, and reasonably priced electrical energy
8 is essential to the daily functions, safety, and economic well-being of Alaskans, their local
9 communities, and the state; and

10 WHEREAS it has been long-standing public policy in Alaska, as in other states, to
11 require state regulation of electric utilities as to service areas, and state or local regulation as
12 to rates, safety, and quality of service; and

13 WHEREAS fundamental restructuring of the electric utility industry is now under
14 deliberation by the Congress and other states; and

15 WHEREAS electric utility restructuring is a highly complex issue, carrying with it
16 profound implications for all classes of electrical consumers; and

17 WHEREAS the implications and ramifications of such restructuring deserve detailed,

1 careful, and informed decision making by the Alaska State Legislature;

2 **BE IT RESOLVED** by the Alaska State Legislature that a Joint Committee on Electric
3 Utility Restructuring is established; and be it

4 **FURTHER RESOLVED** that the Speaker of the House of Representatives and the
5 President of the Senate shall appoint the chair of the Labor and Commerce Committees of
6 each house as co-chair of the joint committee; and be it

7 **FURTHER RESOLVED** that the Speaker of the House of Representatives and the
8 President of the Senate shall determine the number and composition of additional members
9 to the joint committee, and that the Speaker of the House of Representatives shall appoint a
10 number of representatives to the committee and that the President of the Senate shall appoint
11 an equal number of senators to the committee; and be it

12 **FURTHER RESOLVED** that the joint committee may meet during and after the
13 Second Session of the Twentieth Alaska State Legislature and is terminated on the convening
14 of the First Session of the Twenty-First Alaska State Legislature; and be it

15 **FURTHER RESOLVED** that the joint committee shall provide to the legislature
16 written recommendations on whether and how to implement electric utility restructuring in
17 Alaska.



CHUGACH ELECTRIC ASSOCIATION, INC.

JAN 19 1998

December 22, 1997

Representative Norman Rokeberg
716 W. 4th Avenue, Suite 640
Anchorage, Alaska 99501-2133

Dear Representative Rokeberg:

I have enclosed a copy of the Columbia Steel case we discussed. I think you will find the case indicates very strongly that the "state action" exception to the application of federal antitrust laws can only be created by the legislature clearly articulating and affirmatively expressing a policy against competition. Limitations on application of the federal antitrust laws cannot be implied. They must be explicit. The only explicit reference in Alaska Statutes to restricting competition for electric utilities is found in A.S. 42.05.221(d). This provision empowers the Commission to limit competition but only after it begins and after the Commission finds the competition which is occurring is against the public interest. To reach the conclusion that the legislature intended to establish a policy against competition one must infer such an intent because it is not explicitly stated in the statute. This is not permitted.

Obviously this view is difficult to accept for those who oppose customer choice. For this reason, it may be necessary for the legislature in its policy making role to confirm that except as explicitly stated in section 221(d) the legislature intends no limit on competition. As you noted in our meeting this could be accomplished by simply enacting the following single paragraph (or something similar) from the draft bill we gave to you. The change would simply clarify and reaffirm the existing law by an addition to Section 221 as follows:

(* Unless otherwise explicitly stated by order of the Public Utilities Commission supported by written findings, the geographic service territory limitations in the certificates of public convenience and necessity issued to electric public utilities provide service territories that are exclusive only to the extent necessary to prevent duplication and paralleling of distribution and transmission facilities but do not limit sale of electric power sold by a certificated electric utility delivered over existing

Representative Norman Rokeberg
December 22, 1997
Page 2

distribution facilities outside of service territories specified in the certificates of public convenience and necessity of the selling utility.

Thank you again for your interest in this important public policy issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Don Edwards", with a long horizontal flourish extending to the right.

Don Edwards
General Counsel

Enclosure

RECEIVED

JAN 08 1997

GENERAL COUNSEL'S OFFICE

**FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COLUMBIA STEEL CASTING Co., Inc.,
an Oregon corporation,
Plaintiff-Appellee.

No. 93-35902

D.C. No.
CV-90-00592-HJF

PORTLAND GENERAL ELECTRIC
COMPANY, an Oregon corporation,
Defendant-Appellant.

COLUMBIA STEEL CASTING Co., Inc.,
an Oregon corporation,
Plaintiff-Appellant,

No. 93-35958

D.C. No.
CV-90-00524-HJF

v.

PORTLAND GENERAL ELECTRIC
COMPANY, an Oregon corporation;
PUBLIC UTILITY COMMISSION OF THE
STATE OF OREGON,
Defendants-Appellees.

**ORDER AND
AMENDED
OPINION**

Appeals from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
May 3, 1995—Portland, Oregon

Filed July 20, 1995
Opinion Withdrawn December 27, 1996
Filed December 27, 1996

In 1972, an OPUC order approved PPandL's application to transfer to PGE its distribution facilities within certain boundaries, and provided that PGE could transfer to PPandL all distribution facilities for service within specified boundaries.

Appellee Columbia Steel Casting Co., Inc., which was served by PGE, requested PPandL to provide electrical service to its Portland plant. PPandL informed PGE and Columbia that it would offer to provide the requested electricity. PGE objected that PPandL was forbidden to sell power to Columbia by the exchange agreement and the 1972 order, which, PGE claimed, had created exclusive service territories in Portland.

Columbia filed a federal antitrust action against PGE, PPandL, and OPUC, alleging that any purported division of Portland into exclusive territories was beyond the scope of the 1972 order and a violation of the Sherman Act. PGE raised a defense of state-action immunity, contending that the 1972 order had authorized exclusive service territories in Portland pursuant to Oregon statute. While the action was pending, PGE filed an application with OPUC, requesting a declaration that the 1972 order allocated exclusive service territories in Portland.

The district court granted partial summary judgment for Columbia, ruling that the 1972 order did not confer antitrust immunity on PGE's efforts to divide the Portland market. The court reasoned that the 1972 order did not "clearly articulate" the intention of OPUC to divide Portland into exclusive service territories, but was limited to the exchange of property and facilities and a one-time transfer of customer accounts.

In 1992, OPUC issued a nunc pro tunc order stating that the intent of its 1972 order was to approve an allocation of exclusive service territories to PGE and PPandL.

The district court denied PGE's motion for reconsideration, rejecting its contention that the 1992 order was entitled to full

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services
Department of Education
State of Alaska

RECEIVED

JAN 08 1997

GENERAL COUNSEL'S OFFICE

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COLUMBIA STEEL CASTING Co., INC.,
an Oregon corporation,
Plaintiff-Appellee.

v.

PORTLAND GENERAL ELECTRIC
COMPANY, an Oregon corporation,
Defendant-Appellant.

No. 93-35902

D.C. No.
CV-90-00592-HJF

COLUMBIA STEEL CASTING Co., INC.,
an Oregon corporation,
Plaintiff-Appellant.

v.

PORTLAND GENERAL ELECTRIC
COMPANY, an Oregon corporation;
PUBLIC UTILITY COMMISSION OF THE
STATE OF OREGON,
Defendants-Appellees.

No. 93-35958

D.C. No.
CV-90-00524-HJF

ORDER AND
AMENDED
OPINION

Appeals from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
May 3, 1995—Portland, Oregon

Filed July 20, 1995
Opinion Withdrawn December 27, 1996
Filed December 27, 1996

Before: James R. Browning, Thomas M. Reavley*,
and William A. Norris, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Antitrust/Exemptions-State Action

The court of appeals vacated a judgment of the district court in part and reversed in part. The court held that a state's order authorizing the exchange of power utilities' facilities within a market does not extend state-action antitrust immunity to their agreement establishing territorial monopolies.

Appellant Portland General Electric (PGE) and Pacific Power and Light (PPandL) provided electricity in the City of Portland, Oregon. Their competition resulted in duplicate transmission lines, poles, substations and transformers. An Oregon statute gives appellee Public Utilities Commission of Oregon (OPUC) authority to divide markets into exclusive service territories to help eliminate duplication of facilities. The statute provided that under certain circumstances, the OPUC could approve a contract between competitors that divides a market into exclusive service territories.

PGE and PPandL entered into an agreement to exchange properties and customer accounts throughout the City. The agreement effected transfers of properties and customers within specified areas, thereby creating separate territories in which each utility owned all the facilities and serviced all customer accounts within a designated area. The City consented to the agreement by ordinance.

*The Honorable Thomas M. Reavley, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

In 1972, an OPUC order approved PPandL's application to transfer to PGE its distribution facilities within certain boundaries, and provided that PGE could transfer to PPandL all distribution facilities for service within specified boundaries.

Appellee Columbia Steel Casting Co., Inc., which was served by PGE, requested PPandL to provide electrical service to its Portland plant. PPandL informed PGE and Columbia that it would offer to provide the requested electricity. PGE objected that PPandL was forbidden to sell power to Columbia by the exchange agreement and the 1972 order, which, PGE claimed, had created exclusive service territories in Portland.

Columbia filed a federal antitrust action against PGE, PPandL, and OPUC, alleging that any purported division of Portland into exclusive territories was beyond the scope of the 1972 order and a violation of the Sherman Act. PGE raised a defense of state-action immunity, contending that the 1972 order had authorized exclusive service territories in Portland pursuant to Oregon statute. While the action was pending, PGE filed an application with OPUC, requesting a declaration that the 1972 order allocated exclusive service territories in Portland.

The district court granted partial summary judgment for Columbia, ruling that the 1972 order did not confer antitrust immunity on PGE's efforts to divide the Portland market. The court reasoned that the 1972 order did not "clearly articulate" the intention of OPUC to divide Portland into exclusive service territories, but was limited to the exchange of property and facilities and a one-time transfer of customer accounts.

In 1992, OPUC issued a nunc pro tunc order stating that the intent of its 1972 order was to approve an allocation of exclusive service territories to PGE and PPandL.

The district court denied PGE's motion for reconsideration, rejecting its contention that the 1992 order was entitled to full

faith and credit. The court granted summary judgment for Columbia on the remaining issues, ruling that PGE had violated the Sherman Act and awarding Columbia treble damages and attorneys' fees and costs.

PGE appealed, contending for the first time that state-action immunity applied because the division of the Portland market was a foreseeable result of the 1972 order.

The court of appeals agreed with PGE, holding that private conduct is immunized if it is a foreseeable result of state agency action and the circumstances justify an inference that the agency intended to authorize the challenged anticompetitive conduct. The court granted Columbia's petition for rehearing.

[1] The state-action doctrine cloaks anticompetitive conduct with antitrust liability immunity if the state's intent to displace competition with regulation is "clearly articulated," and affirmatively expressed as state policy. [2] Neither the 1972 order nor the agreement it approved said anything about exclusive service territories in Portland. [3] In approving the exchange of property in Portland, the 1972 order did not cite any statutory provisions governing the allocation of exclusive service territories. OPUC cited only statutory provisions governing previously allocated service territories and transfers of facilities. [4] OPUC did not forthrightly state a policy of the State that was clear in its purpose to displace competition in the Portland market with territorial monopolies. [5] At best, the 1972 order and subsequent clarifying orders recited that the utilities had stopped competing within territories they defined.

[6] The 1992 order was not entitled to preclusive effect because the issue decided by OPUC was not identical to the state-action immunity issue. The issue decided by OPUC in 1992 was whether the 1972 OPUC had the intent to approve the allocation of exclusive service territories in Portland. The

state-action immunity issue did not turn on the subjective intent of OPUC at the time of the 1972 order. The state-action immunity issue turned on whether the displacement of competition with monopolies was clearly articulated and affirmatively expressed as state policy. State-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of policy, not on the subjective intent of policymakers.

[7] The court of appeals erred in allowing a foreseeability test to be substituted for the clear articulation test. [8] OPUC did not expressly authorize PGE to maintain an exclusive service territory; it merely approved the exchange of property and customers. [9] Express authorization is the necessary predicate for the foreseeability test. [10] In the absence of state-action immunity, an agreement between PGE and PPandL to divide the Portland market constituted a per se violation of § 1 of the Sherman Act.

[11] Justification defenses were not available to PGE. When it stopped competing with PPandL after the 1972 order, it was under no compulsion to do so because the order did not approve the allocation of exclusive service territories. Because the 1972 order was permissive, it did not require PGE and PPandL to perform the 1972 agreement and did not prevent them from rescinding it before the property was exchanged.

[12] The *Noerr-Pennington* doctrine (competitors may attempt to persuade legislature to take action with respect to law that would result in restraint or monopoly) did not apply. Applying to an administrative agency for approval of an anti-competitive contract is not lobbying activity within the meaning of the doctrine.

[13] The filed rate doctrine was inapplicable. The challenged conduct was not PGE's refusal to sell electricity to Columbia at a lower rate, but the non-competition agreement

that prevented Columbia from buying electricity at PPandL's lower rates.

COUNSEL

Allan M. Garten and Barbee B. Lyon, Tonkon, Torp, Galen, Marmaduke & Booth, Portland, Oregon, for Portland General Electric Company.

Michael C. Dotten, Heller, Ehrman, White & McAuliffe, Portland, Oregon, for Columbia Steel Casting Co., Inc.

Jas. J. Adams, Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, for the Public Utility Commission of Oregon.

Robert B. Nicholson and David Seidman, United States Department of Justice, Washington, D. C., for the United States as amicus curiae.

ORDER

The Petition for Rehearing, filed August 3, 1995, is hereby **GRANTED**.

The Opinion filed July 20, 1995, and reported at 60 F.3d 1390, 1396 (9th Cir. 1995), is **WITHDRAWN** and the attached Opinion is ordered filed instead.

OPINION

NORRIS, Circuit Judge:

TABLE OF CONTENTS

I. Facts and Procedural History	16268
II. State-Action Immunity	16276
A. The Midcal Clear Articulation Requirement	16276
B. Issue Preclusion	16286
C. Foreseeability: PGE's New Argument on Appeal	16289
III. PGE's Other Defenses	16292
A. Statute of Limitations	16293
B. Justification Defenses	16294
C. The Noerr-Pennington Doctrine	16296
D. The Filed Rate Doctrine	16296
IV. Damages	16297
V. Columbia Steel's Cross-Appeal on Damages	16298
VI. Conclusion	16299

This appeal arises out of an antitrust action that Columbia Steel Casting Co., a large consumer of electric power in Portland, Oregon, brought against two electric utilities, Portland General Electric (PGE) and Pacific Power & Light (PP&L), charging them with dividing the city of Portland into exclusive service territories in violation of the Sherman Act, 15 U.S.C. §§ 1-2.¹ PGE raised a state-action immunity defense on the basis of a 1972 order of the Oregon Public Utility Commission which, PGE argued, approved a division of the

¹Only PGE is a party to this appeal.

Portland market into exclusive service territories. See *Parker v. Brown*, 317 U.S. 341 (1943). The district court rejected this state-action immunity defense and awarded summary judgment to Columbia Steel. PGE appeals the summary judgment in favor of Columbia Steel and the denial of its own motion for summary judgment. Columbia Steel cross-appeals the amount of its damage award. We affirm the summary judgment in favor of Columbia Steel on PGE's antitrust liability and vacate and remand the damage award for further proceedings.

I. Facts and Procedural History

The facts are undisputed. Until 1972, PGE and PP&L competed for customers throughout Portland. This competition resulted in the duplication of transmission lines and poles, substations, and transformers throughout the city. For many years the two utilities attempted to gain regulatory approval for a division of the Portland market into exclusive service territories. In 1962, for example, PGE applied to Oregon's Public Utilities Commission (OPUC) for an allocation of an exclusive service territory in the city of Portland.³ These efforts to secure exclusive service territories within Portland were unsuccessful, however, in part because of opposition from the city. Portland had a longstanding policy of encouraging competition among utilities, and the city charter provided that "[n]o exclusive franchises shall be granted." Portland City Charter, § 10-206. See, e.g., Portland, Or., Resolution 28879 (1962) (opposing PGE's 1962 application to the OPUC for an "allocation of exclusive areas for electric service within . . . Portland").

³In 1961, the Oregon legislature enacted a statute vesting in the OPUC exclusive authority to approve the creation of exclusive service territories in order to promote "[t]he elimination and future prevention of duplication of utility facilities." Or. Rev. Stat. § 758.405. The statute authorizes the OPUC to approve contracts between competitors that divide markets into exclusive service territories. Or. Rev. Stat. §§ 758.410 - 758.425, 758.450.

In 1972, PGE and PP&L jointly submitted to the city of Portland a plan to eliminate competition between them by dividing the city into exclusive service territories. This plan provided, *inter alia*, that "[s]ubject to the necessary regulatory approvals . . . it is proposed that Parcels A & B [two defined areas within the city of Portland] be served exclusively by PP&L," and that "[s]ubject to the necessary approvals, it is proposed that Parcel C [a defined area within the city of Portland] . . . be exclusively served by PGE." CR 269, exh. 47 at 2-3.

The Portland City Council disapproved the utilities' 1972 plan to displace competition with territorial monopolies in Portland. The City Council agreed, however, that the duplication of facilities should be eliminated for aesthetic, safety, and economic reasons. In the ordinance it passed, the City Council declared, "both [PGE and PP&L] operate under non-exclusive franchises and . . . the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (Apr. 26, 1972). The only action that the ordinance approved was "the sale, transfer and exchange of plant and property between Portland General Electric Company and Pacific Power & Light Company."³ *Id.*

³The Ordinance states, in part:

An Ordinance consenting to exchange of certain property within the City between [PGE] and [PP&L] on certain conditions in order to permit reduction of poles and wires and duplication of facilities in various areas of the City.

The City of Portland ordains:

Section 1. The Council finds that both [PGE] and [PP&L] operate electric power systems which serve patrons within the City, that both companies operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies; that at the present time, however, in many areas of the City poles and wires are duplicated between the companies for service purposes . . . ; that to reduce the visual impact of duplicating facilities, to promote safety, to

After securing the City Council's approval of the exchange of utility properties, but not the establishment of exclusive service territories, PGE and PP&L entered into an agreement, dated July 18, 1972 (the "1972 Agreement"), which they submitted to the OPUC for approval. In contrast to the plan submitted to the Portland City Council, the 1972 Agreement said nothing about exclusive service territories in Portland. The "whereas" clauses of the 1972 Agreement recited that one of its purposes was to comply with the terms of the Portland ordinance, which had approved an exchange of plant and property, but had disapproved exclusive service territories. The 1972 Agreement recited:

WHEREAS, [PGE] and [PP&L] wish to provide for the elimination of duplicating electric facilities in [the city of Portland]; and

WHEREAS, the City of Portland, by Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972, consented to the exchange by [PGE] and [PP&L] of certain properties located within the city;

NOW, THEREFORE, in order to implement the elimination of said duplicating facilities and to comply with Ordinance 134416, it is agreed

1972 Agreement at 1-2.

The 1972 Agreement used the following language to effect the exchange of facilities:

promote economy, to simplify subsequent undergrounding and to work toward the lowest possible rates for users within the City, an interchange of properties between the companies should be permitted as hereinafter set forth; . . . now, therefore, the City does by this ordinance consent to the sale, transfer and exchange of plant and property between [PGE] and [PP&L] as follows

Portland, Or., Ordinance 134416 (Apr. 26, 1972) (emphasis added).

1. *Exchange of Facilities*

(a) [PP&L] shall transfer and convey to [PGE] and [PGE] shall acquire from [PP&L] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PP&L] in . . . the area [in Portland] designated as Parcel C

(b) [PGE] shall transfer and convey to [PP&L] and [PP&L] shall acquire from [PGE] all of the electric distribution plant, including distribution substations, poles, lines, transformers, meters, related distribution facilities, and all easements necessary for the operation thereof, owned, operated and maintained by [PGE] in the areas [in Portland] designated as Parcels A and B

1972 Agreement at 2-3.

The 1972 Agreement was approved by an order of the OPUC issued in December 1972. The 1972 Order provided, in relevant part:

The Commissioner's approval is needed prior to the sale, lease, assignment or other disposition of public utility property pursuant to ORS 757.480. . . .

On July 18, 1972, [PP&L] and [PGE] entered into an agreement whereby an exchange of property and utility facilities would be made between [PGE and PP&L] in the City of Portland This exchange . . . also involves the transfer of customers from one party to the other.

ORDERED that [PP&L] may transfer to [PGE] all electric distribution plant . . . situated within or used for providing utility service within the boundaries of Parcel A . . . [and] Parcel B

ORDERED that [PGE] may transfer to [PP&L] all electric distribution plant . . . used for providing utility service within the boundaries of [Parcel C]

. . . .

ORDERED that the manner and method of accomplishing the transfer and exchange of property, facilities and customers, and the terms and conditions governing this transfer, shall be provided by that agreement between the companies herein, dated July 18, 1972.

Pub. Util. Comm'n of Or., Order 72-970 (Dec. 15, 1972) (the "1972 Order").⁶

⁶The only reference to customer accounts in the 1972 Agreement is in Section 7, which provides in relevant part:

7. *Transfer of Customer Accounts*

The transfer of customer accounts between [PGE] and [PP&L] shall commence on July 24, 1972, and shall be coordinated so that the revenues from the sales of electricity of each company will remain substantially the same over the period required to accomplish transfer of all customers involved. . . .

There is no reference to customer accounts in Section 1 of the 1972 Agreement, which provides for the exchange of facilities. In referring to the transfer of customers, Section 7 does not use the "shall transfer and convey" language used in Section 1. Thus the language and structure of the 1972 Agreement, as well as the language of the 1972 Order quoted in the text, suggest that the transfer of customers was treated as a necessary incident to the exchange of facilities. For a further discussion of the transfer of customers, see *infra* pp. 17-19.

In approving the exchange of property in the city of Portland, the OPUC did not cite any of the statutory provisions that give the OPUC its authority to approve contracts between utility companies allocating exclusive service territories. See Or. Rev. Stat., ch. 758 ("Utility . . . Territory Allocation . . .").⁸ Unlike the Portland City Council ordinance — which had expressly disapproved exclusive service territories — but like the 1972 Agreement, the 1972 Order said nothing about exclusive service territories in Portland. The OPUC cited as authority for its approval of the 1972 Agreement Chapter 757 of the Oregon Revised Statutes ("Utility Regulation Generally"), specifically Or. Rev. Stat. § 757.480,⁹ which

⁸Chapter 758 of the Oregon Revised Statutes speaks of "allocated" territories and defines that term in a way that means exclusive service territories. Section 758.400(1) defines "allocated territory" as "an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory". Or. Rev. Stat. § 758.400(1). Section 758.410(1) permits "(a)ny person providing a utility service [to] contract with any other person providing a similar utility service for the purpose of allocating territories and customers between the parties and designating which territories and customers are to be served by which of said contracting parties." Or. Rev. Stat. § 758.410(1). Section 758.425 authorizes the OPUC to approve the "contract as filed" and provides that "[i]f the commission approves [the] contract . . . the contract shall be deemed to be valid and enforceable" Or. Rev. Stat. § 758.425. Section 758.450(2) provides that "no other person shall offer, construct or extend utility service in or into an allocated territory." Or. Rev. Stat. § 758.450(2).

⁹Section 757.480 provides in pertinent part:

(1) No public utility doing business in Oregon shall, without first obtaining the commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such public utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of \$10,000, or sell, lease, assign or otherwise dispose of any franchise, permit, or right to maintain and operate such public utility or public utility property, or perform any service as a public utility.

gives the OPUC authority to approve the sale, lease, assignment or other disposition of public utility property.

After the OPUC issued its 1972 Order, PGE and PP&L stopped competing with each other in Portland. Each utility served customers exclusively in the parcels in which it had acquired the electric distribution facilities of the other.

Columbia Steel operates a steel casting plant located in the area which PGE began serving exclusively after the issuance of the 1972 Order. In 1987, Columbia Steel asked PP&L to service its plant because PP&L's rates were lower than PGE's. PP&L refused, citing the fact that the plant was located in the territory being served exclusively by PGE.

In 1989, Columbia Steel again asked PP&L to service its casting plant. This time, PP&L agreed and offered to enter into a supply contract with Columbia Steel. PGE objected, however, citing its 1972 Agreement with PP&L. PGE took the position that the 1972 Agreement gave it the exclusive right to service Columbia Steel's plant because it was located in the service territory allegedly "allocated" to PGE by the 1972 Agreement. Undeterred, Columbia Steel wrote PGE on May 30, 1990, asking it to "wheel" electricity generated by PP&L to the casting plant until PP&L could build a substation which would enable it to deliver power directly to the plant. PGE refused, reasserting that it had the exclusive right to service Columbia Steel's plant.

...

(2) Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same is void.

Or. Rev. Stat. § 757.480.

On June 19, 1990, Columbia Steel filed this antitrust action against PGE, PP&L, and the OPUC, on the theory that the division of Portland into exclusive service territories violated the Sherman Act, 15 U.S.C. §§ 1-2.⁷ The defendants raised the state-action doctrine as an affirmative defense, contending that the division of the Portland market was cloaked with anti-trust immunity by the 1972 Order of the Oregon OPUC approving the 1972 Agreement.

In July 1990, PP&L entered into a contract with Columbia Steel and began servicing the casting plant in July 1991, when PGE began transmitting PP&L's power to the plant over PGE's power line. Columbia Steel later dismissed all its claims against PP&L, which explains why PP&L is not a party to this appeal.

On July 3, 1991, the district court rejected PGE's state-action defense in an order granting Columbia Steel's motion for partial summary judgment. *Pacificorp v. Portland Gen. Elec. Co.*, 770 F. Supp. 562 (D. Or. 1991). The district court held that the OPUC's 1972 Order did not articulate a state policy to allocate exclusive service territories in Portland as required by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). *Pacificorp*, 770 F. Supp. at 569-71. As the district court interpreted the OPUC's 1972 Order, it approved a one-time exchange of property and customer accounts, but not an allocation of exclusive service territories. *Id.* at 570-71.

On February 4, 1993, the district court granted summary judgment for Columbia Steel on the remaining issues, ruling that PGE had violated section 1 of the Sherman Act in agree-

⁷An agreement among competitors to allocate territories is a per se violation of § 1 of the Sherman Act. E.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) (contracts that purported to restrict defendant's ability to wheel power "were 'in reality, territorial allocation schemes,' " and "were per se violations of the Sherman Act") (citation omitted).

ing with PP&L not to compete in the Portland market. The court awarded Columbia Steel \$508,425 in treble damages and \$901,671.62 in attorneys' fees and costs.

II. State-Action Immunity

A. The Midcal Clear Articulation Requirement

[1] The state-action doctrine cloaks anticompetitive conduct with antitrust immunity only if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105 (upholding state wine pricing system because "[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance"). The *Midcal* test is a "rigorous" one that "ensure[s] that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive acts [are] truly the product of state regulation." *Patrick v. Burget*, 486 U.S. 94, 100 (1988). It guarantees that the "private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests," *id.* at 101, and limits the spread of an immunity that is "disfavored, much as are repeals [of the antitrust laws] by implication," *FTC v. Ticor Tile Ins. Co.*, 504 U.S. 621, 636 (1992), because of Congress's "overarching and fundamental policies" protecting competition, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978). See also Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶214e (1978).

The district court acknowledged that the provisions of chapter 758 of the Oregon Revised Statutes, which authorize the OPUC to approve contracts between public utilities allocating exclusive service territories, "articulate the policy of the State of Oregon to remove market competition as the basis for determining the customers of the providers of electricity." *Pacificorp*, 770 F. Supp. at 570. As the district court put it:

To the extent that a public utility provider obtains a lawful and valid contract for the allocation of territories and customers through the provisions of the territorial allocation statutes, [Or. Rev. Stat.] 758.400 to 758.475, that provider is immune from antitrust violations.

....

[Or. Rev. Stat.] 758.400(1) states that "[a]llocated territory" means an area with boundaries established by a contract between persons furnishing a similar utility service and approved by the commission or established by an order of the commission approving an application for the allocation of territory." In order to lawfully displace competition as the method of allocating customers for electric service in a particular area, utility companies must enter into a contract which allocates service territories and designates service to customers, and the utility companies must make application to and receive an order from the [O]PUC approving and establishing the allocation of these territories. These requirements must be met in order to receive the immunity which is provided by the state statutory scheme from the federal antitrust laws.

Id.

Notwithstanding the clarity with which chapter 758 expresses a legislative policy of authorizing the OPUC to approve allocations of exclusive service territories, the district court rejected PGE's state-action immunity defense because the OPUC failed to exercise that authority in issuing the 1972 Order. *Id.* at 571. The district court explained that the 1972 Agreement between PGE and PP&L, which the 1972 Order approved, did not establish exclusive service territories in the city of Portland. As the district court read the 1972 Agree-

ment, PGE and PP&L had agreed "only to an exchange of facilities within the area relevant to this action." *Id.* at 571. In other words, the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal*.

[2] We agree with the district court that the 1972 Order fails to speak with sufficient clarity to satisfy the *Midcal* test.⁸ Neither the 1972 Order nor the 1972 Agreement it approved says anything about exclusive service territories in the city of Portland. This omission becomes glaring when the language of the 1972 Order as it pertained to Portland is compared with the language of the same order as it pertained to the city of Rainier. Although the 1972 Order said nothing about exclusive service territories in approving the exchange of property

⁸PGE argues that the clear articulation prong of the *Midcal* is satisfied because Or. Rev. Stat. §§ 758.400 - 758.450 "encourage exactly the kind of division that PGE and PP&L carried out," and that whether or not the OPUC clearly authorized PGE's challenged conduct is relevant only to the active supervision prong of *Midcal*, 445 U.S. at 105 (state action immunity only applies if the state actively supervises the challenged anticompetitive conduct). Resp. of Portland General Elec. Co. to Appellant's Pet. for Reh'g and Amicus Brief of United States, at 18. In making this argument, PGE relies on *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609, 612 (11th Cir. 1995) ("If [the defendant engaged in anticompetitive conduct] presumably because of a territorial agreement, but the area in question was never approved by the Commission, the [defendant's] action would not merit state action immunity because of the lack of 'active state supervision.'") (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)), *cert. denied*, 116 S. Ct. 1678 (1996).

Praxair does not help PGE. As the Court explained in *Ticor*, the case on which *Praxair* relies, "*Midcal*'s two elements . . . [are both] directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. *Praxair* is nothing more than a fact specific application of the *Midcal* test. The anticompetitive conduct had been authorized by a Florida Public Service Commission order approving an allocation of service territories, and the Eleventh Circuit merely held that the order was intended to include a particular county in the exclusive service territories created. See *Praxair*, 64 F.3d at 613.

in Portland, it expressly used such language in approving a provision of the 1972 Agreement which transferred to PGE an area within the city of Rainier that had previously been served exclusively by PP&L. See 1972 Order at 8 ("ORDERED that the application of [PP&L] to transfer certain of its *exclusively served area allocated to it and lying in and around Rainier, Oregon*, to [PGE] is approved.") (emphasis added). The contrast between the "transfer and exchanging of utility property and facilities and customers" language used in the 1972 Order to describe the utilities' agreement with respect to the city of Portland, 1972 Order at 8, and the "exclusively served territory" language used in the 1972 Order to describe the utilities' agreement with respect to the Rainier area, *id.*, is striking.

Like the part of the 1972 Order relating to Rainier, the ordinance passed by the Portland City Council earlier in 1972 also referred to exclusive service territories. It did so, however, in disapproving, not approving, the elimination of competition in favor of a territorial division between PGE and PP&L. The ordinance reminded the utilities that they "operate under non-exclusive franchises and that the obligation to supply properties within the City must remain binding upon both companies." Portland, Or., Ordinance 134416 (1972).

[3] Our second reason for agreeing with the district court is that in approving the exchange of property in Portland, the 1972 Order does not cite any of the statutory provisions governing the allocation of exclusive service territories. Rather than citing chapter 758 or any of its provisions, the OPUC cited a provision of chapter 757, the chapter governing "Utility Regulation Generally," specifically Or. Rev. Stat. § 757.480, which authorizes the approval of exchanges of utility facilities. We are struck by the precision and care with which the OPUC cited various statutory provisions in issuing the 1972 Order. As authority for approving the transfer to PGE of the exclusively served territory in Rainier previously allocated to PP&L, the OPUC cited the statutory provision

governing transfers of previously allocated service territories (Or. Rev. Stat. § 758.460⁸). It did not cite any section of chapter 758 in approving the provisions of the 1972 Agreement relating to Portland.⁹ As authority for approving the exchange of facilities in Portland, the OPUC cited only the statutory provision governing transfers of utility facilities (Or. Rev. Stat. § 757.480).

[4] In sum, the OPUC did not "forthrightly state[]" a policy of the state of Oregon that was "clear in its purpose" to displace competition in the Portland market with territorial monopolies.¹⁰ *Midcal*, 445 U.S. at 105.

The OPUC argues that, despite the failure of the 1972 Order to say anything about exclusive service territories in the city of Portland, the Order nonetheless immunized the divi-

⁸Section 758.460 provides in relevant part:

(1) The rights acquired by an allocation of territory may only be assigned or transferred with the approval of the commission after a finding that such assignment or transfer is not contrary to the public interest.

Or. Rev. Stat. § 758.460.

⁹In particular, there is no reference in the 1972 Order to Or. Rev. Stat. § 758.410, which permits utilities to contract with each other "for the purpose of allocating territories and customers between the parties." Nor is there any reference to § 758.425, which gives the OPUC its authority to approve such contracts, even though an exclusive service territory can be established only "by a contract between persons furnishing a similar utility service and approved by the commission or . . . by an order of the commission approving an application for the allocation of territory." Or. Rev. Stat. § 758.400(1) (defining "allocated territory").

¹⁰Columbia Steel argues that FGE and PP&L intentionally introduced ambiguity into the 1972 Agreement in order to slip a monopolistic agreement past the city of Portland. We need not address this argument because, whether or not ambiguity was introduced into the contract for the self-serving purpose of making it less politically vulnerable, the utilities' failure to include the "exclusively served" language in the 1972 Agreement that had been included in the plan submitted to the City Council certainly had the effect of creating ambiguity in the 1972 Order.

sion of the Portland market because the "statutory import of the 1972 Order was necessarily an allocation of service territory in the City of Portland as between PGE and PP&L." Opening Brief of Pub. Util. Comm'n of Or. at 9. The OPUC asserts that the 1972 Agreement "effectively" allocated exclusive service territories because "[e]xchanging customers is logically the only way to reallocate established service territory into exclusive zones." *Id.* at 9-10. The OPUC adds that "[t]he only way that the OPUC could lawfully have approved the transfer of customers between existing utilities was under the authority of the territorial allocation statutes." *Id.* at 10. See also Resp. of Portland General Elec. Co. to Appellant's Pet. for Reh'g and Amicus Brief of United States, at 7 ("The allocation statutes speak of the allocation of 'territories and customers.' The 1972 Agreement and the 1972 Order explicitly allocate *customers*, whether they explicitly allocate territories or not.") (citation omitted) (emphasis in original).

In response, Columbia Steel argues that nothing in the relevant statutory provisions rules out a one-time exchange of customers as an incident of an exchange of facilities without the establishment of permanent territorial monopolies. According to Columbia Steel, such a one-time exchange of customers is a practical consequence of an exchange of facilities:

When, as in this case, a utility sells the power line that distributes electricity directly to a customer, it makes sense that the account of the customer served by that line would be transferred to the new owner of the line. Thus, the transfer of customer accounts was only an incident of the transfer of utility property. It is the practical consequence of a transfer of facilities, but it is not the perpetual grant of monopoly power. As a practical matter, unless another source of electricity is available, the customer will take service from the utility that owns the facilities connected to that customer's premises. But the utility

serves that customer because it is practical to do so, not because the utility has an exclusive right to serve that customer.

Pet. for Reh'g, at 13-14.

Columbia Steel's argument has considerable force. It is buttressed by the fact that PP&L was able to take a good customer away from PGE simply by building a substation in PGE's "territory" to transmit power to Columbia Steel's plant at rates that were more competitive than PGE's. Thus, although the transfer of facilities, and the transfer of customers incidental thereto, gave each utility a temporary competitive advantage, it did not immunize them from competition forevermore. That PGE's advantage proved to be transitory is not surprising given the competitive pressures that technology and deregulation have been exerting on utility markets where monopolies have traditionally reigned.

In any case, we need not resolve the dispute over whether, as the OPUC argues, an exchange of customer accounts is, as a practical matter, the factual equivalent of an allocation of exclusive service territories. Even if this were the case, it would merely be evidence that might tend to support a permissive inference that the OPUC intended to approve a displacement of competition in Portland with monopolies, and any such inference could not transform the 1972 Order into the forthright and clear statement that it takes to satisfy *Midcal's* stringent requirements.

PGE and the OPUC also argue that the OPUC's failure to cite any provision of chapter 758 as authority for the 1972 Order as it pertains to Portland renders the 1972 Order nothing more than an "imperfect regulation" which may still confer state-action immunity, citing *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) ("actions otherwise immune should not forfeit that protection merely because the state's

attempted exercise of its power is imperfect in execution under its own law").

PGE and the OPUC's reliance on *Llewellyn* is misplaced. In *Llewellyn*, the administrator of a state agency promulgated a fee schedule for health care providers, as he was authorized to do under state statute, but bypassed statutory rulemaking procedures. We held that although the administrator had acted in a "procedurally improper manner," the state government was nonetheless entitled to state-action immunity. *Id.* at 773. *Llewellyn* is inapposite here. There the state legislature had clearly articulated an intention to authorize the administrator to promulgate a fee schedule, and the administrator had exercised that authority in clearly articulating his intent to adopt such a fee schedule, notwithstanding that he did not follow the required rulemaking procedures of the state's Administrative Procedure Act. *Id.* at 772. In contrast, the OPUC did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland; indeed, it did not speak to the issue at all. So rather than exercising its authority "imperfectly," the OPUC failed altogether to exercise its authority to approve exclusive service territories with any clarity whatsoever.

Finally, PGE and the OPUC argue that even if the 1972 Order did not clearly authorize an allocation of exclusive service territories within the city of Portland, later orders issued by the OPUC clarify the 1972 Order. In particular, the PGE and the OPUC rely upon a 1974 Order of the OPUC, which, they assert, confirmed that the 1972 Order did, in fact, confer state-action immunity.²²

None of the OPUC orders relied on by PGE establishes state-action immunity. First, to the extent that there is language in the orders relevant to the division of the Portland

²²PGE also cites Pub. Util. Comm'n of Or., Orders 73-688 (Oct. 25, 1973), 75-704 (Aug. 13, 1975), and 79-055 (Jan. 12, 1979).

market, it merely recognizes the undisputed fact that PGE and PP&L had stopped competing with each other in that city.¹⁹ For instance, the 1974 Order, on which PGE relies most heavily, states that PGE and PP&L "no longer competitively serve the same areas. Their respective areas of service within Portland have been defined." Pub. Util. Comm'n of Or., Order 74-658 (Sept. 3, 1974), *aff'd sub nom. American Can Co. v. Davis*, 559 P.2d 898 (1976) (the "1974 Order"), at 25; see also Pub. Util. Comm'n of Or., Order 75-704 (Aug. 13, 1975) (noting that PP&L serves customers "in parts of Portland"). That language is merely a description of the status quo; it is not an expression of a state policy to replace competition with regulation. Although the quoted language might tend to support a permissive inference that the commissioners in 1974 thought that the commissioners in 1972 had defined exclusive service territories in Portland when they issued the 1972 Order, the OPUC can not confer state-action immunity by forming an intent that is not expressed forthrightly and clearly.

Second, the "respective areas of service" language in the 1974 Order, as well as the language in the other OPUC orders stating that PGE and PP&L had stopped competing in Portland, cannot be construed as a product of the OPUC's exercise of its statutory authority to approve contracts allocating exclusive service territories. Because there were no such contracts before the OPUC when it issued these later orders, the orders were not issued pursuant to the provisions of Or. Rev. Stat. ch. 758 authorizing approval of such contracts. The 1974 Order, for example, was issued pursuant to Or. Rev. Stat. §§ 757.205, 757.210, and 757.215, which pertain to changes in tariffs charged by utilities. The 1974 Order approved PP&L's revised tariff schedule, which equalized PP&L's rates

¹⁹As Columbia Steel puts it, "[w]hether, as a matter of fact, the utilities competed is an entirely different inquiry from whether, as a matter of law, the utilities secured lawful allocations of exclusive service territory." Columbia Steel Reply Brief at 11.

in Portland with the higher rates it charged in other areas of the state. As a result, PP&L's rates for customers in Portland became higher than the rates charged by PGE. The "respective areas of service" language in the 1974 Order was recited merely to establish a rationale for the OPUC's action approving the new rates:

A rate differential between Portland and [other areas] was formerly justified on the basis of competing electric service in Portland between [PP&L] and [PGE]. For various reasons, it was believed that in the Portland metropolitan area rates between two similar utilities serving the same area should be the same.

The two companies no longer competitively serve the same areas. Their respective areas of service within Portland have been defined. Thus, with the lack of competition, the justification for rate uniformity is said to have disappeared.

1974 Order, at 25.

[5] As a matter of law, then, neither the 1974 Order nor any of the other subsequent orders of the OPUC amend the 1972 Order to clarify that Order as an expression of state policy to displace competition with regulation. At best, these orders recite that the utilities have stopped competing with each other within territories they have defined. As our court has said, mere "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 736 (9th Cir. 1981) (quoting *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976)), cert. denied, 459 U.S. 1145 (1983).

In sum, we agree with the district court that the elimination of competition between PGE and PP&L in Portland was not

cloaked with state-action immunity. As the district court put it, the OPUC did not "specifically and clearly authorize[] by the relevant statutory process" a division of the Portland market into exclusively served territories. *Pacificorp*, 770 F. Supp. at 571.

B. Issue Preclusion

After Columbia Steel filed this antitrust action in federal district court, PGE applied to the OPUC for a declaration that the 1972 Order allocated exclusive service territories in Portland. In response, the 1992 OPUC issued an order declaring that the 1972 OPUC had intended to do so, and amended the 1972 Order, *nunc pro tunc*, to that effect. In its 1992 Order, the OPUC acknowledged that "perhaps [the 1972 Order] did not unambiguously allocate exclusive service territories to PGE and PP&L." Pub. Util. Comm'n of Or., Order 92-557 (Apr. 16, 1992) (the "1992 Order"), at 14.¹⁴

¹⁴The 1992 Order states, in relevant part:

[B]ecause [the 1972 Order] did not expressly refer to ORS Chapter 758 with respect to future service in Portland under the allocation statutes and because the order did not say that exclusive territorial allocations are being created in Portland, . . . perhaps it did not unambiguously allocate exclusive service territories to PGE and PP&L. However, the order did create boundaries that the utilities observed as if they were allocated territories until Columbia Steel's attempt to switch utilities in 1989. The Commission made the required statutory findings to allocate exclusive service territories and acted as if it had approved a territorial allocation in its 1972 order. The behavior of the utilities and the Commission demonstrates an understanding that exclusive service territories had been created.

For the foregoing reasons, it appears to the Commission that [the 1972 Order] is not a complete and accurate memorial of the 1972 decision of the Commissioner . . . : the order omits a reference to the statute under which its findings were actually made when the Commissioner approve the PGE/PP&L contract. Pursuant to ORS 756.568, the Commission will amend [the 1972 Order], *nunc pro tunc*, to conform to the actual decision intended and followed.

1992 Order at 14-15.

Armed with the OPUC's 1992 Order, PGE moved for reconsideration of the district court's summary judgment rulings in favor of Columbia Steel, arguing that the OPUC's 1992 Order was entitled to full faith and credit. The district court denied the motion, reasoning that:

[t]he availability of the defense of state action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [*v. Brown*, 317 U.S. 341 (1943)] and the authorities which have interpreted *Parker*. . . . The fact that the [O]PUC did not do what it now concludes that it intended to do in the 1992 Order does not alter the fact that the claim of PGE to a monopoly was not specifically and clearly authorized at the time that this court decided that Columbia Steel was entitled to a declaration that [the 1992 Order] neither empowers nor authorizes PGE to monopolize the service of electric power to Columbia Steel.

Unpublished Opinion, filed June 29, 1992, at 7-9.

[6] We agree and hold that the 1992 Order is not entitled to preclusive effect because the issue decided by the OPUC in that order is not identical to the state-action immunity issue.¹⁴

¹⁴Oregon law provides that one tribunal may give preclusive effect to the prior determination of an issue by another tribunal only if "the issue in the two proceedings is identical." *Hickey v. Settlement*, 864 P.2d 372, 375 (Or. 1993).

Oregon law also provides that the second tribunal may give preclusive effect to an earlier decision only if "the party sought to be precluded has had a full and fair opportunity to be heard on that issue." *Id.* Columbia Steel argues that it was not given such an opportunity before the OPUC issued the 1992 Order. Columbia Steel denies having waived its right to a hearing on the merits, pointing to record evidence that it only agreed to postpone the submission of evidence to the OPUC until the OPUC ruled on Columbia Steel's motion to dismiss for lack of jurisdiction. We need not decide whether Columbia Steel was denied a fair opportunity to be heard in the proceeding before the OPUC because, as we explain in the text, the issue in that procedure is not "identical" to the issue of state-action immunity in this federal antitrust action. *Id.*

The issue decided by the 1992 OPUC is whether the 1972 OPUC had the intent to approve the allocation of exclusive service territories in the city of Portland. The state-action immunity issue is different. It does not turn on the fact issue of the subjective intent of the OPUC at the time it issued the 1972 Order. Rather, the state-action immunity question is one of law that turns on whether the displacement of competition with monopolies in the Portland market was "clearly articulated and affirmatively expressed as state policy," *Midcal*, 445 U.S. at 105. As the district court said, "the availability of the defense of state-action immunity depends upon the satisfaction of the objective standards set forth in *Parker* [and its progeny]." Unpublished Opinion, filed June 29, 1992, at 7-8. In other words, state-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymakers.

In declaring what the 1972 OPUC intended to do, the 1992 OPUC approached the 1972 Order as though it were interpreting a contract. After finding ambiguity in the 1972 Order, the 1992 OPUC went on to decide, as an issue of fact, the intent of the 1972 OPUC by looking to extrinsic evidence such as the behavior of the parties between 1972 and 1990. See 1992 Order, at 12-15. To repeat, state-action immunity is not an issue of fact. It cannot be decided simply by ferreting out extrinsic evidence in an effort to ascertain the subjective intent of the state. The issue of state-action immunity must be decided by applying the "rigorous" test, *Patrick*, 486 U.S. at 100, of whether the state "clearly articulated and affirmatively expressed" its intent to displace competition with regulation as a matter of state policy. *Midcal* 445 U.S. at 105.¹⁰

¹⁰For the same reason, there can be no issue preclusion based on the judgment of the Marion County Court affirming the 1992 Order on the ground that the it was "supported by substantial evidence." See *Columbia Steel Casting Co. v. Public Util. Comm'n of Or.*, Marion County Circuit Court No. 92C-12005, Judgment affirming Public Utility Commission of Oregon Order Nos. 92-557 & 92-1135, at 2, *aff'd without opinion*, Oregon Ct. of Appeals (Dec. 15, 1993).

In sum, the 1992 OPUC could not satisfy the *Midcal* test retroactively by amending the 1972 Order years after PGE entered into the monopolistic agreement it now seeks to cloak with federal antitrust immunity.¹⁷ In other words, the state of Oregon cannot satisfy the objective *Midcal* clear articulation test by declaring that it had intended to displace competition with regulation 20 years earlier.¹⁸

C. Foreseeability: PGE's New Argument on Appeal

PGE, joined by the OPUC, argues for the first time on appeal that state-action immunity applies because the division of the Portland market was a foreseeable result of the 1972 Order. According to PGE, "state action immunity must apply where the [challenged] conduct is the 'foreseeable result' of the state's policy." Opening Brief of Appellant Portland General Elec. Co. at 23 (citing *Nugget Hydroelectric Co. v. Pacific Gas & Elec. Co.*, 981 F.2d 429 (9th Cir. 1992), cert. denied, 113 S. Ct. 2336 (1993)). "We will review an issue that

¹⁷It is fundamental that an order or judgment is not entitled to full faith and credit if the issuing tribunal had no subject matter jurisdiction over the matter before it. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-05 (1982). We do not know whether the OPUC and the Marion County Court had subject matter jurisdiction as a matter of state law to amend the 1972 Order retroactively. We believe, however, that it is questionable whether either had subject matter jurisdiction to decide the federal antitrust question of state-action immunity that is now before us. We need not decide this jurisdictional question because the lack of identity between the issue decided in the 1992 Order and the issue of state-action immunity deprives the 1992 Order of any preclusive effect in this federal antitrust action.

¹⁸PGE's reliance on *California Aviation, Inc. v. City of Santa Monica*, 806 F.2d 905 (9th Cir. 1986), and the cases on which it relies, for the proposition that *Midcal* can be satisfied retroactively is misplaced. In *California Aviation*, the later statute "articulat[ed] and affirm[ed] a pre-existing state policy of allowing [particular] anticompetitive conduct." *Id.* at 909 (emphasis added). In contrast, there was no pre-existing state policy to eliminate competition in the Portland market for the OPUC to articulate or affirm in its 1992 Order.

has been raised for the first time on appeal under certain narrow circumstances," including "when the issue is purely one of law." *Parks Sch. of Business v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995). Because the foreseeability issue raised by PGE and the OPUC is a pure issue of law, and because consideration of it will not prejudice Columbia Steel, see *Aronson v. Resolution Trust Corp.*, 38 F.3d 1110, 1114 (9th Cir. 1994), we exercise our discretion to consider it.

In our original opinion, we agreed with PGE. We held that "[u]nder [*Nugget and Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988)], private conduct is immunized if it is a foreseeable result of state agency action and if circumstances justify an inference that the agency intended to authorize the conduct." *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 60 F.3d 1390, 1396 (9th Cir. 1995), *herewith withdrawn*. Although we said that "the 1972 Order is not particularly clear regarding the [O]PUC's intention to permit a permanent division of the Portland market, as opposed to a one-time exchange of facilities and customer accounts," *id.* at 1396, we nonetheless "conclude[d] that the elimination of competition between PGE and PP&L was a natural and foreseeable result of the 1972 Order," *id.* at 1399, "justify[ing] the inference that it was intended by the [OPUC]." *Id.* Accordingly, we held that PGE's conduct enjoyed state-action immunity from Sherman Act liability.

[7] We are persuaded by Columbia Steel's petition for rehearing and an amicus curiae brief filed by the Antitrust Division of the Department of Justice that we erred in allowing a foreseeability test to be substituted for the clear articulation test of *Midcal*. In doing so, we misconstrued *Medic Air* and *Nugget*. In *Medic Air*, we used *Midcal*'s clear articulation test, not a foreseeability test, in deciding that state-action immunity shielded a monopoly granted to Air Ambulance Authority in the market of dispatching air ambulances in Washoe County, Nevada. 843 F.2d at 1189. We did use a foreseeability test in *Medic Air*, but only in deciding the reach

of the antitrust immunity that protected Air Ambulance Authority's monopoly in the dispatching market. Specifically, we held that Air Ambulance Authority was not shielded from antitrust liability in using its immunized monopoly power to gain a competitive advantage in a different market, the market for air ambulance services. *Id.* We reasoned that Air Ambulance Authority's antitrust immunity in the dispatching market did not extend to the ambulance service market because anticompetitive conduct in the service market was "not a 'necessary or reasonable consequence' of the decision to establish an exclusive dispatcher." *Id.* (citation omitted). As we explained, "[t]he state and its agencies have not granted Air Ambulance an exclusive [ambulance service] franchise. That they might have done so is irrelevant. The state must act if immunity is to exist. . . . The Protocols [governing dispatching procedures] did not interfere with existing competition. The District Board did not seek to displace competition or limit entry into the ambulance market. The District Board did not even consider the dispatch program's effect upon competition." *Id.*

The anticompetitive conduct at issue in *Nugget* was also expressly authorized by state action independently of any foreseeability inquiry. A California statute authorized the California Public Utility Commission to "'specify the prices, terms, and conditions' for the sale of power by a private power producer like *Nugget* to a utility." 981 F.2d at 434 (quoting statute). In exercising that statutory authority, the California PUC clearly expressed an intention to regulate such sales in detail. The California PUC's implementing Guidelines provided that private power producers would "generally bear the risk of failing to develop their power facility before the five year deadline and that only rarely will permitting delays qualify as *force majeure* events." *Id.* The Guidelines specified that a utility was "'expect[ed] . . . [to] negotiate [*force majeure* claims] only in instances where it is convinced that a settlement, versus adjudication, is in the ratepayers' best interest.'" *Id.* (quoting Guidelines). We held in *Nugget*

that state-action immunity extended to the anticompetitive effects of a utility's rejection of a private power supplier's *force majeure* claim for an extension of the contract period because the anticompetitive effects were a foreseeable result of the California PUC's implementing Guidelines. *Id.*

[8] Our rejection of PGE's argument that it is entitled to state-action immunity because the division of the Portland market was a foreseeable result of the 1972 Order is consistent with *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), upon which we relied in *Nugget*. The issue in *Town of Hallie* was whether the city's anticompetitive activities were protected by state-action immunity "when the activities are *authorized*, but not compelled, by the State." *Id.* at 36 (emphasis added). The Supreme Court held that the challenged action of the city was protected by the state-action immunity doctrine because the city's conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id.* at 42. However, the Court held that this result was foreseeable because the state expressly authorized the city's anticompetitive behavior. *See id.* In contrast, the OPUC did not expressly authorize PGE to maintain an exclusive service territory; it merely approved the exchange of property and customers.

[9] In sum, neither *Medic Air* nor *Nugget* applies a foreseeability test as a substitute for the threshold *Midcal* clear articulation test. As the Antitrust Division puts it, "express authorization [is] the necessary predicate for the Supreme Court's foreseeability test." Brief of Amicus Curiae United States, at 9. PGE cites no case to the contrary and we know of none.

III. PGE's Other Defenses

[10] In the absence of state-action immunity, an agreement between PGE and PP&L to divide the Portland market for electricity constitutes a per se violation of § 1 of the Sherman

Act. See, e.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (agreement among competitors to allocate territories to diminish competition is a per se § 1 violation). There is no genuine issue of material fact regarding the existence of such an agreement that would prevent the entry of summary judgment against PGE on liability. See *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996). We therefore address PGE's affirmative defenses other than state-action immunity. Although the district court found only one of these defenses worthy of discussion, we discuss each of them in turn.

A. Statute of Limitations

PGE argues that Columbia Steel's antitrust action, which was filed on June 19, 1990, is time-barred because it was filed four years after any overt act in furtherance of PGE and PP&L's agreement to divide the Portland market. See 15 U.S.C. § 15(b) (establishing 4-year limitations period for Sherman Act violations); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) ("even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act"). PGE argues that the acts relied upon by the district court in finding Columbia Steel's antitrust claims timely were insufficient to restart the running of the statute because they were merely "reaffirmations" of the original 1972 Agreement to divide the Portland market. See *id.* at 238.

On May 30, 1990, Columbia Steel wrote to PGE and stated that it would terminate its contract with PGE and take power from PP&L as of July 1, 1990, if PGE would agree to wheel power for PP&L so it could serve Columbia Steel's casting plant. PGE said no, declaring in a letter dated May 30, 1990, that "[Columbia Steel] is within PGE's exclusive territory. If it desires to purchase electricity, it must do so from PGE." The district court held that PGE's refusal to wheel PP&L's

electricity to Columbia Steel's casting plant was an overt act that restarted the statute of limitations.

We agree with the district court. PGE's refusal was not a mere reaffirmation of PGE and PP&L's 1972 Agreement to stop competing in the Portland market because the 1972 Agreement was not a permanent and final decision that controlled the later act. See *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300-01 (9th Cir.) (limitations period restarted each time tour guides shepherded tourists away from plaintiff's souvenir shop in furtherance of antitrust conspiracy between tour operators and other vendors) (quoting and distinguishing *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.), cert. denied, 444 U.S. 900 (1979), in which later acts were mere affirmations of earlier "irrevocable, immutable, permanent and final" decisions that "completely and permanently excluded [plaintiff] from the market"), cert. denied, 479 U.S. 886 (1986).¹⁹ *Hennegan* also distinguishes *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), cert. denied, 454 U.S. 816 (1981), the only Ninth Circuit case other than *Multidistrict Air Pollution* that is cited by PGE on the statute of limitations issue, on the same ground. *Hennegan*, 787 F.2d at 1301-02.

B. Justification defenses

PGE asserts that the 1972 Order required it to stop competing with PP&L in the city of Portland, and that "had PGE failed to conform to the commands of the OPUC . . . it could have subjected itself to treble damages for violation of Oregon utility law." Opening Brief of Appellant Portland Gen.

¹⁹Columbia Steel also argues that the refusal in 1987 of PGE's coconspirator PP&L to service the steel casting plant over the objection of PGE was also an overt act that restarted the statute of limitations. We need not consider the significance of the events in 1987 to the statute of limitations question because we hold that the statutory period was restarted in 1990. The 1987 events are, however, relevant to Columbia Steel's cross-appeal regarding damages, which we address in Part V, *infra*.

Elec. Co., at 29. PGE argues that as a result it is entitled to raise a regulatory justification defense, *see Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 737-38 (9th Cir. 1981) (no antitrust liability when defendant reasonably concludes that its actions are *necessitated* by concrete factual imperatives recognized as legitimate by the regulatory authority), *cert. denied*, 459 U.S. 1145 (1983), and a business justification defense, *see, e.g., City of Anaheim v. Southern Cal. Edison*, 955 F.2d 1373, 1381 (9th Cir. 1992) (utility not liable for using high-powered transmission line to the exclusion of competitors in order to keep rates low).

[11] These justification defenses are not available to PGE. When it stopped competing with PP&L in Portland after the 1972 Order issued, it was under no compulsion to do so because the 1972 Order did not approve the allocation of exclusive service territories. Had the 1972 Order done so, a justification defense would arguably have been available to PGE because the Oregon statutes provide that only the utility that has been allocated a territory may serve that territory. *See Or. Rev. Stat. § 758.450(2)* ("Except [under circumstances not relevant here], no other person shall offer, construct or extend utility service in or into an allocated territory."). In light of this provision, it is significant that in approving an exchange of facilities, the 1972 Order used *permissive* language. *See* 1972 Order at 8-9 ("ORDERED that [PP&L] may transfer to [PGE] all electric distribution plant . . . that [PGE] may transfer to [PP&L] all electric distribution plant . . . that the manner and method for accomplishing the transfer and exchange of property . . . and the terms and conditions governing this transfer, shall be as provided by [the 1972 Agreement]") (emphasis added). Because the language of the 1972 Order was permissive, it did not require PGE and PP&L to perform the 1972 Agreement and did not prevent them from rescinding it before the property was exchanged. Given the statutory prohibition against serving a territory allocated to another utility, *see Or. Rev. Stat. § 758.450(2)*, the permissive language in the 1972 Order would have been incongru-

ous if the 1972 Order had approved an allocation of exclusive service territories.

C. The Noerr-Pennington Doctrine

[12] PGE argues that it is entitled to antitrust immunity under the *Noerr-Pennington* doctrine. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (the Sherman Act does not prohibit competitors from "associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly"); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965). The *Noerr-Pennington* doctrine, which is rooted in the First Amendment protection of political activity, see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), does not apply here. Applying to an administrative agency for approval of an anticompetitive contract is not lobbying activity within the meaning of the *Noerr-Pennington* doctrine. In any case, PGE is not being held liable for filing the application that resulted in the 1972 Order. PGE is being held liable for agreeing with PP&L to replace competition with area monopolies in the Portland market.

D. The Filed Rate Doctrine

PGE argues that the filed rate doctrine bars Columbia Steel from recovering damages even if PGE did violate the Sherman Act. The filed rate doctrine generally forbids the recovery of treble damages under the Sherman Act based on the payment of rates that are established by regulated tariffs, even if the defendants engaged in illegal price-fixing. See, e.g., *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162 (1922). According to PGE, the filed rate doctrine applies in this case as follows: (1) Because PGE could charge only the rates approved by the OPUC, it could not charge the same rate offered by PP&L to Columbia Steel; (2) PGE could not "transfer" its customer Columbia Steel to PP&L without

OPUC approval; (3) thus, the district court could not award damages based on the difference between the rate charged by PGE and the "rate that might have been approved absent the conduct at issue." Opening Brief of Appellant Portland General Electric Co. at 32.

[13] We reject PGE's reasoning. The conduct challenged in this case is not PGE's refusal to sell electricity to Columbia Steel at a lower rate. Rather, the challenged conduct is the non-competition agreement that prevented Columbia Steel from buying electricity at PP&L's lower rates. The filed rate doctrine is inapplicable. To hold that it is applicable would be to "allow a blockade of a competitor to escape scrutiny. This would overextend *Keogh's* reach and could produce a rule that one who pays for services governed by [a regulatory body's] tariffs is foreclosed from asserting that antitrust violations prevented use of a less expensive, equivalent service." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993).

IV. Damages

PGE argues that Columbia Steel suffered no damages at any time because (1) at all relevant times, Columbia Steel was obligated on its requirements contract with PGE to purchase electricity from PGE, and (2) PGE could not transfer Columbia Steel as a customer to PP&L without prior OPUC approval. These arguments are to no avail. First, Columbia Steel's requirements contract with PGE did not bar it from suing PGE under the Sherman Act for agreeing with PP&L to stop competing in the Portland market. *See, e.g. Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968) (franchise agreement does not defeat franchisee's standing to bring antitrust suit against franchisor); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 716, 781 (3d Cir. 1967) ("captive customer" having valid lease agreement with defendant for use of certain equipment could nonetheless sue for antitrust violation based on defendant's

refusal to sell the equipment), *aff'd on other grounds*, 392 U.S. 481 (1968).

As for PGE's second argument, the only authority it cites is an unexplained statement by the district court that "PGE must receive prior approval from the OPUC before it can transfer a customer to another provider of electric service." Unpublished Opinion, filed Feb. 5, 1993, at 8. Not only is this statement unexplained,²³ the district court cited no statute, regulation, or any other authority to support it. Nor does PGE offer any. In the absence of any analysis or authority for PGE's argument that OPUC approval was necessary for Columbia Steel to become a customer of PP&L, we cannot hold that it has any merit.

V. Columbia Steel's Cross-Appeal on Damages

Columbia Steel argued to the district court, and now argues on its cross-appeal, that it was entitled to damages beginning with PP&L's refusal in 1987 to sell Columbia Steel power at its lower rates. The district court rejected this argument, stating that "Columbia Steel cannot recover damages from PGE for actions taken or not taken by PP&L. Even where officials of PP&L contacted officials of PGE and discussed the request for service, the refusal of service was an act by PP&L and not an act by PGE." Unpublished Opinion, filed Feb. 5, 1993, at 24. The district court therefore limited recovery of damages to the period from July 1990, when Columbia Steel entered into a contract with PP&L and was thus "willing and able to actually purchase power at a lower rate from PP&L," and July 1991, when PGE began wheeling PP&L's power to Columbia Steel over PGE's transmission lines. *Id.* at 25.

We agree with Columbia Steel that the district court erred

²³Specifically, the district court does not explain how this statement squares with its analysis leading to its rejection of PGE's state-action immunity defense.

in not awarding damages beginning in 1987. The district court mistakenly held that PGE could not be liable for PP&L's refusal to sell power to Columbia Steel in 1987. PP&L was a coconspirator in 1987, and PGE is liable for the acts of PP&L in furtherance of their conspiracy not to compete in Portland. *See Beltz Travel Serv., Inc. v. International Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) ("If [plaintiff] can establish the existence of a conspiracy in violation of the antitrust laws and that [defendants] were a part of such a conspiracy, [defendants] will be liable for the acts of all members of the conspiracy in furtherance of the conspiracy, regardless of the nature of [defendants'] own actions.").

VI. Conclusion

The partial summary judgment holding PGE liable to Columbia Steel under § 1 of the Sherman Act is **AFFIRMED**. The partial summary judgment awarding Columbia Steel \$508,425 in treble damages is **VACATED** and the case is remanded to the district court for a redetermination of Columbia Steel's damages in accordance with this opinion. Columbia Steel's motion for attorney's fees on appeal pursuant to 15 U.S.C. § 15 is **GRANTED**. The amount of the fees shall be determined by the district court.

Rec'd
11-21-97
from Don Edwards
CEA

STATE OF ALASKA
BEFORE THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners:

Sam Cotten, Chairman
Alyce A. Hanley
Dwight D. Ornquist
Tim Cook
James M. Posey

In the Matter of the Formal Complaint Filed by)
the MUNICIPALITY OF ANCHORAGE d/b/a)
MUNICIPAL LIGHT AND POWER Against) U-97-201
CHUGACH ELECTRIC ASSOCIATION, INC.)
_____)

MOTION OF CHUGACH ELECTRIC ASSOCIATION, INC
FOR DECLARATORY JUDGMENT
(SUMMARY JUDGMENT)

ORAL ARGUMENT REQUESTED

CHUGACH ELECTRIC ASSOCIATION, INC.

General Counsel's Office
5601 Minnesota Drive, P.O. Box 196300
Anchorage, Alaska 99519-6300
Phone 907-782-4790

Pursuant to AS 42.05.311 and 42.05.321, 3 AAC 48.820 (34) and Rule 77(c) of the Alaska Rules of Civil Procedure, Chugach Electric Association, Inc. ("Chugach") hereby moves the Alaska Public Utilities Commission ("Commission") for an Order:

1. Declaring that Alaska state law does not clearly articulate and affirmatively express the state's intent to permit the Municipality of Anchorage d/b/a Municipal Light & Power ("ML&P") to monopolize the sales of electric power for customers served by its transmission and distribution facilities;

2. Compelling ML&P immediately to commence system access services to deliver electric power supplied by Chugach for customers requesting such service on an interim basis at an interim rate such as that attached as Exhibit A to the Memorandum accompanying this Motion; and

3. Compelling ML&P immediately to submit a tariff with the Commission setting forth the terms and conditions for system access services over its transmission and distribution system.

In support of its motion, Chugach files its Memorandum In Support of Motion For Declaratory Judgment.

//

//

//

//

//

7
DATED this 10th day of November, 1997, at Anchorage, Alaska.

Respectfully, submitted,

CHUGACH ELECTRIC ASSOCIATION, INC.



Donald W. Edwards, General Counsel

Telephone: (907) 762-4790

Facsimile: (907) 762-4688

Michael C. Dotten

Eric R. Todderud

Heller, Ehrman, White & McAuliffe

200 S.W. Market Street, Suite 1750

Portland, OR 97201-5718

Telephone: (503) 227-7400

Facsimile: (503) 241-0950

Attorneys for Respondent/Cross-Complainant—
Chugach Electric Association, Inc.

I:\wp61\doal\1997\rec50.wpd

STATE OF ALASKA
BEFORE THE ALASKA PUBLIC UTILITIES COMMISSION

Before Commissioners:

Sam Cotten, Chairman
Alyce A. Hanley
Dwight D. Ormquist
Tim Cook
James M. Posey

In the Matter of the Formal Complaint Filed by)
the MUNICIPALITY OF ANCHORAGE d/b/a)
MUNICIPAL LIGHT AND POWER Against) U-97-201
CHUGACH ELECTRIC ASSOCIATION, INC.)
_____)

MEMORANDUM OF CHUGACH ELECTRIC ASSOCIATION, INC.
IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT

(SUMMARY JUDGMENT)

CHUGACH ELECTRIC ASSOCIATION, INC.

General Counsel's Office
5801 Minnesota Drive, P.O. Box 198300
Anchorage, Alaska 99519-8300
Phone 907-782-4790

TABLE OF CONTENTS

	Page
I. INTRODUCTION, SUMMARY, BACKGROUND	1
A. Introduction & Summary	1
B. Background: The Place Of Competition	4
1. The Legal Starting Point: Federal Antitrust Law	4
2. The "State Action Immunity" Defense: What It Takes	4
3. Substantial Factual Differences Between The Bush And The Railbelt Result In Different Legal Outcomes	5
4. Technology Created, Then Undermined, Natural Monopolies	8
5. Competition Does Not Eliminate Regulation	10
6. The Competition Rulemaking Docket vs. This Case	11
7. Significance Of The Chugach-ML&P Boundary Settlement .	12
8. The Rulings Chugach Seeks	14
II. Argument	15
A. Federal Law Compels Competition Even For Distribution	15
1. Competition Is The Rule	15
2. ML&P Has The Burden Of Demonstrating A Clearly Articulated And Affirmatively Expressed State Policy In Favor Of Monopolization Of Electric Power Sales	16
3. Unless State Law Clearly and Affirmatively Authorizes Their Creation, Exclusive Service Territories Violate the Antitrust Laws	17

i.	The only clear and affirmative authority for the creation of exclusive service territories is found in AS 42.05.221(d).	17
ii.	The expression of one means and one type of exclusive service territory excludes other means of creating exclusive territories.	18
3.	Certificate Requirements Do Not Clearly Authorize Exclusive Service Territories	19
i.	Federal Law: Creation of a distribution monopoly does not clearly articulate and affirmatively express the state's intent to create commodity sales monopoly.	19
ii.	State Law: The Supreme Court has held certificates do not create a monopoly.	19
iii.	State Law: The Commission has concluded that certificates don't grant monopolies.	20
iv.	AS 42.05.221(a) Authorizes exclusive distribution, but not exclusive commodity sales.	21
4.	The Legislature Never Authorized the Elimination of Competition For Sales of Electric Energy Generally; It Only Allows the APUC to Eliminate the Duplication of Facilities	22
B.	The Commission Must Resolve Uncertainties Surrounding Competition and the Scope of Regulation In Favor Of Competition	24
III.	Conclusion	25

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980)	17
Chugach Elec. Ass'n v. City of Anchorage, 426 P.2d 1001 (Alaska 1967)	19, 23
Columbia Steel Casting Co. v. Portland General Elec. Co., 111 F.3rd 1427 (9th Cir. 1997)	13, 15-17, 19, 20, 24
Nugget Hydroelectric v. Pacific Gas and Electric, 981 F.2d 429 (9th Cir. 1992)	16
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	15
Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716 (9th Cir. 1981), cert. denied, 459 U.S. 1145 (1983)	17, 18
Re Claude C. Bailey dba Valley Refuse, APUC Order No. U-83-8(4), 7 APUC 97, 112 (1985)	20
Snake River Valley Elec. Ass'n v. PacifiCorp, No. CV 96-0308-E-BLW, Memorandum Decision at 10, 1997 WL 241086, at *5 (D. Idaho April 25, 1997)	15
<u>Statutes, Rules and Regulations</u>	
3 AAC 48.820(34)	3
3 AAC 52.110	22
3 AAC 52.110 - 3 AAC 52.150	22
15 U.S.C. § 1	15

15 U.S.C. § 2	15
Alaska Rules of Civil Procedure Rule 77(c)	3
AS 42.05.221	20
AS 42.05.221(a)	19, 21
AS 42.05.221(d)	2, 6, 10, 11, 12, 15, 17, 18, 20, 22
AS 42.05.311	18
AS 42.05.321	22, 23
AS 42.05.321(a)(1)	23
AS 42.05.321(a)(2)	23
AS 42.05.361	10
AS 42.05.381	11
Sherman Antitrust Act § 1	15
Sherman Antitrust Act § 2	15

I. INTRODUCTION, SUMMARY, BACKGROUND

A. Introduction & Summary

Chugach Electric Association, Inc. ("Chugach") has asked its neighboring utility, Anchorage Municipal Light & Power ("ML&P"), to deliver over ML&P's transmission and distribution system certain electric power that several current ML&P customers have asked Chugach to sell them. Chugach has asked the Commission to issue a declaratory order because the essential issues in this case can be decided as a matter of law. The key, undisputed facts are these:

- * The customers are willing to pay, and Chugach proposes to charge, Chugach's existing Commission-approved tariff rates for the classes of service involved. No unauthorized rate, much less "cut-throat" pricing, is involved.
- * Chugach has offered to pay ML&P, beginning immediately, a reasonable interim charge for use of ML&P's transmission and distribution facilities and for the delivery, metering, and related services that Chugach and the affected consumers have asked ML&P to provide. No one proposes that ML&P should be "cut out" of fair cost reimbursement or a fair return on its investment in transmission and distribution facilities.
- * Chugach recognizes the Commission has the authority and ability to determine the lawful level of the access services charge that Chugach should pay ML&P, and Chugach has offered to pay ML&P the Commission-determined charge retroactive to the date of first delivery. No one proposes an "end run" around Commission rate regulation.

Nonetheless, ML&P has refused to deliver Chugach's electricity to the customers who have asked to buy it. Interestingly, ML&P has not alleged in its complaint that the form of competition that Chugach wishes to provide to consumers would be harmful to consumers. Presumably even under ML&P's view the Commission could provide for competition if it finds that the public interest would not be hampered by such competition.

Instead of arguing the merits of competition, ML&P insists that only ML&P (the "incumbent" utility) is legally entitled to sell power to customers who receive distribution and power delivery services from ML&P – a proposition Chugach believes is flatly incorrect, as a matter of Federal and State law. ML&P has complained to the Commission; Chugach has answered and filed a cross-complaint and now seeks a declaratory order from the Commission to permit customer choice to begin in the modest way that Chugach has proposed.

The Commission now has its first Railbelt electric "retail competition" case squarely presented to it.¹ At the outset, and to avoid any initial misstep, Chugach

¹Chugach recognizes that the Railbelt is unique in Alaska and that the Commission is concerned that any precedent stemming from this proceeding not lead to unbridled competition in the Bush that could impair the economic viability of Bush utilities or cause economic risk or injury to their consumers. As discussed later in this memorandum, the Commission has ample authority to prevent any such uncontrolled economic injury in the Bush through exercise of the Commission's authority under: 1) AS 42.05.221(d) to condition certificates of public convenience and necessity to prevent competition that would result in duplication of facilities and 2) the Commission's ratemaking authority to condition access to Bush (and Railbelt) distribution systems by requiring payments that will prevent such injury. The appropriate place to investigate the question of whether and how to permit competition in the Bush may be in the regulation docket recently opened by the Commission. As described below, an answer to Chugach's right and legal obligation to compete cannot await resolution of those broader questions.

respectfully asks that the Commission note the threshold issue: this case presents a question of law. The Commission has ample authority to address questions of law through Declaratory Judgment. 3 AAC 48.820(34) and Rule 77(c), Alaska Rules of Civil Procedure. The Commission should understand the legal question presented, address it, and recognize that the Commission's answer to the question will either end this legal dispute quickly (as Chugach hopes) or complicate it greatly.

By clearly and decisively acting on this most fundamental issue of law the Commission with one decision can save Railbelt electric ratepayers the weighty expenditures which will otherwise be made to fight in multiple forums to protect service territory monopolies which, as a matter of law, do not exist. By acting now on this fundamental issue the Commission has an opportunity to do the tremendous public service of shifting the considerable capabilities and efforts of the interested parties from preventing and delaying competition to implementing it.

ML&P has the burden of demonstrating that its proposal to restrict competition for sales of electric power is consistent with antitrust law for the reasons expressed in the Argument portion of this memorandum. To meet this burden, ML&P may not merely infer that the Legislature intended to eliminate competition (a proposition that is contrary to the statutes themselves and Alaska Supreme Court and Commission precedent). To meet its burden, ML&P must point to statutory provisions that constitute a clearly articulated and affirmatively expressed state policy to eliminate competition in electric power sales in Alaska.

B. Background: The Place Of Competition

1. The Legal Starting Point: Federal Antitrust Law

"Open access distribution and retail competition can't happen yet," asserts ML&P, the incumbent utility in this case. "The Commission hasn't authorized it. The Legislature hasn't legislated it. ML&P hasn't filed an open access tariff." (We've taken the liberty of paraphrasing ML&P's argument.)

As a matter of law, ML&P is simply wrong. ML&P mistakes the legal starting point. Through the Federal antitrust laws, Congress long ago mandated competition. In particular, under Federal antitrust law, attempts to enforce exclusive sales territories are illegal per se throughout the American economy, at least in the absence of a valid legal defense.

The Federal antitrust laws do apply to electric utilities in Alaska (despite ML&P's denials). Competition is therefore the starting point; the legal status quo. Neither Commission action nor legislative action -- much less action by ML&P -- is needed in order to "allow" competition to begin; competition is already mandated unless legislative action, or authorized Commission action, is taken to stop it.

2. The "State Action Immunity" Defense: What It Takes

The reason exclusive sales territories for electric utilities remain lawful in some other States, despite Federal antitrust laws, is that the Legislatures in those States have enacted statutes that "clearly articulate and affirmatively express" a State legislative policy in favor of such exclusive territories and against competition in retail sales of electric

power generally. Legally, State statutes of this specific type reflect a sovereign policy choice that Federal law respects. The courts treat such statutes as providing a "State action immunity" defense to an electric utility that might otherwise be charged with violating Federal antitrust laws by attempting to monopolize the sale of power within the territory where that utility owns distribution lines, meters, and other delivery facilities.

The Alaska Legislature is free to enact such a statute, i.e., to "clearly articulate and affirmatively express" a State legislative policy in favor of exclusive territories for the sale of electric power at retail and against retail competition generally. But the Legislature never has.

The Legislature has authorized the Commission to limit some forms of retail electric competition on the basis of particular specified findings. This is not a general Legislative policy against competition; far from it. And legally, no Legislative policy against competition can properly be inferred from other portions of the Commission's governing statutes, such as the statutory provisions that govern tariffs or certificates of public convenience and necessity. None of these latter provisions mentions competition, much less expresses a Legislative policy against it; none mentions exclusive sales territories, much less expresses any Legislative policy in favor of such monopolies.

3. Substantial Factual Differences Between The Bush And The Railbelt Result In Different Legal Outcomes

One reason for the natural development of traditional, vertically integrated monopoly utilities is important, and may continue to apply in those parts of Alaska (unlike the Railbelt) where individual electric utilities remain electrically isolated and without

interconnection to other power systems. When electric power is first generated in any previously unelectrified and electrically isolated (or "islanded") location, it is customary and logical for a single entity to build, obtain, and/or install all the necessary facilities: the electric distribution system; the initial generating units to provide power to consumers over that system; and the transmission to bring power from the generators to the distribution system. This is how electric power was originally brought to most U.S. communities, including in Alaska.

For historical and technological reasons, all electric utilities were once considered "natural monopolies" ill-suited to any form of competition. In many Alaska Bush communities, where electric utilities remain electrically isolated and are interconnected poorly or not at all with other systems, electric utilities may remain natural monopolies ill-suited to any form of competition. The Commission might reasonably conclude that competition among utilities or other regulated power suppliers in electrically isolated localities would result in an undesirable duplication of facilities, and/or be contrary to the public interest for this or other reasons. If so, the Commission has ample power under existing Alaska statutes to prevent competition in such localities through exercise of its authority to limit duplication of distribution facilities (AS 42.05.221(d)) or by limitations placed on distribution access through tariffs adopted by the Commission in exercising its ratemaking authority. But those are matters for the Commission's rulemaking proceeding.

The Railbelt is not the Bush. Railbelt utilities are large, electrically interconnected, and just as well suited to competition as electric utilities elsewhere in the United States.

Since the sale of electric power as a commodity can now be "unbundled" from the service of delivering that commodity, competition in sales of electric power at the retail level has become every bit as feasible as traditional and by now familiar competition in sales of electric power at the wholesale, economy, and bulk power levels. This is true throughout most of the United States, and is true in the Railbelt.

Non-discriminatory open access over an "incumbent" utility's distribution system, in return for payment of a tariff charge for access services, is conceptually no different from non-discriminatory open access over any utility's transmission system in return for payment of a tariff charge for wheeling. Open transmission access is a fact everywhere. In Alaska, open distribution system access simply hadn't arrived – until now.

Electrically, the Railbelt resembles the majority of the United States in all respects relevant to retail competition. The distribution system is fully built. The transmission system is generally adequate. Existing generating capacity is more than sufficient to meet the total load on the interconnected system. There are no technological obstacles to competition.

Thus, in the Railbelt, the sale of electric power as a commodity can readily be "unbundled" from the provision of access services. This is similar to the sale of other commodities, such as oil or gas, bulk goods, or consumer goods, which are sold competitively and delivered by separate pipeline, rail, air, shipping, or trucking companies. Even when the delivery facilities remain a regulated "natural monopoly" because their duplication would be wasteful – as for an oil pipeline – there is no reason

those delivery facilities cannot be made available on an open access basis to competing sellers of the commodity being delivered.

In the Railbelt, if transmission and distribution are provided on a non-discriminatory, open-access basis, competition need not produce any duplication of facilities -- distribution, transmission, or generation. In fact, it is worth noting that traditional utility regulation has not prevented an excess of generation in the Railbelt. Thus, the notion that competition might produce duplication of generation facilities in the Railbelt is particularly untenable. And, as already noted, the sale of power on a competitive basis using already installed transmission and distribution facilities will not produce duplication of these types of facilities either.

4. Technology Created, Then Undermined, Natural Monopolies

As electric utilities were formed in this country, including in Alaska, the relatively primitive technology available at the time for matching the output of generators to the actual loads of consumers also required that utilities be vertically integrated. That is, the utility that provided the delivery service also needed to control the distribution and transmission facilities and control the output of the generators that produced the electricity ultimately sold and delivered to the customer.

The control technology then available to coordinate generation, transmission and distribution was very limited -- far too limited to allow an "incumbent" utility to undertake delivery of electricity sold by another supplier to consumers on the "incumbent's" distribution system.

In many states, the statutory law reflected the physical reality that electric sales and service must be vertically integrated and provided on a "bundled" basis. The notion that electric power generation, sales, and service were all one "natural monopoly" evolved. In some states, "exclusive service territories" were established either by the Legislature or by state regulatory commissions.

Some States (especially those that were electrified later in the century), including Alaska, took a different approach. Those States passed statutes that permitted competition for end-user load, except to the extent that such service would result in potentially inefficient, harmful, or dangerous duplication of facilities. Once a utility had received a certificate of public convenience and necessity, it would be permitted to provide electric power sales and service, including competitive electric power sales and service, unless the state's public utilities commission ordered otherwise.

Now, even the "exclusive service territory" States are rethinking the logic of vertically integrated electric monopolies. Huge advances in electric control technology now permit electric power to be "unbundled" into the component parts of generation, transmission, and distribution/delivery service in much the same way as local and long distance telephone service have been unbundled. (To repeat another example with which this Commission is very familiar: the sale of crude oil, and more recently of natural gas, is "unbundled" from the regulated pipeline service of delivering these commodities.)

In addition, the advent of non-utility power marketers (and even non-utility generators) has created competition in the sale of power and demonstrated the feasibility

of integrating power from third party sources to provide power to distribution customers. The physical rationale for vertically integrated monopolies (lack of interconnection and limited control technology) is evaporating at the same time that the potential benefits of competition are becoming more evident to all consumers.

5. Competition Does Not Eliminate Regulation

The rationale for regulated natural monopolies was to protect the consumer from monopoly abuses through regulatory supervision, while at the same time providing lower rates that would result from the economies of scale presumed to come from vertical integration. The new control technologies that permit unbundling of the component parts of electric service can now produce the best of both worlds for the consumer: competitive prices for power sold as a competitive commodity, and continued rate regulation over transmission and distribution.

Chugach proposes not to eliminate regulation in favor of unbridled competition, but instead to give consumers the benefits of competition for the sale of electricity as a commodity, subject to continued regulation by the APUC of retail rates, access charges, construction of facilities, and the scope of distribution and transmission monopolies. The proposal requires no change in Alaska law.

The Commission can prevent duplication of facilities that it finds harmful to the public interest under AS 42.05.221(d). The Commission has full authority over the rates that a utility may charge those for whom it is providing transmission and distribution service. AS 42.05.361. It can prevent undue impact to utilities, including prevention of

"stranded" asset costs, by adjusting the rates for transmission and distribution service so that the rates are just and reasonable (AS 42.05.381) and adequate to prevent harm to the "incumbent" utility.

6. The Competition Rulemaking Docket vs. This Case

The Commission's recently-initiated rulemaking proceeding may provide a forum for considering the needs of, and perhaps protecting, Bush utilities in the face of growing competition in the electric power sector. Chugach expresses no opinion on that point, other than to repeat that the Commission has the power to so protect Bush utilities if it determines that such protection is necessary in the public interest. AS 42.05.221(d), AS 42.05.361 and AS 42.05.381.

Chugach's and ML&P's specific disagreement must be addressed in this proceeding, however, and promptly. First, the public is presently being deprived of electricity purchases at a lower rate. So an expeditious determination by the Commission would serve the public interest. Furthermore, if Chugach is correct, the Commission cannot lawfully prevent the competition Chugach proposes, although the Commission certainly can regulate (1) what Chugach charges for electricity sold to consumers, and (2) the charge ML&P imposes for distribution and delivery services.

Actual consumers have asked Chugach to sell them electricity, and Chugach has asked ML&P to deliver that electricity for a fee. ML&P has refused. Chugach and ML&P each base their position on a legal argument. Federal antitrust law governs,

including in the application of State statutes to this case, and Federal antitrust law determines whether Chugach's position or ML&P's is correct.

The Commission's applicable statutes compel such a decision, too. ML&P has filed a complaint against Chugach that necessarily begins a docket to resolve the dispute at the Commission, and that complaint compels an answer. Chugach has answered, and Chugach has cross-complained against ML&P. Chugach therefore requests that the Commission proceed expeditiously and rule promptly in this case, as applicable statutes require. AS 42.05.141(2) (setting deadlines to answer complaints, and requiring complaints to be set for hearing "at the earliest convenience of the Commission"). Because there are no genuine issues of material disputed fact, this case--and certainly this first phase--may be decided by the Commission by Declaratory Judgment.

7. Significance Of The Chugach-ML&P Boundary Settlement

ML&P can be expected to make much of the Commission having resolved a long-standing boundary dispute between Chugach and ML&P by approving an agreed territorial division of service areas between Chugach and ML&P under AS 42.05.221(d). That ML&P contention is a complete red herring. First, in determining that Chugach and ML&P should reallocate distribution facilities and customers, and thereafter not construct duplicate distribution facilities, the Commission did not rule that Chugach and ML&P should thereafter never compete in sales of electricity as a commodity. This is especially true when, as here, the seller proposes no duplication of delivery facilities but instead