



# Utility Legal Update

2015 Alaska Electric Utility  
Accounting and Finance Workshop

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# Topics

- Fuel Surcharge Litigation
- Update on Smart Meter Litigation
- Capital Credit Class Actions
- Changes to Federal Overtime Regulations
- Vaping in the Workplace
- Employee Benefits Legal Issues
- Did That Cubicle Just Growl at Me?
- America's Least Popular Game Show: Legal or Illegal?

# Fuel Surcharge Litigation

*If you drive a car, I'll tax the street;  
If you try to sit, I'll tax your seat;  
If you get too cold, I'll tax the heat;  
If you take a walk, I'll tax your feet*  
The Beatles, Taxman

# Fuel Surcharge Litigation

- Effective July 1, 2015, the Legislature imposed a new fuel surcharge on all gallons of liquid fuel sold in Alaska, except aviation fuel
- The Department of Revenue says this new surcharge applies to utilities
- The Department of Revenue admits that this is a tax even though it is called a surcharge

# Fuel Surcharge Litigation

- Cooperatives and municipalities should be exempt from this type of tax:
  - Alaska cooperatives are exempt from all state and local taxation because of the tax they pay on gross kwh sold under AS 10.25.540(b)(2)
  - Alaska municipalities also have a very broad exemption from state taxation under AS 29.71.030
- The Legislature never discussed these cooperative and municipal exemptions and the surcharge bill did not amend them
- This tax will ultimately be paid by utility customers, particularly customers of utilities that have to rely on expensive diesel and other liquid fuels for power

# Fuel Surcharge Litigation

- **What are we going to do about it?**
  - A coalition of cooperative and municipal utilities are going to apply for refunds
  - Will share costs of pursuing refund
- **Things your cooperative or municipal utility should do:**
  - Make sure that your supplier is assessing this tax and showing it as a separate line item
  - Make sure you are providing invoices to legal counsel for refund filings

# Update On Smart Meter Litigation

*I always feel like somebody's watching me  
And I have no privacy*

Rockwell, Somebody's Watching Me

# Update on Smart Meter Litigation

- According to the National Conference of State Legislatures, about half of all states have laws governing smart meters
- Alaska still has no laws or regulations regarding smart meters
  - In Docket R-06-05, the RCA declined to adopt federal standards for smart metering
    - Federal standards would have required utilities to provide smart meters to customers who wanted them
  - Economically deregulated utilities have freedom to implement
  - Economically regulated utilities still potentially subject to RCA review



# Update on Smart Meter Litigation

- **Tanner Electric Cooperative - lawsuit in Washington where property owner sued over cooperative's smart meter program**
  - Cooperative billed member for refusing smart meter
  - Member sued
  - Cooperative won and got attorney's fees

# Update on Smart Meter Litigation

- **Plumas Electric Cooperative – In rural California, at member request, cooperative replaced smart meter with analog meter**
  - Cooperative billed customer opt-out charge and monthly fees
  - Eventually disconnected customer for failure to pay opt out fees (member paid for electricity)
  - Member filed small claims court and presented letter from physician stating member had EMF Hypersensitivity
    - Headaches and other symptoms when exposed to smart meter radio frequency
- **So what happened?**

# Update on Smart Meter Litigation

- California Public Utility Code prohibits different rates because of medical conditions
- Cooperative lost because:
  - Cooperative permitted some remote members to self-read meters instead of using smart meters
  - Cooperative did not present evidence to dispute medical condition
  - Court said member could self read and cooperative could terminate service if the member doesn't read accurately

# Update on Smart Meter Litigation

- Firstenberg v. Monribot, NM App March 2015: found that plaintiff's 93 studies showing adverse effects of EMF were not scientifically reliable
- City of Naperville, US District Court for Illinois: City smart meter program
  - As a government entity, subject to constitutional limits that generally would not apply to cooperatives, but certainly could to municipalities
  - Court has dismissed most claims, but not equal protection claim

# Capital Credit Class Actions

*With my mind on my money and my money on my mind*  
Snoop Dog, Gin and Juice

# Capital Credit Class Actions

- **Since 2009, there have been a total of 44 lawsuits filed against cooperatives in the Lower 48**
  - Most have been settled or gone away, but none on the merits
  - Shift over time from governances to capital credits
- **Late 2013, settlement of lawsuit against one Georgia electric cooperative for former and current members**
  - Cooperative agreed to retire capital credits from 1957-1988
  - Voluntary discount and retirement for 1988-2012 at 12% for 24.6 year period
  - Plaintiff's attorneys got \$20 million

# Capital Credit Class Actions

- **Recent lawsuit filed March 2014 in Georgia**
  - **Alleges that when a member terminates service, the cooperative must retire capital credits immediately, or alternatively, on a 13 year cycle**
    - **Says former members have no service, no vote and are forced to subsidize current members**
    - **Claims directors have conflict of interest because only current members pay bills and vote in elections**
  - **Claims bylaw provisions giving directors great discretion over retiring capital credits are unfair and unenforceable**
  - **Claims bylaw provisions prohibiting capital credit retirements that financially impair cooperative are unenforceable**
  - **Trying to pull in most Georgia electric cooperatives**
  - **Attorneys overlap with prior capital credit lawsuits**

# Capital Credit Class Actions

- Allegations in other cases
  - Improper discounting of retirements for deceased member estates
    - Lack of informed consent
    - How would your cooperative prove you obtained informed consent for a discounted retirement?



# Changes to Federal Overtime Regulations

*I've been takin' care of business, it's all mine*  
*Takin' care of business and working overtime, work out*  
**Bachman-Turner Overdrive, Takin' Care of Business**

# Changes to Federal Overtime Regulations

- This summer the federal Department of Labor proposed extensive changes to overtime regulations
  - These are proposed changes, but they will almost certainly come into effect in 2016
  - Not much impact on blue collar employees
  - White collar exempt employees – professionals, managers and administrative – are the targets

# Changes to Federal Overtime Regulations

- Currently, for most federal overtime exemptions:
  - must pass the “duties” test and the minimum weekly compensation test
  - or be a highly compensated employee and regularly perform some work that counts towards the duties test
- Proposed regulations increase:
  - The minimum weekly comp would go to the 40<sup>th</sup> percentile of full time wage earners = \$54,440 annually in 2016 (est.)
  - The highly compensated threshold would go to 90<sup>th</sup> percentile = \$122,148 annually in 2016 (est.)

# Changes to Federal Overtime Regulations

- Nothing else is changing, FOR NOW
  - But DOL soliciting comments on whether to change the duties test and still could do so
  - DOL will likely only give employers a few months to comply
- Things to consider
  - Annual review of exempt employee pay as minimum pay will now increase every year
  - Impact on Alaska overtime rules – changes likely incorporated by reference
  - Could you prove an exempt employee's primary duties?

# Vaping in the Workplace

*Smoke on the water*

*A fire in the sky*

*Smoke on the water*

**Deep Purple, Smoke on the Water**

# Vaping in the Workplace

- How many of your utilities operate in an area that specifically prohibits vaping?
  - Palmer, Haines, Petersburg, and Nome
  - Other locations?
- How many have a utility policy that restricts vaping?
- AS 18.35.300 bans “smoking in any form” in a “place of employment” where the owner or manager has posted a sign prohibiting smoking

# Vaping in the Workplace

- In 2014, a bill to ban smoking and vaping in public places statewide died in committee
  - Sponsor has indicated may re-introduce without ban on vaping
- So for now, utilities are generally free to set their own policies on vaping
  - Considerations – health claims, liability for minors

# Employee Benefits Legal Issues

*Going to the chapel*  
*And we're gonna get married*  
The Beach Boys, Chapel of Love



# Employee Benefits Legal Issues

- US Supreme Court ruled that states must perform and recognize same sex marriages
  - Likely impact for health and welfare plans is that all spouses, regardless of sex, must be treated the same
- ACA and Cadillac Tax
  - The Cadillac Tax is tax on 40% of the value of all health care benefits that exceed \$10,200 for individuals and \$27,500 for families, subject to adjustments for inflation; potential higher limits for electric and telephone utilities
  - 48% of large employer plans will hit the threshold in 2018, 82% by 2023
  - 2018 tax due is determined off of 2017 benefits

# Did That Cubicle Just Growl at Me?

*Who let the dogs out*  
*Woof, woof, woof, woof, woof*  
Baha Men, Who Let the Dogs Out?

# Did That Cubicle Just Growl at Me?

- The new era of “service” animals is here
  - Used to be just dogs, primarily to assist the blind or deaf
  - Now we see emotional support monkeys, miniature horses, cats and pigs
    - For anxiety, hypoglycemia, PTSD, and just general comfort
  - This year a City in Wisconsin passed an ordinance defining service animals as only dogs or miniature horses after a woman brought her therapy kangaroo to a local McDonalds
  - The day before Thanksgiving, US Airways asked a woman and her 70-80 pound “emotional support pig” to leave the plane

# Did That Cubicle Just Growl at Me?



- Anyone can buy vests, tags or certificates for “service” animals
- There is no official body that licenses legitimate service animals
- There are organizations out there that will tell you businesses are required to allow nontraditional service animals for nontraditional reasons

# Did That Cubicle Just Growl at Me?

- Did That Cubicle Just Oink at Me? Maybe.
- If a disabled employee asks to bring a service dog to work, does your utility have to let the employee do it?
  - What about a request to bring a service pig?
- If a customer comes to your front counter, can you require the customer not to bring a dog inside?
  - What about a kangaroo?

# Did That Cubicle Just Growl at Me?

- Legal Background

- For public accommodations, under the Americans with Disabilities Act guidance, DOJ requires service animal to be a dog or miniature horse that is “individually trained to do work or perform tasks for a person with a disability.”
  - Specifically excludes “dogs whose sole function is to provide comfort or emotional support”
- Air Carrier Access Act allows emotional or psychiatric support dogs on commercial flights
  - Airlines can ask for note from mental health professional

# Did That Cubicle Just Growl at Me?

- So what is required for employers?
  - The trend seems to be towards animals going to all the places people go
  - For employers, there is currently no obligation to allow pets or service animals to come to work unless the employee has a disability
    - Proving disability has gotten easier since Congress revised the Americans with Disabilities Act in 2012
    - So then it's a question of whether or not it's a "reasonable accommodation"
      - A guide dog for the blind seems like an easy case
      - Beyond that, it's case-by-case and who knows

# America's Least Popular Game Show: Legal or Illegal

*Hey now you better listen to me everyone of you  
We got a lotta lotta lotta lotta work to do  
Forget about your woman and that water can  
Today we're working for the man  
Roy Orbison, Working for the Man*



# Legal or Illegal?

- Employment policy requiring that employees “Be courteous, polite and friendly.”
- Employment policy requiring that employees “No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [Employer]”

# Legal or Illegal?

- “Off-duty employees are prohibited from entering the workplace except to conduct employer-related business.”
- “Off-duty employees are prohibited from entering the workplace, except to attend employer-sponsored events.”

# Legal or Illegal?

- “Employees are prohibited from walking off the job or willfully restricting production.”
- “Employees who disclose their participation in this internal investigation will be subject to immediate termination”

# Legal or Illegal?

- “Statements posted electronically . . . that damage the [Employer], defame any individual or damage any person’s reputation, or violate the policies outlined in the [Employee Handbook], may be subject to discipline, up to and including termination of employment.”

# Legal or Illegal?

- “The at-will relationship cannot be amended, modified or altered in any way.”
- “No representative of the company has any authority to enter into an agreement that is contrary to the “employment at will” relationship.”

# Legal or Illegal?

- In accordance with utility policy, utility denies a CSR permission to miss a day of work for a Jehovah's Witness Convention because 3 of the other 6 CSRs in the office have already had leave approved for that day
  - When CSR fails to report to work on Friday, she is terminated the following Monday.

# Legal or Illegal?

- An employee upset about tax withholding issues posts on a personal Facebook account that, “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!”
  - Another employee clicks the “Like” button
- Both fired

# Legal or Illegal?

- Employment Policy says, “When internet blogging, chat room discussions, or other forms of communication extend to employees engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. **In the event state or federal law precludes this policy, then it is of no force or effect.”**



# Legal or Illegal?

- You are hiring a new utility employee and reviewing the applications. You decide to login to Facebook and also to do a web search on the applicant. You ultimately decided not to hire the applicant
  - What if you see that the applicant is interested in bird-watching?
  - What if you the applicant lists “going to the opera” as favorite hobby?
  - What if you see a photo of the applicant and can see she is an ethnic minority, or is wearing a “Union Yes” button?
  - What if you see all three?

# Legal or Illegal?

- **Employee's mother has end stage congestive heart failure**
  - **Employee is mother's primary care giver**
  - **Mother wants to go to Las Vegas before she dies**
  - **Employee uses FMLA leave for the trip and takes her there**
  - **You treat the leave as an unexcused absence and fire her because you can't use FMLA leave to go on a vacation**

# Legal or Illegal?

- During labor negotiations with AT&T, union encouraged employees to wear shirts that said “INMATE” on the front and “Prisoner of AT&T” on the back
  - AT&T allowed them to wear them in offices and other non-public spaces, but not when in public or interacting with customers
  - Gave 1 day suspensions to 183 employees who refused to comply

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# The End

*This is the end, my only friend*

*The end*

The Doors, The End