

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

April 19, 2007

1:06 p.m.

MEMBERS PRESENT

Representative Carl Gatto, Co-Chair
Representative Craig Johnson, Co-Chair
Representative Vic Kohring
Representative Bob Roses
Representative Paul Seaton
Representative Peggy Wilson
Representative Bryce Edgmon
Representative David Guttenberg
Representative Scott Kawasaki

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Representative Max Gruenberg
Representative Anna Fairclough
Representative Mike Doogan
Senator Lyda Green

COMMITTEE CALENDAR

HOUSE BILL NO. 177

"An Act relating to the Alaska Gasline Inducement Act; establishing the Alaska Gasline Inducement Act matching contribution fund; providing for an Alaska Gasline Inducement Act coordinator; making conforming amendments; and providing for an effective date."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 177

SHORT TITLE: NATURAL GAS PIPELINE PROJECT

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

| | | |
|----------|-----|---------------------------------|
| 03/05/07 | (H) | READ THE FIRST TIME - REFERRALS |
| 03/05/07 | (H) | O&G, RES, FIN |

03/06/07 (H) O&G AT 3:00 PM BARNES 124
03/06/07 (H) -- MEETING CANCELED --
03/08/07 (H) O&G AT 3:00 PM BARNES 124
03/08/07 (H) -- MEETING CANCELED --
03/13/07 (H) O&G AT 3:30 PM HOUSE FINANCE 519
03/13/07 (H) Heard & Held
03/13/07 (H) MINUTE(O&G)
03/15/07 (H) O&G AT 3:00 PM BARNES 124
03/15/07 (H) Heard & Held
03/15/07 (H) MINUTE(O&G)
03/19/07 (H) O&G AT 8:30 AM CAPITOL 106
03/19/07 (H) Heard & Held
03/19/07 (H) MINUTE(O&G)
03/20/07 (H) O&G AT 3:00 PM BARNES 124
03/20/07 (H) Heard & Held
03/20/07 (H) MINUTE(O&G)
03/21/07 (H) O&G AT 5:30 PM SENATE FINANCE 532
03/21/07 (H) Heard & Held
03/21/07 (H) MINUTE(O&G)
03/22/07 (H) O&G AT 3:00 PM BARNES 124
03/22/07 (H) Heard & Held
03/22/07 (H) MINUTE(O&G)
03/23/07 (H) O&G AT 8:30 AM CAPITOL 106
03/23/07 (H) Heard & Held
03/23/07 (H) MINUTE(O&G)
03/24/07 (H) O&G AT 1:00 PM SENATE FINANCE 532
03/24/07 (H) -- Public Testimony --
03/26/07 (H) O&G AT 8:30 AM CAPITOL 106
03/26/07 (H) Heard & Held
03/26/07 (H) MINUTE(O&G)
03/27/07 (H) O&G AT 3:00 PM BARNES 124
03/28/07 (H) O&G AT 7:30 AM CAPITOL 106
03/28/07 (H) Heard & Held
03/28/07 (H) MINUTE(O&G)
03/28/07 (H) O&G AT 8:30 AM CAPITOL 106
03/28/07 (H) Heard & Held
03/28/07 (H) MINUTE(O&G)
03/29/07 (H) O&G AT 3:00 PM BARNES 124
03/29/07 (H) Heard & Held
03/29/07 (H) MINUTE(O&G)
03/30/07 (H) O&G AT 8:30 AM CAPITOL 106
03/30/07 (H) Heard & Held
03/30/07 (H) MINUTE(O&G)
03/31/07 (H) O&G AT 1:00 PM BARNES 124
03/31/07 (H) -- MEETING CANCELED --
04/02/07 (H) O&G AT 8:30 AM CAPITOL 106
04/02/07 (H) Heard & Held

04/02/07 (H) MINUTE(O&G)
 04/03/07 (H) O&G AT 3:00 PM BARNES 124
 04/03/07 (H) Moved CSHB 177(O&G) Out of Committee
 04/03/07 (H) MINUTE(O&G)
 04/04/07 (H) O&G RPT CS(O&G) NT 3DP 2NR 2AM
 04/04/07 (H) DP: RAMRAS, DOOGAN, OLSON
 04/04/07 (H) NR: SAMUELS, KAWASAKI
 04/04/07 (H) AM: DAHLSTROM, KOHRING
 04/04/07 (H) O&G AT 8:30 AM CAPITOL 106
 04/04/07 (H) -- MEETING CANCELED --
 04/05/07 (H) O&G AT 3:00 PM BARNES 124
 04/05/07 (H) -- MEETING CANCELED --
 04/10/07 (H) RES AT 1:00 PM BARNES 124
 04/10/07 (H) Heard & Held
 04/10/07 (H) MINUTE(RES)
 04/11/07 (H) RES AT 1:00 PM BARNES 124
 04/11/07 (H) Heard & Held
 04/11/07 (H) MINUTE(RES)
 04/12/07 (H) RES AT 1:00 PM BARNES 124
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 04/16/07 (H) RES AT 1:00 PM BARNES 124
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 04/17/07 (H) RES AT 1:00 PM BARNES 124
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 04/18/07 (H) RES AT 1:00 PM BARNES 124
 04/18/07 (H) Heard & Held
 04/18/07 (H) MINUTE(RES)
 04/19/07 (H) RES AT 1:00 PM BARNES 124

WITNESS REGISTER

SENATOR HOLLIS FRENCH

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Presented information on the Alaska State Senate's version of the Alaska Gasline Inducement Act and answered questions.

SENATOR LESIL MCGUIRE

Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented information on the Alaska State Senate's version of the Alaska Gasline Inducement Act and answered questions.

DON BULLOCK, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Answered questions and explained possible legal issues relating to the Alaska Gasline Inducement Act.

SENATOR BILL WIELECHOWSKI

Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Answered questions on the Alaska Senate's version of the Alaska Gasline Inducement Act.

LARRY OSTROVSKY, Chief Assistant Attorney General
Statewide Section Supervisor
Oil, Gas & Mining Section
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: Explained possible legal issues associated with HB 177.

ACTION NARRATIVE

CO-CHAIR CARL GATTO called the House Resources Standing Committee meeting to order at [1:06:17 PM](#). Representatives Gatto, Johnson, Seaton, Roses, Edgmon, Kawasaki, Kohring, and Wilson were present at the call to order. Representative Guttenberg arrived as the meeting was in progress. Representatives Gruenberg, Fairclough, and Doogan, and Senator Green were also present.

HB 177-NATURAL GAS PIPELINE PROJECT

[Contains discussion of SB 104.]

[1:06:31 PM](#)

CO-CHAIR GATTO announced that the only order of business would be HOUSE BILL NO. 177, "An Act relating to the Alaska Gasline

Inducement Act; establishing the Alaska Gasline Inducement Act matching contribution fund; providing for an Alaska Gasline Inducement Act coordinator; making conforming amendments; and providing for an effective date." [Before the committee was CSHB 177(O&G).]

[1:07:18 PM](#)

CO-CHAIR GATTO explained that the goal of today's meeting is to compare and understand the differences between the House and Senate versions of HB 177, the Alaska Gasline Inducement Act (AGIA).

[1:09:35 PM](#)

SENATOR HOLLIS FRENCH, Alaska State Legislature, expressed support for the decision to request members of the Alaska State Senate to address the members of the Alaska State House regarding this very important bill at this stage in the process. He first addressed the provision in AGIA that allows for a 10-year freeze on gas production taxes. He explained that the basic structure is set forth on page 22, lines 9 through 16 of committee substitute (CS) for SB 104 (JUD), 25-GS1060\0, Bullock, 4/18/07, (Version 0). The 10-year limitation to the exemption is described on page 22, line 17. As proposed in AGIA, the tax rate is set at the beginning of open season, and applies for a 10 year period beginning at the time the pipeline commences operations, he said.

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SENATOR FRENCH referred to the Alaska State Constitution, Article IX, section 1 which reads:

The power of taxation shall never be surrendered.
This power shall not be suspended or contracted away,
except as provided in this article.

SENATOR FRENCH told the committee this section was included in the state's constitution because of a series of tax breaks that had been granted by western state legislatures to banks and railroads in the late 1880s as a way to attract development. When those legislatures tried to remove the tax limitations, they were prevented from doing so due to provisions in the federal constitution disallowing impairment of contracts. As a result, the tax breaks became permanent, he indicated. Based on

this, the constitutions of prior states were amended and the constitutions of new states were drafted to prohibit the legislature from surrendering taxation authority. He opined that there is probably no state in the union where it is more important to have this constitutional protection than Alaska because there is no state in the union that is so dependent on one industry.

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CO-CHAIR GATTO asked whether the term sovereign is essential to a determination of this issue.

SENATOR FRENCH suggested that the drafters of the Alaska Constitution also recognized the need to entice new industry to the state. Therefore, they added the modifier "except as provided in this article" to Article IX, section 1 of the Alaska State Constitution. He explained that Article IX, section 4 provides the constitutional authority for commonly known tax exemptions, such as the senior property tax exemption and provisions which exempt religious property from taxation. He referred to the "crucial third sentence" which reads:

Other exemptions of like or different kind may be granted by general law.

SENATOR FRENCH characterized the aforementioned language as the crux of the provision authorizing the 10-year production tax exemption.

CO-CHAIR GATTO suggested that the words "like or different" comprise 100 percent of everything.

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SENATOR FRENCH agreed that there is no getting around the fact that "this is as different as you can imagine." He stated that while the context of this section is clearly about property taxes, "different means different and there's no point in quibbling over it." He noted that any tax exemption must be done by general law and offered his belief that "general law" means statute. He noted that statutes are subject to change anytime by the legislature. He set forth that one must first consider if the tax freeze is necessary to build the gas pipeline. The second consideration is whether the tax limitation can be put into law, and he offered that it should be

done by statute, since statutory law is subject to change by the legislature.

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SENATOR LESIL MCGUIRE, Alaska State Legislature, conveyed that during the Alaska Constitutional Convention the delegates discussed the Industrial Incentives Act, which she said was "never challenged." Therefore, it may be hard to determine how the current discussions "will play out" in general law and whether "we can carve out these incentives," she opined. She offered her belief that any tax exemption must be one of "general applicability" and cannot be crafted for one group, or a "group out of a group." Rather, it must apply to an industry or a group of individuals, she opined.

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CO-CHAIR GATTO referred to a prior situation where the legislature modified the law to allow a person to sit on a former governor's cabinet. He offered that this had been a very specific law directed towards "one post in the cabinet."

SENATOR MCGUIRE recalled that it may have been a change in law to allow the governor to appoint special assistants and applied to more than one person.

SENATOR MCGUIRE addressed the limitation of one legislature's ability to bind a future legislature. She threw out for committee consideration the issue of how past legislative actions can affect a future legislature's ability to act in a manner contrary to past legislative actions.

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SENATOR FRENCH opined that the current policy dispute over the proposed production tax exemption is whether the 10-year tax exemption should be contractual. The current Senate Judiciary Committee version of AGIA does not have the tax exemption as a contractual provision because legal counsel has advised that the tax exemption is more likely to be constitutional if not contractual, he explained. Other persons may present a different perspective, he implied. He noted that prior legal research on the constitutionality of a "general law tax freeze" also indicated that a contractual tax freeze would likely be unconstitutional unless the contract was subject to change.

[1:24:50 PM](#)

REPRESENTATIVE SEATON asked whether it was possible to change the gas production tax from an annual tax to a 10-year tax with annualized payments and thereby avoid constitutional issues. He noted that the petroleum profits tax (PPT) is an annual tax, with monthly estimated payments.

SENATOR FRENCH opined it may be possible to structure the tax as suggested, but said the real issue is whether the tax is subject to change.

SENATOR MCGUIRE opined that the tax, however structured, could perhaps be crafted to apply to initial shippers as long as it applied to all initial shippers. She offered that the type of fiscal certainty desired by some parties may unduly restrict future legislative actions. She reminded the committee that there is a constitutional restriction against dedicated funds, therefore the legislature can only recommend that funds be directed towards a certain cause, but cannot mandate it.

SENATOR FRENCH opined that the most "legal way" to do this is to amend the constitution, but he opined that a constitutional amendment was politically impossible.

CO-CHAIR GATTO stated he agreed that "we are not going to change the constitution because that is the way it is done all over the country," and indeed all over the world - "with no certainty."

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SENATOR FRENCH said he agreed with the aforementioned comment. He said there is also an issue related to the separation of powers between the legislative and executive branch regarding the approval or disapproval of the licensee by the legislature. He explained that the Senate Judiciary Committee's current approach to this issue is in AS 43.90.190 and provides that the legislature shall propose a bill, rather than a resolution, to approve the recommended licensee as a bill is more binding. He explained that the Senate Judiciary's version of AGIA is drafted "in the affirmative" to provide for approval of the proposed license within a 60 day period. He said there is an issue as to whether it would be an intrusion on the power of the executive branch for the legislature to "step in and say we [the legislature] have a role in this." He opined that it is "probably not" an intrusion on the executive branch.

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SENATOR MCGUIRE opined that there is not only a constitutional consideration here, but also practical and political considerations. She said that "in our committee" there is no question that the members believe "it is probably not constitutional for certain elements of the contract." She also opined that the executive branch is limited in its ability to enter into contracts that are "fundamentally legislative in nature, - that require the taxation authority of our body." She offered her opinion that it is preferable to keep the legislative approval section in AGIA so as to "do it right" and so as to increase the legislature's public accountability.

CO-CHAIR GATTO opined that the idea of having the legislature approve the contract is the preferable approach.

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SENATOR MCGUIRE told the committee that state legal counsel has cautioned members to be ever mindful of the precedents that they set in AGIA and to not lose sight of the legislature's equal or co-equal role in the operation of government. Therefore, to not require legislative approval of the proposed licensee may cast future doubt on the legislature's rightful role in a contract that incorporates fiscal terms, she opined. Furthermore, if the legislature does provide a 10-year "lock in of rates" for the gas pipeline, it is likely that the legislature will receive requests for similar incentives from other industry groups, she opined.

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REPRESENTATIVE GUTTENBERG asked whether parties will be entitled to stop moving forward if there is litigation regarding the constitutionality of the 10-year lock-in of production tax rates.

SENATOR FRENCH replied that AGIA as submitted by the executive branch has a severability clause so that if one part of the bill is unconstitutional, the rest of AGIA still goes into effect. He said the prior administration's proposed Stranded Gas Development Act (SGDA) was drafted so that the entire process stopped if one part of the bill was found unconstitutional.

CO-CHAIR GATTO asked if a shorter tax exemption provision would be more likely to be legal.

SENATOR FRENCH replied no.

SENATOR MCGUIRE recalled that a point had been made by a prior witness that "the closer you had to a nexus in your rationale, the better you were on constitutional grounds." Under this approach, if one started the tax exemption "at first gas" for the initial risky 10 years of the pipeline, then the more likely it would be that the court would uphold the constitutionality of the tax incentive, she opined.

[1:38:20 PM](#)

CO-CHAIR JOHNSON asked who would have standing to challenge the tax incentive provision of AGIA.

SENATOR FRENCH replied that any state citizen would have standing to challenge the constitutionality of the tax incentive provision. He went on to say that legislative approval of the license may reduce the grounds for legal challenge except perhaps for "questions of constitutionality." He said this is important because under AGIA only one license will be issued, and if the award is based solely on the decisions of the commissioners [of the Department of Revenue and Department of Natural Resources], disgruntled applicants would have the ability to "do a full and thorough analysis" of the decision, first before the administration, and then before the court. However, he opined "that's not going to happen once we put our stamp of approval on it" because it is "just like a bill." If a bill is constitutional, the bill stays, he said. He said that the 60-day period for approval will provide an opportunity for disappointed licensee applicants to appear before the legislature and argue against the approval of the license.

SENATOR MCGUIRE responded to a query by indicating that a change in the CSSB 104 (JUD) had been made to section 5 to clarify that it is the intent of the legislature that the commissioners issue their first requests for license applications within 90 days after the effective date of AGIA.

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Representative Gruenberg asked how the timing provisions in AGIA for approval of the license would work in the event of a special session, and whether the legislature would have adequate time for review in the event of a special session.

SENATOR FRENCH replied that the issue has not yet been examined. He opined that the administration and the commissioners would likely carefully coordinate the issuance of the application with the possibility of a special session. He agreed that there may be 30 days between the call for a special session and the commencement of that session.

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REPRESENTATIVE GRUENBERG observed that there may be some tension between the eventual contractual language and the severability clause in AGIA.

SENATOR MCGUIRE agreed that there is an issue regarding a party's contractual position if based on a legislative incentive that ends up being disallowed after the party has entered the contract. She indicated that legal counsel would address this.

REPRESENTATIVE GRUENBERG agreed that the aforementioned point is the issue, but that he also questioned whether section 7 on severability makes it even more difficult for a party to "make that argument."

SENATOR MCGUIRE replied that this administration's intent for the severability clause is "exactly opposite of the former administration's ... it is to say that you will be bound by the terms." She noted that there is a process for abandonment of the project should it become uneconomic. A licensee could argue that the lack of fiscal certainty has made the project uneconomic, she said. At that point, the state and the licensee would invoke the provisions of AS 43.90.240 to determine if the project is uneconomic, and thus subject to abandonment.

REPRESENTATIVE GRUENBERG offered that there is "one avenue" for a licensee to escape the contract terms, and that is "the route of abandonment." He stated that it should be clear that the legal term abandonment is used in at least three other contexts: property, railroad, and infant abandonment. He offered that the definition in AGIA is unique and is the one that should apply.

[1:48:35 PM](#)

DON BULLOCK, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, reminded the committee that Article 2 of AGIA concerns the relationship between the state and licensee. Article 3 covers resource inducements and affects the resource producers, but is

really not an issue between the state and the licensee, he opined. He characterized the inducements "as a carrot" to get "people to commit their gas to the licensed project" during the initial open season. He said that loss of the license incentive does not necessarily have an effect on the licensed project, but may have an effect on the viability of the project and how the Federal Energy Regulatory Commission (FERC) would look at a "commitment that goes away because they feel that they lost their economic basis - for making that commitment." He responded to a comment by reiterating that the abandonment provision applies between the licensee and the state, not between the producers and their commitment to ship gas during that first binding open season, he said. Even if a producer is the licensee, the producer's obligations as a recipient of the inducements differ from its obligations as a licensee, he explained. He reiterated that abandonment is contingent on the project being found uneconomic and that there are enhanced standards relating to the term "uneconomic" in the Senate's version of the bill.

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SENATOR MCGUIRE opined that Representative Gruenberg is "exactly right." The method by which a controversy between the licensee and the state would be settled would be through the abandonment and arbitration process to determine whether the project is uneconomic, she said. She said the bill section on "fiscal certainty" was included to clarify that one of the elements necessary to make the project economic is the ability to get firm transportation (FT) commitments. She offered that a non-producer licensee could argue that the project has become uneconomic if the provision on fiscal certainty is ruled unconstitutional. She said that she believes the provisions in the bill on abandonment provide a way to resolve this potential issue in a fair way.

REPRESENTATIVE GRUENBERG asked whether a producer non-licensee could seek to use the abandonment process were the tax inducement provisions found unconstitutional.

SENATOR FRENCH replied no, that the commitment to ship gas is likely not effected by a change in the tax structure.

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MR. BULLOCK said that several different relationships are covered under AGIA, with a major portion of the bill covering

the relationship between the state and the licensee. The licensee is to pursue a pipeline project, but the project itself is not part of AGIA, he said. The licensee will seek FT commitments from shippers. The potential shippers will consider whether they can make money from the project, but those shippers will have a relationship with the licensee, not the state, he said. The incentives provided by the state are a factor in the project's economics, he said.

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CO-CHAIR GATTO asked whether an owner could maintain a legal action against a party who reneges on an FT commitment.

MR. BULLOCK noted that if there are not adequate FT commitments to finance the pipeline, then the parties may consider whether the project can be modified or whether there are grounds for abandonment of the project.

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SENATOR FRENCH noted that the abandonment provisions are the "circuit breaker" portions of the bill because in the abandonment situation the process stops. He set forth that under AGIA as currently structured, "any two arbitrators ... could essentially stop the gas pipeline." He indicated that it will be made clear "that there is a right of appeal from that decision," through judicial review will be under the "abuse of discretion" standard.

[1:57:22 PM](#)

REPRESENTATIVE SEATON referred to Version 0, page 3, lines 16-19, which state that the commissioners shall adopt administrative procedures for any protest and appeal. He contrasted this provision with the provision in Version 0, page 9, lines 11-13, whereby applicants must commit to waive their right to appeal the issuance of the license to another party and asked whether this provision applies to administrative or judicial appeals.

SENATOR FRENCH explained that the waiver in Version 0, page 9, lines 11-13 is an attempt to forestall "legal wrangling" in the event no license has been issued. He indicated there are legal issues regarding the extent to which appeals can be restricted.

REPRESENTATIVE SEATON sought to clarify whether the intent is to waive the right to appeal to a court, or to waive the right of a party to appeal under whatever administrative process is established by the commissioners as set forth in Version 0, page 3. He offered that it appears that under Version 0 an appeal process is established that cannot be used.

MR. BULLOCK said he was confused by the provisions regarding the waiver of appeals and suggested this area could use some clarification as to whether the waiver allows a judicial or administrative appeal. He noted that there may be a constitutional basis for appeal should there be an abuse of discretion by the commissioners when making the decision regarding license issuance.

SENATOR MCGUIRE said that the administrative procedures suggested in Version 0, page 3, cover the time period during which the commissioners will be soliciting for applications. However, the appeal waiver in page 9, subsection 16, covers the period after an applicant has decided to apply for the license. She reiterated that the appeal provisions cover an applicant's rights at the beginning of the process and their rights after the applicant has decided to submit an application.

[2:03:08 PM](#)

REPRESENTATIVE SEATON pointed out that the language on page 3 of Version 0 covers not only the solicitation of the license, but also the award of a license and he requested that the language be clarified to state whether the waiver applies to administrative and court appeals or just to court appeals.

SENATOR MCGUIRE stated that she is aware of the intent of the provision, and indicated that the language would be clarified "because they are different points in the process."

[2:04:41 PM](#)

SENATOR MCGUIRE said that modifications were being considered to the sections on vouchers and arbitration. She noted that the changes will require that Alaska law apply to any arbitration proceedings, and explained that Alaska contract law interpretation incorporates consideration of an implied covenant of good faith and fair dealing. She said an "abuse of discretion standard" will be added for the court to use for review. There will be further clarification of the term "uneconomic," she said. She explained that a licensee who

claimed the project was uneconomic must first try to modify the contract. Failing that, the licensee could then proceed to abandonment proceedings, she said. If the commissioners and the licensee agree that the project is uneconomic, then the project can be abandoned, she explained. If the parties do not agree that the project is uneconomic, then the parties can proceed to arbitration. The arbitrators must then use the criteria set forth in AGIA to determine if the project is uneconomic, she explained.

CO-CHAIR GATTO said he hoped to conform the House and Senate versions of AGIA as much as possible.

SENATOR MCGUIRE referred to Version O, page 18, line 6, and explained that the term "preponderance of evidence," was included as potentially fairer than the higher standard of "clear and convincing evidence." She also noted that there had been some controversy regarding whether the appointment of an AGIA coordinator should be subject to legislative confirmation, and indicated that this issue was still being considered.

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MR. BULLOCK explained that under the Alaska Natural Gas Pipeline Act of 2004, a pipeline coordinator was appointed by the President of the United States, with the advice and consent of the United States Senate. He said that provisions in the Alaska Constitution limit the positions that are subject to legislative confirmation and that these provisions have been "quite narrowly construed." He explained that one provision concerns commissioners and another refers to agencies such as the Regulatory Commission of Alaska (RCA), which have quasi-judiciary functions. He opined that the AGIA coordinator position does not seem to fall within those constitutional provisions, but based on his understanding of the duties of the AGIA commissioner, he indicated that appointment "would not rise to the level where the constitution would allow legislative confirmation." He noted that there is no prohibition against the governor voluntarily including the legislature in the appointment process, but opined that a separation of powers issue may arise if the legislature does not confirm the governor's choice for the AGIA coordinator. He offered that legal precedent supports the conclusion that there need not be legislative approval of any position lower than that of a commissioner.

[2:13:46 PM](#)

REPRESENTATIVE GUTTENBERG asked about commercial arbitration rules and Alaska arbitration proceedings. He noted that the House Special Committee on Oil and Gas version of AGIA refers to commercial arbitration rules.

SENATOR MCGUIRE opined that the commercial arbitration rules and the law of the state would likely work in concert.

REPRESENTATIVE GUTTENBERG said that CSHB 177(O&G) provides that in the event of a disagreement regarding whether the project is uneconomic, the "disagreement shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules." Version 0, page 17, line 23, refers to arbitration administered by the American Arbitration Association "under the laws of this state." He questioned whether the state has an adequate body of law in this area and what the standards are under commercial arbitration rules. He said he recalled testimony from last year that indicated some arbitration approaches provide advantages to certain parties.

SENATOR BILL WIELECHOWSKI, Alaska State Legislature, opined that it would be preferable to use Alaska law to the extent possible.

[2:16:25 PM](#)

REPRESENTATIVE GRUENBERG said that the American Arbitration Association has a set of commercial arbitration rules that parties can agree to abide by through contracts. He referred to AS 09.43.010-595, which is the Uniform Arbitration Act, and opined is the state law referred to. He expressed concern regarding use of the term "abuse of discretion," and noted that there are very narrow grounds which allow a court to vacate or modify an arbitration award. He indicated that AS 09.43.500(a) sets forth that arbitration awards can only be vacated if procured by corruption, fraud or other undue means, or if there was evidence of partiality, misconduct, corruption, or other factors affecting the integrity of the decision. He offered his belief that there is nothing in the Alaska arbitration statutes "approaching abuse of discretion" and that using this standard would be a major change in state law. He said that the term "abuse of discretion" does not reflect a uniform standard, but is interpreted differently depending on the area of law. He offered that in the event of an appeal, the meaning of the term "abuse of discretion" would likely be a main point on appeal.

MR. BULLOCK opined that the "abuse of discretion" standard is generally applicable in administrative appeals.

REPRESENTATIVE GRUENBERG offered his opinion that it is not that simple, and opined that courts give different degrees of deference to administrative agencies depending on the nature of the administrative decision. He characterized the determination of "abuse of discretion" as a very complex issue of appellate law.

2:20:49 PM

SENATOR WIELECHOWSKI said he argued against use of the term "abuse of discretion" because the term has varying meanings. He opined that the default provision should be the Alaska Uniform Arbitration Act, which sets a fairly high standard. He argued in favor of the term "under the laws of this state" in Version 0, page 17, line 23. He said that typically arbitrators will "apply any laws that they want," and opined that it is appropriate to indicate that Alaska law should apply.

CO-CHAIR GATTO observed that the pipeline may go through another country and asked whether the limitation to Alaska law could cause disputes.

MR. BULLOCK noted that the abandonment issue concerns only the state and the licensee, not other parties.

SENATOR MCGUIRE suggested that one approach may be to reference the Alaska statute governing the Uniform Arbitration Act.

REPRESENTATIVE ROSES recounted his experience with an arbitration proceeding in which the arbitrator used precedent from another jurisdiction rather than Alaska law. He recalled that neither side was satisfied with the decision.

REPRESENTATIVE GUTTENBERG asked what laws will apply to pipeline issues for the portions of the project outside of the United States.

2:25:16 PM

SENATOR WIELECHOWSKI replied that his understanding of AGIA is that the licensee will agree to abide by the terms of AGIA for the entire project. If there is a dispute regarding a portion of the project in Canada and it is addressed in AGIA, then it will be determined under the provisions of AGIA. If those

provisions call "for Alaska law," then that is the law that applies, he said.

SENATOR MCGUIRE opined that if AGIA is a contract, then some parties might argue that federal laws apply. If AGIA is a general law, then Alaska law applies.

MR. BULLOCK reiterated that the abandonment provisions only concern the relationship between the state and the licensee. He indicated that a determination that the project is uneconomic does not necessarily result in abandonment of the pipeline, but only the abandonment of the relationship between the state and the licensee. He opined that AGIA is to "get a project started," it is not to define what the project is.

SENATOR WIELECHOWSKI responded to a question by explaining that the bill had been amended to state that Alaska law applies throughout the entire AGIA process.

[2:28:43 PM](#)

CO-CHAIR GATTO asked for clarification as to whether Alaska law applies to AGIA, or whether AGIA determines that Alaska law applies to the contract.

SENATOR WIELECHOWSKI stated his understanding is that Alaska law applies to AGIA, and any disputes related to the contract or the bill will "be disposed of by a court of competent jurisdiction here in Alaska." He opined that issues related to Canadian regulatory laws will be "prosecuted in the Canadian courts."

[2:29:27 PM](#)

SENATOR MCGUIRE said this issue was still being considered by the Senate. She noted that Version 0, Section 6 concerns expedited consideration of court cases and sets forth that the legislative intent is for expedited consideration of cases concerning pipeline issues as allowed by the Alaska Rules of Court.

CO-CHAIR GATTO asked what authority would authorize a party to a contract to invoke expedited judicial review.

[2:31:03 PM](#)

SENATOR MCGUIRE stated it is a statement of intent, and indicated that there is a separation of powers issue which

restricts the ability of the legislature to direct other branches of government.

REPRESENTATIVE GRUENBERG suggested that the language of Version O, Section 6, be broadened to include challenges and interpretations of AGIA as matters that the legislature would like reviewed expeditiously.

SENATOR WIELECHOWSKI agreed that the aforementioned point is well taken. He stated that although Section 6 is not binding on the judicial branch, the courts generally attempt to expedite issues like this because "they understand the importance."

[2:33:22 PM](#)

REPRESENTATIVE GRUENBERG asked about the possibility of requiring that challenges to AGIA be filed within a certain time period and directly to the Alaska Supreme Court. He indicated that a similar approach was used during construction of the Trans-Alaska Pipeline System (TAPS).

[2:34:20 PM](#)

SENATOR WIELECHOWSKI replied that there is a section in Version O, section 420, page 24, which requires that constitutional challenges to AGIA be brought within 90 days after issuance of a license. He said there had been "quite a bit" of discussion about the possibility of granting original jurisdiction to the Alaska Supreme Court. He offered that if the goal is to expedite resolution of issues under AGIA, an appeal directly to the Alaska Supreme Court may not speed up the process as that Court may have to appoint a special master to hold a hearing on certain issues.

REPRESENTATIVE GRUENBERG suggested that a special master could be allowed to proceed under a different set of rules than the normal appellate rules so as to expedite proceedings on a challenge to AGIA.

SENATOR WIELECHOWSKI explained that a special master is someone selected by the Alaska Supreme Court to gather facts as directed by the court. He said special masters are often retired judges appointed to particular cases to help the Supreme Court, which is not bound by the special master's findings.

[2:37:16 PM](#)

REPRESENTATIVE SEATON opined that this committee may want to consider the voucher issue in its discussions of AGIA as a way to address approaches to avoid or address a failed open season.

[2:37:57 PM](#)

MR. BULLOCK explained that vouchers would allow a utility or other party interested in buying gas to commit to firm transportation (FT) capacity during the first binding open season. After they acquire capacity, they can apply to the commissioners for a voucher that describes the capacity that party has committed to. The holder of the voucher can then negotiate with the producers to enter a binding purchase agreement for gas produced on the North Slope. As part of the agreement, the voucher would be transferred to the producers so that the voucher-holder can claim the royalty and tax inducements, he explained. The goal is to broaden the potential parties at the first binding open season, he opined.

REPRESENTATIVE SEATON asked whether the voucher allows the purchaser of gas on the other end to control the inducements that the state would be offering to a shipper.

MR. BULLOCK stated he believes there is a requirement that the sale happen on the North Slope, before input into the pipeline. Otherwise, the gas producer that "doesn't commit" would not get the benefit of the inducements. The voucher provision allows another party to commit to capacity on the pipeline without having its own source of gas, he explained. That party then has to purchase gas to fulfill their commitment, and the voucher can be offered to the producer as part of the negotiation, he said.

[2:40:05 PM](#)

REPRESENTATIVE SEATON offered his belief that previously the upstream inducements were available only to a party with FT commitments. He asked whether a party that wants to sell gas but does not want to take on FT commitments can still receive inducements through the voucher system.

MR. BULLOCK explained that the voucher gives the resource inducement to a producer that did not bind themselves to capacity during the first open season.

[2:40:57 PM](#)

LARRY OSTROVSKY, Chief Assistant Attorney General, Statewide Section Supervisor, Oil, Gas & Mining Section, Department of Law (DOL) acknowledged that the producers have claimed that they need fiscal certainty to be able to enter FT commitments for a gas pipeline. He said that when considering AGIA, there was an attempt to accommodate those concerns within the bounds of constitutionality. He indicated that the provisions on fiscal certainty were crafted so as to be similar to the timing and language of the prior Industrial Incentive Act. He said that the provision was intended to be limited to gas production taxes and not to apply to a broad ranges of taxes as was done in the SGDA. He opined that "there is a pretty good likelihood" that the "provisions we put in would pass constitutional muster," and in any event there is a severability clause in AGIA so that the process could continue despite some uncertainty regarding the constitutionality of the fiscal certainty provisions.

[2:44:54 PM](#)

REPRESENTATIVE SEATON asked whether the administration's position is that a 10-year freeze on production taxes provides adequate fiscal certainty despite producer testimony that they require fiscal certainty as to all applicable taxes.

MR. OSTROVSKY said it is not surprising in a situation like this that any commercial party would desire the maximum degree of certainty possible. He indicated that the state understands the concern of the producers that even if one tax rate is frozen, another tax could still be raised. He offered that an effort was made to accommodate the need for fiscal certainty, but noted that it could only be "accommodated to a certain extent," without going beyond the bounds of the constitution. He opined that although "this might not be everything" the producers requested, it represents a determination of what the drafters of AGIA thought the state could provide within the bounds of the state constitution.

[2:47:29 PM](#)

REPRESENTATIVE SEATON asked if there is still any constitutional uncertainty if the 10-year provisions do not, in the opinion of the producers, provide fiscal certainty.

MR. OSTROVSKY answered that he cannot answer for the North Slope companies, although he did note that the producers have expressed a desire that tax rates be set on a greater number of taxes for a greater period.

[2:48:57 PM](#)

MR. BULLOCK addressed the issue of legislative approval of AGIA and the applicable time period. He said that the time period for approval may depend on the extent of the legislature's review. He noted that review could be as simple as the commissioners presenting only their recommended licensee, or a more complex consideration of the other acceptable, but ultimately rejected proposals. The scope of the review may dictate the time required for approval, he explained.

CO-CHAIR GATTO asked if it is likely that legislative review will consist of an up or down vote.

[2:50:11 PM](#)

MR. BULLOCK replied that ultimately it is an up or down vote because the legislature will be presented with only one recommended licensee. If the licensee is rejected, the commissioners have the discretion to start the process over and request new applications, he said. He noted that in that situation, the commissioners would have knowledge of the legislature's grounds for rejection of the prior proposed licensee.

[2:50:44 PM](#)

CO-CHAIR GATTO asked if the commissioners could accept their recommended licensee if time runs out before the legislature has time to finish the task of reviewing the commissioners' recommendation.

[2:50:56 PM](#)

MR. BULLOCK stated that if a licensee is not approved, there is no licensee available. He went on to say that if the governor and the commissioners believe the licensee has presented a proposal that is in the best interests of the state, they may go ahead and issue the license. In that instance, it may be up to the court to determine if the license issuance under AGIA is an executive decision that does not require legislative approval. He opined that another party with an interest in the pipeline could also raise the issue and request that the license be issued even if not approved by the legislature.

[2:51:55 PM](#)

CO-CHAIR GATTO asked if the legislature was restricted to approving only a single licensee.

MR. BULLOCK explained that the commissioners review the applications and present to the legislature the licensee whose proposal they have determined to be in the best interest of the state.

CO-CHAIR GATTO asked how a potential liquefied natural gas (LNG) project would be considered in the event the legislature later wants to have an LNG project.

[2:52:18 PM](#)

MR. BULLOCK replied that would involve the provisions of AGIA whereby the licensee is assured that the state will not give the same benefits in AGIA to another party. He said that the Senate version includes language that defines a competing pipeline as one that transports North Slope gas of 500 million cubic feet (Mcf).

[2:53:13 PM](#)

CO-CHAIR JOHNSON asked whether the state may be subject to damages under AGIA should the state reduce taxes or royalties after the pipeline contract has been awarded to a third-party licensee.

MR. BULLOCK opined that the state is not subject to damages as long as it is not giving money to the other pipeline or providing incentives. He opined that "tax laws will change" and that is alright.

[2:54:01 PM](#)

CO-CHAIR JOHNSON sought further clarification as to whether the tax provisions of AGIA are an incentive.

MR. BULLOCK replied that it is ambiguous and that discussions surrounding both the House and Senate versions of AGIA have considered the issue of whether changes to laws or regulations could be deemed to be a benefit or inducement to a competing pipeline company. He noted that any change in tax laws would also affect other parties that may be committing to the licensed project. He went on to say it is critical to have the public convenience and necessity issue, and if the state's project is

going forward it is possible that a finding could be made that a second line is needed.

2:54:54 PM

REPRESENTATIVE GUTTENBERG asked whether the state will have the ability to evaluate a second project should one be proposed prior to the commencement of operations of the first pipeline.

MR. BULLOCK answered that the competition aspect would have to be evaluated a little bit further. He opined that competition takes place at both the intake and output ends of the pipeline. He said it is not clear without further consideration whether delivery of gas to Valdez for shipment to San Francisco would necessarily be in competition with a gas pipeline that goes overland to the Midwestern United States.

2:56:15 PM

SENATOR WIELECHOWSKI stated that a definition of what constitutes a competing project has been added to Version 0, page 25, lines 2-4 which defines a competing natural gas pipeline project as "a project designed to accommodate throughput of more than 500,000,000 cubic feet a day of North Slope gas to market." Therefore, an LNG project with less than 500 Mcf per day would not meet the definition of "competing natural gas pipeline project," he explained. He stated the intent of the provision was not to discourage development of a spur line or a bullet line to provide natural gas to Alaska residents and businesses. He offered that 500 Mcf is a good number to provide natural gas for in-state use.

2:57:40 PM

SENATOR WIELECHOWSKI addressed a previous point as to whether lowered taxes could be considered a preferential treatment extended to a competing project by noting that AS 43.90.440 describes preferential treatment as actions done with the intent to provide preferential royalty or tax treatment for the purpose of facilitating or constructing a competing natural gas pipeline. He indicated that actions that do not constitute preferential royalty or tax treatment are set forth in Version 0, page 25, lines 5-12. He opined that if taxes were lowered for everyone, that would not be considered inducing or facilitating the construction of a natural gas pipeline project.

CO-CHAIR JOHNSON expressed concern that the state could be liable for damages if the tax changes allowed for development of a competing project even if the state's intent was not to facilitate a competing project.

[2:58:48 PM](#)

SENATOR WIELECHOWSKI referred to language that says the treatment must be offered "for the purpose of facilitating construction." He said there must be an intent to facilitate construction of a competing natural gas pipeline project and a party seeking damages would have to prove intent.

[2:59:59 PM](#)

REPRESENTATIVE SEATON asked whether the legislature can describe or narrow the scope of its approval.

MR. BULLOCK responded that how a legislature approaches the consideration of a recommended licensee is within the discretion of the legislature.

SENATOR WIELECHOWSKI said that his understanding is that the legislature can "talk about anything," but if the license is not approved within 60 days, then the bill fails and no license is issued. He opined that at that point the executive branch may decide to award the license despite lack of legislative approval.

[3:02:15 PM](#)

CO-CHAIR JOHNSON asked whether the legislature can amend the bill requesting issuance of a license for the gas pipeline project.

MR. BULLOCK replied that the legislature could amend the bill requesting issuance of the license, but that AGIA is designed to allow the legislature to approve or disapprove the recommended licensee. He reminded the committee that the separation of powers limitations may limit the legislature's ability to amend the bill.

[3:04:17 PM](#)

REPRESENTATIVE GUTTENBERG asked whether the governor could amend AGIA to conform to a licensee she had approved.

MR. BULLOCK replied that the governor can request a bill through the House Rules Standing Committee and the legislature can do what it wishes with it.

[HB 177 was held over.]

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at [3:05:40 PM](#).