

STATE OF ALASKA

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REGULATORY COMMISSION OF ALASKA 10 JAN 15 PM 3:37

Before Commissioners:

Robert M. Pickett, Chair  
Kate Giard  
Paul F. Lisankie  
Anthony A. Price  
Janis W. Wilson

In the Matter of the Petition for Declaratory Judgment Regarding Jurisdiction of the Regulatory Commission of Alaska Under AS 42.05 Over the Natural Gas Storage Project Proposed by Cook Inlet Natural Gas Storage, LLC. ) U-09-124

In the Matter of the Petition for Declaratory Judgment Regarding Jurisdiction of the Regulatory Commission of Alaska Under AS 42.06 Over the Natural Gas Storage Project Proposed by Cook Inlet Natural Gas Storage, LLC. ) P-09-16

THE ATTORNEY GENERAL'S BRIEFING

The Attorney General ("AG") in his capacity as public advocate for regulatory affairs pursuant to AS 44.23.020(e) and Executive Order 111 offers the following legal brief in response to Order U-09-124(1)/P-09-16(1). The AG further encourages the Commission to provide an opportunity for interested persons to reply to the legal briefs that are filed.<sup>1</sup>

<sup>1</sup> Order U-09-124(1)/P-09-16(1), page 4 notes: "We may order reply briefing."

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## INTRODUCTION

Pragmatically speaking, natural gas storage in Cook Inlet is the type of service that seems best suited to both certification and rate regulation as a public utility at this time. In addition to encouraging orderly development of the first nonproprietary/publicly accessible gas storage service in the state, a regulatory framework would best assure that optimal pricing and other terms of service are established to the benefit of both the proposed sole service provider and prospective utility customers, and also that scarce economic resources are efficiently allocated to the endeavor.

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## THE LEGAL QUESTION

That said, there is no clear-cut, comforting answer to the posed legal question of whether the Commission has jurisdiction over Cook Inlet Natural Gas Storage, LLC ("CINGS") and its proposed natural gas storage facility in the Cannery Loop reservoir near Kenai. Based upon the facts presented thus far, AS 42.05, as opposed to AS 42.06,<sup>2</sup> provides the most likely foundation for establishing the Commission's regulatory authority in this matter. Even under AS 42.05, however, rational arguments can be made both for and against a finding of Commission jurisdiction. Thus, an exhaustive parsing of applicable law by commenters may not

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<sup>2</sup> *But see Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d. 896 (Alaska 1987).

1 relieve the Commission of an interpretive challenge in ultimately resolving questions  
2 posed about its own jurisdiction.

3           The Michigan Public Service Commission regulates gas storage and sets  
4 intrastate storage rates, including for the Eaton Rapids 36 reservoir in which entities  
5 related to both CINGS and Enstar Natural Gas Co. (“Enstar”) have a property interest.  
6  
7 Reportedly, during peak winter periods, as much as two thirds of Michigan’s gas comes  
8 from storage as transmission pipelines from the southern states have inadequate  
9 capacity to supply the peak demand of the northern states, including Michigan.<sup>3</sup>  
10 Michigan’s jurisdictional basis for regulation of gas storage flows from an express grant  
11 of authority to exercise “complete power and jurisdiction to regulate all public utilities  
12 in the state” and the “power and jurisdiction to hear and pass upon all matters *pertaining*  
13 *to, necessary, or incident to the regulation of public utilities, including . . . gas, and*  
14 *pipeline companies . . . .” See Act 3 of 1939, MCL § 460.6(1) (emphasis added).*

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16           By contrast, and as noted by CINGS in its petition, AS 42.05.990(4)(D)  
17 qualifies the Alaska Commission’s jurisdiction over gas-related entities by defining a  
18 public utility in terms of its “*furnishing by transmission or distribution*” gas to the  
19 public for compensation. It is not presently clear that the dynamics of natural gas  
20 storage can be deemed, strictly speaking, a transmission or distribution function as  
21 contemplated under the statute.

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24 <sup>3</sup> Source: Mr. John King, Engineering Manager for the Michigan Public Service  
Commission (Jan.12, 2010).

1           It is instructive, however, that some courts have recognized the  
2 importance of gas storage to the overall supply of natural gas to consumers when  
3 interpreting statutory law. For example, consider the federal court's perspective in  
4 *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*,  
5 776 F.2d 125, 129 (6<sup>th</sup> Cir. 1985):  
6

7           Given the importance of natural gas underground storage  
8 facilities to the overall function of supplying natural gas to  
9 the consuming public, the underground *facilities fall within*  
10 *the intent of the legislature* to provide the use of eminent  
11 domain to acquire the right-of-way for stations or equipment  
12 necessary to the proper operation of gas pipelines.<sup>4</sup>  
13 (Emphasis added)

14 *Columbia Gas Transmission* thus underscores the need to take a broad, rather than a  
15 crabbed, approach to interpreting applicable law by assessing the interconnected role  
16 that gas storage could play in the provision of fundamental, otherwise fully regulated,  
17 public utility gas service in the Railbelt.<sup>5</sup>

## 18           **THE COMPELLING PRACTICAL AND POLICY CONSIDERATIONS**

19           As stated in previously filed Comments, the development of gas storage is  
20 one of various measures that may enhance deliverability of Cook Inlet gas for the  
21 purpose of meeting peak demand usage in the Railbelt. The more certainty present

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22           <sup>4</sup>           Citing *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*,  
23 578 F. Supp. 930, 933 (N.D. Ohio 1984). Alaska law similarly confers upon regulated public  
24 utilities a right to take by eminent domain. AS 42.05.631.

25           <sup>5</sup>           This is so notwithstanding the 1995 modification of the Commission's general  
powers and duties in AS 42.05.141(a). See § 1 Ch. 1 SLA 1995.

1 regarding the aspects of any proposed gas storage project, including regulatory  
2 oversight, increases the prospect of a successful venture. The jurisdictional question  
3 posed by CINGS' gas storage proposal is a question of first impression because public  
4 gas storage has neither existed nor previously been proposed in Alaska. Likewise, gas  
5 storage was likely not contemplated at the time existent law was enacted. Absent  
6 contemporary legislative guidance, the Commission should bring broader policy  
7 considerations to bear upon the question of whether CINGS' gas storage proposal is  
8 subject to its regulatory authority.

10 As a matter of public policy and as a practical matter, there are several  
11 reasons why the better course of action is to find jurisdiction to regulate prospective  
12 provision of gas storage at this time. First, this seminal (CINGS) proposal to provide  
13 gas storage would be a monopoly service. Since there is no existent market in the Cook  
14 Inlet for the provision of public gas storage to exert price discipline, the classic  
15 economic basis exists to substitute monopoly regulation as a proxy for market discipline  
16 at this time.

18 Second, the successful provision of public gas storage will be an integral  
19 part<sup>6</sup> of the overall provision of fundamental public utility gas service, so Alaska  
20 customers can heat their homes and fuel their businesses. It is commercially rational

23 <sup>6</sup> To paraphrase the Irish poet: how can we separate the dancer from the dance?  
24 "Among School Children", William Butler Yeates, 1928 ("How can we know the dancer from  
the dance?").

1 and plainly practical to regulate the costs of that component as part of the overall,  
2 established regulatory process administered by the Commission for the purpose of  
3 determining just and reasonable gas rates, and terms of public utility gas service.

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5 Third, the imperfect Cook Inlet gas supply market as a whole, including  
6 regulated public utilities (and the Commission itself), has already experienced the  
7 systemic difficulties involved when one party to a proposed gas supply agreement  
8 submitted for the Commission's regulatory approval is regulated, while the other party  
9 is not. No market for gas storage presently exists (much less an imperfect market); it  
10 will enhance the development of one at this time to have all prospective parties to gas  
11 storage transactions – utility-customers and the storage provider- and the storage service  
12 itself subject to public process involved in regulatory oversight.

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14 Finally, a decision that gas storage is subject to established regulatory  
15 oversight will likely promote more certainty (rather than less) across the board, to all  
16 stakeholders. That should be a desired outcome that will increase the prospect of a  
17 successful venture – one that can meaningfully contribute to enhancing deliverability of  
18 Cook Inlet gas for the purpose of meeting peak demand usage by Alaskans in the  
19 Railbelt and throughout the state wherever else that natural gas can eventually be  
20 delivered.

## 21 CONCLUSION

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23 As applied to presently known facts, existent law may ultimately be  
24 determined to confer the requisite jurisdiction for the Commission to undertake

1 regulation of the natural gas storage proposal of CINGS. More importantly, regulatory  
2 oversight is the best public policy alternative under the circumstances.

3 DATED this 15<sup>th</sup> day of January, 2010, at Anchorage, Alaska.

4 DANIEL S. SULLIVAN  
5 ATTORNEY GENERAL

6 By: 

7 Daniel Patrick O'Tierney  
8 Chief Assistant Attorney General  
9 Regulatory Affairs & Public Advocacy  
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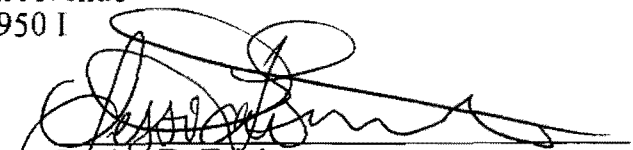
In the Matter of the Petition for Declaratory Judgment Regarding Jurisdiction of the Regulatory Commission of Alaska Under AS 42.06 Over the Natural Gas Storage Project Proposed by Cook Inlet Natural Gas Storage, LLC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of January, 2010, true and correct copies of the THE ATTORNEY GENERAL'S BRIEFING and this CERTIFICATE OF SERVICE were served by First Class U.S. Mail on the following:

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