ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9789 HOUSE COMMUNITY & REGIONAL AFFAIRS

AS 29.35.130;

(11) subject to AS 28.01.010, regulate the licensing and operation of motor vehicles and operators;

(12) engage in activities authorized under AS 29.47.460;

(13) contain, clean up, or prevent a release or threatened release of oil or a hazardous substance, and exercise a power granted to a municipality under AS 46.04, AS 46.08, or AS 46.09; the borough shall exercise its authority under this paragraph in a manner that is consistent with a regional master plan prepared by the Department of Environmental Conservation under AS 46.04.210.

* **Sec. 5.** AS 38.05.810(f) is amended to read:

(f) The commissioner shall lease state land for telephone or electric transmission and distribution lines for less than the appraised value of the land if the lessee is a nonprofit cooperative association organized under AS 10.25. The commissioner may lease state land that is not located within the boundary of a municipality for the disposal of garbage, refuse, trash, or other waste material for less than the appraised value of the land if the lessee is **approved by the commissioner and collects and disposes** [A LICENSED PUBLIC UTILITY AUTHORIZED TO COLLECT AND DISPOSE] of garbage, refuse, trash, or other waste material outside the boundaries of a municipality. Before determining the annual rental, the commissioner shall consider the nature of the public service rendered by the nonprofit cooperative association or **approved lessee** [LICENSED PUBLIC UTILITY] and the terms of the grant under which the land was acquired by the state. A nonprofit cooperative association may not construct improvements other than transmission or distribution lines and substations on land leased under this subsection. **An approved lessee** [A LICENSED PUBLIC UTILITY] may not construct permanent improvements on land leased under this subsection that are not related to the purpose of the lease.

* **Sec. 6.** AS 42.05.711(l) is amended to read:

(l) A person, utility, or cooperative that is exempt from regulation under (a), [OR] (d) - **(h), (j), or** (k) of this section is not subject to regulation by a municipality under AS 29.35.060 and 29.35.070.

* **Sec. 7.** AS 42.05.712(h) is amended to read:

(h) A utility or cooperative that is already exempt from regulation under this section or that is exempt from regulation under AS 42.05.711(e) [, (i),] or (k) may elect to terminate its exemption in the same manner.

* **Sec. 8.** AS 45.50.572(d) is amended to read:

(d) AS 45.50.562 - 45.50.596

(1) apply to long distance telecommunications services provided by public utilities;

(2) [. AS 45.50.562 - 45.50.596] do not apply to

(A) other services provided by public utilities that have been issued a certificate of public convenience and necessity under AS 42.05; **or**

(B) solid waste collection and disposal that is regulated by a municipality under AS 29.35.050 where the municipality has granted the private carrier an exclusive franchise to operate in an area.

* **Sec. 9.** REPEAL OF STATUTES. (a) AS 29.35.050(a) and 29.35.050(b) are repealed.

(b) AS 42.05.431(f), 42.05.431(g), 42.05.711(i), 42.05.711(m), and 42.05.990(4)(F) are repealed.

* **Sec. 10.** Sections 1, 2, 4, 8, and 9(a) of this Act take effect immediately under AS 01.10.070(c).

* **Sec. 11.** Except as provided in sec. 10 of this Act, this Act takes effect January 1, 2000.

Amendment #1

G version of the bill: Section 2 (e) (1) Line 14 insert after customers no [at] more than "

This amendment caps the rates. Present language fixes the rates.

MEMORANDUM

TO: Jonathan Lack

FROM: Steven E. Mulder

DATE: April 29, 1999

RE: HB 178

Jonathan, thank you for the committee substitute work draft.

Section 2(e)(3) continues existing state law requiring a municipality to compensate a certificate holder when a "taking" occurs. Under state law, a utility holding a certificate has a property interest in its certificated operations. Currently, under AS 29.35.050(b), the governing body of a municipality may not prohibit a certificate holder from continuing its authorized collection and disposal services until it has purchased the "certificate, equipment and facilities of the carrier, or that portion of the certificate that would be affected, at fair market value."

In reviewing the draft committee substitute, it appears section 2(c)(2)(B) should be changed to be consistent with the (e)(1) five year term requirement. We suggest the following language be added to (e)(2)(B):

> One of the franchise holders in the area of competition must be the public utility that provided residential or commercial solid waste collection and disposal service in that service area on the day before the effective date of this section under a certificate issued by the Alaska Public Utilities Commission; the franchise must be for a term of at least five years from the later of the date that the franchise was granted or January 1, 2000; or

Also, I attended the Anchorage Assembly work session on HB 178 on Tuesday morning of this week and the lunch meeting of the Solid Waste Advisory Commission on Wednesday. The following is a discussion of issues raised at those meetings and some suggested language changes that would address those concerns.

1. Some members of the advisory commission expressed the view that AS 29.35.050(a) should not be repealed but rather a new subsection (8) added to state:

(8) grant franchises under (c) of this statute.

2. There was concern that paragraph (e) of section 2 of HB 178 may not clearly allow the Municipality of Anchorage to maintain the current checkerboard of service areas. A suggestion was made to delete this sentence:

[THE MUNICIPALITY MAY SATISFY THE REQUIREMENT OF THIS SUBSECTION EITHER BY OPERATING THE SERVICE ITSELF, WITH MUNICIPAL OFFICIALS AND EMPLOYEES, OR BY GRANTING ONE OR MORE FRANCHISES TO A PRIVATE CARRIER TO PROVIDE THE SERVICE.]

And to substitute:

In implementing this requirement, the municipality may operate the service itself; it may also grant one or more franchises to provide the service. Where the municipality holds a certificate from the Alaska Public Utilities Commission to provide solid waste collection and disposal service, it may retain exclusive or non-exclusive authority to continue to provide such service in its service area.

3. There was a suggestion to add to the end of (e)(3):

, provided however, the obligation to purchase shall not exist after January 1, 2005.

4. Some would be comforted by additionally adding to (e)(3) the following:

no franchisee shall be entitled to compensation solely as a result of expiration of any franchise granted under (e).

Please note that the Solid Waste Advisory Commission did not vote to formally recommend the above possible changes; however, these are suggestions of language changes that could address concerns of some members of the commission.

cc: Pat Harmon

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April 21, 1999

Mary K. Hughes, Esq.
Municipal Attorney
Municipality of Anchorage
P.O. Box 196650
Anchorage, Alaska 99519-6650

Re: House Bill 178

Dear Ms. Hughes:

You have requested our review and evaluation of House Bill 178, paying special attention to whether the proposed legislation is constitutional. This letter constitutes our analysis.

House Bill 178 appears to signify an attempt by a single foreign corporation, Waste Management, Inc., to exert its market power in the Alaska economy at the expense of local governments, and ultimately, the residents of the State. House Bill 178 is peculiar in one respect, however, because it places the State in a new "facilitating" role with respect to substantial market power consolidation affecting the State. Rather than resisting the trend in the private sector toward market consolidation within Alaska, House Bill 178 is unique because it proposes that the State actually take the proactive step of creating and sanctioning a monopoly in the State's refuse industry.

Proponents of House Bill 178 may view the bill as simply transferring regulatory oversight of the refuse industry from state to local government. But the bill does much more than that. It effectively diminishes the regulatory capacity of local government by extending new and exclusive rights to the private company currently certified to collect refuse in many of Alaska's communities. A comparison of the current regulatory scheme with the proposed regulatory regime will highlight a few of these shortcomings.

Under the existing regulatory scheme, a refuse company must acquire a Certificate of Public Convenience and Necessity from the Alaska Public Utilities Commission. AS 42.05.221(a). The Certificate of Public Convenience and Necessity is a property right which is entitled to protection. Homer Electric Ass'n v. City of Kenai, 423 P.2d 285, 289-90 (Alaska 1967). But the Certificate does not grant the Certificate holder a monopoly right to provide exclusive utility service. Chugach Electric Ass'n v. City of Anchorage, 426 P.2d 1001, 1003 (Alaska 1967); Homer Electric Ass'n v. City of Kenai, 423 P.2d 285, 289 (Alaska 1967). The utility is always subject to competition from other private companies or from the municipality itself. Chugach Electric Ass'n, supra; Homer Electric Ass'n, supra.

In contrast, under proposed Section 2(e) of House Bill 178, the rights of a refuse collector currently possessing a Certificate from the APUC would be greatly expanded at the expense of the municipalities and residents of the State. No longer would the refuse collector be subject to free and open competition. Instead the public utility would be insulated from competition and would be entitled to monopoly rights and monopoly profits. Under subsections one and two of Section 2(e), the refuse collector would have either the right to be granted an *exclusive* franchise by the municipality for at least five years, or, if the municipality determines that an unrestrained monopoly was not in its residents best interests, the right to have its assets purchased at fair market value by the municipality. Any refuse collection monopoly created and sanctioned under House Bill 178 would enjoy immunity from antitrust regulation under the State antitrust laws pursuant to Section 8 of House Bill 178.

Viewed from an antitrust perspective, House Bill 178 ends competition in the refuse industry in Alaska in favor of establishing monopolies. The purpose of the antitrust laws is to protect competition and to prevent monopoly. Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-49 (1951). By stamping out competition, establishing a monopoly, and then granting that monopoly immunity under the state antitrust laws, House Bill 178 turns the underlying policy for the state antitrust laws on its head.

Given House Bill 178's purpose of ending free competition in the refuse industry while simultaneously protecting the property rights of currently certified refuse collectors, the situation becomes even more problematic when multiple refuse collectors are certified by the APUC in any given service area. In this situation under the proposed act, the municipalities are required to bestow a monopoly on one refuse collector while simultaneously buying out any other certificated refuse collectors. Section 2(g), ll. 25-29.

The net result is to place a tremendous financial burden upon municipalities at a time of dwindling revenues for the sole purpose of allowing a private corporation to collect monopoly profits.

Moreover, in municipalities such as Anchorage where the municipality itself owns and operates a refuse collection service, House Bill 178 gives the municipality two options under subsections 2(e) & (g): either (1) grant an exclusive franchise to the private corporation and end municipal service without any form of compensation to the municipality, or (2) buy out the private refuse collector at fair market value. Assuming that the buy-out option is barred by prohibitive costs in an era of dwindling revenues, a valuable public right and asset will effectively be transferred to a private corporation without compensation when the exclusive franchise is granted to the private refuse company.

Perhaps the most troubling aspect of House Bill 178 is that the regulatory body will be held hostage by the interests and demands of the regulated refuse collector. After the exclusive franchise is granted and the monopoly created, Section 2(g) requires the municipality to buy out the refuse collector at fair market value if the municipality "*deprives* a public utility holding a certificate to provide service in the municipality of the *right* to provide service within municipal boundaries." § 2(g), p. 3, ll. 29-31 to p. 4 ll. 1-2. Neither "deprive" nor "right" is defined under House Bill 178. Because any form of public regulation necessarily infringes upon private rights to some degree, the refuse monopolist could assert that its buy-out rights have been triggered by any municipal regulation which it found unfavorable. The unfortunate result is to grant the sole remaining refuse collector extensive political power over local government as a complement to the extensive economic power it receives as a result of its monopoly status. This proposed legislation gives a private corporation political and economic power of unprecedented proportion.

In addition to the problems discussed above, House Bill 178 raises numerous constitutional issues as well. House Bill 178 is proposed by one party: Waste Management Inc. In light of the fact that Waste Management owns most private refuse companies in the State possessing Certificates of Public Convenience and Necessity, and therefore will effectively be receiving a monopoly on waste collection throughout the State, House Bill 178 is not drafted for the general welfare but instead for the private advantage of one private corporation.

House Bill 178 will be subject to challenge as a special act under Article II, Section 19 of the Alaska Constitution. Legislation which *incidentally* operates to private

advantage must bear a "fair and substantial relationship" to legitimate purposes. State v. Lewis, 559 P.2d 630, 643 (Alaska 1977). The very legitimacy of House Bill 178's purpose is questionable because its purpose and effect are to grant monopoly rights and monopoly profits to one private corporation at the expense of the municipalities and residents of the State. Moreover, even if a legitimate purpose for House Bill 178 could be articulated to some degree, that purpose is questionably furthered by the grant of monopoly rights to Waste Management at the expense of Alaskan municipalities and residents. House Bill 178 may be subjected to heightened judicial scrutiny, however, because it goes farther than *incidentally* affording a private advantage to Waste Management. House Bill 178 *intentionally* operates to Waste Management's private advantage because it was drafted for the very purpose of affording Waste Management monopoly or buy-out rights at the expense of Alaskan municipalities and tax paying citizens. Accordingly, House Bill 178 may be judicially reviewed to determine whether it is the least restrictive means to serve a compelling governmental interest. See, e.g., State, Dep't of Transp. & Labor v. Enserch Alaska Constr., Inc., 787 P.2d 624, 631-32 (Alaska 1989).

House Bill 178 is also subject to challenge under the equal protection clause by those refuse collectors who are statutorily denied the right compete against Waste Management, Inc. "'The right to engage in economic endeavor' is an important right that the government may impair only if its interest in taking the challenged action is important and the nexus between the action and the interest it serves is close." Laborers Local No. 942 v. Lampkin, 956 P.2d 422, 430 (Alaska 1998)(quoting State, Dep't of Transp. & Labor v. Enserch Alaska Constr., Inc., 787 P.2d 624, 633 (Alaska 1989)). As discussed above with reference to an Article II, Section 19 challenge, it may be difficult to articulate a legitimate governmental purpose for bestowing a monopoly on a private corporation at the expense of residents of the State, much less an "important" governmental interest. Moreover, if an important interest can in fact be articulated, the requisite "close" relationship between the private monopoly and the purported purpose is also questionable.

Finally, House Bill 178 may be subject to challenge by Anchorage tax paying residents who are being treated differently than Fairbanks tax paying residents under the proposed legislation. Under House Bill 178 Section 2(e), "a *city that is inside a borough* and that has established a system of solid waste collection and disposal before the effective date of this subsection may maintain that service." Thus, Fairbanks will be permitted to maintain the status quo, but a municipality such as Anchorage will be required to either grant an exclusive franchise to Waste Management, Inc. or buy out Waste Management, Inc. under Section 2(e). Anchorage taxpayers would have citizen-taxpayer standing to challenge

the plan, see Baxley v. State, 958 P.2d 422, 428-29 (Alaska 1998), as a violation of equal protection under the Alaska Constitution. The level of judicial scrutiny could vary from a "substantial-relationship-with-a-legitimate-state-purpose" test, to "the-least-restrictive-means-for-furthering-a-compelling-governmental interest" test. As discussed in connection with an Article II, Section 19 challenge, a legitimate much less compelling purpose for House Bill 178 is questionable, and the relationship between the proposed monopoly rights for Waste Management and any articulated purpose is also suspect.

In short, House Bill 178 is special interest legislation designed to benefit one private corporation, at great expense to the Municipality of Anchorage, and local government bodies throughout the State. The bill bestows unprecedented rights and powers on one private corporation, thereby producing numerous pitfalls and shortcomings. House Bill 178 therefore should not be enacted into law.

Very truly yours,

ATKINSON, CONWAY & GAGNON

By _____
Bruce E. Gagnon

By _____
Jeffrey J. Jarvi

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April 26, 1999

VIA FACSIMILE & U.S. MAIL

The Honorable Andrew Halcro
Alaska State Legislature
House of Representatives
Alaska State Capitol, Room 418
Juneau, Alaska 99801

Re: House Bill 178

Dear Representative Halcro:

We are in receipt of your letter of April 22, 1999. One of your questions concerned the antitrust ramifications of exempting franchises under the state antitrust laws. I have responded to a similar question asked by Representative Kott. A copy of that letter is attached.

The other questions are much harder to answer in a concise way. Whether property has been taken or damaged in constitutional terms is often dependent on the particular facts. It is even more difficult to make generalizations without specific facts about the required valuation when there has been an admitted taking.

The question of whether a decertification of a utility's right to serve is a taking and what compensation may be due is now the subject of litigation before the Alaska Supreme Court in a case involving the modification of an electrical service area by the Alaska Public Utilities Commission on Prince of Wales Island. Tlingit-Haida Regional Electrical Authority v. State of Alaska, Alaska Public Utilities Commission (Nos. S-8833, S-8844, and S-8843). The THREA case, unlike HB 178, deals with decertifaction by a public utility commission for public interest reasons, rather than a municipality establishing its own solid waste collection business. The case has been briefed. The APUC removed the Klawock area from THREA and ordered that

Alaska Power Company serve the area. The superior court has held that removal of the service area was a taking. The APUC has appealed whether the modification of the certificate was a taking and has taken the position that compensation is not due for lost future profits for the utility. The brief is attached.

There is case law in other jurisdictions that support the position that a modification of a certificate for public interest reasons is not a taking. Cambridge Telephone Co. v. Pine Telephone, 712 P.2d 576, 581 (Idaho 1985)(holding that modification of a certificate of public convenience and necessity was not a taking of a property right); Knox County Rural Electric Membership Corporation v. PSI Energy, Inc., 663 N.E.2d 182, 192-93 (Ct. of App. Ind. 1996) (rejecting a takings claim and denying compensation to a utility whose service area was reduced in the public interest by the Indiana Utility Regulatory Commission).

However, the issue of whether a municipality could create an exclusive franchise for itself and therefore leave existing facilities and equipment with reduced value would present a more difficult question. Even if it is a taking, the facts may determine whether future profits of a going concern would be included in the compensation, rather than limited to facilities and equipment.

Attached is a general outline of takings principles that was prepared to aid in analyzing such a question. It should not be considered a legal opinion but you may find it helpful. It illustrates how the analysis can vary with the facts.

It should be noted that HB 178 in Section 2 adds a new subsection (AS 29.35.050(j)(2)) which defines "fair market value" as including "future projected revenue." There is no definition in the present statute and case law would determine the meaning of "fair market value" under it. This definition guarantees compensation that may go beyond what is required by the constitution.

Finally, we would have to know exactly what provision raises concerns under the local or special acts provision before we could express our view on that issue.

We hope this answers some of your questions. We will be happy to provide more analysis once the question is more specific.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Ron Zobel
Ron Zobel
Assistant Attorney General

Enclosures:

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April 23, 1999

VIA FACSIMILE & U.S. MAIL

The Honorable Pete Kott
Alaska State Legislature
House of Representatives
Alaska State Capitol
Juneau, Alaska 99801

Re: House Bill 178

Dear Representative Kott:

You have asked whether Section 8, of HB 178, makes private solid waste collection and disposal carriers subject to Alaska's antitrust laws.

Under present law refuse utilities are exempt from antitrust laws if the utility has a certificate from the APUC. AS 45.50.572 (d). However, because Section 9, of HB 178, acts to remove solid waste collection and disposal from the definition of a public utility and from the APUC's jurisdiction, this would subject refuse collection to Alaska's antitrust laws.

Section 8, of HB 178, however, acts to limit the application of Alaska's antitrust laws in one specific category. This section exempts from state antitrust laws a private solid waste and collection provider where a municipality has granted "an exclusive franchise to operate in an area."

The new exemption under Section 8 creates an exemption to antitrust laws for all conduct by an exclusive franchisee, without any assurance that the conduct will be reviewed or regulated by a municipality. The net effect of Section 8 is to eliminate the State's ability to review, for antitrust concerns, whether conduct by an entity with an exclusive franchise would result in any anticompetitive effects. Further, the elimination of the state's antitrust review authority occurs in the absence

of any guarantee that the municipality or any other regulatory body will conduct such a review.

Exemptions to the state antitrust laws should be determined by whether the specific activity or conduct, and any "anticompetitive effects", have been considered and approved by a regulatory body. This is the approach taken by present state law in AS 45.50.572 (g) and the analogous "state action" doctrine under the federal antitrust law. The important distinction is between exempting a legal person that has an exclusive franchise and exempting only the conduct of that person that has been reviewed.

In summary, while Section 8 and 9, of HB 178, make private solid waste and collection carriers subject to antitrust law, the Sections also act to exempt from Alaska's antitrust laws conduct that may be anticompetative, without guaranteeing that a review will be commissioned by any other regulatory body.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Ron Zobel
Ron Zobel
Assistant Attorney General

TAKINGS: GENERAL PRINCIPLES IN ALASKA LAW

A. STEP I: IDENTIFY NATURE OF GOVERNMENTAL ACTION TO DETERMINE WHICH TAKING ANALYSIS APPLIES.

PER SE TAKINGS

(1) "Physical Invasion" of property.

(2) Regulation/Order denying "landowner" all economically feasible use of property.

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If government action falls into "per se" category, automatically a taking and "Just Compensation" is due.

REGULATORY TAKINGS

(1) a regulation or order that affects the use and value of property.[1]

(2) Court must engage in fact-specific inquiry to determine whether a taking has occurred. Court has identified the following factors to be considered:

* character of governmental action
* economic impact on property owner
* interference with reasonable investment-backed expectations.
* legitimacy of interest advanced by regulation/order.

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After consideration of these factors, court will rule whether a taking

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[1] The Alaska Supreme Court has defined a "taking" to occur when a private property owner is forced to bear an unreasonable burden as a result of the government's exercise of power in the public interest. Sandberg, at 558.

has occurred.

See Anchorage v. Sandberg, 861 P.2d 554, 557 (Alaska 1993) citing Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2892-95 (1992); see also Cannone v. Noey, 867 P.2d 797, 800 (Alaska 1994).

B. STEP II: IF GOVERNMENTAL ACTION RESULTS IN A TAKING, JUST COMPENSATION IS DUE

WHAT PRINCIPLES APPLY IN DETERMINING WHAT IS JUST COMPENSATION?

1. The Alaska Supreme Court has repeatedly stated that the protection of private property under Art. I, Sec. 18 of the Alaska Constitution is to be liberally construed in favor of the property owner. Zerbetz v. Municipality of Anchorage, 856 P.2d 771, 782 (Alaska 1993). This means that "the requirement that the condemnor pay just compensation when property is damaged provides broader protection for private property rights than the fifth amendment to the United States Constitution." Id.

2. The Alaska Supreme Court has defined "just compensation" as:

> The term just compensation implies full indemnification to the owner for the property taken. In other words the property owner should be placed in the same position as he was prior to the taking of his property.

Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 150 (Alaska 1971); see also Bakke v. State, 764 P.2d 655, 657 (Alaska 1987).

3. Fair market value of the property as of the date of the taking usually is the compensation that is required to satisfy the just compensation requirement. Gacksetter v. State, 618 P.2d 564, 567 (Alaska 1980).

4. Just Compensation includes compensation for loss of personal property. Stroh v. State, 459 P.2d 480, 483-87 (Alaska 1969) (appending superior court opinion, which allowed recovery of compensation for loss of personal

property taken); see also State v. Hammer, 550 P.2d 820, 827 (Alaska 1976).

*5. The Alaska Supreme Court has held that just compensation in an eminent domain proceeding required the state to compensate Mr. Hammer for the temporary lost profits that accrued during the relocation of his business. State v. Hammer, 550 P.2d 820, 826-27 (Alaska 1976).

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JAMES R. WEISS
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April 20, 1999

Honorable Andrew Halcro, Co-Chair
House Community and Regional Affairs Committee
Alaska State Legislature
Juneau, Alaska 99801

Re: ***H.B. 178 Solid Waste Collection and Disposal Bill***

Dear Chairman Halcro:

Preston Gates is national antitrust counsel for Waste Management, Inc. In that capacity, we have been asked to review and comment on the antitrust aspects of House Bill 178.

Section 8 of the bill as drafted does not exempt or shield refuse service providers from state antitrust laws except in one narrow circumstance: where the local government grants an exclusive franchise. In this instance, the local government chooses to regulate the provision of solid waste services through a franchise agreement with a single provider.

This exception is necessary for two reasons. First, under current law, any municipality and solid waste company entering into an exclusive franchise agreement will be exposed to antitrust liability. Without an exemption, any disgruntled bidder is armed with an antitrust suit against the municipality and successful bidder for an agreement which will, by definition, exclude the unsuccessful bidder from the market. Such cases would almost always be without merit and, for that reason, House Bill 178 would not allow such a suit. Disallowing such suits would not, however, preclude all remedies. In the event the contract process is improperly manipulated, other state causes of action are available to enjoin or punish such activity.

Second, the exemption will make Alaska law consistent with the federal Local Government Antitrust Act, which precludes the collection of antitrust damages from municipalities and companies contracting with municipalities. This exemption is based on the rationale that public entities are presumed to act in the best interests of its citizens.

Currently, AS 45.50.572(d) exempts from state antitrust laws certain services, including solid waste collection, provided by public utilities that have been issued a certificate of public convenience and necessity. House Bill 178 allows (but does not mandate) a franchise system to replace the previous public utility certificate system. The bill takes into account this change of regulatory system by amending AS 45.50.572(d) to say that Alaska's antitrust laws do not apply when a municipality grants an exclusive franchise. Where a municipality grants multiple franchises, the exemption is not needed and does not apply.

Notably, House Bill 178 does *not* shield municipalities or bidders from any state antitrust claims arising beyond the franchise contract between the municipality and the successful franchise bidder. For example, the bill does not preclude antitrust suits against two or more companies that conspire to allocate the bids on the contract, or against the winning bidder who engages in predatory pricing or other monopolistic practices to drive a competitor from the market.

In summary, House Bill 178 will not diminish the protections available under state or federal laws to any competitor, whether large or small. To the contrary, the bill provides the potential for increased competition where local government so chooses.

Sincerely,

James R. Weiss
Counsel for Waste Management, Inc.

CLERK'S OFFICE
AMENDED AND APPROVED
Date: 4-27-99

Submitted by: Assembly Member Wuerch,
Prepared by: Assembly Office
For reading: April 27, 1999

ANCHORAGE, ALASKA
AR NO.99- 106

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING STATE LEGISLATION WHICH PROVIDES A MANNER AND METHOD OF ALASKA PUBLIC UTILITIES COMMISSION DEREGULATION WHICH PROVIDES THE ANCHORAGE RATEPAYERS PROTECTION FROM INCREASED COST OF SERVICES TOGETHER WITH SAFE AND RELIABLE SERVICE AND TAXPAYERS PROTECTION FROM A LOSS OF VALUE OF THE TAXPAYERS' INVESTMENT

WHEREAS, the Municipality of Anchorage provides refuse collection pursuant to ordinance as provided for in AS 29.35.050;

WHEREAS, the State Legislature has for many years discussed deregulation of refuse collection;

WHEREAS, the Municipality of Anchorage supports deregulation of refuse collection services provided that the Anchorage ratepayers are protected from increased costs of service and are provided safe and reliable services and the Anchorage taxpayers are protected from a loss of value of the taxpayers' investment in refuse collection services;

NOW, THEREFORE, the Anchorage Assembly resolves:

Section 1: That the Anchorage Assembly hereby supports legislation which would provide a method and manner of Alaska Public Utilities Commission deregulation of refuse collection services which provides the Anchorage ratepayers safe, reliable services at a reasonable cost and the Anchorage taxpayers no loss of value in their investment. Such legislation should not alter the provisions of AS 29.35.050(a), should provide an option to the Municipality of Anchorage to maintain its own refuse collection, and should allow the Anchorage Assembly to exercise regulatory powers similar to those contained in AS 42.05.

Section 2: That the Municipal Clerk shall forward copies of this resolution to the Governor and the Alaska State Legislature immediately upon passage and approval.

AR 99-106

PASSED AND APPROVED by the Anchorage Assembly this 27th day of April 1999.

Fay Von Gemmingen

Chair Von Gemmingen

ATTEST:

_____

Municipal Clerk.

	Yes	No	Abstain
Bell	*		
Carlson	*		
Wuerch	*		
Taylor	*		
Wohlforth	*		
Von Gemmingen	*		
Clementson		*	
Meyer	*		
Abney	*		
Kendall		*	
Murdy		*	

Date 4/27

Title #10 substituted C8 memo on APUC

Long
x Wuerch

Municipality of Anchorage

P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-4311
Fax: (907) 343-4780
http://www.ci.anchorage.ak.us/Assembly

ANCHORAGE ASSEMBLY

HB 178
file
: copy to CoRA members

April 19, 1999

Honorable Andrew Halcro
Honorable John Harris
Co-Chairs, House Community and Regional Affairs Committee
State Capitol, Room 418
Juneau, AK 99801

Dear Representatives Halcro and Harris:

I would like to take this opportunity to comment on House Bill 178. In my estimation, this legislation is good public policy because it transfers control of refuse collection from the state to local governments. Decisions at the local level best ensure that the community's needs will be met in an efficient and effective manner.

The current regulatory system is complicated, burdensome, and ineffective. Refuse collection does not need this type of regulatory oversight. In fact, only three states, including Alaska, remain under the control of a Public Utilities Commission.

I can support this legislation only if it does not require the local government to adopt any regulations currently enforced by the state. Each local government should be allowed to make its own decision as to how much, if any, regulation is required.

I also support this legislation because it is consumer oriented. This legislation freezes rates for refuse collection at their current levels for up to five years or until the local government determines if a competitive system should be put into place. Likewise, this legislation protects a valuable city asset in Anchorage and rests its ultimate destiny where it should be, with local elected officials.

Sincerely,

Bob Bell
Assemblyman

LAUSEN'S
DEPENDABLE DISPOSAL
"THE EXCESS EXPRESS"
P.O. Box 365 • Otto Lake Road • Healy, Alaska 99743
(907) 683-3333

3-30-99

Utility Restructuring Committee
Rep. Bill Hudson, Chairman
AK. State Legislature, State Capital
Juneau, AK. 99801-1182

re. Proposed Legislation To Deregulate Refuse Hauling

Dear Representative Hudson and Committee,

We have seen and read the proposed legislation to remove APUC's authority to regulate refuse hauling. At this time and stage in our business we would highly recommend that you NOT sponsor it.
We agree on all the points submitted to you from Pam & Phil of Valley Refuse of Wasilla. We also are a privately owned refuse business located in Denali Borough. Our area is quite spread and sparsely populated, and it takes the whole area combined to make a go of it. We do residential and commercial.
We would like to add that we have always been very pleased with our relationship with the APUC. they may take awhile, but have been very helpful to us and our business. The decisions they make are always made on the basis of what is in the best interest of the public.
Thank you for your time.
Sincerely,

Leroy & Vickie Lausen

Leroy and Vickie Lausen
Lausens Dependable Disposal

March 19, 1998

Rep. Norm Rokeberg
House of Representatives
Labor & Commerce Committee
State Capitol
Juneau, AK 99801-1182

Re: HB 161 Deregulation of Refuse Utilities

Dear Rep. Rokeberg and L&C Committeee members,

I am the owner of Commercial Refuse, Inc. (CRI). I have some concerns and wish to make some comments in regards to the above proposed legislation.

In October of 1994, CRI applied for a certificate from the Alaska Public Utilities Commission (APUC) to provide competitive refuse services in Anchorage. The application was opposed and contested by the local monopoly, Anchorage Refuse Inc. (ARI) and procedurally required a hearing. There was a considerable delay in the APUC's response to the application in terms of processing.

Therefore, in early 1995, I contacted Rep. Jeannette James in regards to introducing legislation which would allow for competition in the refuse industry, which became HB 161. The bill did not advance very far that session.

The APUC scheduled a hearing date for April 1, 1996 which was continued in late May. In May of 1997, the APUC issued an order granting a certificate to CRI. The certificate has allowed CRI to slowly expand it's business. My original reason for legislative remedy is now moot. The APUC has streamlined the certification process so that other potential competitors may obtain a certificate without undue delays.

Recently, USA Waste of Alaska (a Delaware Corp.) purchased controlling interest in ARI. USA Waste has made applications with the APUC to purchase the rest of the major refuse utilities in the state. If this is approved by the APUC, the result will be one large financial monopoly.

Commercial Refuse
INCORPORATED
750 E. International Airport Rd.
Anchorage, AK 99518
PHONE (907) 562-3700
FAX (907) 562-3750

Rep. Norm Rokeberg
House of Representatives
Labor & Commerce Committee
March 19, 1998

I find it difficult to comprehend any valid reason for legislative deregulation in a case where USA Waste would effectively possess a financial monopoly control over the majority of the market without some regulation or oversight from the APUC.

While I do not represent all the minor players in the marketplace, I have heard similar concerns from my competitors. Any lobbyist that would promote the notion that the entire industry is supportive of deregulation has not taken the time to speak to anyone other than the major refuse utilities, who are all waiting to be purchased by USA Waste.

In summary, the present status wherein the APUC maintains some regulatory control, is appropriate. Any legislation at this point to totally deregulate the refuse industry is premature. For these reasons, I am not supporting HB 161 at this time.

Sincerely,

Jim A. Arnesen
President

cc: Rep. John Cowdery
Labor & Commerce Committee

Copper Basin Sanitation Service Company

PO BOX 88 • GLENNALLEN, AK • 99588-0088
Phone (907) 822-3600 • FAX (907) 822-3800

April 29, 1999

APR 29 1999

State of Alaska
Legislature
House Labor & Commerce Committee
Rep. Rokeberg, Chair

REF: HB 183
Garbage Service Regulation

Dear Chairman Rokeberg,

Garbage service across the state NEEDS to be regulated whether by A.P.U.C. or another regulatory body.

Refuse collection is tied to public health no matter where you live. Garbage will endanger the health of the public if it is not promptly and properly disposed. This is a fact of life.

There is presently in the State of Alaska, a business that is capable of taking over ANY garbage service area it wants. I am not saying it wants any particular area, but IF it wants AND garbage service is deregulated, it CAN take any service area. Waste Management Inc. is a strong business and owns or controls garbage service companies and sanitary landfills across the nation. They have recently moved into Alaska and have purchased a number of garbage collection businesses and acquired control of landfills in most of the heavily populated areas. (Street rumor has it, they now own the garbage service companies that service over 60% of the populace of Alaska.) They are obviously good business people or they would not have such a strong financial footing necessary to purchase control of so many companies in such a short period of time.

So, if they are such good business people, what's my problem??? A big company has the financial power to take a loss in one area and yet make a profit on the company's bottom line. When a large company moves into an area where there is

competition by a smaller company, all they have to do is provide the service at a lower cost to the public and the smaller company will be forced out of business. After the smaller company is forced out, the rates will rise and the no-profit and low-profit areas will be dropped.

Alaska has a lot of areas that can only be served by non-profit entities (village councils, volunteer groups, etc.), these areas are remote and do not have enough money to support a garbage service business. There are areas of the state that have lots of people and lots of service businesses (Anchorage, Fairbanks, Kenai, etc.), these areas have enough money to support multiple garbage service companies, *IF* no one company forces all others out. And last, but not least, there are the areas with highway connections that have enough population to support one business only (Copper Basin, Delta Jct., Tok, Parks Highway, etc.). These areas frequently include very rural areas that produce very little profit to the business. Because they are connected by the highway system, the high volume, high dollar areas could be cherry picked leaving the low/no profit areas to wallow in their trash.

Unorganized borough areas of the state are particularly at risk because the only regulation comes from the State. The areas that have another layer of government (city, borough or both) do have some protection because they could regulate in the State's place.

Deregulation of garbage collection and disposal *will* result in areas of the state no longer receiving any garbage service and also encourage an extremely large monopoly on the rest of the state.

Please do NOT deregulate garbage service in the State of Alaska. Please continue to make the State of Alaska responsible for the regulation of garbage collection and disposal services.

Sincerely,

COPPER BASIN SANITATION SERVICE COMPANY

Sharon Daniel
Business Administrator

AWTi **Alaska Waste Transfer, Inc.**
11811 S. Gambell St. Phone: 907-344-9490
Anchorage, Ak. 99515 Fax: 907-243-8659

April 8,1999

Representative Bill Hudson
Alaska State Legislature
State Capitol
Juneau, Ak. 99801-1182

Ref: Deregulation of Refuse Hauling and Alaska Public Utilities Commission

Dear Representative Hudson,

I am writing to ask for your consideration with respect to the legislation that you may introduce at the request of Waste Management Inc.

This proposed legislation , if passed, would amount to a limitation of competitive choices.

Most of the Alaska based businesses in the field of solid waste collection and disposal are small and competitive, but they lack the financial resources, capitalization and access to substantial bank lending necessary in order to sustain a defense against a larger national Corporation that might choose to compete with aggressive pricing tactics.

My concern, and the concern of my colleagues, is for a level working field. I do not fear fair competition.

Already, Waste Management is proving itself aggressive, by virtue of its use of lobbyist and suggesting legislation which favors to its advantages.

My colleagues and I would be grateful if you would consider our concerns and look into the reasons that solid waste collection is regulated by Alaska Public Utilities Commission in the first place. Our business is one that requires substantial and expensive capital. And as waste collection is a necessity for all citizens, it is worthy of a reasonable level of overseeing. Alaska Public Utilities Commission exists to maintain a level playing field and ensure a fair cost of services to the public.

If Alaska Public Utilities Commission ceases to regulate solid waste collection and disposal services, it would place the responsibility with local communities, many of whom are ill equipped to quickly manage this issue. This would give an aggressive

Waste Management Inc. an opportunity to influence matters in their favor.

Thank you for your attention and consideration of our concerns.

Sincerely,

Dan

Daniel R. Zipay
President

HB178

ALASKA MUNICIPAL LEAGUE
Alaska Conference of Mayors
217 Second Street, Suite 200 ▪ Juneau, Alaska 99801 ▪ Tel (907)586-1325, Fax (907)-463-5480

April 23, 1999

Representative Pete Kott
State Capitol
Juneau, AK 99801

Dear Representative Kott,

The Transportation and Utilities Committee of the AML Legislative Committee met on April 21, 1999 to review HB 178. This bill would mandate the transfer of garbage hauling regulation to municipalities. The Committee unanimously opposed passage of the bill for the following reasons:

1. Higher potential administrative costs to the local ratepayers: HB 178 would require each individual municipality to assume the powers and work of the APUC. Rate hearings are deeply legal and technical procedures. Because hearings would likely only occur every 1 to 3 years, it would be a huge administrative burden to maintain such a technical capability for each individual unit of local government.
2. Higher potential general rates to local customers: Under HB 178, individual cities and boroughs would individually be matched against a large national corporation with much larger legal and technical resources and experience. This could result in higher than necessary local rates paid by citizens.
3. No state cost savings: State regulation of garbage hauling is covered by direct fees and charges. If more staff are needed to expedite regulatory actions, it would be covered by direct charges. This bill has no impact on the state General Fund, or reduction of the fiscal gap.

In conclusion, the Committee is unable to find a public purpose in adopting a local government mandate to regulate garbage hauling, and therefore opposes adoption of the bill. If you have questions regarding this bill or other municipal issues, please call me at 586-1325.

Sincerely

Kevin Ritchie
Executive Director

CC: House Community and Regional Affairs Committee
AML Board and Legislative Committee
APUC

FAIRBANKS
Daily News-Miner

Tuesday, April 20, 1999

Council raises trash pickup rate, hears privatization bid

By SEAN COCKERHAM
Staff Writer

The Fairbanks City Council Monday instituted a modest garbage rate hike in response to increased costs in offering the service, and heard a private company's bid to take garbage collection off the city's hands.

Council members also suggested that no deal is forthcoming on the lone sticking point in the city's health plan rewrite, so the best course is to propose an ordinance and let the unions take it or leave it.

The residential garbage rate will go from $13.12 to $14.12 per month, under the ordinance passed Monday. The council also mandated that $1.20 of that money will be placed in a "city refuse equipment replacement fund."

Bob Cox, a representative of Waste Management Inc., told the council that the city's garbage trucks are getting older and more expensive to maintain, and his company—with its large parts purchasing network— would be "very interested" in buying them and taking over the service.

Councilman John Immel was intrigued by the idea of privatization. A large company might be able to deal easier with high equipment replacement and maintenance costs, he said. "We need to work with this private company," he said.

Other council members, while not adverse to discussing the matter in greater detail at a future work session, opposed privatization.

"Our garbage pickup ain't broke," said Councilman Charlie Rex. "At this point, to try to privatize, we're opening a can of worms we don't need to open," he said.

The privatization offer came before the regular meeting, in a work session which also included the health care discussion.

A health care committee, including both council members and union representatives, has spent a year revising the city's high-cost health care plan. All sides agree that a good compromise was reached, which is expected to knock costs down to $607 per employee per month, from an average of $804 per employee per month last year—under a plan widely considered to be generous.

See TRASH, Page B-2

TRASH: Pickup

Continued from Page B-1

"It's the savings from the health care that are the point of contention, whether the savings should come back to the city—to the taxpayers of the city—or into the pockets of the employees," said Councilman Bob Boko.

The city is proposing a buyout in which each employee would get a $1,000 "signing bonus," a $1,040 payout in July and $2,080 per year for the remainder of a five-year period.

But the city says the only way to affordably do so is to to put that money in a "Section 125 Plan," to be used only to pay medical expenses, rather than giving it directly to employees. That way, the city does not incur associated costs, like paying into the Public Employment Retirement System. The money goes back to the city if it's not all utilized in a year.

Union representatives said the employees should have more options for the money than the Section 125 Plan, such as investments and deferred compensation plans.

John Brown of the operating engineers AFL-CIO said some city workers have gone a decade with the same wage and only a slight benefit increase. "We're not asking for all the money, we're asking to share in the savings that this plan will provide."

The new plan will likely save the city $500,000-$750,000 after the first five years. The bigger savings would come after the buyout period is completed, said Councilman Billy Ray Allen.

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Calif. agency funds work at illegal site

By Robert Bryce

LANCASTER CALIF — The California Integrated Waste Management Board will pay $200,000 to clean up an illegal dump containing about 2,000 cubic yards of waste.

The dump site, in a mile-long ravine in a sparsely populated part of northern Los Angeles County, Calif., has been a continuing problem for California regulators.

In June, the county Health Department ordered the property owners to clean up the site by August. When the owners did not comply, the waste board decided to launch a cleanup.

"This illegal dump site is an all-too-familiar and sad commentary on some people's disregard for the environment," waste board Chairman Daniel G. Pennington said.

The state may seek to recover costs from the owners of the property, waste board spokesman Lanny Clevecilla said. "We have two options. We can work through the county to put a lien on the property. Or we can file a lawsuit against the property owners," he said.

MESSY BUSINESS: Although the California Waste Management Board will pay $200,000 to clean up this illegal dump site in northern Los Angeles County, the agency hopes to recover the funds from the site's owners.

The waste board, a division of the California Environmental Protection Agency, has arranged the cleanup of 74 sites since 1994. The board is working on 16 additional illegal dump sites. The state has many more unreported illegal sites, Clevecilla said.

The waste board will hire a contractor to remove the refuse from the ravine. The board expects the work to begin as soon as the state can contact the property owners and gain access to the dump site. ■

Painful price

Small Tenn. haulers protest hike

By Robert Bryce

NASHVILLE TENN — A sharp price hike at a Waste Management of Tennessee transfer station in Nashville is putting small haulers in a financial bind.

In mid-October, the facility imposed an $84 minimum per-trip charge for all haulers.

The new two-ton rule was necessary because the small haulers, many of whom use pickups or stake bed trucks, take too much time to empty their loads, Waste Management said. But the small haulers say the new tariffs could put them out of business.

"I think it's ridiculous. There used to be a $10 minimum. Now we are having to pay $84 even if we only have a bag of trash," said John Evans, who owns We Haul Anything, in Gallatin, Tenn. Small haulers cannot dump their loads in the city's incinerator or in the city's landfill, which only accepts construction and demolition debris, said Evans, who does small hauling jobs as well as landscaping and tree trimming.

That means the small haulers either must pay the fees at the transfer station or drive to landfills outside Davidson County, Tenn., some of which are more than 30 miles from the Nashville transfer station.

Nashville formerly had two transfer stations, one owned by USA Waste Services Inc. and the other by Waste Management. After the firms merged, the new company closed the old USA Waste station, dramatically increasing traffic at the Waste Management transfer station.

The extra traffic means the small haulers "are utilizing a valuable commodity, which is our transfer station floor space, to dispose of a small volume of waste. It was a time vs. revenue problem," said Mitch Rowan, a district manager for Waste Management.

Small haulers are not the only ones feeling the pinch. The USA Waste transfer station closing has affected the metro government, which held a contract with the plant to take the trash that the city's incinerator couldn't accept, said Dianne Wiles, assistant director for the Nashville-Davidson County metropolitan government's Department of Public Works. "The level of service has declined since they consolidated operations," she said. ■

WMI raises fees at select sites

HOUSTON- Waste Management Inc. announced an average tipping fee increase of two to three percent at selected landfill sites across the country in late February. Other major players in the landfill industry are expected to follow suit this month.

The WMI increases will be larger for customers that do not have contracts with the company, said Cherie Rice, vice president of investor relations.

Specific rate hikes at specific landfills and other disposal facilities owned by WMI would not be released by the company.

The rate increases were not greeted with applause, Rice noted, but reflect increased costs of operating modern, state-of-the-art landfills.

Indeed, in New York some independent haulers have complained to the city's Waste Trade Commission, which said it would investigate after tipping fees nearly doubled at WMI's Hunts Point recycling station.

Haulers complained the hike violates antitrust regulations or fair trade practices.

The largest increase so far came at WMI's American landfill in Ohio, which raised rates 138 percent.

od of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. *Ledesma v. Bergeson*, 99 Idaho 555, 558, 585 P.2d 965, 968 (1978). Thus, while other evidence is to be considered in determining whether the employer has assumed the right to control, it is *the contract* between the parties which is the starting point for a determination of the parties' intent and the basic relationship between them.

In this case, the commission's only reference to the parties' contract was their passing comment that under the *Beutler* case the agreement was not necessarily determinative, nor were they bound by it. I believe that statement by the commission reflects a basic evidentiary misunderstanding of the important role which the agreement between the parties plays in a determination of whether or not the relationship is employer-employee or principal and independent contractor. In this case, important probative evidence on this issue was contained in the parties' agreement, which I believe the commission neglected to consider. That fact, coupled with the commission's erroneous evaluation of the Thorntons' investment in the horse training arena as evidence suggesting an employment relationship requires that this case be remanded to the Industrial Commission for reconsideration. On reconsideration, the commission (1) should not consider the owners' investment in the arena as evidence of an employer-employee relationship, and (2) should consider the agreement between the parties as the most important, albeit not conclusive, evidence in determining whether the parties' arrangement was an employer-employee relationship, or a principal-independent contractor relationship.

I would reverse and remand for a new determination free from the errors described above.

DONALDSON, C.J., concurs.

109 Idaho 875

CAMBRIDGE TELEPHONE CO., INC., Appellant,

v.

PINE TELEPHONE SYSTEM, INC., and Idaho Public Utilities Commission, Respondents.

In the Matter of the Application of PINE TELEPHONE SYSTEM, INC., to establish a service area in Idaho.

No. 15558.

Supreme Court of Idaho.

Dec. 17, 1985.

The Public Utilities Commission granted application to establish telephone service area on a portion of territory within certified but unserved area of another certified telephone provider. Certified telephone provider, which also sought to serve disputed area, appealed order granting application. The Supreme Court, Bakes, J., held that: (1) the Commission had jurisdiction, as a condition of the certificate of convenience and necessity, to review extension of services into an unserved area within already certified area; (2) an unserved area previously certified to a utility could be revoked where Commission concluded that the public interest would be disserved by denying application of applicant seeking to establish service in area; and (3) modification of certificate of convenience and necessity based on statutory conditions contained in the certificate when it was first obtained was not a "taking" of property right.

Affirmed.

Bistline, J., filed concurring opinion.

1. Telecommunications ⇐76

Where the Public Utilities Commission did not issue a modified certificate of con-

venience and necessity with disputed area removed from its description, but counsel for the Commission stated at oral argument that it was Commission's intention to remove area from certificate, the order granting application would be viewed accordingly.

2. Telecommunications ⇐76

The Public Utilities Commission properly applied public convenience and necessity analysis to limited facts of case where applicant sought to provide telephone service to a region even though that region was included in territorial description of another telephone company's existing certificate.

3. Public Utilities ⇐113

A certificate of public convenience and necessity is subject to and contingent upon statutory conditions, regulations and restrictions.

4. Telecommunications ⇐76

Although certified telephone provider had a prima facie right to extend its service within its certified area, the extension was subject to the limitations set out in I.C. § 61-526, which provides that if public convenience and necessity do not require the extension, the Public Utilities Commission may prescribe the terms and conditions for the locating or type of extension as may seem just and reasonable.

5. Public Utilities ⇐113

The Public Utilities Commission has jurisdiction to review the extension of service into an unserved area within an already certified area, and may rescind, alter or amend certificate of convenience previously issued for an unserved area upon a showing that public convenience and necessity do not require extension.

6. Public Utilities ⇐113

An unserved area previously certified to a utility may not be revoked when the certified utility is ready, willing and able to extend adequate service at reasonable rates, except where the record clearly shows that public convenience and necessity do not require extension of service into a certified but unserved area.

7. Telecommunications ⇐76

The Public Utilities Commission's order, granting applicant the right to establish telephone service area on a portion of another certified telephone provider's territory, did not unconstitutionally deprive certified telephone provider of its certificate, where convenience and economy of residents of disputed area would be better served by applicant's toll-free service to nearest communities as opposed to certified telephone provider's service, which included the possibility of long-distance toll charges and certified telephone provider would incur $47,000 in extra costs.

8. Eminent Domain ⇐2(1.1)

When an intangible property right such as a certificate, franchise, permit or contract is modified or revoked according to its terms, the modification is not a "taking" of the property right, but a mere modification based upon statutory conditions contained in the certificate when it was first obtained; thus, where telephone provider's certificate of convenience and necessity was accepted subject to statutory conditions, including Public Utilities Commission's authority to modify certificate by revoking the right to a portion of unserved area, revocation of right to serve a portion of the area was not a "taking."

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

Lary C. Walker, Weiser, for appellant Cambridge Telephone Co.

Jim Jones, Atty. Gen., Marsha H. Smith, Deputy Atty. Gen., Boise, for respondent Idaho Public Utilities Commission.

John L. King, Boise, for respondent Pine Telephone System, Inc.

BAKES, Justice.

Cambridge Telephone Company has appealed the order of the IPUC which granted an application of Pine Telephone System, Inc., to establish a telephone service

area on a portion of the Idaho side of the Snake River Canyon along the Oregon/Idaho border. We affirm the order of the commission.

This case involves the right to provide telephone service to the Idaho side of the Snake River Canyon bounded on the south by the Oxbow Dam and on the north by the Hell's Canyon Dam. The territory in question is approximately one-half mile wide and twenty-two miles in length, bordering a paved road which runs the distance of the disputed area. The road also extends south to the Oregon community of Oxbow.

Also running the length of the disputed area is a telephone cable owned by Mountain Bell. During the construction of the Hell's Canyon Dam the cable was first installed, but only a southern portion of the cable is presently used to provide telephone service to a former Idaho Power Company caretaker's residence which is located in a small section of the canyon territory previously certified to Mountain Bell. The southern end of the cable connects into Pine's telephone system at the Idaho/Oregon border near Oxbow, Oregon. Through an agreement with Mountain Bell, Pine presently provides the telephone service to the former Idaho Power residence within the disputed territory. There are three other residences along the canyon which presently need telephone service. The residents along the canyon rely on the Oregon communities of Oxbow and Halfway for social and community services.

With the exception of the small section certified to Mountain Bell, the southern portion of the disputed canyon area, along with the adjacent Idaho territory, was previously certified in 1979 to Cambridge. Three of the residences needing service are within the area previously certified to Cambridge, and the fourth residence in the small section certified to Mountain Bell is surrounded by territory previously certified to Cambridge. Prior to this dispute arising, Cambridge had extended its telephone services to within ten miles east of the disputed Oxbow area. Cambridge had also acquired materials and equipment and began laying telephone cable toward the Oxbow area in order to connect with the Mountain Bell cable and provide service to residents in the canyon. In the process, Cambridge had extended service to two or three residents along the way (not located in the disputed area) when the commission ordered a halt to the extension prior to completing the final 8–10 miles, which required a descent of approximately 4000 feet into the canyon to service the Oxbow area. Cambridge also planned on servicing the needs of future businesses and hoped to eventually provide telephone services further down the river canyon to the north to Hell's Canyon Dam, which was not in Cambridge's certified area. The northern portion of the disputed territory was previously uncertified.

Mountain Bell intervened at the IPUC hearing but is not a party to this appeal. Mountain Bell was willing to give up its small section of the disputed area and sell its telephone cable to either Pine or Cambridge. Mountain Bell's only interest was that the service to the residence within its small section be continued. Mountain Bell has no plans to alter or give up its right to provide telephone service to Idaho Power Company at the Hell's Canyon Dam, which service is presently supplied with the use of a microwave system.

Both Pine and Cambridge telephone companies were apparently unaware of each other's concurrent plans to provide telephone services along the Snake River Canyon. When Pine discovered that Cambridge was extending telephone cable toward Oxbow, Pine filed the application to establish a telephone service area along the Snake River Canyon. Cambridge filed a motion to dismiss the application, arguing that it was entitled under its existing certificate of convenience and necessity to service the entire disputed area. The four residents along the canyon all requested the commission to grant the application to Pine. Their preference was based on the fact that, if the area was granted to Cambridge, the residents may have to pay long distance charges to make telephone calls to

the Oregon communities of Oxbow and Halfway. The commission determined that either company would incur the costs of acquiring and repairing the Mountain Bell cable running along the canyon and the cost of hookups to the residences. Pine would have no other expenses above and beyond these costs. However, Cambridge would have to expend an additional $47,325 in order to complete the laying of its telephone cable another ten miles descending approximately 4,000 feet in elevation to the bottom of the canyon near Oxbow. Based upon the difference in cost and the residents' community of interest in Oregon, the commission granted Pine's application to establish the service area and denied Cambridge's motion to dismiss. The order also allowed Cambridge to amortize its investment and allowed Cambridge an opportunity to submit further evidence on the amount of its investment and costs to terminate the project. Cambridge has appealed.

[1] Our review on appeal is limited to "whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the Constitution of the United States or of the State of Idaho," I.C. § 61-629, and also whether the commission's findings are supported by substantial competent evidence. *Boise Water Corp. v. Idaho Pub. Utilities Comm'n*, 97 Idaho 832, 555 P.2d 163 (1976); *Mountain View Rural Tel. Co. v. Interstate Tel. Co.*, 55 Idaho 514, 46 P.2d 723 (1935). Cambridge argued before the commission and now argues on appeal that the commission's order barring Cambridge from serving a portion of its certified [1] area amounts to an unconstitutional taking of vested property rights. We hold that the findings contained in the order of the commission are adequate to justify the modification of Cambridge's certificate of convenience and necessity and revoke its privilege to provide telephone service to the disputed area.

There is no question that the certificate of convenience and necessity issued to Cambridge is a property right protected by the due process provisions of the United States and Idaho Constitutions. U.S.Const. Amend. V, Amend. XIV, § 1; Idaho Const. Art. 1, §§ 13-14. *E.g.*, *Frost v. Corporation Commission of State of Oklahoma*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929); *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389 (1913); *Western Colorado Power Co. v. Public Utilities Comm'n*, 168 Colo. 61, 428 P.2d 922 (1967); *Mississippi Power & Light Co. v. City of Clarksdale*, 288 So.2d 9 (Miss.1973). The procedural aspect of due process, *i.e.*, adequate notice and timely hearing, have not been raised as issues on appeal, and we presume that Cambridge was afforded proper procedural due process. Due process also protects Cambridge's property interest in the certificate from being infringed upon. Cambridge argues that its property interest was taken without due process by misapplication of the law, insufficient evidence to justify the commission action, and that it must be justly compensated for the partial revocation of its certificate.

[2] The commission basically made a public convenience and necessity analysis applying the factors enumerated in *McFayden v. Public Utilities Consolidated Corp.*, 50 Idaho 651, 299 P. 671 (1931), and *Application of Kootenai Natural Gas Co.*, 78 Idaho 621, 308 P.2d 593 (1957). Those cases involved competing applications to provide natural gas service to areas previously uncertified for that service. The factors enumerated in that case aid in determining which applicant could best serve the public convenience and necessity. The public convenience and necessity analysis was also properly applied to the limited

1. The commission did not issue a modified certificate of convenience and necessity to Cambridge with the disputed area removed from the description; however, at oral argument counsel for the commission stated that it was their intention to remove the area from Cambridge's certificate. Therefore, we view the order accordingly.

facts of this case, even though the territorial description in Cambridge's certificate previously included part of the territory applied for by Pine.

[3–5] A certificate of public convenience and necessity is subject to and contingent upon statutory conditions, regulations and restrictions. Cambridge had a *prima facie* right to extend its service within its certified area. I.C. § 61–526. However, even a proposed extension within a utility's own certified area is subject to the limitation set out in I.C. § 61–526:

> "[I]f any public utility in constructing or extending its lines, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, *or if public convenience and necessity does not require* or will require such construction or extension, the commission on complaint of the public utility claiming to be injuriously affected, or on the commission's own motion, may, after hearing, *make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable:* provided, that power companies may, without such certificate, increase the capacity of their existing generating plants." I.C. § 61–526 (emphasis added).

Therefore, it was within the commission's jurisdiction, as a condition of the certificate of convenience and necessity, to review the extension of service into an *unserved* area within an *already certified area.* The commission may[2] "rescind, alter or amend," I.C. § 61–624, the certificate of convenience and necessity previously issued for an unserved area upon a showing that the "public convenience and necessity" does not require the extension, and the commission may "make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable...." I.C. § 61–526. The applicable statutory law became a part of Cambridge's certificate.

[6] Some jurisdictions have held that an unserved area previously certified to a utility may not be revoked when the certified utility is ready, willing and able to extend adequate service at reasonable rates. *See Western Colorado Power Co. v. Public Utilities Comm'n,* 163 Colo. 61, 428 P.2d 922 (1967); *Capital Electric Power Ass'n v. Mississippi Power & Light Co.,* 240 Miss. 139, 125 So.2d 739 (1961). The rule in Idaho is the same except where the record clearly shows that "public convenience and necessity do not require" the extension of service into a certified but unserved area. The Utah Supreme Court recently addressed this issue, and we are persuaded by the analysis of that court:

> "Despite the prior granting of a franchise to one company, therefore, it may not be assumed that the franchise is permanent and exclusive for the indefinite future when circumstances require reassessment.
>
> ....
>
> "As the Commission stated in it conclusions of law:
>
> > '[T]he concept of "public convenience and necessity" should be considered in light of current and changing circumstances. If the end goal of providing adequate services at reasonable rates is not best subserved by a utility granted a prior certificated area, then "public convenience and necessity" dictates modification of the prior grant of authority. The development of our natural resources, which frequently are located in remote and sparsely populated areas of our State, should not be hindered by a blind adherence to previously certificated boundary lines where a utility in an adjoining service area already has facilities in place to provide continuous and adequate service at reasonable rates.'

2. This holding is limited to the facts of this case in which a utility was decertified to a presently unserved area on a public convenience and necessity standard. If the utility were presently serving the area or had substantially completed the extension, this rule would not apply.

....

"To allow the duly certificated franchise holder to provide the needed electrical service would result in the very duplication of facilities and economic waste that utility regulation is designed to avoid. Allowing service to be provided by another utility not certificated within the area, but in very close proximity thereto, at a substantial cost savings is properly within the power of the Commission when there is no showing of harm to the losing utility, other than the loss of a small amount of revenue, and the public convenience and necessity supports the granting of the authority." *Empire Elec. Ass'n v. Public Service Comm'n*, 604 P.2d 930, 933-34 (Utah 1979).

[7] In the present case the commission concluded that "the public interest would clearly be disserved by denying Pine's application," and further that "this commission fails to see the wisdom of allowing Cambridge to spend an additional $47,000 to serve an area that can be served with only minimal expenditures by Pine." The commission found that the residents of the disputed area have strong social and economic ties to the Oregon communities. The commission found that their convenience and economy would be better served by Pine's toll free service to those communities as opposed to Cambridge's service which includes the possibility of long distance toll charges to those communities. The difference in cost to Pine as compared to Cambridge for providing the service to such a limited number of customers would adversely impact upon the existing customers of Cambridge by the addition of $47,000 into the rate base of that company.

Therefore, we conclude that the commission's order did not unconstitutionally deprive Cambridge of its certificate. The certificate was modifiable by a non-arbitrary application of a public convenience and necessity standard, a condition of the certificate, based upon substantial competent evidence.

[8] Cambridge next argues that it is entitled to just compensation for the commission's taking of its certificate. When an intangible property right such as a certificate, franchise, permit or contract is modified or revoked according to its terms, no taking of the property has occurred. The modification is not a "taking" of the property right, but a mere modification based upon statutory conditions contained in the certificate when it was first obtained. *Empire Elec. Ass'n v. Public Service Com'n*, 604 P.2d 930 (Utah 1979). The property right within Cambridge's certificate of convenience and necessity was accepted subject to these statutory conditions, which in this case included the commission's authority to modify the certificate by revoking the right to a portion of unserved area when the showing was made that the public convenience and necessity did not require Cambridge's extension of service to the area. The property right initially acquired by Cambridge in its certificate was subject to these statutory conditions.[3]

The order of the commission is affirmed. Costs to respondent; no attorney fees.

DONALDSON, C.J., and SHEPARD and HUNTLEY, JJ., concur.

BISTLINE, Justice, concurring in the judgment and in the opinion of the Court.

The Commission's decision is additionally fortified by giving appropriate attention and deference to legislative policy as evidenced by the enactment of I.C. § 61-332, *et seq.*, the statement of purpose being:

Purpose of electric supplier stabilization act.—...

B. This act is designed to promote harmony among and between electric

3. Cambridge's capital expenditures and expenses incurred in an effort to serve the disputed area prior to the commission's ruling in this matter must be allowed, and we specifically affirm the commission's order on reconsideration to allow Cambridge an additional opportunity to further prove its termination costs after making proper mitigation and allocation of the expenditures.

suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of customers of another supplier, discourage duplication of electric facilities, and stabilize the territories and customers served with electricity by such suppliers.

One would suppose that that which is good and beneficial for the people with regard to electric service is also so with regard to telephone service.

109 Idaho 881

IDAHO FALLS CONSOLIDATED HOSPITALS, INC., a nonprofit Idaho corporation, Plaintiff-Appellant,

v.

BOARD OF COMMISSIONERS OF JEFFERSON COUNTY, Idaho, Defendant-Respondent.

No. 15836.

Supreme Court of Idaho.

Dec. 17, 1985.

Patient and husband applied for financial assistance as medical indigents and hospital intervened on their behalf. The county board of commissioners determined that patient and husband were not medically indigent, and appeal was brought. The District Court, Seventh Judicial District, County of Jefferson, Grant L. Young, J., affirmed, and appeal was brought. The Supreme Court, Huntley, J., held that: (1) county could not consider equity in home below homestead exemption as resource available to patient and husband in determining issue of medical indigency; (2) county could not consider social security and railroad retirement benefits as resources available to patient and husband in determining issue of medical indigency; (3) issue of whether money given to patient and husband by their son was resource available to patient and husband was matter for evidentiary hearing if and when county sought reimbursement of financial assistance, and (4) even if resources available included vehicles and checking and savings accounts, patient and husband were medically indigent and entitled to financial assistance.

Reversed.

Shepard and Bakes, JJ., dissented.

1. Social Security and Public Welfare ⇐241

"Resources available" which could be considered in determining whether patient and her husband were medically indigent so as to qualify for financial assistance did not include equity in home below homestead exemption, even though patient and husband had not filed declaration of homestead. I.C. §§ 31-3501, 31-3502(1), 55-1001, 55-1004, 55-1005, subd. 1, 55-1201, subd. 1, 55-1203.

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

2. Social Security and Public Welfare ⇐241

"Resource available," to be considered by county board of commissioners in determining whether patient and husband were medically indigent so as to qualify for financial assistance, did not include social security and railroad retirement benefits. I.C. §§ 11-603(3), 31-3501, 31-3502(1); Social Security Act, § 207, as amended, 42 U.S.C.A. § 407; Railroad Retirement Act of 1974, § 14, as amended, 45 U.S.C.A. § 231m.

3. Social Security and Public Welfare ⇐241

Issue of whether money given to patient and her husband by their son to help pay for medical expenses was resource available to patient and her husband, for purposes of medical indigency statute [I.C. § 11-605(3)], was matter for evidentiary hearing if and when county sought reimbursement of financial assistance provided

STRAWBERRY ELECTRIC SERVICE DISTRICT, an Electric Service District of the State of Utah, and Strawberry Water Users' Association, a Utah Corporation, Plaintiffs, Appellee, and Cross-Appellant,

v.

SPANISH FORK CITY, a Utah Municipal Corporation, Defendant, Appellant, and Cross-Appellee.

No. 940317.

Supreme Court of Utah.

June 21, 1996.

Electric service district brought action against city, arising from city's provision of electric service to some of consumers in annexed areas previously served by district, seeking injunction prohibiting city from serving consumers within annexed area until district received compensation. City counterclaimed, seeking declarations that it could serve future consumers in annexed areas without paying district compensation and enumerating its rights and obligations if it elected to serve all residents within annexed areas. The Fourth District Court, Utah County, Ray M. Harding, Sr., J., enjoined city from providing electric service to residents of annexed areas to extent that district had present capacity to provide service, requiring city to compensate district for lost projected revenues, and dismissing city's request for declaration as to its rights and obligations if it determined to provide electric service to all residents within annexed areas. City appealed, and district cross-appealed. The Supreme Court, Russon, J., held that: (1) municipality providing electric utility service to existing residents must provide that service to all consumers in annexed areas; (2) for purposes of proper measure of damages owed by city to district, district was entitled to profits from customers within annexed areas served by city during city's noncompliance with statute requiring city's compensation to previously serving electric utility, district was not entitled to future profits from consumers within annexed areas after city would comply with statute, [illegible] once city served all consumers within [illegible] nexed areas, it had to pay district for [illegible] facilities dedicated to service within annex areas, and such award would include da ages for district's lost and stranded facili and severance damages; (3) statute of limit tions did not bar district's claim for injun tion prohibiting city from providing serv in annexed area without compensating [illegible] trict; (4) city could not be enjoined fro providing electric service to annexed areas it complied with statute; and (5) trial cour properly refused to consider city's reque for declaratory judgment as to its rights an duties if it decided to provide electric servic to all residents within annexed areas, as is sue was not ripe and did not represent actu al conflict.

Reversed in part, affirmed in part, and remanded.

1. Electricity ⇐8.1(4)

Proper construction of statute governing provision of electric service by city in annexed area already served by electric utility was question of law and, thus, Supreme Court on appeal would accord no deference to trial court's ruling on that issue but, rather, would review it for correctness, in electric service district's action against city, arising from city's provision of electric service to some of consumers in annexed areas previously served by district. U.C.A.1953, 10-8-424.

2. Statutes ⇐188

When faced with question of statutory construction, Supreme Court looks first to plain language of statute.

3. Statutes ⇐184, 217.4

When faced with question of statutory construction, if statute is unclear, Supreme Court resorts to legislative history and purpose for guidance.

4. Electricity ⇐8.1(2.1)

Under governing statutes, municipality providing electric utility service to existing residents must provide that service to

consumers in annexed areas. U.C.A.1953, 10–2–401(4), 10–2–424.

5. Electricity ⇐8.1(2.1)
Eminent Domain ⇐147

For purposes of proper measure of damages owed by city to electric service district, that served areas annexed by city, as result of city commencing electric service in annexed areas, district was entitled to profits from customers within annexed areas served by city during city's noncompliance with statute requiring city's compensation to previously serving electric utility, district was not entitled to future profits from consumers within annexed areas after city would comply with statute, and, once city served all consumers within annexed areas, it had to pay district for its facilities dedicated to service within annexed areas, and such award would include damages for district's lost and stranded facilities and severance damages. Const. Art. 1, § 22; U.C.A.1953, 10–2–424.

6. Appeal and Error ⇐842(1)

On appeal, Supreme Court would review for correctness trial court's ruling on issue involving interpretation and application of statute and constitutional provision.

7. Eminent Domain ⇐2(1)

State constitutional takings analysis has two principal steps: first, claimant must demonstrate some protectible interest in property, and, if claimant possesses protectible property interest, claimant must then show that interest has been taken or damaged by government action. Const. Art. 1, § 22.

8. Eminent Domain ⇐2(1)

For purposes of state constitutional takings analysis, "taking" is any substantial interference with private property which destroys or materially lessens its value, or by which owner's right to its use and enjoyment is in any substantial degree abridged or destroyed. Const. Art. 1, § 22.

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

9. Eminent Domain ⇐81.1

Electric service district had no protectable property interest under state constitutional takings provision in its certificate of public convenience and necessity where its service area was lawfully invaded by annexing municipality, for purposes of determining compensation due district for city's provision of electric service in annexed areas previously served by district. Const. Art. 1, § 22; U.C.A.1953, 10–2–424.

10. Eminent Domain ⇐81.1

State constitutional takings provision protects all property protected by its federal counterpart, and perhaps even more so due to its more expansive language. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 22.

11. Eminent Domain ⇐81.1

Under state constitutional takings provision, every species of property which public needs may require, including legal and equitable rights of every description, is liable to be appropriated. Const. Art. 1, § 22.

12. Eminent Domain ⇐81.1

For purposes of state constitutional takings provision, taking of public utility includes not only physical facilities of utility, but also its exclusive business. Const. Art. 1, § 22.

13. Eminent Domain ⇐86

For purposes of constitutional takings analysis, to create protectable property interest, contract must establish rights more substantial than unilateral expectation of continued privileges; absent exclusive franchise or equivalent thereof, no vested, legally enforceable interest arises and, consequently, there is no property that can provide basis for compensation in inverse condemnation proceeding. Const. Art. 1, § 22.

14. Eminent Domain ⇐81.1

For purposes of state constitutional takings analysis, notwithstanding municipality's right to commence electric service within its annexed areas, electric utility has protectable property interest in its certificate of public convenience and necessity until its service area is lawfully invaded. Const. Art. 1, § 22; U.C.A.1953, 10–2–424.

15. Eminent Domain ⇐2(1)

Municipal power cannot be exercised in derogation of specific rights protected by state constitutional takings provision. Const. Art. 1, § 22.

16. Electricity ⇐8.1(2.1)

Municipal Corporations ⇐36(1)

After annexing area served by electric utility, municipality may not commence electric service within any portion of utility's service area unless it has either obtained utility's consent or reimbursed utility for its compensable losses. U.C.A.1953, 10-2-424.

17. Constitutional Law ⇐48(3)

Courts should construe statutory terms to avoid unconstitutional application of statute.

18. Electricity ⇐8.1(2.1)

For purposes of statute requiring annexing municipality to reimburse electric utility that was serving annexed area for fair market value of facilities dedicated to provide service to annexed area, "reimburse" means to make whole for any losses compensable under state constitutional takings provision. Const. Art. 1, § 22; U.C.A.1953, 10-2-424.

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

19. Appeal and Error ⇐170(1)

Supreme Court would decline to address argument made for first time on appeal, that statute governing electric service district service areas precluded award of lost profits to electric service district for city's annexation and provision of electric service to territory formerly served by district. U.C.A.1953, 17A-2-302(1)(a).

20. Eminent Domain ⇐138

For purposes of constitutional takings analysis, "severance damages" are awarded for partial taking, as opposed to taking of entire business, and compensate owner for diminished value of its remaining physical property. Const. Art. 1, § 22.

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

21. Appeal and Error ⇐954(1, 2), 1024.2

Supreme Court will not disturb trial court's judgment granting or refusing injunction unless trial court abused its discretion or judgment rendered is clearly against weight of the evidence.

22. Injunction ⇐14, 16

Injunctions are available only upon showing of irreparable injury for which there is no adequate remedy at law.

23. Injunction ⇐65, 74

When exclusive business is unlawfully invaded, injunction is proper regardless of whether unlawful invasion is effected by another company or by governing body.

24. Injunction ⇐77(1)

Municipal actions may be enjoined when municipality illegally extends its utility service.

25. Limitation of Actions ⇐58(2)

Statute of limitations did not bar electric service district's claim for injunction prohibiting city from providing service in its annexed area previously served by district without compensating district for value of facilities dedicated to provide service to annexed area, where city continued to unlawfully provide such service up to trial. Const. Art. 1, § 22; U.C.A.1953, 10-2-424.

26. Electricity ⇐8.1(4)

City could not be enjoined from providing electric service to its annexed areas if it complied with statute requiring city to reimburse electric service district that was serving annexed areas for value of facilities dedicated to provide service to annexed areas. U.C.A.1953, 10-2-424.

27. Declaratory Judgment ⇐209

Trial court properly refused to consider annexing city's request for declaratory judgment as to its rights and duties if it decided to provide electric service to all residents within annexed areas, in electric service district's action against city, arising from city's provision of electric service to some of consumers in annexed areas previously served by district, as issue for which city requested resolution was not ripe, nor did it repres

actual conflict. U.C.A.1953, 78–33–2, 78–33–6, 78–34–16.

28. Declaratory Judgment ⇐61, 62

To sustain declaratory judgment action, there must exist justiciable controversy based upon accrued set of facts, actual conflict, adverse parties, legally protectible interest on plaintiff's part, and issue ripe for judicial resolution. U.C.A.1953, 78–33–2.

29. Declaratory Judgment ⇐5.1

Declaratory Judgment Act provision gives trial court discretion to either grant or deny party's declaratory judgment action. U.C.A.1953, 78–33–2.

Michael R. Carlston, Reed L. Martineau, Rodney R. Parker, Salt Lake City, for plaintiffs.

Gary A. Dodge, Bentley J. Tolk, Salt Lake City, for defendant.

John R. Erickson, Brent O. Hatch, Salt Lake City, and F. Elgin Ward, Sandy, for amicus Deseret Generation & Transmission.

Val R. Antczak, James E. Karkut, Salt Lake City, for amicus Utah Associated Municipal Power.

RUSSON, Justice:

Spanish Fork City appeals from a decision of the Fourth District Court enjoining it from providing electric utility service to residents of its annexed areas to the extent that the supplier prior to annexation, Strawberry Electric Service District (Strawberry Electric), had present capacity to provide service at the time of the trial court's order. To the extent Strawberry Electric did not have present capacity to provide service, the trial court's decision allows Spanish Fork to provide electric service but only upon compensating Strawberry Electric for lost projected revenues. Spanish Fork also appeals the trial court's decision dismissing a request for a declaration as to Spanish Fork's rights and obligations if it determined to provide electric services to all residents within the annexed areas. Strawberry Electric cross-appeals that portion of the trial court's decision authorizing Spanish Fork to serve consumers in the annexed areas to the extent Strawberry Electric did not have present capacity to provide service. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. BACKGROUND

Since 1986, Strawberry Electric has been providing electric utility service to customers in portions of southern Utah County. It operates under a certificate of public convenience and necessity issued by the Public Service Commission. The certificate recognizes Strawberry Electric as the exclusive distributor of electric power to consumers residing in its service area.

Adjacent to Strawberry Electric's service area is Spanish Fork City, which has been experiencing rapid growth. During the 1980s, Spanish Fork annexed approximately 4,000 acres, partly in response to changes in the Utah County zoning classifications permitting more development in these areas. All of the areas annexed by Spanish Fork since the organization of Strawberry Electric were included within Strawberry Electric's service area. Moreover, these areas constitute some of the more densely populated portions served by Strawberry Electric. At the time of annexation, Strawberry Electric provided electric power to approximately 200 consumers in these areas. In addition, Strawberry Electric maintained excess capacity to serve future customers who would likely be high margin electric users due to the changed zoning rules.

After its incorporation of these areas, Spanish Fork commenced, on a limited basis, to provide electric utility service within these areas. After disconnecting Strawberry Electric's distribution lines, Spanish Fork attached its own lines and commenced electric service to six residential consumers. For the most part, however, Spanish Fork provided service only to new consumers to the annexed areas never before served by Strawberry Electric (hereinafter referred to as future consumers). Spanish Fork required construction permit applicants to agree, as a condition to obtaining the permit and other city services, to accept Spanish Fork electric service and reject Strawberry Electric's ser-

vices. By the time trial was held, Spanish Fork had commenced service to thirty-seven future consumers.

Aside from the six residential consumers, Spanish Fork elected to serve only future consumers because it claimed that it could not afford to provide service to all consumers in the annexed areas. Such an undertaking would have entailed reimbursing Strawberry Electric for its facilities used in supplying the areas, which, according to Spanish Fork's studies, was not economically feasible.

In some cases, Spanish Fork's strategy resulted in a duplication of Strawberry Electric's distribution system. Spanish Fork constructed distribution lines into the same areas in which Strawberry Electric had previously constructed its lines in anticipation of future growth. For example, Spanish Fork connected a line to a new building located on the property of the Intermountain Farmers Association (IFA), an existing customer of Strawberry Electric. Also, Spanish Fork constructed a line approximately one-half mile in length into the annexed area to serve only one consumer and anothe line approximately one mile in length to serve only two consumers. In all of these cases, Strawberry Electric stood ready to serve with distribution lines either within or immediately adjacent to the consumers' properties.

Strawberry Electric objected pursuant to section 10-2-424 of the Utah Code, which provides:

> Whenever the electric consumers of the area being annexed are receiving electric utility services from sources other than the annexing municipality, the municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility company which previously provided the services for the fair market value of those facilities dedicated to provide service to the annexed area. If the annexing municipality and the electric utility cannot agree on the fair market value, it shall be determined by the state court having jurisdiction.

Strawberry Electric requested that Spanish Fork provide service to either all consumers in the annexed area or none of them. Also, Strawberry Electric requested compensation for its lost right to serve in these areas if Spanish Fork elected to provide service.

Spanish Fork denied all requests. It insisted that it need not serve all or none of the consumers in the annexed area. Also, Spanish Fork believed that it was not obligated to compensate Strawberry Electric under the statute because it chose to serve only future consumers, not the existing customers of Strawberry Electric. Failing to informally resolve its dispute with Spanish Fork, Strawberry Electric initiated this lawsuit.[1]

Strawberry Electric sought an injunction to prohibit Spanish Fork from serving consumers within the annexed area until it received compensation. The compensation Strawberry Electric demanded included damages suffered as a result of its lost investment in facilities constructed to serve future growth. Spanish Fork counterclaimed, seeking two declarations: first, that it may serve future consumers without paying compensation and, second, enumerating its rights and obligations under section 10-2-424 if it elected to take over service to all residents within the annexed areas.

Strawberry Electric moved for summary judgment, arguing that Spanish Fork violated section 10-2-424 and urging dismissal of Spanish Fork's second claim for declaratory relief. Reasoning that the requested declaratory judgment would not "terminate the uncertainty or controversy giving rise to the proceeding," the trial court dismissed Spanish Fork's claim. Also, without identifying a particular damages formula, the trial court held that Spanish Fork was obligated to compensate Strawberry Electric for its lost right to provide electric service to future consumers. In so ruling, the trial judge limited the issues at trial to Strawberry Electric's claim for an injunction and the compensation due

1. In filing suit against Spanish Fork, Strawberry Electric was joined by Strawberry Water Users' Association (Strawberry Water), the entity from which Strawberry Electric obtained its distribution system and service area. Upon Spanish Fork's motion, the trial court dismissed Strawberry Water as a party to the litigation.

to Strawberry Electric u
424.

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2. On the basis of a motion
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to Strawberry Electric under section 10–2–424.

During a bench trial, Strawberry Electric proposed a capitalized income method to assess damages. That is, it demanded anticipated revenues as damages caused by Spanish Fork's provision of service to future consumers. In contrast, Spanish Fork proffered a facilities-based calculation, or a calculation based on the amount by which the value of specified facilities dedicated to providing service to the annexed areas was lost.

Following the trial, the court enjoined Spanish Fork from providing electric utility services in the annexed areas until it complied with section 10–2–424. Specifically, the injunction prohibited Spanish Fork from serving the annexed areas until it either obtained Strawberry Electric's consent to provide service or paid Strawberry Electric the fair market value of those facilities dedicated to providing service to the annexed areas. In the expectation that Spanish Fork would compensate Strawberry Electric, the trial court enjoined Spanish Fork from providing service to future consumers who locate in the annexed areas after trial to the extent Strawberry Electric had capacity to serve them with its facilities then in place. The court ruled that Spanish Fork may provide electric services to future consumers who locate within the annexed areas to the extent that Strawberry Electric's service to them would require facilities in addition to meters, drop lines, and related items.[2]

With regard to each future consumer Spanish Fork was allowed to serve, however, the trial court ordered Spanish Fork to pay Strawberry Electric damages. Adopting Strawberry Electric's capitalized income method, the court awarded Strawberry Electric $1,108.50 for each residential consumer who would move into the annexed areas and a sum to be determined by the court for future commercial consumers. In addition, the trial court, utilizing the same method, awarded Strawberry Electric $41,015.50 for consumers who had moved into the annexed area before trial and who had been served by Spanish Fork.

On appeal, both parties insist that the trial court erred. Strawberry Electric contends that the trial court incorrectly allowed Spanish Fork to serve only some consumers in the annexed areas. Spanish Fork argues that the trial court (1) adopted an inappropriate method to calculate damages, (2) improperly enjoined it from providing electric service within the annexed areas, and (3) improperly refused to declare Spanish Fork's rights and duties under section 10–2–424 if it determined to provide service to all residents within the annexed areas.

II. ANALYSIS

[1–3] The first issue we address is whether section 10–2–424 of the Utah Code directs a municipality providing electric utility service to serve all consumers in a newly annexed area. When faced with a question of statutory construction, we look first to the plain language of the statute. *State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993); *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991). If the statute is unclear, we then resort to legislative history and purpose for guidance. *World Peace Movement v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994). The proper construction of section 10–2–424 is a question of law. *See Larsen*, 865 P.2d at 1357. We will therefore accord no deference to the trial court's ruling but will review it for correctness. *Ward v. Richfield City*, 798 P.2d 757, 759 (Utah 1990); *Henretty v. Manti City Corp.*, 791 P.2d 506, 510 (Utah 1990).

In pertinent part, section 10–2–424 provides:

> Whenever the electric consumers of the area being annexed are receiving electric utility services from sources other than the annexing municipality, the municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility com-

2. On the basis of a motion filed by Spanish Fork, this court stayed the trial court's injunction pending this appeal.

pany which previously provided the services for the fair market value of those facilities dedicated to provide service to the annexed area.

The plain language of section 10–2–424 does not reveal whether a municipality may elect to serve only some consumers in annexed areas. Rather, the statute provides only that whenever "the electric consumers" of an annexed area are receiving services from a utility, a municipality may not provide services to "the electric consumers" until the utility consents or the municipality pays. "[T]he electric consumers" could mean either all consumers, including future consumers, i.e., those in the annexed areas who have never received services from the utility, or only the consumers who have actually received service from the utility. To discern the proper construction, we must examine the legislative history and purpose underlying section 10–2–424.

The legislative policy of the code provisions dealing with expansions of municipalities includes the desire that municipalities provide city services to the residents of newly annexed areas: "Areas annexed to municipalities in accordance with appropriate standards should receive the services provided by the annexing municipality, subject to section 10–2–424, as soon as possible following the annexation...." Utah Code Ann. § 10–2–401(4). Thus, in enacting the provisions dealing with municipal expansion, the legislature endeavored to secure the benefit of city-offered services for those in newly annexed areas. *See Sandy City v. Salt Lake County*, 827 P.2d 212, 222 (Utah 1992) ("The legislature clearly prefers that cities provide urban services to developing areas and has designated annexation as the means by which those services should be extended.").

By serving only some consumers within the annexed areas, however, Spanish Fork acted to the detriment of the group which the legislature endeavored to benefit. With regard to consumers within the annexed areas, Spanish Fork contravened the legislative policy that annexed areas should receive city services as soon as possible. When residents desire to incorporate with a municipality, *see* Utah Code Ann. § 10–2–416, a major reason for doing so is to receive city services. For the most part, however, Spanish Fork sought to serve none of the residents that desired incorporation but only those consumers who located in the areas after annexation.

[4] We hold, therefore, that under sections 10–2–424 and 10–2–401(4), a municipality providing electric utility service to existing residents must provide that service to consumers in annexed areas.[3] Although section 10–2–424 is silent as to whether a city may serve only a portion of the customers in these areas, the legislative history and policy make clear that through section 10–2–424, the legislature sought to prevent the result of such a strategy.

[5, 6] The next issue is the proper measure of damages owed by Spanish Fork to Strawberry Electric as a result of its commencing electric service to portions of Strawberry Electric's service area. This issue involves an interpretation and application of section 10–2–424 and article I, section 22 of the Utah Constitution. Accordingly, we review the trial court's ruling for correctness. *See Utah Dep't of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 608 (Utah 1983).

Section 10–2–424 provides that a municipality taking over utility service in annexed areas must pay "the fair market value of those facilities dedicated to provid[ing] service to the annexed area." In *City of Logan v. Utah Power & Light Co.*, 796 P.2d 697 (Utah 1990), this court established a framework by which to determine the "fair market value" of a utility's affected facilities. First, the facilities, both inside and outside the annexed area, used to provide service to the annexed area must be identified. *Id.* at 700–01. Next, an article I, section 22[4] "takings" analysis with regard to those facilities is

3. Nothing in this opinion should be construed as implying that Spanish Fork could or could not choose to satisfy its obligation to serve its residents by contracting with Strawberry Electric or some other utility to provide electric utility service.

4. Article I, section 22 of the Utah Constitution provides, "Private property shall not be taken or damaged for public use without just compensation." Utah Const. art. I, § 22.

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necessary. *Id.* The *City of Logan* court held that "fair market value" within the meaning of section 10–2–424 is equivalent to "just compensation" to the extent that the municipality's actions constitute a taking of the utility's property. *Id.* The *City of Logan* court, however, provided no guidance on the issue of calculating damages because the parties had stipulated to damages figures depending on the court's ruling. *Id.* at 701.

[7, 8] Prior cases nevertheless provide us with that guidance. Under article I, section 22, the takings analysis has two principal steps. First, the claimant must demonstrate "some protectible interest in property." *Colman v. Utah State Land Bd.*, 795 P.2d 622, 625 (Utah 1990). If the claimant possesses a protectible property interest, the claimant must then show that the interest has been "taken or damaged" by government action. *Id.* at 626. A "taking" is "'any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed.'" *Id.* (quoting *State ex rel. State Road Comm'n v. District Court, Fourth Judicial Dist.*, 94 Utah 384, 394, 78 P.2d 502, 506 (1937)).

[9] In this case, the dispute centers on the property in which Strawberry Electric possessed a protectible property interest. Spanish Fork claims that Strawberry Electric had a protectible property interest only in its physical facilities. Strawberry Electric, however, claims that in addition to its facilities, article I, section 22 protects its certificate of public convenience and necessity and the privileges incident thereto, that is, its right to serve all consumers within the annexed areas which fall within its service area, and the earnings it would have realized from those consumers.

[10, 11] This court has stated, "'The kinds of property subject to the [eminent domain] right ... [are] practically unlimited.'" *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990) (quoting *Lund v. Salt Lake County*, 58 Utah 546, 552, 200 P. 510, 512 (1921)). Indeed, article I, section 22 protects all property protected by its federal counterpart,[5] and perhaps even more so due to its more expansive language. *See Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995). Under article I, section 22, "'[e]very species of property which the public needs may require, ... [including] legal and equitable rights of every description [is] liable to be thus appropriated.'" *Lund*, 58 Utah at 552, 200 P. at 512 (quoting Cooley, *Constitutional Limitations* 646 (6th ed.)).

In contending that Strawberry Electric has a protectible interest only in its facilities, Spanish Fork points out that such intangible assets as profits and future business are generally not protected by the Takings Clause. *Thorsen v. Johnson*, 745 P.2d 1243, 1246 (Utah 1987); *State ex rel. Road Comm'n v. Ouzounian*, 26 Utah 2d 442, 445, 491 P.2d 1093, 1095–96 (1971); *State ex rel. Road Comm'n v. Noble*, 6 Utah 2d 40, 44, 305 P.2d 495, 498 (1957); *State v. Tedesco*, 4 Utah 2d 248, 251, 291 P.2d 1028, 1029–30 (1956); 27 Am.Jur.2d *Eminent Domain* § 285 (1966); 4 Nichols *The Law of Eminent Domain* § 12B.09[1] (rev. 3d ed. 1995). These assets are generally too speculative and uncertain to award. *See Ouzounian*, 26 Utah 2d at 445, 491 P.2d at 1095–96; *Noble*, 6 Utah 2d at 44, 305 P.2d at 498; *Tedesco*, 4 Utah 2d at 251, 291 P.2d at 1030.

[12] These authorities, however, do not deal with the taking of a public utility which enjoys an exclusive right to conduct business within its service area. The taking of a public utility includes not only the physical facilities of the utility, but also its exclusive business. 27 Am.Jur.2d *Eminent Domain* § 339 (1966). Moreover, this court has held that some kinds of contractual rights, such as exclusive commercial privileges, may also be "property" that can be taken for public use. *Bagford*, 904 P.2d at 1098–99; *see also West River Bridge Co. v. Dix*, 47 U.S. 507, 533–34, 6 How. 507, 12 L.Ed. 535 (1848) (holding that for Fifth Amendment takings purposes, a

5. The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides in part that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

franchise is property subject to eminent domain).

[13] However, to create a protectable property interest, a contract must establish rights more substantial than a unilateral expectation of continued privileges. "Absent an exclusive franchise or the equivalent thereof, no vested, legally enforceable interest arises, and consequently, there is no property that can provide the basis for compensation in an inverse condemnation proceeding." *Bagford*, 904 P.2d at 1099.

In this case, Strawberry Electric's commercial privilege is subject to termination by annexing municipalities and therefore is nothing more than a mere unilateral expectation of a continued right to service customers. While Strawberry Electric operates pursuant to a certificate of public convenience and necessity issued by the Public Service Commission, municipalities are not subject to the regulation and control of the Commission, *Utah Power & Light Co. v. Public Serv. Comm'n*, 122 Utah 284, 289, 249 P.2d 951, 953 (1952); *Barnes v. Lehi City*, 74 Utah 321, 349, 279 P. 878, 888 (1929), and are specifically authorized to regulate the sale and use of electric power within their boundaries. Utah Code Ann. § 10–8–21. Moreover, section 10–2–401(4) provides:

> Areas annexed to municipalities . . . should receive the services provided by the annexing municipality, subject to Section 10–2–424, as soon as possible following the annexation. . . .

This section, and section 10–2–424 by reference, must be construed as a term of Strawberry Electric's certificate of public convenience and necessity. Strawberry Electric was therefore on notice that all or part of its service area could be annexed and its exclusive business privilege limited or terminated. Thus, Strawberry Electric has no protectable property interest in its certificate of public convenience and necessity where its service area is lawfully invaded by an annexing municipality.

The trial court, without the benefit of *Bagford*, failed to appreciate Spanish Fork's right to lawfully invade Strawberry Electric's service area and ruled that Strawberry Electric was entitled to lost future income from consumers in the annexed areas. Apparently, the trial court determined that Strawberry Electric had an exclusive commercial privilege even though Utah law confers upon municipalities the right to lawfully invade Strawberry Electric's service area. In this respect, the trial court erred. We therefore reverse the trial court's damage award to the extent it was based upon the incorrect premise that Strawberry Electric had an exclusive right vis-a-vis lawfully invading municipalities to serve annexed consumers.

[14, 15] Notwithstanding a municipality's right to commence service within its annexed areas, a utility does have a protectable property interest in its certificate until its service area is lawfully invaded. Until an annexing municipality has complied with section 10–2–424, it has the power to invade the utility's service area but not the right. *City of Logan*, 796 P.2d at 700. And since municipal power cannot be exercised in derogation of specific rights protected by article I, section 22, *id.*, the utility has a legally cognizable expectation to exclusively provide electricity within its service area. In this case, when Spanish Fork began to serve annexed residents, Strawberry Electric had a legally cognizable interest in an exclusive privilege to serve within its service area.

[16] In pertinent part, section 10–2–424 provides that when an electric utility company has been serving consumers in an area annexed by a municipality, "the municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers *until* the municipality has reimbursed the electric utility company . . . for the fair market value of those facilities dedicated to provid[ing] service to the annexed area." Utah Code Ann. § 10–2–424 (emphasis added). According to the plain language of this statute, *see State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993) (directing that in construing a statute's provisions, courts are bound by its plain language), a municipality may not commence service within any portion of an electric utility's service area unless it has either obtained the utility's consent or reimbursed the utility for its compensable losses. Any other construction

would entail an improper disregard of the section's terms. *See State v. One 1984 Oldsmobile*, 892 P.2d 1042, 1046 (Utah 1995) (We must assume that "'each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.'" (quoting *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P.2d 664, 670 (Utah 1991))).

Spanish Fork all but concedes that it violated section 10–2–424. Spanish Fork admits that it furnished electric service to forty-three residents of the annexed areas before either securing Strawberry Electric's consent or reimbursing Strawberry Electric for its compensable losses. This conduct violates section 10–2–424.

Moreover, the effect of Spanish Fork's noncompliance is that Strawberry Electric has an exclusive right to serve consumers within its service area. Until Spanish Fork either secures Strawberry Electric's consent or pays Strawberry Electric for the "fair market value of those facilities dedicated to provid[ing] service to the annexed area[s]," Strawberry Electric has a legally enforceable interest in exclusively serving within its service area. This includes its right to serve any customer in the annexed areas until Spanish Fork complies with section 10–2–424. Therefore, under *Bagford*, Strawberry Electric has a protectible property interest in serving these customers, and if this interest has been "taken or damaged," it must be compensated accordingly.

Next, we must determine whether Strawberry Electric's protectable property interest has been "taken or damaged" by Spanish Fork's actions. *See Colman*, 795 P.2d at 626. Every consumer within the annexed areas served by Spanish Fork before it ultimately complies with section 10–2–424 represents a partial taking or damaging of Strawberry Electric's protectable property interest. As of the time of trial, Spanish Fork commenced service to forty-three consumers. If Spanish Fork has since commenced service to more consumers, it has further damaged Strawberry Electric's protectable interest. Accordingly, Spanish Fork must compensate Strawberry Electric for its inability to serve these customers.

This compensation must include the profits Strawberry Electric would have realized during the time Spanish Fork failed to comply with section 10–2–424. That is, Strawberry Electric is entitled to the lost profits from each of the forty-three above-mentioned customers, in addition to any other customer that has located in the annexed areas and for whom Spanish Fork has commenced service, from the time Spanish Fork initially served the customer until it complies with section 10–2–424 by compensating the utility.

Spanish Fork objects to an approach which would award lost profits. First, Spanish Fork contends that the language of section 10–2–424 precludes such an award. According to Spanish Fork, a municipality is required to "reimburse[ ] the electric utility company" only when it supplants a portion of the company's service area and a city can "reimburse" a company only for expenses already incurred, not for lost profits. Second, Spanish Fork argues that section 17A–2–302(1)(a) of the Utah Code precludes an award of lost profits to the extent it denies electric utility companies the right to provide service in areas adjacent to the service territory of municipal agencies.

[17, 18] Spanish Fork's contentions lack merit. Its argument that the text of section 10–2–424 precludes an award of lost profits is unpersuasive because it requires an unconstitutional construction of the statute. Utah courts should "construe statutory terms to avoid an unconstitutional application of the statute." *Utah State Road Comm'n v. Friberg*, 687 P.2d 821, 831 (Utah 1984). This court has ruled that "the fair market value reimbursement requirement of section 424 is to be read as congruent with the 'just compensation' requirement of article I, section 22" of the Utah Constitution. *City of Logan*, 796 P.2d at 700. And above, we ruled that article I, section 22 protects as an incident of Strawberry Electric's certificate of public convenience and necessity profits from consumers Spanish Fork unlawfully served. If we were to interpret section 10–2–424 in the manner proposed by Spanish Fork, we would be forced to hold the statute unconstitutional.

Therefore, "reimburse" for purposes of section 10–2–424 means to make whole for any losses compensable under article I, section 22 of the Utah Constitution. *Accord The American Heritage Dictionary of the English Language* 1097 (1980) (defining "reimburse" as "to ... compensate ... for ... losses or damages incurred").

[19] The second challenge—that section 17A–2–302(1)(a) of the Utah Code precludes an award of lost profits—is unripe. This argument was made for the first time on appeal. "'With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal.'" *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455 (Utah 1993) (quoting *Espinal v. Salt Lake City Bd. of Educ.*, 797 P.2d 412, 413 (Utah 1990)). We therefore decline to address this argument.

As discussed above, to lawfully invade Strawberry Electric's service area, Spanish Fork must commence service to all consumers within the annexed areas and pay Strawberry Electric "the fair market value of those facilities dedicated to provid[ing] service to the annexed area[s]." Utah Code Ann. § 10–2–424. Further discussion of damages is therefore warranted to guide the trial court in calculating them.

[20] Section 10–2–424 requires that to serve the consumers within the annexed areas, Spanish Fork must pay Strawberry Electric the fair market value of the facilities dedicated to serving within those areas. Both parties agree that section 10–2–424 therefore requires compensation for the utility's lost or stranded physical facilities, such as distribution lines, poles, conduits, and related hardware. In addition, *City of Logan* suggests that Strawberry Electric is entitled to recover damages for the diminished value of its remaining physical property. *City of Logan* directed that damage awards should compensate utilities for facilities damaged outside the annexed areas, which suggests that utilities are entitled to severance damages. *See City of Logan*, 796 P.2d at 700–01. Severance damages are awarded for a partial taking, as opposed to a taking of the entire business, and compensate the owner for the diminished value of its remaining physical property. *See* 4A Julius L. Sackman & Patrick J. Rohan, *Nichols' The Law of Eminent Domain* §§ 14.02[1][a], 15.11 (rev. 3d ed. 1994 & Supp.1995). Thus, to serve the annexed areas, Spanish Fork must pay Strawberry Electric the fair market value of its lost or stranded facilities and severance damages.

In sum, Strawberry Electric is entitled to profits from customers within the annexed areas served by Spanish Fork during Spanish Fork's noncompliance with section 10–2–424. However, Strawberry Electric is not entitled to future profits from consumers within the annexed areas after Spanish Fork complies with section 10–2–424. In addition, if Spanish Fork serves all consumers within the annexed areas, which it must do pursuant to section 10–2–424 of the Utah Code, it must pay Strawberry Electric for its facilities dedicated to service within the annexed areas. Such an award would include damages for Strawberry Electric's lost and stranded facilities and severance damages.

The next issue is whether the trial court improperly enjoined Spanish Fork. The trial court found Spanish Fork in violation of section 10–2–424 for failing to compensate Strawberry Electric for its losses before it commenced electric service within the annexed areas. The trial court held, "If the City wishes to provide *any services* in the areas served by [Strawberry Electric], it must obtain the consent of [Strawberry Electric] or it must pay [Strawberry Electric] for the fair market value of those facilities dedicated to provid[ing] service to the annexed area." The trial court further ordered that even if it compensates Strawberry Electric, Spanish Fork is prohibited from serving consumers in the annexed areas whom Strawberry Electric had present capacity to serve.

[21] Spanish Fork levels three objections to the trial court's injunction. First, Spanish Fork argues that a municipality's authority to furnish utility service to its residents may not be prohibited and therefore Strawberry Electric's sole remedy is monetary damages. Second, Spanish Fork maintains that inasmuch as the injunction mandates the termination of service to six residential consumers

that it disconnected from Strawberry Electric's distribution system and connected to its own, the injunction contravenes a three-year statute of limitations. Third, Spanish Fork asserts that the injunction preventing it from serving its residents incorrectly assumes that Strawberry Electric has an exclusive right vis-a-vis municipalities in compliance with section 10–2–424 to serve its customers. In considering these arguments, "[w]e will not disturb a trial court's judgment granting or refusing an injunction unless the court abused its discretion or the judgment rendered is clearly against the weight of the evidence." *Birch Creek Irrigation v. Protheo*, 858 P.2d 990, 993 (Utah 1993).

[22] Injunctions are available only upon a showing of irreparable injury for which there is no adequate remedy at law. *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425–27 (Utah 1983). Injunctions are commonly granted where an exclusive business, such as Strawberry Electric's until a municipality supplants it in compliance with section 10–2–424, is unlawfully invaded. *See Georgia Power Co. v. Altamaha Elec. Membership Corp.*, 221 Ga. 521, 145 S.E.2d 691, 695 (1965); *Southern Indiana Gas & Elec. Co. v. Indiana Statewide Rural Elec. Coop.*, 251 Ind. 459, 242 N.E.2d 361, 368 (1968); *Mid-America Pipeline Co. v. Iowa State Commerce Comm'n*, 253 Iowa 1143, 114 N.W.2d 622, 626 (1962); *Campbell Sixty-Six Express, Inc. v. J. & G. Express, Inc.*, 244 Miss. 427, 141 So.2d 720, 726 (1962); *Missouri Utilities Co. v. Scott-New Madrid-Mississippi Elec. Coop.*, 475 S.W.2d 25, 28 (Mo. 1972) (en banc); 43A C.J.S. *Injunctions* § 106 (1978). When invaded, the business bears irreparable injury for which there is no adequate remedy at law; "[m]onetary damages would be difficult and perhaps impossible to ascertain, and [the business] would be forced to bring continuing and successive lawsuits for damages." *Payne v. Jackson City Lines, Inc.*, 220 Miss. 180, 70 So.2d 520, 523 (1954).

[23, 24] Moreover, an injunction is proper whether the unlawful invasion is effected by another company or by a governing body. *City of Pinellas Park v. Cross-State Utils. Co.*, 205 So.2d 704, 706–07 (Fla.Dist.Ct.App. 1968); *Missouri Pub. Serv. Co. v. City of Trenton*, 509 S.W.2d 770, 772 (Mo.Ct.App. 1974); 43A C.J.S. *Injunctions* § 106 (1978). These authorities countenance enjoining municipal actions where the municipality illegally extends its utility service. *See Cross-State Utils. Co.*, 205 So.2d at 706–07; *Missouri Pub. Serv. Co.*, 509 S.W.2d at 772. We adopt this rule and will therefore approve the trial court's injunction if Spanish Fork exceeded its authority in furnishing electric service to the annexed areas.

[25] In resolving the previous issue, we held that Spanish Fork violated section 10–2–424. Spanish Fork contends, however, that the injunction ignores the applicable statute of limitations. Spanish Fork maintains that it connected its lines to the six consumers no later than 1986. Further, Spanish Fork contends that actions for liability created by section 10–2–424 must be commenced within three years of connection. *See* Utah Code Ann. § 78–12–26. Because Strawberry Electric's action was not commenced within three years of connection, Spanish Fork argues, Strawberry Electric's claims with respect to these consumers are time-barred. The trial court rejected the application of this statute, explaining that Spanish Fork "continues to violate [section 10–2–424] in providing service" to the six consumers.

To address whether Strawberry Electric's cause of action is time-barred, we must determine exactly what acts comprise the cause of action and when they occurred. Under section 10–2–424, a "municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility company." Utah Code Ann. § 10–2–424. Thus, the action forbidden by section 10–2–424 is the "furnish[ing of] electric utility services" without the utility's consent or before compensation is provided.

It is undisputed that Spanish Fork furnished electric service to at least forty-three consumers. The next step is to determine when Spanish Fork furnished those services. From the record, it appears that at least until trial, Spanish Fork furnished electric

utility services to the specified consumers. At no time before trial did Spanish Fork cease to provide service to these residents. Indeed, had Spanish Fork done so, the injunction, at least as to these consumers, would have been unnecessary. Therefore, assuming the applicability of section 78–12–26 of the Utah Code,[6] Strawberry Electric's claims were not time-barred because Spanish Fork violated section 10–2–424 within the time set forth in section 78–12–26. Thus, the trial court did not abuse its discretion in enjoining Spanish Fork's electric utility service until it complies with section 10–2–424.

[26] The trial court's injunction, however, would prohibit Spanish Fork from serving consumers within the annexed area whom Strawberry Electric had present capacity to serve even if Spanish Fork ultimately complies with section 10–2–424. This portion of the trial court's injunction was based upon the now discredited premise that Strawberry Electric possessed an exclusive right vis-a-vis municipalities in compliance with section 10–2–424 to serve consumers within the annexed areas. We ruled above that it does not. We therefore reverse that part of the trial court's injunction preventing Spanish Fork from serving its residents even if it complies with section 10–2–424.

[27] The final issue on appeal is whether the trial court properly refused to consider Spanish Fork' request for a declaratory judgment as to its rights and duties if it decided to provide electric service to all residents within the annexed areas. The trial court dismissed Spanish Fork's request on the ground that "[s]uch a judgment would not 'terminate the uncertainty or controversy giving rise to the proceeding.'" (Quoting Utah Code Ann. § 78–33–6.) Spanish Fork argues that its action is justiciable and that Utah law concerning condemnation, specifically section 78–34–16 of the Utah Code, precludes the dismissal of its action.

[28, 29] Under the Utah Declaratory Judgment Act,

> [a]ny person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction ... arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.

Utah Code Ann. § 78–33–2. The Act goes on to state, however, "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." *Id.* § 78–33–6. To sustain a declaratory judgment action, there must exist "a justiciable controversy based upon an accrued set of facts, an actual conflict, adverse parties, a legally protectible interest on the plaintiff's part, and an issue ripe for judicial resolution." *Barnard v. Utah State Bar*, 857 P.2d 917, 919 (Utah 1993). The statute gives a trial court discretion to either grant or deny a party's declaratory judgment action by virtue of the statute's use of the word "may." *See World Peace Movement v. Newspaper Agency Corp.*, 879 P.2d 253, 265 (Utah 1994) (Russon, J., dissenting); *cf. Canyon Country Store v. Bracey*, 781 P.2d 414, 420 (Utah 1989) (holding that use of word "may" in Utah Rule of Civil Procedure 49 indicates grant of discretion to trial court); *accord Boyle v. National Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah.Ct.App.1993).

In this case, the issue for which Spanish Fork requested resolution was not ripe, nor did it represent an actual conflict. In its own words, Spanish Fork "sought a determination of the value of the facilities dedicated to provid[ing] service to all consumers in the Annexed Areas and the extent to which title to affected facilities would pass." As such, Spanish Fork's theoretical taking had no specified date, and therefore, any valuation of Strawberry Electric's compensable losses would be inaccurate or outmoded. More-

6. For the purpose of this discussion, we need not determine whether this section prescribes the applicable limitation period. It is important to note that an action under section 10–2–424 is, to a large extent, founded upon article I, section 22. *City of Logan*, 796 P.2d at 701. Thus, section 78–12–26, which prescribes a limitation period for liability created by statutes, may not be applicable to the extent liability is actually created by the Utah Constitution. *See Webber v. Salt Lake City*, 40 Utah 221, 224, 120 P. 503, 504 (1911).

over, the value of Strawberry Electric's compensable losses as a result of such a taking was never the source of any actual conflict among the parties. Indeed, Spanish Fork admitted that undertaking electric service to all consumers within the annexed areas would not be economically feasible.

Contrary to Spanish Fork's suggestion, section 78–34–16 does not support its claim for declaratory relief. In relevant part, this statute provides:

> Condemnor, whether a public or private body, may, at any time prior to final payment of compensation and damages awarded the defendant by the court or jury, abandon the proceedings and cause the action to be dismissed without prejudice, provided, however, that as a condition of dismissal condemnor first compensate condemnee for all damages he has sustained and also reimburse him in full for all reasonable and necessary expenses actually incurred by condemnee because of the filing of the action by condemner [sic], including attorneys fees.

Utah Code Ann. § 78–34–16. Spanish Fork contends that this section supports the view that it may receive a determination of value from a court prior to determining whether to complete the condemnation. Spanish Fork, however, misapprehends the reasons for the trial court's dismissal. The trial court did not reject Spanish Fork's request because it did not commit to assuming electric service throughout the annexed area. Rather, the trial court denied declaratory relief because Spanish Fork's issue had not yet accrued; the issue was not ripe, and no actual conflict existed between the parties. In short, the trial court properly refused to issue an advisory opinion. Thus, the trial court did not abuse its discretion in dismissing Spanish Fork's declaratory judgment action.[7]

III. CONCLUSION

We conclude that the trial court incorrectly authorized Spanish Fork to serve only select customers in the annexed areas and incorrectly calculated Strawberry Electric's damages to include projected earnings from consumers whom Spanish Fork may lawfully serve. In addition, the trial court abused its discretion in enjoining Spanish Fork from serving annexed residents if it complies with section 10–2–424. The trial court, however, did not abuse its discretion in enjoining Spanish Fork from serving annexed residents until it complies with section 10–2–424 and in dismissing Spanish Fork's second claim for declaratory relief. We therefore lift the stay of the permissible part of the trial court's injunction, reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

ZIMMERMAN, C.J., HOWE, J., and PEULER and THORNE, Judges, concur in RUSSON's, J., opinion.

STEWART, Associate C.J., and DURHAM, J., having disqualified themselves, do not participate herein; PEULER and THORNE, District Judges, sat.

7. We note that our resolution of the first issue will require the determination of compensation owed to Strawberry Electric as a result of Spanish Fork's assumption of utility service to all residents in the annexed areas. Spanish Fork must provide service to all of its residents, and Strawberry Electric must be compensated accordingly. However, the trial court's dismissal of Spanish Fork's declaration request was still proper since it lacked the benefit of this ruling.

STATE of Utah, Plaintiff and Appellee,

v.

James QUADA, Defendant and Appellant.

No. 950076–CA.

Court of Appeals of Utah.

May 31, 1996.

Defendant was convicted in the Fourth District Court, Utah County, Ray M. Harding, J., of two counts of aggravated assault, and he appealed. The Court of Appeals,

Fairbanks North Star Borough Office of the Mayor
809 Pioneer Road P.O. Box 71267 Fairbanks, Alaska 99707-1267 907/459-1300
Fax 907/459-1102
Email mayor@co.fairbanks.ak.us

May 5, 1999

Representative Andrew Halcro
Co-Chair, Community & Regional Affairs Committee
Alaska State Legislature
Juneau, AK 99801

Dear Representative Halcro,

The Fairbanks North Star Borough has concerns with HB178, which relates to waste collection and disposal. The bill requires local government to regulate the waste industry. We do not currently possess the expertise necessary to regulate a utility. Should HB178 pass, we would be required to gain that expertise, but I question whether local government is the proper place for such regulatory authority. Given the current number of mergers and acquisitions currently pending before the APUC that involve one waste disposal company, it does not seem to be the appropriate time to decentralize regulatory authority. It seems that if anything, a comprehensive statewide regulatory authority would be more appropriate.

We also have concerns that HB178 is not clear about the impacts the legislation would have on our hauling contracts for our transfer sites. We are not aware of any current problems that exist that this legislation addresses. Please excuse me for being anecdotal, but if it is not broken, why fix it.

I appreciate you taking the time to hear our concerns. The Fairbanks North Star Borough cannot support HB178 at this time. If you need further information, please do not hesitate to contact me.

Sincerely,

for Hank Hove
Borough Mayor

Cc: Interior Delegation

HB 193

Budget Request Unit: Village Public Safety Officer Program

Manager: Col. Glenn Godfrey, Director
Tel: (907) 269-5641 **Fax:** (907) 337-2059 **E-mail:** glenn_godfrey@dps.state.ak.us

BRU Mission

To increase public safety in rural Alaska through unique partnerships with regional nonprofit corporations and village governments by providing Village Public Safety Officers (VPSOs).

BRU Services Provided

Throughout rural Alaska, the Village Public Safety Officer is often the only person responsible for a broad range of public safety needs. These include law enforcement support duties, emergency medical services, search and rescue missions, fire prevention activities, etc. Currently eighty-four VPSOs present an ongoing positive public safety presence in eighty-two rural communities. VPSOs also often assist Troopers in alcohol and drug enforcement efforts.

VPSO oversight troopers and detachment troopers travel regularly to all villages under their direction. During these visits troopers provide training through special VPSO training modules on specific subjects such as report writing, search and rescue coordination, etc. The close working relationship developed between VPSOs and Troopers helps VPSOs in carrying out their duties, as well as ensuring the VPSOs that the state troopers will be there during crisis situations.

VPSOs are employees of native regional non-profit corporations that share in direction of VPSOs' daily activities with village leaders and troopers. VPSO personnel prevent child abuse, prevent domestic violence, reduce aggravated assaults, prevent injuries, save lives and protect property in rural Alaska.

BRU Goals and Strategies for FY2000

The main goal of the Division is to protect and serve the public. As related to the VPSO Program, this will be accomplished by:

- Handling more than 6,850 non-criminal incidents.
- Investigating over 160 cases concerning illegal alcohol.
- Investigating over 350 cases involving misdemeanor assaults.
- Handling over 490 other investigations.

Key BRU Issues for FY1999 – 2000

VPSO TURNOVER RATE
The Village Public Safety Officer Program suffers from a high turnover rate that results in the State being forced to constantly train new personnel who do not stay in VPSO positions. A partial solution to this situation is to increase salaries for VPSOs by 5% over the cost of the FY99 contracts.

UNFUNDED VPSOs
Several villages are authorized VPSOs which cannot be afforded at current levels of funding. The number of funded VPSOs has been declining in recent years.

Major BRU Accomplishments for FY1998

- VILLAGE POLICE OFFICER (VPO) TRAINING - Training was conducted by state troopers in Nome and St. Marys for Village Police Officers employed by villages in those areas.

- DOMESTIC VIOLENCE TRAINING - Troopers are currently producing a domestic violence training video for VPSO and VPO personnel in rural Alaska. This will allow timely training for personnel who have yet to receive formal academy training. State troopers also provided domestic violence training to VPSOs and VPOs throughout rural Alaska. As a result, public safety officials at the village level are able to intervene in a more timely and appropriate manner.

Village Public Safety Officer Program

Budget Request Unit — Financial Summary

All dollars in thousands

	FY1998 Actuals				FY1999 Authorized				FY2000 Governor			
	General Funds	Federal Funds	Other Funds	Total Funds	General Funds	Federal Funds	Other Funds	Total Funds	General Funds	Federal Funds	Other Funds	Total Funds
Formula Expenditures												
None.												
Non-Formula Expenditures												
Contracts	5,611.1	0.0	0.0	5,611.1	5,523.5	0.0	0.0	5,523.5	5,766.0	0.0	0.0	5,766.0
Support	1,686.5	0.0	0.0	1,686.5	1,702.7	0.0	0.0	1,702.7	1,721.0	0.0	0.0	1,721.0
Administration	282.0	0.0	0.0	282.0	271.8	0.0	0.0	271.8	253.5	0.0	0.0	253.5
Totals	**7,579.6**	**0.0**	**0.0**	**7,579.6**	**7,498.0**	**0.0**	**0.0**	**7,498.0**	**7,740.5**	**0.0**	**0.0**	**7,740.5**

Village Public Safety Officer Program

Proposed Changes in Levels of Service for FY2000

Funds are requested to provide VPSOs with a 5% salary increase.

Village Public Safety Officer Program

Budget Request Unit — Summary of Budget Change

From FY1999 Authorized to FY2000 Governor

All dollars in thousands

	General Funds	Federal Funds	Other Funds	Total Funds
FY1999 Authorized	**7,498.0**	**0.0**	**0.0**	**7,498.0**
Adjustments which will continue current level of service:				
-Contracts	0.0	0.0	0.0	0.0
-Support	18.3	0.0	0.0	18.3
-Administration	-18.3	0.0	0.0	-18.3
Proposed budget increases:				
-Contracts	242.5	0.0	0.0	242.5
FY2000 Governor	**7,740.5**	**0.0**	**0.0**	**7,740.5**

Component: Contracts

Manager: Col. Glenn Godfrey, Director
Tel: (907) 269-5641 **Fax:** (907) 337-2059 **E-mail:** glenn_godfrey@dps.state.ak.us

Component Mission

To increase public safety in rural Alaska through unique partnerships with regional native nonprofit corporations.

Component Services Provided

This component provides funding for grants with nine regional native nonprofit corporations to recruit, hire, place, and pay approximately 84 VPSOs located in some of the124 authorized villages. The cost of these services, if provided directly by individual state agencies, such as the Departments of Health and Social Services, Education, Community & Regional Affairs and Public Safety would be higher than the cost presently incurred by the VPSO program.

The VPSO Program provides a unique way to meet local public safety needs in rural Alaska. It does not simply focus on law enforcement, but addresses a broad spectrum of government services. VPSOs are trained in basic law enforcement, fire prevention and suppression techniques, search and rescue response, water safety, etc. With this broad background, VPSOs are responsive to rural community needs and priorities. The VPSOs are employees of the regional corporations. Their daily activities are jointly supervised by the city or village council and the corporation. AST provides oversight and training and works with individual VPSOs to assist them in developing the most effective approaches to their particular public safety situations. A close working relationship between the oversight Trooper and VPSOs is the foundation for development of a successful VPSO.

Component Goals and Strategies for FY2000

To increase the safety of the public in rural Alaska by providing grants to regional native nonprofit corporations. These corporations employ Village Public Safety Officers in selected rural communities. The Alaska State Troopers work closely with VPSOs to provide law enforcement oversight. Troopers also handle serious crimes in rural Alaska.

Key Component Issues for FY1999 – 2000

VPSO TURNOVER RATE - A VPSO turnover rate of over 35% was experienced during FY98. One of the issues causing this turnover is believed to be inadequate compensation. In order to address this situation a 5% salary increase is requested.

SUPPORT COSTS - Without additional funds for support costs, regional native nonprofit corporations have had to closely manage administrative expenses.

Major Component Accomplishments for FY1998

Agreements were successfully negotiated with nine regional native non-profit corporations to provide eighty-four Village Public Safety Officers.

Statutory and Regulatory Authority

1) DPS - Powers and duties of department (AS 44.41.020)
2) State Troopers (AS 18.65.010-110)
3) VPSO Definition (AS 01.10.060(6))
4) VPSO Program (AS 18.65.670)

Contracts

Resource Summary

All dollars in thousands

	FY1998 Actuals	FY1999 Authorized	FY2000 Governor
Non-Formula Program:			
Component Expenditures:			
71000 Personal Services	0.0	0.0	0.0
72000 Travel	0.0	0.0	0.0
73000 Contractual	5,611.1	5,523.5	0.0
74000 Supplies	0.0	0.0	0.0
75000 Equipment	0.0	0.0	0.0
76000 Land/Buildings	0.0	0.0	0.0
77000 Grants, Claims	0.0	0.0	5,766.0
78000 Miscellaneous	0.0	0.0	0.0
Expenditure Totals	**5,611.1**	**5,523.5**	**5,766.0**
Funding Sources:			
1004 General Fund Receipts	5,611.1	5,523.5	5,766.0
Funding Totals	**5,611.1**	**5,523.5**	**5,766.0**

Contracts

Proposed Changes in Levels of Service for FY2000

Funds are requested to provide VPSOs with a 5% salary increase.

Component — Summary of Budget Changes

From FY1999 Authorized to FY2000 Governor

All dollars in thousands

	General Funds	Federal Funds	Other Funds	Total Funds
FY1999 Authorized	**5,523.5**	**0.0**	**0.0**	**5,523.5**
Adjustments which will continue current level of service:				
-Classify as Grants (AS 18.65.670 (b))	0.0	0.0	0.0	0.0
Proposed budget increases:				
-5% Wage Increase	242.5	0.0	0.0	242.5
FY2000 Governor	**5,766.0**	**0.0**	**0.0**	**5,766.0**

Component Detail

Department of Public Safety

Component: Contracts

BRU: Village Public Safety Officer Program

	FY1998 Actuals	FY1999 ABS Conference Committee	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor	FY1999 Authorized Vs FY2000 Governor	
71000 Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
72000 Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
73000 Contractual	5,611.1	5,275.5	5,523.5	0.0	0.0	-5,523.5	-100.0%
74000 Supplies	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
75000 Equipment	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
76000 Land/Buildings	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
77000 Grants, Claims	0.0	0.0	0.0	5,523.5	5,766.0	5,766.0	100.0%
78000 Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
Totals	**5,611.1**	**5,275.5**	**5,523.5**	**5,523.5**	**5,766.0**	**242.5**	**4.4%**
Funding Sources :							
1004 Gen Fund	5,611.1	5,275.5	5,523.5	5,523.5	5,766.0	242.5	4.4%
Positions :							
Permanent Full Time	0	0	0	0	0	0	0.0%
Permanent Part Time	0	0	0	0	0	0	0.0%
Non Permanent	0	0	0	0	0	0	0.0%

Change Record Detail With Description

Department of Public Safety

Scenario: FY2000 Governor
Component: Contracts
BRU: Village Public Safety Officer Program

Change Record Title	Trans Type	Totals	Personal Services	Travel	Contractual	Supplies	Equipment	Land/ Buildings	Grants Claims	Misc.	Non Specific	Positions PFT	PPT	NP
Breako it Conference Committee	Breakout	5,275.5	0.0	0.0	5,275.5	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund 5,275.5														
Reappropriation	Special	248.0	0.0	0.0	248.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund 248.0														
Classify as Grants (AS 18.65.670 (b))	LIT	0.0	0.0	0.0	-5,523.5	0.0	0.0	0.0	5,523.5	0.0	0.0	0	0	0
1004 Gen Fund 0.0														
This transfer more appropriately classifiesf these funds as grants. This change provides consistency with wording in the VPSO statute (AS 18.65.670 (b)).														
5% Wage Increase	Inc	242.5	0.0	0.0	0.0	0.0	0.0	0.0	242.5	0.0	0.0	0	0	0
1004 Gen Fund 242.5														
There are 40 rural communities that are authorized Village Public Safety Officer (VPSO) positions but which do not have VPSOs. These communities are dependent upon the VPSO program to provide first responders (VPSOs) who have been trained in public safety services; i.e., fire, ETT, law enforcement, domestic violence, search and rescue, etc. Presently there are 82 villages t.at are staffed by 84 funded VPSO positions. (2 villages have two VPSOs assigned.)														
The Village Public Safety Officer program makes up for a portion of the tremendous gap in public safety in rural Alaska. A VPSO is often the lone person in a village responsible for fire protection, search and rescue, and other responses. The VPSO presents an ongoing public safety presence in ninety-one rural communities. VPSOs respond to misdemeanor complaints and help to prevent minor incidents from becoming major incidents requiring State Trooper response. VPSOs are also utilized in alcohol and drug enforcement efforts in villages.														
This increment will provide funding for a 5% raise for the existing 84 VPSOs. It does not allow for merit increases, expansion of overtime, increases in overhead rates or other inflationary costs. The intention of this increment is to provide a viable income to VPSOs to help address an excessive turnover rate in VPSO positions.														
Totals		**5,766.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**5,766.0**	**0.0**	**0.0**	**0**	**0**	**0**

Change Record Detail - Multiple Scenarios

Department of Public Safety

Component: Contracts

BRU: Village Public Safety Officer Program

Change Record Title		Trans Type	Totals	Personal Services	Travel	Contractual	Supplies	Equipment	Land Buildings	Grants Claims	Misc.	Non Specific	Positions PFT	PPT	NP
****** Changes From FY1999 ABS Conference Committee To FY1999 Authorized ******															
Breakout Conference Committee		Breakout	5,275.5	0.0	0.0	5,275.5	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund	5,275.5														
Reappropriation		Special	248.0	0.0	0.0	248.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund	248.0														
	FY1999 Authorized:		5,523.5	0.0	0.0	5,523.5	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
****** Changes From FY1999 Authorized To FY2000 Adjusted ******															
Classify as Grants (AS 18.65 670 (b))		LIT	0.0	0.0	0.0	-5,523.5	0.0	0.0	0.0	5,523.5	0.0	0.0	0	0	0
1004 Gen Fund	0.0														
	FY2000 Adjusted:		5,523.5	0.0	0.0	0.0	0.0	0.0	0.0	5,523.5	0.0	0.0	0	0	0
****** Changes From FY2000 Adjusted To FY2000 Governor ******															
5% Wage Increase		Inc	242.5	0.0	0.0	0.0	0.0	0.0	0.0	242.5	0.0	0.0	0	0	0
1004 Gen Fund	242.5														
	FY2000 Governor:		5,766.0	0.0	0.0	0.0	0.0	0.0	0.0	5,766.0	0.0	0.0	0	0	0

Line Item Detail

Department of Public Safety

Contractual

Component: Contracts

BRU: Village Public Safety Officer Program

Expenditure Account	Account Name	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor
73000	Contractual	5,523.5	0.0	0.0

Funding Source

Fund Code	Fund Source Name			
1004	General Fund Receipts	5,523.5	0.0	0.0

Detail Information

Sub-Expenditure Account	Explanation	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor
73100 Professional Srvcs		5,523.5	0.0	0.0

Line Item Detail
Department of Public Safety
Grants, Claims

Component: Contracts
BRU: Village Public Safety Officer Program

Expenditure Account	Account Name	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor
77000	Grants, Claims	0.0	5,523.5	5,766.0

Funding Source

Fund Code	Fund Source Name	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor
1004	General Fund Receipts	0.0	5,523.5	5,766.0

Detail Information

Sub-Expenditure Account		Explanation	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor
77000	Total Grants	PROFESSIONAL SERVICES $5523.5 Funding for contracts to provide 84 Village Public Safety Officers of the 124 authorized positions throughout villages in the State of Alaska. FY00 GOVERNOR'S INCREMENT $242.5 (See Change Record Detail).	0.0	5,523.5	5,766.0

Component: Administration

Manager: Col. Glenn Godfrey, Director
Tel: (907) 269-5641 **Fax:** (907) 337-2059 **E-mail:** glenn_godfrey@dps.state.ak.us

Component Mission

To provide direction and administration of the VPSO program, working in a partnership with the native nonprofit regional corporations and rural villages statewide, to place trained VPSOs in selected communities who can immediately provide basic public safety services.

Component Services Provided

This component writes, administers, and ensures compliance for the VPSO grants initiated with nine native nonprofit regional corporations; coordinates and provides training for all VPSOs and Troopers involved in the VPSO program; establishes policy, goals, and objectives for the program; interacts with AST Detachment Commanders in ensuring the VPSO mission is being met; provides a focal point for future planning, needs assessments, and budget preparation; and is the repository for VPSO records.

Component Goals and Strategies for FY2000

- provide consistent, approved training for all VPSOs
- provide consistent program direction in accordance with established policy and grants
- provide support for the nonprofit coordinators in meeting standards established for the program
- identify needs, create program goals and objective and establish plans to meet those goals

Key Component Issues for FY1999 – 2000

Both administrative employees recently retired.

Major Component Accomplishments for FY1998

- One VPSO Academy concluded
- One Basic Rural Firefighter class concluded
- Nine VPSO grants negotiated

Statutory and Regulatory Authority

1) DPS - Powers and duties of department (AS 44.41.020)
2) State Troopers (AS 18.65.010-110)
3) VPSO Definition (AS 01.10.060(6))
4) VPSO Program (AS 18.65.670)

Administration

Resource Summary

All dollars in thousands

	FY1998 Actuals	FY1999 Authorized	FY2000 Governor
Non-Formula Program:			
Component Expenditures:			
71000 Personal Services	267.2	256.4	238.1
72000 Travel	5.4	7.0	7.0
73000 Contractual	4.9	6.2	6.2
74000 Supplies	0.1	2.2	2.2
75000 Equipment	4.4	0.0	0.0
76000 Land/Buildings	0.0	0.0	0.0
77000 Grants, Claims	0.0	0.0	0.0
78000 Miscellaneous	0.0	0.0	0.0
Expenditure Totals	**282.0**	**271.8**	**253.5**
Funding Sources:			
1004 General Fund Receipts	279.5	271.2	253.5
1053 Investment Loss Trust Fund	2.5	0.6	0.0
Funding Totals	**282.0**	**271.8**	**253.5**

Estimated Administration Revenue Collections

Description	Master Revenue Account	FY1998 Cash Estimate	FY1998 Actuals	FY1999 Authorized	FY2000 Governor
Unrestricted Revenues					
None.		0.0	0.0	0.0	0.0
Unrestricted Total		**0.0**	**0.0**	**0.0**	**0.0**
Restricted Revenues					
Investment Loss Trust	51393	0.0	2.5	0.6	0.0
Restricted Total		**0.0**	**2.5**	**0.6**	**0.0**
Total Estimated Revenues		**0.0**	**2.5**	**0.6**	**0.0**

Administration

Proposed Changes in Levels of Service for FY2000

The current level of service will be maintained without significant changes.

Component — Summary of Budget Changes

From FY1999 Authorized to FY2000 Governor

All dollars in thousands

	General Funds	Federal Funds	Other Funds	Total Funds
FY1999 Authorized	**271.8**	**0.0**	**0.0**	**271.8**
Adjustments which will continue current level of service:				
-Change Investment Loss Trust Fund to General Fund	0.0	0.0	0.0	0.0
-Maintain VPSO Support	-18.3	0.0	0.0	-18.3
FY2000 Governor	**253.5**	**0.0**	**0.0**	**253.5**

Administration

Component — Personal Services Information

Authorized Positions	FY1999 Authorized	FY2000 Governor
Full-time	3	3
Part-time	0	0
Nonpermanent	0	0
Totals	**3**	**3**

Personal Services Costs	
Annual Salaries	164,950
Premium Pay	10,621
Annual Benefits	62,506
Less 0.00% Vacancy Factor	(0)
Lump Sum Premium Pay	0
Total Personal Services	**238,077**

Position Classification Summary

Job Class Title	Anchorage	Fairbanks	Juneau	Others	Total
Administrative Assistant	1	0	0	0	1
Captain PS	1	0	0	0	1
State Trooper	1	0	0	0	1
Totals	**3**	**0**	**0**	**0**	**3**

Component Detail

Department of Public Safety

Component: Administration

BRU: Village Public Safety Officer Program

	FY1998 Actuals	FY1999 ABS Conference Committee	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor	FY1999 Authorized Vs FY2000 Governor	
71000 Personal Services	267.2	255.2	256.4	238.1	238.1	-18.3	-7.1%
72000 Travel	5.4	7.0	7.0	7.0	7.0	0.0	0.0%
73000 Contractual	4.9	6.2	6.2	6.2	6.2	0.0	0.0%
74000 Supplies	0.1	2.2	2.2	2.2	2.2	0.0	0.0%
75000 Equipment	4.4	0.0	0.0	0.0	0.0	0.0	0.0%
76000 Land/Buildings	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
77000 Grants, Claims	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
78000 Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
Totals	**282.0**	**270.6**	**271.8**	**253.5**	**253.5**	**-18.3**	**-6.7%**
Funding Sources :							
1004 Gen Fund	279.5	270.6	271.2	253.5	253.5	-17.7	-6.5%
1053 Invst Loss	2.5	0.0	0.6	0.0	0.0	-0.6	-100.0%
Positions :							
Permanent Full Time	3	3	3	3	3	0	0.0%
Permanent Part Time	0	0	0	0	0	0	0.0%
Non Permanent	0	0	0	0	0	0	0.0%

Change Record Detail With Description

Department of Public Safety

Scenario: FY2000 Governor
Component: Administration
BRU: Village Public Safety Officer Program

Change Record Title	Trans Type	Totals	Personal Services	Travel	Contractual	Supplies	Equipment	Land/ Buildings	Grants Claims	Misc.	Non Specific	Positions PFT	PPT	NP
Breakout Conference Committee	Breakout	270.6	255.2	7.0	6.2	2.2	0.0	0.0	0.0	0.0	0.0	3	0	0
1004 Gen Fund 270.6														
FY99 COLA Spread	SalAdj	1.2	1.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund 0.6														
1053 Invst Loss 0.6														
Change Investment Loss Trust Fund to General Fund	FndChg	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund 0.6														
1053 Invst Loss -0.6														
Maintain VPSO Support	Trout	-18.3	-18.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund -18.3														
Recent turnover in personnel in this small component has resulted in less experienced staff performing the administrative functions of the VPSO program. It is necessary to transfer some of the personal services funding to the VPSO Support component where more experienced troopers have been assigned and where underfunding exceeds the maximum allowable.														
Totals		**253.5**	**238.1**	**7.0**	**6.2**	**2.2**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**3**	**0**	**0**

Change Record Detail - Multiple Scenarios

Department of Public Safety

Component: Administration

BRU: Village Public Safety Officer Program

Change Record Title	Trans Type	Totals	Personal Services	Travel	Contractual	Supplies	Equipment	Land Buildings	Grants Claims	Misc.	Non Specific	Positions PFT	PPT	NP
..... Changes From FY1999 ABS Conference Committee To FY1999 Authorized														
Breakout Conference Committee	Breakout	270.6	255.2	7.0	6.2	2.2	0.0	0.0	0.0	0.0	0.0	3	0	0
1004 Gen Fund 270.6														
FY99 COLA Spread	SalAdj	1.2	1.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund 0.6														
1053 Invst Loss 0.6														
FY1999 Authorized:		**271.8**	**256.4**	**7.0**	**6.2**	**2.2**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**3**	**0**	**0**
..... Changes From FY1999 Authorized To FY2000 Adjusted														
Change Investment Loss Trust Fund to General Fund	FndChg	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund 0.6														
1053 Invst Loss -0.6														
Maintain VPSO Support	Trout	-18.3	-18.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund -18.3														
FY2000 Adjusted:		**253.5**	**238.1**	**7.0**	**6.2**	**2.2**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**3**	**0**	**0**
..... Changes From FY2000 Adjusted To FY2000 Governor														
FY2000 Governor:		**253.5**	**238.1**	**7.0**	**6.2**	**2.2**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**3**	**0**	**0**

Personal Services Expenditure Detail

Department of Public Safety

Scenario: FY2000 Governor
Component: Administration
BRU Name: Village Public Safety Officer Program

PCN	Job Class Title	Time Status	Retire Code	Barg Unit	Location	Salary Sched	Range / Steps	Budg Months	Split / Count	Annual Salaries	COLA	Premium Pay	Annual Benefits	Total Costs	GF Amount
12-1013	Captain PS	FT	P	SS	Anchorage	1A	23 J	12.0		75,864	0	576	24,627	101,067	101,067
12-1550	State Trooper	FT	P	AA	Anchorage	1A	76 J	12.0		56,988	0	6,494	22,865	86,347	86,347
12-1563	Administrative Assistant	FT	A	GG	Anchorage	1A	13 B / C	12.0		32,098	0	3,561	15,014	50,663	50,663

	Total Positions	New	Deleted
Full Time Positions:	3	0	0
Part Time Positions:	0	0	0
Non Permanent Positions:	0	0	0
Positions in Component:	3	0	0

Total Salary Costs :	164,950
Total COLA :	0
Total Premium Pay :	10,621
Total Benefits :	62,506
Total Personal Services :	238,077
Minus Vacancy Adj. (0.00%):	(0)
Sub - Total :	238,077
Plus Lump Sum Premium Pay :	0
Personal Services Line 100 :	238,077

PCN Funding Sources	Amount	Percent
1004 General Fund Receipts	238,077.00	100.00%
Total PCN Funding:	238,077.00	100.00%

Note: If a position is split, an asterisk (*) will appear in the Split/Count column. If the split position is also counted in the component, two asterisks (**) will appear in this column.

Line Item Detail
Department of Public Safety
Personal Services

Component: Administration
BRU: Village Public Safety Officer Program

Expenditure Account	Account Name	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor
71000	Personal Services	256.4	238.1	238.1

Funding Source

Fund Code	Fund Source Name	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor
1004	General Fund Receipts	255.8	238.1	238.1
1053	Investment Loss Trust Fund	0.6	0.0	0.0

Detail Information

Sub-Expenditure Account	Explanation	FY1999 Authorized	FY2000 Adjusted	FY2000 Governor
71000 Total Personal Services		256.4	238.1	238.1