

ALASKA STATE LEGISLATURE
SENATE SPECIAL COMMITTEE ON NATURAL GAS DEVELOPMENT

June 7, 2006

9:14 a.m.

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Lyda Green
Senator Gary Wilken
Senator Con Bunde
Senator Fred Dyson
Senator Bert Stedman
Senator Lyman Hoffman
Senator Donny Olson
Senator Thomas Wagoner
Senator Ben Stevens
Senator Kim Elton
Senator Albert Kookesh

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Senator Gene Therriault
Senator Hollis French
Senator Gary Stevens
Representative Kurt Olson
Representative Paul Seaton
Representative Berta Gardner
Representative Ralph Samuels
Representative Max Guttenberg
Representative Les Gara
Representative Jay Ramras
Representative John Coghill
Representative Peggy Wilson

COMMITTEE CALENDAR

Roundtable Question and Answer Session - Legislators,
Consultants, Producers, Administration

SENATE BILL NO. 2001

"An Act relating to the production tax on oil and gas and to
conservation surcharges on oil; relating to criminal penalties

for violating conditions governing access to and use of confidential information relating to the production tax; providing that provisions of AS 43.55 do not apply to certain oil and gas subject to a contract executed under the Alaska Stranded Gas Development Act; amending the definition of 'gas' as that definition applies in the Alaska Stranded Gas Development Act; making conforming amendments; and providing for an effective date."

BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

JIM CLARK, Chief Negotiator
Office of the Governor
PO Box 110001
Juneau, AK 99811-0001

POSITION STATEMENT: Participated in the round table discussion

NICK SPILIOTES
Morrison and Foerster
Counsel to the Governor
Office of the Governor
PO BOX 110001
Juneau, AK 99801-0001

POSITION STATEMENT: Participated in the round table discussion

BOB LOEFFLER
Morrison & Foerster
Counsel to the Governor
Office of the Governor
PO Box 110001
Juneau, AK 99811-0001

POSITION STATEMENT: Participated in the round table discussion

DAN DICKINSON, CPA
Consultant to the Governor
Office of the Governor
PO BOX 110001
Juneau, AK 99801-0001

POSITION STATEMENT: Participated in the round table discussion

DONALD SHEPLER
Greenberg Traurig, LLP

Consultant to the Legislative Budget and Audit Committee
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT:

PHILLIP GILDAN
Greenberg Traurig, LLP
Consultant to the Legislative Budget and Audit Committee
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Participated in the round table discussion

DAVE VAN TUYL, Commercial Manager
Alaska Gas Group
BP Alaska
Anchorage, AK

POSITION STATEMENT: Participated in the round table discussion

MARTIN MASSEY, Joint Interest Manager for U.S. Operations
ExxonMobil Production
Houston, TX

POSITION STATEMENT: Participated in the round table discussion

RICK HARPER
Econ One Research, Inc.
Consultant to the Legislature
Three Allen Center, Suite 2825
333 Clay Street
Houston, TX 77002

POSITION STATEMENT: Participated in the round table discussion

JAMES BARNES
Barnes & Cascio LLP
Consultant to the Legislature

POSITION STATEMENT: Participated in the round table discussion

WENDY KING, Director of External Strategies
ANS Gas Development Team
ConocoPhillips Alaska, Inc.
PO Box 100360
Anchorage, AK 99510

POSITION STATEMENT: Participated in the round table discussion

LOUISIANA W. CUTLER
Preston Gates & Ellis
Counsel to the Governor
Office of the Governor

PO Box 110001
Juneau, AK 99811-0001

POSITION STATEMENT: Participated in the round table discussion

KEN GRIFFIN, Deputy Commissioner
Department of Natural Resources
400 Willoughby Avenue
Juneau, AK 99801-1724

POSITION STATEMENT: Participated in the round table discussion

ACTION NARRATIVE

CHAIR RALPH SEEKINS called the Senate Special Committee on Natural Gas Development meeting to order at [9:14:17 AM](#). Present at the call to order were Senators Lyda Green, Gary Wilken, Ben Stevens, Fred Dyson, Kim Elton, Donny Olson, Lyman Hoffman, Con Bunde and Chair Ralph Seekins; Senator Thomas Wagoner arrived shortly thereafter, and Senators Bert Stedman and Albert Kookesh arrived as the meeting was in progress.

**Roundtable Question and Answer Session - Legislators,
Consultants, Producers, Administration**

CHAIR RALPH SEEKINS announced the committee would have a roundtable discussion among legislators, consultants, producers and the Administration.

[9:19:05 AM](#)

Senator Thomas Wagoner joined the meeting.

SENATOR BEN STEVENS asked the reason that Alaska was using an LLC based in Delaware. He expressed concern that this would cause a jurisdiction conflict.

[9:21:47 AM](#)

JIM CLARK, Chief of Staff for Governor Frank Murkowski, advised that he is also Chief Negotiator for the pipeline project. He recognized and thanked the team of consultants for their work on the project. He deferred the question to Nick Spiliotes.

[9:24:27 AM](#)

NICK SPILIOTES, Counsel to the Governor, responded to Senator Ben Stevens' question. He advised the committee that he had over 20 years of experience in project development and finance and has been working with the State since 2004 on LLC issues. He has worked with Steve Porter, Deputy Commissioner of Revenue, on the pipeline negotiations from the beginning. He spoke to the issue

of Alaska versus Delaware and said it was an issue that drew extended conversations with the sponsor group. The Alaska Natural Gas Pipeline will be one of the largest and most complex civil engineering projects in the world and would need a corporate governance document that guarantees the parties certainty and predictability in outcomes and one that would minimize disagreements that might result in arbitration.

After extensive analysis, Delaware was the agreed jurisdiction for the LLC based on the desire for certainty. There are over 150,000 LLCs in Delaware and so the jurisprudence is very developed there. They reviewed the duties required under both states and felt this was in the best interest for all parties.

[9:26:36 AM](#)

The group concluded that Alaska law creates a higher legal duty of the LLC members to each other. In a voting context, the State could owe a higher duty to the LLC and to the oil companies than it would to act solely in its own interest. That is a concern to consider. Even though the Alaska Natural Gas Pipeline will be a public corporation it will also be a commercial entity; as commercially possible under Alaska law. One concern is that the State could be subject to second-guessing and/or subject to external standards where obligations are imported from the law into the LLC when it makes a decision on a vote. There could be times when the State has an interest in promoting the hiring of certain companies or experts for the LLC and that consideration may not be in the interest of the LLC. The vote that the State makes should not be subject to challenge on the basis that it doesn't advance the commercial interest of a particular LLC. Remember, the State is a political entity with broad interest in the outcome of this project, he stated.

Another example could be settlement of major litigation with a third party. It could be in the interest of the LLC and other members to settle the claim but the State might have a different view. The rationale for Delaware is that Delaware permits great flexibility for how the members structure contractual arrangements. Delaware permits members to vote in their own interest for any reason without threat of suit. Alaska law creates a higher duty to the other members.

[9:30:44 AM](#)

MR. SPILIOTES continued there has also been much discussion about the State being a minority member. The fact is oil producers assert their positions as aggressively as possible with each other, against each other and in various combinations.

So in this LLC and in all the project entities, there will be no majority member. The real cleavage in the LLC will be the one operator and the three non-operators. The three non-operators will have an alignment of interest to make sure the operator does its job properly. The operator must take instruction from the management committee of the LLC and is subject to oversight.

The State is a sophisticated and powerful entity with many legal and economic resources and so there is no reason to think that the State will need minority protection. Another element to consider is a developed jurisprudence on corporate governance. The parties will not want to go to litigation for every issue that arises. The parties will want certainty to particular outcomes as permitted under law.

"Duty of Care" is the issue of what is owed to the LLC or what duty an entity owes to the other members. In Alaska there is only one case on Duty of Care so if the project is under an Alaska LLC there is uncertainty as to how a dispute would be considered in the courts. There is no real precedence whereas in Delaware there are hundreds of cases on Duty of Care and the landscape is very well established.

[9:35:01 AM](#)

MR. SPILIOTES summarized there are 150,000 LLCs in Delaware, there are a couple dozen cases already decided on the LLC interpreted through Delaware statute and as far as Alaska law goes, it would be very restrictive and would require the duty to act in the interest of all the shareholders. The State must act in its own interest and so the idea is to define the legal environment so that legal disputes can be avoided.

[9:35:59 AM](#)

CHAIR SEEKINS made the announcement that Attorney General David Marques was present and also that the House members were absent due to a Floor Session.

[9:36:39 AM](#)

MR. SPILIOTES continued his summary. Lenders who are very familiar with Delaware law and have a preference for it will finance the project. That certainty issue works in the best interest of the State. The State would be able to act in its own interests at all times for any reason and not owe any duties to any companies or the LLC.

MR. CLARK interjected the negotiations by the team were an attempt at preserving State sovereignty and preserving independence for the project.

SENATOR KIM ELTON referenced Mr. Spiliotes' comment regarding making the LLC as commercial as possible and asked whether that would implicate the State in federal tax law in any way.

MR. SPILIOTES replied the LLC would be a "pass-through entity for tax purposes" and so because the State is tax-exempt, the State will not pay tax on its interest. The LLC will pay taxes to the State of Alaska but the State would not be taxed on distributions.

SENATOR ELTON asked Mr. Spiliotes whether he saw anything that might obligate the State under federal tax laws.

MR. SPILIOTES deferred the question to Louisiana Cutler.

LOUISIANA CUTLER, Partner, Preston Gates & Ellis LLP, responded to Senator Elton's question. She said they have specifically designed AK Pipe so that it will have the best possible chance of obtaining its tax-exempt status. It is her understanding that Mr. Gildan testified in the House Judiciary Standing Committee recently and complimented the work done by her team.

[9:40:48 AM](#)

SENATOR WAGONER asked Mr. Clark to speak about the indirect interests of the State when it comes to the non-owner producers or explorers who want to become producers. Somebody has to look out for these people in the LLC and make sure they have access, he stated.

MR. CLARK deferred the question to Bob Loeffler.

[9:42:06 AM](#)

BOB LOEFFLER, Partner, Morrison and Foerster, Consultant to the Governor, introduced himself for the record. Under the Delaware LLC, the State would have more freedom to pursue that expansion objective. There will be an expansion article within the LLC and beyond that there is a special expansion right granted to the State under the contract.

SENATOR WAGONER asked how difficult it would be to provide expansion to the pipeline. The presentations at Centennial Hall seemed to suggest that the pipe would not be accessible for expansion for at least 20 years.

MR. LOEFFLER responded Alaska would need more gas in order to fill the demand for the pipe for 20 years so expansion will be definitely encouraged. At the end of 20 years the initial FT commitments will expire and people will have some rights to the capacity on the pipeline so there will be a natural incentive to fill up the pipe. The design of the pipe is 4.5 bcf per day with the possibility of an easy expansion to increase capacity by 37 percent.

[9:46:27 AM](#)

MR. LOEFFLER continued there is three different ways to the expansion as far as the legalities are concerned. FERC lacks the authority to order an expansion in the lower 48 but because the pipeline is likely to be the only road out of Alaska, Congress gave FERC the power to expand it. The expansion works under the Alaska Natural Gas Pipeline Act. The person that sponsored the process that resulted in mandatory expansion gets that capacity. Any other kind of voluntary capacity is subject to the open season requirements where everyone is bidding for the capacity, including the independents and the North Slope majors. The person that puts in the best bid wins. So if Alaska wants to lock in the capacity, mandatory expansion is the best way to do it.

The State negotiated "State Initiated Expansion" as an additional right to call for expansion. Beyond that the LLC will have voluntary expansions where the members of the LLC take a vote to expand.

MR. CLARK added the voluntary expansion is in the contract and it was very hard to get that proposition in.

SENATOR WAGONER asked the reason it was such a hard fight to get that into the contract if it is such a good deal for the producers.

MR. LOEFFLER replied the Lower 48 pipeline industry was worried about precedent. The other reason is the mandatory conscription for capital that companies worry about in terms of free enterprise rights.

[9:50:02 AM](#)

SENATOR CON BUNDE asked whether the committee could hear the opposing point of view on that point.

SENATOR HOLLIS FRENCH said according to the contract, any disputes would go to a tribunal. He asked whether disputes amongst LLC members would end up in court or in a tribunal.

MR. SPILIOTES replied there are two different kinds of agreements. The fiscal contract is a royalty tax. Any relationship between the State as regulator and the producers on complex tax issues would go to arbitration. The LLC is strictly a corporate governance document and so that should be handled in a Delaware court. There will be some overlapping, which Mr. Loeffler should speak to.

MR. LOEFFLER pointed out under the dispute resolution clause of the contract the substantive law of Alaska is applied for disputes at the fiscal contract level.

MR. SPILIOTES added one issue that was identified is how to juxtapose the two regimes. They are two very different provisions so there will not be a huge overlap but there will be some and that still needs to be addressed.

SENATOR FRENCH clarified the disputes amongst the LLC members will go to a Delaware court and disputes under the fiscal gas line contract will go to a tribunal.

MR. SPILIOTES agreed. He added there would be three or four very technical items under the LLC such as determination of fair market value and tax related matters to which a separate dispute procedure would apply. So Delaware courts would decide corporate governance issues, the yet-to-be decided mechanical overlaps, and the technical issues under the LLC.

[9:54:51 AM](#)

SENATOR FRENCH asked whether there would ever be a set of circumstances where the State would end up before an Alaska court.

MR. LOEFFLER responded when the arbitration tribunal is done, that award would be taken an Alaska court for enforcement. Other than that, he couldn't think of a case where there would be a dispute before an Alaska court.

[9:55:44 AM](#)

MR. SPILIOTES clarified the interpretation of the contract would be in Delaware but the LLC would be sued in an Alaskan court.

CHAIR SEEKINS clarified internal matters would be settled in a Delaware court under the tribunal. Enforcement terms would be heard in the Superior Court of Alaska.

MR. CLARK advised the committee that the negotiators fought long and hard to protect the interests of the State of Alaska. The key thing was to come up with a quick dispute resolution process that would get matters resolved and keep things moving. He asked Mr. Loeffler to speak of the rationale behind Exhibit C.

MR. LOEFFLER referred to page 257 of contract where it deals with audit cases that could go to the Alaska courts. The biggest foreseeable dispute would be under the PPT/PILT where arbitration is available but general discovery limitations do not apply to that. That is where the tribunal defines what discovery is appropriate. These are big disputes that cost a lot of money, he said.

Secondly, in one of the appendices dealing with the PPT/PILT is something that is possibly better than existing law. If the Department of Revenue (DOR) issues a subpoena, it can go to a single arbitrator under dispute resolution and get a much quicker result. That single arbitrator then becomes a standing arbitrator for any further disputes that arise in the DOR administrative process.

Thirdly the years of litigation on royalty valuation will not occur under the contract. The State would get its volume of gas to market without having to fight about the value because of the provision allowing the State to take its gas.

[10:01:53 AM](#)

MR. LOEFFLER referred to page 407 of the contract and continued. Through the design of the contract they have removed a lot of big number disputes. However, when the bigger disputes arise the contract would allow the State better rights and more robust discovery at the administrative level.

SENATOR FRENCH noted that PPT/PILT payments were an item of concern for him because the contract seems to give a lot away. For example, it gives away the presumption that the work done by the DOR employees is accurate and factual. There is no presumption in favor of that as it now stands in Alaska courts. He said it was odd that the Administration would give that deference away.

MR. LOEFFLER responded there is a multi-tier process under the DOR, which will result in a better ability for the State to get information at the departmental level. He explained that the quality of information in court would be better through this process.

MR. CLARK asked that Dan Dickinson come forward and speak to the issue.

10:06:15 AM

DAN DICKINSON, Consultant to the Governor, explained frequently when the State is either in a dispute or is deciding whether there is a dispute, much information is needed to put the facts together. He said he does not believe the State has given up any rights to get information and they have built in an expedited process. Even though the Department has subpoena power it isn't used it very often.

10:09:24 AM

CHAIR SEEKINS brought the topic back to Delaware versus Alaska LLC advisability. He noted testimony from the State prefers to form the LLC under Delaware law and asked whether anyone had an alternate position to consider.

DONALD SHEPLER, Greenberg and Traurig, Consultant to the Legislature, advised the committee that Phillip Gildan was on the line ready to speak about the choice of establishing the LLC in Delaware.

PHILLIP GILDAN, Greenberg and Traurig, Consultant to the Legislature, introduced himself for the record. He complimented Mr. Spiliotes for his presentation. He advised the committee that he would list options for them to consider regarding the issue. There were four items that Mr. Spiliotes highlighted and the first was protection for the State and the freedom to act contrary to the entity if the State had other interests in mind with a particular management or vote. While that provides the State protection, it also provides protection to the oil producers, which gives them the right to act in their own self-interest. It is important to understand that the benefit applies to both sides.

The second point is that all four members will be minority members with the majority shifting back and forth on different issues. The third point established jurisprudence on corporate governance where Delaware has a lot of history, albeit more so on the corporate side than with an LLC.

[10:16:25 AM](#)

One point to consider is that the State could utilize a Delaware corporation or corporate jurisprudence but still have venue for actions in Alaska in front of an Alaska court simply requiring the Alaska court to apply the jurisprudence of Delaware. Application of other state laws happens all the time in commercial settings. He suggested the committee could consider that option and the benefit is that Alaska jurors have extensive experience in the oil business.

[10:18:11 AM](#)

The fourth point regarding benefit of the Delaware LLC is that anything the parties agree to can be put into the document so that duties and such can be outlined there. This creates flexibility as to importing duties into the project. For example the item of the Alaska hire intent is one of great interest to the State as well as a duty to get the project completed.

[10:20:27 AM](#)

MR. CLARK asked the Chair for permission to respond to Mr. Gildan's testimony. He recognized that Mr. Gildan brought valid points and that the Administration considered those points but had to make some policy decisions. As far as reciprocity is concerned they negotiated with the best interests of the State of Alaska in mind. He said they felt it preferable to make the choices that they made.

[10:21:46 AM](#)

MR. SPILIOTES said on the issue of protecting the State and recognizing that it is a reciprocal right that the other LLC members would have, everyone is going to act in their own interest. It was concluded that the State must protect itself and that doesn't mean the State is likely to be oppressed. Everyone will be able to act in self-interest without being subject to second-guessing or legal challenge. The issue is getting the pipeline built as quickly as possible and in the best interest of Alaskans and of the State. In regards to the point on venue in Alaska, he said, they have a preference for venue in Delaware based on the vast volumes of experience that the Delaware courts have.

[10:24:00 AM](#)

MR. SPILIOTES continued there could be other legal regimes applicable to the project; particularly in Canada where they lack the design of the LLC such as it is in the U.S. In an unincorporated joint venture in Canada there will be no

corporate entity. There will be contracts and arrangements among the four parties and the Canadian courts will want to look at the Canadian piece as well.

In terms of the issue of importing concepts from the fiscal contract into the LLC, first of all the LLC will be a signatory to the fiscal contract and so the LLC will be a contractual party to the fiscal contract and will participate in the fiscal contract's dispute resolution regime as a party. There is a provision in the LLC that commits the members and their affiliates to be devoted to the project.

MR. CLARK asked Mr. Loeffler to add a point to that topic.

[10:26:37 AM](#)

MR. LOEFFLER referenced Mr. Spiliotes' point regarding duties or obligations in the fiscal contract that the LLC will have to respect. The leading one is the diligence standard under the work commitment clause. The LLC is not free to ignore the diligence standard.

[10:27:37 AM](#)

MR. GILDAN said he was glad to hear of the highlights that would be seen in the LLC agreement because they will resolve some of the issues brought forth. As far as substance goes, it boils down to a degree and a choice and that is what he meant to point out in his consultation.

MR. SHEPLER said he would like to echo Mr. Gildan's comments and said he would be glad to move toward getting the LLC so that the document could be reviewed and any further issues resolved.

CHAIR SEEKINS announced a brief recess at [10:29:32 AM](#).

[10:45:26 AM](#)

DAVID VAN TUYL, Commercial Manager, Alaska Gas Group, BP Alaska, agreed with Mr. Spiliotes' testimony on the reasons the Delaware LLC is the appropriate structure for this mission. He said he agreed with the provision that requires entities to maintain allegiance to the project. He emphasized the point that Delaware has the largest body of case law on LLC matters and said it provides certainty, a clear stable regime, and access to low cost financing. Under Alaska law there would also be a requirement of duty of loyalty to the LLC and that has a particular implication. Any actions taken by a member outside of the LLC have to be consistent with the positions of the LLC itself. For example, the State would be prevented from voicing

it's own position before FERC if the LLC had the position that was not the State's preference.

10:49:32 AM

There was a question on the expansion provision to which he spoke. The reason BP was resistant was they didn't see the need to preempt FERC. It is FERC's role to adjudicate rates and tariffs for interstate pipeline systems and that policy could change over the years. There are certain rights preserved under the Alaska Natural Gas Pipeline Act that protect the rights of those that would like to expand.

10:50:52 AM

MR. VAN TUYL continued Mr. Loeffler testified that 20 years would be the term for the FT and that is a common and acceptable duration but nobody knows what the term for transportation will be. Concerning the role of Alaska courts in the case of disputes, specifically involvement of enforcement of an award, under Article 26.2 of the contract, the duration that an Alaska court has is 365 days.

10:51:53 AM

CHAIR SEEKIKS recognized Senator Gary Stevens, Representatives Paul Seaton and Kurt Olson.

WENDY KING, Director of External Strategies, ANS Gas Development Team, ConocoPhillips, informed the committee that she was not the team member representing ConocoPhillips in the LLC negotiating team. She emphasized the LLC team needs to be set up for success since this is one of the biggest commercial enterprises the company has pursued. When the LLC is available it will be presented to the committee. She agreed that Delaware has a well-established body of law to operate and negotiate the LLC in. She clarified that the LLC would be added as a party to the fiscal contract. Article 31 in the fiscal contract allows for the addition of a party. When each entity of the LLC is formed, they will be added to the fiscal contract. She pointed out that Alaska law applies to how the entities are treated in the fiscal contract. So when the LLC is in a dispute with the State, Alaska law will be applied.

10:55:10 AM

MS. KING highlighted Article 6.3 and said each mid-stream entity shall advertise for available positions. Article 6.4 states each mid-stream entity shall work with the State to develop these or other publicly funded programs. She said they specifically set

Article 6 up to address Alaska hire concerns and that mid-stream entities also have to adhere to the provisions.

SENATOR GARY WILKEN asked whether there would be a major rewrite of the contract when the LLC gets adapted into the fiscal contract.

MR. CLARK deferred the question to Mr. Spiliotes.

MR. SPILIOTES responded the LLC agreement would create an entity called the Alaska Gas Pipeline Company. The LLC agreement governs the relationship between the members, distributions, voting and a full range of activities. The LLC entity would then become a party to the fiscal contract because the fiscal contract imposes obligations on the mid-stream entity and the other project entities, which will own the various components of the pipeline. Each of the other parts of the project will be owned separately, such as the Canadian entity and the potential natural gas liquids plant. There will not be a need to rewrite the fiscal contract to pull those in. Once the entities sign up on the project, they will be subject to the contractual obligations.

SENATOR WILKEN said he keeps referring back to Mr. Barnes' possible pipeline structure because that is the best illustration they have so far. He asked Mr. Barnes whether Mr. Spiliotes' testimony lines up with what he knows.

JAMES BARNES, Barnes and Cascio, Consultant to the Legislature, said he had a question of whether the LLCs would become signatories of the agreement because the fiscal contract uses generic terminology in certain places. "It's almost as though there has to be synchronization that needs to be reflected in the agreement." He asked whether there would be an amendment to the fiscal contract that would clarify which of the obligations are mainline LLC obligations versus which are other obligations.

[11:01:00 AM](#)

MS. KING referred to Article 31.1(d) and said it highlights "a producer shall add to this contract any person that owns midstream element in which one or more producers or their affiliates have an interest." "Each of the obligations in the contract have been drafted so that if an additional person is added, and the midstream entities have obligations, the fiscal contract is designed to put the midstream obligations directly to those midstream entities by adding them to this contract as a party to this contract," she stated.

[11:01:34 AM](#)

SENATOR ELTON asked whether the party being added would have the ability to renegotiate any component of the contract.

MR. SPILIOTES responded there is no separate approval process. There is no step that would allow any party to renegotiate the contract.

MR. LOEFFLER clarified the LLC signs up to the fiscal contract. There is no negotiation mechanism.

[11:04:35 AM](#)

MARTIN MASSEY, Joint Interest Manager for U.S. Operations, ExxonMobil, introduced himself for the record. He referred to the topic of the Alaska LLC versus the Delaware LLC and said he could not add much to the discussion that hasn't already been said. He agreed with the decision by the Administration to go with the Delaware LLC plan and said ExxonMobil supports the decision.

[11:06:24 AM](#)

SENATOR LYMAN HOFFMAN asked whether other states were considered for the LLC formation.

MR. CLARK said he did not believe so.

MR. SPILIOTES agreed. Delaware was the only state considered. It is the location of choice for many corporation formations and corporate governance.

CHAIR SEEKINS noted there is a recent publication done by the U.S. Chamber of Commerce that rates Delaware as number one in fairness of the jurist and the speed of which they can dispose of motions. Alaska was in the mid-thirties.

[11:09:29 AM](#)

SENATOR BEN STEVENS referred to his question to Mr. Gildan the previous day regarding the memorandum and the proposed amendments of the operating agreement. He read Item 9 in Exhibit A. "The operating or the LLC or the management agreement shall provide that in the event that entity elects to contract with a vendor to operate the entity or implement the project such vendor shall be independent and not an affiliate of a member of the entity." He asked for a response from the Administration, the producers, and the consultants.

MR. SPILIOTES commented that is contrary to how most contracts are structured. Most pipeline projects have integration with the various entities and their activities across the project. There will be four to six entities owning pieces of the project and those entities will contract with operators who will be responsible for constructing and operating the project. Those operators will be affiliates of the managing member of the LLC or the equivalent position in the other projects.

The construct is a managing committee in which all members are represented. That management committee is responsible for managing the entity. The management committee would delegate responsibility to a managing member and that managing member is the one that signs the agreements on behalf of the LLC. There will be a contract or operating agreement that will be with an affiliate of the managing member that will govern the terms under which the project will be constructed and managed over time.

The concern with having an independent unaffiliated operator is that there are too many differences in the way different companies operate. For example, Company X and Company Y might attempt to "marry-up" their engineering divisions and they might have different approaches to technical problems and different procedures to handle day-to-day operations. The two must be integrated so as to minimize distortions and artificial delays. "The preferred structure is to have an integrated set of companies that are part of an affiliated group charged with constructing the project under the supervision of the LLC," he stated.

One of the sponsor groups will be the operator and they will have affiliates throughout the project, working to build the project under the operating agreement under the supervision of the LLC. That operator will be subject to scrutiny of the non-operator. If legislation is introduced requiring that the operator be independent it will introduce major inefficiencies and disputes. The non-operators are very interested in making sure that the operator does a good job. It's a check and balance within the operating structure, he said.

[11:17:34 AM](#)

MR. GILDAN responded the issue of the independent operator arose after listening to a presentation by a member of the Administration team explain the requirements of securing a successful mega-project. The presentation suggested that in

order to secure a successful mega-project, one must have the entities in the project all aligned and moving in the same direction at the same time. It is concerning that there will be a cleavage between the owner that has the operator obligation and the other three. By having the operator be an affiliate of one of the owners it automatically establishes that cleavage and that creates different relationships of self-interest with the others.

That said, it seems to make sense to have the four owners who are the management of the entity be aligned. Having their combined interest creates much stronger control overseeing the operator.

MR. VAN TUYL advised that he would like to add a few other points for the committee to consider. In addition to the efficiencies that Mr. Spiliotes pointed out, the three companies have experience in delivery of mega-projects. BP is currently completing a mega-project in the Caspian Sea. ExxonMobil and ConocoPhillips are involved in mega-projects as well. That is important to consider on the resume of an operator. The three companies have also pioneered arctic operations so they have experience in the field and know the importance of preserving the environment. The producers share the common objective with Alaska of delivering a project at the lowest possible cost.

MR. MASSEY added since this is a huge project, it will be very difficult to decide who amongst the four entities will be the operator. Having an independent make major project decisions is beyond contemplation, he stated. The three companies coming together on the project know how to do big projects. ExxonMobil has an affiliate called the ExxonMobil Development Company that builds worldwide projects for all the affiliates that operate within the countries. If ExxonMobil were the operator, they would contract with the development company to build the project and they have the expertise to put this project together.

[11:24:55 AM](#)

MS. KING echoed the previously made point that efficiency and alignment are extremely important and the producers have experience in this arena since they have worked together before. The industry has learned the processes and how they should work. All three companies have project management experts that will help deliver the project in the best means process. The expertise in the three companies that the State is dealing with is tremendous. Personally speaking, she said she had never been involved in a project where one of the owners was not the

operator so it would be very atypical to have someone other than an owner be the operator of a project.

11:27:01 AM

MR. CLARK pointed out that all three participants in Prudhoe Bay operate that way. BP is the operator in that unit with the others. From the State's point of view, the model that is currently working is what they chose to use.

MR. SPILIOTES added having an owner of the pipeline as an operator adds to efficiency and cost saving since the State would not have to pay the independent operator to come and take upon risks.

SENATOR FRED DYSON said he would like to hear from one or more of the consultants about the pros and cons of an independent operator.

MR. BARNES responded typically with large projects usually the operator is selected from among the parties. The debate is focused on disclosure of the nature of the transaction. There is usually a higher level of scrutiny before the affiliate is engaged and typically that is covered in an operating agreement or the governance document. He said he is confident that affiliate transaction will be dealt with in those documents.

There is another paradigm under which large projects are done. For instance in the "gutter project" there is a corporate entity, a joint stock company that is set up and each participant places people in that company. Alaska has a similar arrangement with Alyeska where the parties don't agree to have one of them as the operator but they form that joint stock company. They have advantages and disadvantages.

SENATOR DYSON voiced hope that the citizens of Alaska could have the option of stockholders in the pipeline. He asked whether there were any independent-operated pipelines in North America.

MR. BARNES said he believed so and deferred the question to Mr. Loeffler.

MR. LOEFFLER replied in natural gas there are relatively few. Independent companies own them but an independent operator does not own them. El Paso Natural Gas has ten pipelines but it is the operator. He said he could not think of any pipeline that is run by an independent operator.

RICK HARPER, Consultant to the Legislature, observed two types of operations at issue. One is the operation of construction of the pipeline and related facilities; the second is the ongoing operations after the pipeline is constructed. It is important to note that when one considers the implications of ownership, operator-ship and layering of subsidiaries. It is wise to be concerned about the expansion issue. The reserves and deliverability are two different issues when looking at the operation of the pipeline. Also, remember that the pipeline will be fully subscribed in terms of firm capacity for 20 years so the fact that some capacity will not be utilized in the out years does not necessarily mean that the capacity will be available on a reasonable basis or on a basis that is attractive to other independent explorers.

[11:33:51 AM](#)

MR. LOEFFLER responded unless the operator was imposed by the Department of Justice of the FTC, the operator is subservient by law to the member companies that control it so it's not as if the independent operator could do whatever it wants.

MR. HARPER said that might be how it works from a legal standpoint but an operator has tremendous control over information, in managing committees, and in managing decision-making and so to indicate that an operator is merely an agent is not entirely correct.

MR. LOEFFLER countered there is a whole body of FERC law that controls intent. It is designed to make sure there is no preferential or discriminatory treatment of the owners versus the non-owners.

MR. HARPER agreed that was true in theory but a holder of firm capacity has contractual rights. Once he makes the capacity available those laws go into effect but the basis upon which he makes those means available determines who might be interested in it. Just because there is physical capacity in the out years and in the first 20 years does not mean that will necessarily satisfy the needs of the independent producers.

MR. LOEFFLER agreed with that assessment and said he did not know of a natural gas pipeline in the United States that has an independent operator.

MR. HARPER quipped, "I don't know of an interstate natural gas pipeline in the United States that's owned by a producer either."

MR. LOEFFLER said the ownership has changed but the producers built the alliance and the interests were sold off.

MR. HARPER said there was producer ownership but the producers did not own and operate that system and that was a Canada-based system. That is the only example in recent times of any ownership and to this day there has not been producer ownership of any natural gas pipeline that he is aware of.

MR. LOEFFLER said his point is that interstate gas pipelines with independent operators are just not done.

MR. HARPER countered the El Paso system operates all of its gas. The owner of the pipeline does not have an independent operator.

11:38:02 AM

SENATOR BEN STEVENS quipped they just demonstrated why the committee doesn't see the LLC operating.

MR. CLARK stressed there are choices out there to be made. The administration chose among the choices to be made in order to get the agreement written.

11:38:54 AM

MR. MASSEY argued from a producer's perspective, both gentlemen were right. There aren't many producer-owned natural gas pipelines because upstream companies don't want to be in that business. The upstream companies risk huge amounts of capital with long term payouts and they expect a high rate of return. The situation here is an attempt at unlocking a major natural resource with a mammoth capital investment. The risk of turning that investment over to someone else to build is not one the producers are willing to take. Producers have the expertise in-house to build the project at the lowest cost.

MR. VAN TUYL introduced a couple of points into the discussion. BP operates the Destin Pipeline so that is one owner-operator. There was a suggestion that those seeking access to the pipeline might view presence of an independent operator favorably but access is actually determined by the regulator of the pipeline regardless of who the operator would be. As to the specific role and authority that the operator is vested with, that comes through the operating agreement. The operator has no more authority than the other members who sign that agreement. Lastly, having an affiliate member be the operator introduces

efficiencies since the accounting system and other systems are already known amongst the producer companies.

MR. HARPER said the Destin Pipeline is a very small, limited-purpose pipeline and that was not his point. His concern was over the issue of "layering of affiliates." As indicated in earlier discussion, there will be a different set of affiliates in the LLC than in the Stranded Gas Development Act Contract. That does not appear to represent any significant binding. At the parent level he said he has not seen anything indicating any cross under-writings or cross obligations between the LLC and the SGDA contract.

MR. VAN TUYL said there is a provision in the contract that says if they are imposing a duty on an entity that is not signatory to the contract then that duty falls to the signatory. Whether or not the future entities become signatories, the ultimate duty would fall on BP Exploration Alaska, for instance.

[11:45:06 AM](#)

MS. KING reiterated this is a huge project that will affect the producer companies tremendously and so they clearly want to be an active party to it. It is very critical that one of the owners be the operator.

MR. LOEFFLER emphasized Mr. Harper's point about the two different periods of operation. In TAPS there was a different agreement for the construction period and then an operating agreement afterwards. Some of the concerns about independent access to the pipeline apply to that period when the pipeline is constructed and up and running. He suggested the committee keep those two periods separate because the Independent Petroleum Association of America (IPAA) testimony was directed at how to get the project built. The best way to do it is to use an affiliate that is experienced, he asserted.

[11:47:29 AM](#)

SENATOR BEN STEVENS asked Mr. Clark whether any of the other applicants provided a complete proposal that brought together the upstream, midstream and downstream applications.

MR. CLARK replied no.

MR. LOEFFLER added there was another possible import to Senator Stevens' question, which was did the other potential applicants have an upstream component in the sense that "did they have gas to ship through an affiliate through the pipeline" and they did

not. The only ones who have gas to fill the pipeline are the project sponsors.

[11:49:53 AM](#)

SENATOR BUNDE said he was impressed with the complexity and the intention of the negotiators and said he felt they have Alaska's best interest at heart.

MR. CLARK commented it was one year ago today that the Governor asked him to head up the negotiating team. At the time he thought it would take approximately two months to resolve the issues around the contract.

CHAIR SEEKINS announced the committee would recess for lunch at [11:51:49 AM](#).

[1:27:49 PM](#)

CHAIR SEEKINS called the committee back to order. He asked that the committee discuss the dispute resolution process as well as work commitments.

[1:29:00 PM](#)

MR. BARNES reminded the group they were talking about how additional parties would be added and reference was made to Article 31. Everyone agrees that maintaining alignment between project entities is important. Article 31.2 says the added person will have the rights, privileges and obligations that are assigned to it and then the assigning person will retain the rights, privileges and obligations other than the ones that are being assigned. He questioned how the State would know what is being assigned and what is being retained. He wondered how it would work considering that it is all done by inference. He expressed discomfort with this provision from a legal standpoint.

[1:30:28 PM](#)

MR. CLARK suggested that Mr. Spiliotes could address that concern.

MR. SPILIOTES said Article 31 was intended to offer flexibility so as to allow the adding of another party for a specific purpose. He deferred the fiscal side of the question to his colleagues.

MR. BARNES agreed but questioned the affect of adding a party. He said in effect it would be a shifting of rights, privileges and obligations and wondered how the parties would know which

rights, privileges and obligations have been shifted. He said he was uncomfortable with the notion that it could be done with inference.

MR. LOEFFLER referred to Section 31.1(b) and said it is customary to provide a notice when adding parties. The notice would describe the rights, privileges and obligations that are assumed by the added party.

MR. BARNES asked whether the unilateral assignment notice would effectively amend the contract.

MR. LOEFFLER responded he does not view it that way. Some of the obligations of the contract are identified as connected with LLCs and until those come into being; obligations cannot be placed upon that LLC.

MR. SPILIOTES added there are two things going on in Section 31.1. There is a mechanism for assignments of rights, privileges and obligations by a producer and there is a producer adding a party to the contract.

[1:34:52 PM](#)

MR. VAN TUYL advised in Section 31.1(b) there is an obligation to provide notice to the State of an entire list of items, such as a description of the reason for adding the additional person and the identity of that person. The contract already contains the language that defines what the obligations would be for the mainline entity so there would not be an amendment to the contract. The assignment fulfills the contract.

MR. BARNES added the section on assignment is subject to approval by the commissioner of the Department of Natural Resources (DNR). Section 31.1(b) appears to have unintended consequences and it is difficult to understand how that section would fit together with the LLC.

[1:38:17 PM](#)

MR. LOEFFLER countered the point of adding that was to create an obligation. He said the intent was to make the LLCs join the fiscal contract. He suggested the language in that section could be worked on to make that more clear.

MR. BARNES asked for clarification whether Mr. Loeffler would be amenable to clean up the language in that section.

MR. LOEFFLER said yes.

CHAIR SEEKINS questioned whether the additional person should also be subject to approval by the commissioner of DNR.

MR. LOEFFLER responded the point of the approval was that they are dealing with leases and capturing existing law in Section 31.1(a). Section 31.1(b) is not based on existing law but on the entities that will come into being. There is a difference.

MR. VAN TUYL informed the committee that the addition of the additional person is not a unilateral right but an obligation. It's is defined in the context as "an ownership of a midstream element" and so it would be only the pieces of the qualified project that would need to be constructed and operated to fulfill the contract, he stated. It is not a broad, sweeping right, it is very specific to the execution of the project.

MR. BARNES agreed but asked what assurance the other parties would have that the additional party is creditworthy.

[1:41:11 PM](#)

MR. SPILIOTES clarified Section 31.1(b) and said the definition of "midstream element" is the four pieces of the project. The intent is strictly to have a procedure for adding entities as they come into existence, not to split up rights and move them around. The person that owns a midstream element is the corporate entity that owns the physical assets.

MR. BARNES expressed confusion at the language of the section.

MR. SPILIOTES suggested there was a drafting matter involved that needs clarification.

[1:42:49 PM](#)

MR. VAN TUYL pointed out Section 2.9 includes language to specify that the parties of the contract retain an obligation to perform or cause the project entity to perform an obligation.

MR. MASSEY said the State would participate in formation of the LLCs and every party would sign the LLC together. Each party will know the creditworthiness of the parties when the entity is put into place.

CHAIR SEEKINS added under Section 2.9 the obligation is there for the producers and the State for the performance of the entity regardless.

1:44:06 PM

CHAIR SEEKINS suggested the committee discuss the dispute resolution process.

SENATOR CON BUNDE said his question centered on the considerable dialogue the committee has heard about the arbitration process and dispute resolution. To oversimplify, Alaska has the arbitration ability but that ability is so difficult to use that the State is almost powerless in resolving disputes. Integral to the process is the definition of what is diligent. He questioned how the State would be able to determine when a lack of diligence occurred.

MR. CLARK interjected that during the course of negotiating the contract the State assured that there was a dispute resolution clause.

MR. LOEFFLER said he wanted to make very clear to the committee that there is a general dispute resolution process that covers work commitments and any other dispute such as a PILT dispute. The work commitment diligence standard applies all the way to project sanction, he stated. Until project sanction, decisions by the participants are subject to the diligence standard. Point number one is that the termination clause for work commitments and the diligence standard apply to project sanction.

The second point is that work commitments and termination was a big part of the discussion and it is a balance. Terminating the contract is a serious step that should be a clear decision. It is important that the tribunal make a decisive decision as to whether the contract should be terminated. Instead of the term "burden of proof" they settled on "clear and convincing" because they wanted the decision to be clear and convincing.

1:51:31 PM

MR. LOEFFLER continued if a termination action were to be brought the State would not be looking at a case where they want discovery. The State would have been a participant through the LLC all along the way through the actions or inactions that would cause a termination action to be brought. The State would be "inside the fence" and would have questioned that behavior far before coming to a situation of termination.

A number of the things that are cited as affecting the burden of proof, such as not entering into a commercial arrangement with another party and not settling a dispute, may be adversely affected by factors such as the U.S. regulatory process. Those

things would be taken into consideration by a tribunal. In The Wall Street Journal today there is a story about a Chevron L&G project in Australia where a decision by a regulatory agency denied the permits because of environmental concern. "These things happen and it's not a failure of diligence when the regulatory process doesn't go perfectly," he stated.

[1:54:37 PM](#)

MR. LOEFFLER continued the most obvious circumstance where the State would see the project subject to termination would be where no activity is happening inside the LLC to further the project along or where the pace of spending becomes minimal. That would be all the proof needed to bring the termination clause about.

[1:56:26 PM](#)

MR. VAN TUYL added the definition of diligence under the contract is "advancing the project as diligently as prudent under the circumstances." He noted that Mr. Loeffler touched on some of the qualifications that a tribunal might or might not consider in the case of a dispute involving termination. Previous testimony brought attention to the phrase, "errors in judgment" yet it is very easy to play Monday morning quarterback and second-guess actions taken. In even the best of companies, the most diligent operators make errors in judgment and that does not necessarily constitute a lack of diligence. For example, the LLC might choose to source a turban driver from a vendor that has state of the art technology reported to lower the cost of the project. The vendor might have some material delivery problems that the LLC was not aware of and in retrospect someone could pinpoint that decision as a mistake. That may well be an error in judgment but not necessarily a lack of diligence in advancing the project, he said.

[1:59:40 PM](#)

MR. HARPER said in discussing "clear and convincing evidence" pre-sanction termination is a right and a remedy. Post-sanction once construction begins is another thing so it is important to divide the two periods. He suggested dividing the two in terms of discovery and deposition issues. In his experience, "clear and convincing" is a standard that might be applied in cases of determining fraud or in assessing punitive damages. He said he is not accustomed to seeing it applied as a standard throughout a contract. He asked Mr. Loeffler to comment on that idea. He asked whether it was the agreement that "errors in judgment" do not include negligence and gross negligence.

[2:01:22 PM](#)

MR. LOEFFLER responded dispute resolution covers more than just the development of the project. The standard "clear and convincing evidence" was negotiated into the contract simply because the State wanted to be in the position where there was an easy burden to meet.

MR. HARPER said he struggles with that because "clear and convincing" seems to be a standard to apply throughout the term of the contract.

MR. LOEFFLER said that is not the way he understands it. "Clear and convincing" applies to termination through project sanction, he stated.

MR. CLARK interjected to say he was an attorney for a 50-year contract that was terminated - The Alaska Pulp Corporation in Sitka. He said in situations where the outcome is a serious consequence, the trier will take an extremely serious approach. A tribunal would not simply go to a preponderance of evidence standard. In a situation prior to sanction, where the companies and the State have spent hundreds of millions of dollars, there would be a serious level of concern by the trier of fact.

[2:04:33 PM](#)

MR. HARPER opined he has personally never seen a situation where the standard and burdens of proof were altered based upon the size of the consequences of litigation. He asked Mr. Loeffler whether it was the party's view that negligence and gross negligence were separate and apart from errors in judgment or would negligence and gross negligence in judgment constitute errors in judgment.

MR. LOEFFLER responded in his view, an error in judgment was something far less than gross negligence and less than negligence.

[2:05:50 PM](#)

MR. VAN TUYL agreed with Mr. Loeffler and emphasized that the body understands the undertaking of getting the project to sanction. The commitment is up to \$1 billion dollars to advance the project to sanction.

MR. LOEFFLER added the "clear and convincing" standard is not applied to anything post-sanction. It only applies to work commitments and termination.

MR. SHEPLER referred to Section 5.5(b) and asked whether there was another provision in the contract that sets forth a different standard for post-sanction dispute resolution.

MR. LOEFFLER said no. The contract is silent on standards for any other dispute. That is common for arbitrations.

[2:07:51 PM](#)

MR. HARPER said earlier in the discussion it was pointed out that "diligence" means advancing the project. However, "project" as defined is something that can be amended as many times as the parties so desire. So the term "project" as it is used is different than the project overview. He asked Mr. Loeffler to comment on his view of the amendment, the extent that the project might be amended, and the number of times it might be amended.

MR. LOEFFLER responded that was discussed in length during the negotiation of the work commitment clause, including whether the State wanted a specific approval right on each time it is amended. Essentially, if the State objects to any changes, such as the project plan stating that work on the pipeline would begin in the year 2020, the State would immediately bring action for termination for lack of diligence if that were the nature of the amendment. In the matter of changing the size of the pipe, the State would certainly want to know the reasons why but that situation wouldn't amount to a failure of diligence.

MR. CLARK added they have a summary of the qualified plan that is an attachment to the contract and they are working on the inside. The State is in the LLC and is right on top of any changes. The State intends to very clearly understand the reason for any amendments to the qualified project plan. That plan, and any changes, will be made public annually as well.

[2:11:03 PM](#)

MR. VAN TUYL added the qualified project plan or project summary is located on the State's website as it has been for two years. He offered to provide a copy to committee members.

[2:12:23 PM](#)

MR. BARNES said he could not find it on the website. He asked whether the qualified project plan was an attachment to the contract or whether it was the summary that would be the attachment to the contract.

MR. VAN TUYL replied neither will be an attachment to the contract. The project summary will be an excerpt of the qualified project plan. The project summary will be made publicly available and updated annually.

MR. SHEPLER referred to Mr. Loeffler's example of if the qualified project plan changed to a 2025 start date, where the State would immediately begin termination procedures. He said his concern was, to use a phrase of Dr. van Muer's, the risk of "being nibbled to death" or a cumulative affect of delaying the project. He asked whether it would be better to give the State the right to consent to material changes.

[2:14:29 PM](#)

MR. LOEFFLER said there is nothing that precludes the State from doing that. However, if the requirement for approval of material change is added, there will be disputes over what is material or substantial. Also there is a potential for the State to threaten to deny approval without some kind of continual renegotiation of the contract each time.

MR. SHEPLER expressed concern that by relying on the termination right it puts the State behind the eight ball as opposed to having to consent as the changes occur.

MR. LOEFFLER said that statement overlooks the fact that the State is a 20 percent participant inside the LLC. If the representatives are doing their job, there should never be a circumstance arise that would lead to consideration of termination.

[2:17:19 PM](#)

MR. CLARK added that if the case is a serious issue, the State could always file a dispute.

MR. LOEFFLER said at one point there was a proposal that the State, if it brought a termination case and lost, would have a required time delay before it could bring another termination clause. That was ultimately rejected.

MR. VAN TUYL said in a sense he feels this is the wrong conversation to have. BP Alaska is in the business of bringing energy to markets and of developing big projects. BP Alaska intends to advance the project. He reminded the committee that they spent two years negotiating a fiscal contract with the State of Alaska. The terms of the contract allow sufficient incentive and sufficient motivation to make the project happen.

The contract is structured to align common interests of the parties. BP Alaska is motivated commercially in every way.

MR. CLARK asked Chair Seekins whether the committee could have Ken Griffin discuss the practicality of the project management.

[2:21:18 PM](#)

KEN GRIFFIN, Deputy Commissioner, Department of Natural Resources (DNR), noted that over his 25-year career in Alaska he has been involved in several major projects and that is the perspective he brings to the committee. He agreed with Mr. Van Tuyl that the committee was having the wrong conversation. "The bottom line is you cannot fake diligence in a project of this nature," he stated. The project will start with a planning phase and will move to permitting, open season and engineering design. Through each step there will need to be a dedicated organization, authorities and accountabilities, multi-disciplinary demands, schedules and timelines, and continual measurement of deliverables. Not everything is going to fall in line and so there will have to be adjustments and corrections so that the project can move on.

Project plans that change as time progresses are expected. The contract provided for reality of the fact that participants cannot see the end of the project today. A project of this nature will have a strong control and reporting function. AK PipeCo will have access to all of that. There is a commitment in the project to get us to the open season and to permitting. Beyond that Article 5 brings the commitment to the project sanction position.

[2:25:23 PM](#)

MR. GRIFFIN concluded there is a thorough entity that will be extremely visible. It would be impossible to fake a project development phase for something of this size and nature.

CHAIR SEEKINS said the process of getting Alaska's gas to market began in the late 1970s with Governor Jay Hammond. He said many people in Alaska question whether the project is going to happen. There have been a lot of false starts and promises. People want assurance of intent to get the pipeline built.

[2:28:13 PM](#)

MR. CLARK said on May 24 the Administration announced that all four parties were willing to sign the contract. After the Legislature ratifies it, it will go into effect within 60 days. Within 90 days the planning process must be started and the

parties have to start spending money. One strategy of the State is to get the companies to spend enough money on the front end that they would not be able to turn their backs on the project.

CHAIR SEEKINS called a brief at ease at [2:31:00 PM](#).

[2:52:29 PM](#)

CHAIR SEEKINS called the meeting back to order. He asked Wendy King to speak about work commitment.

MS. KING said she wanted to highlight what project sanction means. The activities that will be pursued under the diligence standard are conducting an open season, preparing and filing applications, supporting applications during the two-year process. These are all highly transparent work activities. The Canadian government and the State of Alaska will be working with the companies during this time. The first version of the project summary was posted on the website in May and that summary includes a number of items, such as the project overview, the description of the work accomplished, the project schedule, the proposed development activities and the description of the expenditures and programs in Article 6.4. Everyone in the nation will be able to see how the project is advancing. She emphasized that this project will draw national attention. ConocoPhillips is excited about this project and committed to it, she stated.

[2:55:59 PM](#)

MS. KING continued project sanction is the time when ConocoPhillips would be able to book the reserves as proved reserves with the FCC and they will be working to advance the contract toward that point. "This contract creates a unique and unprecedented partnership," she said. It creates alignment so that whatever the current price of gas is, it affects all partners directionally the same. She added ConocoPhillips is excited to be able to continue to explore for new gas in Alaska.

[2:57:31 PM](#)

MR. MASSEY addressed the question of whether the oil companies were committed to the project. ExxonMobil has every intention to diligently advance this project, he stated. Once the contract is available to sign they will sign it and then advance to the work commitment stage. The oil companies have spent \$125 million dollars since 2001 studying the development of the case. Execution of the business plan is ready to go. They have spent almost three years negotiating a fiscal contract with the State. "No other party besides the producers have invested the time and effort both financial and technical in an effort to

commercialize this gas," he stated. He assured the committee that the oil companies were committed to the project.

[2:59:42 PM](#)

MR. MASSEY continued within 90 days of contract execution the producers must begin project planning. He listed the activities stated in the project summary that they are required to do. The obligations to progress the activities are so firm that they are required to continue the work even in the face of a judicial challenge. He assured the committee that the producers were committed to the project.

[3:02:24 PM](#)

MR. HARPER surmised that Alaska would be competing with ConocoPhillips, ExxonMobil, and BP Alaska as marketer and capacity holder in the financial and derivative markets. He asked Ms. King to comment on how that fact would affect the "alignment" or relationship of the four parties.

[3:03:14 PM](#)

MR. CLARK commented that sounded like a new topic. He offered to provide handouts of the qualified project summary to committee members. The handout included a Gantt chart of the initial work plan.

MR. SHEPLER informed the committee that the summary is in the draft findings. He asked for a copy of the full-qualified project plan.

MR. GRIFFIN said the qualified project plan is one document in the application that the producers filed. The producers application is on the website and the qualified project plan is part of that. It has not been updated. One section of Article 5 is the qualified project plan and the next section is the project summary, he stated. That project summary is updated on an annual basis and is public information. The handout that was passed out is the project summary.

CHAIR SEEKINS informed the committee they were still discussing dispute resolution as to the work commitments.

[3:05:39 PM](#)

SENATOR ELTON referred to the dispute resolution and said the draft contract defines dispute as "a dispute matter controversy or claim between the State and a participant arising out of or relating to any of this contract's articles or exhibits including it's interpretation, construction, performance

enforcement, privileges, rights or obligations." He said the words he wanted to focus on for his question are the words "between the State and a participant." The way he reads that definition then the Articles 26, 27, 28 and Exhibit C would refer only to a dispute between the State and a participant. The way the definition reads those articles may not cover a dispute between ConocoPhillips and ExxonMobil. He asked whether his interpretation was correct.

MR. LOEFFLER replied a dispute between the State and the three other parties is an eligible dispute. A dispute among the three other parties is not covered by the dispute resolution and the State would not be a part of it.

SENATOR ELTON said that seems as if the contract puts the State at an entirely different level than the other three parties. He said it was curious that the limitation of arbitration was set up only for the State.

MR. LOEFFLER replied the fiscal contract is the contract between the State and the three companies. The dispute resolution is intended to cover that. In the LLC agreements, each LLC agreements will have dispute resolution clauses. Since those have not been seen yet, he could not comment as to how they would cover those types of disputes.

[3:08:58 PM](#)

SENATOR ELTON reiterated his concern that the State seemed limited on how to resolve disputes with the three companies.

MR. LOEFFLER disagreed. He said, "The nature of the disputes under the contract, given how the clauses are set up, given the structure of the contract, would be between the State and one or more of the participants of the contract."

[3:09:46 PM](#)

MR. MASSEY added they went through great pains in drafting the contract such that it had defined obligations between the State and the participants. It does not define obligations between the producers. He agreed with Mr. Loeffler that the obligations between the producers would be defined in the LLC agreements.

MR. CLARK referred to the Stranded Gas Development Act (SGDA) and said that is how the process is directed to be. The fiscal contract is to be entered between the State and the applicant. The reason for that is it ties into the whole underlying fiscal

plan. It defines the agreements between the parties under Article 9, Section 4 of the Alaska State Constitution.

3:11:35 PM

MS. KING added the dispute resolution provisions were written between the State and a participant and the obligations were clearly written. With respect to each individual LLC, there will be dispute resolution provisions within that. Some of those provisions are already written because the relationship at Prudhoe Bay, for example, is an established relationship between the working interest owners in that asset.

3:12:36 PM

MR. LOEFFLER noted page 1 of the contract says, "The Alaska Stranded Gas fiscal contract is entered into between the State of Alaska on the one part and BP, ConocoPhillips and ExxonMobil production on the other part," and so that clearly reflects the relationship as intended for the fiscal contract.

MR. BARNES said he was struggling with how the dispute resolution mechanism would work.

MR. LOEFFLER responded on a conceptual level; the rights, duties and obligations of the fiscal contract are intended to be set up to be between the State and all of the participants. He committed to check on the definition of "participant." A dispute under the LLC agreement would be handled under the mechanism set up with the LLC agreement. He asked Mr. Barnes to repeat the question.

MR. BARNES said:

As parties are added and they become participants, either in the form of assignee or capacity holder, how does that interact with the application of the definition of dispute and then the dispute resolution provision?"

MR. LOEFFLER responded if the genesis of the dispute is the fiscal contract, it's handled under the dispute resolution mechanism of the fiscal contract. If a dispute arises under the LLC agreement then it's handled under that mechanism.

3:16:40 PM

CHAIR SEEKINS clarified that "participant" means BP, ExxonMobil, ConocoPhillips, assignees, or any other person added under Article 31 excluding the State and it's affiliates except that the State may hold an interest in a participant.

MR. LOEFFLER agreed with that summarization.

CHAIR SEEKINS asserted the committee should see the LLC template before they could examine the issue any further.

[3:18:16 PM](#)

CHAIR SEEKINS asked whether the committee and its consultants were comfortable in their understanding of the dispute resolution process between the State and the participants.

MR. HARPER said he had a point on topic. The committee has discussed the very serious limitations on discovery and depositions in all matters except PPT/PILT. It has been suggested that the biggest dispute that might arise under the contract would be in PPT/PILT. He asked the reason there are no limitations on discovery and depositions for PPT/PILT and asked the reason for the distinction. He surmised that was because the State would have a lot of documents and witnesses that would need to be addressed. Other disputes within operations would have a very serious limitation on discovery. Again, he asked the practical impacts on the nature of dispute with PPT/PILT as opposed with construction and other disputes.

MR. LOEFFLER explained disputes about construction and operations would occur under other agreements and since those agreements have yet to be seen, it is impossible to address whether there are limitations of discovery.

MR. HARPER posed a hypothetical situation where BP as the operator simply failed to construct the project and asked whether that would fall under the LLC agreement or the SGDA contract.

[3:20:57 PM](#)

MR. LOEFFLER clarified that depended on the timeline. If that were to happen before project sanction, it would be under the termination clause pertaining to work commitments. It would also be handled under the LLC agreement mechanism of dispute resolution.

MR. HARPER asked whether failure to act diligently to get to project sanction would be a dispute subject to arbitration and subject to the serious limitations on discovery and deposition.

MR. LOEFFLER replied he just stated the opposite.

[3:22:20 PM](#)

MR. HARPER asked Mr. Loeffler whether it was his position that if the participants failed to diligently pursue the project that instance would not subject to serious limitations on discovery and deposition.

MR. LOEFFLER reiterated that he had just stated the opposite. The failure to diligently pursue the project up to project sanction is a dispute that is covered by the work commitments clause.

MR. HARPER countered that situation would be subject to very significant restrictions on deposition of discovery. He asked the practicalities that led to that particular structure in the contract.

MR. LOEFFLER said he gave a quite complete answer to that before lunch. He offered to repeat it:

Under a termination for failure of diligence, we're going into that process with the understanding, the knowledge we've gained from being a participant, in the LLC. So, it's not that we're an outsider as is the usual case; we're an insider and we expect to have our case together what we know. We'll see the documents inside the LLC. But beyond that, if we should need discovery, discovery is graduated to the size of the dispute and on larger disputes, not talking about PPT/PILT, we have some discovery rights and we can certainly ask for more discovery under the general standard of the clause.

MR. HARPER said, "I still don't understand the distinction why would one blow the doors open on discovery and depositions in PPT/PILT and not on the other side. Wouldn't you be an insider on PPT/PILT the same way?"

MR. LOEFFLER responded not in the same way.

MR. CLARK advised Chair Seekins that Mr. Spiliotes could clarify the point.

[3:25:02 PM](#)

MR. SPILIOTES said he was not prepared to speak on that point but would like to speak on another point.

CHAIR SEEKINS asked Mr. Spiliotes to respond to the question regarding the dispute resolution process.

MR. SPILIOTES advised the LLC would have a contract with an affiliate of one of the members of the LLC, such as one of the producers. Once the LLC becomes a party to the fiscal contract, the LLC is the vehicle by which the producer's subsidiaries on the upstream side have signed the fiscal contract. That essentially implements their obligations so the producer's pipeline affiliates would own the interest in the LLC along with the State. That LLC will be the one that has to implement the obligations under the fiscal contract and if they don't, then that dispute is resolved under the fiscal contract. The dispute resolution under the LLC is solely related to the relations among the members. The LLC is responsible under the fiscal contract for the performance of the operator.

[3:27:23 PM](#)

MR. HARPER said it was his understanding that there was a different set of subsidiaries in the LLC than the subsidiaries in the Stranded Gas Contract. He asked how one set of subsidiaries that is legally and distinctly different could be intertwined.

MR. SPILIOTES said that question relates to how the different pieces would be coordinated. One thing they talked about in the fiscal interest finding was the need for coordination among all the different entities. The sanction under the fiscal contract is directed at the upstream producer subsidiaries so they lose fiscal certainty if their pipeline affiliates don't cause the LLC to meet the work commitments, he stated.

MR. HARPER said he does not debate that but expressed concern that he has not heard anything about coordinating the legal relationships between the various producer subsidiaries.

[3:28:43 PM](#)

MR. SPILIOTES said the coordination is if they do not cause their pipeline subsidiaries to deliver then they lose fiscal certainty.

MR. VAN TUYL interjected the question was addressed earlier in the contract. In Article 2.9 there is a provision that states each of the parties are obligated to compel its project entities to perform. If they don't perform, the obligation falls on the producers.

MR. HARPER stated he was talking about dispute resolution and satisfying concerns over discovery.

[3:29:47 PM](#)

CHAIR SEEKINS asked Mr. Clark to speak on limitations of discovery that are imposed in superior court in the State of Alaska versus an arbitration process.

MR. CLARK replied there would be a scheduling order through the court for the depositions. The parties are normally able to stipulate but if for some reason they cannot they would go back to court. The courts routinely provide more discovery and more opportunities for discovery to the parties.

[3:31:37 PM](#)

MR. LOEFFLER added the Alaska Rule of Civil Procedure (38) limits the maximum number of depositions to three. Rule 30(d) imposes a six-hour limit on depositions of experts.

CHAIR SEEKINS said that lines up with his experience in the case of discovery. However, in the case where millions of dollars are concerned, he wondered how that would "line up."

[3:34:11 PM](#)

MR. HARPER apologized that perhaps his question was confusing. He said he was simply contrasting what was called for in non-PPT/PILT situations and wondered the reason there were no limitations on discovery in PPT/PILT situations.

CHAIR SEEKINS agreed and asked whether anyone could explain "what would be, under arbitration, the limitations on discovery that would be normally opposed on those on which we have not established - any limitations in the contract."

[3:35:19 PM](#)

MR. HARPER did not understand the question.

CHAIR SEEKINS rephrased the question. "What would the normal limitations be by an arbitration panel to discovery, since there are none and we've said in this arbitration situation on PPT/PILT there are no limitations on discovery? What would the arbitration panel normally impose?"

MR. HARPER said that would depend on the circumstances. Normally when the stakes are very large, jurists are reluctant to inhibit discovery and depositions unless it becomes clearly abusive.

[3:36:21 PM](#)

MR. LOEFFLER advised the committee he would review the rule overnight. In large disputes there is a tendency to allow free discovery and for the parties being "discovered against" there is a tendency to allow filing of protective orders. The same thing would happen under this contract.

[3:37:47 PM](#)

CHAIR SEEKINS opined the burden of discovery is sometimes meant to be oppressive enough to compel someone to use a less costly dispute resolution process.

MR. LOEFFLER agreed it sometimes does have that effect.

MR. HARPER asked whether, in a multi-party dispute, would the State be limited to two oral depositions.

MR. LOEFFLER clarified in a multi-party dispute, each side would be entitled to no less than two.

[3:40:15 PM](#)

CHAIR SEEKINS advised the committee there was a Senate floor session scheduled for 4 p.m.

REPRESENTATIVE JOHN COGHILL asked the reason the State would take its gas in-kind.

SENATOR BUNDE said he would also like to know the reason the State is required to have an equity position.

CHAIR SEEKINS advised committee members and the participants that the previous questions would be contemplated over the evening and would be addressed at the following meeting.

CHAIR SEEKINS adjourned the meeting at [3:42:56 PM](#).