

January 23, 2008

Comments of Ed Jenkin on proposed DOT/PF Title 17 regulations

Good evening.

My name is Ed Jenkin. I am the Director of the Engineering Services Division for Chugach Electric Association. Chugach is a member-owned, not-for-profit cooperative. It is the largest electric utility in Alaska, providing retail service to approximately 80,000 metered locations and wholesale power to other utilities throughout the Railbelt.

Chugach operates approximately 2,200 miles of transmission and distribution line – some of which is located in state road rights of way. We have a long history of working with the Department of Transportation and Public Facilities to resolve issues.

We appreciate the fact you have initiated a public process to discuss proposed changes to the regulations. We especially appreciate the fact that you took seriously the input our industry offered last year and stepped back from some of the changes that were first proposed.

I'll begin by noting that Chugach is a member of the Alaska Power Association, our statewide trade association. Chugach participated in the preparation of APA's comments on this topic and is in support of the document you will receive from that organization.

I want to highlight two of our key concerns.

The first has to do with the principle of “rent.” Chugach believes that road rights of way are a logical corridor for public infrastructure of many kinds – and not just roads. In particular, we believe it is appropriate to locate power lines in these rights of way. We are not opposed to paying fees that fairly compensate the department for the work involved in processing and issuing a permit. We support cost-based fees. However, we are opposed on principle to the concept of paying “rent” for the use of a right of way. We are concerned that some of the proposed fees in the draft regulations do not appear to be based upon the recovery of actual costs.

Our second concern is with “non-reimbursable permits” or the ability to deny a permit to avoid having to pay for a future relocation. Chugach does not agree that the department should be allowed to issue “non-reimbursable permits” or deny permits to avoid possible future costs. We think the law is clear on this topic. If the department advertises a highway construction contract within 5 years of issuing a permit, the utility must pay to move its facilities out of the way. If 5 years have passed, the department pays to move the utility facilities. We cannot support the draft regulations that appear to be an attempt to circumvent these requirements. The department seems to want extraordinary leeway for possible projects that may someday happen if funding occurs.

Additionally, this would shift the cost of relocations from being largely funded by federal highway dollars to being paid for exclusively by Alaska ratepayers.

These concerns and others are more fully discussed in the letter from APA.

Once again, I thank you for the opportunity to offer Chugach’s comments this evening.

January 23, 2008

Alaska Department of Transportation and Public Facilities
Attention: Rick Kauzlarich
P.O. Box 112500
Juneau, AK 99811-2500

Subject: Alaska Power Association's Comments on the Supplement to
the Notice of Proposed Changes in the Regulations of the
Department of Transportation and Public Facilities

Dear Mr. Kauzlarich:

The Alaska Power Association ("APA") represents the vast majority of electric utility customers in the state of Alaska. It was organized in 1952 as a trade organization to advance the common goals of Alaska rural electric cooperatives. Today, APA's members are electric cooperatives, investor-owned utilities, and municipal utilities throughout the state. APA members are Alaska Electric and Energy Cooperative, Inc.; Alaska Electric Generation & Transmission Cooperative, Inc.; Alaska Railbelt Energy Authority Joint Action Agency; Alaska Village Electric Cooperative, Inc.; Anchorage Municipal Light & Power; Barrow Utilities & Electric Cooperative, Inc.; Chugach Electric Association, Inc.; Copper Valley Electric Association, Inc.; Cordova Electric Cooperative, Inc.; Four Dam Pool Power Agency; City of Galena; Golden Valley Electric Association, Inc.; Homer Electric Association, Inc.; I-N-N Electric Cooperative, Inc.; Inside Passage Electric Cooperative, Inc.; Kodiak Electric Association, Inc.; Kotzebue Electric Association, Inc.; Levelock Electric Cooperative, Inc.; Middle Kuskokwim Electric Cooperative, Inc.; Naknek Electric Association, Inc.; Nome Joint Utility System, Inc.; North Slope Borough Power & Light; Nushagak Electric & Telephone Cooperative, Inc.; City of Seward Light & Power Division; Thomas Bay Power Authority; Unalakleet Valley Electric Cooperative, Inc.; City of Unalaska; and Yakutat Power, Inc. Together, APA's members serve about a half million Alaskan customers, with over 9,000 miles of electrical distribution lines.

APA submitted two sets of comments to the Department of Transportation and Public Facilities ("the Department") on May 5, 2007, and May 22, 2007. APA also participated in the public meetings regarding these proposed changes. Several APA members also submitted comments of their own and participated in the public hearings.

After reviewing the first set of changes proposed by the Department, APA asked that the Department use the negotiated rulemaking process to develop final regulations. APA never received a response from the Department to that request. APA renews its request that the Department submit these proposed regulations to the negotiated rulemaking process under Alaska Statute 44.62.710, *et seq.*

Negotiated rulemaking would provide an opportunity for dialogue between DOT/PF and the affected utilities. Under Alaska Statute 44.62.720, negotiated rulemaking is particularly appropriate for this case. The direct impact of these proposals is on electric, telephone, water, sewer, cable, and natural gas utilities. The utilities will all be significantly impacted by these regulations, and their interests are very similar. This makes it likely that a committee could be appointed to adequately represent their interests and work toward a consensus on revised regulations for utility permits. APA and its members would like to enter into good faith negotiations with the Department to reach a consensus on how these regulations should be amended.

Rights-of-way are shared resources, and the Departments' regulations should be developed with open communication and disclosure. APA is frustrated that the Department has failed to enter into a negotiated rulemaking process. The Department has never said whether it considered negotiated rulemaking or if it has, why it rejected that process.

1. Utility Permit Criteria: 17 AAC 15.011

The Department originally proposed to add a multitude of factors to be considered when determining whether to issue permits, many of which were objectionable to APA. The Department has rewritten this section so that it simply references the other sections of the utility permits chapter as the criteria for issuing permits. As a result, APA has no objections to the proposed changes to subsections (a), (b), and (c) of 17 AAC 15.011.

However, APA still has serious concerns about subsection (d). While the Department has proposed eliminating the troubling subsections (d)(1) and (d)(2) that appeared in the prior draft of this subsection, the main body of subsection (d) remains. Subsection (d) now provides that:

The department may attach to the utility permit special provisions it considers necessary to protect the public interest.

Proposed 17 AAC 15.011(d).

APA does not know what the Department has in mind for this section. Does the Department still plan to attach conditions relating to accident reductions or financing? What provisions could the Department attach under this subsection that are not covered under other

provisions of the regulations? If there are other factors that the Department feels should be addressed in permits, they should be made specific requirements and stated in the regulations. APA requests that the Department remove subsection (d) altogether.

2. Utility Permit Fees: 17 AAC 15.041

The Department initially proposed to increase permit fees, remove the cap on lineal foot fees, and recategorize some utility projects as requiring major permits that currently only require less expensive minor permits. In its first round of comments, APA objected to both the increase in costs proposed in this section and the increase in the categories of work that would require major permits. APA members are willing to pay reasonable fees to cover actual permit processing costs, but as legitimate users of the public rights-of-way, should not be charged anything that amounts to a rental charge. While APA appreciates the changes the Department has made to proposed 17 AAC 15.041, they do not go far enough.

Service connections should only require minor permits, even if they involve a pole in the right-of-way. Long distance service connections that cross a right-of-way to serve a single customer, and thus require a pole, are common in rural Alaska. The Department's fees place an unreasonable burden on Alaskans who need basic services such as electricity. For more than 20 years, the regulations have treated all service connections as minor permits. The Department has not provided any explanation for recategorizing so many minor permits as major permits.

The Department's revised proposal also continues to impose unreasonable costs. While it helpful that the Department has proposed a cap on lineal foot permit fees, that proposed cap has still quadrupled in size. The Department has made no changes to the other excessive fees it has proposed. APA proposes the following cost schedule for section 17 AAC 15.041:

Major permits:	\$600
Minor permits:	\$100
Lineal foot charges:	\$0.50 per foot over 200 feet
Cap on lineal foot charges:	\$5,000

The Department has not provided any explanation or justification based upon actual costs for the new fees it has proposed. The amounts proposed by APA are in line with increases in general price levels since these fees were last updated. Increasing fees to the amounts proposed by the Department would have a serious impact on Alaska utilities' ability to provide service to their customers.

Finally, APA is also concerned with the language in proposed subsection (d) that grants the Department broad authority to impose additional charges for inspections of utility facilities. The Department has not provided any information regarding what kinds of permit

conditions would be imposed or what the costs for inspecting those conditions might be. Rural utilities in particular could be forced to pay substantial amounts for travel and time if Department employees make inspections in locations far away from the Department's offices. APA requests that subsection (d) be removed from 17 AAC 15.041. Alternatively, 17 AAC 15.041 should be amended to subject the total costs of permitting, including those in subsection (d), to the lineal foot price cap and make it an all-encompassing cap on permit fees.

3. Mergers and Acquisitions: 17 AAC 15.071

The current version of 17 AAC 15.071 contains two simple requirements. First, utilities may not assign or transfer their permits without prior written approval of the Department. Second, when there is a sale, merger or combination with another utility, or some other change in identity, the utility must provide new contact information to the Department.

The existing provisions make sense and have been in place since 1982. The Department has not explained why any changes are needed to this section. APA objected specifically to the changes to this section proposed in April that would force utilities to apply and pay for a new permit just because of a merger of two utilities. APA also objected that requiring a new permit would potentially restart the clock under AS 19.25.020, the five-year reimbursability rule. If a utility's facility has been in place for four years, and the utility then merges with another utility, the permit should become reimbursable in one more year. Under the Department's proposed regulation, it appears the Department wants to reissue new permits and restart the five-year clock. There is no reason to take this approach, and it amounts to an attempt to circumvent the legislature's determination that all utility permits should become reimbursable after five years.

Under the existing 17 AAC 15.071, there is no charge to the utility for transferring a permit or updating contact information. Under the Department's original proposed change, utilities would have had to pay permit fees all over again for such minor changes. Now the Department has added language to proposed 17 AAC 15.071(b)(3) to limit costs of processing a new permit to the Department's actual costs. However, the Department has not provided any information regarding the actual costs it would seek to recover, and there is no limit to how high those costs could be. While processing a change of address should be relatively inexpensive, it appears from the changes to 17 AAC 15.071 that the Department wants to do more than that.

If the Department imposes substantial additional conditions in approving a transfer, the cost of developing them could be passed on to utilities. There is no limit to the kinds of conditions the Department could impose, even though the only change is a change in ownership, or a mere change in names or addresses. Permits are for facilities and are issued to the certificated public utilities that own and maintain them. So long as the permit is held by a certificated utility, there is no reason to require anything other than the equivalent of a change of

address notification. The Regulatory Commission of Alaska is a much better judge of whether a merger or sale of a utility is in the public interest than the Department, yet the Department wants the authority to impose special terms and conditions on valid existing permits merely because of a merger or sale.

For example, Municipal Light & Power and Chugach Electric Association, Inc., have recently publicly discussed the possibility of a merger or some form of increased cooperation between the utilities. Why would the Department need authority to do anything other than accept change of name and address notices in the event some kind of merger or sale took place?

Subsection (b) should be rewritten to provide that the Department will amend a permit to reflect the new name or contact information unless the Department provides a written decision indicating why it would be contrary to the best interest of the State to make such a change. It should also provide that the Department must accept such a change if the merger or sale has been approved by the Regulatory Commission of Alaska. APA suggests the following change to the Department's proposal:

b) If a permittee is acquired, in whole or in part, by another utility, or combines or merges with another utility, or otherwise changes identity, the new utility shall notify the department in writing within 30 days after the date of the transaction, and shall furnish the department with the names and addresses of the new officials responsible for the permittee's facilities. After receiving that notification, the department **shall without cost to the utility amend the permit to reflect any changes in names, addresses or other ownership information in the permit. If a utility is acquired in whole or in part, by another utility, or combines or merges with another utility, or otherwise changes identity, and the acquisition, combination, merger or change in identity has not been approved by the Regulatory Commission of Alaska, then the Department** may

(1) take no action;

(2) amend the existing permit; or

(3) require the new utility to apply for a new utility permit.

Associated permit fees would be limited to the department's actual administrative costs in processing the new permit in lieu of 17 AAC 15.041 fees.

This change would clarify that for mergers or other combinations that have been approved by the Regulatory Commission of Alaska, the only Department action necessary is to

update its contact information. This change would also mitigate the problem of issuing new permits for purposes of the five-year reimbursability rule under AS 19.25.020.

4. Additional Service Connections: 17 AAC 15.101

APA appreciates the change made to proposed 17 AAC 15.101, which now clarifies that fees for utility service connections need only be paid for connections subsequent to the original permit action. This will result in substantial savings on permit costs. APA has no objection to the current version of proposed 17 AAC 15.101.

5. Highways: 17 AAC 15.171

APA previously objected to the revisions to 17 AAC 15.171 because they increased the likelihood that the Department would reject a permit application from a utility. The proposal for this subsection redefined interference with use of an existing or proposed highway to cover any use of the right-of-way. APA also objected to language in proposed 17 AAC 15.011 that allowed the Department to reject a permit based on future planned highway improvements. The substance of that objectionable language in 17 AAC 15.011 has moved to 17 AAC 15.171.

The revised 17 AAC 15.171 now provides that the Department can reject a permit if it believes that negative effects on right-of-way or highway plans within the next 10 years “are reasonably likely to occur.” This section should be made consistent with AS 19.25.020. A permit should be granted unless the highway project has been advertised. Ten years is a very long time. The permit can be issued as a non-reimbursable permit. If a project does not get advertised within five years, the permit becomes reimbursable.

Denying a permit to a utility because a project might be built or expanded places serious burdens on the utilities and their customers. Together with the provisions allowing the Department to vary the right to reimbursability by contract, this subsection would exceed the Department’s authority under AS 19.25.020. As a result, 17 AAC 15.171(c) and (d) should be amended to read as follows:

(c) Facilities installed within the department right-of-way must be designed and placed so that neither their use nor occupancy will adversely affect the safety, construction, maintenance, or operations of ~~right-of-way or~~ highways or related structures.

(d) The department may **not refuse to issue a permit based on the cost to relocate the facility under AS 19.25.030** ~~consider the effect of a proposed facility's installation on future right of way or highway plans . However, if this paragraph is used as a basis for~~

~~denial of an application, the department must provide a memorandum providing evidence that the future right of way or highway plans are reasonably likely to occur within ten years from the date of application, and the anticipated impact the facilities would have on safety, construction, maintenance or operations of the right of way or highways or related structures. A lack of currently available funding does not, by itself, establish that plans are not “reasonably likely” to occur.~~

6. Utility Clearances: 17 AAC 15.201

APA objected to the clearance requirements in this proposed section. The NESC requires only 15.5 feet of clearance, and APA believes that the Department’s regulations should be brought into line with the NESC. The Department has provided no explanation for why higher clearances should be required.

7. Maintenance of Utility Facilities: 17 AAC 15.281

APA objected to the proposed new subsection (e) of 17 AAC 15.281 because it would allow the Department to perform maintenance on utility facilities if the Department believes they are being inadequately maintained. APA pointed out that to protect the public and the Department’s employees, such maintenance should be limited to emergency situations, and the utilities should be given notice and an opportunity to cure the problem.

The Department has proposed revisions that partially address APA’s concern. APA requests the following change to 17 AAC 15.281(e):

If a permittee’s routine maintenance is inadequate, the department may give notice and an opportunity to cure. If a permittee fails to take appropriate corrective actions **after notice and a reasonable opportunity to cure**, the department may perform the maintenance and charge the permittee for the reasonable associated costs.

APA believes this suggested change is consistent with the Department’s intent, but that it makes the proposed section clearer.

8. Eligibility for Reimbursement: 17 AAC 15.321

Under the current version of 17 AAC 15.321, the regulation simply restates the existing law with regard to reimbursement for utility relocations. It provides that “utilities that have facilities occupying department rights-of-way are eligible for reimbursement as provided in

AS 02.15.104, AS 19.25.020, or AS 35.10.220.” The Department has proposed to add to that section the phrase “unless otherwise provided for by contract or agreement between the department and the utility.”

APA objected to this proposed change because it would give the Department authority to condition a permit on the utility contractually agreeing to waive their statutory right to relocation reimbursement. While the Department has revised its proposed 17 AAC 15.321, it has done nothing to address this concern. Proposed Section 17 AAC 15.321 contemplates agreements between a utility and Department that would circumvent the statutory requirement for relocation reimbursement. There is a legitimate fear that Department will force utilities to give up their statutory rights to reimbursement assistance in order to obtain permission to use a right-of-way. The proposed section should be amended to reflect that the reimbursement provisions of Alaska law are mandatory for all permits:

17 AAC 15.321. Eligibility for relocation reimbursement. If utility facilities are ordered by the department to be relocated to accommodate construction and are not unauthorized encroachments as described in 17 AAC 15.111, the utilities that have facilities occupying department rights-of-way are eligible for reimbursement as provided in AS 02.15.104, AS 19.25.020, or AS 35.10.220. ~~unless otherwise provided for by contract or agreement between the department and the utility.~~ **The department may not condition issuance of a permit on a utility’s agreement to limit its statutory right to relocation reimbursement.**

APA appreciates the clarification proposed by the Department which makes it clear that it is not just permitted utility facilities, but any legally existing facility under 17 AAC 15.111, that is eligible for relocation reimbursement. With the suggested amendment proposed by APA above, this section will accurately reflect the state of the law.

9. Conclusion

While APA appreciates the improvements in this proposal compared to the Department’s April 2007 proposal, the current proposal still has serious shortcomings. The Department’s proposed regulations would make it more expensive and more difficult to pursue regional electrical interties, renewable energy development, and use of emerging technologies in power system development. Public rights-of-way are the logical location for utility facilities. The Department’s regulations should be designed to expedite the procedures for placing utility facilities in public rights-of-way. Not only will the Department’s proposed regulations make the process more difficult and expensive, but by denying reimbursability in a wide range of circumstances, it will shift the cost of relocations from federal highway funds to the pockets of

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local ratepayers. Because this is contrary to the statutes enacted by the legislature, the proposed regulations also will likely lead to litigation that could otherwise be avoided.

The best way to develop regulations that will be satisfactory to Department and the utilities is a cooperative, negotiated, rulemaking process. It is disappointing that the Department has ignored this request. APA once again urges the Department to work with the utilities in a negotiated rulemaking to come up with a set of regulations that everyone can support.

Sincerely yours,

ALASKA POWER ASSOCIATION, INC.

Marilyn Leland
Executive Director

cc: Governor Sarah Palin

Sen. Albert Kookesh, Chair
Senate Transportation Committee

Rep. Kyle Johansen, Chair
House Transportation Committee

Marilyn Leland, APA Executive Director

APA Members