ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10596 SENATE JUDICIARY

New Hampshire

N.H. Rev. Stat. Ann. §498-A:4

Before making the offer provided for in paragraph II, the condemnor shall make reasonable efforts to negotiate with the condemnees or their personal representatives for the purchase of the property, but failure to confer or negotiate shall not be a defense to condemnation of the property.

...No property shall be taken unless the condemnor shall serve upon the condemnee a written notice of offer to purchase...

New Jersey

N.J. Rev. Stat. §20:3-5

...[W]henever any condemnor...shall have determined to acquire land or other property pursuant to law...but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee, whether by reason of disagreement concerning the compensation to be paid or for any other cause...the condemnation of such property...shall be governed...in the manner provided by this act;.

New Mexico

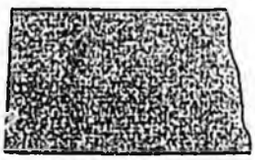
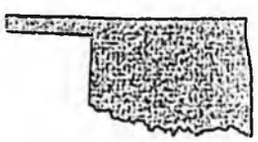
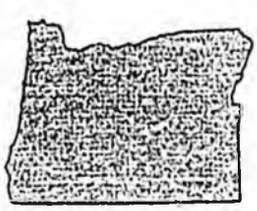
N.M. Stat. Ann. §42A-1-4

A condemnor shall make reasonable and diligent efforts to acquire property by negotiation.

New York

N.Y. Em. Dom. Law §303

The condemnor shall make a written offer to acquire the property for one hundred per centum of the valuation so established. In no event shall such amount be less than the condemnor's highest approved appraisal. Wherever practicable, the condemnor shall make the offer prior to acquiring the property, and shall also, wherever practicable, include within the offeran itemization of the total direct, the total severance or consequential damages and benefits as each may apply to the property.

	**North Dakota**	N.D. Cent. Code §32-15-06.1	*A condemnor shall make every reasonable and diligent effort to acquire property by negotiation.*
	**Ohio**	Ohio Rev. Code Ann §163.04	*Appropriation shall be made only after the agency is unable to agree, for any reason, with the owner...or when any owner is incapable of contracting...or is unknown, or is not a resident of this state, or his residence is unknown to the agency and cannot with reasonable diligence be ascertained.*
	**Oklahoma**	Okla. Stat. tit. 27, §13	*Every reasonable effort shall be made to acquire, expeditiously, real property by negotiation.*
	**Oregon**	Or. Rev. Stat. §35.235	*...[T]he condemnor shall...attempt to agree with the owner with respect to the compensation to be paid therefor, and the damages, if any, for the taking thereof.*
	**Texas**	Tex. Prop. Code Ann. §21.012	*If the United States, [or] this state...wants to acquire real property for public use but is unable to agree with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.* *The petition must...state that the entity and the property owner are unable to agree on the damages.*

Vermont

Vt. Stat. Ann. tit. 24, §2805

When the location of a municipal building is determined...and the owner refuses to release or convey the same to such municipality for a reasonable price...the mayor...shall set out the necessary lands and cause the same to be surveyed. They shall appoint a time and place for hearing...

Virginia

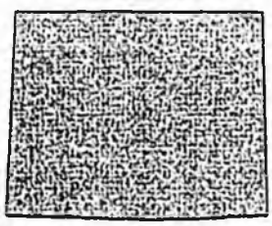
Va. Code Ann. §26-46.5

No proceedings shall be taken to condemn property until a bona fide but ineffectual effort has been made to acquire from the owner by purchase the property sought to be condemned, except where such consent cannot be obtained because of the incapacity of one or more of the owners or because one or more of such owners is unable to convey legal title to such property or is unknown or cannot with reasonable diligence be found in this State.

Wisconsin

Wis. Stat. §32,06(2a)

Before making the jurisdictional offer under sub. (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners...for the purchase of the property.



Wyoming

Wyo. Stat. §1-26-509

A condemnor shall make reasonable and diligent efforts to acquire property by good faith negotiation.

And at the federal level...

Federal Uniform Relocation and Assistance and Real Property Acquisition Policies Act of 1970

Sec. 301, P.L. 91-646

Note: Pursuant to §102 of the Act, the policies of §301 do not affect the vailidity of individual condemnation actions. However, they do govern the use of federal funds by states "to the greatest extent practicable under State law." Sec. 305(1).

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts...and to promote public confidence in Federal land acquisition practices...

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner...shall be given an opportunity to accompany the appraiser during his inspection of the property.

Federal Energy Regulatory Commission

16 U.S.C. §814

When a licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others...it may acquire the same by the exercise of the right of eminent domain....

SB

295

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 295
( ) Publish Date:

Revision Date/Time (Note if correction): 2/21/2002 3:24 pm
Dept. Affected: Health & Social Services
Title: DISCLOSURE OF JUVENILE DELINQUENCY INFORMATION TO LICENSING AGENCIES
BRU: Juvenile Justice
Component: Probation Services
Sponsor: KELLY
Requestor: SENATE (HES)
Component Number: 2134

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (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--do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost:

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

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

While our administrative staff may have to compile information and transmit it to DEED, Senior Services, etc., we do not anticipate a significant fiscal impact with the passage of this bill.

Prepared by: Susan M. Taylor, Administrative Manager
Phone 465-2212
Division Juvenile Justice
Date/Time 02/21/2002
Approved by: Elmer A. Lindstrom, Deputy Commissioner
Date 02/23/2002
Agency Department of Health & Social Services

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

FISCAL NOTE

Alaska State Legislature

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(907) 456-8161

Senate

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Senate District P

MEMORANDUM

To: Senator Robin Taylor, Chair
Senate Judiciary Committee

From: Senator Pete Kelly, Co-Chair
Senate Finance Committee

Date: March 4, 2002

RE: Hearing Request for SB 295
"An Act relating to the disclosure of information regarding delinquent minors to certain licensing agencies; and providing for an effective date."

Please accept this memorandum as a request to schedule SB 295 for a hearing in the Senate Judiciary Committee at your earliest convenience.

I have enclosed the following back-up information for your review and inclusion in bill packets:

- SB 295
- Sponsor Statement
- Fiscal Note

If you have any questions please contact Wendy in my office at extension 4747. Thank you for your consideration of this request.

Alaska State Legislature

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Senator Pete Kelly
District P

SB295 Sponsor Statement

"An Act relating to the disclosure of information regarding delinquent minors to certain licensing agencies; and providing for an effective date."

Both State and Federal laws currently require all child and adult care licensing authorities to review criminal histories of every individual, aged 16 and older, who is seeking either a care license, employment with a care provider, or residing in the home of a care provider seeking licensure.

Criminal history information for persons under 18 is not accessible through the Alaska Public Safety Information Network, but is available through the Division of Juvenile Justice (DJJ). Yet due to the language in the current statute, the division may release certain information for specific situations to only a few of the licensing agencies. The fact that an applicant may have a son living in the home who is a convicted child molester could be kept from a licensing agency because of the limitations on the division's authority to release that information.

This bill will give the Department of Health and Social Services clear authority to provide all child and adult care licensing agencies access to appropriate delinquency information. This will help facilitate the licensing of suitable individuals as well as help ensure quality of care and safety concerns are met for every client receiving services in a care facility or program.

SPONSOR STATEMENT

SB 302

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 302
(s) Publish Date: 3/6/02

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services
Title: DEFINITION OF MENTAL HEALTH PROFESSIONAL
BRU: Community Mental Health Grants
Component: Svcs/Chronically Mentally Ill

Sponsor: WILKEN
Requestor: SENATE (HES)
Component Number: 800

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (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–do not abbreviate)						
TOTAL						

Estimate of any current year (FY2002) cost:

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

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

SB 302 changes the definition of Mental Health Professional (MHP) by adding the licensed disciplines of clinical social worker, marital and family therapist and professional counselor, and allowing experienced unlicensed master's level mental health graduates who are seeking licensure and are supervised by a licensed MHP, to do the work of a MHP. The bill increases access to mental health services to several different consumer populations by increasing the pool of prospective employees in a time of shortage. It also encourages licensure of experienced individuals which increases the quality and accountability of the professions serving vulnerable Alaskans.

No cost is identified with these changes.

Prepared by: Sarah Brinkley, Administrative Manager
Phone 465-3167
Division Mental Health & DD
Date/Time 02/27/2002
Approved by: Elmer A. Lindstrom, Deputy Commissioner
Date 02/28/2002
Agency Department of Health & Social Services

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

FISCAL NOTE

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Website: www.garywilken.com
E-Mail: Senator_Gary_Wilken@legis.state.ak.us

MEMORANDUM

TO: Senator Robin Taylor, Chairman
Senate Judiciary Committee

FROM: Senator Gary Wilken

DATE: March 6, 2002

RE: Senate Bill 302 – Mental Health Professionals

I respectfully request that Senate Bill 302, *Mental Health Professionals,* be scheduled for a hearing before the Senate Judiciary Committee.

Senate Bill 302 recognizes the growth in the clinical mental health profession and broadens the definition to include all qualified mental health experts. A more inclusive mental health professional definition increases the capacity of Alaska's mental health system to protect our youth and adults who are experiencing acute psychiatric crisis in our communities.

Thank you for your cooperation and assistance in scheduling a hearing.

Gary Wilken

Request for Hearing

GARY WILKEN
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Senate

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E-Mail: Senator_Gary_Wilken@legis.state.ak.us

Sponsor Statement
Senate Bill 302 – Mental Health Professional Definition

Senate Bill 302 recognizes the growth in the clinical mental health profession and broadens the "mental health professional" definition to include (1) a licensed clinical social worker, (2) a licensed marital and family therapist, and (3) a licensed professional counselor. The current Title 47 definition was written in 1986 prior to the passage of Alaska's licensing requirements governing these master level mental health clinicians.

A more inclusive mental health professional definition increases the capacity of the Alaska's mental health system to protect our youth and adults who are experiencing acute psychiatric crisis in our communities. Today, not enough mental health professionals are authorized under the current definition to respond to some critical public safety situations, particularly in rural Alaska. And yet there are hundreds of licensed professionals who are qualified to aid these Alaskans, but cannot, as they do not fall within the current statutory definition. Senate Bill 302 recognizes this problem and updates the Title 47 definition.

The expanded "mental health professional" definition, as stated in Senate Bill 302, increases the number of trained professionals who will be:

- Allowed to provide mental health treatment for prisoners
- Authorized to evaluate children and minors in custody to determine placement in residential treatment centers
- Required to report incidents of harm to vulnerable adults
- Allowed to conduct civil commitment evaluations

I respectfully request your consideration and support for Senate Bill 302.

Gary Wilken

SPONSOR STATEMENT

SB 309

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 309
(S) Publish Date: 4/12/02

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: Adverse Possession
BRU: Community Assist & Econ. Dev. (405)
Component: Community & Business Development
Sponsor: Senator Therriault
Requester: Senate Labor & Commerce
Component No.: 2486

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill has no fiscal impact on the operations of the department.

Prepared by: Pat Poland, Director
Phone 907-269-4578
Division: Community & Business Development
Date/Time 2/28/02 3:48 PM
Approved by: Deborah B. Sedwick, Commissioner
Date 2/28/2002
Agency: Department of Community & Economic Development

(Revised 9/2001 OMB)

Fiscal Note

SENATOR
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Alaska State Legislature

Senate

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Senate District Q

MEMORANDUM

TO: Senator Robin Taylor, Chair
Senate Judiciary Committee

FROM: Senator Gene Therriault

DATE: April 11, 2002

SUBJECT: Scheduling of SB 309

I respectfully request that Senate Bill 309 be scheduled for a hearing in the Senate Judiciary Committee. SB 309 would limit the availability of the adverse possession doctrine to two narrow circumstances where the rule may have some arguable policy justification: (1) where a person has, in good faith, occupied property under color of title for 10 years; and (2) where a property owner occupies property adjacent to his own land under a reasonable, good-faith error over the actual boundaries of his property. In both instances, the adverse possessor would be required to pay the property's legal owner both full market value for the property taken, as well as any consequential damages.

Please contact me if you have any additional questions.

Email: Sen ate.ak.us

REQUEST FOR HEARING

ALASKA STATE LEGISLATURE

SENATOR
Gene Therriault
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Fairbanks, Alaska 99701
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Senate
Senate District Q

Senate Bill 309

"An Act relating to actions to quiet title to, eject a person from, or recover real property or the possession of it, and to acquisition of real property by adverse possession; and providin ; for an effective date."

SPONSOR: Senator Gene Therriault

SPONSOR STATEMENT:

Adverse possession is the doctrine under which a person—even a squatter acting in bad faith—can take the owner of record's property without compensation by simply possessing it, in an open and hostile way, for a certain period of years. It is a doctrine born in the Middle Ages under circumstances that have little applicability to 21st Century Alaska, and it offends Alaska's abiding respect for private property ownership.

SB 309 would limit the availability of this doctrine to two narrow circumstances where the rule may have some arguable policy justification: (1) where a person has, in good faith, occupied property under color of title for 10 years; and (2) where a property owner occupies property adjacent to his own land under a reasonable, good-faith error over the actual boundaries of his property. In both instances, the adverse possessor would be required to pay the property's legal owner both full market value for the property taken, as well as any consequential damages.

Adverse possession imposes a particularly harsh burden on private landowners in Alaska who, because of the doctrine, are often charged with the impossible task of policing large remote landholdings to assure themselves that no squatter has taken up residence. It is for this reason that, under existing law, a person cannot take land by adverse possession from the State of Alaska or the United States. SB 309 simply accords equal dignity to private land ownership rights.

Sponsor Statement

SB 309: Legislation to Limit the Circumstances Under Which A Person May Divest a Landowner of Title to Its Land Under the Doctrine of Adverse Possession:

A Rationale and Section-by-Section Analysis

I. Rationale

A. Overview of the Legislation

"Adverse possession" is the doctrine under which a person--even a squatter acting in bad faith--can take another person's property without compensation by simply possessing it, in an open and hostile way, for a certain period of years. It is a doctrine born in the Middle Ages under circumstances that have little applicability to 21st Century Alaska, and it offends Alaska's abiding respect for private property ownership.

SB 309 would limit the availability of this doctrine to two narrow circumstances where the rule may have some arguable policy justification: (1) where a person has, in good faith, occupied property under color of title for 20 years; and (2) where a property owner occupies property adjacent to his own land under a reasonable, good-faith error over the actual boundaries of his property.

In both instances, the adverse possessor would be required to pay the property's legal owner both full market value for the property taken, as well as any consequential damages.

Beyond these two limited circumstances, "adverse possession" is a doctrine inimical to the concept of private property ownership. And it imposes a particularly harsh burden on private landowners in Alaska who, because of the doctrine, are often charged

with the impossible task of policing large remote landholdings to assure themselves that no squatter has taken residence.

That burden is an economic waste, and serves no valid public policy. As a result, beyond the limited circumstances mentioned, the concept of taking another's land by "adverse possession" ought to be abolished in Alaska.

B. The Origins and Purpose of the "Adverse Possession" Doctrine

1. The Doctrine's Original Rationale--Possession was Equated with Ownership

"Adverse possession" is a doctrine that rewards possession of land at the expense of the landowner. Not surprisingly, then, the doctrine has its roots in the feudal concept of "seizin." In the early Middle Ages, "ownership" of land was proven not by title or deed, but rather by actual possession. If a person was forcefully expelled from his property, the trespasser became the land's new "owner," and the dispossessed person could regain "ownership" only by himself resorting to force. [1]/

Gradually, the dispossessed "owner" was given a legal remedy to regain possession--a remedy which, by virtue of a statute issued under Henry VIII, must be exercised within 60 years of dispossession. Thus was borne the thought that a person could recover his land from an "adverse possessor," but only if he acted within a specific period of time. [2]/

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[1] / 5 George W. Thompson, *Commentaries on the Modern Law of Real Property* (1979) ("*Commentaries*") at 573-76.

[2] / *Commentaries, supra* at 574-76. Actually, "adverse possession" rules can be traced further back, to the Code of Hammurabi, which provided, in part, that:

> *If a captain or a soldier has neglected his field, his garden and his house, instead of working them; and another takes his field, his garden and his house, and works them for three years; if he returns and desires to till his field, his garden, and his*

Remember, though, that in those days possession--or "seizin"--*was* title. Therefore, by giving the "adverse possessor"--or "disseizor"--the opportunity to bar the person he dispossessed from reclaiming his property after 60 years, feudal courts were, in their minds, doing no injustice to the prior occupant, since that occupant had lost the basis for his claim of "ownership" when he was forceably dispossessed.

2. A New Rationale--Possession was the Best Proof of Ownership

Gradually, English common law came to recognize the concept of conveying and holding land by deed. "Title" became something different from, and superior to, mere "possession." And so the doctrine of "adverse possession" needed a new rationale.

The virtue of "seizin," of course, was that it was obvious who is "seized" of a particular piece of property--the person living on it. "Title," conversely, was the source of considerable dispute, since there then existed no reliable, centralized recording system to resolve conflicting claims of "title." As a result:

> *In an era of comparatively scarce land, decentralized records and crude surveying techniques, lengthy possession may have been the best possible proof of ownership.*

[3]/ Thus, while possession no longer equated with ownership, possession remained the best evidence of "title," and so the doctrine of adverse possession continued to serve some worthwhile purpose. "Ultimately, the 1623 Statute of Limitations required that

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> *house, they shall not be given to him. He that has taken and worked them shall continue to use them.*

[2]/ *Hammurabi Code and the Sinaitic Legislation* at 32-33 (Chilperic Edwards ed., 1904).

[3]/ Sprankling, *An Environmental Critique of Adverse Possession*, 79 Cornell Law Rev. 816, 822 ("*Critique*") (1994).

suits to recover possession of land be brought within twenty years. The Statute recited that this limit was necessary for 'quieting men's estates, and avoiding of suits...'" [4]/

3. The New American Purpose--Social Engineering

In James I's England, if a person owned land, he probably lived on it. [5]/ Even by the 16th century, there was precious little wild land in England that a person might own, but not make productive use of. [6]/

This was not true in North America, where vast tracts of wilderness might lie in private ownership. Here, the assumption that ownership was reliably proven by physical possession did not hold true:

> *Transplanted to the abundant, sparsely populated wild lands of North America, however, the assumptions of the [doctrine of adverse possession] ...failed. The terrain was too hostile, the forests too impenetrable and the distances too vast for most owners to reside upon or even to inspect their properties regularly. More importantly, possession of land in the English sense, characterized by residence, cultivation or improvement, was often impractical. The minor acts, greatly separated in time, that characterized land use in wilderness areas were unlikely to afford constructive notice to the owner who did inspect occasionally.*

Critique, supra at 823. "Adverse possession," then, needed a new purpose, and found one in our 19th century urge to settle the West. The modern doctrine "developed when much of the continental United States was unsurveyed wilderness," and our courts and legislatures resultantly "adopted a public policy that as much land should be put to use as

---

[4] / *Critique, supra* at 823.

[5] / James I promulgated the 1623 statute just quoted.

[6] / By 1696, only 16% of England's land were uncultivated forest lands. *Critique, supra* at 822, n. 25.

possible." [7]/ Under the new theory of adverse possession, the squatter was to be rewarded for making use of wild land, even at the expense of the person who owned it:

> *Beginning in the nineteenth century, American courts serving the ideology of economic expansion reformulated adverse possession in the pursuit of national productivity. These courts transformed the doctrine from a mechanism designed to* ***protect*** *the title of the true owner against false claims into a tool designed to* ***transfer*** *title to wild lands from the idle true owner to the industrious adverse posessor.*

Critique, supra at 821 (emphasis original).

The American justification for the doctrine also took on something of a Marxist flavor. Vast expanses of public lands were conveyed to large, absentee landlords--principally, the railroads. As pioneers struck west and inadvertently (or otherwise) homesteaded then-or-future railroad land, Western state legislators, and courts, concluded that disputed land should belong to the worker rather than the absentee capitalist:

> *By 1803 more than ninety percent of the nation consisted of sparsely populated, publicly owned wild lands. The broad federal policy toward these wild lands was to transfer them into private ownership, initially through sale. Because the government had never been able to enforce its theoretical ban against squatting on these lands, sales often resulted in conflicts between new absentee owners holding legal title and actual settlers who had already placed the land in productive use.*

Critique, supra at 843. For this reason, the periods necessary to establish title by "adverse possession" tend to shrink as one proceeds westward--from the old 20-year English rule still prevalent in the original colonies, to as little as five years in many western states.

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[7] / *Seddon v. Harpster*, 403 So. 2nd 409, 413 (Florida 1981).

C. Adverse Possession in 20th Century Alaska--A Doctrine Without a Reason

To this day, some courts, including the Alaska Supreme Court, maintain that the doctrine of adverse possession serves a useful public purpose because "society will benefit from someone's making use of land the owner leaves idle." [8]/

One might argue that there is considerable "idle" land in Alaska's ***public*** domain. However, in Alaska as elsewhere, neither the state nor federal government can be divested of title through adverse possession. AS 09.45.052(a). And Alaska has precious little "idle" private land.

The largest private landowners in Alaska are the Native corporations established under the Alaska Native Claims Settlement Act. Those lands were conveyed both in settlement of Alaska Natives' aboriginal claims, and to meet the "real economic and social needs of Natives." ANCSA, §1. ANCSA lands, then, and every acre of them, serve an important legal, social and economic purpose. They are not, any of them, "idle" in that sense.

Congress, in fact, has recognized that fact, and has accordingly extended ANCSA lands some protection from adverse possession claims as long as they remain undeveloped. 43 U.S.C. §1636(d). But ANCSA corporations often acquire other remote lands for future resource development purposes, as will other private landowners as time goes by. To the extent that these lands are not developed, it is because development now would be an economic waste, and there is no sound public policy that should prevent a private landowner from investing those lands for future generations.

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[8] / *Tenala, Ltd. v. Fowler*, ___ P.2nd ___, Slip Op. 4376 at 16 (August 2, 1996).

The last remaining modern justification for adverse possession is that it "keep[s] stale causes out of court." *Tenala, Ltd. v. Fowler, supra* at 16. But, in fact, it does just the opposite. Adverse possession cases involve untrustworthy testimony about who-possessed-what 10 or 20 years ago; conversely, and "considering current methods of record storage on microfiche, computer disks and data tapes," claims based on record ownership will never grow stale. [9]/

Similarly, allowing adverse possession claims promotes litigation, while limiting them discourages it. This because:

> *[b]right line standards generally deter litigation...The record title standard draws an exceedingly bright line: the holder of record title always prevails. In contrast, adverse possession as applied to wild lands is an indeterminate, murky standard under which results can rarely be predicted with certainty.*

Critique, supra at 878. The fact of the matter, as Florida's Supreme Court observed, is that "[w]ith modern technology and computerized transactions our society is now more capable of accurately establishing legal interest to property through paper title than through possession." *Seddon v. Harpster,* 493 So.2nd at 414.

Adverse possession serves no useful public purpose in Alaska today, and it disserves others. Apart from its impact on private property ownership generally, and implementation of ANCSA in particular, "[a]dverse possession...erode[s] the effectiveness and utility of both recording and marketable title statutes by creating uncertainty." *Outlaws, supra* at 97.

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[9] / *"Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession,"* 31 Land and Water Law Review 79, 104 (1996) (*"Outlaws"*).

The doctrine ought to be limited to those few situations where some equity might lie in the adverse possessor's favor, and the enclosed legislation attempts to do just that.

II. SB 309: Section-by-Section Analysis

Section 1. There are two adverse possession statutes in Alaska. The first is AS 09.10.030. This is the squatters' statute. The adverse possessor need not occupy the property under "color of title"--that is, a deed or other conveyance. And the squatter need not even occupy the property in good faith. [10]/ As one commentator puts it, this statute "gives title not only to one who because of good faith error occupies the land of another but also to a person who knowingly sought to appropriate another's land." [11]/

Under this statute, the squatter must adversely possess the property for 10 years. After that, the statute, which is framed as a statute of limitations, bars the property's owner from bringing any action against the squatter to recover his property.

Section 1 would amend this statute to provide that the owner of record could recover his or her land--by a quiet title or ejectment action--at any time. [12]/ Because of computerized land records, the record owner's claim will never, as a practical matter, grow stale.

Sections 2-3. There are several elements to Sections 2-3:

1. Retaining adverse possession claims arising under "color of title." AS 09.45.052 is Alaska's second adverse possession statute, and it deals with adverse possession that is based on "color of title." In other words, the adverse possessor has some deed or other document purporting (but for some reason failing) to convey title to

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[10] / *Hubbard v. Curtiss,* 684 P.2nd 842, 848 (Alaska 1984).
[11] / 7 Richard R. Powell, *Powell on Real Property,* ¶1012(3) (1993).

the property being possessed. Unlike the statute amended by Section 1, this statute requires good faith on the part of the possessor--in other words, an honest and reasonable belief that the possessor really owns the land. *Ault v. State*, 688 P.2nd 951, 956 (Alaska 1984).

Under subsection (a)(1), Section 2 retains "color of title" as a basis for claiming property by adverse possession, but returns the required period of possession to the common law's original 20 years.

2. *Allowing adverse possession claims to be brought for good faith boundary disputes.* A second specie of adverse possession claims that may retain some public policy justification arises when a property owner, in good faith, occupies property beyond the boundaries of property owned by that person. After 20 years' notorious and adverse possession of that property, the property owner may quiet title to the adjacent property he or she has occupied. Section (a)(2) retains this type of adverse possession claim.

3. *Explicitly requiring a showing of good faith.* Section 2 makes the existing court-imposed requirement of "good faith" explicit in the statute, as Oregon did in 1989. [13]/

4. *Requiring the possessor to prove entitlement to the property by "clear and convincing evidence."* Again, this requirement is already imposed by the courts. [14]/ Section 2 would make that requirement explicit.

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[12] / To the extent that this statute governs other types of real property claims, the 10-year statute of limitations would be retained.

[13] / ORS 105.620. As our Supreme Court has noted, "in almost all of these jurisdictions, the requirement of good faith was explicitly written into the statutes." *Lott v. Muldoon Road Baptist Church, Inc.*, 466 P.2nd 815, 818, n. 9 (Alaska 1970). The "good faith" requirement will exist whether or not this legislation is enacted; however, it is better practice for the material elements of any claim to be expressed in the statute itself.

5. Requiring just compensation to the property owner. It is one thing to allow a person to take the private property of another. It is quite another to allow the adverse possessor to do so without paying the owner, and none of the modern justifications for the doctrine of adverse possession explain the squatter's current ability to deprive property owners of land ***without compensation***.

Section 3 requires the successful adverse possessor, as a condition of receiving title to the property, to: (1) pay for an appraisal of the property; (2) pay the record owner the appraised value of the property taken; and (3) pay any other damages that the owner may have suffered as a result of the adverse possession and loss of the property (including the rental value of the property during the period of adverse possession), as a condition of quieting title in the possessor's favor. If the adverse possessor fails to promptly do so, title will be quieted in the owner's favor.

Section 4. This section makes the new legislation applicable to any adverse possession claim that has not "vested" by the effective date of the legislation. Adverse possession claims "vest" when the adverse possessor has met the statutory requirements for the requisite number of years--under current Alaska law, 10 years (or seven years for claims under color of title). [15]/ Serious constitutional questions would arise if the legislation purported to extinguish already-vested adverse possession claims; conversely, there would appear to be no constitutional difficulty in affecting unvested claims, since an

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[14] / *Curran v. Mount*, 657 P.2nd 389, 391 (Alaska 1982).
[15] / *Markovich v. Chambers*, 857 P.2nd 906, 908 (Or. App. 1993).

adverse possessor has no protected right in the mere expectation that, eventually, he or she may possess the land for a sufficient period of time. [16]/

Section 5. Section 5 gives an immediate effective date to the legislation.

[16] / *See Lovell v. Magnet Cove School District No. 8*, 782 S.W.2nd 41, 42 (Ark. 1990) (change in Arkansas adverse possession statutes applicable to unvested adverse possession claims).

SB

324

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 324
(S) Publish Date: 3/6/02

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: Public Utilities Exempt from Regulation
BRU: Regulatory Commission of Alaska (399)
Component: Regulatory Commission of Alaska
Sponsor: Senator Taylor
Requester: Senate Labor & Commerce
Component No.: 2417

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	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--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill has no fiscal impact on the operations of this agency.

Prepared by: Nan Thompson, Chair
Phone 907-276-6222
Division: Regulatory Commission of Alaska
Date/Time 3/6/02 2:24 PM
Approved by: Deborah B. Sedwick, Commissioner
Date 3/6/2002
Agency: Department of Community & Economic Development

(Revised 9/2001 OMB)
COMMITTEE COPY

Alaska State Legislature

Chairman,
Judiciary Committee
Administrative Regulations
Revenue Committee

Vice Chairman,
Resources Committee

Senator Robin L. Taylor

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SPONSOR STATEMENT
SB 324

"An Act providing that a utility or electric operating entity owned and operated by a political subdivision of the state competing directly with a telecommunications utility is not subject to the Alaska Public Utilities Regulatory Act."

SB 324 ensures that the City of Ketchikan retains the ability to set rates for its telephone utility in the event it faces competition from another utility company.

Alaska law provides that where a municipality owns and operates a public utility, the municipality may regulate the terms and conditions governing the provision of that public utility and has the power to set the terms and conditions for the utility services they offer.

Alaska law also provides that if a municipal utility faces competition, all of the municipalities' utilities become fully subject to economic regulation by the Regulatory Commission of Alaska. The RCA may grant an exemption to this rule.

Principles of fairness and regulatory parity provide that this statute should be amended when a municipality faces competition from a telecommunications company. New competitive providers are subject to less regulation by the RCA. Under federal law, some new telecommunications companies are not regulated at all. (Cellular providers) By contrast, if the municipally owned telephone utility becomes subject to economic regulation by RCA, it will be more heavily regulated than the new entrant.

By economically regulating the municipally owned utility while allowing the new entrant to set prices without regulatory oversight, the marketplace is unable to provide the benefits of competition to the public. The new entrant will be able to set its rates based on market forces and competitive need, while the municipally owned utility will be required to set its rates based on its costs through rate cases. These cases can be expensive and time consuming, and sometimes attract input from other interveners.

The unregulated entity has only to price its service slightly under the regulated rates of its competitor to gain market share. Such prices are not necessarily the lowest possible rates, and are not necessarily as low as the rates would be, given unfettered competition.

SB

331

SENATOR
GENE THERRIAULT
Mailing Address:
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(907) 488-0857
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Alaska State Legislature

Senate

While in session
State Capitol
Juneau, Alaska
99801-1182
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Senate District Q

Senate Bill 331: **"An Act relating to the jurisdiction of district courts"**

Sponsor: **Senator Gene Therriault**

Sponsor Statement

Senate Bill 331 addresses and clarifies the current statute relating to civil awards in district court cases. Current statute is unclear regarding the monetary limit in a civil case where there are multiple defendants. As a result, the only way to get around this uncertainty is if plaintiffs file multiple suits in district court to allow for an award in excess of $50,000. Such a course of action would be expensive for the plaintiff and grossly inefficient for the court.

Senate Bill 331 proposes to address this problem by clearly stating that the $50,000 limit is per defendant. This action would also ensure that residents in certain rural settings would not be required to travel to Superior Court venues in urban areas just to get access to moderate award limits.

Email: Sena

SPONSOR STATEMENT

.ak.us

SENATOR
GENE THERRIAULT
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Alaska State Legislature

Senate

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Senate District Q

REQUEST FOR HEARING

To: **Senator Robin Taylor, Chairman**
Senate Judiciary Committee

Subject: **Senate Bill 331**

Sponsor: **Senator Gene Therriault**

Date: **February 26, 2002**

I would like to respectfully request that SB 331 be scheduled for a hearing before the Senate Judiciary Committee.

SB 331 would clarify existing statute relating to civil jurisdiction in district courts. This change would save the court system time and money as well as allow plaintiffs in rural areas access to reasonable awards without having to travel to an urban area to file a claim in superior court.

Email: Sena Request for Hearing .ak.us

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 331
() Publish Date: 2/19/2002

Revision Date/Time (Note if correction):
Dept. Affected:
Title: Jurisdiction of District Courts
BRU: Alaska Court System
Component: Trial Courts
Sponsor: Senator Therriault
Requester: Senate Judiciary
Component No.: 768

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

The court system does not anticipate any fiscal impact from the passage of SB 331.

Prepared by: Douglas Wooliver
Phone 463-4750
Division: Alaska Court System
Date/Time 2/28/02 10:56 AM
Approved by: Stephanie Cole
Date 2/28/2002
Agency: Alaska Court System

SB 344

ALASKA STATE LEGISLATURE

Sen. Robin Taylor, Chair
Sen. Dave Donley, Vice-Chair
Sen. John Cowdery
Sen. Gene Therriault
Sen. Johnny Ellis

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Senate Judiciary Committee

SPONSOR STATEMENT
SB 344

"An Act relating to an aggravating factor at sentencing for terrorism."

This bill was introduced as a result of an alarming number of eco-terrorist groups surfacing around the country.

What we have seen in the last few years is that acts of eco-terrorism and eco-sabotage are not being committed by individuals with a passion for a cause; they are being committed by highly organized groups. Unfortunately, there is nothing in our statutes that addresses acts of terrorism. SB 344 provides an avenue for addressing these threats and crimes by making such actions aggravating factors at sentencing and providing harsher penalties.

Arguably, one of our biggest threats of terrorist violence may not come from Afghanistan or Iraq, but from our own crop of domestic terrorists. Radical environmentalists who use arson, bombs and other forms of sabotage in the name of the environment have swept our country in the past 20 years. We need to send a clear message that terrorism is a serious crime and will be treated accordingly. SB 344 sends that message.

Many eco-terrorist groups such as Earth First, Friends of the Earth, and others, spread their message of contempt and terror by hiding behind the First Amendment, and use newsletters, advertisements and meetings to encourage people to become "Eco-Kamikazes". The following is a passage from and Earth First Journal:

> "Are you terminally ill with a wasting disease? Don't go out with a whimper, go out with a bang! Undertake an eco-kamikaze mission. The possibilities for terminally ill warriors are limitless. Dams from the Columbia and the Colorado to the Connecticut are crying to be blown to smithereens, as are industrial polluters, the headquarters of oil-spilling corporations, fur warehouses, paper mills.....To Those feeling suicidal, this may be the answer to your dreams.....Don't jump off a bridge, blow up a bridge. Who says you can't take it with you?"

At least nine states have already passed legislation increasing the penalties for these crimes. These acts of terrorism have resulted in loss of life and millions of dollars in damages. We need to remember the Amtrak derailment and the Uni-bomber. It is past time to strengthen the penalties for such terrorist acts.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 344
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title "An Act relating to an aggravating factor at sentencing for terrorism."
BRU Legal and Advocacy Services
Component Public Defender Agency
Sponsor Senate Judiciary Committee
Requester (S) JUD
Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	*	*	*	*	*	*
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill would add an aggravating factor for felony sentencing for conduct involving the use of force or violence against a person or property designed to intimidate or coerce a civilian population, government policy, government conduct, or private enterprise policy. The Public Defender Agency cannot anticipate how many cases will be affected by this aggravator, should this bill become law. It may have a fiscal impact on the workload of the Agency, but not the caseload of the Agency, but the extent cannot be quantified. Therefore, an indeterminate fiscal note is submitted.

Prepared by: Barbara Brink, Director
Phone (907) 334-4416
Division Public Defender Agency
Date/Time 3/25/02 8:56 AM
Approved by: Jim Duncan, Commissioner
Date 3/25/2002
Agency Department of Administration

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 344
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to an aggravating factor at sentencing for terrorism."
BRU Criminal Division
Component All
Sponsor Senate Judiciary Committee
Requester Senate Judiciary Committee
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	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--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

SB 344 adds certain acts of terrorism as an aggravating factor at a felony sentencing.

This bill is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 3/14/02 3:56 PM
Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General
Date 3/14/2002
Agency Department of Law

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 344
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title "An Act relating to an aggravating fact
BRU Adminstration and Operations
at sentencing for terrorism."
Component All
Sponsor Senate Judiciary Committee
Requestor Senate Judiciary Committee
Component No. 694

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	***	***	***
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	***	***	***

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This legislation adds an aggravator to the sentencing statutes for using force or violence against persons or property as a means of coercing or intimidating a civilian population; influencing the policy of a government or of a private enterprise by intimidation or coercion; or affecting the conduct of a unit of government.

There have been few, if any, cases involving this particular brand of terrorism in Alaska. If this should occur and the aggravator imposed, it would not have an impact until later years after the presumptive sentence is served. Therefore, the Department of Corrections is submitting a fiscal note that is zero initially, and indeterminate in later years.

Prepared by: Candace Brower
Phone 465-4652
Division Commissioners Office
Date/Time 3/14/02 11:49 AM
Approved by: Margaret Pugh
Date 3/14/02
Agency Department of Corrections

SB

369

ALASKA STATE LEGISLATURE

Sen. Robin Taylor, Chair
Sen. Dave Donley, Vice-Chair
Sen. John Cowdery
Sen. Gene Therriault
Sen. Johnny Ellis

State Capitol
Juneau, AK 99801-1182
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Senate Judiciary Committee

SPONSOR STATEMENT

SB 369

"An Act relating to trusts, including trust protectors, trustee advisors, and transfers of trust interests, and to creditors' claims against property subject to a power of appointment; and providing for an effective date."

Alaska has been in the lead in the development of trust law. Other states have not only enacted similar legislation but have improved on it. This bill fine tunes Alaska's existing trust legislation.

HB 316 provides statutory authority to provisions commonly found in trust instruments. For instance, Section 1 of the bill specifically provides for the position of a trust advisor and trust protector and clarifies the manner in which these positions relate to the administration of a trust. Delaware has similar legislation. Many trust instruments allow a trustee to make trust assets available for the use of a beneficiary. Section 2 allows trust assets, consisting of real property and tangible personal property, to be used by a beneficiary without the use being considered a distribution which could, in turn, be subjected to the claims of a beneficiary's creditors

Other sections contained in the bill codify a number of matters which have always been accepted by Alaska trust practitioners as being the common law of this state, but for which there has been no statutory counterpart. Section 4 provides that trust assets can not be attached by a beneficiary's creditor until such time that trust assets are actually distributed to a beneficiary, nor can there be a continuing order against the Trustee with respect to future distributions that a Trustee would choose to make. Section 6 adds a new subsection (i) to AS 34.40.110 which clarifies that the statute affording spendthrift protection for beneficial interests applies not only to trusts in which a settlor may have a retained interest, but also to the very common third party settled trust where a beneficiary might be serving as sole trustee.

Sections 5 and 6 make amendments to AS 34.40.110, which will assist a future court in the interpretation of this statute, something an Alaska court has yet to do. Section 5 clarifies that a fraudulent conveyance action may only be brought against a settlor of a trust and then only as to a specific transfer of assets which are determined to be

fraudulent as to that creditor. Section 6 also clarifies the definition of a pre-existing creditor who can avail themselves of the time period found in AS 34.40.110(d)(1) for bringing a fraudulent conveyance action against the settlor of a self-settled trust. Subsection (h) as found in Section 6, provides a transfer restriction will be valid with respect to a beneficial interest retained by a settlor, even though the settlor serves as a co-trustee, provided the settlor doesn't have control over the manner in which distributions may be made to the settlor. Subsection (k) invalidates any unwritten agreement or understanding between a settlor who is a beneficiary and a trustee which gives the settlor rights greater than those which are permitted to be expressed in the trust instrument.

Last, there are several provisions contained in this bill which have their counterpart in the laws of other states. Section 3 provides the circumstances in which a transfer restriction will continue to be valid even though a settlor retains a unitrust or annuity interest in the trust. These provisions presently exist in Delaware. Section 7 of the bill clarifies when property subject to a power of appointment can be subjected to the claims of a donee's creditors and codifies the common law as it is now found and enunciated in the Restatement 2nd of Property. This section has its genesis in a comparable Rhode Island statute. All the provisions found in this bill are necessary additions if Alaska expects our trust industry to remain competitive with other states.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 369
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to trusts, including trust protectors, trustee advisors, and transfers of trust interests, . . ."
BRU Civil Division
Component Commercial
Sponsor Senate Judiciary Committee
Requester Senate Judiciary Committee
Component No. 2211

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	**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–Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

SB 369 rovides for the appointment of a trust protector and a trust advisor. The bill also prevents creditors of beneficiaries from attaching assets transferred into a trust unless certain conditions are met by all parties, and establishes a statute of limitations regarding when creditors must bring an action for a fraudulent transfer claim.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 4/30/02 4:20 PM
Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General
Date 4/30/2002
Agency Department of Law

(Revised 9/2001 OMB)

SECTIONAL ANALYSIS
SB 369

Section 1. Establishes two new sections relating to trust.

AS 13.36.370. Provides for the appointment of a trust protector. Requires that the trust protector be a disinterested third party. Gives the trust protector the powers, delegations, and functions conferred on the protector by the trust instrument, and identifies some of these powers. Sets a limit on the modifications the trust protector is allowed to make. Subject to the trust's terms, provides that a trust protector is not liable or accountable as a trustee or fiduciary when acting as a trust protector.

AS 13.36.375. Provides for the appointment of an advisor to the trustee with regard to matters relating to a trust's property. Provides that even if an advisor is appointed, the property and management of the trust and the exercise of powers and discretionary acts remain vested in the trustee. States that the trustee is not required to follow the advisor's advice. States that an advisor is not liable as, or considered to be, a trustee when acting as an advisor.

Section 2. Makes various substantive and stylistic changes to the subsection that allows for the establishment of a restriction on the transfer of a beneficiary's trust interests. States that a 'beneficiary" can include a beneficiary who is the settlor of the trust. Excludes certain activities from being considered as "payment or delivery" of a trust interest for purposes of applying the subsection.

Section 3. Makes various substantive and stylistic changes to the subsection that applies the transfer restriction against the claims of creditors and other persons. Limits the application of one exception.

Section 4. Makes various substantive and stylistic changes to the subsection that addresses the satisfaction of claims of creditors and other persons under (b) of the section. Provides that an attachment or other order may not be made against a trustee with respect to a beneficiary's interest or against property subject to a transfer restriction, except to the extent that the restriction is not allowed under (b) of the section.

Section 5. Makes various subs antive and stylistic changes to the subsection that identifies which creditors may bring a cause of action or claim for relief for a fraudulent transfer under (b)(1) of the section, or under other law, and within what time frame the action or claim must be brought.

Section 6. Adds new subsections to AS 34.40.110

Subsection (g) limits creditor claims and actions under AS 34.40.110(d)(1) to claims that meet certain burden of proof and timing requirements and to actions that meet certain timing and subject matter requirements.

Subsection (h) applies the transfer restrictions to settlers who are also beneficiaries even if the settlor serves as a co-trustee or an advisor, as long as the settlor does not have trustee power over discretionary distributions.

Subsection (i) applies the transfer restrictions to a beneficiary who is not the settlor, even if serving as a sole trustee, a co-trustee, or an advisor to the trustee.

Subsection (k) prohibits a settlor with a beneficial interest subject to a transfer restriction from benefiting from, directing a distribution of, or using trust property except as stated in the trust. Voids an agreement or understanding between the settlor and the trustree that grants greater rights or authority than stated in the trust.

Section 7. States that the property that a donee of a power of appointment is authorized to appoint is not subject to the claims of the creditors of the donee unless certain conditions are met.

Section 8. Applies this Act to trusts created before, on, or after the effective date of the particular section of the Act that is involved.

Section 9. Provides that AS 34.40.110(b), as amended by the Act, takes effect immediately.

SB 3001/
HB 3001

Before the

Senate Judiciary Committee

25 June 2002

Testimony of Wesley E. Carson

Alaska Communications Systems

Mr. Chairman, members of the Committee, on behalf of Alaska Communications Systems I wish thank you for the opportunity to present testimony before the Senate Judiciary Committee. My name is Wesley E. Carson. I was involved in founding Alaska Communications Systems and serve as its President & Chief Operating Officer.

With regard to the Legislature's consideration of the proposed re-authorization of the Regulatory Commission of Alaska ("RCA"), we state most emphatically our belief that the regulatory status quo is unacceptable. We have serious concerns about how the RCA's regulatory processes and substantive decisions are impacting the long-term public interest of Alaskans, as well as the economic strength of the State's regulated utilities. Our concerns and those expressed by many other utilities throughout Alaska must be addressed by the Legislature in a thorough and comprehensive manner ***before the RCA is re-authorized.***

At this juncture, it should be abundantly clear that it would not be prudent for the Legislature to simply re-authorize the RCA and perpetuate the status quo. No matter how well intentioned the commissioners and staff may be, there are procedural flaws, public policy and legal issues that must first be addressed.

Attached to my testimony are outlines of legal and procedural issues we suggest be included in the Legislature's review of the RCA. Many of our procedural concerns are shared by other regulated utilities in the State. However, there are several telecommunications legal and policy matters that primarily affect ACS at this time. I would like to highlight several of these matters for the Committee.

This testimony will focus on the four ACS local telephone companies that build and maintain the Public Switched Telephone Network, serving 75 percent of the State's population. These ACS companies are: ACS of Anchorage (formerly ATU); ACS of Fairbanks (formerly FMUS); ACS of Alaska (serving Juneau); and ACS of the Northland (serving the highest cost and most remote of our service areas).

It is important to distinguish these ACS local telephone companies from the Regional Bell Operating Companies (or RBOCs) that provide service in every one of the other 49 states. Alaska is the only state that is not, and has never been, served by an RBOC. Verizon, the largest RBOC, owns approximately one-third of the nearly 200 million telephone lines in the country and SBC Communications owns almost another one-third. Together, the RBOCs account for 87 percent of the country's telephone lines. All four of the ACS companies taken together represent about 330,000 telephone lines or less than 2/1000ths of the nation's total. In drafting the Telecommunications Act of 1996, Congress was cognizant of the differences between the RBOCs and small independents such as ACS.

TELECOMMUNICATIONS LAW AND POLICY

The RCA purports to simply implement State and Federal law and regulations, and to take its policy direction from the Legislature. We believe the RCA creates its own public

policy and legal interpretations where necessary to support its positions. And we contend the RCA seeks to promote competition in local telephone service at any cost – to ACS and, in the long-term, the rural Alaskan consumer. We suggest the following examples in support our view.

Anchorage Interconnection Agreement

The Interconnection Agreement between General Communications, Inc. ("GCI") and Anchorage Telephone Utility ("ATU"), one of the first in the nation, was approved by the Alaska Public Utility Commission ("APUC") in January, 1997 in Order U-96-89(9). It established the terms for local telephone competition in Anchorage, including the rate at which GCI would lease from ATU unbundled network element ("UNE") loops. The UNE loop is the telephone circuit or line connecting a customer with the Public Switched Telephone Network. By leasing the UNE loop, GCI is able to use the telephone company's facilities to connect a customer and charge the customer for retail telephone service.

In the 1997 order, the APUC established a ***temporary*** UNE loop rate of $13.85 per month. This rate was intended to be a short-term substitute for, and to be replaced by, a final price based on a cost study in compliance with federal law. In the Commission's own words, "all prices in the arbitrated interconnection agreement are temporary in nature and will require a full study based upon a cost methodology to be determined by this Commission at a later date."

ACS of Anchorage, Inc., as the successor to ATU, sought, but failed to obtain, an agreement with GCI for new cost-based rates. ACS then asked the RCA to set new rates in compliance with federal law in January 2000, arguing that the then three-year old rate

of $13.85 was so low as to effectively force ACS to subsidize GCI's competing local telephone service. Undoubtedly, this non-compensatory rate, which gives GCI a cost of goods advantage over ACS, has contributed to making Anchorage the most competitive local telephone market in the nation. It thus explains, in part, the following remark made by RCA Chair G. Nanette Thompson in a speech on July 30, 2001, at the Anchorage Chamber of Commerce:

> ***"My colleagues on other state commissions are astonished to hear that a competitor has captured 35-40 percent of the Anchorage market."***

The RCA, on March 6, 2000, opened a docket to set new rates, and expressly recognized that the existing rates were both temporary and "not based upon an accepted forward-looking cost methodology." Nevertheless, the RCA took no action on the open docket. Finally, a year and a half after requesting new forward-looking rates, with no resolution in sight, ACS asked for at least a new "temporary" rate.

The RCA held a hearing during the latter part of 2001 in which ACS submitted extensive evidence supporting a UNE loop rate of $24.00. ACS requested an "interim and refundable" UNE loop rate increase. This means that in the event a finally adjudicated rate was less than the interim rate, ACS would refund to GCI any overpayment – thereby protecting GCI from economic harm. On the other hand, if the interim rate was set too low, and the finally adjudicated rate was higher than the interim rate, ACS may have no recourse to collect the underpayments from GCI.

At the hearing, GCI's counsel made an oral representation – unsupported by any cost studies submitted in connection with the hearing – that their models could not justify a

rate greater than $14.92. The RCA agreed with GCI, despite the absence of any supporting evidence, and issued an order granting an interim refundable rate of $14.92. Two and a half years after requesting new rates in compliance with federal law, and five and a half years after initiating interconnection competition, ACS still has never had an Anchorage UNE loop rate established in compliance with federal law. In fact, ACS has been unable to obtain even a schedule for resolving this matter. And, as our submitted cost studies indicate, ACS is still not receiving adequate compensation for UNE loops.

Termination of ACS Rural Exemptions

Telephone companies classified as "rural" (i.e., serving high cost areas) by the Telecommunications Act of 1996 are exempt from the obligation to interconnect and lease their loops and other facilities to competitors. State Commissions may terminate a rural exemption, but only, according to the Act, if the state commission finds that it is technically feasible, is not unduly economically burdensome, and would be consistent with universal service to do so. The Act recognized the fragile economics of most rural telephone companies and the folly of trying to bring market economics to high cost telecommunications services that cannot exist without significant subsidies.

GCI requested in 1997 that the APUC terminate rural exemptions for Fairbanks, Juneau and other ACS rural service territories. The APUC placed the "burden of proof" on GCI and found that the economics of interconnection competition would be unduly burdensome on the companies. The APUC therefore ruled that the exemption should be preserved.

GCI appealed the order and the Alaska Superior Court remanded the case back to the APUC with the instruction to place the burden of proof on ACS. The APUC did so, then

terminated the rural exemptions of the ACS companies and ordered interconnection with GCI on June 30, 1999. ACS appealed the APUC's decision to the new RCA. Without a hearing, the RCA sustained the termination of the rural exemption. ACS appealed the termination.

In July 2000, the 8th Circuit Court of Appeals, in a decision that was binding on all other circuits, held that the burden of proof must be on the competitor, not the rural telephone company, and the economic burden on the rural telephone company associated with competitive entry must be considered.

Obviously recognizing that these rural exemptions had been terminated in a manner contrary to federal law, GCI appealed to the U.S. Supreme Court to review the 8th Circuit's ruling on these specific issues. The U.S. Supreme Court denied the GCI request, leaving the 8th Circuit's decision on these matters as the law of the land.

Yet the RCA refused to comply with the law, stating: ***"The 8th Circuit's ruling on the assignment of the burden of proof in a rural exemption proceeding does not persuade us to revisit that issue here."*** This was a clear case of the RCA ignoring a federal decision that did not comport with its own policy to force competition in rural areas. ACS has appealed the matter to the Alaska Supreme Court, where it is now pending review.

The RCA also terminated the exemption for ACS' most rural company, ACS of the Northland, despite GCI's testimony in 1997 and again in 1999 that it was seeking interconnection only in North Pole and not anywhere else in the ACS of the Northland service territory. Given GCI's position, and the absence of a dispute concerning most of the ACS of the Northland territory, we do not believe any specific evidence was

introduced of the impacts of competition on the economic burden or universal service in Northland's small communities such as Seldovia, Ninilchik, Delta Junction and Nenana.

The RCA, in declaring the RCA's intent that the rural exemption be terminated for these small communities, stated: "We have a responsibility to carry out the intent of Congress in adopting the Telecommunications Act of 1996, which is ***to require competition in the provision of local telecommunications services***" (Docket No. U-97-144, Order No. 12).

We contend that the RCA has a responsibility to carry out the ***full intent of the Act***, not just the provisions that support the commission's own agenda. The Act permits a state commission to terminate a rural exemption ***only*** if there is an affirmative finding that allowing interconnection competition is will not be unduly economically burdensome on the rural telephone company and will not jeopardize universal service. And, consistent with the 8th Circuit Court of Appeals decision, the burden of making this case must be on the competitor, not the rural telephone company.

Interconnection Agreements in Fairbanks and Juneau

As a result of the termination of the rural exemption, ACS has been compelled to permit GCI to interconnect and lease UNE loops in Fairbanks and Juneau. In sharp contrast to its dilatory handling of the ACS request for legal UNE loop rates in Anchorage, the RCA very promptly set rates for Fairbanks and Juneau in response to a request by GCI. The actual ACS cost for an average loop in Fairbanks is about $33.50, based on cost information submitted by ACS to justify receipt of federal universal service funds. The RCA, however, set a UNE loop price for Fairbanks of $19.19 – giving GCI a cost of goods that is just 57% of the ACS cost.

At the time it terminated the rural exemptions, the RCA stated that "negotiations regarding appropriate UNE pricing can achieve an acceptable level of economic impact" and promised that it would play a continuing supervisory role to ensure that the "economic burdens borne by the incumbent carrier in a market where local competition is newly introduced are not too great." The Company testified in the Fairbanks rural exemption proceeding that economic harm would result from a UNE loop rate as low as $27.30. The RCA flatly rejected the Company's economic harm argument, declaring: ***"That UNE price is unrealistically low."*** The RCA then promptly arbitrated a rate of $19.19.

Again, we believe the RCA pursued its own policy agenda and was determined to grant GCI a competitive advantage so as to replicate the Anchorage experience in these rural markets. To establish the UNE loop rate, the RCA rejected ACS' detailed cost study, relied on an improper economic model, and elected to set prices based on Lower 48 costs (with an "Alaska differential" in some cases) rather than ***actual ACS costs.***

The RCA relied upon the "Synthesis Model" used by the FCC to allocate Universal Service Funds. As long ago as 1999, the FCC cautioned against using the model for UNE pricing, stating that "[t]he federal cost model was developed for the purpose of determining federal universal service support, and it may not be appropriate to use nationwide values for other purposes, such as determining prices for unbundled network elements" (Tenth Report and Order, 14 FCC Rcd 20156, ¶32 (1999)). The FCC reiterated this position in an order issued just this month, stating: "The Commission has cautioned against using the results of the Synthesis Model to set rates." (Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps, Order, FCC 02-161, para 36 (June 5, 2002)).

Furthermore, it is worth noting that the Rural Task Force of the Federal-State Joint Board on Universal Service, co-chaired by Chair Thompson, reviewed the reliability of the FCC's Synthesis Model and concluded: "[T]he costs generated by the Synthesis Model are likely to vary widely from reasonable estimates of forward-looking costs. As a result it is the opinion of Task Force that the current model is not an appropriate tool for determining the forward-looking cost of Rural Carriers" (Rural Task Force Recommendation to the Federal-State; Joint Board on Universal Service, September 22, 2000, at 18).

Exacerbating the economics of forcing competition in these high cost markets, the RCA also issued an order granting GCI the right to receive the federal universal service fund subsidy – specifically intended by federal law for the support of constructing and maintaining high cost loops – for every customer they take by means of a leased UNE loop. The RCA granted this windfall to GCI, despite the fact that GCI does not build or maintain any loops in these markets. The end result is to discourage investment to build and maintain the high cost networks that connect customers in these areas.

Rate Case Proceedings

Many utilities have expressed concern about the level of effort and resources required to adjudicate rate cases before the RCA. ACS shares this concern. The current ACS rate cases were mandated by the commission as a condition of transferring the certificates of public convenience and necessity to ACS in 1999. By commission order, these rate cases commenced on July 1, 2001, using information from 2000 financial results. We now anticipate rates sometime in 2003, based on data that will then be three years old. This matter has already cost ACS roughly $1.8 million and we expect the full proceeding to cost approximately $3.0 million.

ACS has produced more than 13,000 documents to date, and provided more than 2,500 responses to more than 850 separate discovery requests – the bulk of which came from our chief competitor, GCI. All of this effort is paid for by the consumers, either directly via the "RCC" charge on utility bills or indirectly as recoverable expenses through rates. Earlier this month, the RCA finally issued a depreciation decision in the rate case proceedings that appears to conflict with the U.S. Supreme Court's decision this May in Verizon v. FCC. The U.S. Supreme Court criticized attempts to minimize depreciation and slow depreciation rates, yet that is precisely what the RCA has ordered. The depreciation rates established by the RCA for ACS of Anchorage are not only much lower than the rates employed by its competitors, but these rates appear to be significantly lower than any other telephone utility in Alaska. In fact, they appear to be lower than any known depreciation rate for any telephone utility, big or small, anywhere in the country.

This is exactly the opposite result from what one would expect in the most competitive marketplace in the nation where there is heightened pressure to modernize equipment or lose customers. The effect of this decision will be to leave ACS burdened with capital tied up in stranded, obsolete facilities while the competitors invest in newer technologies. Many utilities have expressed fears that testimony against re-authorization of the RCA could result in retaliatory rulings by the commission in the future. We are left to wonder if ACS has been the RCA's first victim.

The "quid pro quo" for the regulation imposed on the ACS companies should be an opportunity to earn a return on our investment. That would be fair. But the reality is that the RCA can compel us to build and serve – but we do not have a way to assure a return on investment. This is a commission that claimed "sovereign immunity" when ACS

sought to have a matter under the Telecommunications Act reviewed by a federal district court. Where is justice when the Commission refuses to be held accountable for their decisions? And why wouldn't state commissioners welcome a review to make absolutely certain the decisions they were making were consistent with the law and promoting the public interest?

The Legislature must be concerned about the impacts these regulatory policies have on ACS and, more importantly, on Alaskan consumers in the long run. ACS and its predecessors have invested substantial funds to build and upgrade the network that connects three-fourths of the State's population with each other and the rest of the world. We must be able to generate adequate financial returns if we are to continue to construct and operate the modern telecommunications facilities that keep Alaskans connected. I can assure you that the capital markets are scrutinizing the impact of this commission's regulatory decisions on the Alaskan markets. We must have access to capital from those markets to continue to invest in the business.

Looking at ACS of Anchorage, we have seen a steady decline in revenues from 1999 to 2001 that is directly proportional to the increase in UNE loops. Over that same period, we have gotten more efficient each year. Our cash expenses per line have decreased. That is one of the benefits of competition. It makes you become more efficient. In fact, it is worth noting that ACS is a more efficient operation than many of our peer group companies. For 2001, annual cash expense per telephone line for ACS of Anchorage was $242. The comparative spending per line for Alltel was $276; CenturyTel was at $402 and the TDS expense was $435.

We have continued to invest in the network. We have made these investments with the hope that the RCA would, through our current rate case and the Anchorage UNE

proceeding, permit us to earn a reasonable return on that investment. Thus far, we have certainly been disappointed.

I reference again the recent RCA order reducing our depreciation rates. We were seeking a rate of 9.30 percent, which is comparable to our primary competitor's depreciation rate. Interestingly enough, though, it was GCI arguing against our depreciation rate – not the RCA's Public Advocacy Staff. Staff relied entirely on GCI to formulate a position and the RCA reduced our rate from the existing 7.80 percent to 4.78 percent, which was remarkably close to the GCI recommendation of 4.49 percent.

Am I implying that ACS is concerned about the frequency with which the RCA sides with GCI in such matters? Absolutely. We reviewed commission decisions on disputed issues before the RCA from July 1999 to the present. In those matters where GCI advocated a position, the RCA ruled in GCI's favor 81.3 percent of the time. The commissioners might well tell you they are only implementing the law. I believe an objective review of matters such as the five and one-half year old "temporary" Anchorage UNE loop rate, the disregard of the 8th Circuit Court of Appeals ruling on the burden of proof in a rural exemption proceeding, and the termination of the rural exemption for ACS of the Northland communities without a record establishing the findings required by the Act suggest otherwise.

Recommendations for the Legislature

We believe the legislators must carefully review the current regulatory regime before re-authorizing the RCA. The Legislature must assure that State regulation of utilities promotes the public interest, and that every utility receives fair and open, unbiased, and rational treatment that encourages continued investment in Alaska's infrastructure.

With regard to ACS' specific concerns, we would ask that the Legislature consider how continued investment in the network will be assured in the long run; how capital will be generated to build the local telephone network and pay the expense of operating it; and how the future of telecommunications in Alaska, the state more dependent upon modern telecommunications than any other state in the Union, will be guaranteed. There is great urgency for ACS. The RCA has made significant decisions adverse to ACS that are very difficult to remedy as time goes on. How shall ACS recover revenues lost as a result of years of unlawful interconnection rates or due to forced interconnection agreements in rural areas? There is no time for delay and maintenance of the status quo is not acceptable.

ACS makes the following recommendations to the Legislature relative to the proposed re-authorization of the RCA:

1. ***Immediately establish a Legislative Oversight Committee to monitor the RCA's actions and to formulate recommendations for consideration in the 2003 legislative session.*** The charter of the Legislative Oversight Committee should be to assure that regulatory policy is aligned with long-term public interest, that regulatory processes are completed in a timely fashion, that due process is afforded to all, and that substantive law is being applied appropriately.
2. ***Use the findings and recommendations of the Legislative Oversight Committee, along with testimony provided in these and related legislative committee hearings, to guide the 2003 Legislature's deliberations of the proposed re-authorization of the RCA.*** The Legislature should also utilize the State Telecommunications Study as it considers the appropriate statutory,

regulatory and policy directions necessary to guide the regulators in telecommunications matters. We offer the issues set forth on the attachments to this testimony for inclusion in Legislature's deliberations.

3. ***Require that the chair of the RCA be rotated so as to spread the responsibilities and prevent a single commissioner from exercising undue influence.*** As pertaining to ACS specifically, we are concerned about the appearance of impropriety in Chair Thompson's interactions with GCI; what we perceive as bias against ACS in regulatory processes and decisions; and the possibility of retribution against ACS by the RCA in current and future regulatory orders as a result of ACS testifying before this Legislature. Consequently, and in light of the significant power currently vested in the RCA's chair, we believe it would be appropriate for another commissioner to be appointed to the position of chair and to require that Commissioner Thompson disqualify herself from matters relating to ACS.

Mr. Chairman and members of the Committee, we again thank you for this opportunity. This concludes the testimony of ACS.

Re-Authorization of the Regulatory Commission of Alaska
Summary of Procedural/Due Process Issues
Potential Remedial Action

RCA Management Structure; Advisory Staff vs. Public Advocacy Section

Issue:

- Too many duties assigned to the Chair; Chair's term of office too long
- Conflicting roles between Advisory Staff and PAS
- Over allocation of positions to Advisory Staff (47 vs. 5 assigned to PAS)
- Under utilization of PAS (498 formal adjudications; 59 assigned to PAS)
- Rules for Advisory Staff vague and ad hoc; ex parte does not apply
- No opportunity for utilities to cross-examine Advisory Staff

Potential Remedial Action:

- Legislature should implement term limits for the Chair; one-year appointment with limitations on successive terms
- Re-allocate technical and professional Advisory positions to PAS
- Structurally separate PAS from RCA; house RCA and PAS in different Executive Branch departments
- Assign all public interest advocacy functions to PAS
- Remaining RCA staff to perform administrative, filing compliance and informal consumer complaint resolution
- If structural separation of PAS not implemented, Legislature should consider alternative management structures including reinstatement of the Executive Director/Staff Director position

Lack of Codified Ex Parte Rules

Issue:

- Administrative Procedures Act does not apply to RCA adjudications
- No codified ex parte rules beyond what is found in case law
- Perceived concerns about ex parte have been cited by RCA to discourage ACS from communicating directly with commissioners
- ACS is limited in its ability to "make its case"
- Commissioners are limited in their ability to learn about complex telecom issues and ask legitimate questions about the positions of parties

Potential Remedial Action:

- Legislature could adopt specific ex parte rules governing interactions with RCA commissioners
- Legislature could require that the RCA promulgate ex parte regulations by a date certain
- FCC approach that defines rules; applies specific rules to specific cases; allows direct contact with commissioners followed by a mandatory disclosure filing should be considered

Open Meetings Act

Issue:

- Adjudicatory matters and certain other matters are specifically exempted from application of the OMA
- All other matters requiring deliberation and voting must be addressed in a properly noticed public meeting
- Apparent violations of the OMA (comments filed at the FCC; contract and procurement matters; RCA response to pending legislation, etc.)

Potential Remedial Action:

- Legislative guidance to the RCA regarding OMA compliance obligations
- Legislative action prohibiting the practice of conducting two-at-a-time commissioner meetings as an alternative to the public deliberation and voting requirements of the OMA
- Legislative action directed to the Department of Law setting out specific guidelines for reminding the RCA of its OMA obligations

Due Process and Evidentiary Hearings

Issue:

- RCA's new "diversion" procedure implemented without prior public notice or any industry input
- New procedure probably adopted as mechanism to speed up adjudications, but no specific rationale was ever articulated by the RCA
- New procedure effects tariffs that have been "suspended" for further investigation and relies heavily on Advisory Staff recommendations
- Utilities are given 30 days to file written responses to Advisory Staff memoranda; RCA may then summarily decide contested issues
- New procedure eliminates: Opportunity of other interested parties to intervene; discovery, filing of written testimony, opportunity to cross-examine adverse witnesses and the evidentiary hearing itself

Potential Remedial Action:

- The Superior Court reversed and remanded the case that initiated the "diversion" procedure, finding that the RCA failed to follow existing law
- Legislature should direct the RCA to suspend the procedure until new regulations have been duly adopted
- Legislature should direct the RCA to promulgate regulations by a date certain that are calculated to improve efficiency without violating the due process rights of parties
- Legislature should adopt reasonable, but absolute time standards for RCA decisions; RCA's unilateral "good cause" extensions should be eliminated
- Legislature should take action to adopt an Administrative Law Judge classification that allows ALJs to make substantive regulatory decisions subject to appeal

Re-Authorization of the Regulatory Commission of Alaska
Summary of Substantive Policies And
Potential Remedial Action

Interconnection Agreements

Issue:

- Rates for facilities leases ("UNEs" or "Unbundled Network Elements") artificially low based on improper legal standard
- Failure to promptly resolve matters raised by the incumbent
- Refusal to submit implementation of federal law for federal judicial review
- Bias in favor of competitive carriers

Potential Remedial Action:

- Rates should be based on the costs of the carrier leasing facilities, not on another or a hypothetical carrier's costs
- The best evidence of the leasing carrier's forward looking costs should be that carrier's most current costs for labor, materials and other cost components
- Require decisions implementing federal law to be subject to federal judicial review
- Competing carriers must pay the full cost for their use of facilities -- avoid a policy of discounting facilities below their true cost

Rural Exemption

Issue:

- Rural exemptions under the federal Telecommunications Act of 1996 have been terminated by the RCA based on an incorrect legal standard and in the absence of evidence in the record
- Rural exemptions under the federal Telecommunications Act of 1996 have been terminated without detailed analyses and findings, risking universal service for all telephone consumers outside of Anchorage

Potential Remedial Action:

- Require the RCA to follow federal judicial rulings when implementing provisions of the federal Telecommunications Act of 1996
- Require the RCA to place the burden of proof on competing carriers, as required by federal law
- Establish as a universal service as a priority state policy and require detailed analyses and finding to support terminating a rural exemption

Deregulation and Rate Cases

Issue:

- Anchorage is the most competitive major market for telecommunictions in the nation and competition is well under way in Fairbanks and Juneau
- Continued regulation is contrary to the principals of competition
- Rates and other requirements should be eliminated in all markets where consumers have a choice of two or more carriers
- Where regulation continues, final rates should be determined within 12 months of commencing a proceeding and carriers should not be exposed to burdensome discovery

Potential Remedial Action:

- Detariff and deregulate markets where consumers have a choice of carriers
- Permit carriers to negotiate rates and terms with customers
- Establish statutory limits on the time allowed for a rate case
- Establish statutory limits on discovery

Other Matters

Issue:

- Federal law requires incumbent telephone companies to share their facilities with competitors but fails to impose any recipricol obligations on the competitors
- Commission policy imposes retroactive network service standards
- Commission policy imposes barriers to corporate affiliations and marketing
- Commission policy opposes regulatory parity for all providers of the same service, regardless of the mode of service delivery

Potential Remedial Action:

- Establish obligations under state law for competitive carriers to share their facilities to the same extent, and under the same terms and conditions, as incumbent carriers
- Limit the Commission's right to impose new network service standards to those facilities constructed after a rule is adopted
- Eliminate obsolete barriers to corporate efficiency and joint marketing
- Establish a policy of regulatory parity for all telecommunications services regardless of the mode of service delivery

adopted 6/26 10 A.M.

amended Sec 32 (Donley)

22-GH2115\L
Craver
6/26/02

amend 2 - chair (Donley

amend 3 - "terminate" def - (Donley)

SENATE CS FOR CS FOR HOUSE BILL NO. 3001(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - THIRD SPECIAL SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the powers and duties of the Regulatory Commission of Alaska, establishing a task force to inquire into the operation of the commission, extending the termination date of the commission to June 30, 2003, establishing the Telecommunications Commission of Alaska, making conforming amendments, and permitting grants to water and sewer companies for water quality projects; and providing for an effective date."

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

* **Section 1.** AS 29.35.060(a) is amended to read:

(a) The assembly acting for the area outside all cities in the borough and the council acting for the area in a city may grant franchises, including exclusive franchise privileges, to a person, corporation, organization, or utility not certificated by the former Alaska Public Utilities Commission, [OR BY] the Regulatory Commission of Alaska, **or the Telecommunications Commission of Alaska** and may permit the use

of streets and other public places by the franchise holder under regulations prescribed by ordinance.

* **Sec. 2.** AS 29.35.060(b) is amended to read:

(b) Unless the grant is made on a competitive basis, the grant of an exclusive right to use a public street or right-of-way for more than five years to a utility or a transportation system not certificated by the former Alaska Public Utilities Commission, [OR BY] the Regulatory Commission of Alaska, **or the Telecommunications Commission of Alaska** shall be valid only if approved by a majority of the voters at an election.

* **Sec. 3.** AS 29.35.131(c) is amended to read:

(c) A local exchange telephone company or wireless telephone company shall include the appropriate enhanced 911 surcharge, stated separately and included in the total amount owed, in the bills delivered to its customers. The **Telecommunications** [REGULATORY] Commission of Alaska may not consider the enhanced 911 surcharge as revenue of the telephone company and has no jurisdiction over an enhanced 911 system. A customer is liable for payment of the enhanced 911 surcharge in the amounts billed by the telephone company until the amounts have been paid to the telephone company.

* **Sec. 4.** AS 29.35.137(5) is amended to read:

(5) "local exchange service" means the transmission of two-way interactive switched voice communications furnished by a local exchange telephone company within a local exchange area, including access to enhanced 911 systems; in this paragraph, "local exchange area" means a geographic area encompassing one or more political subdivisions as described in maps, tariffs, or rate schedules filed with the **Telecommunications** [REGULATORY] Commission of Alaska, where local exchange rates apply;

* **Sec. 5.** AS 37.05.146(b)(4) is amended by adding a new subparagraph to read:

(AAA) Telecommunications Commission of Alaska under AS 42.05 and AS 42.08;

* **Sec. 6.** AS 39.25.120(c)(19) is amended to read:

(19) hearing officers and administrative law judges of the Regulatory

Commission of Alaska **and the Telecommunications Commission of Alaska**.

* **Sec. 7.** AS 39.50.200(b) is amended by adding a new paragraph to read:

(57) Telecommunications Commission of Alaska (AS 42.08.010).

* **Sec. 8.** AS 42.04.010(b) is amended to read:

(b) **The commission shall annually elect** [WHEN A VACANCY OCCURS IN THE OFFICE OF CHAIR, THE COMMISSION MAY NOMINATE] one of its members to serve as chair **for the following fiscal year**. When a vacancy occurs in the office of chair, the **commission shall elect one of its members to serve the remaining term as chair** [GOVERNOR SHALL DESIGNATE THE CHAIR OF THE COMMISSION, EITHER BY SELECTING THE MEMBER NOMINATED BY THE COMMISSION OR ANOTHER MEMBER]. The term as chair is **one year** [FOUR YEARS]. The chair may [NOT] be **elected** [APPOINTED] to **not more than three** successive terms as chair. **After a year of not serving as chair, the commissioner is eligible for election as chair again.**

* **Sec. 9.** AS 42.04.080 is amended by adding new subsections to read:

(c) A member of a hearing panel appointed under (a) of this section may not have or have had an ex parte communication on the matter before the panel with a party to the proceeding.

(d) The chair may not appoint the members of a hearing panel if the chair has had an ex parte communication on the matter before the panel, and the chair shall delegate the appointment power to the next most senior commissioner who has not had an ex parte communication in that matter.

(e) For purposes of (c) and (d) of this section, an ex parte communication is a direct or indirect communication between a commissioner and a party without the opportunity for all other parties to be present. However, a communication occurring more than five years before the filing of the matter with the commission does not disqualify a person under (c) or (d) of this section. Circumstances that might reasonably suggest to a third party that an ex parte contact had occurred, even if none was made, shall be considered an ex parte contact for purposes of (c) and (d) of this section.

* **Sec. 10.** AS 42.04 is amended by adding a new section to article 1 to read:

Sec. 42.04.090. Impartial decision-making. (a) A hearing panel and each member of the hearing panel shall accord to a person the right to be heard according to law. A member of a hearing panel may not initiate, permit, or consider an ex parte communication or other communication made to the member of a hearing panel outside the presence of the parties concerning a pending or impending proceeding except as allowed by this section. Members of a hearing panel shall make reasonable efforts to see that law clerks and other commission staff carrying out similar functions under the hearing panel's supervision do not violate the provisions of this section.

(b) A hearing panel and each member of the hearing panel may initiate or consider an ex parte communication when expressly authorized by law to do so.

(c) When circumstances require, a hearing panel and each member of the hearing panel may engage in ex parte communications for scheduling or other administrative purposes if (1) the communications do not deal with substantive matters or the merits of the issues litigated; (2) each member of the hearing panel reasonably believes no party will gain a procedural or tactical advantage because the communication is ex parte; and (3) the hearing panel takes reasonable steps to notify all parties promptly of the substance of the ex parte communication and, when practicable, allows them an opportunity to respond. This subsection does not apply to ex parte communications by commission staff concerning scheduling or administrative matters.

(d) If the parties agree to this procedure beforehand, either in writing or on the record, a hearing panel and each member of the hearing panel may engage in ex parte communications on specified administrative topics with one or more parties.

(e) A hearing panel and each member of the hearing panel may consult other members of the panel and commission staff whose function is to aid the hearing panel in carrying out its adjudicative responsibilities.

(f) A hearing panel and each member of the hearing panel may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the hearing panel.

* **Sec. 11.** AS 42.05.141(a) is amended to read:

(a) The **commission** [REGULATORY COMMISSION OF ALASKA] 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 a utility 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;

(4) prescribe the system of accounts and regulate the service and safety of operations of a public utility;

(5) require a public utility to file reports and other information and data;

(6) appear personally or by counsel and represent the interests and welfare of the state in all matters and proceedings involving a public utility pending before an officer, department, board, commission, or court of the state or of another state or the United States and to intervene in, protest, resist, or advocate the granting, denial, or modification of any petition, application, complaint, or other proceeding;

(7) examine witnesses and offer evidence in any proceeding affecting the state and initiate or participate in judicial proceedings to the extent necessary to protect and promote the interests of the state.

* **Sec. 12.** AS 42.05 is amended by adding a new section to read:

Sec. 42.05.144. Telecommunications exempted from jurisdiction. The Regulatory Commission of Alaska may not regulate, adjudicate, or otherwise exercise any of its powers over telecommunications services in the state. Telecommunications services utilities shall be under the sole jurisdiction of the Telecommunications Commission of Alaska. All references in AS 42.04 and this chapter to telecommunications services shall be interpreted as being subject to the jurisdiction of the Telecommunications Commission of Alaska.

* **Sec. 13.** AS 42.05 is amended by adding a new section to read:

Sec. 42.05.175. Timelines for issuance of final orders. (a) The commission

shall issue a final order not later than six months after a complete application is filed for an application

(1) for a certificate of public convenience and necessity;

(2) to amend a certificate of public convenience and necessity;

(3) to transfer a certificate of public convenience and necessity; and

(4) to acquire a controlling interest in a certificated public utility.

(b) Notwithstanding a suspension ordered under AS 42.05.421, the commission shall issue a final order not later than nine months after a complete tariff filing is made for a tariff filing that does not change the utility's revenue requirement or rate design.

(c) Notwithstanding a suspension ordered under AS 42.05.421, the commission shall issue a final order not later than 15 months after a complete tariff filing is made for a tariff filing that changes the utility's revenue requirement or rate design.

(d) The commission shall issue a final order not later than 12 months after a complete formal complaint is filed against a utility or, when the commission initiates a formal investigation of a utility without the filing of a complete formal complaint, not later than 12 months after the order initiating the formal investigation is issued.

(e) The commission shall issue a final order in a rule making proceeding not later than 24 months after a complete petition for adoption, amendment, or repeal of a regulation under AS 44.62.180 - 44.62.290 is filed or, when the commission initiates a rule making docket, not later than 24 months after the order initiating the proceeding is issued.

(f) The commission may extend a timeline required under (a) - (e) of this section if all parties of record consent to the extension.

(g) If the commission does not issue and serve a final order regarding an application or suspended tariff under section (a), (b), or (c) of this section within the applicable timeline specified, and if the commission does not extend the timeline in accordance with (f) of this section, the application or suspended tariff filing shall be considered approved and shall go into effect immediately.

(h) For purposes of this section, "final order" means a dispositive

administrative order that resolves all matters at issue and that may be the basis for a petition for reconsideration or request for judicial review.

(i) For purposes of this section, an application, tariff filing, formal complaint, or petition is complete if it complies with the filing, format, and content requirements established by statute, regulation, and forms adopted by the commission under regulation.

* **Sec. 14.** AS 42.05.191 is amended to read:

Sec. 42.05.191. Contents and service of orders. Every formal order of the commission shall be based upon the facts of record. **However, the commission may issue an order approving any settlement supported by all the parties of record in a proceeding, including a compromise settlement, if the settlement is consistent with this chapter and AS 42.06.** Every order entered pursuant to a hearing must state the commission's findings, the basis of its findings and conclusions, together with its decision. These orders shall be entered of record and a copy of them shall be served on all parties of record in the proceeding.

* **Sec. 15.** AS 42.05.325(c)(2) is amended to read:

(2) does not include an intrastate or interstate long-distance carrier that contracts for operator services and charges rates for those services that are no greater than the rates charged by long-distance carriers regulated by the **Telecommunications** [REGULATORY] Commission of Alaska or by the Federal Communications Commission.

* **Sec. 16.** AS 42.05.381(f) is amended to read:

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

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

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

(3) the rate adjustment required to conform to the required shift in

local revenue requirement.

* **Sec. 17.** AS 42.05.712(c) is amended to read:

(c) Each subscriber or member of the utility or cooperative shall receive notice of an election under this section with the subscriber's or member's regular bill for service at least 60 days before the date set for the election. The notice **must** [SHALL] contain impartial language informing the subscribers or members that an election on the option of deregulation or regulation by the Regulatory Commission of Alaska **or the Telecommunications Commission of Alaska, as applicable,** will be held within 60 days and that a ballot to participate in that election will be mailed or delivered to each subscriber or member of the utility or cooperative with the regular bill for service. The notice **must** [SHALL] also state that a subscriber or member of the cooperative is entitled to vote in the election without regard to whether the subscriber's or member's account with the utility or cooperative is current and that the ballot must be postmarked or returned to the commission within 30 days after it was mailed or otherwise delivered to the subscriber or member. The notice **must** [SHALL] also announce the schedule for one or more public meetings which shall provide an opportunity for the subscribers or members to discuss this election. The public meeting or meetings shall be held not more than 30 days before the ballots are mailed or distributed to those eligible to vote. A cooperative may satisfy this requirement by including a discussion of this election on the agenda of an annual meeting if the annual meeting is scheduled to be held not more than 30 days before the election.

* **Sec. 18.** AS 42.05.712(d) is amended to read:

(d) A ballot with return postage paid shall be mailed or delivered to each subscriber or member of the utility or cooperative with the subscriber's or member's bill for service and shall contain only the following language:

"Shall. . . . . (name of utility or cooperative) be exempt from regulation by the (Regulatory **or Telecommunications)** Commission of Alaska?

[ ] YES [ ] NO"

* **Sec. 19.** AS 42.05.990(2) is amended to read:

(2) "commission" means the Regulatory Commission of Alaska **in**

regard to all matters concerning public utilities except for telecommunications utilities, and "commission" means the Telecommunications Commission of Alaska in regard to all matters concerning telecommunications utilities;

* **Sec. 20.** AS 42 is amended by adding a new chapter to read:

Chapter 08. Telecommunications Commission.

Sec. 42.08.010. Telecommunications Commission of Alaska created. (a) There is created within the Department of Community and Economic Development as an independent agency of the state the Telecommunications Commission of Alaska.

(b) The Telecommunications Commission of Alaska shall regulate, adjudicate and otherwise exercise its powers over all sections of AS 42.05 relating to telecommunications services.

(c) The Telecommunications Commission of Alaska 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 telecommunications utility engaged or proposing to engage in a telecommunications 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 telecommunications utility and hold hearings on them;

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

(4) prescribe the system of accounts and regulate the service and safety of operations of a telecommunications utility;

(5) require a telecommunications utility to file reports and other information and data;

(6) appear personally or by counsel and represent the interests and welfare of the state in all matters and proceedings involving a telecommunications utility pending before an officer, department, board, commission, or court of the state or of another state or the United States and to intervene in, protest, resist, or advocate the granting, denial, or modification of any petition, application, complaint, or other

proceeding;

(7) examine witnesses and offer evidence in any proceeding affecting the state and initiate or participate in judicial proceedings to the extent necessary to protect and promote the interests of the state.

Sec. 42.08.020. Commissioners. (a) The commission consists of three commissioners appointed by the governor and confirmed by the legislature in joint session. To qualify for appointment as a commissioner, a person must be a member in good standing of the Alaska Bar Association or have a degree from an accredited college or university with a major in engineering, finance, economics, accounting, business administration, or public administration. Actual experience for a period of five years in the field of engineering, finance, economics, accounting, business administration, or public administration is equivalent to a degree.

(b) The term of office of each member is five years. A commissioner, upon the expiration of a term, shall continue to hold office until a successor is appointed and qualified.

(c) A vacancy arising in the office of a commissioner shall be filled by appointment by the governor and confirmed by the legislature in joint session, and, except as provided in AS 39.05.080(4), an appointee selected to fill a vacancy shall hold office for the balance of the full term for which the predecessor on the commission was appointed.

(d) A vacancy in the commission does not impair the authority of a quorum of commissioners to exercise all the powers and perform all the duties of the commission.

(e) The governor may remove a commissioner from office for cause, including incompetence, neglect of duty, inability to serve, or misconduct in office or because the member, while serving on the commission, is convicted of a misdemeanor for violating a statute or regulation related to telecommunications utilities or is convicted of a felony. A commissioner, to be removed for cause, shall be given a copy of the charges and afforded an opportunity to be publicly heard in person or by counsel in the commissioner's own defense upon not less than 10 days' notice. If a commissioner is removed for cause, the governor shall file with the lieutenant governor a complete

statement of all charges made against the commissioner and the governor's finding based on the charges, together with a complete record of the proceedings.

(f) Members of the commission are in the exempt service and are entitled to a monthly salary equal to Step C, Range 26, of the salary schedule in AS 39.27.011(a) for Juneau, Alaska. The chair of the commission is entitled to a monthly salary equal to Step C, Range 27, of the salary schedule in AS 39.27.011(a) for Juneau, Alaska.

(g) Each commissioner, before entering upon the duties of office, shall take and subscribe to the oath prescribed for principal officers of the state.

Sec. 42.08.030. Principal office; seal. (a) The commission shall establish a principal office and branch offices necessary to discharge its business efficiently. For the convenience of the public or of parties to a proceeding, the commission may hold meetings, hearings, or other proceedings at other locations.

(b) The commission shall have an official seal.

Sec. 42.08.040. Legal counsel. (a) The Department of Law shall provide full-time legal counsel to the commission.

(b) The commission may, subject to the approval of the attorney general, contract for the services of specialized legal counsel or legal consultants.

Sec. 42.08.050. Employment of commission personnel. (a) The chair of the commission is responsible for directing the administrative functions of the commission and carrying out the policies as set by the commission. The commission chair may employ engineers, hearing examiners, administrative law judges, arbitrators, mediators, experts, clerks, accountants, and other agents and assistants considered necessary. Employees of the commission who are not in the exempt service under AS 39.25.110 or the partially exempt service under AS 39.25.120 are in the classified service under AS 39.25.100.

(b) The chair of the commission may enter into a contract for not more than $5,000 to engage the services of a consultant or expert the chair considers necessary. The commission may contract for and engage the services of consultants and experts the commission considers necessary.

Sec. 42.08.060. Restrictions on members and employees. (a) A member of the commission or an employee of the commission may not have an official

connection with, hold stock or securities in, or have a pecuniary interest in a telecommunications utility within the state. Membership in a cooperative association is not a "pecuniary interest" within the meaning of this section; however, a member or employee of the commission may not be an officer, board member, or employee of a cooperative association. A member or employee may not act upon a matter in which a relationship of the member or employee with any person creates a conflict of interest.

(b) A member or employee of the commission may not, after leaving the position as a member or employee of the commission, act as agent for or on behalf of a telecommunications utility in any matter before the commission that was before the commission during the employee's employment or the member's term of office. A violation of this subsection is a class A misdemeanor.

(c) Members and employees of the commission, except clerical and secretarial staff, are subject to AS 39.50. Members and employees of the commission are subject to AS 39.52.

(d) A member of the commission is disqualified from voting upon any matter before the commission in which the member has a conflict of interest.

Sec. 42.08.070. Powers and duties of commission chair. (a) The chair of the commission shall

(1) employ the commission staff;

(2) establish and implement a time management system for the commission;

(3) assign the work of the commission to members and staff of the commission so that matters before the commission are resolved as expeditiously and competently as possible; when assigning a matter, the chair shall also set a date by which time the matter should be completed.

(b) The chair of the commission may appoint a hearing examiner or an administrative law judge to hear a matter that has come before the commission; a member of the commission may serve as hearing examiner or, if qualified, as an administrative law judge.

(c) The chair of the commission shall direct the public advocacy section to participate as a party in a matter when the commission believes that it is in the public

interest to do so.

Sec. 42.08.080. Decision-making procedures. (a) Except as provided in AS 42.05.171, when a matter comes for decision before the commission under AS 42.05, the three commissioners shall serve as a hearing panel to hear, or if a hearing is not required, to otherwise consider, and decide the case. The panel shall exercise the powers of the commission with respect to the matter.

(b) The commission shall adopt regulations by December 31, 2003, that establish standards of timeliness for the types of cases that come before the commission. The commission shall establish standards based in part on degrees of complexity of the cases.

Sec. 42.08.090. Impartial decision-making. (a) A hearing panel and each member of the hearing panel shall accord to every person the right to be heard according to law. A member of a hearing panel shall not initiate, permit, or consider an ex parte communication or other communication made to the member of a hearing panel outside the presence of the parties concerning a pending or impending proceeding except as allowed by this section. Members of a hearing panel shall make reasonable efforts to see that law clerks and other commission staff carrying out similar functions under the hearing panel's supervision do not violate the provisions of this section.

(b) A hearing panel and each member of the hearing panel may initiate or consider an ex parte communication when expressly authorized by law to do so.

(c) When circumstances require, a hearing panel and each member of the hearing panel may engage in ex parte communications for scheduling or other administrative purposes if (1) the communications do not deal with substantive matters or the merits of the issues litigated; (2) the hearing panel and each member of the hearing panel reasonably believe no party will gain a procedural or tactical advantage because the communication is ex parte; and (3) the hearing panel and each member of the hearing panel take reasonable steps to notify all other parties promptly of the substance of the ex parte communication and, when practicable, allow them an opportunity to respond. This subsection does not apply to ex parte communications by commission staff concerning scheduling or administrative matters.

(d) If the parties agree, either in writing or on the record, to this procedure beforehand, a hearing panel and each member of the hearing panel may engage in ex parte communications on specified administrative topics with one or more parties.

(e) A hearing panel and each member of the hearing panel may consult other members of the panel and commission staff whose function is to aid the hearing panel in carrying out its adjudicative responsibilities.

(f) A hearing panel and each member of the hearing panel may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the hearing panel.

Sec. 42.08.100. Communications carriers section. There is established within the commission a communications carriers section that shall develop, recommend, and administer policies and programs with respect to the regulation of rates, services, accounting, and facilities of communications common carriers within the state involving the use of wire, cable, radio, and space satellites.

Sec. 42.08.150. Public advocacy section. There is established within the commission a public advocacy section. The section shall participate as a party in matters that come before the commission when directed to do so in accordance with AS 42.08.070(c). The public advocacy section shall operate separately from the rest of the commission.

* **Sec. 21.** AS 44.66.010(a)(4) is amended to read:

(4) Regulatory Commission of Alaska (AS 42.04.010) -- June 30, **2003** [2002];

* **Sec. 22.** AS 44.66.010(a) is amended by adding a new paragraph to read:

(21) Telecommunications Commission of Alaska (AS 42.08.010) -- June 30, 2006.

* **Sec. 23.** AS 45.50.473(a) is amended to read:

(a) A person may not provide an alternate operator service without disclosing to the consumer before a charge is incurred the cost of the service provided by the person and the identity of the person providing those services. This section does not affect the power of the **Telecommunications** [REGULATORY] Commission of Alaska to regulate providers of alternate operator services under AS 42.05 in a manner

consistent with this section.

* **Sec. 24.** AS 45.50.473(b) is amended to read:

(b) The owner of a place where telephone business from consumers is aggregated, including a hotel, motel, hospital, and pay telephone other than a telephone utility regulated by the **Telecommunications** [REGULATORY] Commission of Alaska, shall disclose a surcharge added to the cost of local or long distance telephone service before the service is provided. Disclosure may be made by posting the amount of the surcharge on or near the telephone instruments subject to the surcharge or by other reasonable written or oral means.

* **Sec. 25.** AS 45.50.475(b) is amended to read:

(b) A local exchange telecommunications company and a company that provides a telephone directory on behalf of a local exchange telecommunications company shall provide for the identification in the telephone directory of those residential customers who do not wish to receive telephone solicitations. The local exchange telecommunications company may impose a reasonable charge for identification in the directory. The charge shall be based on the cost of providing the identification and is subject to the approval of the **Telecommunications** [REGULATORY] Commission of Alaska.

* **Sec. 26.** AS 45.50.475(c) is amended to read:

(c) A local exchange telecommunications company shall, upon request, provide to a person who engages in telephone solicitation a list of all telephone numbers identified in the telephone directory as residential customers who do not wish to receive telephone solicitations. If possible and if requested by the person who engages in telephone solicitations, this list shall be provided in computer readable format. The local exchange telephone company may impose a reasonable charge for the list. The charge shall be based on the cost of providing the list and is subject to the approval of the **Telecommunications** [REGULATORY] Commission of Alaska.

* **Sec. 27.** AS 45.63.080(12) is amended to read:

(12) by a person who is soliciting for a business, or for an affiliate of a business, that is regulated by the **Telecommunications** [REGULATORY] Commission of Alaska;