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6. The court must award attorney's fees to the prevailing party, whether that party is an applicant, a beneficiary, an issuer, a nominated person, or adviser. Since the issuer may be entitled to recover its legal fees and costs from the applicant under the reimbursement agreement, allowing the issuer to recover those fees from a losing beneficiary may also protect the applicant against undeserved losses. The party entitled to attorneys' fees has been described as the "prevailing party." Sometimes it will be unclear which party "prevailed," for example, where there are multiple issues and one party wins on some and the other party wins on others. Determining which is the prevailing party is in the discretion of the court. Subsection (e) authorizes attorney's fees in all actions where a remedy is sought "under this article." It applies even when the remedy might be an injunction under Section 5-109 or when the claimed remedy is otherwise outside of Section 5-111. Neither an issuer nor a confirmer should be treated as a "losing" party when an injunction is granted to the applicant over the objection of the issuer or confirmer; accordingly neither should be liable for fees and expenses in that case.

"Expenses of litigation" is intended to be broader than "costs." For example, expense of litigation would include travel expenses of witnesses, fees for expert witnesses, and expenses associated with taking depositions.

7. For the purposes of Section 5-111(f) "harm anticipated" must be anticipated at the time when the agreement that includes the liquidated damage clause is executed or at the time when the undertaking that includes the clause is issued. See Section 2A-504.

SECTION 5-112. TRANSFER OF LETTER OF CREDIT.

(a) Except as otherwise provided in Section 5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

(1) the transfer would violate applicable law; or

(2) the transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in Section 5-108(e) or is otherwise reasonable under the circumstances.

Official Comment

1. In order to protect the applicant's reliance on the designated beneficiary, letter of credit law traditionally has forbidden the beneficiary to convey to third parties its right to draw or demand payment under the letter of credit. Subsection (a) codifies that rule. The term "transfer" refers to the beneficiary's conveyance of that right. Absent incorporation of the UCP (which make elaborate provision for partial transfer of a commercial letter of credit) or similar trade practice and absent other express indication in the letter of credit that the term is used to mean something else, a term in the letter of credit indicating that the beneficiary has the right to transfer should be taken to mean that the beneficiary may convey to a third party its right to draw or demand payment. Even in that case, the issuer or other person controlling the transfer may make the beneficiary's right to transfer subject to conditions, such as timely notification, payment of a fee, delivery of the letter of credit to the issuer or other person controlling the transfer, or execution of appropriate forms to document the transfer. A nominated person who is not a confirmer has no obligation to recognize a transfer.

The power to establish "requirements" does not include the right absolutely to refuse to recognize transfers under a transferable letter of credit. An issuer who wishes to retain the right to deny all transfers should not issue transferable letters of credit or should incorporate the UCP. By stating its requirements in the letter of credit an issuer may impose any requirement without regard to its conformity to practice or reasonableness. Transfer requirements of issuers and nominated persons must be made known to potential transferors and transferees to enable those parties to comply with the requirements. A common method of making such requirements known is to use a form that indicates the information that must be provided and the instructions that must be given to enable the issuer or nominated person to comply with a request to transfer.

2. The issuance of a transferable letter of credit with the concurrence of the applicant is *ipso facto* an agreement by the issuer and

applicant to permit a beneficiary to transfer its drawing right and permit a nominated person to recognize and carry out that transfer without further notice to them. In international commerce, transferable letters of credit are often issued under circumstances in which a nominated person or adviser is expected to facilitate the transfer from the original beneficiary to a transferee and to deal with that transferee. In those circumstances it is the responsibility of the nominated person or adviser to establish procedures satisfactory to protect itself against double presentation or dispute about the right to draw under the letter of credit. Commonly such a person will control the transfer by requiring that the original letter of credit be given to it or by causing a paper copy marked as an original to be issued where the original letter of credit was electronic. By keeping possession of the original letter of credit the nominated person or adviser can minimize or entirely exclude the possibility that the original beneficiary could properly procure payment from another bank. If the letter of credit requires presentation of the original letter of credit itself, no other payment could be procured. In addition to imposing whatever requirements it considers appropriate to protect itself against double payment the person that is facilitating the transfer has a right to charge an appropriate fee for its activity.

"Transfer" of a letter of credit should be distinguished from "assignment of proceeds." The former is analogous to a novation or a substitution of beneficiaries. It contemplates not merely payment to but also performance by the transferee. For example, under the typical terms of transfer for a commercial letter of credit, a transferee could comply with a letter of credit transferred to it by signing and presenting its own draft and invoice. An assignee of proceeds, on the other hand, is wholly dependent on the presentation of a draft and invoice signed by the beneficiary.

By agreeing to the issuance of a transferable letter of credit, which is not qualified or limited, the applicant may lose control over the identity of the person whose performance will earn payment under the letter of credit.

SECTION 5-113. TRANSFER BY OPERATION OF LAW.

(a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e), an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in Section 5-108(e) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) has the consequences specified in Section 5-108(i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of Section 5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b).

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

Official Comment

This section affirms the result in *Pastor v. Nat. Republic Bank of Chicago*, 76 Ill.2d 139, 390 N.E.2d 894 (Ill. 1979) and *Federal Deposit Insurance Co. v. Bank of Boulder*, 911 F.2d 1466 (10th Cir. 1990).

An issuer's requirements for recognition of a successor's status might include presentation of a certificate of merger, a court order appointing a bankruptcy trustee or receiver, a certificate of appointment as bankruptcy trustee, or the like. The issuer is entitled to rely upon such documents which on their face demonstrate that presentation is made by a successor of a beneficiary. It is not obliged to make an independent investigation to determine the fact of succession.

SECTION 5-114. ASSIGNMENT OF PROCEEDS.

(a) In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by Article 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Article 9 or other law.

Official Comment

1. Subsection (b) expressly validates the beneficiary's present assignment of letter of credit proceeds if made after the credit is established but before the proceeds are realized. This section adopts the prevailing usage -- "assignment of proceeds" -- to an assignee. That terminology carries with it no implication, however, that an assignee acquires no interest until the proceeds are paid by the issuer. For example, an "assignment of the right to proceeds" of a letter of credit for purposes of security that meets the requirements of Section 9-203(1) would constitute the present creation of a security interest in that right. This security interest can be perfected by possession (Section 9-305) if the letter of credit is in written form. Although subsection (a) explains the meaning of "'proceeds' of a letter of credit," it should be emphasized that those proceeds also may be Article 9 proceeds of other collateral. For example, if a seller of inventory receives a letter of credit to support the account that arises upon the sale, payments made under the letter of credit are Article 9 proceeds of the inventory, account, and any document of title covering the inventory. Thus, the secured party who had a perfected security interest in that inventory, account, or document has a perfected security interest in the proceeds collected under the letter of credit, so long as they are identifiable cash proceeds (Section 9-306(2), (3)). This perfection is continuous, regardless of whether the secured party perfected a security interest in the right to letter of credit proceeds.

2. An assignee's rights to enforce an assignment of proceeds against an issuer and the priority of the assignee's rights against a nominated person or transferee beneficiary are governed by Article 5. Those rights and that priority are stated in subsections (c), (d), and (e). Note also that Section 4-210 gives first priority to a collecting bank that has given value for a documentary draft.

3. By requiring that an issuer or nominated person consent to the assignment of proceeds of a letter of credit, subsections (c) and (d) follow more closely recognized national and international letter of credit practices than did prior law. In most circumstances, it has always been advisable for the assignee to obtain the consent of the issuer in order better to safeguard its right to the proceeds. When notice of an assignment has been received, issuers normally have required signatures on a consent form. This practice is reflected in the revision. By unconditionally consenting to such an assignment, the issuer or nominated person becomes bound, subject to the rights of the superior parties specified in subsection (e), to pay to the assignee the assigned letter of credit proceeds that the issuer or nominated person would otherwise pay to the beneficiary or another assignee.

Where the letter of credit must be presented as a condition to honor and the assignee holds and exhibits the letter of credit to the issuer or nominated person, the risk to the issuer or nominated person of having to pay twice is minimized. In such a situation, subsection (d) provides that the issuer or nominated person may not unreasonably withhold its consent to the assignment.

SECTION 5-115. STATUTE OF LIMITATIONS. An action to enforce a right or obligation arising under this article must be commenced within one year after the expiration date of the relevant letter of credit or one year after the [claim for relief] [cause of action] accrues, whichever occurs later. A [claim for relief] [cause of action] accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

Official Comment

1. This section is based upon Sections 4-111 and 2-725(2).

2. This section applies to all claims for which there are remedies under Section 5-111 and to other claims made under this article, such as claims for breach of warranty under Section 5-110. Because it covers all claims under Section 5-111, the statute of limitations applies not only to wrongful dishonor claims against the issuer but also to claims between the issuer and the applicant arising from the reimbursement agreement. These might be for reimbursement (issuer v. applicant) or for breach of the reimbursement contract by wrongful honor (applicant v. issuer).

3. The statute of limitations, like the rest of the statute, applies only to a letter of credit issued on or after the effective date and only to transactions, events, obligations, or duties arising out of or associated with such a letter. If a letter of credit was issued before the effective date and an obligation on that letter of credit was breached after the effective date, the complaining party could bring its suit within the time that would have been permitted prior to the adoption of Section 5-115 and would not be limited by the terms of Section 5-115.

SECTION 5-116. CHOICE OF LAW AND FORUM.

(a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Section 5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.

(c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is

expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 5-103(c).

(d) If there is conflict between this article and Article 3, 4, 4A, or 9, this article governs.

(e) The forum for settling disputes arising out of an undertaking within this article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a).

Official Comment

1. Although it would be possible for the parties to agree otherwise, the law normally chosen by agreement under subsection (a) and that provided in the absence of agreement under subsection (b) is the substantive law of a particular jurisdiction not including the choice of law principles of that jurisdiction. Thus, two parties, an issuer and an applicant, both located in Oklahoma might choose the law of New York. Unless they agree otherwise, the section anticipates that they wish the substantive law of New York to apply to their transaction and they do not intend that a New York choice of law principle might direct a court to Oklahoma law. By the same token, the liability of an issuer located in New York is governed by New York substantive law – in the absence of agreement – even in circumstances in which choice of law principles found in the common law of New York might direct one to the law of another State. Subsection (b) states the relevant choice of law principles and it should not be subordinated to some other choice of law rule. Within the States of the United States *renvoi* will not be a problem once every jurisdiction has enacted Section 5-116 because every jurisdiction will then have the same choice of law rule and in a particular case all choice of law rules will point to the same substantive law.

Subsection (b) does not state a choice of law rule for the "liability of an applicant." However, subsection (b) does state a choice of law rule for the liability of an issuer, nominated person, or adviser, and since some of the issues in suits by applicants against those persons involve the "liability of an issuer, nominated person, or adviser," subsection (b) states the choice of law rule for those issues. Because an issuer may have liability to a confirmer both as an issuer (Section 5-108(a), Comment 5 to Section 5-108) and as an applicant (Section 5-107(a), Comment 1 to Section 5-107, Section 5-108(i)), subsection (b) may state the choice of law rule for some but not all of the issuer's liability in a suit by a confirmer.

2. Because the confirmer or other nominated person may choose different law from that chosen by the issuer or may be located in a different jurisdiction and fail to choose law, it is possible that a confirmer or nominated person may be obligated to pay (under their law) but will not be entitled to payment from the issuer (under its law). Similarly, the rights of an unreimbursed issuer, confirmer, or nominated person against a beneficiary under Section 5-109, 5-110, or 5-117, will not necessarily be governed by the same law that applies to the issuer's or confirmer's obligation upon presentation. Because the UCP and other practice are incorporated in most international letters of credit, disputes arising from different legal obligations to honor have not been frequent. Since Section 5-108 incorporates standard practice, these problems should be further minimized – at least to the extent that the same practice is and continues to be widely followed.

3. This section does not permit what is now authorized by the nonuniform Section 5-102(4) in New York. Under the current law in New York a letter of credit that incorporates the UCP is not governed in any respect by Article 5. Under revised Section 5-116 letters of credit that incorporate the UCP or similar practice will still be subject to Article 5 in certain respects. First, incorporation of the UCP or other practice does not override the nonvariable terms of Article 5. Second, where there is no conflict between Article 5 and the relevant provision of the UCP or other practice, both apply. Third, practice provisions incorporated in a letter of credit will not be effective if they fail to comply with Section 5-103(c). Assume, for example, that a practice provision purported to free a party from any liability unless it were "grossly negligent" or that the practice generally limited the remedies that one party might have against another. Depending upon the circumstances, that disclaimer or limitation of liability might be ineffective because of Section 5-103(c).

Even though Article 5 is generally consistent with UCP 500, it is not necessarily consistent with other rules or with versions of the UCP that may

be adopted after Article 5's revision, or with other practices that may develop. Rules of practice incorporated in the letter of credit or other undertaking are those in effect when the letter of credit or other undertaking is issued. Except in the unusual cases discussed in the immediately preceding paragraph, practice adopted in a letter of credit will override the rules of Article 5 and the parties to letter of credit transactions must be familiar with practice (such as future versions of the UCP) that is explicitly adopted in letters of credit.

4. In several ways Article 5 conflicts with and overrides similar matters governed by Articles 3 and 4. For example, "draft" is more broadly defined in letter of credit practice than under Section 3-104. The time allowed for honor and the required notification of reasons for dishonor are different in letter of credit practice than in the handling of documentary and other drafts under Articles 3 and 4.

5. Subsection (e) must be read in conjunction with existing law governing subject matter jurisdiction. If the local law restricts a court to certain subject matter jurisdiction not including letter of credit disputes, subsection (e) does not authorize parties to choose that forum. For example, the parties' agreement under Section 5-116(e) would not confer jurisdiction on a probate court to decide a letter of credit case.

If the parties choose a forum under subsection (e) and if -- because of other law -- that forum will not take jurisdiction, the parties' agreement or undertaking should then be construed (for the purpose of forum selection) as though it did not contain a clause choosing a particular forum. That result is necessary to avoid sentencing the parties to eternal purgatory where neither the chosen State nor the State which would have jurisdiction but for the clause will take jurisdiction -- the former in disregard of the clause and the latter in honor of the clause.

SECTION 5-117. SUBROGATION OF ISSUER, APPLICANT, AND NOMINATED PERSON.

(a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of

the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a).

(c) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:

(1) the issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;

(2) the beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and

(3) the applicant to same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

(d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection (c) do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person, and the applicant do

not derive under this section present or prospective rights forming the basis of a claim, defense, or excuse.

Official Comment

1. By itself this section does not grant any right of subrogation. It grants only the right that would exist if the person seeking subrogation "were a secondary obligor." (The term "secondary obligor" refers to a surety, guarantor, or other person against whom or whose property an obligee has recourse with respect to the obligation of a third party. See Restatement of the Law Third, Suretyship § 1 (1995).) If the secondary obligor would not have a right to subrogation in the circumstances in which one is claimed under this section, none is granted by this section. In effect, the section does no more than to remove an impediment that some courts have found to subrogation because they conclude that the issuer's or other claimant's rights are "independent" of the underlying obligation. If, for example, a secondary obligor would not have a subrogation right because its payment did not fully satisfy the underlying obligation, none would be available under this section. The section indorses the position of Judge Becker in *Tudor Development Group, Inc. v. United States Fidelity and Guaranty*, 968 F.2d 357 (3rd Cir. 1991).

2. To preserve the independence of the letter of credit obligation and to insure that subrogation not be used as an offensive weapon by an issuer or others, the admonition in subsection (d) must be carefully observed. Only one who has completed its performance in a letter of credit transaction can have a right to subrogation. For example, an issuer may not dishonor and then defend its dishonor or assert a setoff on the ground that it is subrogated to another person's rights. Nor may the issuer complain after honor that its subrogation rights have been impaired by any good faith dealings between the beneficiary and the applicant or any other person. Assume, for example, that the beneficiary under a standby letter of credit is a mortgagee. If the mortgagee were obliged to issue a release of the mortgage upon payment of the underlying debt (by the issuer under the letter of credit), that release might impair the issuer's rights of subrogation, but the beneficiary would have no liability to the issuer for having granted that release.

TRANSITION PROVISIONS

SECTION [ ]. EFFECTIVE DATE. This [Act] shall become effective on _____, 199___.

SECTION [ ]. REPEAL. This [Act] [repeals] [amends] [insert citation to existing Article 5].

SECTION [ ]. APPLICABILITY. This [Act] applies to a letter of credit that is issued on or after the effective date of this [Act]. This [Act] does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this [Act].

SECTION [ ]. SAVINGS CLAUSE. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this [Act] and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this [Act] as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.

CONFORMING AND MISCELLANEOUS AMENDMENTS TO ARTICLE 1

SECTION 1-105. TERRITORIAL APPLICATION OF THE ACT; PARTIES' POWER TO CHOOSE APPLICABLE LAW.

. . .

(2) Where one of the following provisions of this [Act] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

. . .

Governing law in the Article on Funds Transfers. Section 4A-507.

Letters of Credit. Section 5-116.

Bulk sales subject to the Article on Bulk Sales. Section 6-103.

. . .

CONFORMING AND MISCELLANEOUS AMENDMENTS TO ARTICLE 2

SECTION 2-512. PAYMENT BY BUYER BEFORE INSPECTION.

. . .

(b) despite tender of the required documents the circumstances would justify injunction against honor under ~~the provisions of~~ this Act (Section ~~5-114~~ 5-109(b)).

. . .

COMPLEMENTARY AMENDMENTS TO ARTICLE 9

SECTION 9-103. PERFECTION OF SECURITY INTEREST IN MULTIPLE STATE TRANSACTIONS.

(1) Documents, instruments, letters of credit, and ordinary goods.

(a) This subsection applies to documents, ~~and~~ instruments, rights to proceeds of written letters of credit, and ~~to~~ goods other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3), and minerals described in subsection (5).

. . .

SECTION 9-104. TRANSACTIONS EXCLUDED FROM ARTICLE. This Article does not apply

. . .

(l) to a transfer of an interest in any deposit account (subsection (1) of Section 9-105), except as provided with respect to proceeds (Section 9-306) and priorities in proceeds (Section 9-312); or

(m) to a transfer of an interest in a letter of credit other than the rights to proceeds of a written letter of credit.

Official Comment

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SECTION 9-105. DEFINITIONS AND INDEX OF DEFINITIONS.

. . .

(3) The following definitions in other Articles apply to this Article:

. . .

"Letter of credit".	Section 5-102.

. . .

"Proceeds of a letter of credit".	Section 5-114(a).

SECTION 9-106. DEFINITIONS: "ACCOUNT"; "GENERAL INTANGIBLES." "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

SECTION 9-304. PERFECTION OF SECURITY INTEREST IN INSTRUMENTS, DOCUMENTS, PROCEEDS OF A WRITTEN LETTER OF CREDIT AND GOODS COVERED BY DOCUMENTS; PERFECTION BY PERMISSIVE FILING; TEMPORARY PERFECTION WITHOUT FILING OR TRANSFER OF POSSESSION.

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in the rights to proceeds of a written letter of credit can be perfected only by the secured party's taking possession of the letter of credit. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5) of this section and subsections (2) and (3) of Section 9-306 on proceeds.

. . .

(6) . . .

Special Legislative Note: *As Sections 9-304 and 9-305 appear in the Official Text of the Conforming Amendments to Revised Article 5 (1995), they incorporate the amendments made to these sections in 1994, when Revised Article 8 was promulgated. If Revised Article 5 with Conforming Amendments, as promulgated in 1995, is adopted by any State before Revised Article 8 with Conforming Amendments of*

1994 is adopted, the 1990 text for Sections 9-304 and 9-305 should be used as a basis for amendment, as follows:

SECTION 9-304. PERFECTION OF SECURITY INTEREST IN INSTRUMENTS, DOCUMENTS, PROCEEDS OF A WRITTEN LETTER OF CREDIT, AND GOODS COVERED BY DOCUMENTS; PERFECTION BY PERMISSIVE FILING; TEMPORARY PERFECTION WITHOUT FILING OR TRANSFER OF POSSESSION.

(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in the rights to proceeds of a written letter of credit can be perfected only by the secured party's taking possession of the letter of credit. A security interest in money or instruments (other than certificated securities or instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5) of this section and subsections (2) and (3) of Section 9-306 on proceeds.

. . .

SECTION 9-305. WHEN POSSESSION BY SECURED PARTY PERFECTS SECURITY INTEREST WITHOUT FILING. *A security interest in ~~letters of credit and advices of credit (subsection (2)(a) of Section 5-116),~~ goods, instruments (other than certificated securities), money, negotiable documents, or chattel paper may be perfected by the security party's taking possession of the collateral. A security interest in the right to proceeds of a written letter of credit may be perfected by the secured party's taking possession of the letter of credit. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without a relation back and continues only so long as possession is retained, unless otherwise specified in this Article. The security interest may be otherwise perfected as provided in this Article before or after the period of possession by the secured party.*

Official Comment

. . .

SECTION 9-305. WHEN POSSESSION BY SECURED PARTY PERFECTS SECURITY INTEREST WITHOUT FILING. A security interest in ~~letters of credit and advices of credit (subsection (2)(a) of Section 5-116),~~ goods, instruments, money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral. A security interest in the right to proceeds of a written letter of credit may be perfected by the secured party's taking possession of the letter of credit. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without a relation back and continues only so long as possession is retained, unless otherwise specified in this Article. The security interest may be otherwise perfected as provided in this Article before or after the period of possession by the secured party.

Special Legislative Note: *See Special Legislative Note, Section 9-304.*

Official Comment

. . .

1. As under the common law of pledge, no filing is required by this Article to perfect a security interest where the secured party has possession of the collateral. Compare Section 9-302(1)(a). This section permits a security interest to be perfected by transfer of possession only when the collateral is goods, rights to proceeds of letters of credit (if written), instruments ~~*(other than certificated securities, which are governed by Section*~~

~~8-321)~~*, documents or chattel paper: that is to say, accounts and general intangibles are excluded. *As to perfection of security interests in certificated securities by possession, see the general rules on perfection of security interests in investment property in Section 9-115(4) and the special rule in Section 9-115(6) dealing with cases where a secured party takes possession of a security certificate in registered form without obtaining an indorsement.** ~~See Section 5-116 for the special case of assignments of letters and advices of credit.~~ A security interest in accounts and general intangibles--property not ordinarily represented by any writing whose delivery operates to transfer the claim--may under this Article be perfected only by filing, and this rule would not be affected by the fact that a security agreement or other writing described the assignment of such collateral as a "pledge". Section 9-302(1)(e) exempts from filing certain assignments of accounts which are out of the ordinary course of financing: such exempted assignments are perfected when they attach under Section 9-303(1); they do not fall within this section. **Amendments in italics approved by the Permanent Editorial Board for Uniform Commercial Code November 4, 1995.*

. . .

FISCAL NOTE

STATE OF ALASKA
1999 LEGISLATIVE SESSION

BILL NO. HB 79

Revision Date/Time (Note if correction) _____
Dept. Affected Commerce & Econ. Dev.
Title Uniform Commercial Code: Letters of Credit
BRU Banking, Securities and Corporations
Component Banking, Securities and Corporations
Sponsor House Labor and Commerce by request
Requester _____
Component Serial No. 1233

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	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: _____

POSITIONS

Full-time						
Part-time						
Temporary						

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

Prepared by Franklin T. Elder, Director Phone 465-2521
Division Banking, Securities and Corporations Date/Time 2/26/99 11:49 AM
Approved by Commissioner Deborah B. Sedwick Date 2/26/99
Agency Commerce and Economic Development

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HB

81

ALASKA STATE LEGISLATURE
House of Representatives

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Representative Norman Rokeberg

COMMITTEE PACKETS
HOUSE LABOR AND COMMERCE COMMITTEE
HOUSE BILL 81
October 15, 1999

1. House Bill 81
2. CS HB 81 (URS)
3. Sponsor Statement
4. Sectional Analysis
5. Fiscal Note
6. Draft amendments
   a. e-mail from Marty Weinstein, Department of Law, dated May 10, 1999, concerning amendment K.2, Cramer, 10/4/99
7. April 30, 1997 Attorney General Letter re: APUC Authority
8. Support:
   i. August 24, 1998 letter to Senator Leman from Aurora Power
   ii. April 21, 1999 testimony from Mary Ann Pease, Aurora Power

7. Qualified Support:
   i. April 27, 1999 letter from Anchorage Municipal Lights & Power
   ii. May 11, 1999 letter from Matanuska Electric Association

8. Opposition:
   i. May 5, 1999 letter from Robert A. Wilkinson, Copper Valley Electric Association
   ii. May 4, 1999 letter from Robert A. Wilkinson, Copper Valley Electric Association
   iii. April 27, 1999 letter from Kodiak Electric Association

9. March 6, 1998, "Statement of Consumer Principles To Guide State Restructuring of the Electric Industry", Electric Consumers Alliance.
10. "NRECA and APEC Declare Consumer Protection Principles"
11. Other States Consumer Protection Provisions:
    i. Arkansas
    ii. Arizona
    iii. California
    iv. Connecticut
    v. Delaware
    vi. Maine
    vii. Michigan
    viii. Montana
    ix. New Jersey
    x. New Mexico
    xi. Ohio
    xii. Texas
    xiii. Virginia
12. Other States' Suggestions:
    i. Kentucky
    ii. Louisiana

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS:

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JUDICIARY COMMITTEE, MEMBER
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Representative Norman Rokeberg

SPONSOR STATEMENT
COMMITTEE SUBSTITUTE FOR HOUSE BILL 81 (URS)
Electric Consumers Bill of Rights

CSHB 81 (URS) is the result of testimony offered concerning electric utility restructuring (sometimes called "deregulation" or "competition") during the Fall of 1998 to the Joint Committee on Electric Utility Restructuring and further comments and suggestions presented to the House Special Committee on Utility Restructuring during 1999. Proposals allowing competition in the area of electricity services would present consumers with many choices and decisions. CSHB 81 (URS) indicates that *if* retail electric competition becomes available in Alaska that the Alaska Public Utilities Commission ("APUC") [note: will need to be changed to reflect the Regulatory Commission of Alaska in accordance with the last adopted during the 1999 legislative session] is to adopt regulations protecting consumers and providing them with certain information in order to make decisions. The APUC, currently, has the statutory authority to grant electrical competition even if the Legislature does not act.

This proposal is not unique among states that either have adopted or are working on electric utility restructuring. Michigan, Maine, and Vermont as well as other states have adopted electric consumers' bill of rights. The Electric Consumers Alliance has published a "Statement of Consumer Principles to Guide State Restructuring of the Electric Industry" (March 6, 1998). I feel that Alaskans should be offered some protection *if* competition comes to the electrical industry in Alaska.

Among the consumer "rights" covered in this legislation are: Right to Know (informative or educational materials to allow a consumer to compare price, quality, supplier service records and terms of service), Right to Choice and Right to Fair Dealing (provide choices and pricing options to all consumers without discrimination, one billing for services), Right to Redress (procedures for prompt, effective, and low-cost resolution of consumer complaints), Right to Privacy (records cannot be released that identify a consumer), Right to Service Quality and Required Code of Conduct and Oversight (establishment of minimum safety and service criteria and minimum standards for all suppliers or aggregators).

The bill further mandates regulations to require that electrical service providers must continue to provide service to residential consumers who demonstrate that economic hardship has prevented payment of a bill in full.

Your support would be appreciated. **ED2:09/30/99**

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS:

LABOR &COMMERCE COMMITTEE, CHAIRMAN
JUDICIARY COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON UTILITY RESTRUCTURING, MEMBER
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Representative Norman Rokeberg

SECTIONAL ANALYSIS
COMMITTEE SUBSTITUTE FOR HOUSE BILL 81 (URS)
Electric Consumers Bill of Rights

Prepared by Rep. Norman Rokeberg

Section 1: **Adds new section to AS 42.05 concerning electric consumer protection:**

Provides that the Alaska Public Utilities Commission ("APUC") [NOTE: will need to be changed to reflect "Regulatory Commission of Alaska" as per law adopted during 1999 session] is to establish regulations concerning consumer protection standards, licensing requirements, procedures for resolution of consumer complaints, minimum safety standards, service criteria, and penalties in *a competitive electrical market.*

Consumer protection standards are to address the following areas of concern:

- **information and educational material,**
- **offer of service to consumers,**
- **electric service choices and pricing options,**
- **information and record,**
- **minimum safety standards and service criteria,**
- **advertised terms and conditions, and**
- **unreasonable terms and conditions.**

Requires that regulations that mandate that service providers continue to provide electric service to residential consumers who demonstrate economic hardship. Such regulations may require establishment of a reasonable deferred payment plan.

Regulations shall require an aggregator or supplier to meet minimum standards for certification as a condition of entry into the market. These standards are to be adopted by Commission regulations and must provide for reliable and safe electrical power.

Regulations must state that consumers are to receive only one periodic bill for provision of electric services to a location. That bill must provide clear and concise information regarding the bill.

Regulations are to provide that a customer's provider may only be changed upon written authorization of the customer (this is to prevent the practice known as "slamming").

Reports will be required from the providers participating in a competitive electric service market.

Utilities that have opted out of economic regulation by the Commission will not be brought back under economic regulation; *however, if these utilities are operating in a competitive market, they will be required to follow the consumer protection requirements of this legislation.*

Definitions of "competitive electric service market" and "electric service provider".

Section 2: **Effective date: immediate.** **ED 2:09/30/99**

FISCAL NOTE

STATE OF ALASKA
1999 LEGISLATIVE SESSION

BILL NO. HB 81

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

Title Consumer protection in a competitive electric market BRU _____

Component Ak Public Utilities Commission

Sponsor Reps. Rokeberg, Dyson

Requester _____ Component Serial No. 364

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	183.5	183.5	183.5	183.5	0.0	0.0
Travel	2.3	2.3	2.3	2.3	0.0	0.0
Contractual	17.1	17.1	17.1	17.1	0.0	0.0
Supplies	4.0	4.0	4.0	4.0	0.0	0.0
Equipment	0.9	0.9	0.9	0.9	0.0	0.0
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	207.7	207.7	207.7	207.7	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	207.7	207.7	207.7	207.7	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)	207.7	207.7	207.7	207.7	0.0	0.0
TOTAL	207.7	207.7	207.7	207.7	0.0	0.0

Estimate of any current year (FY99) cost: _____

POSITIONS

Full-time	3.5	3.5	3.5	3.5	0.0	0.0
Part-time						
Temporary						

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

Please see attached narrative.

Prepared by Robert A. Lohr Phone 276-6222

Division APUC Date/Time 4/20/99 4:27 PM

Approved by Commissioner _____ Date 4/20/99

Agency _____

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Preliminary Assessment of HB 81 fiscal impact on the Commission

HB 81 requires the Commission to adopt regulations to protect consumers in a competitive electric service environment. Staff believes that the regulations the bill will require the Commission to adopt will be significantly different from the current electric regulations. For example, the bill, if passed as proposed would require regulations to prevent disconnection of service if a hardship is proven. The current regulations give an extension of time to certain customers (elderly, handicapped, seriously ill, and in households where someone is on life support). However, the current regulations allow disconnections after 15-30 days.

Staff believes the impact on the Commission will be similar to what the Commission experienced with competition in telecommunications markets. Staff believes it will affect the Commission's workload agency wide, including but not limited to certification/licensing filings, tariff filings and consumer complaints. For example, with local telephone competition, telecommunications applications increased 52% in FY98 over FY97, from 32 telephone certifications in FY97 to 66 in FY98. Tariff filings in the telecommunications area increased by 41% in FY98 over FY97, from 192 telephone filings in FY97 to 323 in FY98. Consumer complaints regarding telephone issues increased by 25% over the same period, from 336 in FY97 to 449 in FY98. Telephone complaints in the first eight months of FY99 have already reached 515, 13% more than the previous 12 months with four months remaining. Certification filings and tariff filings have increased 4% and 7% respectively for the first eight months of FY99.

The rulemaking and implementation aspects will definitely affect the Commission's Consumer Protection Section, Engineering Section, Tariff Section, and Records Section. It will also impact the Commission's Legal Staff, Hearing Officer and Receptionist. Again, Staff anticipates that the impact on the agency will be similar to the impact the agency experienced with the adoption and implementation of the competitive local telephone service regulations. Staff anticipates the following resources to adopt and implement regulations specified in the bill.

Consumer Protection - Staff anticipates the need for a full time Consumer Protection & Information Officer (CPIO) I. The added position would be needed beginning the first year of implementation of the regulations and thereafter. Staff anticipates that CP would experience a similar increase as CP experienced with the implementation of regulations governing local telephone competition. However, the staffing level may vary depending on the extent of the competition. For example, local telephone competition has thus far been limited to Anchorage. Staff's projection is based on electric competition in Anchorage. The bill does not appear to limit the market size. Also, based on Staff's experience with the local telephone competition, Consumer Protection

Section (CPS) should take a proactive approach to electric competition. For example, one component of the bill requires that the suppliers provide consumer education. CPS should be actively involved in the education/information dissemination process ahead of the actual implementation of the regulations.

Engineering - The licensing requirement will require a regulatory proceeding to establish the applicable rules and application procedure. The proceeding will establish the minimum requirements necessary to meet the licensing criteria. Staff anticipates a Utility Engineering Analyst (UEA) II would devote full time to act as docket manager establishing minimum safety standards and service criteria in more than one regulatory proceeding for two years. Once the regulations are in place and the barriers to entry and exit are reduced, the UEA II would review licensing applications for completeness and to do annual reviews to assure the licensees are still providing service beginning with the third year and thereafter.

Tariffs - Staff anticipates that the impact of the adoption of regulations for a competitive electric market will require a half-time Admin. Clerk II. The increased filings anticipated will require the half-time position over four years.

Hearing Examiner - Staff anticipates that a Hearing Examiner (HE) will be required to decide informal complaints that elevate to formal complaints. The bill requires that the Commission adopt procedures to ensure that complaints are decided in a prompt, effective and low-cost resolution process. The current procedures for formal complaint handling are not prompt. Staff anticipates one half-time HE beginning with year one of implementation, continuing thereafter.

Records and Filings - Staff anticipates that Records and Filing (R&F) will need one half-time Admin. Clerk II (Clerk II) to process filings associated with a competitive electric market. The Clerk II will devote half-time to process filings, routing, docket entries, dockets set up, orders, notices, public requests for copies, and mailings.

Human Resources

Consumer Protection	- CPIO I	$44,400
Engineering	- UEA II	64,579
Hearing Officer	- ½ Hearing Examiner	42,900
Records & Filing	- ½ Admin. Clerk II	15,795
Tariffs	- ½ Admin. Clerk II	15,795
Total		**$183,469**

HB 81

Section I. AS 42.05 is amended by adding a new section to read:

Sec. 42.05.226. Electric consumer protections. (a) The commission shall establish by regulation

1. with consumer protection standards to protect consumers in a competitive electric service market; **[rulemaking - CP, Finance, Engineering]**

2. licensing requirements for electric service providers operating in a competitive electric service market; **[rulemaking - Engineering]**

3. for **prompt**, effective, and low-cost resolution of consumer complaints against electric suppliers, aggregators, and distributors operating in a competitive electric service market; **[rulemaking - CP, Hearing Officer]**

4. minimum safety standards and service criteria for electric service providers in a competitive electric service market; **[rulemaking - Engineering]**

5. penalties for electric service providers operating in a competitive electric service market who fail to comply with the requirements of the chapter; **[rulemaking - Hearing Officer]**

(b) The consumer protection standards adopted under (a) **must** require electric service providers operating in a competitive electric service market to

(1) provide consumers with free or reasonably priced information and educational materials to enable consumers to compare the price, quality, supplier service record, and terms of service offered by the electric service provider with the offerings of other providers in the market; **[rulemaking - CP]**

(2) offer electric service to any consumer in the area served by the electric service provider so long as providing the service is technically feasible at a reasonable cost to the provider; **[rulemaking - Engineering]**

(3) provide electric service choices and pricing options to all consumers without discrimination; **[rulemaking - CP, Finance]**

(4) maintain information and records, including records concerning individual electric use patterns, about the electric service provider's consumers as confidential records; however, an electric service provider may report information to the commission so long as the information does not identify directly or indirectly an individual consumer; **[rulemaking - CP, Engineering, Tariffs]**

(5) meet the minimum safety standards and service criteria established by the commission; **[rulemaking - Engineering]**

(6) meet its advertised terms and conditions; **[rulemaking - CP, Tariffs]**

(7) refrain from imposing unreasonable terms and conditions as a precondition to providing service to a consumer in a competitive electric service market.**[rulemaking - CP, Engineering, Tariffs]**

(c) The commission **shall** adopt regulations to require electric service providers operating in a competitive electric service market to continue to provide electric service to residential consumers who

demonstrate that economic hardship has prevented payment in full of a delinquent bill. The regulations may require the consumer to agree to a reasonable deferred payment plan and to comply with the plan.**[rulemaking - CP, Tariffs]**

(d) The commission **shall** adopt regulations to require a supplier or an aggregator operating in a competitive electric service market to meet minimum standards for certification as a condition of market entry. The commission **shall,** by regulation, **adopt** the standards for certification. **[rulemaking - Engineering, CP]**

(e) The commission **shall,** by regulation, provide that an electric service consumer in a competitive market may receive only one periodic billing for the provision of electric service to a location. The billing **must** set out information in a clear and concise manner so that the consumer is informed about the components of the billing, including charges associated with generation and with transmission and distribution. **[rulemaking - CP, Engineering, Finance, Tariffs]**

1-LS0181\K.1
Cramer
10/4/99

AMENDMENT

OFFEKED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: CSHB 81(URS)

Page 1, line 1:

Delete "**Alaska Public Utilities Commission**"

Insert "**Regulatory Commission of Alaska**"

1-LS0181\K.2
Cramer
10/4/99

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: CSHB 81(URS)

Page 4, lines 10 - 12:

Delete "This section may not be applied to result in a utility that is not otherwise subject to economic regulation by the commission becoming subject to economic regulation by the commission."

Insert "This section applies to a utility operating in a competitive electric service market. If a utility is exempt from the provisions of this chapter other than AS 42.05.221-42.05.281, the commission may not apply this section to make the utility subject to other provisions of this chapter."

Subject: House Bill 81
Date: Mon, 10 May 1999 16:54:07 -0800
From: "Marty Weinstein" <Martin_Weinstein@law.state.ak.us>
To: <Janet_Seitz@legis.state.ak.us>

Hi Janet. As discussed, I recommend the following substitute for section (h) to avoid using the undefined term "economic regulation," which is a term of art loosely used in the utility industry:

"(h) This section applies to a utility operating in a competitive electric service market. If a utility is exempt from provisions of this chapter other than AS 42.05.221-42.05.281, the commission may not apply this section to make a utility subject to provisions of this chapter other than AS 42.05.221-42.05.281."

The language I have used tracks the exemption language in AS 42.05.711. When the legislature wants to exempt a utility from "economic regulation" but not from certification regulation, the legislature most frequently creates a blanket exemption from APUC regulation but then creates an "exception to the exception" that makes exempt utilities nonetheless subject to certification regulation under AS 42.05.221-42.05.281. See, e.g., AS 42.05.711(b), (f), (h) and (k). I hope this is helpful. Marty Weinstein.

TONY KNOWLES, GOVERNOR

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 30, 1997

4:05 p.m.
MAY 01 1997

The Honorable Norman Rokeberg
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

The Honorable Jerry Sanders
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Re: APUC Authority

Dear Representatives Rokeberg and Sanders:

At the House Labor and Commerce Committee hearing on HB 235 on April 16, 1997, you asked Robert A. Lohr, Executive Director of the APUC for a report on the Commission's authority to issue an electric utility a certificate to compete with an existing utility, and to impose conditions that protect the public from "cream-skimming." Because these questions involve a review of legal authorities, the Attorney General's Office, as legal counsel for the Commission, was asked to prepare this response.

The APUC Has Authority Under Current Law to Issue Certificates Allowing Competition in Electric Utility Service.

A. Statutory Certification Authority

The Alaska legislature has required a public utility to obtain a certificate of public convenience and necessity from the Alaska Public Utilities Commission before operating or receiving compensation for providing the utility commodity or service. AS 42.05.221(a).[1] Through this statute, the

[1] SECTION 42.05.221. CERTIFICATES REQUIRED. (a) A public utility may not operate and receive compensation for providing a commodity or service without first having obtained from the commission under this chapter a certificate declaring that public convenience and necessity require or will

legislature placed control over entry into the utility business in the Commission's hands. Nothing in this statute suggests that the certificates granted by the Commission are exclusive, or that the Commission's authority to grant a certificate is restricted or limited if the applicant would compete with an existing utility.

AS 42.05.241 establishes procedural and substantive guidelines for the Commission in exercising its authority to grant certificates. This statute provides:

> A certificate may not be issued unless the commission finds that the applicant is fit, willing and able to provide the utility services applied for and that the services are required for the convenience and necessity of the public .... (emphasis added)

In compliance with this statute, the Commission must examine the question of whether the public needs the additional service when it considers granting a competing certificate. The Commission cannot grant the competing certificate unless, after examining the question, it finds that the public convenience and necessity do require the competing service.

The term "public convenience and necessity" cannot support an argument that competing certificates are prohibited. Interpreting this term, one court looked back to previous decisions and said:

> The court has stated that the "public convenience and necessity" standard allows the department to exercise wide discretion to take into account a broad range of factors in making the determination whether it has been met. Almeida Bus Lines, Inc. v. Department of Pub. Utils., 203 N.E. 2d 556 (1965). Holyoke St. Ry. v. Department of Pub. Utils., 198 N.E. 2d 413 (1964). Newton v. Department of Pub. Utils., 160 N.E.2d 108 (1959) (all of which discussed the propriety of using the value of competition as a basis for making a "public convenience and necessity" finding).

Zachs v. Department of Public Utilities, 547 N. E. 2d 28 at 32 (Mass. 1989). (State reporter citations omitted).

Therefore, although it requires the question to be addressed and a finding made, AS 42.05.241 gives the Commission the policy-making authority to grant a competing certificate, including

---

require the service. Where a public utility provides more than one type of utility service, a separate certificate of convenience and necessity is required for each type. A certificate must describe the nature and extent of the authority granted in it, including, as appropriate for the services involved, a description of the authorized area and scope of operations of the public utility. . . . (emphasis added)

a competing electric utility certificate, if the Commission decides that the public will benefit from competing utility service.

B. Natural Monopoly Theory

It is true that in the past the Commission has not issued certificates authorizing competitive provision of electrical service. This long-standing policy is not based on lack of authority or on any legal restriction prohibiting the Commission from issuing a competive utility certificate. The non-competitive policy is based on an economic theory widely accepted in the past, but now subject to question (or already rejected) in policy debates all over the United States and in some foreign countries as well. The economic theory was that utilities, including electric utilities, are natural monopolies and should have exclusive service territories because competition would mean wasteful duplication of the capital investment in facilities required to provide the service.

As discussed above, the natural monopoly theory is not formalized in Alaska's statutory scheme, and therefore no statutory change is required before the Commission can consider whether the public convenience and necessity require any competing certificate to be issued. The Commission has authority to change its monopoly policy in granting certificates.

The natural monopoly theory is also not formalized in the legal concept of a certificate. In Alaska, a series of court decisions resulted from competition between electrical utilities in the 1960's and 1970's. These cases involved competition between REA cooperative electric utilities certificated by the Commission, and municipally owned utilities operating under statutory authority. Before 1970, the municipal utilities were not required to obtain certificates from the Commission.

In the first of these cases, the Alaska Supreme Court rejected the argument that a certificate granted by the Commission was an exclusive right to provide service in the specified service area. It is arguable that this ruling only addressed the situation of competition from an uncertificated utility operating under a municipality's statutory authority. Nevertheless, it is clear that the court rejected the argument that the natural monopoly theory must lead to the conclusion that a certificate is an exclusive right to serve a particular area. Homer Electric Association v. City of Kenai, 423 P.2d 285 at 288-289, n. 16. (1967). See also, Chugach Electric Association v. City of Anchorage, 426 P. 2d 1001, 1003 (1967).

In these decisions, the court recognized that the effect of holding that a utility certificate was not exclusive could be uneconomic duplication of facilities. The court urged the legislature to fix this problem. See Homer, 423 P. 2d at 290; Chugach, 426 P.2d at 1004-05. In response the legislature adopted

AS 42.05.221(d).[2] This provision, while making explicit the Commission's authority to eliminate undesirable duplication of facilities, is carefully drafted not to require the Commission to eliminate all competition. This statute directs the Commission to eliminate the competition only if the Commission finds 1) that there is competition, and 2) that the competition is not good for the public. Like AS 42.05.241, AS 42.05.221(d) clearly leaves the door open for a policy-making determination that competition between electrical utilities may be good for the public.

C. *Longstanding Interpretations*

Finally, the Commission has in the past interpreted its statutes to give it authority to issue competing certificates when it concluded that competition was in the public interest, and the legislature has apparently agreed. In interpreting a statute, the court will give some weight to a long-standing agency interpretation. Nat. Bank of Alaska v. State, Dept of Rev., 642 P.2d 811 at 815 (Alaska 1982). The APUC has granted competing certificates for refuse collection utilities: (Re Claude Bailey d/b/a Valley Refuse, et al, 7 APUC 97 (1985); Re Wasilla Refuse, Inc., 8 APUC 106 (1987); for radio common carriers, (RE Competition and Deregulation of Radio Common Carriers as Public Utilities, 5 APUC 86 (1982)); and for water utilities (Re Eagle Utilities, Inc., 7 APUC 548 (1986). For telecommunications utilities, statutory directives (state and federal) now require the Commission to grant competing certificates. In adopting a mandate for competition in long distance telephone service (AS 42.05.800-AS 42.05.890 , § 2 ch 93 SLA 1990), the Alaska legislature did not think that the underlying statutory scheme for certification needed amendment before the Commission had authority to grant competing certificates.

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[2] SECTION 42.05.221. CERTIFICATES REQUIRED. ...

(d) In an area where the commission determines that two or more public utilities are competing to furnish identical utility service and that this competition is not in the public interest, the commission shall take appropriate action to eliminate the competition and any undesirable duplication of facilities. This appropriate action may include, but is not limited to, ordering the competing utilities to enter into a contract that, among other things, would:

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

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

(3) preclude future duplication and paralleling;

(4) provide for the exchange of customers and facilities for the purposes of providing better public service and of eliminating duplication and paralleling; and

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

(emphasis added)

II. The Commission Has Some Authority to Prevent Cream-skimming.

When competition in utility service is permitted, it is predictable that competitors will seek to serve the most profitable customers. The competing utilities may be less willing to serve smaller users, typically residential and small commercial customers. The result may be that service deteriorates while costs rise for those customers. The practice of targeting service only to the most profitable customers is called "cream-skimming." Existing statutes, including AS 42.05.221(d),[3] AS 42.05.241[4], AS 42.05.271,[5] and the Commission's general powers, AS 42.05.141[6], give the Commission some authority to deal with

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[3] See page 4.

[4] SECTION 42.05.241. CONDITIONS OF ISSUANCE. A certificate may not be issued unless the commission finds that the applicant is fit, willing and able to provide the utility services applied for and that the services are required for the convenience and necessity of the public. The commission may issue a certificate granting an application in whole or in part and attach to the grant of it the terms and conditions it considers necessary to protect and promote the public interest including the condition that the applicant may or shall serve an area or provide a necessary service not contemplated by the applicant. The commission may, for good cause, deny an application with or without prejudice. (emphasis added)

[5] SECTION 42.05.271. MODIFICATION, SUSPENSION OR REVOCATION OF CERTIFICATES. Upon complaint or upon its own motion the commission, after notice and opportunity for hearing and for good cause shown, may amend, modify, suspend, or revoke a certificate, in whole or in part. Good cause for amendment, modification, suspension or revocation of a certificate includes

(1) the requirements of public convenience and necessity;

(2) misrepresentation of a material fact in obtaining the certificate;

(3) unauthorized discontinuance or abandonment of all or part of a public utility's service;

(4) wilful failure to comply with the provisions of this chapter or the regulations or orders of the commission; or

(5) wilful failure to comply with a term, condition, or limitation of the certificate. (emphasis added)

[6] SECTION 42.05.141. GENERAL POWERS AND DUTIES OF THE COMMISSION. (a) The Alaska Public Utilities Commission may do all things necessary or proper to carry out the purposes and exercise the powers expressly granted or reasonably implied in this chapter, including

(1) regulate every public utility engaged or proposing to engage in such a business inside the state, except to the extent exempted by AS 42.05.711;

(2) investigate, upon complaint or upon its own motion, the rates, classifications, rules, regulations, practices, services and facilities of a public utility and hold hearings on them;

(3) make or require just, fair and reasonable rates, classifications, regulations, practices, services and facilities for a public utility; . . . .

cream-skimming problems. However, because of limitations within these statutes or their general nature, the Commission's authority may not reach all variations of cream-skimming problems that may arise.

The discussion below shows how these statutes provide Commission authority to protect the public against cream-skimming, and discusses the limitations.

AS 42.05.221(d). Where the Commission finds competition exists and is not in the public interest, this statute authorizes the Commission to take action to "eliminate the competition and any undesirable duplication of facilities." This statute seems to contemplate a remedy that would eliminate the competition, not a remedy that would seek to make competition serve the public interest. For example, if an appropriate cream-skimming remedy may be to order a competitor in a concentrated market to also serve a remote community, this statute does not seem to provide that authority.

AS 42.05.241. This statute gives the Commission broad authority to impose conditions needed to protect the public when it grants a certificate. The Commission can attach to the grant of a certificate the terms and conditions it considers necessary to protect the public interest. One common remedy against cream-skimming is specifically authorized in this statute–the Commission can require a certificate applicant to provide a service that the applicant does not seek to provide. The language also clearly authorizes other remedies the Commission may devise at the time a certificate is granted. However, if the need for a condition to prevent cream-skimming does not become apparent until after the certificate is granted, this statute may not help.

AS 42.05.271. This statute is quite broad, and, along with the Commission's general powers, AS 42.05.141, arguably provides authority to address cream-skimming by requiring a utility to provide service to neglected customers. However, in the past, Commission orders have been challenged on the basis that the Commission's statutory authority is not "explicit," resulting in costly litigation over the extent of the Commission's "implied" authority.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Virginia A Rusch
Virginia A. Rusch
Assistant Attorney General

VAR:jem

Aurora Power
www.aurorapower.com

August 24, 1998

Senator Loren Leman, Chairman
Subcommittee, Joint Committee on Electric Utility Restructuring
Alaska State Legislature
716 West 4th Avenue, Suite 540
Anchorage, Alaska 99501-2133

AUG 24 1998

Dear Senator Leman:

At the August 18th meeting of the Joint Committee on Electric Utility Restructuring, Representative Norman Rokeberg requested that we provide your subcommittee with key issues to be examined during a joint study by the Legislature and APUC.

Aurora Power would like to offer the following recommendations for the study:

- **PILOT PROGRAM**
  Allow a limited scope and limited time frame pilot program to be initiated to the Anchorage area. This pilot program would accompany the study to provide actual data on technical issue resolution, utility coordination and customer satisfaction back to the decision-makers.

- **CUSTOMER PROTECTION**
  Develop Customer protection rules by the APUC. This is a fairly straightforward recommendation to be incorporated as part of the study. Currently Michigan has an extensive docket U-11290 that addresses Customer Focus Issues and Recommendations. Many of the issues and concerns that were raised in the two hearings, as well as the ARECA conference have already been addressed in this document. The staff of the Michigan Commission recommended that the Commission or Legislature consider developing a formal summary of those rights essential to electric consumers. The list would be used as the foundation for guaranteeing consumer protection for all electric consumers.(**Copy Attached – Electric Consumer Bill of Rights)**

- **SUPPLIER OF LAST RESORT**
  Each of the states (California, Maine, Massachusetts, Montana, Nevada, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont) that have adopted or are implementing restructuring programs have provided for a "supplier of last resort." This has been accomplished by establishing a default service or a standard offer provision, or both. In each of these states, the Distribution Company is required to provide basic service to all customers in its service territory:
  1) Who choose not to contract directly with a supplier;
  2) Who cannot obtain power in the open market; or
  3) Whose supplier fails to provide generation service.
  The objective is to ensure that no customer goes without electricity.

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Customers not electing the option to choose an alternative supplier for power generation may retain total service from their host utility. If the customer chooses to remain sales customers of the existing utility, they will not be harmed by the change brought about by restructuring.

- **OBLIGATION TO SERVE**
  For transmission and distribution service, the obligation to serve remains relevant in a competitive generation market since it is expected that these will continue as natural monopoly functions. The natural gas industry moved through a similar transition in the 1980's. In that industry, the issue was resolved by restricting the utility's obligation to serve to those customers who choose an alternative supplier. In those instances, the utility maintains an obligation to deliver the gas the customer procured, but is under no obligation to procure new or additional supplies for the customer. A similar approach could be applied to electricity. Under this approach, the obligation to serve, which by historical definition includes the requirement to supply electricity, would be changed to the "obligation to connect" and deliver electricity for those customers who choose an alternative generation supplier. The utility would no longer be under an obligation to procure and sell electricity to such a customer although it could if it chose to do so.

Aurora Power believes that the aforementioned issues are important implementation decisions to be resolved by the APUC. The list of issues that need to be studied could become quite elongated if a company were to follow the goal of postponing Customer Choice for as long as possible. Aurora's intent is to keep the process simple and enable customer choice in a timely and beneficial manner. The decisions made by the APUC, which will hopefully include implementation of pilot program, will benefit the consumers and provide a valuable stepping stone to full retail wheeling in the Railbelt.

Thank you for your time and consideration of this matter.

Sincerely,

Mary Ann Pease

Mary Ann Pease
Vice President

Cc: Rep. Norman Rokeberg
Senator Bert Sharp
Senator Robin Taylor
Senator Al Adams
Rep. Alan Austerman
Rep. Fred Dyson
Rep. John Davies

Electric consumer Bill of Rights

1. **Right to Know** – Customers should be assured access to free (or easily affordable) and accurate information and education materials, which enable comparison of price. quality, supplier service records, and terms of service offered.

2. **Right to Choice** – Customers should have the ability to choose from among service providers competing in an open market. All customers should have the ability to aggregate efficiently on a nondiscriminatory basis.

3. **Right to Fair Dealing** – All classes of customers should have access to choices and pricing options without discrimination.

4. **Right to Redress** – There should be a neutral, prompt, effective, no-cost or low-cost forum for resolving customer complaints against electricity suppliers, aggregators, and distributors.

5. **Right to Privacy** – Consumers should be able to control release and use of sensitive personal information and records. Marketing should not be unduly intrusive.

6. **Right to Service Quality** – All choices offered to customers should meet minimum safety standards and service criteria, and must fulfill advertised terms and conditions. Unreasonable terms and conditions (e.g. blanket requirements for service limiters) should not be forced on any customers as a precondition for providing service.

7. **Required Code of Conduct and Oversight** – All suppliers and aggregators should meet minimum standards for certification as a condition of market entry and adhere to a standard code of conduct.

8. **Right to Universal Electric Service** – Electric service is a basic necessity, which should be accessible to all residential consumers/properties. Universal service includes the right to firm generation, transmission, and distribution services, and such metering as is necessary to allow customers to participate fully in a competitive power market.

Mary Ann Pease
Aurora Power Resources, Inc.

April 21, 1999

I would like to take this opportunity to voice my support for HB81-"An Act relating to the provision of electric service in the state; and providing for an effective date."
HB 81 provides a precise and useful summary to address the transitional issues associated with consumer protection as we move forward to a competitive, "customer-Choice" state for electric industry restructuring.

The adoption of retail electric competition will require Alaska to rethink a broad range of issues concerning the provision of basic electric utility service to all customers. HB81 is intended to help state decision-makers respond to one significant part of the overall agenda, referred to as consumer protection issues and concerns. Basically, these issues will redefine the consumer's relationship with his or her energy supplier and redefine the rights and remedies of consumers to obtain and maintain electric service. Consumer protection issues are critical as Alaska moves from monopoly regulation of electric utilities to a competitive market for generation services. Most participants in the restructuring debate agree that the general public will not consider the prospect of theoretically lower prices in the future as a sufficient tradeoff if the new market also means an increase in customer confusion, complaints, and inability to understand and participate in the new market structure. These problems and issues can be addressed and remedied in such a fashion as to expedite and encourage a smooth transition to a competitive electric environment in the Railbelt. In short, consumer protection issues are crucial to the public's acceptance of the new market structure. HB81 is appropriately aimed at Alaska since we have not yet adopted electric restructuring legislation.

While many key decisions that will impact the creation of a competitive market are not the subject of HB81, there are two initiatives that may go far to help stimulate customer interest in these changes and help consumers learn about the move to electric competition. The first initiative looks at how consumers are educated about the move to electric competition. The second initiative focuses on giving consumers the tools to enter the competitive market and make an informed choice.

Most residential and small business consumers routinely pay their monthly electric bill without much attention to their regulated rates or their load profiles. Indeed, recent research reveals that most consumers do not know their annual energy usage or the price paid per kWh on their utility bill. The purpose of a comprehensive public education program would be aimed at maximizing public participation in the implementation of retail competition, minimizing customer confusion about the changes being undertaken in the electric industry, and equipping all customers with the means to participate effectively in a competitive electric market.

Consumer research has confirmed that the public wants comparative price information. Focus groups and surveys in New Hampshire and Massachusetts of customers who participated in pilot electric competition programs documented confusion with the lack of standardized pricing statements and a call for state regulation to provide standard price disclosures. "As a result of this experience, the utility commissions in New England have worked together to develop a model uniform Electricity Disclosure Label and a more detailed Terms of Service document for the sale of electricity to residential and small commercial customers to be used by suppliers marketing in the New England region," issues that our APUC will undoubtedly have to contend with as well.

The move to retail electric competition will probably require the APUC to redefine the role of the local utility. For many years the local electric utility has had a monopoly on the generation, distribution and transmission of electricity. Now policymakers must decide what portion of this vertically-integrated industry must remain subject to monopoly regulation and what portion should be open to competition. The distribution function will remain a monopoly in all states that have adopted electric restructuring legislation to date. This means that the local poles and wires used to deliver electricity will not be duplicated. In some states, the distribution function will continue to include billing, metering and customer service functions, but in other states these attributes will also be opened to competition.

Obligation to Serve

The duty of the distribution utility will change from an obligation to serve to a duty to provide access to the electric grid on a nondiscriminatory basis. Under this approach, the distribution utility will continue to provide line extensions and assure connection to the local distribution system.

- Default Service

  Every state that has considered the implications of a move to retail competition in the sale of electricity has determined that a Default Service option (also referred to as the "Standard Offer" or "Basic Service") must be provided to a customer who does not choose a competitive supplier for generation services. In other words, customers will be assured a continuous source of electricity even if they do not choose a new supplier. There is a sound argument that this "Utility of Last Resort" could be competitively bid rather than remain the responsibility of the current distribution provider.

Most states have required the distribution utility to provide generation services to Default Service customers. This approach, often accompanied by rate caps or rate reductions for all customers, raises concerns about market power in a newly created competitive market. Other states have responded to this concern by mandating that the distribution utility obtain generation for this service by a competitive bid.

A distribution utility will remain responsible for most aspects of power quality because of its retained ownership of the distribution system, that is, the poles and wires that deliver electricity to each customer's home and place of business. Therefore, a distribution

utility will remain responsible for service reliability (outages, their frequency and duration), installation of service (service drops, as well as line extensions in previously unserved areas), disconnection of service, complaint resolution concerning distribution services, change-orders for customer-supplier relationships and billing and collection for at least distribution charges and perhaps for suppliers as well. Electric restructuring legislation in several states has reaffirmed the duty of distribution utilities to maintain service quality and reliability in the transition to a new industry structure and has linked that obligation to the use of Performance-Based Ratemaking (PBR) in setting rates for distribution services.

M U N I C I P A L I T Y O F A N C H O R A G E
Rick Mystrom • Mayor

Municipal Light & Power

April 27, 1999

Chairman Bill Hudson
Vice-Chairman John Cowdery
Members of the House Committee on Utility Restructuring

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Re: Testimony of Municipal Light & Power on HB 81- Consumer Bill of Rights

Honorable Representatives:

Municipal Light and Power supports the intent and purpose of HB No. 81 and believes that consumer protection is a matter of central and critical importance in any effort to restructure electric service markets. As the current draft of the CH2M Hill "Study of Electric Utility Restructuring in Alaska" notes, misdirected restructuring efforts can impact consumers adversely in terms of the availability, cost, and reliability of electric power:

> The concept of equitable sharing is not the focal point of a competitive market. Those with the most information and the greatest ability to interpret and react to that information tend to win... Since the most likely time for generation shortages would be on the coldest days in the winter or the hottest days in the summer, low income residential customers who heat or cool with electricity could face a dilemma.[Study at 7.7]

The proposed bill begins the process of insuring that as restructuring moves forward, consumers' interests are not left behind, to the inequities of the marketplace.

In that spirit, ML&P notes the following considerations and recommendations in connection with HB 81. These observations are intended to enhance the scope or effectiveness of the proposed legislation, in furtherance of the public interest concerns motivating its sponsorship.

1. Though critical components in the restructuring equation, the provisions of HB 81 do not (and do not purport to) address all elements which the Commission must address to successfully investigate electric restructuring. This fact is made clear by the CH2M Hill Study, which outlines the broad array of matters

– including those in HB 81 – which require examination. Accordingly, ML&P recommends that proposed Sec. 42.05.226(a) be amended to read:

> ***Sec. 42.05.226. Electric consumer protections.** (a) As part of any general proceeding or proceedings to investigate electric industry restructuring, the Commission shall establish by regulation [etc.]

2. At least one would-be electric service provider has already asserted that it is not subject to the jurisdictional powers of the Commission concerning utility service provisioning. The proposed legislation, HB 81, uses various terms at various points, e.g., "electric service providers" [(a)(2)], "electric suppliers, aggregators, and distributors" [(a)(3)], and "supplier or an aggregator" [(d)]. To ensure full protection for consumers, ML&P recommends that the phrase "electric service supplier" be uniformly utilized throughout the proposed legislation and that the following amendment be added:

> *(f) For purposes of this section, "electric service provider" shall mean any person or entity, including but not limited to a utility, a broker, a marketer, a wholesaler, or an aggregator, seeking to provide or providing electric service to the public or any portion thereof, whether for compensation or otherwise.

3. The experience in telecommunications restructuring, as well as in those few jurisdictions which have undertaken electric restructuring, clearly demonstrates that more consumer data is not the same thing as more consumer information. As CH2M Hill notes,

> Equipping all customers with the education and technological capacity to fully participate in markets characterized by changing hourly electricity costs could easily overwhelm any savings likely to result from the introduction of competition into the industry. [Study at 7.7]

While not disagreeing with the direction of the draft provisions, ML&P believes that any legislative intent accompanying HB 81 should make clear that the goal of the legislation here is clarity, not volume, of information, and that the costs of such information are recoverable from the rates charged to consumers.

4. ML&P has received CH2M Hill's written comments on HB 81, addressing five numbered items. ML&P believes that items 4 and 5 in those comments deal more with competition and competitive structures than with consumer protection, and are neither properly nor effectively addressed here by minor amendments to HB 81.

Competition produces benefits where it promotes reduced costs of service. In seeking to inject issues concerning "customer proprietary network information" (as the 1996 Telecommunications Act describes it) and access to billing and other "back office" support systems, CH2M Hill's comments open very broad topics with implications far beyond consumer protection. ML&P believes CH2M Hill's Study fully supports this view when it asserts:

> But the path from the traditional electric power business to the more competitive industry of the future is strewn with issues and obstacles, some of which may resist resolution and movement more stubbornly tha[n] is commonly assumed today. The issues may include disagreements over the rules and procedures that should govern access to transmission and distribution facilities; the division of regulatory authority between federal, state, and local government agencies; protection of all customer classes; new demands for more stringent environmental protection; and a number of questions related to cost allocation, cost recovery, and sustem reliability. How these issues are resolved will control the pace and scope of change in the industry and, in turn, will answer the overarching question of increasing concern: "What are the potential risks, benefits, and impacts of electric utility industry restructuring on all Alaskan consumers and the economy of the State as a whole?" [Study at 1.1-1.2; emphasis added].

As can be seen, consumer protection is an important piece, but only one piece, of the total puzzle. The other parts, requiring 15 pages of summarized "Recommendations" in the Study, also require thoughtful attention, in the manner proposed by the Study. ML&P supports the CH2M Hill Study's concept of methodical investigation and implementation of the issues. That approach, here, suggests that competitive issues be reserved for separate commission and legislative actions, and not be lightly and superficially injected into an otherwise sound piece of legislation on a different subject.

ML&P appreciates the opportunity to provide these comments and recommendations and stands ready to further support the work of the Special Committee and the sponsors of HB 81.

Respectfully submitted,

Meera Kohler
General Manager

Matanuska Electric Association, Inc.

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MAY 17 1999

May 11, 1999

The Honorable Norman Rokeberg
Chairman, House Labor & Commerce Committee
House of Representatives
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Rokeberg:

Re: CSHB81(URS) Version 1-LS0181\I

Matanuska Electric Association, Inc. (MEA) supports protecting the rights of consumers. We commend you for the foresight to take action to ensure statutory authority to protect the interests of consumers. Section (a) of HB81 is a good example of the broad protection language necessary to clearly protect consumers.

However, we believe that many other sections of HB81 attempt too much regulation in an area that is largely unknown.

As with any competitive environment, the tactics and strategies of competitors are unpredictable. Since competition for generation, transmission, distribution and retail marketing of electrical power will be a new environment, it is particularly difficult to establish the details of consumer protection beforehand.

For example, (b)(1) requires electric service providers operating in a competitive service market to provide consumers with educational materials, etc., without charge. Do providers have to mail this information to all consumers in the competitive market? Do providers have to provide this information only to customers? If Provider X is competing only for the school district account and Provider Y services the entire municipality, does X only have to provide information to the school district while Y must provide information to all consumers (or customers)? Does this information have to be provided every time any part of the information changes?

Under the requirements of (b)(2), how would the "area" of a given electrical service provider be determined? Who will determine whether providing electricity is technically feasible at a reasonable cost?

What does it mean under (b)(3) to "provide the same electric service choices and pricing options to all consumers?" Does this mean one should offer the same options to any consumer whose use is equivalent to another? What if one consumer's use is predominantly during peak hours when power costs more, while another is predominantly

power used during off-peak hours when power costs less? Who will determine what (b)(3) means?

Is the intent of (b)(4)(B), specifically the use of the word "may," that an electric provider could still refuse to release information despite receiving a written request from a consumer? How onerous would this record-keeping become?

Again, there are unanswered questions from the language in (b)(7). Does this mean no service or disconnect fees? Who would set "generally accepted industry standards" in a fluctuating, competitive market? In a competitive market, who would establish whether any particular term and condition is reasonable? Perhaps an electric service provider would offer a very low rate if a consumer signed on as a customer for a very long time. Is it the intent of HB81 that lower rates for longer contracts be prohibited?

Although Section (c) would codify an existing regulation, the existing regulation is designed for a monopolistic environment. Under a competitive environment, who would be responsible for debt should a consumer switch providers? Who would be responsible for negotiating a reasonable deferred payment plan that only "may" be required? Would the Alaska Public Utilities Commission (APUC) resolve disputes about what is reasonable? While this regulation may have merit in a monopoly environment, should electricity, once it is freely marketed, be treated differently than food, water, housing or medical services?

Section (e) seeks to require a single billing for provision of electrical service to a location. Would this section prohibit a single bill for multiple locations? Would this section prohibit combined billing with telecommunication, water and sewer or other services? If the electrical service provider has difficulty in securing information from generators of power, or from the distribution or transmission provider, who is responsible (and to whom) for the failure to inform the consumer?

Section (f) permits changing an electrical service provider only with written authorization. Does this prohibit or allow "written" authorization over the Internet? Or facsimile with signature?

The questions raised here are not exhaustive. MEA does not presume to have identified all the issues that may be raised as we enter the new era of competition and discover efficiencies that could lower costs for Alaskan consumers. The sample of questions are presented to help demonstrate that while authority to protect consumers should be provided to the APUC, since we don't know yet what form competition will take, the details included in HB81 are premature.

Thank you for considering MEA's suggestions.

Sincerely,

Tuckerman Babcock
Manager, Government and Strategic Affairs

meh
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COPPER VALLEY ELECTRIC ASSOCIATION, INC.

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May 5, 1999

Email: wilkinson@cvea.org

Representative Norm Rokeberg
House Labor & Commerce Committee
State Capitol
Juneau, Alaska 99801-1182

MAY 05 1999

SUBJECT: House Bill 81

Dear Representative Rokeberg:

The House Special Committee on Electric Industry Restructuring recently passed House Bill 81 to the House Labor & Commerce Committee. It is anticipated this bill will be heard by Labor & Commerce in the near future.

Copper Valley Electric Association has some serious concerns with the bill as presently drafted. To voice my concern, I have enclosed a copy of testimony provided to the Restructuring Committee on May 4, 1999, as well as a suggested committee substitute to address those concerns.

I am available to provide additional information or answer questions as you feel are appropriate.

Sincerely,

Robert A. Wilkinson
Chief Executive Officer

Enclosures

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[illegible] ELECTRIC ASSOCIATION, INC.

[illegible] Fax 835-4328

May 4, 1999

Representative Bill Hudson, Chairman
House Special Committee on Industry Restructuring
State Capitol
Juneau, Alaska 99801-1182

SUBJECT: Committee Substitute for House Bill 81

Dear Representative Hudson:

First, I want to thank you and the other committee members for your receptiveness to my input on HB 81. I am very appreciative of your diligence in attempting to protect the public interest, and I am certainly aware of the complexity of electric utility restructuring. This knowledge leads me to conclude just how difficult an issue this is in rural Alaska and, to a large degree, accounts for my caution when approaching restructuring. I believe I have some idea how much damage could be effected in the rural utility service areas by opening up those areas to competition while rural utilities are still in the process of attempting to build infrastructure and deliver electricity to some customers for the first time.

At your invitation, I have reviewed the bill and the committee substitute again. I have marked up the committee substitute in a manner that I hope reflects my concerns. The following brief discussion further summarizes my concerns:

1. This bill creates new categories of suppliers called electric service providers, aggregators, distributors, and suppliers. Those terms are not defined in this bill nor are they defined in the Alaska Public Utilities Commission Act. I believe it would be appropriate to define these terms somewhere in the proposed legislation.

2. These new categories of suppliers appear to be subject to a different type of restriction called licensing. The meaning of licensing is undefined and would appear to be implicitly something less than being required to provide a Certificate of Public Convenience and Necessity as are public utilities. I believe that if the intent is to permit some form of electric supplier to provide electricity within a service area, that supplier should be subject to the same certification requirements as any other utility, and further, there should be a determination of public need prior to granting such a certificate. At the risk of belaboring the point, anyone selling

electricity should be subject to all of the requirements of the APUC Act (AS 42.05) that apply to electric utilities.

3. The terms "technically feasible" and "reasonable costs" are sufficiently vague to create the potential for future disagreement. Regulated electric utilities are required to file tariffs outlining their service rules and policies with the Commission. These tariffs necessarily include standards as well as line extension policies regarding the provision of electric service. Following the comments in paragraph 2 above, it would stand to reason all electric service providers should be required to have these same tariffs on file with the Commission. Making all electric service providers subject to the requirements of AS 42.05 would accomplish this.

4. Every effort should be made to shore up the exemption of rural utility service areas from the invasion of new providers. I cannot over emphasize the impact on a small, rural utility if an outside entity comes in and provides service only to its larger load customers. In CVEA's recent experience with Alaska Power Systems' efforts to serve our largest customer, Petro Star Valdez Refinery, the results would have been devastating. Our study showed the loss of this customer would have necessitated a 13.8% increase to remaining customers. This practice, which has been referred to as cream skimming or cherry picking, is the beginning of the end for the remaining customers and can only result in higher rates for those remaining customers. Consequently, I propose that you insert a limitation on the size of service area in which a competitive electric service market could exist or, alternatively, firmly protect those cooperatively owned utilities who have gained exemption from APUC regulation under AS 42.05.711. I am sure there are other approaches. I do not presume to speak for other utilities, but in my view, only the larger urban service areas could withstand the impact of losing large loads and suitably engaging in a competitive marketing process in a restructured environment.

I am aware that a very substantial study has been undertaken by CH2M Hill in behalf of the APUC and the Legislature on the whole issue of restructuring. I genuinely believe that is the only proper approach to addressing the numerous and complex issues of restructuring. To my knowledge, state after state within the contiguous United States have undertaken the issue of restructuring only after comprehensive study. I am concerned that this bill and others like it may introduce the subject of restructuring in a piecemeal fashion before adequate study has been undertaken.

In closing, I want to thank you again for your close attention to this thorny and complex issue. Should the committee choose to move the bill forward this session I could certainly support it with proposed changes. I would be more than pleased to respond to questions you may have if you feel it appropriate.

Sincerely yours,

Robert A. Wilkinson
Chief Executive Officer

CS FOR HOUSE BILL NO 81( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ROKEBERG, Dyson

A BILL

FOR AN ACT ENTITLED

"An Act requiring the Alaska Public Utilities Commission to adopt regulations to provide standards of operation and consumer protection in a competitive electric service market; and providing for an effective date."

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

*Section1. AS 42.05 is amended by adding a new section to read:

Sec. 42.05.226. Electric consumer protections. (a)The commission shall establish by regulation

(1) consumer protection standards to protect consumers in a competitive electric service market;

(2) [LICENSING] <u>certification</u> requirements in accord with <u>AS 42.05.221</u> for electric service providers operating in a competitive electric service market;

(3) procedures for the prompt, effective, and low-cost resolution of consumer complaints against electric suppliers, aggregators, and distributors operating in a competitive electric service market;

(4) minimum safety standards and service criteria [FOR] as applied to public utilities under AS 42.05.291 which will also apply to electric service providers, aggregators, distributors, and suppliers as a further condition of operating in a competitive electric service market; and

(5) penalties for electric service providers operating in a competitive electric service market who fail to comply with the requirements of this chapter.

(b) The consumer protection standards adopted under (a) of this section must require electric service providers operating in a competitive electric service market to

(1) provide consumers with free basic information and free or reasonably priced educational materials to enable consumers to compare the price, quality, supplier service record, and terms of service offered by the electric service provider with the offerings of other providers in the market; the commission shall establish by regulation the information that must be provided without charge; that information must include

(A) the name of the provider and information about how to communicate with the provider, including emergency contact numbers;

(B) the type of service plans available and the cost of each type of service plan;

(C) the procedure to change service providers;

(D) the area in which a provider sells its product;

(E) basic information on the provider itself, including the number of years it has been in business and the number of customers it serves;

(2) offer electric service to any consumer in the area served by the electric service provider [SO LONG AS PROVIDING THE SERVICE IS TECHNICALLY FEASIBLE AT A REASONABLE COST TO THE PROVIDER];

(3) provide the same electric service choices and pricing options to all consumers;

(4) maintain information and records, including records concerning individual electric use patterns, about the electric service provider's consumers as confidential records; if the electric service provider has both a regulated component and an unregulated component, the provider shall keep the records of customers of one component confidential from the provider's other component; however,

(A) an electric service provider may report information to the commission so long as the information does not identify directly or indirectly an individual consumer;

(B) information may be released to an alternate service provider at the written request of the customer; for purposes of this subparagraph, an alternate service provider includes a regulated or unregulated component of an electric service provider that is otherwise not entitled to have access to the information;

(5) meet the minimum safety standards and service criteria established by the commission;

(6) meet its advertised terms and conditions;

(7) refrain from imposing unreasonable terms and conditions as a precondition to providing service to a consumer in a competitive electric service market.

(c) The commission shall adopt regulations to require electric service providers operating in a competitive electric service market to continue to provide electric service to residential consumers who demonstrate that economic hardship has prevented payment in full of a delinquent bill. The regulations may require the consumer to agree to a reasonable deferred payment plan and to comply with the plan.

(d) The commission shall adopt regulations to require a supplier or an aggregator operating in a competitive electric service market to meet minimum standards for certification as a condition of market entry. The commission shall, by regulation,

adopt the standards for certification; these standards must explicitly provide for reliable and safe electrical power.

(e) The commission shall, by regulation, provide that an electric service consumer in a competitive electric service market may receive only one periodic billing for the provision of electric service to a location. The bill must set out information in a clear and concise manner so that the consumer is informed about the components of the bill, including charges associated with generation, transmission, distribution, stranded cost allocation, universal service, and customer service. An electric service provider that handles the billing for a customer shall permit other electric service providers that supply, aggregate, or distribute electric power to the customer to include information in the bill at nondiscriminatory rates.

(f) The commission shall, by regulation, require that, in a competitive electric service market, a customer's electric service provider may only be changed with the written authorization of the customer.

(g) The commission shall, by regulation, require reports from electric service providers who are participating in a competitive electric service market and establish the contents of the reports.

(h) In this section, "competitive electric service market" means a market or program in which retail electricity customers are offered a choice of electric service provider, whether on a permanent or limited basis or under a pilot program. Nothing in this section shall be construed to permit competition within boundaries of an electric utility's recognized service area where the number of existing utility customers is less than 10,000.

(i) Nothing in this section shall exempt electric service providers, suppliers, aggregators, or distributors from the provisions of AS 42.05. For purposes of this section, the entities described as "electric service providers, distributors, aggregators, and

suppliers" shall be subject to the same requirements under such statutory sections as is a public utility.

(j) A public utility exempt pursuant to a deregulation ballot authorized by AS 42.05.712 shall not be subject to the provisions of this section.

COPPER VALLEY ELECTRIC ASSOCIATION, INC.

P.O. BOX 45, GLENNALLEN, ALASKA 99588
(907) 822-3211 FAX 822-5586 VALDEZ (907) 835-4301 FAX 835-4329

May 4, 1999

Recd 5/5/99

Representative Bill Hudson, Chairman
House Special Committee on Industry Restructuring
State Capitol
Juneau, Alaska 99801-1182

SUBJECT: Committee Substitute for House Bill 81

Dear Representative Hudson:

First, I want to thank you and the other committee members for your receptiveness to my input on HB 81. I am very appreciative of your diligence in attempting to protect the public interest, and I am certainly aware of the complexity of electric utility restructuring. This knowledge leads me to conclude just how difficult an issue this is in rural Alaska and, to a large degree, accounts for my caution when approaching restructuring. I believe I have some idea how much damage could be effected in the rural utility service areas by opening up those areas to competition while rural utilities are still in the process of attempting to build infrastructure and deliver electricity to some customers for the first time.

At your invitation, I have reviewed the bill and the committee substitute again. I have marked up the committee substitute in a manner that I hope reflects my concerns. The following brief discussion further summarizes my concerns:

1. This bill creates new categories of suppliers called electric service providers, aggregators, distributors, and suppliers. Those terms are not defined in this bill nor are they defined in the Alaska Public Utilities Commission Act. I believe it would be appropriate to define these terms somewhere in the proposed legislation.

2. These new categories of suppliers appear to be subject to a different type of restriction called licensing. The meaning of licensing is undefined and would appear to be implicitly something less than being required to provide a Certificate of Public Convenience and Necessity as are public utilities. I believe that if the intent is to permit some form of electric supplier to provide electricity within a service area, that supplier should be subject to the same certification requirements as any other utility, and further, there should be a determination of public need prior to granting such a certificate. At the risk of belaboring the point, anyone selling

electricity should be subject to all of the requirements of the APUC Act (AS 42.05) that apply to electric utilities.

3. The terms "technically feasible" and "reasonable costs" are sufficiently vague to create the potential for future disagreement. Regulated electric utilities are required to file tariffs outlining their service rules and policies with the Commission. These tariffs necessarily include standards as well as line extension policies regarding the provision of electric service. Following the comments in paragraph 2 above, it would stand to reason all electric service providers should be required to have these same tariffs on file with the Commission. Making all electric service providers subject to the requirements of AS 42.05 would accomplish this.

4. Every effort should be made to shore up the exemption of rural utility service areas from the invasion of new providers. I cannot over emphasize the impact on a small, rural utility if an outside entity comes in and provides service only to its larger load customers. In CVEA's recent experience with Alaska Power Systems' efforts to serve our largest customer, Petro Star Valdez Refinery, the results would have been devastating. Our study showed the loss of this customer would have necessitated a 13.8% increase to remaining customers. This practice, which has been referred to as cream skimming or cherry picking, is the beginning of the end for the remaining customers and can only result in higher rates for those remaining customers. Consequently, I propose that you insert a limitation on the size of service area in which a competitive electric service market could exist or, alternatively, firmly protect those cooperatively owned utilities who have gained exemption from APUC regulation under AS 42.05.711. I am sure there are other approaches. I do not presume to speak for other utilities, but in my view, only the larger urban service areas could withstand the impact of losing large loads and suitably engaging in a competitive marketing process in a restructured environment.

I am aware that a very substantial study has been undertaken by CH2M Hill in behalf of the APUC and the Legislature on the whole issue of restructuring. I genuinely believe that is the only proper approach to addressing the numerous and complex issues of restructuring. To my knowledge, state after state within the contiguous United States have undertaken the issue of restructuring only after comprehensive study. I am concerned that this bill and others like it may introduce the subject of restructuring in a piecemeal fashion before adequate study has been undertaken.

In closing, I want to thank you again for your close attention to this thorny and complex issue. Should the committee choose to move the bill forward this session I could certainly support it with proposed changes. I would be more than pleased to respond to questions you may have if you feel it appropriate.

Sincerely yours,

Robert A. Wilkinson
Chief Executive Officer

Kodiak Electric Association, Inc.

(907) 486-7700

Box 787
KODIAK, ALASKA 99615

To this committee for their files!
A

April 27, 1999

The Honorable Alan Austerman
Alaska State Legislature
State Capitol, Room 434
Juneau, AK 99801-1182

Re: **HB 81, HB 174, and HB 169**

Dear Representative Austerman:

You have asked for comments on HB 81 and its potential effect on Kodiak Electric Association, Inc. I would also like to provide comments on HB 174 and HB 169 for your reference.

HB 81. This bill proposes a new section in AS 42.05 (the Alaska Public Utilities Commission Act) which would be entitled "Electric Consumer Protections," but is in fact legislation setting up the outline of a restructured competitive electric utility industry. Several sections in this legislation are already incorporated within the existing AS 42.05. For instance, Section (c), requiring deferred payment plans for electric customers unable to pay their bills, is already fully dealt with by the APUC in its regulation 3 AAC 52.445. The remainder of this legislation is premature in that it deals with issues raised by a restructured electric utility industry in a competitive environment before the legislature has fully studied the problems associated with such a restructuring. This is not to say that some type of legislation such as this may not be an integral part of such a restructuring, but only that it is premature at this time.

HB 174. This bill would amend the Electric and Telephone Non-Profit Cooperative Act to restrict the right of electric cooperatives only to enter into personal services contracts of a term of greater than one year. This legislation could have a devastating effect upon non-profit electric cooperatives such as KEA. Electric cooperatives employ CEOs, lawyers, engineers, and other consultants using personal services contracts, many of which extend beyond one year in duration. It is especially critical, in an era when the electric utility industry may be transitioning toward a more competitive environment, that electric cooperatives, such as KEA, have the ability to attract and retain key professional employees. This proposed legislation would make it very difficult for boards of directors to make employment offers to qualified candidates. It is ironic that this legislation is being proposed only for electric cooperatives where the board of directors is elected by the members/consumers to conduct the business and affairs of the cooperative. If the cooperative's

members are unhappy with the board of directors' decisions, they are, of course, free to elect new board members. Once elected, however, the board should be free to carry out its fiduciary duty to act in the best interest of the cooperative, and the cooperative's membership should not be involved in day-to-day decision making.

HB 169. This bill again attempts to regulate only electric cooperatives and specifically does not deal with other types of utilities such as investor-owned and municipally owned utilities which might be in competition with cooperatives. This would have the impact of putting electric cooperatives such as KEA at a competitive disadvantage in a restructured electric industry environment. In fact, this bill goes even further and attempts to "re-regulate" electric cooperatives whose members have chosen to become exempt from regulation by the APUC through a process earlier enacted by the legislature of the State of Alaska. If this bill is enacted, electric cooperatives whose members have voted to remove the electric cooperative from APUC regulation will again become subject to the APUC's review of the cooperative's rates. For electric cooperatives such as KEA which continue to be regulated by the APUC, this legislation is unnecessary because the APUC already has in place regulations dealing with lobbying and promotional expenses. If passed, this legislation would put KEA at a severe disadvantage in a competitive environment. Experience in the telephone industry has shown that privately owned utilities are perfectly willing to spend tremendous amounts of money in lobbying the legislature for legislation which they feel is to their competitive advantage, amounts of money which cooperatives in all likelihood will never be able to match. It is important, however, that cooperatives such as KEA be allowed to get their and their members' story before the legislature early in any move to restructure the electric utility industry toward a more competitive environment.

I would be happy to meet with you at your convenience to discuss this or any other legislation in more depth. If you have any questions or would like more specific examples of how the above proposed legislation would affect KEA, please feel free to give me a call.

Sincerely yours,

KODIAK ELECTRIC ASSOCIATION, INC.

Edwin K. Kozak

Edwin K. Kozak, P.E.
General Manager

EKK:lka
cc: Board of Directors
Kodiak Electric Association, Inc.

legislation\HB174 99

ELECTRIC CONSUMERS' ALLIANCE

FIRST INDIANA PLAZA ■ 135 NORTH PENNSYLVANIA STREET ■ SUITE 2700 ■ INDIANAPOLIS, IN 46204
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Statement of Consumer Principles To Guide State Restructuring Of the Electric Industry

March 6, 1998

We, the members of Electric Consumers' Alliance, gathered in Washington, D.C. on March 6, 1998, recognize that many states are considering the restructuring of their retail electric industry so that customers can select from among competing providers. We believe this consideration to be predominantly a state issue, and one which states have undertaken with the foresight and attention that is required by such a fundamental policy change. The provision of electric service is the key to participation in our modern society and the significance of change cannot be underestimated. We have been active in many of these states and believe that--if implemented correctly--electric competition can bring significant benefits to the consumers we collectively represent, including competitive prices and service innovation. At the same time, however, we recognize that the consumers we represent--including small businesses, senior citizens, rural residents, the disabled, minorities and low income consumers--may also be placed at risk by the transition to a more competitive market structure. These risks may include marketing abuses, billing confusion, service quality issues and access to a provider of choice, among others.

Therefore, given the continuing public interest importance of the provision of electric service--which will endure regardless of market structure--we believe it is necessary and essential for any jurisdiction considering implementation of a competitive market structure to condition entry of a provider in that market upon acceptance of and adherence to the following principles. We believe it is equally imperative that the appropriate legislative and regulatory bodies be given the authority to implement and enforce these principles, which we deem to be minimally necessary to protect and preserve the public interest:

Choice

Customers must be given access to their provider(s) of choice. Providers must not be permitted to discriminate unfairly in access to service based on customer classes, demographics, socioeconomic data or any other factor determined by the regulatory authority to be unjust. As well, no unreasonable terms or conditions may be placed on a customer's receipt of service. Conversely, customers must be allowed to select from among all available suppliers and must not have artificial restrictions placed on their right to choose or right not to choose an otherwise qualified provider, including those entities from whom the customer has previously received service. All consumers are entitled to share in the potential benefits of a restructured electric market.

Special Needs

Access to affordable electric service has been a hallmark of the current regulatory structure, with a number of utility-, government- and private-sponsored programs combining to create what has been described as a universal service "safety net" for consumers, including those with limited capacity (including seniors and the disabled) to pay the full price of service. Affordable access for all must remain a hallmark of a restructured electric industry. To do so, however, will require a recognition that a competitive marketplace is unlikely to fully meet this need and that a new special needs support mechanism is necessary. States should implement procedures to ensure that all customers have continued access to affordable electric service. To do so, states should implement access charges on generation delivered or other funding mechanism on a provider-neutral basis.

Registration

To provide electric service, even in a competitive and substantially deregulated environment, it is still essential that all providers meet registration requirements. Indeed, providers (including aggregators) must establish that they are capable of meeting service obligations to their potential customers as a precondition to doing business. At a minimum, this must include 1) a demonstration of financial viability, including consideration of performance bonding requirements; 2) a demonstration of technical capability; 3) an explanation of available supply sources and alternatives; and 4) a verified commitment by a senior corporate officer to comply with consumer protection, billing and service quality standards in effect. Recent events in states experimenting with market competition underscore the importance of reasonable registration requirements to identify potential problem areas *before* providers are permitted to market in a state. Along with registration provisions must be the ability of state regulatory officials to revoke or suspend the registration of any provider that fails to meet and maintain minimum standards.

Education

An informed consumer population is the key to making a competitive electric market work. Intelligent buyers will respond to superior providers. But quality education about the options and opportunities available to consumers will not necessarily be provided by the market, nor will it be easily understood by all consumers. Experience in the transition from other highly regulated markets--such as cable and telecommunications--suggests that consumer confusion may be significant. To be effective, education about electric restructuring must be ongoing, objective and targeted to specific consumer segments. At a minimum, this requires the development of a state-specific action plan for consumer education that utilizes a variety of approaches and mediums to convey information. It is especially important to involve local constituent organizations--such as the members of ECA and other community-based organizations--into this planning process. The planning process must have a long-term funding source, such as an education trust or other vehicle, to ensure continued effectiveness. This is particularly important because it is likely that many consumers will be cautious in entering the market and may delay decisions for months or even years. It is important that the appropriate educational resources continue to be available to consumers at the time that decisions are made. The funding source should be supported equitably by all market participants. Finally, the state regulatory agency or other authority must take responsibility for the timely compilation and dissemination of educational material and the coordination of this effort with community-based organizations.

Marketing Abuses

Reasonable constraints must be placed on overzealous attempts to sell the provision of this public interest service. Existing telemarketing and consumer solicitation provisions may provide a reasonable starting point in many states, but there may be a need to more clearly define consumer rights and responsibilities in others. Consumers should be entitled to equal, if not greater protection, than that accorded them in the sale of other consumer goods. At a minimum, this should include 1) full disclosure of the price, terms and conditions of service; 2) a three-day window for cancellation of consumer contracts for the provision of electric service; 3) a prohibition on the unauthorized switching of electric providers, or "slamming," by requiring customer verification of the choice of supplier; 4) a prohibition on the unauthorized billing for services not expressly ordered by a consumer, or "cramming," by requiring customer verification of the choice of service(s): and 5) creation of a "don't call me" list which precludes the telephone solicitation of any consumer who elects to be included on the list. States should identify and prohibit illegal "pyramid" sales.

Consumer Information

A standardized bill format within each state must be required so that customers can recalculate their bills for accuracy and make reasonable comparisons between providers. The format should provide sufficient specificity so that customers can make economically efficient decisions regarding their service(s) selected and consumption patterns. The bill must include full and uniform information about the supplier, including a point of contact with local or toll free telephone number, as well as a description of any payment terms and the procedure to be followed for dispute resolution. A state may wish to prescribe collection/late fee provisions to avoid the excessive fees imposed in other industries. The confidentiality of customer bill information, including usage patterns, shall be maintained.

Service Quality

The provision of electric service on a competitive basis should not result in degraded or inferior service for some customers. The state regulatory authority should establish, maintain and enforce standards for technical and operational capacity. Existing service quality standards may be an appropriate starting point for this purpose as long as they are extended to all providers and sufficient reporting mechanisms are in place. It is anticipated that these standards must be augmented to differentiate between the responsibilities of providers and distributors. These requirements should be designed to ensure that customers get the "quality" of service for which they contract; they should not preclude the offering of differing services (e.g. firm v. interruptible service).

Complaints

As additional providers enter the market and competition supplants regulation as the primary means of market discipline, it can be anticipated that the number and types of consumer complaints will increase. It is essential that the state regulatory agency (or other appropriate body) be empowered to receive, adjudicate and remedy complaints between providers and their customers in a timely manner. This must include sufficient authority to confer jurisdiction over providers and to order appropriate remedies, including customer refunds, as well as the ability to prospectively protect consumers against fraud, collection abuses and safety hazards. Any procedure must provide for an expedient resolution of issues.

Privacy

Consumer information should be protected from unauthorized disclosure to third parties. Consumer billing records, usage patterns and other identifying information should be considered confidential unless a consumer consents in writing to disclosures.

Disconnect/Curtailme:

Most states already have in place policies governing the disconnection of service and the priorities to be followed in the event of curtailment of service. Disconnection (especially for non-payment) should be a resort only after remedial steps have failed and due process has been provided. Curtailment should occur only in extreme circumstances and only consistent with an established plan. These policies must be brought forward and applied to all providers so that all consumers are treated equitably and not unfairly deprived of electric service without adequate process. Care should be taken to prevent a situation where essential services or at-risk customers are denied service because they are a lower "economic" priority for the provider.

Price/Performance

For consumers to make informed, rational choices among electric providers, it is essential that they have access to adequate baseline information. The state regulatory agency (or other appropriate body) should compile and publicly disseminate such information on a periodic basis. At a minimum, this should include: a list of each provider registered to provide service with contact information; a general description of each service to be offered and the conditions that need to be met to receive such service; the number of complaints (as a percentage of customers) against the provider and the disposition of those complaints; and any other information deemed to assist consumers in making service choices, including a brief statement of the performance history of the provider.

NRECA and APEC Declare Consumer Protection Principles

A word from NRECA: *The Alliance to Protect Electricity Consumers endorses strong support of consumer service and protection, a primary mission of NRECA and its members. As in any coalition, the widely diverse organizations in APEC naturally hold a range of opinions on any given issue. The consensus stated in the Statement of Principles, however, clearly expresses the need for careful, reasoned approaches as changes to the electric industry are considered.*

Alliance to Protect Electricity Consumers

Statement of Principles *regarding* Electric Industry Deregulation

February 12, 1998

Alliance to Protect Electricity Consumers

The Alliance to Protect Electricity Consumers (APEC) is a coalition of highly diverse organizations formed to ensure the positive resolution of consumer issues related to electric industry deregulation. Our common concerns are the potential effects of deregulation on consumers, communities, the environment and the workplace.

Statement of Principles Regarding Electric Industry Restructuring

This Statement of Principles is the consensus view of APEC

members regarding the specific topics listed below. It is a presentation of facts and issues which we recommend to policy makers and the general public for careful consideration.

Contents

Organizations and Contacts

Organization	Contact Person	Phone	Email
A. Philip Randolph Institute	Norman Hill	202-289-2774	
American Federation of Labor and Congress of Industrial Organizations	Bill Cunningham	202-637-5169	

American Federation of State, County and Municipal Employees	Ed Jayne	202-429-1188	jae@afscme.org
American Public Power Association	Madalyn Cafruny	202-467-2952	
Building and Construction Trades Department, AFL-CIO	Dick Seelmeyer	202-347-1461	
Consumer Federation of America	Mary Rouleau	202-387-6121	
Electric Consumers Alliance	Bob Brandon	202-331-1550	
Friends of the Earth	John McCormick	202-783-7400	
Industrial Union Department, AFL-CIO	Peter diCicco	202-842-7817	
International Association of Machinists	Mike Flynn	301-967-4704	
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers	Bridget Powell Martin	703-560-1493	
International	Mike Emig	202-728-6060	

Brotherhood of Electrical Workers		
International Federation of Professional and Technical Engineers	Candace M. Rhett	301-565-9016
Maritime Trades Department	Daniel Duncan	301-899-0675
National Association of Community Action Agencies	Christine Alden	202-265-7546
National Consumer Law Center	Kay Guinane	202-986-6060
National Consumers League	Linda Golodner	202-835-3323
National Council of Senior Citizens	Daniel Schulder	301-578-8839
National Farmers Union	Lynn McBride	202-554-1600
National Rural Community Assistance Program	Kathleen Stanley	703-771-8636
National Rural Electric Cooperative Association	Alan Edwards	703-907-5836
Oil, Chemical	Paula Littles	703-876-9300

and Atomic Workers International Union		
Public Citizen	Wenonah Hauter	202-546-4996
Service Employees International Union	Robert Masciola	202-898-3346
United Mineworkers of America	Kristin Leary	202-842-7294
United Steelworkers of America	Steve Francisco	202-778-4384
Utility Workers Union of America	Sam Weinstein	202-347-8105

APEC Principles, 2/12/98

Cost to Consumers

Electric rates could increase for residential customers and small business due to profiteering, temporary shortages, and the shifting of costs from large industrial users to small commercial and residential customers. Any legislative and regulatory actions leading to deregulation or restructuring of the electric utility industry should not proceed if lower rates for residential consumers and small businesses cannot be guaranteed for both the short and long term.

Where deregulation is adopted, residential and small business consumers could face several possible scenarios:

Deregulation will actually increase rates for consumers in states with low-cost electricity, if utilities export the cheap electricity and sell it elsewhere to the highest bidder.

Predicted price decreases may not materialize if there is not adequate

generation supply and vigorous competition in generation markets. Dominant firms will be able to charge higher prices if there are too few competing sellers. Residential consumers will not have the same buying power as large industrial customers, who will have the bargaining leverage to buy up all the low-cost power, leaving only high-cost power for residential consumers.

Consumers will have to sift through confusing, possibly misleading, offers of electricity prices, savings, service options, and payment plans. They may have to pay transaction fees to power marketers, brokers, and other middlemen, and the related increased marketing and advertising costs.

Whether caused by accidental outages or insufficient generating reserves, any shortage of electricity will drive up the market price of available electricity.

Depending on how stranded costs are divided between utilities and classes of consumers, any possible price reductions due to deregulation could be substantially delayed or nullified altogether. Residential consumers of a high-cost utility may end up paying a disproportionate share of its stranded costs if the utility's large customers no longer buy electricity from it.

Given these possibilities, deregulation might not provide lower prices to residential and small business consumers.

Consumers in certain markets are aggregating their electricity purchases to protect themselves from higher rates. Deregulation, however, should not require consumers to aggregate to avoid higher costs or reduced services.

Any deregulation plan must include, at a minimum, the following consumer protections:

- **Lower Rates.** Deregulation should not proceed if lower rates for residential and small business consumers cannot be guaranteed for both the short and long term.
- **Competitive Safeguards.** If policymakers choose to deregulate, state and federal regulators must ensure that truly competitive generation markets have been created before deregulation is adopted, and maintained afterward. To prevent the creation of unregulated monopolies, specific definitions of what constitutes effective competition must be in place before deregulation takes place. In addition, state and federal agencies must update and strictly enforce antitrust and other statutes protecting consumers.
- **Protection from Price Cross-Subsidization.** To increase profits to their stockholders, for-profit corporations with both competitive

and regulated subsidiaries may attempt to subsidize their competitive subsidiaries by charging higher prices to captive customers of their regulated subsidiaries. State and federal regulators must prevent this type of cross-subsidization.

- **Access to Information.** Consumers must be able to easily determine and compare the prices for transmission, distribution, and retail energy services and have access to information about the generation sources of the electricity they purchase.
- **Aggregation Protection.** The ability of consumers to aggregate their electricity purchases must be protected.
- **Consumer Protections.** Federal and state agencies must update and strictly enforce consumer protection laws to ensure fair marketing, sales and service practices. All sellers of electricity should, at a minimum, be licensed and be subject to penalty for license violations.

Regulators must address the following issues raised in an environment with multiple electric power suppliers: privacy protection; "slamming" (unauthorized switching of providers); "pre-selling" (securing customers before a supplier has the technical ability or legal authorization to provide service); fair and understandable billing; clearly written terms and conditions of service; nondiscrimination; adequate customer service offices.

APEC Principles, 2/12/98

Environment

Environmental and conservation programs implemented by electric power companies could be dropped and/or would not be expanded. Deregulation could adversely affect the environment. Funding for commercialization of renewable resources could be jeopardized.

Current attempts to deregulate the electric power industry make the already difficult environmental issues even more complex. Increasing competition is already leading to cuts in funding for energy efficiency, renewable energy, and other utility programs that protect the environment. Deregulation could lead to the shutdown of the most inefficient and expensive power plants, but it could also result in marketing and advertising that encourages greater consumption and increased emissions.

Any plan to deregulate the electric power industry must include the following measures:

- Spending on programs to conserve energy and increase the

reliance on cleaner electric power sources, which is already inadequate, must not be reduced. Spending should be increased for energy efficiency and clean energy technologies such as wind, solar, biomass, geothermal, ethanol, small hydro power and advanced fossil energy technologies.

- No existing generating unit should be allowed to operate in violation of any existing or future Clean Air Act provision or regulation.

- States and the federal government should improve the energy efficiency of buildings and equipment by making appropriate changes to building codes and efficiency standards. The federal government should apply and meet the same standards for buildings and efficiency that are required of non-federal sectors of the economy.

- Recipients of low-income energy assistance should not be prevented from purchasing power from environmentally-efficient generation sources.

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E-MAIL

APEC Principles, 2/12/98

Mergers and Market Dominance

Ongoing consolidation of existing electric utilities and other energy industry companies is likely to lead to abuse of economic power and manipulation of energy markets to maximize profits at the expense of consumers.

Electric utility deregulation and competition are being presented as "customer choice." Some deregulation proponents, however, want to dominate the market and its consumers, and to prevent competition. Giant utility holding companies, their affiliates, and global energy companies want to dismantle current laws that attempt to suppress anti-competitive forces and protect consumers from monopolies' abuses.

In the late 1920s, 16 corporations controlled 85 percent of the nation's power supply. Congress enacted the Public Utility Holding Company Act (PUHCA) to simplify the web of corporate relationships and establish minimum consumer protections. Today, while some investor-owned utilities are publicly endorsing competition, a growing wave of investor-owned utility mergers and acquisitions threatens to kill any chance of competition actually developing.

If the market protections provided by the PUHCA are repealed and not replaced with more effective statutory provisions, and if the number of competitors is reduced to a handful through mergers and acquisitions, there will be no real hope of bringing competitive choices to consumers. A few generation sellers will have substantial market power and the ability, through that market dominance, to erect high barriers to the entry of other competitors.

To sustain a healthy competitive electricity market for

consumers, certain changes are needed and specific safeguards must be in place:

- The federal enforcement agency should change. The Securities and Exchange Commission appears to have little interest in enforcing PUHCA's consumer protections against market power abuses. The Federal Energy Regulatory Commission is the appropriate federal agency to aggressively enforce PUHCA or a modernized successor statute.
- Market power must be restrained. A fair, efficient competitive electric industry will not develop if the market consolidates to a handful of giant companies or if some companies are allowed to engage in predatory pricing or discriminatory actions.
- The Department of Justice, the Federal Trade Commission, and the Federal Energy Regulatory Commission must be given the resources and statutory authorities necessary to effectively police electric markets. These statutory authorities should include:
  - The authority to order divestiture of generation facilities if necessary to address effectively the abuse of existing market power.
  - The authority to prevent preferential transactions between corporate affiliates, including discriminatory access to essential information, below-cost transfer pricing, or other anti-competitive arrangements; and in the event of repeal or reform of the PUHCA, the transfer to FERC of provisions under that Act necessary to prevent preferential or anti-competitive activities among and between corporate affiliates of for-profit utilities.
  - The authority to ensure that reliability standards and requirements are adopted and enforced in a nondiscriminatory and competitively neutral basis.

APEC Principles, 2/12/98

Reliability

Many electric power companies, preparing for competitive challenges, are cutting costs and deferring maintenance. Such cost-cutting could result in systems so overstretched they may not be able to operate efficiently in times of peak demand or during storms.

Industry restructuring must ensure an adequate generation

supply and reliable transmission service. Our electricity systems are highly interdependent and complex operations. Reliability depends on the cooperation of all entities using the systems and a well-trained workforce.

Electrical industry groups now maintain interstate reliability through voluntary adherence to agreed upon guidelines. Early indications show that competition among utilities is already overshadowing the prior tradition of cooperation, and some utilities have cut their maintenance staffs and schedules to cut costs.

To protect consumers from unreliable service:

- The roles of state, regional, and federal regulatory authorities must be clearly defined. Primary oversight and enforcement for interstate reliability must be established at the regional or federal level.
- Mandatory national and regional reliability rules and standards should be developed in collaboration with transmission providers, transmission users, consumers and other interested parties.
- An industry-wide umbrella group, such as the North American Electric Reliability Council (or some successor group) should implement such national standards, but any such group should be subject to the oversight, approval and dispute resolution powers of the Federal Energy Regulatory Commission.
- All retail power supply providers in a restructured industry must comply with reliability and minimum quality of service standards.
- Measures must be taken to assure adequate generation reserves.

APEC Principles, 2/12/98

Safety

Worker safety and public safety could be threatened by continued cost cutting.

One likely outcome of electric industry deregulation will be a de-emphasis of public and worker safety as the emphasis shifts to maintaining and increasing profits. Staffing levels and training programs have been the first areas cut when deregulation has occurred in other industries. Work force reductions and scaling back of training programs are already