ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9632 SENATE LABOR & COMMERCE

Aurora Power

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FAX:

To:	Annette Kreitzer	From:	Mary Ann Pease
Fax:	907-465-3810	Pages:	2
Phone:	907-465-2095	Date:	April 20, 1998
Re:	SB No. 355	CC:	

NOTES: These are the proposed changes that Aurora Power would like to see on SB No. 355. I would like to discuss these changes with you.

Mary Ann

5718 Westheimer, Suite 1180 • Houston, Texas 77057 • (713) 977-5799 • Fax (713) 977-1347
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0-LS1675\E

SENATE BILL NO. 355

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE-SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE BY REQUEST

Introduced: 4/14/98
Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to the provision of electric utility service."

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

***Section 1.** AS 42.05.221 is amended by adding a new subsection to read:

(g) ~~In order~~ to facilitate the establishment of pilot programs before ~~prior to~~ full retail competition, electric utilities, power marketers, resellers and aggregators may request the Commission to issue orders necessary to enable the providing entity the use of the transmission and distribution facilities of an certificated electric utility for the provision of retail electric service in the Anchorage area. If the electric utility has more than 30 customers for each mile of 30 distribution line. The commission shall issue the orders requested within 10 days after receiving the request. A request under this subsection may include a request for interim refundable tariffs for distribution access services.

Chugach ELECTRIC ASSOCIATION, INC.

5601 Minnesota Drive • P.O. Box 196300 • Anchorage, Alaska 99519-6300 • Phone: 907-762-4790

FACSIMILE:
(907) 762-4688

TELECOPY TRANSMITTAL SHEET

TO:	**SENATOR LOREN LEMAN**
COMPANY:	
LOCATION:	**STATE CAPITOL**
FAX NO.:	**465-3810**
FROM:	**EUGENE N. BJORNSTAD**
SUBJECT:	
COMMENTS/MESSAGE:	
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CHUGACH ELECTRIC
ASSOCIATION, INC.

EUGENE N. BJORNSTAD, P.E.
General Manager

April 20, 1998

Senator Loren Leman
State Capitol
Room 113
Juneau, Alaska 99801-1182

FAX

Re: Questions and Answers -- Competition

Dear Senator Leman:

Answering frequently asked questions set out below may help explain why Chugach feels so strongly that the time is right for customer choice.

Should the APUC be given explicit statutory authority to allow competition?

No. Because competition is already permitted under Alaska statutes without any prior permission, authorizing the Commission to "allow competition" would actually be a step backwards and away from customer choice. The legislature does not need to authorize the Commission to allow competition because under the structure the legislature has already established, there are currently very few limits on competition. Indeed, it could be dangerous to propose changes which allow opponents of customer choice to argue that competition is or has been limited. However, there may be some benefit to clarifying statutes to reaffirm the existing state of the law that there is no limit to competition except as clearly stated in state statutes. It also may be useful to amend statutes to clarify procedures and policies which will guide regulators and facilitate the development of competition. This is why Chugach's efforts are directed primarily toward expediting the establishment of a rate for access over another utility's system.

The legislature is in charge of establishing the broad policies of the state which govern the activities of regulatory agencies. Pursuant to existing state statutes there are few constraints on competition. The main force constraining competition is force of habit. The legislature has established the framework for the operations of utilities in this state. Notably, the legislature has not stated a general policy of limiting competition. The general rule of law is that competition is permitted unless the legislature clearly articulates and affirmatively expresses a public policy to limit it. In the absence of such a clear articulation of public policy to limit competition, neither the Commission nor anyone else can limit competition.

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When one examines the specific authority the legislature has given to the APUC, one finds that they support competition. Pursuant to A.S. 42.05.221(d) the Public Utilities Commission currently has only one specific authority to prevent competition. The APUC may take appropriate action to **eliminate** competition where competition is occurring but is not in the public interest. In addition, A.S.42.05.311 now requires electric utilities to permit another public utility to use their transmission and distribution facilities for a reasonable compensation.

Of course, the Commission has very potent authority in other areas which will impact the development of competition. In particular, the APUC has broad authority to set the rates, terms and conditions of access services over a utility's system. This authority allows the Commission sufficient control over how competition unfolds to ensure that the public interest is served. Where necessary, the Commission can limit competition through an appropriate proceeding pursuant to A.S. 42.05.221(d). The statutes are adequate as they are because they do not, except in limited circumstances, prevent competition but they allow ample authority for the Commission to protect the public interest.

What is the major difference between electric utilities in Alaska taking into account both urban and rural areas as compared to the lower 49 states?

Unquestionably, the main difference is that many utilities in Alaska are not connected to a grid. From the standpoint of the development of competition, this means that competition for isolated rural communities will come from self-generation and cogeneration as it always has. The Railbelt, on the other hand, looks much like the lower 48 states. In the Railbelt, where several systems have developed to be quite well interconnected, competition already exists not only in the form of self-generation and cogeneration but also from independent power producers. Competition has been occurring at the wholesale level for at least a decade. The last bastion of non-competition is at the retail level within traditional service territories. This will involve both central station providers and power marketers (load aggregators) which claim to be exempt from regulatory oversight and are already becoming active.

If the ultimate goal is to lower consumer prices for electricity, it is true that deregulation and competition will be the method?

Certainly the experience in the airline, natural gas, telephone, and other industries has demonstrated competition is the surest route to savings. It is perhaps the greatest (and most painful) lesson of our century that competition generally is the most efficient and wealth producing economic structure. One need only look to the old Soviet Union for evidence that the old collectivist, planned structures have failed. Most of the rest of the world is busy removing the heavily regulated structures which have failed to produce highest value for consumers. Indeed, many economists believe that a significant portion of the recent economic growth of the United States and other

economies has resulted from the efficiency gains from reduced regulation and increased use of competition in lieu of older forms of regulation.

How should the state assure that residential consumers reap the same benefits as large commercial customers and how do we solve the rural/urban problems?

Again, experience in the airline, natural gas, telephone, and other industries has demonstrated that where **competition is allowed to operate for all levels** of customers, even small customers benefit from greater choice and competition among service providers. It is a myth that cherry picking causes harm to smaller customers so long as all customers are free to choose. Any provider who tries to load costs onto small customers will find load aggregators forming them into "cherries" (larger aggregated loads) to be picked. Chugach will enjoy competing against a utility which thinks it can load costs onto its small customers.

Rural areas may not be large enough to sustain competition for central station power but they are now and will continue to be exposed to increasing competition from self-generation and cogeneration as those technologies become more efficient. Nothing has changed legally in this regard although technological changes are resulting in greater competition. Development of competition in the Railbelt will not affect rural consumers. Rural competition will certainly present different issues for consideration. In any particular situation, the potential benefits and detriments of competition should be evaluated. This is why Chugach was willing last year to support legislation providing for prior review by the Alaska Public Utilities Commission of competition in smaller communities if this was their wish. Currently these communities do not have this protection and must apply to the Commission for protection under A.S. 42.05.221(d).

Can the state control the level of "cherry picking or cream skimming" and accomplish increased competition at the same time without eliminating competition?

The best way to ensure that "cherry picking" does not harm the little guy is to make sure the small customer has a choice. Generally speaking, government has a hard time when it tries to directly control, direct or plan commerce. We believe it is best for government to implement a structure with good incentives built in and allow it to run without direct intervention. If <u>all</u> customers are given the ability to choose their suppliers, the pressures of the competitive market will provide strong incentives for the suppliers not to abuse one group of customers by pushing costs onto them.

How should the practice of "cherry picking or cream skimming" be defined?

"Cherry picking or cream skimming" is used when a seller is unsuccessful in competing with another seller and loses a load or is afraid it will be unsuccessful. Usually, it is a term reserved for large and painful losses and is used most frequently when the unsuccessful seller wants the

government to protect them from having to compete. Another view of a "cherry" is a customer which has been unfairly burdened by a monopoly and can't wait to have a choice. Another "cherry" is a group of formerly ignored and abused customers who (when not prevented by their government from choosing) are aggregated into a large enough load that they can no longer be ignored. In short, cherry picking or cream skimming is merely a negative term used by fearful competitors to describe how and why they will lose customers to a provider which can better meet customer needs.

When electrical service areas overlap how do we preserve competition without duplication of capital investments?

A.S. 42.05.221(d) addresses this by empowering the Commission to prevent competition when it finds that it is not in the public interest. This statute specifically provides for the elimination of duplication of plant. 3 AAC 52.110 et. seq. contains regulations providing procedures for quickly resolving disputes over allocation of facilities and services between competing electric utilities. The boundary settlement agreement between Chugach and ML&P divides service territories to prevent duplication of distribution plant. A.S. 42.05.311 requires utilities to provide access over existing facilities. As you can see, the statutes are in fairly good shape.

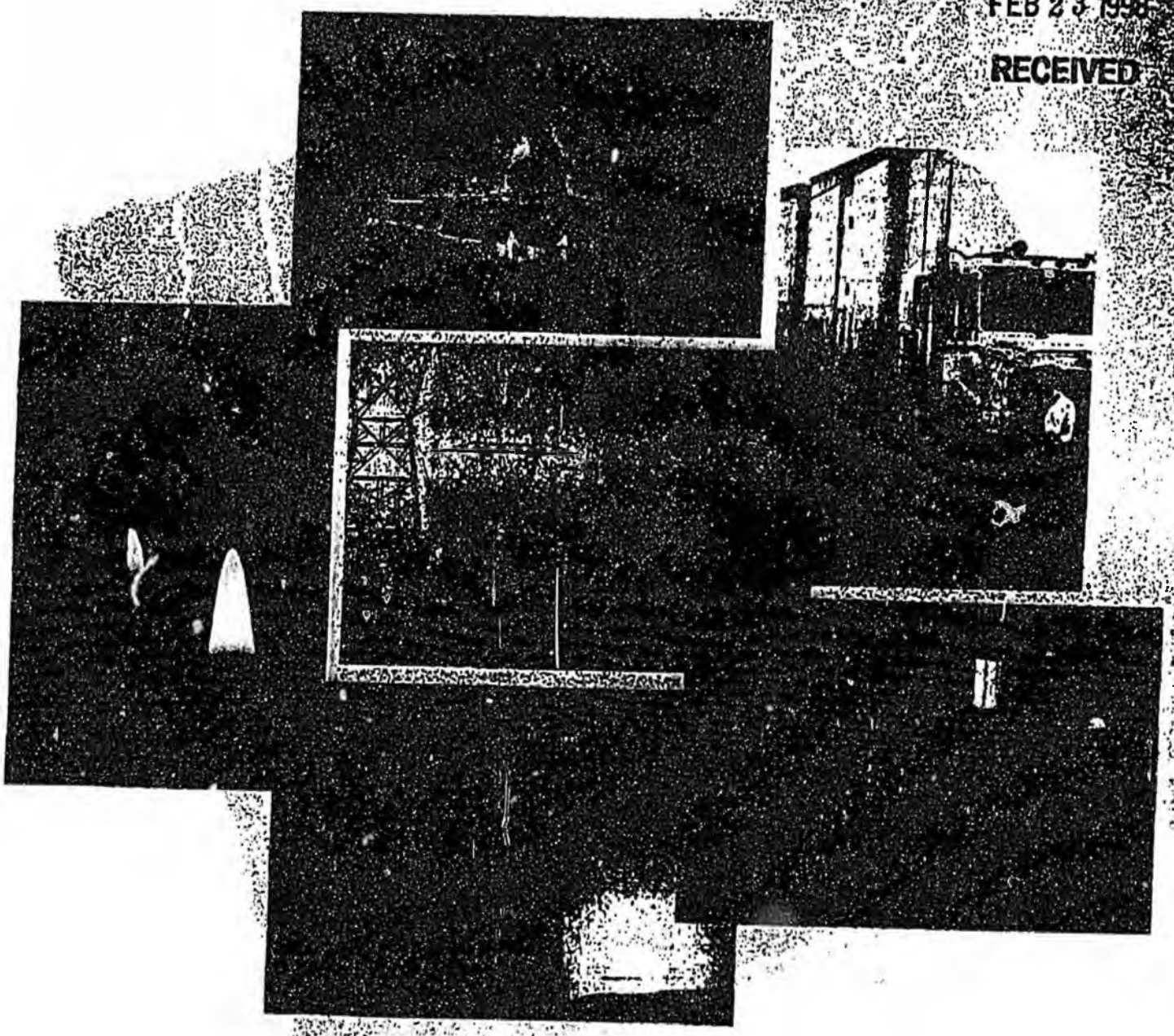
I hope these answers help you to develop your understanding of these matters of great public importance. Chugach greatly appreciates your willingness to grapple with these issues. I truly believe that the public will be well served by leaders such as you taking a stand to protect the rights of customers to choose and have competition for their business.

Sincerely,

Eugene N. Bjornstad

Eugene N. Bjornstad
General Manager

Economic Deregulation and Customer Choice: Lessons for the Electric Industry



Robert Crandall
The Brookings Institution
Washington, DC

Jerry Ellig
Center for Market Processes
Fairfax, VA

Executive Summary

Policymakers and regulators are engaged in an ongoing debate about introducing customer choice in electric service. The most comprehensive legislative proposals envision a market in which all customers could choose their electricity suppliers. Electric utilities would no longer have monopoly rights to sell electricity to particular groups of customers. Instead, they would become transporters of electricity, and they could also compete in the generation marketplace. The price of the electricity would no longer be regulated, although the price of transportation still would be.

During the past two decades, numerous industries with many economic similarities to electricity have already undergone price and entry deregulation in at least part of the industry. The most significant include natural gas, telecommunications, airlines, trucking, and railroads. Like electricity, these are "network" industries. Suppliers and customers are connected via a network of pipes, wires, air routes, roads, or rails, and the decisions of one network user can affect the ability of others to use the network.[1] The experience of these five industries can therefore serve as a guide in the debate over customer choice in electricity.[2] A review of the evidence reveals several broad conclusions about the effects of deregulation, and each conclusion carries with it a policy implication.

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[1] Because of this fact, analysis of these five industries is more relevant to the electricity debate than that of nonnetwork industries that were deregulated at similar times, such as oil production, stock brokerage, or savings and loans.

[2] We are hardly the first to notice the similarities between electricity and other deregulated industries. In August 1996, the National Regulatory Research Institute released a report whose substantive findings largely agree with ours (Costello and Graniere 1996).

Summary of Trends Following Regulatory Change

Industry	% Real price reduction after... 2 years	5 years	10 years	Annual value of consumer benefits due to deregulation
Gas	10-38% (1984-86)	23-45% (1984-89)	27-57% (1984-94)	N.A.*
Long Distance Telecom	5-16% (1984-86)	23-41% (1984-89)	40-47% (1984-94)	$5 billion
Airlines	13% (1977-79)	12% (1977-82)	29% (1977-87)	$19.4 billion
Trucking	N.A.**	3-17% (1980-85)	28-58%*** (1977-87)	$19.6 billion
Railroads	4% (1980-82)	20% (1980-85)	44% (1980-90)	$9.10 billion

Note: All figures are real, in $1995. Consumer benefit figures in the last column measure *total* consumer benefits, including both price reductions and changes in service quality.

Source: For price reductions, see Appendix and/or text of study for data. Consumer benefit figures are from Crandall (1991), Morrison and Winston (1995), and Winston et. al. (1990).

N.A*: For natural gas, no controlled studies quantify the separate effect of deregulation on gas prices. Winston (1993, 1274-75) speculates that the consumer benefits exceeded economists' prederegulation predictions, which were in the range of $2-4 billion in 1995 dollars. If gas prices had remained at 1984 levels, consumers would have paid $50-60 billion more for gas in 1995.

N.A.**: For trucking, no studies have documented the effects for the first couple of years.

***No trucking figure is available for 1980-90; figure quoted is for 1977-87, from Corsi (1994). Because regulation made it difficult to cut trucking rates, the bulk of these rate reductions occurred after 1980.

- **Finding: Deregulation and customer choice lower prices.**

In each of the five industries, prices paid by customers fell significantly as a result of deregulatory reforms. Within the first two years of deregulation, prices had fallen by 4-15 percent, and sometimes more for certain groups of customers. Within 10 years, prices were at least 25 percent lower, and sometimes close to 50 percent lower. Of course, not all of these changes were due to changes in the regulatory regime, but scholarly studies consistently show that regulatory reform created billions of dollars worth of consumer benefits. Consumers gained substantially—not just because of rate reductions, but also because of improvements in the quality of service. All broad consumer groups shared in the price reductions, though some benefited more than others.

Policy implication: *Competition is desirable.*

Policymakers concerned about consumers should open electric service to competition, deregulate rates, and promote consumer choice as quickly as possible.

- **Finding: Deregulation and customer choice align service quality with customer desires.**

The only declines in service quality attributable to deregulation or regulatory reform occurred when regulation previously limited customer choice, forcing customers to pay premium prices for gold-plated service. Crucial social goals like airline safety, reliability of gas service, and reliability of the telecommunications network were maintained or improved by deregulation and customer choice.

Policy implication: *Service quality is no excuse for delay.*

Concerns about reliability and other aspects of service quality are reasons to expedite regulatory reform. Under deregulation, service quality choices will enable consumers to select the services that best meet their needs.

- **Finding: Consumers have experienced genuine benefits, not just reallocation of costs among customer classes.**

Regulatory reform is not a zero sum game; it has generated genuine gains for consumers and society as a whole. It is possible to find narrowly defined groups of customers in special circumstances who paid somewhat higher prices after deregulation, but the gains to the vast majority of consumers far outweighed the effects on these small groups.

Consumers gained for two reasons. First, deregulation or regulatory reform aligned prices more closely with costs, leading to a more efficient use of resources by both firms and customers. Second, firms faced greater incentives to adopt cost-reducing or quality-enhancing innovations in technology, marketing, and business strategy, which often were not predicted beforehand.

Policy implication: *Transition costs are no excuse for delay.*

Based on the experience in other industries, electricity regulatory reform should produce gains well in excess of the transition costs. Therefore, the presence of transition costs is no excuse for delaying or avoiding reform.

- **Finding: The lower the barriers to customer choice, the greater benefits customers receive.**

Rates fell faster in parts of the market where regulators permitted greater customer choice. In telecommunications, for example, long-distance rates fell faster in the interstate market than the intrastate market, because state regulators have been less tolerant of competition and price cutting. Similarly in the airline industry, during the 1970s proponents made a powerful case for deregulation by showing that tickets were less expensive on the less heavily regulated intrastate routes of Texas and California.

Policy implication: *Choice for* **all** *customers for all competitive services will provide the most benefits.*

The best way to let all customers reap the benefits of competitive electric service is to let all customers choose their electricity suppliers. Policy proposals that deregulate only the wholesale electricity market, or allow only large customers to choose their suppliers, are thus inferior from a consumer perspective. For similar reasons, states that refuse to allow competition from out-of-state suppliers do their own citizens a disservice.

- **Finding: Competitive markets continue to evolve in response to consumer needs.**

Although prices fell noticeably in response to deregulation, adjustment to the new, deregulated environment was far from immediate for incumbent firms. Regulation affects not just the structure of incentives facing a firm, but also its corporate culture—the shared assumptions about what types of activities generate business success. Regulation can change relatively quickly, but corporate culture often changes slowly, and so corporate strategies may also adjust slowly to the deregulated environment. For the five industries in this study, significant changes and adjustments are occurring even after 10 years. Benefits of regulatory reform continued to accrue long after the market was first opened.

Even if some firms adjust quickly to the deregulated environment, that environment changes much more quickly than the regulated environment. The industries in this study did not move from a "monopoly equilibrium" to a new "competitive equilibrium." Rather, they moved from a fairly stable regulated environment to an evolutionary environment in which competitive rivalry continually forces producers to improve their performance. Since it is unlikely that firms will ever stop learning, and consumers are never satisfied with the status quo, a stable equilibrium is extremely unlikely.

The five industries in this study present a plethora of examples of innovations that were not foreseen or planned beforehand. These include natural gas hubs, airline hub-and-spoke

systems, and a multitude of types of new services and customer-premises equipment in telecommunications. Such developments should give pause to anyone who claims to be able to predict either the likely or the optimal market structure.

Policy implication: ***Open and competitive markets should be allowed to evolve.***

Legislators and regulators should resist the temptation to elaborately plan either the structure of markets or the transition process. The temptation to overplan takes many forms, including mandates that power must be bought and sold through a central "POOLCO" and proposals that would restrict the range of contracts that generators can make with customers.

In any move toward greater reliance on markets, transition problems must be addressed. But the significant ones where government must play a role, such as those dealing with transition costs, involve the assignment or reassignment of property rights to various market participants. The proper role of policy is not to "design market mechanisms" but to create and protect a framework of property rights that allows market institutions to evolve on their own.

ATTITUDES TOWARDS COMPETITION IN THE ELECTRIC INDUSTRY

February 1998

Chugach Electric

ATTITUDES TOWARDS COMPETITION IN THE ELECTRIC INDUSTRY

IVAN MOORE RESEARCH
TEL: 278-4600

Hello, my name is _____ and I'm calling for Ivan Moore Research, an Anchorage marketing research firm. We are conducting an Anchorage area public opinion survey concerning your household's utility services that should take no more than a few minutes. Your opinions are important to us, and we'd really appreciate your participation. (PAUSE)

S1. Is this a residential telephone?

IF "YES", CONTINUE...
IF "NO", TERMINATE...

S2. I need to speak with the person in your household who pays your utility bills, or who makes decisions about utility services. Would that be you?

IF "YES", CONTINUE...
IF "NO", ASK FOR PERSON...

S3. Do you pay your own electric bill or do you have a landlord that pays it for you?

IF "YES", THEN PROCEED...
IF "DON'T PAY ELECTRIC BILL/LANDLORD PAYS", THEN TERMINATE...

1. Which company provides your household with its electric service, Chugach Electric or ML+P?

	FREQUENCY	PERCENT
CHUGACH	1016	72.6%
ML+P	384	27.4%

OK, across the country, efforts are underway to allow individual customers to choose their electric provider. In Alaska, both the Legislature and Public Utilities Commission are now reviewing this issue. I'd like to ask you a few questions to see how you feel about this topic.

2. First, do you think that customers should have the right to choose which company they buy their electric power from?

	FREQUENCY	PERCENT
YES	1272.	90.9%
NO	76	5.4%
DON'T KNOW	52	3.7%

3. Do you think competition in the electric industry would result in lower electric prices?

	FREQUENCY	PERCENT
YES	1032	73.7%
NO	233	16.7%
DON'T KNOW	135	9.6%

4. Do you think competition in the electric industry would result in better services?

	FREQUENCY	PERCENT
YES	1017	72.7%
NO	247	17.7%
DON'T KNOW	135	9.7%

5. If you could get better services or lower prices from a different power provider, would you want to be able to switch?

	FREQUENCY	PERCENT
YES	1276	91.1%
NO	80	5.7%
DON'T KNOW	44	3.2%

6. If a legislator were to vote in favor of allowing customers to choose their power supplier, would that make you feel more positive or more negative toward that legislator?

	FREQUENCY	PERCENT
MORE POSITIVE	904	64.6%
MORE NEGATIVE	71	5.1%
NO DIFFERENCE	425	30.3%

The following questions are for statistical purposes only.

7. In what year were you born?

	FREQUENCY	PERCENT
18-39	445	31.8%
40-47	332	23.7%
48-57	327	23.4%
58+	296	21.2%

(Mean = 47.7 years)
(Median = 45.8 years)

8. Of the people currently living in your household, how many are children or adolescents aged 18 or under?

	FREQUENCY	PERCENT
None	766	54.7%
One	222	15.9%
Two	273	19.5%
Three or more	139	9.9%

(Mean = 0.89 children)

9. Are you married or single?

	FREQUENCY	PERCENT
MARRIED	1079	77.1%
SINGLE	321	22.9%

10. GENDER...

	FREQUENCY	PERCENT
MALE	700	50.0%
FEMALE	700	50.0%

Thankyou very much for your help. Goodbye.

THE FOLLOWING VARIABLE WAS RECORDED FROM THE VOTER LIST:

	FREQUENCY	PERCENT
House District 10	100	7.1%
House District 11	100	7.1%
House District 12	100	7.1%
House District 13	100	7.1%
House District 14	100	7.1%
House District 15	100	7.1%
House District 16	100	7.1%
House District 17	100	7.1%
House District 18	100	7.1%
House District 19	100	7.1%
House District 20	100	7.1%
House District 21	100	7.1%
House District 22	100	7.1%
House District 23	100	7.1%

THE FOLLOWING VARIABLE WAS COMPUTED FROM THE PREVIOUS VARIABLE:

	FREQUENCY	PERCENT
Senate District E	100	7.1%
Senate District F	200	14.3%
Senate District G	200	14.3%
Senate District H	200	14.3%
Senate District I	200	14.3%
Senate District J	200	14.3%
Senate District K	200	14.3%
Senate District L	100	7.1%

Electric Power Competition In Alaska

Testimony of Michael C. Dotten
Shareholder, Heller, Ehrman, White & McAuliffe

Before the
Senate Labor and Commerce Committee

Alaska Legislature

My name is Michael Dotten and I am a shareholder in the law firm of Heller, Ehrman, White & McAuliffe. For the last 20 years I have been involved in the electric power and natural gas industries, first as a regulator as an Assistant Attorney General assigned to the Idaho Public Utilities Commission and then, as lead rate counsel for Bonneville Power Administration, a large federally owned electric utility that sells 50 percent of the power in the Pacific Northwest and provides 80 percent of the region's bulk transmission. For the last 15 years, I have been in private practice representing large consumers of natural gas and electricity, utilities, independent power producers, and cogenerators. I recently represented Columbia Steel Casting Co., Inc. as plaintiff in a successful Federal antitrust lawsuit against Portland General Electric Company, its incumbent electric utility on grounds that the utility unlawfully monopolized sales of electric power in Portland, Oregon.

Portland General filed a Petition for Certiorari with the United States Supreme Court and we await a decision by the Supreme Court as to whether it will grant review.

My practice has included work in 16 states. Many of those states today permit competition in the sale of electric power in one manner or another. Electric power service consists of three parts: generation (or power), transmission (to move electric power to load centers at high voltage) and distribution (lines that take power from high voltage to stepped down voltage and then over wires to businesses and homes). In the west, the states of California, Nevada, Oregon, Washington, and Montana all have fairly extensive state-wide or pilot programs offering customers a choice in their electric power suppliers. Distribution utilities remain monopolies, but there is competition to provide electric power to all classes of consumers, and prices are dropping.

In other words, Alaska would not be alone in providing its consumers with a choice in allowing competitive access to electric power suppliers. If Alaska fails to do so, however, it will handicap itself from attracting new industry.

I come before you today to describe why I believe current Alaska law not only permits, but mandates competition in the sale of electric power. I am also here to reassure you that Alaska law permits the Alaska Public Utilities Commission to create monopoly electric power distribution territories where it concludes duplication of facilities would be harmful to the public interest.

Free enterprise is the foundation of our country's economic philosophy. In the words of the United States Supreme Court, "antitrust laws are the magna carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to our fundamental personal freedoms." [*US v. Topco*, 405 US 596, 610 (1972)].

Despite this country's historical commitment to free enterprise, the belief arose that some utilities are natural monopolies. Because of the tremendous capital investment that some utility systems require, and technological barriers to entry, it made no sense to have companies compete. Instead, some (but not all) states granted utilities a protected monopoly in return for regulated rates and services. However, as described below, this right to monopolize is not absolute and unfettered. The federal courts have increasingly held that, even in industries where monopolization has historically been permitted, as competition becomes

technologically and economically feasible, monopolization may become unlawful. In those circumstances the Courts will take a harder look at whether monopolization is sanctioned by the state.

Given the importance of the antitrust laws in preserving free enterprise, it is not surprising that the courts in this country that apply and interpret the antitrust laws are reluctant to create exceptions to those laws. The Court of Appeals for the Ninth Circuit (the Circuit in which Alaska is located) has held that immunity from the antitrust laws is "disfavored, much as are repeals [of the antitrust laws] by implication because of Congress's 'overarching and fundamental policies' protecting competition." *Columbia Steel Casting Co., Inc. v. Portland General Electric Company*, 111 F.3d 1427, 1436 [1] This rule applies even in the electric power industry which many people previously consider to be a "natural monopoly."

As this body is aware, electric power is gradually undergoing the same deregulation and is subject to the same competitive forces that have reduced consumer costs in the airline, telecommunications, natural gas, railroad and trucking

[1] The Ninth Circuit cited for these fundamental propositions the cases *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978).

industries. As with many industries, the Federal courts are being used as vehicles by frustrated consumers to obtain competitive pricing from electric utility suppliers. To ward off these challenges to their monopolization and to defend themselves against claims for monopoly pricing, electric utilities seek to use a variety of exceptions to the normal application of the antitrust laws. Despite the courts' general reluctance to permit exceptions to the antitrust laws, some exceptions have arisen. One of those exceptions, called "the state action doctrine," arose, not from statutes, but from Federal court holdings. In the 1943 case of *Parker v. Brown*,[2] the Supreme Court determined that the antitrust laws were never intended to interfere with states implementing state policy. The Court recognized that states must have latitude to formulate regulatory policies that may be inherently anticompetitive. Accordingly, the Court ruled in *Parker v. Brown* that the states acting in their sovereign capacity are immune from the antitrust laws.

Subsequent decisions extended that immunity to private parties acting pursuant to expressly established state regulatory policies. Those decisions developed a test for state action immunity that balances state sovereignty against the judicial policy against implied immunities to the antitrust laws. That test was

[2] 317 U.S. 341 (1943).

formally articulated in the case of *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc. ("Midcal")* 445 U.S. 97 (1980). That decision holds that anticompetitive conduct is not immune from the antitrust laws unless that conduct is "clearly articulated and affirmatively expressed as state policy" to displace competition with regulation and "second, the policy must be actively supervised by the State itself." *Midcal*, 445 U.S. at 105. In other words, the state legislature acting in its sovereign capacity may sanction certain anticompetitive conduct on the part of state officials or private actors, but that sanction must be unmistakable. It cannot be implied in the statutes, nor can it arise *de facto* from the inaction of administrative agencies.

Even though municipalities are arms of the state, the Supreme Court has held that "before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

The question for the Legislature, in light of this background is: to what extent does Alaska law clearly articulate and affirmatively express a policy to displace competition for retail sales of electric energy with regulation? The answer makes

engineering, economic and policy sense and is based on a straightforward reading of Alaska law. AS 42.05.221 (d) reads as follows:

> In an area where the commission determines that two or more public utilities are competing to furnish identical utility service and that this competition is not in the public interest, the commission shall take appropriate action to eliminate the competition and any undesirable duplication of facilities. This appropriate action may include, but is not limited to, ordering the competing utilities to enter into a contract that, among other things, would:
>
> (1) delineate the service area boundaries in each of those areas of competition;
>
> (2) eliminate existing duplication and paralleling to the fullest reasonable extent;
>
> (3) preclude future duplication and paralleling;. . . .

Note that the foregoing approach does not "clearly articulate and affirmatively express" Alaska's intent to permit monopolization of electric power sales. It merely evidences the state's intent (after appropriate findings are made) to eliminate duplication and paralleling of distribution (and potentially transmission) facilities--the only facilities that could be "parallel."

Even if it can be said that a state public utility commission acquiesced in a utility's maintenance of monopoly electric sales, that is not sufficient to insulate the utility from private antitrust liability to consumers who seek access to competitive

markets. Federal Courts are willing to view antitrust immunity through the lens of an evolving technological and economic world. A monopoly insulated from liability when competition is technologically or economically impractical may find itself unprotected when competition becomes feasible. I offer the following real-world examples:

Do you recall the days when we all dialed our calls over black rotary telephones owned by the local exchange company? The local exchange companies claimed (correctly for years) that permitting phones produced by others to be connected to their lines would disrupt service. They claimed that the phone system needed to be a seamless web to assure adequate service. Gradually, however, alternative telephone handset and equipment providers convinced the federal courts and regulatory bodies that they could supply telephones that would be perfectly compatible with the local exchange companies' wires and switches.

Later, in the case of *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir.) *cert. denied*, 464 U.S. 891 (1983) and its progeny, the Federal courts concluded AT&T had misused its essential facility to eliminate competition, that long distance service did not need to be part of a vertically integrated monopoly and the Court ordered the breakup of AT&T. Today, we are seeing competition for

dial tone service. Why? Because each of these steps in breaking up a vertically-integrated monopoly became feasible from a technological and economic perspective. The Federal courts merely applied antitrust law to assure that monopolies were not needlessly perpetuated.

We have seen the beginnings of this evolution in the electric power industry as well. In *Cantor v. Detroit Edison Company*, 428 U.S. 579 (1976) the United States Supreme Court held that Detroit Edison was not insulated from antitrust liability for carrying out a program that allowed consumers to receive free replacement light bulbs from the utility. Suit was filed by a drug store owner who complained that the program constituted an unprotected restraint of trade. The Supreme Court found that the utility was not insulated under the state action doctrine from liability, even though the Michigan Public Service Commission had approved the tariffs that established the bulb replacements and thereby approved the program by implication. In effect, the free replacement of light bulbs, which had taken place since 1886, was part of a vertical monopoly that was no longer technologically or economically necessary.

Today, it is no longer technologically or economically required for electric utilities to provide vertically integrated monopoly generation, transmission and

distribution service--there are technologically and economically feasible alternatives. As the Supreme Court said of electric utilities in *Cantor*:

> There is no logical inconsistency between requiring such a [utility] firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent it engages in business activity in competitive areas of the economy.

Cantor v. Detroit Edison Company, 428 U.S. at 596.

To the same effect, the Supreme Court held that insurance companies that might be insulated from antitrust liability under the federal McCarran-Ferguson Act are not immune from related activity that is subject to competition. *Group Life & Health Insurance Company et al. v Royal Drug Company*, 440 U.S. 205 (1979).

AS 42.05.221(d) does clearly articulate and affirmatively express the state's intent to permit monopolization of distribution facilities when necessary to prevent what the Alaska Public Utilities Commission finds to be harmful duplication of facilities. But that is as far as the Alaska statutes go. Whether the Alaska statutes would permit the vertically integrated monopolization of service when there was no technologically or economically feasible competition for the sale of electric power is now a moot question. Now that there are technologically and economically feasible alternatives to the sale of electric power over distribution lines that form a natural

monopoly, it is clear that neither federal nor state law will insulate a utility that seeks to monopolize sales of electric power over those lines from federal antitrust liability. As they have many times in the past, the federal courts will afford private litigants a remedy against monopolization that is not clearly articulated and affirmatively expressed as the state's own policy. Even if a state public utility commission has acquiesced in monopoly sales of electric power, that will not insulate the utilities. As the Ninth Circuit Court of Appeals recently said in *Columbia Steel Casting Co., Inc. v. Portland General Electric Company*:

> As a matter of law, then, neither the 1974 Order nor any other subsequent orders of the OPUC [Oregon Public Utilities Commission] 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, 96 S. Ct. 3110, 3118-19, 49 L.Ed. 2d 1141 (1976), cert denied, 459 U.S. 1145, 103 S.Ct. 785, 74 L.Ed.2d 992 (1983).

Columbia Steel Casting Co., Inc. v. Portland General Electric Company, 111 F.3d 1427, 1441-42 (9th Cir. 1997).

This opinion is not "out there" in isolation. A federal district court judge in Idaho recently reached a similar result in the case of *Snake River Valley Electric Association v. PacifiCorp*, (Civil No. 96-0308-E-BLW, April 25, 1997, District of

Idaho) (interlocutory review denied by the U.S. Court of Appeals for the Ninth Circuit). Although I am proud of the result in the *Columbia Steel* case, I believe it reflects a straightforward application of the Supreme Court's test in the *Midcal* case.

We are not here today to challenge the notion of natural monopolies. We agree that some utility service cannot reasonably be duplicated and AS 42.05.221(d) affords the Alaska Public Utilities Commission the authority to bar duplication and paralleling of distribution and transmission facilities. But the tremendous changes that have occurred in the past few years in the electric industry have now made it feasible for sales of electric power to be scheduled across lines owned by third parties. That is the essence of competition that is taking place in the lower 48. For the last couple of years utility pilot programs have proven that electric power sales can be decoupled (or "unbundled") from distribution and transmission service, and consumers can be afforded substantial savings from the resulting competition. Alaska's utility statutes are not a bar to competitive sales of electric power that are now technologically and economically feasible. Neither are they a defense to challenges under the federal antitrust laws of those utilities that seek to block access to competition. I can assure you from my own experience that larger consumers of electric power are willing to use the antitrust laws, where necessary, to challenge

anticompetitive conduct by utilities. Businesses that increasingly compete in the world economy have no tolerance for higher prices paid to utilities that seek to protect themselves from competition.

We are not here advocating that legislation is necessary to allow competition to proceed, either. Electric utilities in this state have no lawful alternative but to permit competition to proceed. If the legislature or the Alaska Public Utilities Commission do not act to define how competition is to proceed, then a Federal court judge (as in the *Columbia Steel* and *Snake River* cases) may define the manner in which competition must go forward. All it would take to put the resolution of this question before a federal judge is a plaintiff who believes they have a sufficient stake in encouraging competition in electric power sales.

In addition to private litigation, the United States Department of Justice, through its Antitrust Division has become increasingly more active in the electric power arena. In 1997 the Justice Department filed suit against Rochester Gas and Electric Corporation (RG&E) in the United States District Court for the Western District of New York challenging the anticompetitive aspects of a contract entered into between RG&E and the University of Rochester in which RG&E promised to provide electricity to the University in return for the University's promise not to use

cogeneration to compete with RG&E. After a federal judge refused to dismiss the complaint, on February 20 of this year, RG&E and the Justice Department entered into a stipulation and submitted a consent judgment to the Court by which RG&E voluntarily surrendered the right to enforce the provisions eliminating competition in the sale of electric power from its agreement and prohibiting LG&E from "entering into or enforcing a covenant or agreement not to compete in the retail sale of electricity with any competitor."

Finally, I want to describe why competition is worth the effort. The Brookings Institution published, in 1997, a study entitled "*Economic Deregulation and Customer Choice: Lessons for the Electric Industry.*" The study reveals that in the natural gas, long distance telecom, airlines, trucking, and railroad industries, deregulation (and competition) resulted in real price reductions in the short term (2 years) the medium term (5 years) and the long term (10 years) with the price reductions getting larger over time. The study also reports that all classes of customers (not just large industrial customers) enjoyed substantial savings in each of these industries. A table, revealing the results is attached to this testimony.

I appreciate the opportunity to address you. The changes that will take place in the electric power industry in the next few years will create many new

opportunities. If Alaska does not impede market access and moves swiftly to encourage competition, it will enjoy a relative competitive advantage in attracting new business to the state as the savings resulting from competitive markets become available sooner, rather than later.

Respectfully submitted,

Michael C. Dotten
HELLER, EHRMAN, WHITE & McAULIFFE
200 S.W. Market Street, Suite 1750
Portland, Oregon 97201-5718

(503) 795-7420

SB

359

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. SB 359

Revision Date (5/4/98
Title An Act relating to insurance premium taxes

Dept. Affected Commerce & & Economic Development
BRU Insurance
Component Insurance

Sponsor (S) Rules by Request
Requester (S) L&C

Component Serial No. 354

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	(2,651.0)	(2,746.0)	(2,844.0)	(2,946.0)	(3,052.0)	(3,161.0)

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Exact revenue change not available. See analysis and supporting assumptions on following page.

Prepared by Marianne K. Burke, Director
Division Insurance
Phone 465-2515
Date 5/4/98

Approved by Commissioner Deborah B. Sedwick
Agency Commerce & Economic Development
Date 5/4/98

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Calculation of Fiscal Note - SB 359

According to Blue Cross of WA & AK, exempt premium tax due to this bill in 1997 would have been $400,000 annually at retaliatory tax of 2% (Washington rate). Per Jack McRae and Larry Zommick

Blue Cross writes health coverage on several of the municipalities, school districts, and cities covered by this bill.

Using a listing of policyholders of Blue Cross for 1994, and a list of PERS members - approximately 20% of the PERS market is covered by Blue Cross.

If 20% results in a premium tax savings of $400,000, the same 20% represents premiums of $20,000,000. 100% of the PERS entities would result in $100,000,000 in premium and therefore the remaining premium received by other entities would be $80,000,000.

$80,000,000 at 2.7% Alaska tax rate would result in $2,160,000.

The total tax on PERS entities for one year would be $2,560,000 for calendar year 1997 collected on March 1, 1998.

Using 1996 premium receipts reported in the division annual statement, $100,000,000 total premiums for PERS members represents approximately 25% of premiums received for Blue Cross and all group health insurance.

With the language of the bill as it now is drafted, it would appear that taxation of premiums would not occur until March 1 for the prior year. Therefore, the effective date of the bill (July 1998 or Jan 1999) would not affect the tax collected. On March 1 all prior year premium would be eligible for exemption.

The loss in revenue is increased by a factor calculated using the group health premium total for the last six years and calculating a change factor for each year. The change factor is then averaged over the five year period resulting in an average annual increase in premium of 3.58%. The reduction in tax revenue is increased each year by 3.58%.

5/4/1998

Alaska State Legislature
SENATE

Official Business

State Capitol
Juneau, AK 99801-1182

Senate Labor & Commerce Committee

Memo

TO: Senator Mackie, Vice Chairman
Senator Miller
Senator Kelly
Senator Hoffman

FROM: Senator Leman, Chairman

DATE: May 11, 1998

RE: HB 490/SB 359: Insurance Premiums

At the committee hearing on SB 359 Saturday, May 9, the committee requested a letter from Blue Cross/Blue Shield outlining its commitment to pass savings along to customers in consideration of the relief provided by SB 359/HB 490.

A copy is attached for your file.

Blue Cross
Blue Shield of Alaska
A PREMERA HEALTH PLAN
P.O. Box 327
Seattle, Washington 98111-0327

May 7, 1998

Gail Phillips
Speaker of the House
Alaska State Legislature
State Capitol (ms 3100)
Juneau, AK 99801-1182

Dear Speaker Phillips:

I want to express our appreciation as well as the appreciation of all the members we insure in Alaska for the Finance Committee's passage of HB 490 which would eliminate the State's retaliatory tax. You have our commitment that as we renew our Alaska contracts, this tax reduction will be passed along in the future rate calculations to the benefit of our members.

Our commitment to provide the highest quality of healthcare to Alaskans precedes Alaska statehood. Our goal has always been to provide the highest quality of healthcare at a fair price to each resident of Alaska. Your support and the support of the Finance Committee and other members have greatly assisted us in striving to reach this goal for the benefit of Blue Cross Blue Shield of Alaska members.

Thank you again for your support. Please do not hesitate to call me if I can be of any assistance to you.

H. R. Brereton Barlow
Chief Operating Officer

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 4/28/98

FURTHER:

Date of 5-Day Notice:_____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 5-9-98

Labor and Commerce Committee considered

SENATE BILL NO. 359

"An Act relating to insurance premium taxes."

and recommends:

[✓] be **replaced** with ____ CS SB 359 (L+C)

[ ] adopt **previous** ____ CS _____(____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[✓] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR#____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Tom Kelly	✓		✓		
Mike Miller	✓				
CHAIR:		*CHAIR:* Loren Leman	✓		

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
DCED	5/4/98	✓	

10 CS, Adv

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

0-LS1777\B
Ford
5/8/98

CS FOR SENATE BILL NO. 359(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to insurance premium taxes and to insurance taxes, licenses, fees, fines, penalties, deposit requirements, obligations, prohibitions, and restrictions imposed on certain health care insurers; and providing for an effective date."

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

*** Section 1.** AS 21.09.210(b) is amended to read:

(b) Each insurer, and each formerly authorized insurer with respect to premiums received while an authorized insurer in this state, shall pay a tax on the total direct premium income received during the year ending on the preceding December 31 and paid for the insurance of property or risks resident or located in the state, other than wet marine and transportation insurance, after deducting from the total direct premium income the applicable cancellations, returned premiums, the unabsorbed portion of any deposit premium, all policy dividends, unabsorbed premiums refunded to policyholders, refunds, savings, savings coupons, and other similar returns paid or credited to policyholders with respect to their policies. <u>Deductions</u> [NO

DEDUCTIONS] may **not** be made of cash surrender value of policies. Considerations received on annuity contracts are not included in the direct premium income and are not subject to tax. The tax shall be paid to the director at least annually but not more often than once each quarter on the dates specified by the director. The method of payment must be by the electronic or other payment method specified by the director. **Except as provided under (n) of this section, the** [THE] tax is computed at the rate of

(1) for domestic and foreign insurers, except hospital and medical service corporations, 2.7 percent;

(2) for hospital and medical service corporations, six percent of their gross premiums less claims paid.

* **Sec. 2.** AS 21.09.210 is amended by adding a new subsection to read:

(n) The tax imposed under this section shall be computed at the rate of

(1) one-tenth of a percent for a policy of life insurance with a policy year premium that equals or exceeds $100,000; and

(2) 2.7 percent for a policy of life insurance with a policy year premium below $100,000.

* **Sec. 3.** AS 21.09.270(b) is amended to read:

(b) This section does not apply to

(1) personal income taxes, or to ad valorem taxes on real or personal property or to special purpose obligations or assessments imposed by another state in connection with particular kinds of insurance other than property insurance; except that deductions from premium taxes or other taxes otherwise payable allowed on accounts of real estate or personal property taxes paid shall be taken into consideration by the director in determining the propriety and extent of retaliatory action under this section; or

(2) a health care insurer who issues health care insurance to the state, a municipality, a city or borough school district, a regional educational attendance area, the University of Alaska, or a community college operated by the University of Alaska; in this paragraph, "health care insurer" has the meaning given in AS 21.54.500.

* **Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

SENATE BILL NO. 359

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST

Introduced: 4/28/98
Referred: Labor and Commerce

A BILL

FOR AN ACT ENTITLED

"An Act relating to insurance premium taxes."

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

*** Section 1.** AS 21.09.210(i) is amended to read:

(i) Premiums paid by the state, **premiums paid by employers who participate in the Public Employees' Retirement System of Alaska or in the Teacher's Retirement System of Alaska,** [FOR INSURANCE POLICIES] and **premiums paid under** contracts purchased under the provisions of AS 39.30 are exempt from taxation under this **chapter** [SECTION]. An insurer may not include the tax imposed under this section in a premium charged on an insurance policy or contract purchased by the state under the provisions of AS 39.30. An insurer may claim the exemption on forms provided by the division of insurance.

0-LS1775\K
Ford
5/7/98

CS FOR HOUSE BILL NO. 490(RLS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to insurance premium taxes and to insurance taxes, licenses, or fees imposed on certain health care insurance; and providing for an effective date."

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

*** Section 1.** AS 21.09.210(b) is amended to read:

(b) Each insurer, and each formerly authorized insurer with respect to premiums received while an authorized insurer in this state, shall pay a tax on the total direct premium income received during the year ending on the preceding December 31 and paid for the insurance of property or risks resident or located in the state, other than wet marine and transportation insurance, after deducting from the total direct premium income the applicable cancellations, returned premiums, the unabsorbed portion of any deposit premium, all policy dividends, unabsorbed premiums refunded to policyholders, refunds, savings, savings coupons, and other similar returns paid or credited to policyholders with respect to their policies. <u>Deductions</u> [NO

DEDUCTIONS] may **not** be made of cash surrender value of policies. Considerations received on annuity contracts are not included in the direct premium income and are not subject to tax. The tax shall be paid to the director at least annually but not more often than once each quarter on the dates specified by the director. The method of payment must be by the electronic or other payment method specified by the director. **Except as provided under (n) of this section, the** [THE] tax is computed at the rate of

(1) for domestic and foreign insurers, except hospital and medical service corporations, 2.7 percent;

(2) for hospital and medical service corporations, six percent of their gross premiums less claims paid.

*** Sec. 2.** AS 21.09.210 is amended by adding a new subsection to read:

(n) The tax imposed under this section shall be computed at the rate of

(1) one-tenth of a percent for a policy of life insurance with a policy year premium that equals or exceeds $100,000; and

(2) 2.7 percent for a policy of life insurance with a policy year premium below $100,000.

*** Sec. 3.** AS 21.09.270(b) is amended to read:

(b) This section does not apply to

(1) personal income taxes, or to ad valorem taxes on real or personal property or to special purpose obligations or assessments imposed by another state in connection with particular kinds of insurance other than property insurance; except that deductions from premium taxes or other taxes otherwise payable allowed on accounts of real estate or personal property taxes paid shall be taken into consideration by the director in determining the propriety and extent of retaliatory action under this section; **or**

(2) a health care insurer who issues health care insurance to the state, a municipality, a city or borough school district, a regional educational attendance area, the University of Alaska, or a community college operated by the University of Alaska; in this paragraph, "health care insurer" has the meaning given in AS 21.54.500.

*** Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

BasicOne Program Monthly Rates

Coverage Program	Age (Younger of Subscriber & Spouse)	$1000 Deductible Regular Rate	$1000 Deductible Non-Smoker	$500 Deductible Regular Rate	$500 Deductible Non-Smoker
Subscriber	Under 30	$ 58	$ 53	$ 72	$ 67
	30-34	73	67	87	78
	35-39	82	73	100	90
	40-44	88	82	106	94
	45-49	100	90	122	111
	50-54	119	109	147	133
	55-59	147	132	180	162
	60-64	192	172	234	211
	65 and over	214	192	261	235
Subscriber & Spouse	Under 30	$124	$112	$152	$137
	30-34	143	129	173	157
	35-39	160	143	195	177
	40-44	170	153	206	185
	45-49	197	177	239	214
	50-54	234	212	283	256
	55-59	280	254	342	308
	60-64	377	340	461	414
	65 and over	428	386	528	475
Subscriber, Spouse & Child(ren)	Under 30	$212	$200	$259	$244
	30-34	229	216	280	263
	35-39	242	226	298	279
	40-44	256	241	313	290
	45-49	279	260	339	314
	50-54	313	290	382	353
	55-59	359	333	438	403
	60-64	467	431	570	521
	65 and over	516	474	631	578
Subscriber & Child(ren)	Under 30	$147	$141	$180	$172
	30-34	160	153	195	185
	35-39	167	158	202	191
	40-44	172	167	212	200
	45-49	185	172	222	211
	50-54	200	187	245	231
	55-59	227	214	279	261
	60-64	283	263	347	323
	65 and over	301	280	367	340

C20-9461 (3-1998)

Traditional Program Monthly Rates

Alaska

Coverage Program	Age (Younger of Subscriber & Spouse)	$2500 Deductible Regular Rate	$2500 Deductible Non-Smoker	$1000 Deductible Regular Rate	$1000 Deductible Non-Smoker	$500 Deductible Regular Rate	$500 Deductible Non-Smoker	$200 Deductible Regular Rate	$200 Deductible Non-Smoker
Subscriber	Under 30	$100	$87	$133	$112	$170	$144	$193	$163
	30-34	112	94	144	122	190	162	215	182
	35-39	116	98	152	129	198	168	225	191
	40-44	141	121	191	162	245	208	279	236
	45-49	171	147	231	197	300	256	342	290
	50-54	206	176	274	232	355	303	402	342
	55-59	219	186	288	242	373	317	422	359
	60-64	231	197	306	259	398	339	453	386
	65 and over	260	221	347	294	448	381	509	433
Subscriber & Spouse	Under 30	$207	$177	$274	$232	$343	$291	$387	$329
	30-34	230	196	306	259	381	323	432	368
	35-39	240	205	318	270	397	338	447	381
	40-44	298	251	398	339	494	418	556	474
	45-49	364	309	484	411	603	512	679	578
	50-54	428	365	570	485	710	603	805	685
	55-59	451	386	599	510	747	636	845	718
	60-64	485	411	641	544	799	678	903	767
	65 and over	540	460	720	612	898	764	1017	864
Subscriber, Spouse & Child(ren)	Under 30	$285	$255	$378	$337	$472	$421	$533	$474
	30-34	309	275	408	360	510	452	577	512
	35-39	315	278	418	369	521	462	590	522
	40-44	371	327	496	437	615	541	700	617
	45-49	422	368	558	485	697	607	791	690
	50-54	487	425	648	563	806	700	914	794
	55-59	529	461	702	613	877	765	990	864
	60-64	560	489	744	648	929	809	1050	914
	65 and over	620	540	823	715	1025	889	1162	1010
Subscriber & Child(ren)	Under 30	$197	$182	$257	$237	$323	$298	$367	$337
	30-34	210	192	276	254	344	317	392	359
	35-39	211	193	280	257	350	320	396	362
	40-44	241	221	324	294	404	368	458	417
	45-49	265	239	350	317	441	397	497	446
	50-54	304	273	399	358	500	447	566	506
	55-59	333	300	438	396	553	496	627	564
	60-64	352	318	467	420	583	524	659	592
	65 and over	388	349	511	460	638	570	725	648

SJR

27

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. SJR 27

Revision Date:
Dept. Affected: Legislature
Title: Endorsing Working Families Flexibility Act
BRU:
Component:
Sponsor: Senator Leman
Requester: Senate L&C Committee
COMPONENT SERIAL NO.

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: $ 0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

There is no fiscal impact with this resolution.

Prepared by: Senator Loren Leman, Chairman
Phone: 465-2095
Division: Senate L&C Committee
Date:

Approved by Commissioner:
Date: 4.22.97
Agency:

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SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 4/7/97

FURTHER:

Date of 5-Day Notice: 4-10-97
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 4-22-97

Labor and Commerce Committee considered

SENATE JOINT RESOLUTION NO. 27

Endorsing the Working Families Flexibility Act and the Family Friendly Workplace Act.

and recommends:

[ ] be **replaced** with _____ CS _____ (_____)

[ ] adopt **previous** _____ CS _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
			✓		
CHAIR: D. Lehman	✓	CHAIR:			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
Legislature	4/22/97	✓	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] APPROPRIATION -- no fiscal note

***Include fiscal notes accompanying Governor's bill**

SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 520, Anchorage, AK 99501 (907) 258-8189 Session: State Capitol, Juneau, AK 99801 (907) 465-2095

Sponsor Statement

Senate Joint Resolution 27

Senate Joint Resolution 27 encourages Congress to amend the Fair Labor Standards Act of 1938 (FLSA) so workers covered by the overtime provisions of FLSA may choose compensatory time off in lieu of overtime pay. Specifically SJR 27 urges Congress to pass House Resolution 1 (H.R. 1) or its companion bill, Senate bill 4 (S. 4), that would amend FLSA.

SJR 27 endorses H.R. 1 and S. 4 as commonsense legislation which gives working families another option while trying to balance their work and family schedules. These acts allow private sector employers to offer their employees the option of choosing paid compensatory time instead of cash wages when they work overtime hours.

H.R. 1 and S. 4 change overtime rules for private sector employees that were made in 1938. America was very different in 1938. Then, most women worked at home. Now, many women work both in their homes and outside of the home, and struggle to balance time demands of work and family. And now, more men than ever before are balancing parenting with their work schedule. They struggle to be at home when they need to take a sick child to the doctor or to be with an elderly parent. They struggle because they often do not have the ability to get the time off that they need when they need it.

H.R. 1 and S. 4 give employees the freedom to choose for themselves whether more money or time off makes sense. I urge you to support this resolution.

HR CORNER

Bits and pieces

Federal and state legislation is constantly being introduced that impacts employers and employees alike. The focus of HR Corner is to keep readers current on the status of new and pending bills.

Fair Labor Standards Act

The FLSA was originally passed in 1938 to establish minimum wage and overtime pay obligations. In the past few years it has been recognized that a series of proposed changes need to be made to keep pace with the ever changing work schedules and programs in the American workforce.

Update: Now that Congress is in session again the Republicans have re-introduced legislation that will allow workers — those covered by the overtime provisions of the Fair Labor Standards Act — to choose compensatory time off in lieu of overtime pay.

The first bill was introduced in the House of Representatives by Rep. Cass Ballenger, R-N.C. Another bill was introduced in the Senate by Sen. John Ashcraft, R-Mo. The second bill would allow employees to work more than 40 hours in one workweek, and bank up to 50 "flexible credit" hours that could be used to fill in shorter workweeks. It would also allow employees to work 80 hours over a two-week period in any combination.

Family Medical Leave Act

Update: Sen. Christopher Dodd, D-Conn. recently introduced a measure that would amend the original FMLA so that all companies with 25 or more employees would be covered. The current threshold for plan coverage is 50.

An additional provision would allow employees to take up to 24 hours of FMLA leave to attend to children's or elderly relatives needs. While this is fairly subjective, the bill states the leave would be "for the purpose of participating in school activities, to accompany children to routine dental or medical appointments or other professional services."

Local HR news

• Monthly Meetings - Anchorage Society for Human Resource Management (ASRHM) meets the fourth Thursday of each month at the Hilton Hotel. Time: 11:30 - 1:00 pm. Cost for lunch $16 members, $20 for non-members. Reservations required: Call Carol Coleman at (907) 265-8880, or fax her at 265-8860.

see HR page B10

■ OPINION

Legislation that allows comp time in lieu of overtime pay a good idea

By Todd Y. Allen
PNA Contributing Columnist

Author's Note. Normally, my column offers information and advice on human resource topics. However, this month I offer my opinion on comp time legislation (see adjacent HR Corner).

If you have been following HR Corner, you know that while legislation was introduced during the 1996 Congressional session to amend the Fair Labor Standards Act, no related measures were passed. In this month's adjacent HR Corner I report that new federal legislation has been introduced this year. One bill — introduced by Sen. John Ashcraft, R-Mo. — would allow private employers to offer the benefit of time off, in lieu of overtime pay.

Time-off in lieu of overtime

There is a new, or at least another focus for many employees who traditionally were paid overtime after working 40 hours per week. That focus is time-off or more leisure time for the employee and the family.

For many Americans, the payment of overtime is very important and critical to their household income. However, many other Americans also see time-off as a valuable resource for their families.

Let's take Alaska as an example. We have many citizens who work in remote locations and are often off work for 1-2 weeks at a time. On many occasions I've heard the comment by a spouse, "I sure wish I was off work so we could spend some time together".

The issue for many of these individuals is "quality family time." If Dad or Mom comes home after being gone for a week or two, the family may want to spend some time together — going fishing, camping, skiing, or just doing odds and ends around the house. Even if neither individual works in a remote location, some believe it would be quite beneficial to have time off together, in addition to the two-day weekend.

While we briefly discussed the family side of the issue, there are many individuals who are single and may not have an immediate family of a spouse and/or a child. Even so, the same should apply. If they want time off in lieu of pay, the same opportunity should be available.

Labor union opposition

Opposition to this legislation comes from labor unions, who argue that the legislation makes it too easy for employers to coerce workers into giving up valuable overtime pay and accepting time-off at the convenience of the employer rather than the employee. This is a serious consideration. However, if legislation is properly drafted, safeguards can and should be implemented to prevent such abuses, whether the place of employment is union or non-union.

I believe for many Alaskans, accepting time-off in lieu of overtime pay is an

see COMP page B10

COMP

acceptable offering. A balancing act must be considered for both the employee and the employer, and the employee shouldn't be forced or coerced into taking time off. But, the employee should have the opportunity to take time when necessary, especially if it involves family time.

Contact your Congressman

If you are interested in seeing this legislation pass, call your members of Congress and urge them to pass the FLSA reform/comp-time legislation. There are two bills. H.R. 1 would allow for employers to provide for and for employees to choose the option of compensatory time-off at a rate of time and one-half instead of overtime pay. The Senate bill, S. 4, would allow for bi-weekly schedules. Employers could allow and employees could choose to work in any combination of hours in order to achieve a total of 80 hours over a two-week period. Nothing in either bill requires employers to change current practice or agree to such options.

Call the Capitol switchboard at 202-225-3121 and ask to speak with the administrative assistants for Congressman Don Young and Senators Frank Murkowski and Ted Stevens. Any related information you want to offer in support would be appropriate. Don't forget to ask for their position on the bills.

BILL TEXT Report for H.R.1
As referred to committee in the Senate, March 20, 1997

H.R.1 As referred to committee in the Senate, March 20, 1997

IIA

105th CONGRESS
1st Session

H. R. 1

IN THE SENATE OF THE UNITED STATES
March 20, 1997
Received; read twice and returned to the Committee on Labor and Human Resources

---

AN ACT
To amend the Fair Labor Standards Act of 1938 to provide compensatory time for employees in the private sector.

==========

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Working Families Flexibility Act of 1997".

SEC. 2. COMPENSATORY TIME.

Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end the following:

"(r) Compensatory Time Off for Private Employees.--

"(1) General rule.--

CORRECTION

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

BILL TEXT Report for H.R.1
As referred to committee in the Senate, March 20, 1997

H.R.1 As referred to committee in the Senate, March 20, 1997

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Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end the following:

"(r) Compensatory Time Off for Private Employees.--

"(1) General rule.--

"(A) Compensatory time off.--An employee may receive, in accordance with this subsection and in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

"(B) Definition.--For purposes of this subsection, the term 'employee' does not include an employee of a public agency.

"(2) Conditions.--An employer may provide compensatory time to employees under paragraph (1)(A) only if such time is provided in accordance with--

"(A) applicable provisions of a collective bargaining agreement between the employer and the labor organization which has been certified or recognized as the representative of the employees under applicable law, or

"(B) in the case of employees who are not represented by a labor organization which has been certified or recognized as the representative of such employees under applicable law, an agreement arrived at between the employer and employee before the performance of the work and affirmed by a written or otherwise verifiable record maintained in accordance with section 11(c)--

"(i) in which the employer has offered and the employee has chosen to receive compensatory time in lieu of monetary overtime compensation; and

"(ii) entered into knowingly and voluntarily by such employees and not as a condition of employment.

No employee may receive or agree to receive compensatory time off under this subsection unless the employee has worked at least 1000 hours for the employee's employer during a period of continuous employment with the employer in the 12 month period before the date of agreement or receipt of compensatory time off.

"(3) Hour limit.--

"(A) Maximum hours.--An employee may accrue not more than 160 hours of compensatory time.

"(B) Compensation date.--Not later than January 31 of each calendar year, the employee's employer shall provide monetary compensation for any unused compensatory time off accrued during the preceding calendar year which was not used prior to December 31 of the preceding year at the rate prescribed by paragraph (6). An employer may designate and communicate to the employer's employees a 12-month period other than the calendar year, in which case such compensation shall be provided not later than 31 days after the end of such 12-month period.

"(C) Excess of 80 hours.--The employer may provide monetary

compensation for an employee's unused compensatory time in excess of 80 hours at any time after giving the employee at least 30 days notice. Such compensation shall be provided at the rate prescribed by paragraph (6).

"(D) Policy.--Except where a collective bargaining agreement provides otherwise, an employer which has adopted a policy offering compensatory time to employees may discontinue such policy upon giving employees 30 days notice.

"(E) Written request.--An employee may withdraw an agreement described in paragraph (2)(B) at any time. An employee may also request in writing that monetary compensation be provided, at any time, for all compensatory time accrued which has not yet been used. Within 30 days of receiving the written request, the employer shall provide the employee the monetary compensation due in accordance with paragraph (6).

"(4) Private employer actions.--An employer which provides compensatory time under paragraph (1) to employees shall not directly or indirectly intimidate, threaten, or coerce or attempt to intimidate, threaten, or coerce any employee for the purpose of--

"(A) interfering with such employee's rights under this subsection to request or not request compensatory time off in lieu of payment of monetary overtime compensation for overtime hours; or

"(B) requiring any employee to use such compensatory time.

"(5) Termination of employment.--An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon the voluntary or involuntary termination of employment, be paid for the unused compensatory time in accordance with paragraph (6).

"(6) Rate of compensation.--

"(A) General rule.--If compensation is to be paid to an employee for accrued compensatory time off, such compensation shall be paid at a rate of compensation not less than--

"(i) the regular rate received by such employee when the compensatory time was earned, or

"(ii) the final regular rate received by such employee,

whichever is higher.

"(B) Consideration of payment.--Any payment owed to an employee under this subsection for unused compensatory time shall be considered unpaid overtime compensation.

"(7) Use of time.--An employee--

"(A) who has accrued compensatory time off authorized to be

provided under paragraph (1), and

"(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the employer.

"(8) Definitions.--The terms 'overtime compensation' and 'compensatory time' shall have the meanings given such terms by subsection (o)(7).".

SEC. 3. REMEDIES.

Section 16 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216) is amended--

(1) in subsection (b), by striking "(b) Any employer" and inserting "(b) Except as provided in subsection (f), any employer"; and

(2) by adding at the end the following:

"(f) An employer which violates section 7(r)(4) shall be liable to the employee affected in the amount of the rate of compensation (determined in accordance with section 7(r)(6)(A)) for each hour of compensatory time accrued by the employee and in an additional equal amount as liquidated damages reduced by the amount of such rate of compensation for each hour of compensatory time used by such employee.".

SEC. 4. NOTICE TO EMPLOYEES.

Not later than 30 days after the date of the enactment of this Act, the Secretary of Labor shall revise the materials the Secretary provides, under regulations published at 29 C.F.R. 516.4, to employers for purposes of a notice explaining the Fair Labor Standards Act of 1938 to employees so that such notice reflects the amendments made to such Act by this Act.

SEC. 5. SUNSET.

This Act and the amendments made by this Act shall expire 5 years after the date of the enactment of this Act.

Passed the House of Representatives March 19, 1997.

Attest:

ROBIN H. CARLE

Clerk.

BILL TEXT Report for S.4
As introduced in the Senate, January 21, 1997

S.4 As introduced in the Senate, January 21, 1997

II

105th CONGRESS
1st Session

S. 4

To amend the Fair Labor Standards Act of 1938 to provide to private sector employees the same opportunities for time-and-a-half compensatory time off, biweekly work programs, and flexible credit hour programs as Federal employees currently enjoy to help balance the demands and needs of work and family, to clarify the provisions relating to exemptions of certain professionals from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and for other purposes.

IN THE SENATE OF THE UNITED STATES
January 21, 1997

Mr. Ashcroft (for himself, Mrs. Hutchison, Mr. Lott, Mr. Nickles, Mr. Craig, Ms. Collins, Mr. DeWine, Mr. Allard, Mr. Brownback, Mr. Chafee, Mr. Coats, Mr. Domenici, Mr. Enzi, Mr. Faircloth, Mr. Gramm, Mr. Grams, Mr. Grassley, Mr. Hagel, Mr. Hatch, Mr. Helms, Mr. Hutchinson, Mr. Kyl, Mr. Murkowski, Mr. Roberts, Mr. Sessions, Mr. Thurmond, Mr. Warner, Mr. Coverdell, and Mr. Jeffords) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

---

A BILL

To amend the Fair Labor Standards Act of 1938 to provide to private sector employees the same opportunities for time-and-a-half compensatory time off, biweekly work programs, and flexible credit hour programs as Federal employees currently enjoy to help balance the demands and needs of work and family, to clarify the provisions relating to exemptions of certain professionals from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and for other purposes.

==========

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Family Friendly Workplace Act".

SEC. 2. PURPOSES.

The purposes of this Act are--

(1) to assist working people in the United States;

(2) to balance the demands of workplaces with the needs of families;

(3) to provide such assistance and balance such demands by allowing employers to offer compensatory time off, which employees may voluntarily elect to receive, and to establish biweekly work programs and flexible credit hour programs, in which employees may voluntarily participate; and

(4) to give private sector employees the same benefits of compensatory time off, biweekly work schedules, and flexible credit hours as have been enjoyed by Federal Government employees since 1978.

SEC. 3. WORKPLACE FLEXIBILITY OPTIONS.

(a) Compensatory Time Off.--

(1) In general.--Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end the following:

"(r) Compensatory Time Off for Private Employees.--

"(1) General rule.--

"(A) Compensatory time off.--An employee may receive, in accordance with this subsection and in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which monetary overtime compensation is required by this section.

"(B) Definition.--For purposes of this subsection, the term 'employee' does not include an employee of a public agency.

"(2) Conditions.--An employer may provide compensatory time off to employees under paragraph (1)(A) only pursuant to the following:

"(A) Such time may be provided only in accordance with--

"(i) applicable provisions of a collective bargaining agreement between the employer and the representative of the employees recognized as provided in section 9(a) of the National Labor Relations Act (29 U.S.C. 159(a)); or

"(ii) in the case of employees who are not represented by a labor organization recognized as provided in section 9(a) of the National Labor Relations Act, an agreement or understanding arrived at between the employer and employee before the performance of the work involved if such agreement or understanding was entered into knowingly and voluntarily by such employee and was not a condition of employment.

"(B) If such employee has affirmed, in a written or otherwise verifiable statement that is made, kept, and preserved in accordance with section 11(c), that the employee has chosen to receive compensatory time off in lieu of monetary overtime compensation.

"(C) If the employee has not accrued compensatory time off in excess of the limit applicable to the employee prescribed by paragraph (3).

"(3) Hour limit.--

"(A) Maximum hours.--An employee may accrue not more than 240 hours of compensatory time off.

"(B) Compensation date.--Not later than January 31 of each calendar year, the employee's employer shall provide monetary compensation for any unused compensatory time off accrued during the preceding calendar year that was not used prior to December 31 of the preceding calendar year at the rate prescribed by paragraph (6). An employer may designate and communicate to the employees of the employer a 12-month period other than the calendar year, in which case such compensation shall be provided not later than 31 days after the end of such 12-month period.

"(C) Excess of 80 hours.--The employer may provide monetary compensation for an employee's unused compensatory time off in excess of 80 hours at any time after giving the employee at least 30 days' notice. Such compensation shall be provided at the rate prescribed by paragraph (6).

"(D) Policy.--An employer that has adopted a policy offering compensatory time off to employees may discontinue such policy upon giving employees 30 days' notice.

"(E) Written request.--An employee may withdraw an agreement or understanding described in paragraph (2)(A)(ii) at any time. An employee may also request in writing that monetary compensation be provided, at any time, for all compensatory time off accrued that has not yet been used. Within 30 days after receiving the written request, the employer shall provide the employee the monetary compensation due in accordance with paragraph (6).

"(4) Prohibition of coercion.--

"(A) In general.--An employer that provides compensatory time off under paragraph (1) to employees shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any employee for the purpose of--

"(i) interfering with the rights of the employee under this subsection to request or not request compensatory time off in lieu of payment of monetary overtime compensation for overtime hours; or

"(ii) requiring the employee to use such compensatory time off.

"(B) Definition.--As used in subparagraph (A), the term 'intimidate, threaten, or coerce' has the meaning given the term in section 13A(d)(3)(B).".

(2) Remedies and sanctions.--Section 16 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216) is amended--

(A) in subsection (b), by striking "(b) Any employer" and inserting "(b) Except as provided in subsection (f), any employer"; and

(B) by adding at the end the following:

"(f)(1) An employer that violates section 7(r)(4) shall be liable to the employee affected in an amount equal to--

"(A) the product of--

"(i) the rate of compensation (determined in accordance with section 7(r)(6)(A)); and

"(ii)(I) the number of hours of compensatory time off involved in the violation that was initially accrued by the employee; minus

"(II) the number of such hours used by the employee; and

"(B) as liquidated damages, the product of--

"(i) such rate of compensation; and

"(ii) the number of hours of compensatory time off involved in the violation that was initially accrued by the employee.

"(2) The employer shall be subject to such liability in addition to any other remedy available for such violation under this section or section 17, including a criminal penalty under subsection (a) and a civil penalty under subsection (e).".

(3) Calculations and special rules.--Section 7(r) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(r)), as added by paragraph (1), is amended by adding at the end the following:

"(5) Termination of employment.--An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon the voluntary or involuntary termination of employment, be paid for the unused compensatory time off in accordance with paragraph (6).

"(6) Rate of compensation for compensatory time off.--

"(A) General rule.--If compensation is to be paid to an employee for accrued compensatory time off, such compensation shall be paid at a rate of compensation not less than--

"(i) the regular rate received by such employee when the compensatory time off was earned; or

"(ii) the final regular rate received by such employee,

whichever is higher.

"(B) Consideration of payment.--Any payment owed to an employee under this subsection for unused compensatory time off shall be considered unpaid monetary overtime compensation.

"(7) Use of time.--An employee--

"(A) who has accrued compensatory time off authorized to be provided under paragraph (1); and

"(B) who has requested the use of such compensatory time off,

shall be permitted by the employer of the employee to use such time within a reasonable period after making the request if the use of the compensatory time off does not unduly disrupt the operations of the employer.

"(8) Definitions.--The terms 'monetary overtime compensation' and 'compensatory time off' shall have the meanings given the terms 'overtime compensation' and 'compensatory time', respectively, by subsection (o)(7).".

(4) Notice to employees.--Not later than 30 days after the date of the enactment of this Act, the Secretary of Labor shall revise the materials the Secretary provides, under regulations published at 29 C.F.R. 516.4, to employers for purposes of a notice explaining the Fair Labor Standards Act of 1938 to employees so that such notice reflects the amendments made to such Act by this subsection.

(b) Biweekly Work Programs and Flexible Credit Hour Programs.--

(1) In general.--The Fair Labor Standards Act of 1938 is amended by

inserting after section 13 (29 U.S.C. 213) the following new section:

"SEC. 13A. BIWEEKLY WORK PROGRAMS AND FLEXIBLE CREDIT HOUR PROGRAMS.

"(a) Purposes.--The purposes of this section are--

"(1) to assist working people in the United States;

"(2) to balance the demands of workplaces with the needs of families;

"(3) to provide such assistance and balance such demands by allowing employers to establish biweekly work programs and flexible credit hour programs, in which employees may voluntarily participate; and

"(4) to give private sector employees the same benefits of biweekly work schedules and flexible credit hours as have been enjoyed by Federal Government employees since 1978.

"(b) Biweekly Work Programs.--

"(1) In general.--Notwithstanding any other provision of law, an employer may establish biweekly work programs that allow the use of a biweekly work schedule--

"(A) that consists of a basic work requirement of not more than 80 hours, over a 2-week period; and

"(B) in which more than 40 hours of the work requirement may occur in a week of the period.

"(2) Computation of overtime.--In the case of an employee participating in such a biweekly work program, all hours worked in excess of such a biweekly work schedule or in excess of 80 hours in the 2-week period, that are requested in advance by an employer, shall be overtime hours.

"(3) Overtime compensation provision.--The employee shall be compensated for each such overtime hour at a rate not less than one and one-half times the regular rate at which the employee is employed, in accordance with section 7(a)(1), or receive compensatory time off in accordance with section 7(r) for each such overtime hour.

"(4) Compensation for hours in schedule.--Notwithstanding section 7 or any other provision of law that relates to premium pay for overtime work, the employee shall be compensated for each hour in such a biweekly work schedule at a rate not less than the regular rate at which the employee is employed.

"(c) Flexible Credit Hour Programs.--

"(1) In general.--Notwithstanding any other provision of law, an employer may establish flexible credit hour programs, under which, at the election of an employee, the employer and the employee jointly designate

hours for the employee to work that are in excess of the basic work requirement of the employee so that the employee can accumulate flexible credit hours to reduce the hours worked in a week or a day subsequent to the day on which the flexible credit hours are worked.

"(2) Computation of overtime.--In the case of an employee participating in such a flexible credit hour program, all hours worked in excess of 40 hours in a week that are requested in advance by an employer, other than flexible credit hours, shall be overtime hours.

"(3) Overtime compensation provision.--The employee shall be compensated for each such overtime hour at a rate not less than one and one-half times the regular rate at which the employee is employed, in accordance with section 7(a)(1), or receive compensatory time off in accordance with section 7(r) for each such overtime hour.

"(4) Compensation for flexible credit hours.--Notwithstanding section 7 or any other provision of law that relates to premium pay for overtime work, an employee shall be compensated for each flexible credit hour at a rate not less than the regular rate at which the employee is employed.

"(5) Accumulation and compensation.--

"(A) Accumulation of flexible credit hours.--An employee who is participating in such a flexible credit hour program can accumulate not more than 50 flexible credit hours.

"(B) Compensation for flexible credit hours of employees no longer subject to program.--Any employee who was participating in such a flexible credit hour program and who is no longer subject to such a program shall be paid at a rate not less than the regular rate at which the employee is employed on the date the employee receives such payment, for not more than 50 flexible credit hours accumulated by such employee.

"(C) Compensation for annually accumulated flexible credit hours.--

"(i) In general.--Not later than January 31 of each calendar year, the employer of an employee who is participating in such a flexible credit hour program shall provide monetary compensation for any flexible credit hours accumulated as described in subparagraph (A) during the preceding calendar year that were not used prior to December 31 of the preceding calendar year at a rate not less than the regular rate at which the employee is employed on the date the employee receives such payment.

"(ii) Different 12-month period.--An employer may designate and communicate to the employees of the employer a 12-month period other than the calendar year, in which case such compensation shall be provided not later than 31 days after the end of such 12-month period.

"(d) Participation.--

"(1) In general.--Except as provided in paragraph (2), no employee may be required to participate in a program described in this section. Participation in a program described in this section may not be a condition of employment.

"(2) Collective bargaining agreement.--In a case in which a valid collective bargaining agreement exists, an employee may only be required to participate in such a program in accordance with the agreement.

"(3) Prohibition of coercion.--

"(A) In general.--An employer may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any employee for the purpose of interfering with the rights of such employee under this section to elect or not to elect to work a biweekly work schedule, to elect or not to elect to participate in a flexible credit hour program, or to elect or not to elect to work flexible credit hours (including working flexible credit hours in lieu of overtime hours).

"(B) Definition.--As used in subparagraph (A), the term 'intimidate, threaten, or coerce' includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation) or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).

"(c) Application of Programs in the Case of Collective Bargaining Agreements.--

"(1) Applicable requirements.--In the case of employees in a unit represented by an exclusive representative, any biweekly work program or flexible credit hour program described in subsection (b) or (c), respectively, and the establishment and termination of any such program, shall be subject to the provisions of this section and the terms of a collective bargaining agreement between the employer and the exclusive representative.

"(2) Inclusion of employees.--Employees within a unit represented by an exclusive representative shall not be included within any program under this section except to the extent expressly provided under a collective bargaining agreement between the employer and the exclusive representative.

"(3) Collective bargaining agreements.--Nothing in this section shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefits program or plan that provides lesser or greater rights to employees than the benefits established under this section.

"(f) Definitions.--As used in this section:

"(1) Basic work requirement.--The term 'basic work requirement' means the number of hours, excluding overtime hours, that an employee is

required to work or is required to account for by leave or otherwise.

"(2) Collective bargaining.--The term 'collective bargaining' means the performance of the mutual obligation of the representative of an employer and the exclusive representative of employees in an appropriate unit to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

"(3) Collective bargaining agreement.--The term 'collective bargaining agreement' means an agreement entered into as a result of collective bargaining.

"(4) Election.--The term 'at the election of', used with respect to an employee, means at the initiative of, and at the request of, the employee.

"(5) Employee.--The term 'employee' means an employee, as defined in section 3, except that the term shall not include an employee, as defined in section 6121(2) of title 5, United States Code.

"(6) Employer.--The term 'employer' means an employer, as defined in section 3, except that the term shall not include any person acting in relation to an employee, as defined in section 6121(2) of title 5, United States Code.

"(7) Exclusive representative.--The term 'exclusive representative' means any labor organization that--

"(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to Federal law; or

"(B) was recognized by an employer immediately before the date of enactment of this section as the exclusive representative of employees in an appropriate unit--

"(i) on the basis of an election; or

"(ii) on any basis other than an election;

and continues to be so recognized.

"(8) Flexible credit hours.--The term 'flexible credit hours' means any hours, within a flexible credit hour program established under subsection (c), that are in excess of the basic work requirement of an employee and that, at the election of the employee, the employer and the employee jointly designate for the employee to work so as to reduce the hours worked in a week or a day subsequent to the day on which the flexible credit hours are worked.

"(9) Overtime hours.--The term 'overtime hours'--

"(A) when used with respect to biweekly work programs under subsection (b), means all hours worked in excess of the biweekly work schedule involved or in excess of 80 hours in the 2-week period involved, that are requested in advance by an employer.

"(B) when used with respect to flexible credit hour programs under subsection (c), means all hours worked in excess of 40 hours in a week that are requested in advance by an employer, but does not include flexible credit hours.

"(10) Regular rate.--The term 'regular rate' has the meaning given the term in section 7(e).".

(2) Prohibitions.--

(A) Purposes.--The purposes of this paragraph are to make violations of the biweekly work program and flexible credit hour program provisions by employers unlawful under the Fair Labor Standards Act of 1938, and to provide for appropriate remedies for such violations, including, as appropriate, fines, imprisonment, injunctive relief, and appropriate legal or equitable relief, including liquidated damages.

(B) Remedies and sanctions.--Section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)) is amended by inserting before the semicolon the following: ", or to violate any of the provisions of section 13A".

(c) Limitations On Salary Practices Relating To Exempt Employees.--Section 13 of the Fair Labor Standards Act of 1938 (29 U.S.C. 213) is amended by adding at the end the following:

"(m)(1)(A) In the case of a determination of whether an employee is an exempt employee described in subsection (a)(1), the fact that the employee is subject to deductions in compensation for--

"(i) absences of the employee from employment of less than a full workday; or

"(ii) absences of the employee from employment of less than a full pay period,

shall not be considered in making such determination.

"(B) In the case of a determination described in subparagraph (A), an actual reduction in compensation of the employee may be considered in making the determination.

"(C) For the purposes of this paragraph, the term 'actual reduction in compensation' does not include any reduction in accrued paid leave, or any other practice, that does not reduce the amount of compensation an employee receives for a pay period.

"(2) The payment of overtime compensation or other additions to the compensation of an employee employed on a salary based on hours worked shall not be considered in determining if the employee is an exempt employee described in subsection (a)(1).".

HB

10

FISCAL NOTE

No. 1

Bill Version: CSHB 10(L&C)

(H) Publish Date: 3/14/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date:

Dept. Affected: Alaska Court System

Title: Civil action against an architect, engineer or land surveyor

BRU: Trial Courts

Component:

Sponsor: Rep. Green

Requestor:

COMPONENT SERIAL NO. 768

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 97) cost: None

Positions

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel for Phone: 264-8228

Agency: Alaska Court System Date: 03/10/97

Approved by: Stephanie J. Cole, Acting Administrative Director Date: 03/10/97

Agency: Alaska Court System

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

02:53 PM

Rev 1/97

COMMITTEE COPY

Alaska Court System
Fiscal Analysis
HB 10

HB 10 amends the Code of Civil Procedure to require mediation of a civil action alleging professional negligence against an architect, engineer or land surveyor. Mediation must be conducted as provided under the Rules of Civil Procedure.

The court system does not keep statistics on the number of professional negligence claims filed against design professionals each year; based on testimony, it is assumed that only a few dozen such cases are filed each year in superior or district court.

Court rules will specify that the costs of the mediation shall be paid by the parties. However, as long as mediation is mandatory, the state will be required to pay the costs of the mediator for any party who is legally indigent. Because of the small number of claims each year and the relatively low costs of mediation, this note assumes that there will be no costs to the state for indigent mediation. This could change dramatically from year to year, however. Several years ago, a school roof collapsed because of snow load. Because the building was empty, no one was injured and only one plaintiff (the school district) had standing to file a claim. If school had been in session, however, scores of children or their estates might have had grounds for filing a civil action. In such an event, there could be a large number of legally indigent plaintiffs ordered to mediation, and the engineers who designed the roof might not be financially able to pay their share of the costs of hundreds of mediation sessions. While the catastrophic failure of buildings or other structures is fortunately rare, the potential exists that the court system would need to return to the legislature for funding of indigent mediation at some time in the future.

Alaska State Legislature

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CAPITOL BUILDING
JUNEAU, ALASKA 99801-1182
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CHAIRMAN, JUDICIARY COMMITTEE
VICE CHAIRMAN, HEALTH, EDUCATION & SOCIAL SERVICES COMMITTEE
MEMBER, RESOURCES COMMITTEE

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

Representative Joe Green
District 10

Sponsor Statement

CSHB 10 (L&C)

Mandatory Mediation for Claims Against Design Professionals

HB 10 attempts to keep frivolous lawsuits out of the courtroom by amending the Code of Civil Procedure to require mediation of a civil action alleging professional negligence against an architect, engineer, or land surveyor.

A voluntary mediation process is set out under Court Rule 100, HB 10 simply makes this process mandatory for actions against design professionals. After a suit is filed both parties will go through a limited discovery process, then a mediator will work with each side to help reach a settlement.

Members of both the professional design community and the trial attorneys have offered public testimony in favor of this approach. They have testified, and I agree, that mandatory mediation will help resolve claims of negligence against design professionals *before* they reach the courtroom.

Not in other packets

CSHB 10 BILL HISTORY

03/14/97 L&C RPT CS(L&C) 5DP 1NR
DP: COWDERY, SANDERS, RYAN, HUDSON, ROKEBERG
NR: BRICE
•ZERO FISCAL NOTE (COURT)

03/24/97 JUD RPT CS(L&C) 6DP
DP: ROKEBERG, CROFT, BERKOWITZ, BUNDE, JAMES, GREEN
•ZERO FISCAL NOTE (COURT) 3/14/97

04/21/97
Third Reading
Final Passage

YEAS: 38 NAYS: 0 EXCUSED: 0 ABSENT: 2

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

Absent: Kott, Moses

LEGAL SERVICES

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

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Mail Stop 3101

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

MEMORANDUM March 18, 1997

SUBJECT: Design professional mediation - (CSHB 10(L&C))

TO: Representative Joe Green
Attn: Jeff Logan

FROM: Michael F. Ford
Legislative Counsel

You asked for a brief explanation of the discovery provisions of Civil Rule 26. Generally there are two types of discovery, the initial mandatory disclosure required under rule 26(a), and the optional discovery under rule 26(b). Under rule 26(a) a party is required to initially disclose the factual basis of claims or defenses, names and addresses of witnesses, documents, photographs, insurance policies, and the type of damages claimed by category. This type of disclosure is intended to be fairly quick, and, unless otherwise ordered by the court, must occur within 10 days after the parties first meet to discuss their claims, arrange a discovery plan, and discuss the possibility of settlement. See civil rule 26(f).

Under rule 26(b) discovery may be made of any matter relevant to the claim or defense of the party seeking discovery, if not privileged. Typical discovery includes depositions, written interrogatories, production of documents, physical or mental examinations, and requests for admission.

Please contact me if you have further questions.

MFF:jdr:glc
97-192.jdr

BBFM
Engineers Inc.

510 L Street, Suite 200
P.O. Box 91139
Anchorage, AK 99509-1139
(907) 274-2236
(907) 274-2520 Fax

March 12, 1997

apdcltr HB10_397

Representative Joe Green
Room 118, State Capitol
Juneau, AK 99801-1182

Re: HB10

Dear Rep. Green:

I am writing to you as a professional engineer and as a representative of the Alaska Professional Design Council, commonly known as APDC. APDC is a consortium of professional societies representing architects, engineers, land surveyors, building code officials, and landscape architects. The ten member-organizations have a combined membership of over 1400 and represent approximately 5000 licensed professionals. APDC is very supportive of HB10.

Our legal system needs modification! Over 90% of civil suits never go to trial. Most cases are settled, with little to no consideration to actual fault, to avoid the expenses of discovery, trials, the threat of punitive damages (which aren't covered by insurance) and the seemingly capricious decisions of juries. When suits are filed against all possible defendants, regardless of fault, to ensure there are plenty of pockets to chip into the settlement, some defendants end up spending a considerable amount of time and money to extricate themselves from cases in which they shouldn't be involved. In most cases, they get to contribute to the settlement, even though they have no fault, due to pressure from the other parties to the suit. Knowing this, some people use the court system as a means of legal extortion by filing frivolous suits with the hope of a settlement. Millions of dollars are spent in the so called "discovery process" which almost always results in the defendants throwing in their insurance to stop the bleeding and make the case go away.

Existing sanctions against frivolous suits are rarely used because they require that the plaintiff first lose at trial, a trial that rarely happens. Summary judgment is also very rare because appellate courts have almost always overturned such decisions, making trial judges wary of issuing such orders. Many settlements are due to fear of the perceived large down side of going to trial, including the expense involved and the tendency of some juries to ignore common sense and aid the "little guy" plaintiff by dipping into the "deep pocket". All too often we read about large awards being reduced by the trial judge or on appeal or on the second appeal, all of which takes time and money. Some argue that these are rare, but they are not rare enough to take the gamble of a trial.

It is time to develop a system which identifies patently frivolous and meritorious suits early, so we can to get them out of the system. HB10 will help the situation for design professionals. Mandatory mediation would occur immediately after the immediate mandatory discovery process, a relatively new exchange of documents which occurs very shortly after a case is filed. A mandatory mediation system would reduce the number and costs of frivolous suits by letting the plaintiff and their attorney know early on if a case has no merit. They will be less willing to press the case as the likelihood of recovery will be decreased and the likelihood of court sanction for bringing a frivolous suit will be increased. On the other hand, it will encourage

defendants to settle valid claims early by giving them an independent opinion of the validity of the claim against them. It will reduce the costs of litigation by resolving cases before the lengthy, expensive, regular discovery process which includes depositions and responding to interrogatories. This may have the added benefit of more money going to the injured, rather than lawyers and expert witnesses. It should slow down the shotgun approach to suits by removing defendants who are obviously not liable.

It is our understanding that approximately 80% of cases sent to mediation in Washington are resolved during or soon after the mediation process. Fewer, smaller, and shorter cases should provide relief to an overtaxed court system. A bill which would have established mandatory mediation in suits against design professionals passed the House last year, 37-3. The trial attorneys, who have generally not been proponents of legal reform, testified on that bill that they support mandatory mediation, although they would prefer it to apply to all suits.

APDC thanks you for introducing HB10 and urges its passage. If you have any questions, I can be reached by phone at (907) 274-2236, by fax at (907) 274-2520, or by e-mail at bbfm@alaska.net.

Respectfully yours,

Colin Maynard, PE

(1) Hearings involving telephonic participation must be scheduled in the same manner as other hearings.

(2) When telephonic participation is requested, the court, before the hearing, shall designate the party responsible for arranging the call and the party or parties responsible for payment of the call pursuant to Administrative Rule 48.

(3) Upon convening a telephonic proceeding, the judge shall:

(i) Recite the date, time, case name, case number, names and locations of parties and counsel, and the type of hearing;

(ii) Ascertain that all statements of all parties are audible to all participants;

(iii) Give instructions on how the hearing is to be conducted, including notice that in order to preserve the record speakers must identify themselves each time they speak.

(4) A verbatim record must be made in accord with Administrative Rule 35.

(c) The right of public access to court proceedings must be preserved in accordance with law.

(Added by SCO 623 effective June 15, 1985; amended by SCO 790 effective March 15, 1987; and by SCO 922 effective January 15, 1989)

Annotations

Cases

Where father participated telephonically in parental rights termination action, his due process right to confront and cross-examine witnesses was not violated, since his attorney was present in the courtroom and did effectively cross-examine witnesses and since the transcript of the hearing indicated that the father could hear well enough to follow the proceedings. **E.J.S. v. Dept. of Health & Social Serv.**, Op. No. 3318, 754 P2d 749 (Alaska 1988)

Trial judge did not err in accepting telephonic testimony over the objection of a party. **Gregg v. Gregg**, Op. No. 3454, 776 P2d 1041 (Alaska 1989).

Trial judge could administer oath to witness appearing by telephone. **Gregg v. Gregg**, Op. No. 3454, 776 P2d 1041 (Alaska 1989)

Oath administered to witness appearing by telephone was valid even though the witness was not physically present in the state. **Gregg v. Gregg**, Op. No. 3454, 776 P2d 1041 (Alaska 1989).

At telephonic hearing on father's opposition to mother's motion seeking child support arrears, judge's ruling limiting hearing to oral arguments, which preventing father from testifying and his counsel from cross-examining the mother, was error, even though father did not file motion to participate telephonically in the hearing. **Carvalho v. Carvalho**, Op. No. 3881, 838 P2d 259 (Alaska 1992)

Rule 100. Mediation.

(a) **Application.** At any time after a complaint is filed, a party may file a motion with the court requesting mediation for the purpose of achieving a mutually agreeable settlement. The motion must address how the mediation should be conducted as specified in paragraph (b), including the names of any acceptable mediators. The court may order mediation in response to such a motion, or on its own motion, whenever it determines that mediation may result in an equitable settlement. In making this determination, the court may consider whether there is a history of domestic violence between the parties which could be expected to affect the fairness of the mediation process or the physical safety of the domestic violence victim. Mediation may not be ordered in a case filed under AS 25.35.010 or .020 and conduct which constitutes domestic violence under these statutes may not be the subject of mediation under this rule.

(b) **Order.** A order of mediation must state:

(1) the name of the mediator, or how the mediator will be decided upon;

(2) any changes in the procedures specified in paragraphs (c) and (e), or any additional procedures;

(3) that the costs of mediation are to be borne equally by the parties unless the court apportions the costs differently between the parties; and

(4) a date by which the initial mediation conference must commence.

(c) **Challenge of Mediator.** Each party has the right once to challenge peremptorily any mediator appointed by the court if the "Notice of Challenge of Mediator" is timely filed pursuant to Civil Rule 42(c).

(d) **Mediation Briefs.** Any party may provide a confidential brief to the mediator explaining its view of the dispute. If a party elects to provide a brief, the brief may not exceed five pages in length and must be provided to the mediator not less than three days prior to the mediation. A party's mediation brief may not be disclosed to anyone without the party's consent and is not admissible in evidence.

(e) **Conferences.** Mediation will be conducted in informal conferences at a location agreed to by the parties or, if they do not agree, at a location designated by the mediator. All parties shall attend the initial conference at which the mediator shall first meet with all parties. Thereafter the mediator may meet with the parties separately. Counsel for a party may attend all conferences attended by that party.

(f) **Termination.** After the initial joint conference and the first round of separate conferences if separate conferences are required by the mediator, a party may withdraw from mediation, or the mediator may terminate the process if the mediator determines that mediation efforts are likely to be unsuccessful. Upon withdrawal by a party or termination by the

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mediator, the mediator shall notify the court that mediation efforts have been terminated.

(g) Mediation proceedings shall be held in private and are confidential. The mediator shall not testify as to any aspect of the mediation proceedings. This rule does not relieve any person of a duty imposed by statute.

(h) If the mediation is successful, the party requesting mediation shall prepare a stipulation for dismissal which dismisses all or such portions of the action as have been concluded by mediation as agreed upon at the mediation.

(Added by SCO 1116 effective July 15, 1993; amended by SCO 1130 effective July 15, 1993)