ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9851 HOUSE JUDICIARY

HB 164

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

MAR 06 2000

P.O. BOX 25526
JUNEAU, ALASKA 99802-5526
PHONE: (907) 465-4100
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February 29, 2000

Honorable Pete Kott
Chairman
House Judiciary Committee
Capitol Building, Room 118
Juneau, AK 99801

Dear Representative Kott:

I am writing to request the House Judiciary Committee schedule House Bill 164, which authorizes the electronic sale and issuance of hunting and fishing licenses, permits and tags. This bill will make it more convenient for the public to immediately purchase licenses and tags needed to hunt and fish in the state.

The Department of Fish and Game has worked closely with the Department of Public Safety and the Department of Law in drafting this bill. Individuals may now apply for licenses using either an 800 phone number or a computer and the Internet. The applicant subsequently receives his or her license by mail.

This bill will allow the department to institute a paperless licensing system that allows applicants, upon successful completion of an electronic licensing process, to be immediately issued a valid license to hunt or fish. This system provides the maximum convenience to the public by allowing the purchase of a valid license 24 hours a day, seven days a week.

Several other states, including Idaho, Georgia, Florida, Texas, and Nebraska, are using some variation of electronic means to sell and issue hunting and fishing licenses. These systems have been well received by the hunting and fishing public. We have contacted fish and wildlife management and enforcement personnel in several of these states and they also report that electronic licensing has been performing successfully.

The House Resources Committee recently held hearings on HB 164, and after adopting an amendment to section 1 of the bill, moved the bill out of committee. One committee member recommended do pass and the other members present indicated no recommendation.

The department is alw .ys looking for ways to involve more people in hunting and fishing, and we believe that making it easier to get licensed is an effective means to that end. I hope you will schedule a hearing on this bill as soon as possible.

Sincerely,

Frank Rue
Commissioner

cc: Pat Pourchot
Ron Otte
Geron Bruce

TONY KNOWLES
GOVERNOR

HB 164

P.O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500
Fax (907) 465-3532

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 26, 1999

The Honorable Brian Porter
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Porter:

Since the beginning of my Administration, state agencies have taken great strides to "plug into" the high technology age. We increasingly use electronic means to communicate with the public, whether it be to renew a driver's license, check the status of a permanent fund dividend application, or offer up-to-the-minute election results.

This bill I transmit today is yet another effort by the state to make it easier for the public to conduct business with us through electronic communication. It will allow application for fish and game licenses "on line" and lay the groundwork for the state to eventually issue paperless licenses.

A process allowing fishers and hunters to apply for and receive licenses, permits, or tags electronically should reduce paperwork for the public and the state while building a better, more efficient system for license management. I urge your prompt and favorable action on this measure.

Sincerely,

Tony Knowles
Governor

No: 4

Bill Version: CSHB 164 (RES)

FISCAL NOTE

(H) Publish Date: 2/23/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) _____ Dept. Affected Law

Title "...electronic application for and issuance of licenses, permits, and tags issued by ... Fish and Game ..." BRU Criminal/Civil Divisions

Component 1st-4th Jud Dist; Criminal Appeals/Spec Lit; Natural Resources

Sponsor House Rules Committee

Requester House Resources Committee Component Serial No. 2198-99;2201-03,79,12

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

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

CSHB 164 (RES) will authorize the Department of Fish and Game to use "on-line" and other electronic means to accept and process applications for, and to issue, certain licenses, permits, and tags in appropriate circumstances. The method of implementing electronic issuance would require the concurrence of the Department of Public Safety to ensure the license system continues to serve a useful role in enforcing fish and wildlife protection laws.

This bill will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone 465-5370

Division Attorney General's Office Date/Time 2/22/00, 3:06 PM

Approved by Commissioner Bruce M. Botelho, Attorney General Date 2/22/00

Agency Department of Law

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No: 3

FISCAL NOTE

Bill Version: CSHB 164(RES)
(H) Publish Date: 2/23/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) 2/21/00
Dept. Affected Fish and Game
Title FISH & GAME LICENSING BY ELECTRONICS
BRU Admin. & Support
Component Admin. Services
Sponsor House Rules Committee
Requester House Resources Committee
Component No. 479

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

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

Prepared by: Kevin Brooks
Phone 465-5999
Division Administration
Date/Time 2/21/00 10:42 AM
Approved by Commissioner Frank Rue
Date 02/21/2000
Agency Department of Fish and Game

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Analysis:
This bill provides for the electronic issuance of hunting and fishing licenses, tags and permits. This process is intended to be a convenience to the public and will complement the current paper system that will continue to be offered and account for the vast majority of sales. The state currently sells over 700,000 pieces of licensing stock annually, generating over $20 million in revenue, and pays out approximately $2 million in vendor compensation.

Any licenses sold by the state as a license vendor will result in the foregone vendor compensation remaining in the Fish and Game fund pending appropriation by the Legislature through the normal budget process. Any fees assessed by a vendor for providing electronic licenses are anticipated to be less than the amount currently paid out as vendor compensation. In the event that an electronic vendor, through a competitive solicitation process, charges more than the current allowance for vendor compensation, the bill allows for a surcharge (or convenience fee) of not more than $3 to be assessed by the vendor.

No: 2

FISCAL NOTE

Bill Version: HB 164
(H) Publish Date: 3/29/99

STATE OF ALASKA
1999 LEGISLATIVE SESSION

Revision Date/Time (Note if correction)
Dept. Affected: Law
Title: "...electronic application for and issuance of licenses, permits and tags issued by ... Fish and Game ...
BRU: Criminal/Civil Divisions
Component: 1st-4th Jud Districts; Criminal Appeals/ Spec Lit; Natural Resources
Sponsor: Rules Committee
Requester: Governor
Component Serial No.: 2198-99;2201-03,79,12

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY99) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill will authorize the Department of Fish and Game to use "on-line" and other electronic means to accept and process applications for, and to issue, certain licenses, permits, and tags in appropriate circumstances. The method of implementing electronic issuance would require the concurrence of the Department of Public Safety to ensure the license system continues to serve a useful role in enforcing fish and wildlife protection laws.

This bill will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Division: Attorney General's Office
Phone: 465-5370
Date/Time: 3/12/99, 11:54 AM

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 3/12/99

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FISCAL NOTE

No: 1

FISCAL NOTE

Bill Version: HB 164
(H) Publish Date: 3/29/99

STATE OF ALASKA
1999 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) _____ Dept. Affected Fish and Game
Title Electronic application and issuance of fishing and hunting licenses BRU Administration and Support
Component Administrative Services
Sponsor Rules Committee
Requester Governor Component Serial No. 479

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY99) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

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

Prepared by Kevin Brooks, Director Phone 465-5999
Division Administration Date/Time 3/17/99 11:07 AM
Approved by Commissioner Frank Rue Date 3/17/99
Agency Alaska Department of Fish and Game

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HB 169

4/28/99

Alaska State Legislature

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BUDGET SUBCOMMITTEES
ALASKA COURT SYSTEM
DEPT. OF ENVIRONMENTAL CONSERVATION
DEPT. OF REVENUE

Representative Joe Green
District 10
House Majority Leader

Sponsor Statement

HB 169 - Member approval of political and expansion activities

HB 169 establishes that an electric cooperative may only include the costs of political or expansion activities in its rates if it; 1) advises members that rate monies will be used for such activities, 2) tells them how much of the rate money would be used for such activities, 3) informs the member that the cooperative would not refuse service if the members declines to consent, and finally, 4) receives the consent of the member.

HB 169 empowers consumers by providing them the opportunity to approve rate charges for political and expansion activities. AS 42.05.381 (a) currently restricts rate monies collected by a utility from being used for political contributions or public relations, with some exceptions. However, political and expansion activities *are* being undertaken, which suggests the statute needs clarification.

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

HB 169 takes no position on electric utility industry restructuring; it simply clarifies the law regarding the use of rate monies for political activities.

HOUSE BILL NO. 169

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE GREEN

Introduced: 3/31/99
Referred: House Special Committee on Utility Restructuring, Labor and Commerce

A BILL

FOR AN ACT ENTITLED

"An Act relating to including the costs of expansion activities and political activities in rates of electric cooperatives."

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

*** Section 1.** AS 42.05.381 is amended by adding new subsections to read:

(h) An electric cooperative, whether subject to regulation by the commission or exempt from regulation, may only include the cost of expansion activity in its rates to a customer if it first secures the customer's consent to the inclusion of a charge for expansion activity. An electric cooperative may not refuse to serve or discriminate against a customer who declines to give consent under this subsection. An electric cooperative may only include a charge for expansion activity in a rate if the cooperative

(1) advised its members that a portion of the rates would be used for expansion activities;

(2) identified how much of the rate would be used for expansion

H

activities;

(3) advised the customer that the cooperative would not refuse to serve or discriminate against the customer if the customer declined to consent to the expansion activity charge; and

(4) received the consent of the customer to inclusion of the expansion activity charge in the customer's billings.

(i) An electric cooperative, whether subject to regulation by the commission or exempt from regulation, may only include the cost of political activity in its rates to a customer if it first secures the customer's consent to the inclusion of a charge for political activity. An electric cooperative may not refuse to serve or discriminate against a customer who declines to give consent under this subsection. An electric cooperative may only include a charge for political activity in a rate if the cooperative

(1) advised its members that a portion of the rates would be used for political activities;

(2) identified how much of the rate would be used for political activities;

(3) advised the customer that the cooperative would not refuse to serve or discriminate against the customer if the customer declined to consent to the political activity charge; and

(4) received the consent of the customer to inclusion of the political activity charge in the customer's billings.

(j) In (h) and (i) of this section,

(1) "expansion activity" means an activity that is intended to attract customers to an electric cooperative who, at the time of the activity, are customers of another electric public utility;

(2) "political activity" means an activity intended to

(A) advocate for a political position not directly related to the core services of the utility or for a candidate;

(B) make a contribution to a candidate or political party;

(C) advocate for a public policy issue not directly related to core services of the utility.

* **Sec. 2.** AS 42.05.711(b) is amended to read:

(b) Except as otherwise provided in this subsection, public utilities owned and operated by a political subdivision of the state, or electric operating entities established as the instrumentality of two or more public utilities owned and operated by political subdivisions of the state, are exempt from this chapter, other than AS 42.05.221 - 42.05.281, **42.05.381(h) - (j),** and 42.05.385. However,

(1) the governing body of a political subdivision may elect to be subject to this chapter; and

(2) a utility or electric operating entity that is owned and operated by a political subdivision and that directly competes with another utility or electric operating entity is subject to this chapter and any other utility or electric operating entity owned and operated by the political subdivision is also subject to this chapter.

* **Sec. 3.** AS 42.05.711(d) is amended to read:

(d) The commission may exempt a utility, a class of utilities, or a utility service from all or a portion of this chapter if the commission finds that the exemption is in the public interest. **However, the commission may not issue an exemption from AS 42.05.381(h) - (j).**

* **Sec. 4.** AS 42.05.711(e) is amended to read:

(e) Notwithstanding any other provisions of this chapter, any electric or telephone utility that does not gross $50,000 annually is exempt from regulation under this chapter, **other than AS 42.05.381(h) - (j),** unless the subscribers petition the commission for regulation under AS 42.05.712(h).

* **Sec. 5.** AS 42.05.711(f) is amended to read:

(f) Notwithstanding any other provisions of this chapter, an electric or telephone utility that does not gross $500,000 annually may elect to be exempt from the provisions of this chapter, other than AS 42.05.221 - 42.05.281 **and 42.05.381(h) - (j),** under the procedure described in AS 42.05.712.

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

(h) A cooperative organized under AS 10.25 may elect to be exempt from the provisions of this chapter, other than AS 42.05.221 - 42.05.281 **and 42.05.381(h) - (j),** under the procedure described in AS 42.05.712.

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

(1) energy conservation efforts;

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

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

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

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

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

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

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

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

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

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

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

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

Effect of amendments. — The 1986 amendment added subsection (e).

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

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

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

NOTES TO DECISIONS

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

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

Applied in Alaska Pub. Util. Comm'n v. Greater Anchorage Area Borough, 534 P.2d 549 (Alaska 1976).

HOMER ELECTRIC ASSOCIATION, INC., Appellant,

v.

STATE of Alaska, ALASKA PUBLIC UTILITIES COMMISSION, Appellee.

No. S–1952.

Supreme Court of Alaska.

May 20, 1988.

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

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

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

1. Electricity ⇐11.3(4)

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

2. Electricity ⇐11.3(5)

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

3. Electricity ⇐11.3(4)

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

4. Electricity ⇐11.3(4)

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

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

5. Electricity ⇐11.3(5, 7)

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

C.R. Baldwin, Kenai, for appellant.

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

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

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

II. EXCLUSION OF LOBBYING EXPENSES

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

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

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

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

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

(Emphasis added).

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

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

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

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

6. The amendment, as originally proposed, read:

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

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

bying expenses, advertising and charitable contributions.[7]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. AS 42.06.610(a) provides:

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

12. *See supra* note 3.

13. AS 42.05.111 provides:

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

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

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

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

IV. 100% COST ALLOCATION TO HOMER ELECTRIC

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

MATTHEWS, Chief Justice, dissenting in part.

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

APUC gave three reasons in support of this allocation:

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

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

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

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

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

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

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

v.

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

Nos. S-1667, S-1737.

Supreme Court of Alaska.

May 27, 1988.

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

ANNOTATION

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

by

Jane Massey Draper, B.C.L.

TABLE OF JURISDICTIONS REPRESENTED

Consult POCKET PART in this volume for later cases

I. Preliminary matters

§ 1. Introduction

[a] Scope

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

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

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

3. Although this annotation is con-

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

[b] Related matters

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

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

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

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

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

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

§ 2. Background, summary, and comment

[a] Generally

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

Courts have dealt with advertising

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

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

5. § 3, infra.

6. § 4[a], infra.

7. § 4[b], infra.

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

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

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

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

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

8. § 5, infra.

9. § 6, infra.

10. § 7, infra.

11. § 8, infra.

12. § 9[a], infra.

13. § 9[b], infra.

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

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

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

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

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

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

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

test each situation by the guidelines set forth in Re Utah Power & Light Co. (1952, Utah) 95 PURNS 390, such guidelines seem to state the case nicely: the advertising and promotion expenses of a company are completely within the control of management; the amount to be so expended can be large or small depending on the judgment and discretion of management; if the full amount of this type of expenditure is to be allowed as an operating expense in testing the company's need for additional net revenue, it is most incumbent upon the management that no expenditures be made in this category except those such as are reasonably necessary to fully serve the customers of the company and keep the company in contact with the consuming public as an alert, energetic, forward-looking business enterprise and public servant.

[b] Practice pointers

Counsel practicing before a utility regulating agency on behalf of a public utility seeking a rate increase needs to be aware that the burden of proof is upon the utility to establish that such an increase in revenue is essential.[15] And it is equally true that the one asserting the error of the rate set by the commission has the burden of proving that the order is invalid because it is unjust and unreasonable in its consequences.[16] Although a commission may examine a utility's expenses or cost of service very carefully, and although justification for large outlays is frequently required, an attorney for a utility may be able to prove his case by showing that the present utility rates set by the commission are confiscatory,[17] that utility income is insufficient both to meet overhead and also to give a fair and reasonable return to the utility's stockholders, and that management has handled the utility's affairs in a wise and efficient manner and still has found itself in a financial bind.

If counsel can show the reasonableness of the advertising expenditures by the utility—either by a comparison of such expenses to those of a sufficient number of utilities whose operations are similar in size and type, or by a showing that such expenses have remained a constant percentage of the total operating-expense budget over a significant period of time—and that such advertising expenditures will result in benefits to the ratepayer as well as to the stockholders, his defense of such items would seem to be sufficient. As the court pointed out in New England Tel. & Tel. Co. v Department of Public Utilities (1971) 360 Mass 443, 275 NE2d 493, 59 ALR3d 899,[18] in view of the fact that

15. Application of Hawaiian Electric Co. (1975) 56 Hawaii 260, 535 P2d 1102, 83 ALR3d 951.

16. Fuels Research Council, Inc. v Federal Power Com. (1967, CA7) 374 F2d 842.

17. A bill in equity to enjoin enforcement of rates was held in Southern Bell Tel. & Tel. Co. v Georgia Public Service Com. (1948) 203 Ga 832, 49 SE2d 38, to be the proper remedy for a public utility whose rates set by the commission were clearly confiscatory and violative of due process. It was there explained that mandamus was an inadequate remedy, in that it was not available to require public officials (commissioners) to change their action taken in the exercise of a discretion vested in them by the law, and that it could merely require that these officials act again in the exercise of this discretion vested in them by law, which discretion was subject to errors in its conclusions.

For further discussion of this question, counsel's attention is drawn to the annotation at 8 ALR2d 839.

18. § 7, infra.

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management should be permitted to control advertising expenditures as long as they are within the limits of reason, and so long as these expenses do not exceed what is reasonably necessary and proper in the particular case, there is no ground to distinguish such costs from other necessary and proper expenses. The court explained that to the extent that advertising fosters sound consumer relations or encourages people to invest in a company, it is clear that the consumers, as well as the stockholders, are ultimately benefited through the lessening of the expense of doing business.

If counsel can show the expenses in question to have been incurred for advertising of an informational nature, such as electric or gas utility advertisements directed to energy conservation and the proper use of energy,[19] or communications utility advertisements relating to the proper use of party telephone lines, and the issuance and distribution of telephone directories,[20] or advertisements giving information regarding benefits available to prospective utility employees,[21] the defense of such items of expense would seem to be complete, inasmuch as most informational advertising is considered beneficial to a utility's customers.

Counsel should be aware that promotional expenses are a more controversial item than are expenses incurred in advertising of an informational nature. However, expenses incurred in promotions which can be shown to have added new customers and/or to have sold additional services, and which are reasonable in amount, do not seem to encounter much opposition.[22] But such promotional expenditures have been disallowed by utility commissions in ratesetting cases where it was obvious that there would be no benefit to the ratepayer from such expenditures made by the utility,[23] and, as pointed out in Application of Hawaiian Electric Co. (1975) 56 Hawaii 260, 535 P2d 1102, 83 ALR3d 951, § 9[b], infra, expenses incurred for promotional practices which tend only toward wastefulness or an aggravation of the energy crisis have also recently become highly suspect.

In the area of attempting to justify expenses incurred in a utility's advertising campaign to "explain" its need for additional revenue, counsel will face a formidable array of judicial and quasi-judicial opinions running con-

19. See, for example, Re North Carolina Natural Gas Corp. (1973, NC) 99 PUR3d 237; Re Michigan Consolidated Gas Co. (1973, Mich) 1 PUR4th 229; Re Gas Service Co. (1974, Mo) 6 PUR4th 99; and Washington Utilities & Transp. Com. v Pacific Power & Light Co. (1974, Wash) 7 PUR4th 470.

20. Southern Bell Tel. & Tel. Co. v Georgia Public Service Com. (1948) 203 Ga 832, 49 SE2d 38.

21. Re New York Tel. Co. (1970, NY) 84 PUR3d 321; Pennsylvania Public Utilities Com. v Bell Tel. Co. (1971, Pa) 93 PUR3d 13.

Even such advertising results as obtaining sufficient numbers of new employees to avoid expensive overtime pay, and reducing the cost of handling public inquiries, were held in Re Pacific Tel & Tel. Co. (1954, Cal) 5 PUR3d 396, to be beneficial to the ratepayer and thus the cost of such advertising was allowed as an operating cost.

22. § 9[a], infra.

23. § 9[b], infra.

See, to similar effect, Re Pacific Tel. & Tel. Co. (1972, Mo) 95 PUR3d 1; Re Kansas Gas & Electric Co. (1972, Kan) 95 PUR3d 247; and Re Potomac Electric Power Co. (1975, Md) 10 PUR4th 13.

tra. Perhaps with some additions, the points brought out in the dissenting opinion in Re Southwestern Bell Tel. Co. (1949, Mo) 77 PUR NS 33, might be put forth. There it was stated, in respect to the disallowance of advertising expenses incurred in connection with the rate case, that this advertising, in the form of newspaper advertisements, pamphlets, and bill inserts, had been a proper means which the company employed to inform its subscribers of its need for additional money; that the company should have the right to present its problems to the public using its services; and that it was fair that the company should be allowed a reasonable sum for this purpose so that its customers would not be misled by information from less authoritative sources. Counsel might also note Cincinnati Gas & Electric Co. v Cincinnati (1948, Ohio) 75 PUR NS 97, in which it was held that advertising expenses incurred by a gas and electric utility in presenting its case in the newspapers, while the question of rates was still a matter of negotiation with the Council of the city, would be included in the costs of service.

The question of the allowance of advertising expenses incurred in connection with political issues, such as private versus government ownership and operation of public utilities, has been resolved by utility commissions against the inclusion of such expenses as operating costs for ratemaking purposes, and counsel should be aware that these decisions have been made both on the merits and in accounting procedure determinations. Determinations on the merits have, for the most part, been made in situations involving contributions by a local utility to a national advertising campaign.[24] The Federal Power Commission's decision in Re Alabama Power Co. (1959) 22 FPC 72, 29 PUR3d 209, set forth the situation with regard to such expenditures in the accounting context, and distinguished between those advertising expenses to be charged to an above-the-line advertising account and those to be charged to below-the-line accounts. The commission ruled that nonpromotional advertising of the type sometimes referred to as institutional advertising or as good will advertising, the purpose of which is to foster and maintain public good will rather than being intended for any immediate and direct promotion of sales of electricity or appliances, should be charged to account number 787.2, Advertising; however, Account 538, Miscellaneous Income Deductions, should be charged with the cost of any advertising done for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or ordinances, and approval or revocation of franchises, or for the purpose of influencing decisions of public officers, or of any advertising having any direct or indirect relationship to political matters. The commission explained that the 700 and 800 series of accounts involved operating expenses charged against electric revenues normally collected from the ratepayer (in the language of accountancy, such items are classified "above the line"), while account 538 involved income deductions which, being charged against general corporate income, more directly affected the shareholders. (Such items are referred to as

24. See, for example, Re Consumers Power Co. (1959, Mich) 29 PUR3d 133, and Re Pacific Power & Light Co. (1960, Or) 34 PUR3d 86.

"below the line.") The commission emphasized, however, that this proceeding dealt only with the classification of certain expenditures for accounting purposes, and that the directive requiring political advertising to be in account number 538 did not decide its final disposition for rate purposes.

II. General considerations

§ 3. General rule that corporate management should be permitted to control amount of advertising expenses

In the following cases involving the propriety of allowing advertising or promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts recognized the general rule that corporate management should be permitted to control the amount of advertising expenses incurred by the utility.

Good faith is to be presumed on the part of the managers of a business, and in the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay, the court, speaking to the issue of the allowability of promotion expenses for ratemaking purposes, observed in West Ohio Gas Co. v Public Utilities Com. (1935) 294 US 63, 79 L Ed 761, 55 S Ct 316.

See Trans World Airlines, Inc. v Civil Aeronautics Board (1967) 128 App DC 126, 385 F2d 648, cert den 390 US 944, 19 L Ed 2d 1133, 88 S Ct 1029, an appeal from a final subsidy mail rate determination, in which the court, referring to certain selling expenses, noted the principle that good faith is presumed on the part of the managers of a business regulated by the government, and that—in the absence of a showing of inefficiency or improvidence—their judgment on prudent outlay is not to be set aside by a commission regulating rates.

Public regulation must not supplant private management, the court noted in Southern Bell Tel. & Tel. Co. v Georgia Public Service Com. (1948) 203 Ga 832, 49 SE2d 38, reinstating the advertising expense item the commission had disallowed.

The propriety of spending money for advertising the wares of a utility is for the owners to determine, the court pointed out in Wichita Gas Co. v Public Service Com. (1930, DC Kan) 3 F Supp 722.

In view of the fact that the commission was of the opinion that management should be permitted to control advertising expenses as long as they are within the limits of reason, the expenses incurred therefor would be allowed, the court explained in State ex rel. Dyer v Public Service Com. (1960, Mo) 341 SW2d 795, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1351.

This is a field in which management must be allowed some discretion, within the bounds of good faith and prudent judgment, the court noted in Public Service Co. v State (1959) 102 NH 150, 153 A2d 801, in speaking of the amount claimed for promotion.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from a commission order prohibiting public utilities from making expenditures for promotional advertisements, in which the court pointed out that attempts to disallow promotional expenditures as operating expenses for ratemaking purposes had been held to constitute an invasion of the discretion reserved to corporate management if the expenditures were

designed to produce ultimate benefits to every customer and were not excessive or unwarranted.

The function of a public service commission is that of control and not of management, and regulation should not obtrude itself into the place of management, the court pointed out in considering the commission's action in regard to promotional expenses of the utility in Petition of New England Tel. & Tel. Co. (1949) 115 Vt 494, 66 A2d 135. The court declared that this rule is recognized in all of the cases. The court also noted that the matter of advertising expenses called for the exercise of judgment on the part of the management of the company and that good faith on its part was to be presumed.

§ 4. Factors considered by court in application of rule

[a] Is advertising beneficial to ratepayer?

In the following cases invoiving the propriety of allowing advertising or promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts recognized that one of the factors to be considered in determining whether the company's figures on such expenses should be allowed, reduced, or disallowed as part of the operating expenses was whether or not the advertising engaged in by the public utility benefited the ratepayer.

In El Dorado v Arkansas Public Service Com. (1962) 235 Ark 812, 362 SW2d 680, a minimum gas service charge case, the court stated, in effect, that advertising could be charged to utility expenses where increases in sales resulting therefrom would tend to lower the price paid by consumers.

Expenditures for advertising which did not benefit the ratepayer were disallowed as operating expenses in Application of Hawaiian Electric Co. (1975) 56 Hawaii 260, 535 P2d 1102, 83 ALR3d 951, where the court noted that one of the primary factors which the commission must take into consideration when it fixes rates is fairness to the ratepayer.

Advertising expenses incurred by the company and allowed as administrative costs by the commission would not be disallowed on appeal, where the commission had been unable to find that such advertising would not result in benefit to the ratepayers, the court noted in State ex rel. Dyer v Public Service Com. (1960, Mo) 341 SW2d 795, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1351.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from an order of the corporation commission prohibiting public utilities from making expenditures for institutional advertising, promotional advertising, and promotional practices, in which the court declared that the commission might disallow any institutional advertising expenditures from operating expenses for ratemaking purposes unless the utility established that such expenditures benefited all ratepayers.

[b] Is advertising expense reasonable?

In the following cases involving the propriety of allowing advertising or promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts recognized that one of the factors to be considered in determining whether the company's figures on such expenses should be allowed, reduced, or disallowed as part of the operating expenses was whether the amount expended by the

utility for advertising and promotions was reasonable.

The court noted in West Ohio Gas Co. v Public Utilities Com. (1935) 294 US 63, 79 L Ed 761, 55 S Ct 316, that within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others.

Advertising expenses were allowed where they had not been "excessive nor deemed improper," in Illinois Bell Tel. Co. v Illinois Commerce Com. (1973) 55 Ill 2d 461, 303 NE2d 364.

The court explained in Peoples Gas Light & Coke Co. v Slattery (1939) 373 Ill 31, 25 NE2d 482, app dismd 309 US 634, 84 L Ed 991, 60 S Ct 724, that ordinarily, in the absence of a showing of inefficiency or improvidence, the court will not substitute its judgment for the management's judgment as to the amount of outlay expended in procuring new business or in holding business already obtained.

Where the method used to increase business is appropriate, the amount expended for the advertising is reasonable, and the results justify the expenditure, such expenses are necessary operating expenses, the court explained in Wichita Gas Co. v Public Service Com. (1930, DC Kan) 3 F Supp 722.

The question is whether it clearly appears that the advertising expenses are excessive or unwarranted, the court pointed out in Central Maine Power Co. v Public Utilities Com. (1957) 153 Me 228, 136 A2d 726.

Promotional expenses should have been allowed as operational costs, the court declared in State ex rel. North Carolina Utilities Com. v Piedmont Natural Gas Co. (1961) 254 NC 536, 119 SE2d 469, where the commission had used an unreasonable standard of comparison in disallowing the expenditures, and had otherwise found the company's management to be reasonable and of high quality.

In Columbus v Public Utilities Com. (1950) 154 Ohio St 107, 42 Ohio Ops 186, 93 NE2d 693 (ovrld on other grounds Cleveland v Public Utilities Com., 164 Ohio St 442, 58 Ohio Ops 289, 132 NE2d 216), advertising expenses were allowed as an operational expense where the company's management had not been unreasonable in this respect.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from an order of the corporation commission prohibiting public utilities from making expenditures for promotional advertisements, in which the court explained that promotional expenditures may be excluded from operating expenses for ratemaking purposes if such expenditures are excessive, unwarranted, unreasonable, or incurred in bad faith.

The court in American Can Co. v Davis (1977) 28 Or App 107, 559 P2d 898, upheld the allowance of expenses of an advertising program directed at energy conservation, stating that there was substantial evidence enabling the commissioner to find that the utility's expenditures for such advertising were not unreasonable.

In State v Lone Star Gas Co. (1935, Tex Civ App) 86 SW2d 484, error ref, revd on other grounds 304 US 224, 82 L Ed 134, 58 S Ct 883, reh den 304 US 590, 82 L Ed 1549, 58 S Ct 1051, advertising or new business expenses were disapproved where the company was held not to have supported its expenditures by the quantum and character of evidence required.

See Petition of New England Tel. & Tel. Co. (1949) 115 Vt 494, 66 A2d

135, involving, inter alia, the court's response to questions presented by the briefs of both parties, which the court felt might arise for determination in a court-ordered hearing de novo before the commission, in which the court stated that the advertising expenses of the company should not be disallowed or reduced unless it clearly appeared that they were excessive or unwarranted or incurred in bad faith.

III. Particular types of advertising or promotional expenditures

§ 5. Advertising, generally

In the following cases involving the propriety of allowing advertising expenses incurred by a public utility to be included in operating expenses for rate-making purposes, the courts held that advertising expenses in general, as stated by the utility and allowed by the commission, were allowable.

Responding to the plaintiff cities' claim that advertising expenditures allowed by the commission as an operating expense for rate-making purposes had been excessive, the court in Columbus v Public Utilities Com. (1950) 154 Ohio St 107, 42 Ohio Ops 186, 93 NE2d 693 (ovrld on other grounds Cleveland v Public Utilities Com., 164 Ohio St 442, 58 Ohio Ops 289, 132 NE2d 216), upheld the allowance, explaining that the commission had stated that the determination of what a reasonable expenditure for this purpose should be was not subject to exact determination, and that the commission had been unable to say that the company's management had been unreasonable in this respect.

See Petition of New England Tel. & Tel. Co. (1949) 115 Vt 494, 66 A2d 135, a case in which the court responded to questions, presented by the briefs of both parties, which the court felt might arise for determination in a court-ordered hearing de novo before the commission, and in which the court considered the complaint of extravagant expenditures for advertising by the telephone company. Noting that the matter of advertising expense called for the exercise of judgment on the part of the management of the company and that good faith on its part was to be presumed, the court explained that although these expenses should be scrutinized with care by the commission, they should not be disallowed or reduced unless it clearly appeared that they were excessive or unwarranted or incurred in bad faith.[25]

§ 6. Informational advertising

In the following cases involving the propriety of allowing advertising expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts held that the utility's informational advertising expenditures, including those directed at energy conservation, were allowable.

In Los Angeles v Public Utilities

25. In Re New England Tel. & Tel. Co. (1950, Vt) 83 PURNS 414, a hearing de novo ordered by the court, the commission stated that it was proper to allow as a legitimate operating expense the cost of advertising designed to inform subscribers as to changes in service, its use, closing of directories, and party line relationships, since such advertising generally accrued to the benefit of the individual customer served by the company. The commission questioned the propriety, however, of advertising expense designed to promote the good will of the company and of the Bell System in general, as well as the propriety of advertising expense incurred by the company in explanation and justification of proposed rate increases pending before regulatory bodies.

Com. (1972) 7 Cal 3d 331, 102 Cal Rptr 313, 497 P2d 785, a review of the commission's approval of telephone rate increases, the court upheld the commission's inclusion of the major portion of advertising expenditures in operating expenses. The court, pointing out that advertising which is properly classified as informative, results in more than a mere fostering of good will, and should result in reductions in operating costs and more efficient service to the ratepayer, determined that the commission could properly conclude that expenditures for such purposes were reasonable operating expenses, and that in the absence of a showing that the amount allowed for informative advertising was primarily directed for other purposes, the allowance of the commission should be upheld.

A disallowance of the telephone company's advertising expenses, on the ground that the company already had more applications for telephones than it could fill and therefore should not advertise for more, was found to be in error in Southern Bell Tel. & Tel. Co. v Georgia Public Service Com. (1948) 203 Ga 832, 49 SE2d 38, a suit for an injunction against obstruction of the telephone company from placing in effect emergency rates exceeding those fixed by the commission's order. Explaining that the testimony of the company's witnesses was that the advertising consisted in part of notices in the papers to acquaint the public with the proper use of party lines, others relating to the issuance and distribution of new telephone directories, some to the conversion of services from the manual to the dial telephone—all testimony of the company showing that the money was actually spent for advertising purposes considered by the management to be in the public interest—the court concluded that the advertising expenditures were proper expenses and should have been considered in computing rates.

A rate set by the commission was affirmed in American Can Co. v Davis (1977) 28 Or App 107, 559 P2d 898, notwithstanding the contention that the cost of the utility's advertising program directed at energy conservation should not have been allowed as a ratepayer expense because it was not in the best interests of residential customers. The court stated that there was substantial evidence enabling the commissioner to find that energy conservation is in the public interest, and that the utility's expenditures for such advertising were not unreasonable. The court noted that other regulatory bodies which had considered this issue had allowed conservation advertising expenses.

§ 7. Institutional advertising

In the following cases involving the propriety of allowing advertising expenditures incurred by a public utility to be included in operating expenses for rate-making purposes, the courts held that institutional advertising expenditures made by the utility were allowable.

Holding to be error the action of the department of public utilities in disallowing, as a proper cost of service, nearly half of the claimed advertising expense of the utility, the court in New England Tel. & Tel. Co. v Department of Public Utilities (1971) 360 Mass 443, 275 NE2d 493, 59 ALR3d 899, rejected the department's determination that the institutional advertising relating to attempts to improve the climate of public opinion toward the company or to explain why service was not as good as it had been should be borne by the stockholders of the company. Citing with

approval a New York Public Service Commission decision[26] in which the commission had held that expenditures for institutional advertising were a proper expense for ratemaking purposes, the court noted that the decision stated that what was of concern there were advertisements which were obviously designed to project a favorable image of the company to its customers, its existing stockholders, and potential investors; that to the extent that such advertising fostered sound consumer relations or encouraged people to invest in the company, it was clear that the consumers, as well as the stockholders, were ultimately benefited through the lessening of the expense of doing business; that the trend in modern regulatory decisions was to allow such charges as proper for rate-making purposes. The commission had concluded that in view of the fact that management should be permitted to control advertising expenditures as long as they are within the limits of reason, and so long as these expenses do not exceed what is reasonably necessary and proper in the particular case, there was no ground to distinguish the advertising costs in question from other necessary and proper expenses. The court determined that the department's disallowance of some of the expenditures for advertising on the grounds stated by it was an unwarranted interference with the function and prerogative of the company's business managers and that it was therefore beyond the power and authority of the department. On remand the test year computations were to be made without deduction of such advertising costs, the court directed.

The court in State ex rel. Dyer v Public Service Com. (1960, Mo) 341 SW2d 795, cert den 366 US 924, 6 L Ed 2d 384, 81 S Ct 1351, declined to overturn a decision of the commission to allow, as an administrative expense, a contribution by an electric utility to a private utility power group for several advertisements. In this appeal from a judgment affirming orders of the public service commission made in a utility rate proceeding, the court explained (1) that the commission had found that it was a recognized fact that the principal purpose of advertising is to create good public relations and stimulate a demand for the service or product being advertised, and (2) that the commission was unable to find from the evidence offered that this particular form of advertising would do neither. The court went on to point out that the commission had further stated that in view of the fact that it was of the opinion that management should be permitted to control such advertising expenditures as long as they are within the limits of reason, and in view of the fact that the commission was unable to find that such advertising would not result in benefit to the rate payers, the expenses incurred therefor would be allowed.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from an order of the corporation commission prohibiting public utilities from making expenditures for institutional advertising,[27] in which the court declared that the prohibition on expenditures for institutional advertising was an unreasonable means of protecting rate payers from these expenditures. Noting that this

26. Re Consolidated Edison Co. (1961, NY) 41 PUR3d 305.

27. Institutional advertising was defined as advertising designed to promote the corporate image of the utility and to present it in a favorable light to the public and to potential investors.

did not mean that the commission must allow all institutional advertising expenses as operating expenses for rate-making purposes, the court concluded that the commission might disallow any institutional advertising expenditures from operating expenses for rate-making purposes unless the utility established that such expenditures benefited all rate payers.

Refusing to disturb the commission's allowance of the power company's expenses incurred for trade ally advertising, the court in Commonwealth v Virginia Electric & Power Co. (1971) 211 Va 758, 180 SE2d 675, an appeal from the corporation commission's authorization of electric rate increases, pointed out that although the commission had recently disapproved further use of such advertising in the form engaged in by the company, the commission had refused to eliminate those expenses, finding it reasonable to assume that the company would substitute some other form of promotional activity at an equal or greater cost.

§ 8. Advertising supporting rate increase

In the following cases involving the propriety of allowing advertising expenses incurred by a public utility to be included in operating expenses for rate-making purposes, the courts held that advertising expenses incurred in support of attempts to obtain rate increases should be disallowed.

In Ft. Smith v Southwestern Bell Tel. Co. (1952) 220 Ark 70, 247 SW2d 474, wherein the Arkansas Public Service Commission's condemnation of the company's practice of using the ratepayers' money to conduct an advertising campaign to increase the rates proposed to be charged the ratepayers by the company was approved,[28] the court explained that the commission's language indicated that in hearings for rate increases by any utility, the commission would carefully examine to see how much was being paid for overhead and staff work directed, in whole or in part, at trying to get rate increases from the public. Making no specific reduction in the amount of advertising expenditures claimed by the company as operating expenses, the court did declare that the utility must use all its receipts as though they were a public trust, and that receipts must not be dissipated in an effort to get further increases from the public.

Affirming the commission's disallowance of expenditures during the test year for advertising purposes, including costs of advertising by means of newspaper, radio, and television, ostensibly as a means of informing the public as to the company's situation in connection with the instant application for a rate increase, the court in Southern Bell Tel. & Tel. Co. v Louisiana Public Service Com. (1960) 239 La 175, 118 So 2d 372, noted that proper allowance should be made for ordinary advertising expenses. The court, referring to the commission's statement, explained that after re-

28. The commission, in Re Southwestern Bell Tel. Co. (1951, Ark) 87 PUR NS 97, from which the above appeal was taken, had noted that during the course of the hearing, the propriety of this practice was questioned and that the company had discontinued the practice after the issue had been raised in the hearing. The commission voiced the hope and assumption that the company would not engage in such practice in the future, but apparently took no further action on the matter, stating in its order that the operating revenues and expenses, as discussed in this opinion, were thereby approved.

viewing the rulings of the courts of other states which condemn the practice of utilities in using the rate payer's money to conduct an advertising campaign to increase the rates proposed to be charged to the rate payer, the commission disallowed this item, not on the grounds of impropriety, but because the record clearly showed that these expenditures were abnormal and nonrecurring in character and that their inclusion in the operating expense accounts would distort the test year earnings.

§ 9. Promotion

[a] Expenses allowed or allowable

Under the circumstances of the following cases involving the propriety of allowing promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts held that promotional expenditures made by the utility were allowable.

Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes, the court declared in West Ohio Gas Co. v Public Utilities Com. (1935) 294 US 63, 79 L Ed 761, 55 S Ct 316, reversing on appeal the decree of a state Supreme Court affirming a rate order of the state public utilities commission. The commission had more than halved the expenses claimed by the gas company for procuring new business or endeavoring to procure it, on the ground that anything more than what was allowed by the commission was unnecessary and wasteful. The court responded that the criticism had no basis in evidence, either direct or circumstantial. Noting that good faith was to be presumed on the part of the managers of a business, the court stated that in the absence of a showing of inefficiency or improvidence, a court would not substitute its judgment for theirs as to the measure of a prudent outlay.

In El Dorado v Arkansas Public Service Com. (1962) 235 Ark 812, 362 SW2d 680, a minimum gas service charge case, the court, responding to the contention that expenses incidental to merchandising, such as advertising, should not be allowed as a utility expense, declared that the commission had correctly allowed the expense of company advertising to be charged to utilities expense. The court pointed out that the record reflected that the company engaged in merchandising only such items as were related to its utility business and would tend to increase the sale of gas. The court held, therefore, that the commission had authority to permit the company to charge to utilities expense items of merchandise advertising, and that it did not act arbitrarily in doing so on the reasonable theory that increased gas sales would tend to lower the price paid by consumers.

On appeal from a rate base determination by the public utility commission, the court in Re Honolulu Gas Co. (1935) 33 Hawaii 487, determined that the commission's division of the gas company's expenses, incurred in carrying on a merchandise business devoted to the sale locally of gas stoves, gas heaters, gas refrigerators, and other gas appliances, between utility and nonutility activities, was unwarranted, and that such expenses, including advertising, should have been considered and included in the rate base. The court, pointing out that if the commission was correct in its conclusions that the merchandise activities of the company were nonutility, it followed that the same had no proper place in the rate base, and the

division of expenses on the above basis was justified, explained that the uncontroverted evidence showed that the merchandise business of the company constituted but a small percentage of the company's total operations, and that it returned slight, if any, profit to the company and was carried on solely for the purpose of promoting or increasing the demand for manufactured gas throughout the territory in which the company was supplying that product. Noting that there was ample authority to sustain the principle that a company will not be permitted to charge as an operating expense of its public utility activities separate merchandising or other nonutility enterprises, the court stated that it was well settled that where a gas manufacturing company engages in the sale of gas appliances not as an independent or profit-making vocation but to encourage and stimulate the sale of gas, the merchandising thus carried on is a business activity beneficial to the consuming public because the increased use of gas necessarily tends to lower the rate to the consumers, and the assets and capital thus devoted should be included within the property to be appraised in determining the rate base. Recognizing that here, as in other cases, it was the practice of the gas company to conduct such business partly to aid consumers in securing gas appliances manufactured under standard specifications that would thus render most efficient service to the consumers, and partly, by thus promoting the sale of appliances to be used for additional purposes, to increase the sale of gas, the court concluded that the reasonable expenses incurred in promoting new business or in the endeavor to procure it should be incorporated into the rate base.

Notwithstanding the contention that the commission had erred in allowing excessive amounts expended for advertising by the telephone company to be treated as operating expenses for rate-making purposes, the court in Illinois Bell Tel. Co. v Illinois Commerce Com. (1973) 55 Ill 2d 461, 303 NE2d 364, affirmed the commission's finding that the expenditures had not been excessive or improper. Noting that there was no quarrel with the company's expenditures for "informative" as distinguished from "promotional" advertising, the court stated that the telephone company's position was that a reduction in advertising would injure service and reduce its net earnings. The court referred to the commission's statement relative to the company's advertising and public relations programs, in which the commission had declared that the company's expense in relation thereto had not been excessive nor should it be deemed improper. The commission had gone on to add that in an economic climate involving inflationary spiraling of costs which the utilities cannot avoid and still provide adequate service to the public, it becomes apparent to the regulatory agencies that a company's operating expenses should be closely scrutinized and that those which do not specifically relate to business operations should be excluded for ratemaking purposes in the determination of the company's operating income. The commission had pointed out that this observation had also been made in a recent expression of policy on advertising by the New York Public Service Commission wherein it was stated that since management could control its advertising expenditures, it was not in the interest of anyone to have unnecessary institutional advertising

exacerbate customer resentments at a time when large rate increases were made necessary by increases in the various classes of costs beyond the control of utility management. The commission had concluded that sound business judgment indicated that the belt tightening process should begin in those areas not directly and totally related to the providing of the utility service to the public. The court explained that after the admonition that such expenditures would be carefully scrutinized in the future, the commission had then found that the telephone company's expenditures had not been excessive or improper, and the court stated that from its review of the record, it could not say that the commission's findings were without sufficient support in the evidence.

Denying the exceptions by the commission as to the gas company's advertising expenses to be included in operation costs for ratemaking purposes, the court in Wichita Gas Co. v Public Service Com. (1930, DC Kan) 3 F Supp 722, pointed out that the propriety of spending money for advertising the wares of a utility was for the owners to determine, and concluded that the method used by the gas company to increase its business was appropriate, the amount expended was reasonable, and the results justified the expenditure.

The court in Central Maine Power Co. v Public Utilities Com. (1957) 153 Me 228, 136 A2d 726, sustained the company's exception to the commission's exclusion, as operating expenses, of a large portion of the expenditures made by the company for sales promotions, with the court pointing out that the good faith of the management of the company was not challenged in the slightest degree and that the question resolved itself into whether it clearly appeared that the expenses were excessive or unwarranted, or, stated differently, whether expenses in excess of the allowance by the commission were within the limits of reason. The court, criticizing the commission for unreasonably substituting its judgment for that of the company's management, explained that the items had not been considered by the commission to be as a whole improper or unlawful charges against the ratepayers, and that placing a more than 50 percent reduction on the amounts shown to be required to meet the company's needs in the promotional field, basing such reduction on the ground that an expanding utility such as the electric company should severely reduce expense of this type, was clearly a substitution of the commission for the company in the management of the utility.

Promotion expenses, including those of advertising, for gas appliances and gas utilitization, were allowed in Consolidated Gas Co. v Newton (1920, DC NY) 267 F 231, mod on other grounds, 258 US 165, 66 L Ed 538, 42 S Ct 264, a suit in equity brought to enjoin the defendant commission and state officials from imposing confiscatory rates on the plaintiff gas company. The propriety of the expenses was challenged largely because the sale of gas and of machines to burn gas had not increased much. The court pointed out that the truth appeared to be that the constantly increasing use of electricity for illumination had driven out gas more and more, until, to hold its sales, the plaintiff gas company had to promote the use of gas for heating and cooking. The court noted that the company had succeeded in achieving a slight increase in sales, and its officers attributed their ability

to do even this well to such promotions. Pointing out that their decision was not now open to question since they were under a duty to keep up their sales so far as they could, and to push the use of gas in any new ways in which the public would use it, the court determined that even under municipal management, advertising, when not pushed to the useless extreme which competition too often engenders, is a necessary function.

The commission's refusal to allow the gas company's promotional expenditures as operational costs had been found by the trial court to be in error of law, and the court in State ex rel. North Carolina Utilities Com. v Piedmont Natural Gas Co. (1961) 254 NC 536, 119 SE2d 469, an appeal from the commission's order canceling a proposed new rate, affirmed such finding. The commission had disallowed the amount in excess of the national average of promotional expenditures for companies retailing natural gas, but the court determined that the gas company's expenditures should have been compared to those of companies in the defendant company's class instead of to the national average. Pointing out that the gas company had, within recent years, changed over from manufactured to natural gas, that all its customers had to be "sold" on natural gas, that new customers had to be won, and that competition with electricity and oil had to be met, the court added that the company was faced with promotion in a new field at a time when promotional expenditures throughout the nation (on which the national average was figured) included those of many older companies which had been in the field for years with a well-known product and an established market. The court, noting that the commission had recognized the high quality of the company's management and that the company was rapidly expanding its facility by a heavy promotional program, remanded the proceeding to enable the commission, inter alia, to ascertain the company's true operating expenses.

See State v Oklahoma Gas & Electric Co. (1975, Okla) 536 P2d 887, an appeal from commission order prohibiting public utilities from making expenditures for promotional advertisements,[29] wherein the court declared that such prohibitions were invalid. The commission had argued that if such expenditures did not sell energy, they were wasteful, and rate payers should not be required to pay them, but the court responded that this argument did not justify prohibiting such expenditures, because the same result could be obtained by excluding such expenditures from operating expenses for rate-making purposes. To the opposite argument, that if such practices sold energy, they increased the use of fossil fuels and should be prohibited, the court replied that many promotional expenditures are designed to achieve conversion to competing utilities, and to instill preferences for one form of energy over another, rather than to increase overall consumption of energy, and that since the commission did not have jurisdiction over appliance manufacturers and distributors, and since the proposed prohibitions did not prohibit appliance manufacturers and distributors from advertising their products, the prohibited practices and expenditures had little, if any, effect upon overall consump-

29. Promotional advertising was defined as advertising designed to increase usage, obtain new customers, or encourage use of one form of energy over another.

tion of energy. As long as appliance manufacturers and distributors were allowed to advertise their products, it was arbitrary to deny utilities the right to counteract this advertising at the expense of the stockholders on the ground that promotional advertising and practices by utilities increased overall consumption of fossil fuels, the court explained. Turning then to testimony that if peak load demand for electricity exceeded peak capacity, a brownout would occur, the court declared that if a particular utility faced a foreseeable danger of being unable to meet peak demand, the commission might have authority to prohibit it from engaging in any promotional activities which would further increase its peak demand, but the court pointed out that this did not justify a rule prohibiting all utilities from engaging in such activities. Noting that attempts to disallow promotional expenditures as operating expenses for ratemaking purposes had been held to constitute an invasion of a discretion reserved to corporate management if the expenditures were designed to produce ultimate benefits to every customer and were not excessive or unwarranted, the court concluded that promotional practices which were reasonably calculated to improve the utility's load factor and benefit all consumers by reducing the average unit cost of energy were not unjustly discriminatory, and prohibitions against such practices constituted an invasion of the discretion reserved to corporate management.

[b] Expenses reduced or disallowed

Under the circumstances of the following cases involving the propriety of allowing promotional expenses incurred by a public utility to be included in operating expenses for ratemaking purposes, the courts held that promotional expenditures made by the utility should be reduced or disallowed.

See Trans World Airlines, Inc. v Civil Aeronautics Board (1967) 128 App DC 126, 385 F2d 648, cert den 390 US 944, 19 L Ed 2d 1133, 88 S Ct 1029, a case involving a government subsidy mail rate determination rather than a determination of consumer rates, in which the court upheld the Civil Aeronautics Board's disallowance of a specified amount of selling expense as in excess of the amount appropriate under the honest, economical, and efficient management criterion, over the airline's contention that the disallowance was an unwarranted interference with the airline's managerial discretion. The court explained that once the principle of setting a ceiling on selling expenses was established, it was plain that the Board had acted reasonably and that its action had support in the record. In response to the airline's charges of interference with managerial discretion, the court pointed out that a company which sought and pocketed the boon of subsidy or protective contracts could not assail the restraint inherent in accountability to government officials as a tyrannical burden. The government officials were themselves accountable in court for compliance with the rule of law applicable to administrative agencies, the court explained, concluding that the petitioner had not established the agency's action in this case to be arbitrary or capricious.

In reversing that part of the public utility commission's ratemaking order which had allowed a sizable sum for promotional expenses, the court in Application of Hawaiian Electric Co. (1975) 56 Hawaii 260, 535 P2d 1102, 83 ALR3d 951, noted that the bur-

den was always on the applicant to prove justification for a requested rate increase, and that the electric company had the burden of showing the propriety of its request for these promotional expenditures. The court held that the electric company had not carried its burden. Part of the expenditures claimed were for allowances or payments to owners and developers who built all-electric homes and apartments and advertised them for sale as such, the court pointed out, declaring that in the context of present times, these promotional expenditures on the part of a regulated public service company were wasteful and unreasonable, and their allowance by the commission was an abuse of its discretion. The disturbing aspect of the public utility commission's decision to allow expenditures for these programs was the rationale behind it, the court observed, noting that the basis of the allowance seemed to be the circuitous reasoning by which an earlier allowance of promotional expenditures to the applicant's competitor, on the ground that the expenditures were necessary to attract away customers from the applicant, now necessitated a like allowance to the applicant. Disapproving the public utility commission's consistent failure to meet squarely the issue of the reasonableness of competitive advertising expenditures, the court explained that one of the primary factors which the public utility commission must take into consideration when it fixes rates is fairness to the ratepayer, and that it was obvious that the particular type of advertising competition involved here did not benefit the ratepayer. Turning then to the propriety of allowing a sizable sum for promotion programs designed to increase the use of electricity and purportedly to improve the company's load factor, the court indicated that these programs consisted essentially of direct advertising and contributions to dealer and distributor advertising of certain electric appliances. The electric company was, in effect, subsidizing the promotional activities of dealers and distributors whose commercial transactions formed no part of the electric company's own business venture, the court remarked, distinguishing such expenses from those of the gas company competitor, which sold gas appliances as an essential component of its commercial operations. The electric company failed to satisfactorily show how much of an improvement in its load factor these expenses could reasonably be said to make, the court observed, adding that since the appliances being promoted by the electric company were those generally in use during peak load periods, it was difficult to see how the electric company could argue that these expenses encouraged the increase of off-peak utility loads. In conclusion, the court spoke of the stark reality of energy problems and environmental concerns, and insisted that in the face of dwindling oil supplies and spiraling costs, promotional practices which were wasteful or which only served to aggravate the energy crisis should be viewed by a regulatory agency with extreme caution.

The commission, in setting new gas rates, had disallowed as operating expense one-third of the amount claimed by the appellant gas company as new business expense, and in Peoples Gas Light & Coke Co. v Slattery (1939) 373 Ill 31, 25 NE2d 482, app dismd 309 US 634, 84 L Ed 991, 60 S Ct 724, the court affirmed the commission's action in this regard, viewing the company's promotional prac-

tice of rental purchase plans for putting gas appliances on the premises of customers as creating an unduly large expenditure for business promotion to be charged as an operating account. The court explained that since gas appliances were sold by many other dealers, and since those sales made by the gas company, if conducted as a separate business, would not be subject to regulation, the advisability of such a method of promoting sales of gas and the propriety of the amount thus expended became matters entirely for the commission. Concluding that the action of the commission in disallowing part of the claimed promotional expenses was not unjustified, the court pointed out that in the very nature of things, a sale of outside articles to promote the sales of a commodity regulated by a utility must be controlled by the commission, since otherwise it would be possible to either raise the operating expenses to unreasonable heights or convert the utility into a mere medium for the sale of appliances and merchandise not regulated by the commission.

In Boston Consol. Gas Co. v Department of Public Utilities (1951) 327 Mass 103, 97 NE2d 521, a suit in equity to determine whether rates permitted by the department were confiscatory, it was determined that costs involved in the sale of gas appliances, including the cost of advertising appliances for sale, stood on a different footing than did expenses of sending repairmen to customers in response to complaints of leaks, faulty operation of appliances, etc., which were considered proper charges to the operating expenses of a gas business. The court noted that the gas company had treated the appliance business as a separate entity for most purposes, but had sought to treat the expenses of the appliance business, including the advertising expenditures, as a part of the company's business of supplying gas. The company had argued that gas could not be bought by the consumer like ordinary merchandise, but could be bought only by having it flow through appliances of one kind or another; that apart from these appliances it could not be advertised effectively; and that whatever promoted the flow of gas through appliances promoted the sale of gas. The court observed that the difficulty with the argument seemed to be that it either fell short of proving the point or it proved too much: if the appliance business was really a part of the gas business, the gas customers were entitled to have the profits from appliances included in the earnings of the gas business, but if it was really a separate business, its expenses ought not to be charged against the gas customers. The court cited an earlier case[30] in which it had been stated that the sale and servicing of gas appliances constituted a separate business from the supplying of gas, so that it would not be fair, on the one hand, to charge all customers with higher rates so that some might buy appliances and have them serviced at less than cost, or, on the other hand, to lower the cost of gas service because of a profit on those items. The court recommitted the case for purposes of having the company's earnings determined by correct legal standards.

While the public utility commission had determined that in the absence of evidence of bad faith or imprudence,

30. Lowell Gas Co. v Department of Public Utilities (1949) 324 Mass 80, 84 NE2d 811, cert den 338 US 825, 94 L Ed 501, 70 S Ct 71.

the advertising and promotional expenditures by an electric company were within the limits of the discretion of the management, the court in Public Service Co. v State (1973) 113 NH 497, 311 A2d 513, upheld the contention that all promotional advertising expense should be disallowed because the company and the industry was encountering increased unit costs and decremental profits. The court noted that it was not disputed that increased demand had caused the purchase of power from outside sources so that increased costs would result, and further observed that the parties making the contention disclaimed any concern with past advertising and promotion, seeking only to preclude further such expense. Pointing out that the merchandise and promotional advertising aggregated a comparatively insignificant figure, the court nevertheless held that under present conditions, promotional advertising might well be disallowed, and distinguished the holding of Public Service Co. v State (1959) 102 NH 150, 153 A2d 801,[31] which, the court explained, was decided under circumstances quite different from those of this case and could not stand in the way of disallowance of proposed expenses where appropriate under current conditions.

The commission's disallowance, for rate-making purposes, of certain claimed advertising or new business expenses, was upheld in State v Lone Star Gas Co. (1935, Tex Civ App) 86 SW2d 484, error ref, revd on other grounds 304 US 224, 82 L Ed 134, 58 S Ct 883, reh den 304 US 590, 82 L Ed 1549, 58 S Ct 1051, a suit by the state to restrain the defendant gas company from violating a rate setting order of the commission. The court explained that only a small amount of advertising was proved, nothing in proportion to the charges made for it, and concluded that the high annual expense claimed for advertising was not supported by the quantum and character of evidence required.

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31. In the above-cited case, wherein the commission's action in making no reduction in the questioned accounts was upheld, the court voiced its unwillingness to question the judgment of the commission in its treatment of the amounts claimed by the company for sales and new business, of which promotional expenses were a part.

Special Edition--A hard look at competition, unions and change

MEA POWERLINES

Vol. XII, No. 141 | Published by Matanuska Electric Association, Inc. | November 1997

Competition heats up

Chugach goes after a neighbor's customers

Chugach Electric Association has declared it intends to serve customers in a sister utility's service territory, firing the opening shot in what could become a competitive war for electric utility customers.

Chugach fired a shot across Anchorage Municipal Light & Power's bow in the form of a Sept. 19 letter saying it intended to begin serving one or more of ML&P's customers – beginning with a condominium office complex that houses Ray Kreig & Associates, among other firms. Kreig is a member of Chugach's board of directors.

Chugach has also approached several other ML&P customers, including the Anchorage Daily News and Columbia Alaska Regional Hospital, claiming it can provide them with electricity at a lower cost than ML&P charges.

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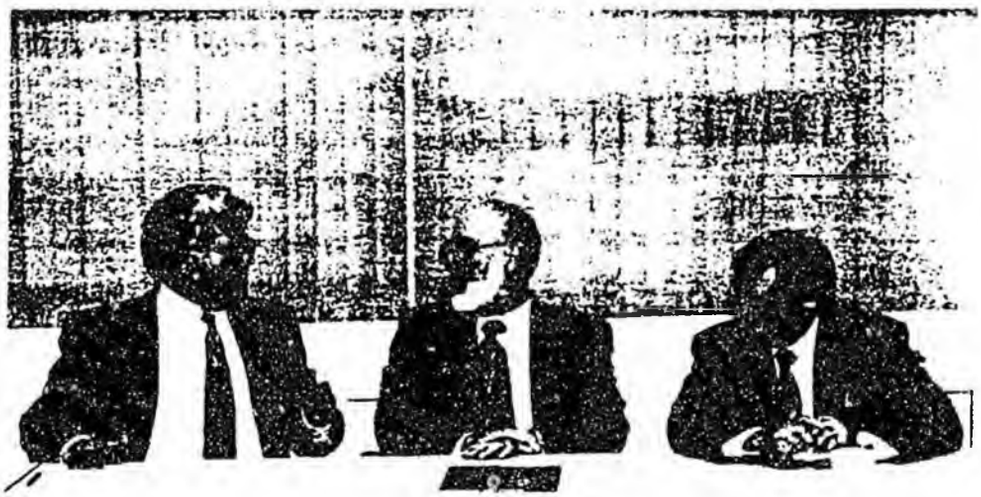

HYDRO PURCHASE -- At the October signing, ownership of the Eklutna Hydroelectric Plant transfers from the federal government to MEA. Chugach Electric Association and Anchorage Municipal Light & Power. From left are MEA General Manager Wayne Carmony, Chugach General Manager Gene Bjornstad and Municipality of Anchorage Operations Manager George Vakalis. MEA operates the plant. (See January 1998 Powerlines for a feature story.)

IBEW wages 'corporate campaign' at MEA

Surrounded by customer-hungry utilities, MEA management believes the co-op needs to become more competitive without sacrificing customer service.

"This is a difficult task, even in the best of circumstances," said co-op spokesman Bruce D. Scott, "but MEA has been gearing up for competition in the midst of an all-out effort to resist it by higher-ups from the International Brotherhood of Electrical Workers."

MEA and the IBEW, Local 1547, are presently negotiating separate contracts for the Information Services (computer) and Eklutna power plant employees represented by the union. But even as they sit at the bargaining table, the IBEW is waging a "corporate campaign" at the co-op, said Scott, MEA director of member and public relations.

In a corporate campaign, "the union uses all the leverage at its disposal to harass the company and make fighting the union so distracting and so expensive that management caves in on its bargaining demands," says an article in *Electric Light and Power Magazine.*

Author Ronald Meisburg writes that the tactics used in a corporate campaign may include conducting a public relations campaign against company management and obtaining unfavorable coverage in the media. He says other tactics include "inundating the company with information requests" and "filing unfair labor practice charges" against the company.

Whether or not IBEW leaders read Meisburg's article, Scott said they seem

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IBEW wages 'corporate campaign' at MEA

Continued from Page 1

to be following the blueprint for a corporate campaign, such as by making an attempt to bury MEA in information requests, Scott said.

Human Resources Director James Woodcock said that this year's correspondence from the IBEW requesting information from the co-op's management fills two fat binders.

Examples include a request from the IBEW for all daily time sheets for all linemen for a period of five years – literally thousands of pieces of paper, he said. In a separate request, a union representative asked for a list of all jobs performed by engineering supervisors from Aug. 1, 1996 to date, "along with all documents related to the jobs." The demand gave MEA less than 10 days to come up with the information.

While information requests are time-consuming and costly, Scott said, "two of the biggest weapons in the IBEW's arsenal are the grievance and the unfair labor practice complaints."

Between Jan. 1, 1996 and Oct. 20, the IBEW filed 84 grievances with the co-op and a dozen unfair labor practice complaints with the National Labor Relations Board (NLRB) against MEA. Scott said 40 of those grievances were filed through Oct. 20 of this year.

"The grievances cost the co-op thousands of dollars in attorneys' fees, in addition to consuming a great deal of staff time and associated in-house expenses," he said. "If the corporate campaign continues through the end of the year, MEA's legal expenses for labor relations are on a pace to average $240,000 per year since 1995," he said.

"But much more is at stake than attorney fees," he said. "Let's take one example, a disagreement that crops up with the IBEW on a regular basis – whether to enroll employees in the IBEW's $1 billion pension fund or the national plan MEA participates in."

"The national plan most of MEA's employees are enrolled in has performed so well that MEA has frequently enjoyed a moratorium on investing in the fund, saving the co-op about $2 million since 1994 and $5.5 million in the past decade," he said. "During this 10-year period, our members would have had to pay out millions of additional dollars if the union's pension plan had been in place."

Scott said that in the normal course of events, grievances are filed with the company and, if management and the union are unable to resolve them, the IBEW has the option to send them to arbitration (see box).

"Lately, however, the union, in its enthusiasm for the corporate campaign, has sent grievances straight to arbitration, before MEA management has even seen them," he said.

"The IBEW has even filed a complaint over our bylaws with the NLRB," he said. The union contends that a bylaw amendment proposed and approved by MEA's members last year is unlawful because it effectively excludes IBEW members and interdependent relatives from serving on the co-op's Board of Directors.

Subcontracting a concern

Many of the grievances filed this year stem from an amendment to MEA's bylaws approved by the co-op's members in 1994, Scott said. The amendment requires the co-op to engage in "free, open and competitive bidding" and says MEA cannot require contractors to sign labor agreements with the IBEW or any other union. Chugach Electric Association has a similar bylaw.

"This bylaw has the effect of placing IBEW members in competition with nonunion workers, as well as members of other unions," Scott said.

MEA awarded several major construction contracts this year to a nonunion firm – a firm that won the bids in free, open and competitive bidding, he said. "Since then, the IBEW has stepped up its corporate campaign, turning in stacks of grievances and unfair labor practice complaints, sometimes on a daily basis, even though our labor agreements allow MEA to subcontract work."

Woodcock said that about a third of the complaints filed in 1997 appear to be tied to MEA's award of contracts to the nonunion firm, Irby Construction, one of several contractors performing work for MEA this year.

'Preparation' expense

In 1996, the IBEW filed 40 grievances and four unfair labor practice (ULP) complaints. Later, it withdrew 14 of the grievances and three of the ULPs (the NLRB

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How the grievance process works

In short, the grievance process works like this: A grievance is filed by the union and submitted to the company. The company and the union discuss the issue to see if the two parties can resolve it. If it is not resolved to the union's satisfaction, the IBEW can ask that the grievance proceed to arbitration.

Arbitration is a process whereby the parties select an individual to act as an arbitrator. The arbitrator listens to the arguments on each side and then issues a decision. The arbitrator has the authority to determine whether the grievance has merit and whether or not the company should be ordered to take steps to remedy the complaint. The arbitrator also has the authority to deny the union's grievance.

In two of MEA's three bargaining union agreements – the Engineering, Operations and Accounting unit and the Information Services unit, respectively, the employee is supposed to discuss the issue of concern with his or her supervisor and the next level of supervision prior to filing a grievance.

Under the third agreement, which covers the "Outside" unit which includes linemen, meter readers and other employees, the process starts with a grievance. MEA is negotiating an agreement covering a fourth work unit consisting of employees at the Eklutna Hydroelectric Plant.

Approximately one-half of MEA's workforce is nonunion.

Competition heats up in the Anchorage Bowl

Continued from Page 1

Chugach unilaterally declared it would pay ML&P a rental fee – called a "wheeling" charge – for using ML&P's lines to serve customers that presently "belong" to the municipal utility. MEA analysts said the rate chosen by Chugach "has no demonstrated basis in fact." It would take a fairly extensive study, and likely hearings before the Alaska Public Utilities Commission (APUC), to determine what the wheeling charge should be, and whether Chugach should even be allowed to pay one, the analysts said.

ML&P responded to Chugach's letter by filing a complaint with the APUC. Its complaint says ML&P is certified by the commission to provide service in an exclusive territory; Chugach, therefore, lacks the authority to provide service to customers within ML&P's territory.

Both utilities provide electrical service in Anchorage. ML&P serves an area sweeping north of Tudor Road, west of Boniface Parkway and east of Arctic Boulevard. Chugach serves most of the remaining Anchorage area. MEA provides service to Eagle River and Chugiak in the northern part of the Municipality of Anchorage.

Chugach representatives have stated that the APUC has the authority to determine when and where utilities can compete. But just in case that argument fails, Chugach is supporting a bill in the state legislature that would expressly give the APUC authority to regulate competition.

In the waning hours of the last legislative session, Chugach lobbyists introduced a different bill that would allow Chugach to compete with ML&P. The bill is now in the House of Representatives' Labor and Commerce Committee.

"MEA is opposing the bill because it would allow Chugach to set the rules for competition statewide, without grass roots involvement from the state's other utilities," said MEA General Manager Wayne D. Carmony. "There is a chance that the state could rush into defining how competition will be practiced before we assess the impact on ratepayers."

"There is a possibility, for example, that power providers would sell electricity at a discount to large commercial users. But because the fixed costs of a utility's investment do not go away, this could result in increased costs to residential customers," he said.

Carmony said that a competitive battle is also being waged by private energy firms trying to do just that – pick up the largest customers at a discount.

An Anchorage-based firm called Alaska Power Systems is marketing on-site diesel generators to Copper Valley Electric Association customers in Glennallen and Valdez. Another private firm, Aurora Power Resources (APR), is pooling its large commercial natural gas customers into one group "and going to all the power generators in the Railbelt and asking them to bid for the group,"according to an APR spokeswoman.

In Fairbanks, Golden Valley Electric Association (GVEA) recently signed a power supply contract with ML&P. GVEA previously had purchased as much as 300 million kilowatt-hours per year from Chugach, at less than half of what Chugach charges MEA. Chugach responded by suing GVEA for breach of contract.

MEA spokesman Bruce D. Scott said that increased competition has not been without its costs, particularly in the arena of legal expenses. MEA invested a considerable sum to fight off hostile takeover at-

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MEA's next Board of Directors meetings:

Monday, November 10 - 7 p.m.
Monday, December 8 - 7 p.m.

at MEA's main office in Palmer.
Call 745-3231 for directions.

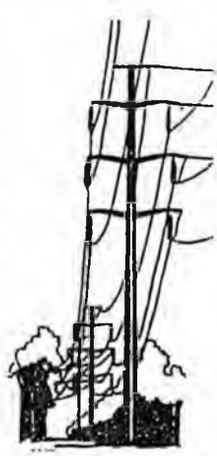
Web site: www.Matanuska.com

Board of Directors:

Barbara J. "Tamie" Miller *Acting President*	376-5636
William A. "Bill" Folsom *Secretary-Treasurer*	745-4339
Rodney R. Cottle	376-5711
James S. Hermon	745-3558
Frank G. Mielke	688-9754
Douglas R. Mills	745-3867
Wayne D. Carmony *General Manager*	745-9211

Who's who among Railbelt utilities

A member-owned cooperative, Chugach Electric Association, serves approximately 66,600 retail customers in Anchorage and provides wholesale electricity to MEA, Homer Electric Association, the city of Seward, Golden Valley Electric Association (GVEA) in Fairbanks and Chugach itself.



Owned by the Municipality of Anchorage, Anchorage Municipal Light & Power (ML&P) serves some 46,000 customers in Anchorage and recently signed a five-year contract to supply wholesale power to GVEA, in competition with Chugach.

Incorporated in 1941 as a member-owned cooperative, MEA serves 34,000 customers in the Chugiak-Eagle River area and throughout the Mat-Su Valley.

What's at stake for the IBEW

The International Brotherhood of Electrical Workers' corporate campaign at MEA is one of the ways the union is working to resist competition, said Bruce D. Scott, MEA director of co-op member and public relations.

"The IBEW is fighting to negotiate exclusive labor agreements and maintain the ones it has," Scott said. "The 5,000 or so IBEW members have had a fairly captive labor market in Alaska for decades. Now they're facing increased competition from nonunion workers, who make up the majority of Alaskans, as well as from workers in other unions."

Scott noted that the members of both MEA and Chugach Electric Association have changed their respective bylaws during the past few years to demand the utilities engage in "free, open and competitive bidding." Both sets of bylaws say that bidders may not be required to sign labor agreements with the IBEW or any other union.

"This throws open the doors to competition," he said, adding that the availability of such "open bid" work could even attract more skilled workers to Alaska.

General Manager Wayne D. Carmony said the electric industry as a whole is becoming much more competitive.

"This is forcing employers to operate more efficiently, to change the way we do business," he said. "We've always been extremely cost-conscious at MEA, but we're under pressure to become even more cost-efficient and concerned about the costs we pass on to our members than we have been in the past."

He noted that MEA has instituted three rate reductions – and no rate increases – during the past 18 months.

Scott said that IBEW, Local 1547, appears to be in a financially healthy position to wage its corporate campaign at MEA (See Page 1) and tackle competition in its labor market.

According to a federal report the IBEW filed, the local had revenues of more than $6.5 million in 1996 and assets with a fair market value of nearly $1.7 million. All but $200,000 of its revenues came from its dues-paying members. Scott said the dues represent only a fraction of the value of the contracts it negotiates for its members. The union paid out some $2.1 million in gross salaries to its union hall employees in 1996, as well as $122,000 in allowances and disbursements, says the report filed with the U.S. Department of Labor.

IBEW's 'corporate campaign'

Continued from Page 2

dismissed the fourth) – a third of the 44 complaints it filed. Scott said there is a possibility the union may drop some of the dozens of grievances it has filed in 1997. But even if the union eventually drops some of its complaints, they are extremely costly to MEA and its members, he said.

"The union may know in advance that it intends to drop a grievance at some point in the future. But the co-op has to treat every complaint as if the IBEW planned to take the issue to arbitration or file a complaint with the NLRB," he said.

"Filing grievances is one way for the IBEW to put pressure on MEA management to comply with the union's demands," he said. "Filing grievances and unfair labor practice complaints forces the co-op to hire attorneys to defend its members' interests. The IBEW's representatives then turn around and accuse management of having bad labor relations and 'wasting' funds on attorneys."

Since the IBEW began the corporate campaign, the charges against management have become part of the campaign rhetoric during the annual election for MEA directors, he said.

"Regardless of what happens Outside," Scott said, "MEA will do its best to represent the interests of our members, while preparing for the larger competitive battle with other electric utilities and private power providers."

Competition heats up

Continued from Page 3

tempts by Chugach in 1994 and 1995, as well as tens of thousands of dollars for APUC proceedings, he said.

He said the co-op also spent $179,000 in a successful effort to defeat a $5 million lawsuit filed by GVEA. The Fairbanks utility attempted to force MEA to upgrade some of its lines to allow other utilities to ship more cheap power to GVEA without providing sufficient compensation to MEA or giving adequate consideration of safety and related issues, he said.

"It is too soon to predict the shape of competition, or even if we will truly have it here in Alaska," he said. "In the Lower 48, there is more impetus for competition because major transmission lines flow from one state to another, enabling an electric utility in Georgia, for example, to purchase wholesale power from a power generation company in Florida. Alaska's power lines are all in-state."

Scott said a recent Federal Energy Regulatory Commission order directed electric utilities under its jurisdiction to allow others to use their transmission lines to provide electricity, charging them the same rates the utilities would charge themselves to provide power.

FERC also directed those utilities to "unbundle" services they provide to encourage competition, a process that ultimately could require a utility such as Chugach to break its generation, transmission, and distribution components into separate components or companies.

"Unbundling is a prerequisite if you're going to identify the costs of using a transmission or distribution line, such as Chugach is proposing to do with ML&P's lines," Scott said.

Carmony said that in its proposed 1998 budget, MEA is dividing itself on paper into a "wire company" and "service company" to better identify and control costs.

PowerLines is published monthly by Matanuska Electric Association Inc., a nonprofit electric cooperative owned and operated by the people it serves.

MEA's goal is to provide reliable power at the lowest possible cost.

Questions and suggestions regarding this publication should be addressed to Bruce D. Scott, CREC or Pamela Sadloske in Member and Public Relations, 745-3231.

To report a power outage, call 745-3231 or MEA's toll-free number, 800-478-5150.

Matanuska Electric Association, Inc.

P.O. Box 2929
Palmer, Alaska 99645-2929
Telephone: (907) 745-3231
Fax: (907) 745-9328

March 27, 1998

Mr. James R. Hays
10828 Steeple Drive
Eagle River, AK 99577

Dear Mr. Hays:

Thank you for your interest in Matanuska Electric Association. You have written to request:

1. The annual budget for the Member and Public Relations Department for 1994,
2. The annual budget for the Member and Public Relations Department for 1995,
3. The annual budget for the Member and Public Relations Department for 1996,
4. The annual budget for the Member and Public Relations Department for 1997,
5. The annual budget for the Member and Public Relations Department for 1998,
6. A complete breakdown of the public relations sponsorship, donations and contributions for 1994,
7. A complete breakdown of the public relations sponsorship, donations and contributions for 1995,
8. A complete breakdown of the public relations sponsorship, donations and contributions for 1996,
9. A complete breakdown of the public relations sponsorship, donations and contributions for 1997,
10. A complete breakdown of the public relations sponsorship, donations and contributions for 1998,
11. The annual meeting expense for 1994,
12. The annual meeting expense for 1995,
13. The annual meeting expense for 1996,
14. The annual meeting expense for 1997,
15. The annual meeting expense for 1998,
16. The "Powerlines" production and printing expense for 1994,
17. The "Powerlines" production and printing expense for 1995,
18. The "Powerlines" production and printing expense for 1996,
19. The "Powerlines" production and printing expense for 1997,
20. The "Powerlines" production and printing expense for 1998,
21. "All costs pertaining to the publication of the Matanuska Electric Association Members Only Coupon Savings Book, including but not limited to staff time soliciting participation, printing costs, layout and design, distribution and any other associated costs to compile and publish (the) MEA Coupon Savings Book.

As the "proper purpose" of the request, you state that you want the information to "answer outstanding questions regarding the MEA's public relations objectives, the cost-benefit analysis and whether this is an expense that is appropriately factored into my rate base."

In our judgment, there is no relationship between the information you have requested and the stated purpose. However, we will provide the attached 1998 budget information as a courtesy, without waiver of our position that all requests for other than routine information must state a proper purpose. Enclosed is a copy of the 1998 Operating Budget approved by Matanuska Electric Association's Board of Directors. Including memberships in associations,[1] claims settlements, customer service and information, annual meeting, division personnel wages and benefits, marketing/sales expense, economic development, and other items, the Member and Public Relations Division's 1998 budget is $861,100.

The other information you request is extensive and not readily available. Before I embark upon what could be a timely and expensive research project,[2] please help me to understand how the information you request will assist in accomplishing your stated objectives. In addition, please provide some details regarding the "outstanding questions" you have regarding MEA's public relations objectives. Perhaps I could address them directly.

MEA's 1998 budget, the same as those adopted in the 1994-97 period you cite, was developed by management at the direction of the member-elected Board of Directors, and approved by the Board. I am certain the Board concluded the expenses were adequately factored into our rate base, particularly since the Board has worked diligently to reduce expenses and, in fact, has approved two rate reductions during the past 12 months.

Mr. Hays, please understand that your inquiry comes at the busiest time of the year for our department, as we are preparing for the Annual Membership Meeting on April 30.

Sincerely,

Bruce D. Scott, CREC
Director of Member and Public Relations

BDS/prw
cc: Consumer Protection Division, Alaska Public Utilities Commission

---

[1] Memberships include dues for the National Rural Electric Cooperative Association and Alaska Rural Electric Cooperative Association, Northwest Public Power Association and approximately two dozen national, state and local associations, including chambers of commerce.

[2] The applicable MEA Board policy requires you to prepay for that effort.

HB 174

4/28/99

Alaska State Legislature

REPRESENTATIVE
JERRY SANDERS
District 19

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Official Business

COMMITTEES:
Co-Chair Resources
Labor and Commerce
Transportation

Sponsor Statement
HB 174

Good public policy dictates that those who are elected by the polity have the right and the responsibility to implement their own perspective and agenda on the operational management of the organization they were elected to by selecting and hiring paid staff of their own chosing. This holds true with the President of the United States, the Governor, and on down through the ranks of municipal forms of government. In each case the elected executives are granted the authority to select staff they have confidence will implement the agenda favored by the elected official.

When first organized under the Rural Electric Association, Alaska Cooperatives were beholden to this policy by a mandate from REA that dictated no General Manager's contract should exceed three years, the typical term of the elected boards of director of cooperatives. Since the abolition of REA, there is no official policy on the record to reinforce this traditional limit on cooperative executives' contracts.

Indeed, since the demise of REA, we have seen the implementation of at least one utility cooperative General Manager contract that essentially grants a perpetual term through a unique automatic renewal clause that requires the Board to take affirmative action to negate the automatic renewal of the contract for another year on a five year term.

In the case cited above, if a new board of directors wished to terminate the current General Manager's contract, they could find themselves obligated to in effect buy-out the remainder of the term of the contract. With current utility mangers salaries and benefit packages reaching the $200,000 a year level, this could mean up to one million dollars, a figure most rural electric cooperatives would find staggering.

HB

176

803 P.2d 402 ANCHORAGE DAILY NEWS V. ANCHORAGE SCH. DIST. (S. Ct. 1990) 1990 Alas. Lexis 127

ANCHORAGE DAILY NEWS, Appellant,

vs.

ANCHORAGE SCHOOL DISTRICT, Appellee

No. 3652, File No. S-3374
SUPREME COURT OF ALASKA
803 P.2d 402, 1990 Alas. LEXIS 127
December 7, 1990

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justice Ripley, Judge. No. 3AN 88 11807 Civil.

COUNSEL

D. John McKay, Middleton, Timme & McKay, Anchorage, for Appellant.
Kermit E. Barker, Jr., Stephanie D. Galbraith, Lane, Powell & Barker, Anchorage, for Appellee.

JUDGES

Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices. Moore, Justice, dissenting.

AUTHOR: BURKE

OPINION

In this appeal we hold that a public interest litigant is entitled to the full amount of its attorney's fees. We so hold despite whatever minimal private interest the litigant may have had in the outcome of its suit.

Following our decision in **Anchorage School District v. Anchorage Daily News,** 779 P.2d 1191 (Alaska 1989), the prevailing party, the Anchorage Daily News, moved for its costs and "full reasonable" attorney's fees, contending that "the Daily News . . . qualified as a public interest litigant." The school district opposed the motion, arguing that the Daily News was motivated to bring suit by economic self-interest.

The superior court "accepted" the argument that the Daily News was a public interest litigant, but awarded it only **part** of its attorney's fees, stating:

The plaintiff is in the business of gathering news. It does so for the entirely proper purpose of publishing that news for profit. This profit takes many forms -- from the rates paid by its readership, to its own editorial proclamation as society's crusading voice, to, it might even be supposed, its aspiration to a Pulitzer Prize for meritorious service in the cause of the public's right to know. There is no vice in any of these. Indeed most are praiseworthy. However, they benefit, they profit the Anchorage Daily News.

. . . The court concludes that a significant part of the plaintiff's motivation to bring this action was commercial in nature and personal to itself, but in part accepts plaintiff's characterization of

public interest litigation. For want of a more precise method of measure, the [c]ourt considers the motivations equal, and awards plaintiff one half the actual fees of $ 4,139, or $ 2069.50, as a prevailing public interest litigant. Applying the partial compensation rule at 40% to the balance of the fees actually incurred produces an additional $ 827.60, for a total fee award of $ 2,897.10.

This appeal followed.

II

We reject at the outset any suggestion that a newspaper engaged in litigation to obtain information for public dissemination is automatically a public interest litigant.[1] The facts of the particular litigation must be evaluated on a case-by-case basis to determine public interest status. Thus, we examine first the factors critical to this determination in the case at bar.[2]

In general, a litigant must satisfy the following criteria to be deemed a public interest litigant:

(1) Is the case designed to effectuate strong public policies?

(2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?

(3) Can only a private party have been expected to bring the suit?

(4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?

Murphy v. City of Wrangell, 763 P.2d 229, 233 (Alaska 1988). The school district implicitly concedes that the Daily News satisfies the first three criteria, but maintains all four criteria must be met to be a public interest litigant. We held accordingly in **Murphy,** where the purported public interest litigant satisfied three of the four criteria, but was, nevertheless, denied public interest status for having sufficient personal economic motive to bring suit. **Murphy,** 763 P.2d at 233; **see also Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Ry.,** 658 P.2d 776, 778 (Alaska 1983) (public interest status denied where court concluded bondholders had substantial private economic motivation to bring suit).

In our earlier decision, we recognized the important public policy violated by the school district's refusal to disclose the terms of the settlement agreement:

> The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential. Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.

Anchorage School District, 779 P.2d at 1193 (emphasis deleted). It is clear, therefore, that the lawsuit filed by the Daily News vindicated an important public right;[3] the main reason for the litigation, and its primary accomplishment, was to compel the school district to disclose information required by law to be available to the public. Moreover, whatever private interest the Daily News might have had, economic or otherwise, was comparatively minor. Indeed, it is

highly unlikely that the Daily News would have brought its suit "if the action [had] involved only narrow issues lacking general importance." **Murphy,** 763 P.2d at 233.

Given these circumstances, we conclude that the Daily News is, in this instance, a public interest litigant, and that the superior court abused its discretion in awarding it only part of its attorney's fees. Having qualified as a public interest litigant, the Daily News is entitled to the full amount of its attorney's fees, to the extent that they are otherwise reasonable.[4]

REVERSED and REMANDED for entry of an amended judgment.

DISSENT

MOORE, Justice, dissenting.

Because I find that the Daily News fails the fourth criterion set out in **Murphy,** I do not agree with the majority's holding that the Daily News is a public interest litigant.

The majority summarily concludes that the Daily News' economic interest in this litigation is "comparatively minor." On the record presented in this case, I do not see any justification whatsoever for the majority's conclusion.

The Daily News' submissions to the superior court fail to substantiate its claim that the commercial benefits of this litigation are minimal. The paper simply asserts that its status as public interest litigant is beyond reasonable dispute. It argues that it would never have brought this suit if it was only interested in financial gain because the costs of litigation outweigh any short-term increase in newsstand sales resulting from the school district story.[1]

This argument is unpersuasive. A newspaper's financial well-being depends on its circulation base and the paid advertisements generated by that circulation base, not on the 25 cent cover price. When a newspaper seeks access to information that is being kept from the public, it builds goodwill in the community and gains a competitive advantage. A newspaper with an image as champion of the public's right to know increases its circulation base and attracts more advertisers in the long-run.[2] Plain common sense dictates that this suit will have a direct impact on the paper's circulation base and future profits. Absent any evidence to the contrary,[3] it is impossible to conclude that the Daily News pursued this suit only to further the public interest.[4]

The superior court properly considered these long-term economic benefits in reaching its decision. It weighed the paper's commercial interest in its reputation[5] and found that the Daily News had a significant commercial motivation in bringing this suit. A trial court's determination of a litigant's public interest status will not be overturned unless it is "manifestly unreasonable." **Kenai Lumber Co. v. LeResch,** 646 P.2d 215, 222 (Alaska 1982). Thus any party challenging the superior court's decision in this regard has a heavy burden of persuasion. **Western Airlines, Inc. v. Lathrop Co.,** 535 P.2d 1209, 1217 (Alaska 1975). On appeal, the Daily News has not met its heavy burden of persuasion. The superior court's determination that the Daily News has a commercial interest in this litigation should be upheld and the paper should be denied public interest status.

In granting the Daily News public interest status, the majority applies the fourth criterion without reflecting on its purpose. The fourth criterion tests whether a litigant has a sufficient private interest in a suit to offset the deterrent effect of the costs of litigation. **Kenai Lumber Co.,** 646 P.2d at 223. In the past, we have been unwilling to award public interest status to litigants who are acting in their private interests and not on behalf of the public. **See Mobil Oil Corp. v. Local Boundary Comm'n,** 518 P.2d 92, 104 (Alaska 1974). In its analysis, the majority fails to appreciate the fact that the public importance of this litigation is directly tied to its commercial value to the newspaper. Thus the majority's rote application of the fourth criterion sidesteps the basic question of whether the litigation costs will, in fact, deter the newspaper from bringing similar suits. When the majority observes that "it appears highly unlikely that the Daily News would have brought its suit 'if the action [had] involved only narrow issues lacking general importance,'" it fails to reach the issue of deterrence.

The newspaper's economic interest in this litigation is not rendered insignificant simply because it is dependent on the public importance of the issues at stake. The Daily News has a significant economic interest in maintaining and increasing its circulation and advertising revenues. Given the record presented in this case, the Daily News has ample economic incentive to bring this suit despite the costs of litigation. Thus, the Daily News fails the fourth criterion and should be denied public interest status.

The Daily News is a profit-making enterprise. The costs of these suits are part of doing business and should not be subsidized by the taxpayer[6] as a matter of policy. The majority provides no adequate justification for creating what amounts to a special exception for newspapers (or any other news organization) by insulating their business motives from scrutiny under the fourth criterion. The majority's analysis guarantees a newspaper public interest status for virtually any suit that a newspaper is likely to bring. This is a Pandora's box that should not be opened. There are better uses for public funds. The Daily News and other commercial news organizations should not be held to a less rigorous standard than the ordinary litigant.

For the above reasons, I respectfully dissent.

OPINION FOOTNOTES

1 We also expressly reject the trial court's bifurcation of the public interest litigant analysis. We find no justification to create such a dichotomy. A litigant either satisfies the requirements for being a public interest litigant, or does not.

2 We apply the abuse of discretion standard "in reviewing a trial court's finding that a litigant has a public interest status." **Citizens for the Preservation of the Kenai River, Inc. v. Sheffield,** 758 P.2d 624, 626 (Alaska 1988); **see also Murphy v. City of Wrangell,** 763 P.2d 229, 233 (Alaska 1988).

3 There is no question that the documents were released solely because of the Daily News's efforts. Cf. **Public Law Education Inst. v. United States, Dep't of Justice,** 240 U.S. App. D.C. 166, 744 F.2d 181, 183-84 (D.C. Cir. 1984).

4 The superior court concluded that some of the fees submitted were unreasonable. On remand, the superior court need only award the Daily News full **reasonable** attorney's fees. **Hunsicker v. Thompson,** 717 P.2d 358, 359 (Alaska 1986).

DISSENT FOOTNOTES

1 The Daily News calculates that it would have to sell 18,000 extra newspapers to recoup the costs of litigation.

2 This court should take judicial notice of the Daily News' television advertisements which claim that its circulation greatly exceeds that of its nearest competitor. Clearly the Daily News understands the commercial importance of a wide circulation base.

3 The Daily News offers no hard proof on this issue. It merely asserts:

The fact that the news media, acting as surrogates for the public in pursuing access to information, must stay in business to do so and in fact attempt to operate at a profit as other businesses do, does not change the nature of the public-interested pursuit of such records and meetings. No **economic** interest can reasonably be argued . . . that might have motivated the Daily News to proceed as it has below.

4 There is no reason to assume that newspapers are different than any other kind of business. Many large businesses routinely engage in public service activities to improve their public image. Often such businesses even run advertisements selling this image to the public. Like any form of advertising, such public service activities are an investment in future profits and a part of doing business.

5 The Daily News contends on appeal that reputational benefits are non-economic and thus legally irrelevant. This argument is without merit.

6 The state (and by extension the taxpayers) will always have to bear the full cost of defending these suits even when the newspaper loses.

Alaska State Legislature

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DEPT. OF REVENUE

Representative Joe Green

District 10
House Majority Leader

Sponsor Statement

HB 176 – Attorney fees for public interest litigants

The Alaska Supreme Court has established a unique and creative doctrine, known as the Public Interest Litigant Doctrine (PILD), which is not codified in any law or set out in any procedure, but has evolved through the court's decisions. PILD was established by the court to allow private plaintiffs to advocate for issues in the public interest.

PILD provides an exception to Civil Rule 82. Rule 82 sets out a formula for the reimbursement of attorney fees to be collected by a prevailing party in a legal action. The prevailing party is entitled to 30% of actual, reasonable attorney fees if the case goes to trial, and 20% if it does not. It is interesting to note that Alaska is the only state in the union that utilizes this system. In all other states, the party that files or defends a legal action is responsible for their own expenses.

If the court grants a party in a legal action "public interest litigant"status that party is allowed to collect ***full*** reasonable, actual attorney fees if they prevail. If they lose, the public interest litigant pays none of the prevailing party's attorney fees.

I believe that PILD has developed into an encouragement, an incentive for litigation causing valuable state assets to be used to fund plaintiffs' law firms. Over the past several years these organizations have challenged the state in our effort to develop our resources.

Representative Joe Green
Sponsor Statement
HB 176

HB 176 does not *in any way* hinder these groups from filing legal challenges to administrative decisions, but it does require them to pay for their own lawsuits, to the extent that other Alaskans do. The state employees responsible for utilizing our natural resources are conscientious public servants. Guided by our constitution, statutes and regulations, they practice due diligence in determining that the disposal of our hydrocarbons, minerals, timber, fish, water, and land, are in the best interests of Alaskans. Not surprisingly, this public process never seems to be good enough for the people who profit from filing lawsuits. HB 176 doesn't prevent these people from challenging the process, but it does make then do it at their own expense.

Abuse of the broad definition of who can be a public interest litigant, and an even broader definition of "prevailing party" has occurred. HB 176 establishes some limits in the public interest litigant doctrine.

Trustees for ALASKA

Trustees for Alaska is a public interest environmental law firm that has provided legal services in Alaska since 1974. Our advocacy work and legal cases deal with oil and gas development, mining, hazardous waste management, air pollution, water pollution, wetlands management, land use management, and protection of marine ecosystems. Our successes have set significant legal precedent in environmental law on a state and national level. We have initiated hundreds of administrative actions and legal cases on behalf of a broad constituency, including local and national environmental groups, Alaska Native villages and nonprofit organizations, community groups, commercial fishermen, and individuals committed to protection and wise management of Alaska's natural resources. While we have a number of cases pending in state and federal courts, we view litigation as a tool of last resort for achieving effective and lasting resolution of resource management conflicts. Where appropriate, we encourage and assist our clients in working to achieve desired protection through negotiation and consensus.

Why do we exist?

To provide no-cost legal services relating to environmental and natural resource policy matters to individuals and groups whose concerns would be unrepresented if forced to pay for private representation.

What have we accomplished?

Over the last twenty years, Trustees has instituted a number of important legal actions and initiatives:

- Helped prevent oil and gas drilling in the Arctic National Wildlife Refuge.
- Fought forestry and marine development projects that threatened traditional Native Alaskan values and practices.
- Forced the US Environmental Protection Agency to set nationwide standards to reduce mining industry pollution to rivers and streams.
- Prevented offshore oil and gas development in fragile marine ecosystems off Alaska's coasts.
- Halted illegal and shortsighted road development in some of Alaska's most pristine and natural areas.
- Worked to reduce the waste and pollution from industrial high seas fishing fleets in the North Pacific.

How do you help people in my community?

Many of our legal victories are far-reaching, setting precedent nationwide for environmental protection. These precedents are part of the body of laws ensuring clean air and water, and the wise development of natural resources in your community.

Why do we need your support?

Trustees has been providing legal counsel to environmental groups, Native villages and nonprofit organizations, rural communities, fishers, hunters and other conservationists who have asked for our help in defending the rich natural resource heritage that makes Alaska unique. Throughout this time, **Trustees for Alaska** has been willing and able to respond to these requests.

As doors to achieving environmental protection are being slammed in Congress and the Alaska Legislature, they are also being quietly closed in state and federal agencies. This trend leaves the court system as the only effective avenue for achieving environmental protection. Consequently, we have been deluged with requests for advice and assistance.

How can I be sure that you will use my money wisely and won't waste it?

Your pledge will help us in answering the many requests for help that await our immediate attention, and will aid us in launching an "all fronts" effort to use our current, strong environmental laws to defend Alaska's natural treasures. We apply your contribution directly toward our legal defense of the fish, wildlife, recreation and scenic values we all cherish. We know that if we don't maintain a "lean and mean" organization, you won't support our work, and the requests we receive for legal representation will go unanswered.

Can I volunteer? How?

We supplement our legal work witht he help of volunteer attorneys, we also accept law student interns throughout the year. If you have technical or computer experience, we may be able to use your help.

Visit Our Sister Web Site	Now Accepting Your Donations over the Internet!
Click here to visit our sister web site. View updates and alerts on current issues and read copies of our past newsletters!	**Trustees for Alaska** depends upon public support to continue its work. Through an alliance with CharitiesUSA, you can donate to Trustees via a **secure server.** Click the Give Button to make a contribution. All gifts are tax-deductible.

Contact Us!

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725 Christensen Drive, Suite 4

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SCLDF

Sierra Club Legal Defense Fund

Contents

What is SCLDF?

The Sierra Club Legal Defense Fund (SCLDF) is a public interest law firm (IRC 501(c)(3)), founded in 1971, that brings environmental litigation on behalf of the Sierra Club and other environmental organizations. Headquartered in San Francisco, with offices in Washington, D.C., Denver, Seattle, Honolulu, Juneau, Montana, Florida, New Orleans, and Tallahassee.

Using Law and the Courts To Protect the Land

It may be hard to believe now, but until the late 1960s there was no such thing as environmental law, at least in the way we understand it today.

Conservationists had tried rarely, and with little success, to pursue their goals through the legal system. Plaintiffs seeking to protect the environment lacked what most judges considered a prerequisite to a day in court: a financial interest in the outcome of the dispute. For all intents and purposes, the courthouse door was closed to those who would preserve mountains, meadows, forests, and streams, for recreation, wildlife, or for other uses that resource managers call "non-consumptive."

In the late 1960s, however, a profound change began in the courts, triggered by a lawsuit brought against the Federal Power Commission. At issue was a plan by a New York utility, Consolidated Edison, to build a hydroelectric plant at Storm King Mountain on the Hudson River. Lawyers for the Scenic Hudson Preservation Conference, the Sierra Club, and three nearby towns persuaded the federal Court of Appeals that the plaintiffs' "aesthetic, conservational, and recreational interest" in the area justified there being granted "standing" to sue. While this decision affected only disputes based on a limited area of the law regarding power development, conservationists were given hope that courts throughout the nation might soon grant them standing to file suit.

New initiatives within the Sierra Club also contributed to the genesis of environmental law. For many years, the Club's legal program served mainly to help with contracts and other internal matters. But in the late 1960s, newly appointed Sierra Club Legal Committee Chair Phil Berry and Conservation Director Michael McCloskey began to urge using the courts to pursue conservation objectives. Two San Francisco

attorneys, Don Harris and Fred Fisher, joined the fledgling campaign and helped recruit other lawyers to the cause.

Soon, volunteer attorneys were battling government agencies over timber sales and other matters, and in 1970 Harris argued the first case brought under the National Environmental Policy Act. With Earth Day fresh in mind, Congress was swiftly enacting new environmental statutes, and such suites were vital to ensuring enforcement and clarifying lawmakers' intentions. It soon became evident that a volunteer organization was inadequate to realize the potential of environmental law.

The Sierra Club Legal Defense Fund was formed to realize that potential. Established in 1971 with the aid of a generous grant from the Ford Foundation, and supported by The Sierra Club Foundation, the Legal Defense Fund was created legally and financially distinct from the Sierra Club. This allows the organization to solicit and accept tax-deductible contributions, and to represent clients other than the Sierra Club itself.

Mineral King

It didn't take long for the young Legal Defense Fund to break new ground in environmental law. A suit over a place called Mineral King, first filed in 1969 by attorneys hired by the Club and taken on by the Legal Defense Fund two years later, became one of the organization's most important victories when the U.S. Supreme Court used the case to broaden the principle of standing from the Storm King litigation.

Mineral King is a small valley about 7,000 feet high in the southern Sierra Nevada. The flat valley floor, a fraction of the size of Yosemite Valley, is ringed by magnificent 12,000-foot peaks. In 1926 an early Sierra Club campaign to establish Sequoia National Park brought protection to an area that surrounded Mineral King, but the valley itself remained under Forest Service jurisdiction, subject to the Service's multiple-use management.

In 1965 the Forest Service invited private companies to propose winter-sports resorts in Mineral King. Walt Disney Enterprises won the agency's approval for a plan that would have jammed Mineral King with as many as 27 chair lifts, an ersatz alpine village, a huge underground parking garage, restaurants, and more: a total installation that the Disney master plan called the equivalent of six Squaw Valleys. The plan envisioned more tan two million visitors to Mineral King each year, a level of use that makes the far larger Yosemite Valley desperately overcrowded.

In the 1940s the Sierra Club had approved in principle a modest ski resort in Mineral King. Such resorts were smaller then, and the Club was trying to find suitable sites for a fast-growing ski industry. Twenty years later, however, the Club found many features of the Disney plan objectionable. First, it was too big. Second, it required upgrading the only road into the valley, a road that passes through Sequoia National Park. Third, it seemed a dubious proposition to devote so much public land to the profit of private enterprise. And fourth, Mineral King was designated a game refuge, and a giant resort was incompatible with the idea of preserving wildlife. While the Club mounted a campaign to preserve the valley through legislative action, it also sought ways to halt the proposed development.

The Club asked the Forest Service to estimate the environmental effects of the project; when the agency refused, the Club then asked the National Park Service to deny permission to improve the road through the park, again without success. Having run out of options, the Club filed suit. The district court issued an injunction that halted further work on the resort. The Forest Service's subsequent response was to ask the Court of Appeals to dismiss the case on grounds that the Club lacked standing to sue; losing that legal round, the Club appealed to the Supreme Court.

Setting ground rules for future environmental litigation, the Supreme Court handed the Sierra Club what might be called a friendly defeat: while the court rejected the Club's complaint as failing to show the organization's standing to sue, Legal Defense Fund attorneys were allowed to rewrite it to address a new, broadened rule of standing defined by the court. This rule stated that while a party must be injured to file suit, the injury can be to recreational interests, rather than only to financial interests. This new rule entered into the "common law" and opened the courts to environmental plaintiffs across the country. The door that had been slightly opened in the Storm King case under a particular statue was now thrown wide open. The Club's amended complaint detailed members' recreational use of Mineral King and the harm they would suffer without court action.

By the time attorneys filed the amended complaint, the National Environmental Policy Act had become law, and the Club asked the court to order the Forest Service to prepare an environmental impact statement on the project. This process, which involves public hearings and scientific studies, increased the public's interest in the dispute. Sensing a profound change in the public's mood, Disney dropped its proposal, and in 1978 the grassroots legislative campaign bore fruit when Congress and President Carter added Mineral King to Sequoia National Park.

In those early days the Legal Defense Fund represented the Sierra Club almost exclusively. But as the organization grew and its attorneys branched out, they took on new clients from other corners of the environmental community. While the Sierra Club remains a major client, Legal Defense Fund attorneys now represent dozens of other groups.

Over the years, the Legal Defense Fund has been involved in many of the classic cases in environmental law, both setting legal precedents that can be followed across the nation, and complementing legislative and grassroots campaigns to preserve valuable areas. Among the most important cases are these:

Admiralty Island, Alaska

The object of Sierra Club and Legal Defense Fund efforts that continue to this day. Admiralty Island is a million-acre paradise in the Pacific west of Juneau known to the native Tlingit as *Kootz-noowoo* the Fortress of the Bears. A part of the nation's largest national forest, the Tongass, the heavily forested island supports the world's densest concentrations of Alaskan brown bears and bald eagles, and vast numbers of salmon, otters, trout, and other creatures.

But the Forest Service had long been determined to see Admiralty's hemlock and spruce clearcut, despite the destruction this would wreak upon the majestic island's wildlife and Native peoples. When the Service ignored pleas from conservationists to halt an unprecedented 50-year timber harvest lease that would have left much of Admiralty roaded and barren, the Sierra Club launched what eventually became a number of incredibly complex series of lawsuits and appeals. As in the Mineral King case, the Admiralty litigation was begun by an attorney working directly for the Club (in this case Warren Matthews, now an Alaska Supreme Court Justice) and was later assumed by the Legal Defense Fund.

Also like the Mineral King case, litigation helped persuade the corporation holding the lease to abandon the project. This bought time while the Sierra Club and other groups waged a dramatic and long-running legislative campaign to protect Alaskan wild areas, including Admiralty. That campaign succeeded in 1980 with the passage of the Alaska National Interest Land Conservation Act, which granted wilderness status to almost all of the island; left out was Angoon, Admiralty's only settlement, and a controversial 23,040-acre

area comprised of three of the island's most valuable watersheds. Legal Defense Fund attorneys continue battling to protect portions of that area from clearcutting by the Shree Atika logging corporation.

Air Quality and the Colorado Plateau

The parks and wildlands of the Colorado Plateau--Grand Canyon, Zion, Canyonlands, and other areas--are famous for their expansive views. At the same time, developers have sought to build stripmines, coal-fired powerplants, uranium mines, and other projects that would spoil views and sully air quality across the entire region, parks and wildlands included.

Passage of the first Air Quality Act in 1967 committed the federal government to "protect and enhance" the nation's air. To implement the act, the National Air Pollution Control Administration (NAPCA, an agency then within the Department of Health, Education, and Welfare) decreed that in areas where the air was still relatively clean, like the Colorado Plateau, the federal government must undertake to "prevent significant deterioration" of air quality. This important provision of the regulations is abbreviated "PSD."

In 1970, however, NAPCA was transferred to the new Environmental Protection Agency, and when the Clean Air Act was enacted by Congress that year, there was no explicit reference to PSD. The EPA's regulations to implement the new Clean Air Act included provisions that would have allowed the dirtying of clean air in most of the country. On the Colorado Plateau, that would have meant polluted skies from stripmines, powerplants, and other projects, approval for which had been blocked in part by the PSD standards.

The Legal Defense Fund sued, arguing that the "protect and enhance" language in both clean air laws strongly implied the PSD requirement. A district court agreed, and so did the Court of Appeals and the Supreme Court (although neither wrote an opinion). When the Clean Air Act was amended in 1977, Congress added PSD as an explicit provision of the law. The PSD lawsuit helped protect air quality over the Colorado Plateau's parks and wildlands, while it aided in blocking developments that would have fouled land, water, and air throughout the region.

These are just two of the cases in which the Sierra Club Legal Defense Fund has made a difference. There have been hundreds of such lawsuits in the years since the organization hung out its shingle, and there will be many more.

Sierra Club members and other conservationists usually turn to litigation when all other remedies are exhausted. Upon being contacted by officers of a Club chapter considering a suit, Legal Defense Fund attorneys review the dispute to determine its prospects for success in court, whether it could set a precedent useful elsewhere, and if a victory could be sustained politically. When a good case cannot be accepted owing to workload, the Legal Defense Fund attempts to find volunteer or reduced-fee lawyers to help the chapter with its case.

Back to Affiliated Sierra Club Organizations.


Back to Sierra Club home page.

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Sierra Club, 85 Second St., Second Floor, San Francisco, CA 94105-3441, USA. Telephone (415) 977-5500 (voice), (415) 977-5799 (FAX). Text written by Tom Turner, 1989. Last updated 12 March 1996.

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HB 177

Alaska State Legislature

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REPRESENTATIVE FRED DYSON

HB 177
Sponsor Statement

"An Act relating to foster parents; relating to the right of foster parents to have notice of, and testify at, delinquency hearings and to the disclosure of minors' records to foster parents; and amending Rules 3, 7, 10, 12, 15, 21, 23, and 25, Alaska Delinquency Rules."

Foster parents often are an inordinately valuable resource to the State of Alaska case workers and judges in respect to the condition and best interests of a foster child in state custody. This bill requires that foster parents be allowed to be present and have a voice at all proceedings dealing with the disposition and treatment of the child.

Because these foster parents live with the child continually, and are often very experienced at dealing with troubled children, most foster parents are an excellent resource for the overworked case workers and the busy judges who must make important decisions concerning children with very little information.

Last year, we introduced HB 456 which gave the right of foster parents to have notice of, and testify at, **child-in-need-of-aid** (CINA) and **delinquency** hearings and to the disclosure of minors' records to foster parents. In addition, HB 375, the Child Protection Bill which predominately focused on CINA proceedings, was introduced. Due to its subject, we were able to incorporate half of HB 456 into HB375.

Now law, HB 375 gives foster parents a right to be heard in CINA court proceedings, but not in delinquency hearings. HB 177 will essentially achieve my original intent and will allow foster parents a voice in court and information without regard to the process in which their foster children are involved.

FISCAL NOTE

STATE OF ALASKA
1999 LEGISLATIVE SESSION

BILL NO. HB 177

Revision Date/Time (Note if correction): _____
Dept. Affected: Health and Social Services
Title: Relating to foster parents rights at delinquency proceedings.
BRU: Youth Corrections
Component: Probation Services
Sponsor: Rep. Dyson
COMPONENT SERIAL NO. 2134
Requestor: House (HES)
See also (SN#): _____

Expenditures/Revenues: (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING	FY2000	FY2001	FY2002	FY2003	FY2004	FY2005
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY1999) cost: $0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill will have no fiscal impact on the Department if enacted.

4/13/99

Prepared by: George Buhite / Robert Buttcane
Phone: 465-2212
Division: Family & Youth Services
Date/Time: 4/13/99 1:14 PM

Approved by Commissioner: Karen Perdue, Commissioner
Date: 4/14/99
Agency: Department of Health & Social Services

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FISCAL NOTE

STATE OF ALASKA
1999 LEGISLATIVE SESSION

BILL NO. HB 177

Revision Date. _____
Title: "An Act relating to foster parents..."

Sponsor: Representative Dyson
Requestor: (H)HES

Department Affected: Administration
BRU: Legal and Advocacy Services
Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2 002	FY 2003	FY 2004	FY 2005
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE: (Thousands of Dollars)

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

Estimate of any current year (FY 98) cost: $_____

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

This bill has no fiscal impact on the Public Defender Agency.

Prepared by: Barbara Brink, Director
Division: Public Defender Agency

Phone: (907) 264-4414
Date: _____

Approved by Commissioner: Robert Poe Jr. Alison M. Elgee
Agency: Department of Administration

Date: 4/12/99

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